RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100989 SEPARATION DATE: 20060121

BOARD DATE: 20120627

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a mobilized National Guard member, PV2/E2 (92F, Fuel Handler), medically separated for low back pain (LBP). The CI injured his back in 2004 when he jumped out of a truck while deployed. The CI did not improve adequately with physical therapy or conservative (medication) treatment to meet the physical requirements of his Military Occupational Specialty (MOS). His profile allowed for alternate events to satisfy physical fitness requirements. He was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded LBP secondary to degenerative disk and degenerative joint disease of the lumbar spine as medically unacceptable IAW AR 40-501. Polysubstance abuse, bilateral plantar fasciitis, cervical degenerative disc disease (DDD), bilateral knee pain and headaches, identified in the rating chart below, were also identified and forwarded by the MEB as meeting retention standards. 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) and likely application of the US Army Physical Disability Agency (USAPDA) pain policy. The remaining conditions were determined to be not unfitting. The CI appealed to the Formal PEB (FPEB), which affirmed the PEB findings; and was then medically separated with a 10% disability rating.

CI CONTENTION: “Board rating of 10% for back pain related service in Iraq in 2004. PTSD is currently rated by the VA at a 30% rating. Sleep Apnea which rated by the VA at a 30% rating. DDD, Thoracolumbar which is rated 10% by the VA. DDD, Cervical Spine which is rated at 10% by the VA and Tinnitus rated at 10% by the VA.”

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 cervical condition requested for consideration and the unfitting back pain (thoracolumbar) condition meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. The other requested conditions (posttraumatic stress disorder (PTSD), sleep apnea and tinnitus) 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 the Correction of Military Records (BCMR).

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service FPEB – Dated 20051117** | **VA (1 Mo. After Separation) – All Effective Date 20060122** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Low Back Pain | 5243 | 10% | Thoracolumbar DDD | 5243 | 0%\* | 20060223 |
| Polysubstance Abuse | Not Unfitting | Anxiety Disorder … | 9410 | 10%\* | 20060224 |
| Bilateral Plantar Fasciitis | Not Unfitting | Bilateral Plantar Fasciitis | 5284 | NSC\* | 20060223 |
| Cervical DDD | Not Unfitting | Cervical DDD | 5243 | 0%\* | 20060223 |
| Bilateral Knee Pain | Not Unfitting | L/R Knees | 5257 | NSC | 20060223 |
| Headaches | Not Unfitting | Headaches | 8100 | NSC | 20060223 |
| ↓No Additional MEB/PEB Entries↓ | OSA | 6847 | 30% | 20060223 |
| Tinnitus | 6260 | 10% | 20060223 |
| 0% x 4/Not Service-Connected x 13 | 20060223 |
| **Combined: 10%** | **Combined: 40%\*** |

\*Effective 20090413 thoracolumbar increased to 10%; cervical spine increased to 10%; Anxiety Disorder (see note) increased to 30%; and bilateral plantar fasciitis added at 0% (combined 60%) NOTE: Anxiety disorder changed to “acquired psychiatric disorder (Dx as anxiety d/o, MDD, and PTSD)” as a progression of the prior diagnosis on exam of 20091026.

ANALYSIS SUMMARY: The Board acknowledges the CI's contention suggesting that ratings should have been conferred for other conditions documented at the time of separation, some of which were evaluated and determined not to be individually unfitting for continued service. 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. The DES is responsible for maintaining a fit and vital fighting force. 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 re-evaluate said conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment vary over time. The Board is empowered to evaluate the fairness of fitness determinations, and to make recommendations for rating of conditions which it concludes would have independently prevented the performance of required duties (at the time of separation). The Board’s threshold for countering DES fitness determinations is higher than the VASRD §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard.

Low Back Pain (lumbar and thoracolumbar) Condition. The narrative summary (NARSUM) notes the back injury as summarized above and included treatment with electrical nerve stimulation and narcotic pain medication. Imaging documented degenerative disc and facet (joint) disease with small disk protrusions in the thoracic and lumbar spine (T2-3 & T5-6 that indented the thecal sac without contacting the cord; and L3-4). The CI had reasonably declined surgery.

There were 3 goniometric range-of-motion (ROM) evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation; as summarized in the chart below.

|  |  |  |  |
| --- | --- | --- | --- |
| Thoracolumbar ROM | MEB ~5 Mo. Pre-Sep | PT ~3 Mo. Pre-Sep | VA C&P ~1 Mo. Post-Sep |
| Flexion (90⁰ Normal) | 55,50,50⁰ | 90⁰ | 90⁰ |
| Ext (0-30) | 25,25,25⁰ | Full | 30⁰ |
| R Lat Flex (0-30) | 18,20,20⁰ | Full | 30⁰ |
| L Lat Flex 0-30) | 20,22,22⁰ |  | 30⁰ |
| R Rotation (0-30) | 30,30,30⁰ | Full | 30⁰ |
| L Rotation (0-30) | 30,30,30⁰ |  | 30⁰ |
| Combined (240⁰) | 175⁰ | ~240⁰ | 240⁰ |
| Comment | Painful motion; + tenderness; normal gait | Tender R&L SI joint; gait normal; “reflexes 0/4 plus, equal” (unclear if goniometer was used) | no tenderness; full and painless motion; normal gait |
| §4.71a Rating | 20% (PEB 10%) | 10% (PEB 10%) | 0% |

At the MEB exam, 5 months prior to separation, the CI reported persistent back pain worsened with activities. The MEB physical exam noted tenderness and pain-limited ROMs as charted above. There was no spasm and gait and spine contour were normal. Motor, sensory and reflex exams were normal. Specialty consultant exam indicated some radiating pain. There was no evidence of incapacitating episodes (an incapacitating episode is a period of acute signs and symptoms due to intervertebral disc syndrome that requires bed rest prescribed by a physician and treatment by a physician). A physical therapy exam 3 months prior to separation indicated 90⁰ of forward flexion and “full” ROM with tenderness. At the VA Compensation and Pension (C&P) exam a month after separation, the CI reported up to 10/10 in LBP with radiation of pain, use of narcotic pain medication and no episodes of incapacitation. Exam indicated normal gait, full and painless ROM without any tenderness, spasm or motor or sensory deficits.

The Board directs attention to its rating recommendation based on the above evidence. Pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease is considered under the general rating formula for the spine. There was no evidence of an unfitting radiculopathy in this case. At the MEB exam, absent the pain policy, the ROMs met the 20% VASRD criteria for forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees; however, the PT exam and VA exam which were both closer to the date of separation indicated improved ROMs and exams that would rate no higher than 10%. 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 FPEB’s 10% adjudication for the LBP condition.

Contended PEB Conditions. The contended condition adjudicated as not unfitting by the PEB was the cervical spine (neck) condition. The Board’s first charge with respect to this condition is an assessment of the appropriateness of the PEB’s fitness adjudications. The Board’s threshold for countering fitness determinations is higher than the VASRD §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard. The cervical spine condition was not profiled; was not implicated in the commander’s statement; and, was not judged to fail retention standards. There were no incapacitating episodes from the neck condition. The cervical condition was reviewed by the action officer and considered by the Board. There was no indication from the record that the cervical condition significantly interfered with satisfactory duty performance. After due deliberation in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB fitness determination for the contended cervical condition; and, therefore, no additional disability ratings can be recommended.

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 the USAPDA pain policy for rating the LBP condition was possibly operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the LBP condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB’s 10% adjudication. In the matter of the contended cervical spine condition, the Board unanimously recommends no change from the PEB determination as not unfitting. 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** |
| Low Back Pain | 5243 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111019, 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 XXXXXXXXXXXXX, AR20120011980 (PD201100989)

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 XXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA