RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxxxx BRANCH OF SERVICE: Army

CASE NUMBER: PD1100943 DATE OF TEMPORARY RETIREMENT: 20040107

BOARD DATE: 20120822 Date of Permanent SEPARATION: 20060728

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E4 (92F, Petroleum Supply) medically separated for asthma. He was diagnosed with asthma in 2003 and stabilized on medication; but, could not be adequately controlled to meet the requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was consequently issued a permanent P3 profile and referred for a Medical Evaluation Board (MEB). The asthma condition was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions were submitted by the MEB. The PEB adjudicated the asthma as unfitting, rated 30%, citing criteria of the Veterans Administration Schedule for Rating Disabilities (VASRD); and, placed the CI on the Temporary Disability Retired List (TDRL). After 31 months on the TDRL, the asthma condition was considered to be stable but still unfitting. The PEB’s rating of 10% at that time was appealed to a Formal PEB (FPEB), which arrived at the same rating. This decision was affirmed on review by the US Army Physical Disability Agency (USAPDA); and, the CI was removed from TDRL in 2006 and permanently separated with a 10% disability rating.

CI CONTENTION: “I, [Name], am still suffering with breathing problems caused by my service connected disability. I served my country faithfully never complaining and without hesitation. It’s to the point where I can’t get involved with physical activities. … [He elaborates the current details of his asthma disability.] … I just want to be taken care of as I have taken care of my country. … Thanking you in advance, [Name], SPC U.S. Army.” He does not specify a request for Board consideration of any additional conditions.

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in Department of Defense Instruction (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 rating for the unfitting asthma condition is addressed below; and, no additional conditions are within the DoDI 6040.44 defined purview of the Board. 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 (ABCMR).

RATING COMPARISON:

|  |  |
| --- | --- |
| **Final Service FPEB - 20060619** | **VA (14 Mo. Prior to Adjudication Date) – All Effective 20050216** |
| **On TDRL - 20040107** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| **Condition** | **TDRL** | **Sep.** |
| Asthma | 6602 | 30% | 10% | Asthma | 6602 | 30% | 20050608 |
| No Additional MEB Entries | Right Shoulder Condition | 5299-5201 | NSC | 20050608 |
| **Combined: 30% → 10%** | **Combined: 30%** |

ANALYSIS SUMMARY: The Board wishes to clarify that there is a significant interval (14 months) between the Department of Veterans’ Affairs (DVA) evidence and ratings proximate to placement on TDRL and the date of permanent separation; and, the Board’s permanent rating recommendation is based on the disability in evidence at final separation. DoDI 6040.44 specifies a 12-month interval for special consideration to DVA findings, and thus little probative value can be assigned to the clinical evidence rated by the DVA with regards to the Board’s permanent recommendation. Since there was no service or DVA outpatient evidence reasonably proximate to the date of permanent separation, the Board must rely heavily on the TDRL revaluation on 9 March 2006, 4 months prior to final separation, to assess the severity of symptoms probative to its permanent rating recommendation.

Asthma Condition. The CI began developing exertional shortness of breath in 2002, and in 2003 began requiring rescue treatment for wheezing. He was formally diagnosed with asthma at that time, and was placed on daily maintenance medications (Albuterol inhaler, Flonase, and Advair); but, his pulmonologist eventually recommended a MEB since he continued to suffer breakthrough attacks. His pulmonary function test (PFT) results at that time were quite good, a post-treatment FEV1 of 115% predicted and an FEV1/FVC ratio of 113%. The PEB’s DA Form 199 initiating the TDRL cited “normal spirometry” and “daily inhalational therapy” in support of the 30% rating. The only treatment note for the period of TDRL was an interim service evaluation in November 2004 following a repeat PFT, which documented an improving course and noted compliance (by history) with continued daily medications. At the time of the final TDRL re-evaluation, the examiner noted a stable course and stated “if he does exert himself strenuously his dyspnea will occur.” The examination contained several entries citing use of daily medications (identical to the MEB regimen) and compliance with same, although there was no verification of record review. The PFT results at this time were an FEV1 of 97% and FEV1/FVC ratio of 110%. Of note, the examiner recommended continuance on TDRL (without citing rationale). There was no requirement for hospital admission or intermittent courses of systemic steroids in evidence throughout the MEB and TDRL courses.

As elaborated below, the Board must make a critical judgment as to the requirement for daily medication at the time of final separation; and, the evidence relevant to that issue follows. The last dispensing on the service medication profile was June 2004, and that record also documented consistent refills throughout the 2002 – 2003 time span. The PEB made a written request for the CI to supply documentation of his TDRL medication profile; which was not forthcoming, and which was the rationale cited on DA Form 199 for premising the 10% rating solely on PFT results. The CI rebutted this finding by providing a profile from his civilian pharmacy, which documented dispensing of 30 day quantities in September 2005 and January 2006. To this profile, the CI added a handwritten note stating, “I also have an emergency 6 month backup of meds on-hand.” The CI additionally supplied a statement from his civilian provider that he was prescribed the relevant medications (listing 30 day quantities and number of refills), and which noted that they were last renewed in January 2006. Also submitted was a separate prescription pad note from the same physician stating that he had provided medication samples (without elaboration). The PEB’s response to the CI’s rebuttal stated, “you have not provided sufficient evidence that you require daily medications.” This conclusion was sustained by the FPEB and USAPDA review.

The Board directs attention to its rating recommendations based on the above evidence. The TDRL rating was compliant with the VASRD §4.100 30% criteria under 6602 (bronchial asthma) of “daily inhalational or oral bronchodilator therapy, or; inhalational anti-inflammatory medication.” The PFT results, both at TDRL entry and at permanent separation, meet only 10% criteria; i.e., “FEV-1 of 71- to 80-percent predicted, or; FEV-1/FVC of 71 to 80 percent, or; intermittent inhalational or oral bronchodilator therapy.” Members deliberated whether to concede the daily medication criteria at separation in support of a permanent 30% rating recommendation. It was noted, however, that significant intervals of treatment were unaccounted for by hard evidence: The 12 months from September 2004 (exhaustion of last 90 day dispensing by the service) to September 2005 (first civilian refill); the 3 months from October 2005 (exhaustion of September quantity) to January 2006 (last civilian refill); and, the significantly probative 5 months from February 2006 (exhaustion of January quantity) to end-July 2006 (separation). An assumption that the CI sustained daily treatment of his asthma throughout those intervals (a cumulative 20 months) with stockpiled medications and physician office samples was not sufficiently tenable. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board concluded that there was insufficient cause to recommend a change in the PEB’s TDRL or permanent adjudications of the asthma 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. The Board did not surmise from the record or PEB ruling in this case that any prerogatives outside the VASRD were exercised. In the matter of the asthma condition and IAW VASRD §4.100, the Board unanimously recommends no change in the PEB adjudications for the period of temporary retirement or permanently. There were no other conditions within the Board’s scope of review for consideration.

RECOMMENDATION: The Board, therefore, recommends that there be no recharacterization of the CI’s disability and separation determination, as follows:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| **TDRL** | **PERMANENT** |
| Asthma | 6602 | 30% | 10% |
| **COMBINED** | **30%** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110930, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans Affairs Treatment Record.

 XXXXXXXXXXXXXXXXXXXXXX

 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 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, AR20120015659 (PD201100943)

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 and hereby deny the individual’s application.

This decision is final. The individual concerned, counsel (if any), and any Members of Congress who have shown interest in this application have been notified of this decision by mail.

BY ORDER OF THE SECRETARY OF THE ARMY:

Encl XXXXXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA