RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: X BRANCH OF SERVICE: air force

CASE NUMBER: PD1101013 SEPARATION DATE: 20040421

BOARD DATE: 20120510

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSgt/E-5 (1N271/Signal Intelligence Production Craftsman), medically separated for chronic low back pain (LBP) and depression. She did not respond adequately and she was unable to perform within her Air Force Specialty (AFS) or meet physical fitness standards. In March 2003, she was issued a temporary L4,E2 profile and underwent a Medical Evaluation Board (MEB). Left L4-L5 disc protrusion with left L5 radiculopathy and depression were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AFI 48-123. No other conditions appeared on the MEB’s submission. The PEB adjudicated the chronic LBP condition and depression condition as unfitting, rated 10% and 10% respectively with application of the DoDI 1332.39 and Veterans Administration Schedule for Rating Disabilities (VASRD). The CI initially requested a Formal PEB (FPEB) but later waived her request, and was medically separated with a 20% combined disability rating.

CI CONTENTION: “When I was discharged from the military, after fighting it for a year, I was pressured and threatened to take the medical discharge. I had drop foot syndrome/part paralysis in my left leg, ruptured disk L4/L5, clinically diagnosed with severe depression. They also did not correct the blindness from my left eye due to optic neuritis that I had in 1992. I was on the verge of a nervous breakdown, had tried killing myself and was at my wits end. When the two Colonels started threatening me about not getting anything but still being discharged since I was no longer fit for duty or deployment and said I could end up with an other than honorable discharge. I felt that I had no choice but to take the honorable medical discharge at 20%. Being blind and having chronic depression has hurt my quality of life as I know it. My back, legs and eye sight has gotten worse over the years. I was in 15 years and to this day feel that I should have been allowed to serve my last 5 years or given a medical retirement. The last few years I was bullied by supervisors, commanders and SR NCOs and finally the discharge office I was threatened checked upon and denied many of my medical appointments. I was even denied going to the hospital when my son was dieing. I do not feel the board gave me a fair evaluation to my medical conditions. At times, I could barely walk and w/ now diminishing vision in my R eye, life only becomes harder to live. Because of the stress of being assaulted in the dorms and continued mistreatment throughout my career I developed Lachen Planus all over my body. This skin condition makes me more of a hermit as people say horrible things, shame me and my clothes is stained with blood from the sores.” She additionally lists all of her VA conditions and ratings as per the rating chart below, as well as other conditions not rated by the VA. A contention for their inclusion in the separation rating is therefore implied.

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 left L5 radiculopathy condition requested for consideration and the unfitting chronic LBP and depression conditions meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. The other requested conditions 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 Air Force Board for the Correction of Military Records (AFBCMR).

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service PEB – Dated 20031224** | **VA (14 Mo. After Separation) – All Effective Date 20040422** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5237 | 10% | Low Back Condition | 5237 | 10% | 20050622 |
| Depression | 9434 | 10% | Depression w/ Anxiety | 9440 | 10% | 20050622 |
| ↓No Additional MEB/PEB Entries↓ | Left Leg Sciatica | 8599-8520 | 10% | 20050622 |
| 0% x 0/Not Service-Connected x 9 | 20050622 |
| **Combined: 20%** | **Combined: 30%** |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which her service-aggravated condition continues to burden her. 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 DVA, operating under a different set of laws (Title 38, United States Code), is empowered to compensate 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 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. The Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to the CI’s statements in the application regarding suspected DES improprieties in the processing of her case.

Chronic Low Back Pain Condition. The CI developed a herniated L4-5 intervertebral disc in September 2002 with pain radiating down the left leg and associated weakness of the left leg and foot (left quadriceps and foot dorsiflexion graded 4+/5). Magnetic resonance imaging (MRI) disclosed a herniated L4-5 intervertebral disc with a large sequestered disc fragment impinging on the left L5 nerve root. Surgery was recommended but the CI elected non-surgical therapy and underwent a series of epidural steroid injections between April 2003 and November 2003. A 1 July 2003 neurosurgery appointment documented improved symptoms with much improved strength of left foot dorsiflexion graded 5-/5 and normal strength in other muscles. She had patchy altered sensation in the left L5 distribution but reflexes remained intact. A MRI in October 2003 demonstrated dramatic improvement with complete resorption of the large sequestered disc fragment, with a residual small L4-5 left paracentral protrusion with mild neuroforaminal encroachment. The 13 November 2003 neurosurgery MEB narrative summary (NARSUM) noted a recent pain exacerbation treated with a fourth epidural steroid injection. The left foot weakness was improved, and foot dragging was resolved. Strength of the left foot dorsiflexor was graded as 5-/5 with intact and normal reflexes. There was some back tenderness and subjective numbness in the left L5 distribution. The neurosurgeon thought that the CI may have permanent L5 injury and would not be expected to have further improvement in her symptoms. There was no range-of-motion (ROM) examination. A pain clinic examination, on 11 March 2003, 13 months prior to separation and before the initial epidural steroid injection documented flexion of 90 degrees and extension of 10 degrees. The VA Compensation and Pension (C&P) examination was 22 June 2005, 14 months after separation. On examination the gait and posture were normal. There was no muscle spasm or tenderness, and no complaints of radiating pain on movement. Straight leg raising was negative on the left and the right. The thoracolumbar ROM was normal (flexion 90 degrees; extension 30 degrees; right and left lateral flexion 30 degrees each; right and left rotation 30 degrees each; combined ROM 240 degrees) and spine function was not additionally limited by pain, fatigue, weakness, lack of endurance or incoordination after repetitive use. The examiner noted decreased left foot dorsiflexion strength at 4/5 and sensory deficit of the left dorsal foot, however, the examiner also stated that the CI does not have any limitation with standing and walking. There was no ROM documented at the time of the MEB examination. The ROM examination from the pain clinic examination on 11 March 2003, 13 months prior to separation would warrant a 10% rating based loss of extension (combined ROM less than 235 degrees); however, this examination was prior to any epidural steroid injections after which MRI demonstrated complete resolution of the large sequestered disc fragment that was impinging on the nerve root. The ROM at the time of the C&P examination, on 22 June 2005, 14 months after separation, was normal and did not attain a compensable threshold. Although the C&P examination was 14 months after separation, the normal ROM is similar to the expected ROM at the time of the MEB suggested by the pain clinic examination and the subsequent MRI 7 months later showing resolution of the large disc fragment. Although there was no pain with movement at the time of the C&P examination, service treatment records reflected pain with use prior to separation and the Board concluded this supported a 10% rating with application of §4.59 and §4.40. 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 LBP condition.

Depression Condition. The CI experienced anxiety and depressive symptoms in 2002 in the setting of occupational and home stressors and was seen in the mental health clinic once in July 2002. She initially declined treatment; however, she returned for care in August 2003 for worsened symptoms in response to recurring occupational and home stressors. She was treated with medication and psychotherapy. Her symptoms improved and she self discontinued medication by 5 November 2003. At the time of the psychiatry NARSUM dated 20 November 2003, her mood was euthymic with normal affect. There was no emotional lability (“affectual lability”) and mental status examination was normal including executive and cognitive function. The examiner recorded a near full recovery of depressive symptoms. Diagnosis was depression not otherwise specified. The VA psychiatry C&P examination was performed 22 June 2005, 14 months after separation. Although no longer in any kind of treatment, it described similar symptoms and rendered diagnoses of chronic adjustment disorder with mixed anxiety and depressed mood, and histrionic personality disorder. Based on this examination, the CI was granted a 10% service-connected rating that was continued until June 2010 (when it was increased to 30%). All Board members agreed that at the time of separation, the CI’s depression condition more nearly approximated the 10% rating. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s rating decision for the depression condition.

Contended PEB Conditions. The contended condition adjudicated as not unfitting by the PEB was left L5 radiculopathy. The Board’s first charge with respect to these conditions 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 Board considered if additional disability rating was justified for peripheral nerve impairment due to radiculopathy based on the evidence reviewed above. The presence of functional impairment with a direct impact on fitness is the key determinant in the Board’s decision to recommend any condition for rating as additionally unfitting. Board precedent is that a functional impairment tied to fitness is required to support a recommendation for addition of a peripheral nerve rating at separation. The pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a. While the CI may have suffered additional pain from the nerve involvement, this is subsumed under the general spine rating criteria, which specifically states “with or without symptoms such as pain (whether or not it radiates).” The sensory component in this case has no functional implications. The residual motor impairment after recovery was relatively mild and isolated to left foot dorsiflexion with normal gait and cannot be linked to significant physical impairment separate from that due to the persistent pain. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of lumbar radiculopathy as an unfitting condition for separation rating. After due deliberation in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change from the PEB fitness 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. As discussed above, PEB reliance on DoDI 1332.39 for rating depression was likely operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the low back pain condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the depression condition and IAW VASRD §4.130, the Board unanimously recommends no change in the PEB adjudication. In the matter of the radiculopathy 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** |
| Chronic Low Back Pain | 5237 | 10% |
| Depression | 9434 | 10% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111103, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 X

 Physical Disability Board of Review

SAF/MRB

1500 West Perimeter Road, Suite 3700

Joint Base Andrews MD 20762

X

Dear X

 Reference your application submitted under the provisions of DoDI 6040.44 (Title 10 U.S.C. §  1554a), PDBR Case Number PD-2011-01013

 After careful consideration of your application and treatment records, the Physical Disability Board of Review determined that the rating assigned at the time of final disposition of your disability evaluation system processing was appropriate. Accordingly, the Board recommended no re-characterization or modification of your separation with severance pay.

 I have carefully reviewed the evidence of record and the recommendation of the Board. I concur with that finding and their conclusion that re-characterization of your separation is not warranted. Accordingly, I accept their recommendation that your application be denied.

 Sincerely,

X

Director

Air Force Review Boards Agency

Attachment:

Record of Proceedings