RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD11-00942 SEPARATION DATE: 20020325

BOARD DATE: 20120829

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (77F10/Aircraft Refueler), medically separated for seizure disorder, partial complex with generalization. The CI had non-traumatic onset of seizures in June 2000 that started as partial seizures and sometimes generalized. He was initially well controlled on medication (Dilantin), but in June 2001 reported recurrent seizures that seemed associated with missing his medication. Neurology recommended increasing Dilantin or changing anti-seizure medication, with close follow-up for toxicity if the CI were staying in the area. The CI was issued a permanent P3 profile and referred for a Medical Evaluation Board (MEB). The left knee reconstruction condition, identified in the rating chart below, was also identified and forwarded by the MEB. The original Physical Evaluation Board (PEB) adjudicated the seizure disorder, partial complex with generalization condition as unfitting with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD), Department, but determined it to be non-compensable based on noncompliance by the CI. The left knee condition was determined to be not unfitting. The CI did not concur (waived a formal hearing) and submitted a written appeal. Following additional clarification from neurology, a Reconsideration PEB determined the seizure disorder was unfitting, noted the break-through seizures associated with missed medications and rated the CI at 10% for a “confirmed diagnosis of epilepsy with history of seizure.” The CI was then medically separated CI with a 10% disability rating.

CI CONTENTION: “The disability rating that was given was unfit due to the severity of my seizure condition. The disability rating process was unjust by the following actions: my condition was down played, yet had life changing conditions (unable to work, drive, and live independently due to lack of consciousness/short term memory loss) and failure of all parties involved for explanation of the disability rating process provided my mental condition.”

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in DoDI 6040.44, Enclosure 3, paragraph 5.e.(2) is limited to those conditions which were determined by the PEB to be specifically unfitting for continued military service; or, when requested by the CI, those condition(s) “identified but not determined to be unfitting by the PEB.” The ratings for unfitting conditions will be reviewed in all cases. The unfitting seizure condition as requested for consideration meets the criteria prescribed in DoDI 6040.44 for Board purview and is addressed below. Any conditions or contention not requested in this application, or otherwise outside the Board’s defined scope of review, remain eligible for future consideration by the Army Board for the Correction of Military Records.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service Recon PEB – Dated 20020221** | **VA (~6 Mos. Post-Separation) – All Effective Date 20020326** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Seizure D/O, Partial Complex w/ Generalization | 8914 | 10% | Seizure D/O | 8911 | 20%\* | 20020912 |
| Left Knee Reconstruction | Not Unfitting | Lt Knee Strain S/P ACL Reconstruction | 5259 | 10% | 20020912 |
| ↓No Additional MEB/PEB Entries↓ | 0% X 0 / Not Service-Connected x 0 | 20020912 |
| **Combined: 10%** | **Combined: 30%\*** |

\* Seizure changed from 8911 at 20% to 8911-8910 at 80% effective 20060417 (combined 80%), then 100% effective 20110204

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the gravity of his condition, worsening of his condition and significant impact that his service-incurred condition has had on his current earning ability and quality of life. It is a fact; however, that the Disability Evaluation System (DES) has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions resulting in medical separation. This role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA). The Board utilizes DVA evidence proximal to separation in arriving at its recommendations; and, DoDI 6040.44 defines a 12-month interval for special consideration to post-separation evidence. The Board’s authority as defined in DoDI 6044.40, however, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation. With regard to the CI’s assertion that explanation of the disability rating process was lacking or incorrect, the Board must note for the record that it has neither the jurisdiction nor authority to scrutinize or render opinions in reference to suspected improprieties in the disposition of a case.

Seizure Disorder Condition. The narrative summary (NARSUM) and addendums indicated the CI’s seizures were evaluated with MRI and EEG that were both normal. Physical exams were all negative for focal neurologic findings or underlying pathology for the seizure condition. Neurology diagnosed epileptic seizures. Neurology consult performed 4 months prior to separation, indicated poor control, ongoing seizures on medication. The listed blood medication levels were indicated as below therapeutic level in April 2001, 11 months prior to separation [6.7 with therapeutic 10-20]. Blood level on 15 June (11.4), 20 June (20.3) and 15 November (18.4) were all in the therapeutic range. The specialist recommended increasing the CI’s medication and/or changing medication if the CI remained in the area for appropriate observation period. The NARSUM addendum stated, 3 months prior to separation stated: “In June 2001 the patient started reporting recurrent seizures, but states they were seen to be associated with missing Dilantin doses. He states that he has approximately an average of about one per week. Some have been witnessed and some occur at night. He states that he gets spells of blank staring, he occasionally drops objects and has some stiffening in his arms. The patient states he is amnestic for those periods and with postictal drowsiness reported. The patient states he occasionally sees blood on his pillow in the mornings and that his tongue hurts.” Seizures were described as complex partial seizures. The examiner indicated the CI did not wish to increase his medication at that time and “per neurology; however, again it is recommended that the patient increase his Dilantin with close f/u monitoring for toxicity, as well as blood levels. The patient was advised not to drive and he was advised to f/u with a neurologist wherever he is going in the near future.” The neurology MFR indicated that the CI was not uncooperative regarding increasing medication, but that it may have been related to uncertainty of remaining for an appropriate observation period. The commander indicated “the medication (the CI) is currently on to control his epileptic seizures negatively affects his ability to complete even the most mundane tasks without constant supervision and reminder.”

At the VA Compensation and Pension (C&P) exam performed 6 months after separation, the CI reported having an average of one seizure, once a month, over the last 3 months while continuing on his Dilantin. Exam was non-contributory. VA treatment notes 2 days prior to separation indicated therapeutic levels of Dilantin and general frequency of seizures “every couple of months” with “three seizures yesterday. Each lasting about 30 seconds.” VA treatment note 2 days prior to separation indicated therapeutic levels of Dilantin and general frequency of seizures “every couple of months” with “three seizures yesterday. Each lasting about 30 seconds.” Treatment note 8 months after separation indicated addition of a second anti seizure medication. Additional VA exams remote from separation 2 and 3 years post separation were rated at the same level as the initial VA exam. VA evidence of two major seizures 4 years after separation (April and May 2006) led to increased VA rating of the CI’s seizure condition. Subsequent VA records were noted to indicate worsening of the CI’s seizure condition.

The Board directs attention to its rating recommendation based on the above evidence. The PEB disability description indicated “with some break-through seizures associated with missed medications.” However, the record indicated episodic seizures with therapeutic medication blood levels. The CI’s seizures were often nocturnal and DoDI 1332.39 (since rescinded) indicated “seizures that occur during sleep (“nocturnal seizure”) are not relevant to the determination of seizure frequency unless they can be shown to significantly impair industrial adaptability.” There was possible non-compliance to recommended increased medication use, but this was adjudged by the Board as reasonable given the required follow-up was uncertain and there were indications of side effects from his therapeutic dose. VA records also demonstrated the CI was not seizure free on medications and was started on additional anti-seizure medication within a year of separation. There was no axis I mental health disorder diagnosed (IAW §4.121 §4.122 and §4.124a.). The seizures proximate to separation were considered minor seizures IAW note (2) under 8911 “a minor seizure consists of a brief interruption in consciousness or conscious control associated with staring or rhythmic blinking of the eyes or nodding of the head (“pure” petit mal), or sudden jerking movements of the arms, trunk, or head (myoclonic type) or sudden loss of postural control (akinetic type).” Both the PEB coding of 8914 (epilepsy, psychomotor) and the VA coding of 8911 (epilepsy, petit mal) are rated under the same general rating formula. The frequency of the CI’s seizures was at least 2 minor seizures in the last 6 months (20% criteria) and did not approximate the “at least five to eight minor seizures weekly” for the higher 40% rating level. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 20% for the seizure condition.

BOARD FINDINGS: IAW DoDI 6040.44, provisions of DoD or Military Department regulations or guidelines relied upon by the PEB will not be considered by the Board to the extent they were inconsistent with the VASRD in effect at the time of the adjudication. As discussed above, PEB reliance on DoDI 1332.39 for rating the seizure condition was likely operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the seizure condition, the Board unanimously recommends a disability rating of 20%, coded 8914 IAW VASRD §4.124a. There were no other conditions within the Board’s scope of review for consideration.

RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows; and, that the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective as of the date of his prior medical separation:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Seizure D/O, Partial Complex w/ Generalization | 8914 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111017, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

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 President

 Physical Disability Board of Review

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency

(TAPD-ZB / ), 2900 Crystal Drive, Suite 300, Arlington, VA 22202

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for XXXXXXXXXXXXXXXXXXXXXXXXXXX, AR20120016396 (PD201100942)

1. I have reviewed the enclosed Department of Defense Physical Disability Board of Review (DoD PDBR) recommendation and record of proceedings pertaining to the subject individual. Under the authority of Title 10, United States Code, section 1554a, I accept the Board’s recommendation to modify the individual’s disability rating to 20% without recharacterization of the individual’s separation. This decision is final.

2. I direct that all the Department of the Army records of the individual concerned be corrected accordingly no later than 120 days from the date of this memorandum.

3. I request that a copy of the corrections and any related correspondence be provided to the individual concerned, counsel (if any), any Members of Congress who have shown interest, and to the Army Review Boards Agency with a copy of this memorandum without enclosures.

 BY ORDER OF THE SECRETARY OF THE ARMY:

Encl XXXXXXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA