RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100973 SEPARATION DATE: 20060611

BOARD DATE: 20120925

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a mobilized National Guard SGT/E-5 (13B20/Field Artillery), medically separated for chronic low back pain (LBP). The CI first suffered a back injury in 1996 which was exacerbated during OCONUS deployment in 2004. The low back condition could not be adequately rehabilitated to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent P2/L3/S3 profile and referred for a Medical Evaluation Board (MEB). Anxiety disorder, as a medically unacceptable condition, pes planus, high frequency sensory neural hearing loss, and hypertension, as medically acceptable conditions, delineated in the rating chart below, were also forwarded by the MEB. The Physical Evaluation Board (PEB) adjudicated the low back condition as unfitting, rated 10%, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). The remaining conditions were adjudicated as not unfitting. The CI appealed to the Formal PEB (FPEB), but withdrew the appeal and was medically separated with a 10% disability rating.

CI CONTENTION: “Separated with no disability and no retirement after over 18 years of continuous service, is Wrong. Extensive back leg issues continue to hinder my quality of life. Continued service in a non-combat related role was denied due to my disability yet no rating was offered for disability. In lieu of retirement I was given a severance all of which I am being forced to give back. Purely nonsense in my opinion.”

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in the 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 ratings for unfitting conditions will be reviewed in all cases. The unfitting low back condition meets the criteria for Board purview, and is accordingly addressed below. The remaining not unfitting conditions were not requested for review and, thus, are not within the Board’s purview. 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 Correction of Military Records.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service Admin PEB – Dated 20060320** | | | **VA (2 Mos. Post-Separation) – All Effective Date 20060612** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5237 | 10% | DDD Lumbar Spine L3-L5 w/ Sciatica | 5242 | 10% | 20060912 |
| High Freq Hearing Loss | Not unfitting | | Bilateral Tinnitus | 6260 | 10% | 20060831 |
| Pes Planus | Not unfitting | | Bilateral Pes Planus\* | 5276 | 0% | 20060823 |
| Anxiety Disorder | Not unfitting | | Maj Depressive Disorder w/ Anxiety… | 9413-9434 | 10% | 20060817 |
| Hypertension | Not unfitting | | Hypertension\* | 7101 | 10% | 20060818 |
| ↓No Additional MEB/PEB Entries↓ | | | 0% X 1 / Not Service-Connected x 0 | | |  |
| **Combined: 10%** | | | **Combined: 30%(original VARD) - 40% (w/ Deferred Decision)** | | | |

\*Deferred decisions to 20070510 VARD, but effective date is same.

ANALYSIS SUMMARY: The Disability Evaluation System (DES) is responsible for maintaining a fit and vital fighting force. While the DES considers all of the member's medical conditions, compensation can only be offered for those medical conditions that cut short a member’s career, and then only to the degree of severity present at the time of final disposition. The 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 nor for conditions determined to be service-connected by the Department of Veteran Affairs (DVA) but not determined to be unfitting by the PEB. However the DVA, operating under a different set of laws (Title 38, United States Code), is empowered to compensate all service connected conditions and to periodically re-evaluate said conditions for the purpose of adjusting the veteran’s disability rating should his degree of impairment vary over time. The Board’s role is confined to the review of medical records and all evidence at hand to assess the fairness of PEB rating determinations, compared to VASRD standards, based on severity at the time of separation.

Low Back Condition. The CI developed back pain in 1996. This condition responded to medical treatment but intensified during preparation and OCONUS deployment in 2004. MRI evaluation of the spine, 21 May 2004, revealed disc disease at three levels, with compression of a spinal nerve at the L4-5 area. Non-surgical treatment was recommended by neurosurgeons on two separate evaluations in 2004. And the CI was treated with epidural injections. A follow-up magnetic resonance imaging (MRI) performed on 19 August 2004, however showed no nerve compression and physical examinations documented no signs of radiculopathy. An orthopedic evaluation, performed on 3 March 2005, noted improvement of back pain and resolution of radiating pain. At the MEB/narrative summary (NARSUM) evaluation performed in November 2005, approximately 7 months prior to separation, the CI reported pain rated 3-4/10 aggravated by bending, changes in temperature and sitting for long periods. Pain was improved by stretching, getting up and walking around. On examination, back pain was produced on straight leg raising. Hip strength was mildly decreased (4.5-5/5), neurologic reflexes, sensory exam and gait were normal. On range-of-motion (ROM) exam, flexion of the back was 70 degrees, extension, 20 degrees and combined, ROM, 200 degrees, all associated with pain. Service treatment records (STR) from May and June 2006 reflect improved back symptoms with the CI reporting no discomfort and minimal controlled pain. At the VA Compensation and Pension (C&P) exam performed in August 2006, approximately 3 months after separation, the CI reported no use of mechanical aids. On physical exam, severe tenderness with paravertebral muscle spasms in the lower back area with normal gait and stance were reported. At the C&P spine orthopedic examination, obtained cotaneously, the CI reported back pain without radiation into the legs. On examination, he was able to do 10 toe touches without increase in back discomfort. Neurologic exam was normal. ROM was flexion of 80 degrees, extension of 20 degrees and combined ROM of 180 degrees.

The Board directs attention to its rating recommendation based on the above evidence. Both PEB and VA rated the back condition 10% IAW VASRD §4.71a, General Rating for Disease of the Spine, citing reduced ROM from pain. A higher rating of 20% is not warranted unless there is: 1) forward flexion of the thoracodorsal spine greater than 30 degrees but not greater than 60 degrees 2) combined ROM not greater that 120 degrees, or 3) spasm so severe to result in abnormal gait or spinal contour. This is not supported *via* MEB/NARSUM and C&P evaluations.

The Board noted a reference to a leg condition in the CI’s contention and opined this to concern the intermittent symptoms of radiating pain reported by the CI. The Board noted that the radiating pain symptoms were largely resolved by the end of 2004 and multiple examinations proximate to separation, including the C&P examination documented normal neurologic findings. The Board, therefore, concludes that additional disability rating was not justified on this basis. The Board noted the CI report during the C&P evaluation of five to six incapacitating episodes per month over the last 12-months. The Board considered a rating under intervertebral disc syndrome based on incapacitating episodes. Under VASRD 5243, an incapacitating episode is defined as a period of acute signs and symptoms due to intervertebral disc syndrome that requires bed rest prescribed by a physician or treatment by a physician. On review of the records in evidence, the Board found no documentation of placement of the CI on quarters, hospitalization or prescription of bed rest for acute back symptoms by any health care provider in the prior 12-month interval and no reference to incapacitation in the commander’s statement. The Board was unable to ascertain any pathway to a higher rating under any applicable VASRD code. 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 adjudication for the chronic low back pain 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 chronic LBP condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. 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** |
| Chronic Low Back Pain | 5237 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111025, 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 XXXXXXXXXXXXXXXXXXXXXXXXX, AR20120018087 (PD201100973)

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 XXXXXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA