RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100952 SEPARATION DATE: 20011215

BOARD DATE: 20120626

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SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (91B10/Healthcare Specialist), medically separated for chronic back pain following a parachute landing accident (LOD) for which soldier was taking pain medications*.* She did not respond adequately to treatment and was unable to perform within her Military Occupational Specialty (MOS) or meet physical fitness standards. She was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Chronic low back pain (LBP) with HNP of L4-5 and L5-S1 and chronic right knee pain were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. The PEB adjudicated the chronic back pain condition unfitting, rated 10%, with application of the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: “No improvement with condition and noted continuous degeneration.”

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. 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 (BCMR).

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service PEB – Dated 20011004** | **VA (3 Mo. Pre Separation) – All Effective Date 20011216** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain with HNP of L4-5 and L5-S1 | 5299-5295 | 10% | Degenerative Disc Disease, Lumbosacral Spine | 5293 | 60%\* | 20010918 |
| Chronic Right Knee Pain | Not Unfitting | Chondromalacia, Right Knee | 5099-5019 | 10% | 20010918 |
| Refractive Error Corrected to 20/20 | Not Unfitting | No VA Entry |
| ↓No Additional MEB/PEB Entries↓ | Chronic Cervical Strain | 5290 | 10% | 20010918 |
| Plantar Fasciitis, Right Foot | 5099-5024 | 10% | 20010918 |
| Migraine Headaches | 8100 | 10% | 20010918 |
| 0% x 6/Not Service-Connected x 1 |
| **Combined: 10%** | **Combined: 70%** |

\*Initially 40% but increased to 60% and code changed from 5293-5292 to 5293 effective 20011216 based on same examination and documented in Decision Review Officer Statement of the Case 20020529.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred condition continues to burden her. The Board wishes to clarify that it is subject to the same laws for disability entitlements as those under which the Disability Evaluation System (DES) operates. While the DES considers all of the service member's medical conditions, compensation can only be offered for those medical conditions that cut short a service member’s career, and then only to the degree of severity present at the time of final disposition. However the Department of Veterans’ Affairs (DVA), operating under a different set of laws (Title 38, United States Code), is empowered to compensate all service-connected conditions and to periodically reevaluate said conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment vary over time. 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 6040.44, however, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation and is limited to conditions adjudicated by the PEB as either unfitting or not unfitting. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Chronic Back Pain Following a Parachute Landing Accident. The CI first noticed back pain after an airborne operation in June 1999. Her symptoms were minor and intermittent at first but became more severe over time. She had normal lumbar spine X-rays in April 2000 and was treated in physical therapy. A magnetic resonance imaging (MRI) performed on 29 August 2000 documented spondylotic changes with left-sided disc protrusion minimally effacing the thecal sac and minimally effacing the lateral recess likely causing mild to moderate canal stenosis and possibly affecting the traversing S1 nerve root or the exiting L5 nerve root. She was given a permanent U2 profile and was transferred from the 82nd Airborne Division to the 44th Medical Brigade. Her profile was later changed to a permanent L2 profile in February 2001 and to a permanent L3 in May 2001. Her pain remained constant and she was not considered a surgical candidate. The CI was treated with nonsteroidal anti-inflammatories (NSAIDs), intermittent muscle relaxants, and occasional narcotic pain medication for severe pain. EMG testing was completed on 1 March 2001 and was normal.

An orthopedic consult completed for the MEB in June 2001, approximately 6 months prior to separation, also noted the CI reported LBP with cough or sneeze but no bowel or bladder complaints. Lying on her side provided some relief. She had mild pain at rest but no significant night pain. Her pain radiated into her buttocks. The exam noted range-of-motion (ROM) measurements as noted in the chart below as well as lumbar muscle spasm, tenderness to palpation, negative tension signs both seated and supine, and normal motor and sensory examinations.

A VA Compensation and Pension (C&P) Exam was completed on 18 September 2001, approximately 3 months prior to separation, and its ROM measurements are noted in the chart below. It includes a clinical history similar to that reported above. It also noted the CI had constant back pain together with weakness, fatigue, lack of endurance, and stiffness. She reported that she was unable to stand at times and often unable to find a comfortable position. The pain often radiated into her buttocks and she felt numbness and tingling in her legs at times but this was not present at the time of the examination.

There were three ROM evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation.

|  |  |  |  |
| --- | --- | --- | --- |
| Goniometric ROM Thoracolumbar | PT ROM for MEB ~8 Months Pre-Separation(20010416) | Ortho Consult ~6 Months Pre-Separation(20010607) | VA C&P ~3 Months Pre-Separation(20010918) |
| Flex (0-90) | 80⁰ | 30⁰ with pain | 30⁰ |
| Ext (0-30) | 15⁰ | 0⁰ with severe pain | 10⁰ |
| R Lat Flex (0-30) | 30⁰ (35⁰) | 10⁰ with pain | 20⁰ |
| L Lat Flex 0-30) | 30⁰ (35⁰) | 10⁰ with pain | 20⁰ |
| R Rotation (0-30) | 30⁰ (45⁰) | Twisting does not cause pain | 10⁰ |
| L Rotation (0-30) | 30⁰ (45⁰) | Twisting does not cause pain | 10⁰ |
| COMBINED (240) | 215⁰ | 50° to 110° | 100⁰ |
| Comment | Stated all active motion in degrees | Objective lumbar spasm; tenderness to palpation; negative tension signs seated and supine; motor, sensory, and reflex exams were normal. | All ROM accompanied by intense pain 5+/5 except right and left rotation 4+/5; painful motion; tenderness to palpation of the lower spine and paraspinal muscles; positive straight leg raise test for both right and left legs at 10 degrees and pain was increased with dorsiflexion of each foot; reduced range of motion with severe pain; gait guarded secondary to low back and right heel pain; no assistive device; normal motor, sensory, and reflex exams. |
| §4.71a Rating5293 | 20% for moderate, recurring; 40% severe recurring with intermittent relief | 20% for moderate, recurring; 40% severe recurring with intermittent relief | 20% for moderate, recurring; 40% severe recurring with intermittent relief; 60% for pronounced with little intermittent relief |
| §4.71a Rating5292 | 10% for mild | 40% for severe | 40% for severe |
| §4.71a Rating5295 | 10% | 10% | 10% |

The 2001 VASRD coding and rating standards for the spine, which were in effect at the time of separation, were modified on 23 September 2002 to add incapacitating episodes (5293 Intervertebral disc syndrome), and then changed to the current §4.71a rating standards on 26 September 2003. The 2001 standards for rating based on ROM impairment were subject to the rater’s opinion regarding degree of severity, whereas the current standards specify rating thresholds in degrees of ROM impairment. When older cases have goniometric measurements in evidence, the Board reconciles (to the extent possible) its opinion regarding degree of severity for the older spine codes and ratings with the objective thresholds specified in the current VASRD §4.71a general rating formula for the spine. This promotes uniformity of its recommendations for different cases from the same period and more conformity across dates of separation, without sacrificing compliance with the DoDI 6040.44 requirement for rating IAW the VASRD in effect at the time of separation. For the reader’s convenience, the 2001 rating codes under discussion in this case are excerpted below.

5292 Spine, limitation of motion of, lumbar:

Severe.................................................................................................. 40

Moderate............................................................................................. 20

Slight.................................................................................................... 10

5293 Intervertebral disc syndrome: Pronounced; with persistent symptoms compatible with sciatic neuropathy with characteristic pain and demonstrable muscle spasm, absent ankle jerk, or other neurological findings appropriate to site of diseased disc little intermittent relief……………………………................................................................... 60

Severe; recurring attacks, with intermittent relief.......................... 40

Moderate; recurring attacks............................................................ 20

Mild.................................................................................................. 10

Postoperative, cured.......................................................................... 0

5295 Lumbosacral strain:

Severe; with listing of whole spine to opposite side, positive Goldthwaite's sign, marked limitation of forward bending in standing position, loss of lateral motion with osteoarthritic changes, or narrowing or irregularity of joint space, or some of the above with abnormal mobility on forced motion................................................................. 40

With muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral, in standing position.............................................................................. 20

With characteristic pain on motion.................................................. 10

With slight subjective symptoms only................................................ 0

There is a disparity between the three examinations, with implications for the Board's rating recommendation. The Board thus carefully deliberated its probative value assignment to the conflicting evaluations, and reviewed the service treatment file for corroborating evidence in the 12-month period prior to separation. The orthopedic examination and the VA C&P exam document similar ROM measurements and are closer in time to the date of separation than the physical therapy ROM measurements. Therefore these examinations were afforded greater probative value and the ROM limitations demonstrated at these examinations are thought to represent the CI’s ROM limitations at the time of separation. Both of these examinations would result in a 40% rating under code 5292 for severe limitation of motion. This is also consistent with today’s VASRD general rating formula for diseases and injuries of the spine which applies a 40% rating for lumbosacral flexion of 30 degrees or less. Both exams could also support a 40% rating under the 2001 code 5293 for intervertebral disc syndrome. However the clinical histories do not specify the level of severity of her symptoms or the frequency of periods of relief, if any were present. The VA clinical history appears to imply a more severe degree of symptoms but it is not clear. The orthopedic exam states the CI had mild pain at rest and that she found some relief with lying on her side. This implies at least some relief and would preclude a 60% rating but could support a 40% rating. Both exams would only support a 10% rating under the 5295 code. However, IAW VASRD §4.7, higher of two evaluations, and Board precedent, the Board determined that the disability picture more nearly approximates the criteria required for rating with the 5292 code. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 40% for the chronic back pain condition coded as 5292 lumbar spine degenerative disc disease.

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. In the matter of the lumbar spine degenerative disc disease condition, the Board unanimously recommends a disability rating of 40%, coded 5292 IAW VASRD §4.71a. 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 her prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Lumbar Spine Degenerative Disc Disease | 5292 | 40% |
| **COMBINED** | **40%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111018, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 XXXXXXXXXXXXXX

 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 XXXXXXXXXXXXXXXXXXX, AR20120011981 (PD201100952)

1. Under the authority of Title 10, United States Code, section 1554(a), I approve the enclosed recommendation of the Department of Defense Physical Disability Board of Review (DoD PDBR) pertaining to the individual named in the subject line above to recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 40% effective the date of the individual’s original medical separation for disability with severance pay.

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.

 a. Providing a correction to the individual’s separation document showing that the individual was separated by reason of permanent disability retirement effective the date of the original medical separation for disability with severance pay.

 b. Providing orders showing that the individual was retired with permanent disability effective the date of the original medical separation for disability with severance pay.

 c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, and payment of permanent retired pay at 40% effective the date of the original medical separation for disability with severance pay.

 d. Affording the individual the opportunity to elect Survivor Benefit Plan (SBP) and medical TRICARE retiree options.

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 XXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA