RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXX. BRANCH OF SERVICE: Army

CASE NUMBER: PD1101014 DATE OF PLACEMENT ON TDRL: 20040430

BOARD DATE: 20120926 Date of Permanent SEPARATION: 20050928

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was active duty SPC/E-4 (21J10/General Construction Equipment Operator), medically separated for asthma. The CI did not improve adequately with treatment to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent P3 profile and referred for a Medical Evaluation Board (MEB) in March 2004. The MEB forwarded no other conditions for PEB adjudication. The CI was placed on Temporary Disability Retired List (TDRL) with a 30% rating for asthma. At the time of TDRL reevaluation, the Physical Evaluation Board (PEB), in September 2005, initially adjudicated a rating of 0% based on absences of documentation of medication requirement. The PEB subsequently adjudicated a corrected rating of 10% based on an intermittent requirement for medication with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD) and Department of Defense Instruction (DoDI) 1332.39. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “I was issued the reenlistment code of RE4. This is a permanent designation that bars the individual from reenlistment due to a medical condition that was incurred during military service. I had been diagnosed with asthma by military doctors. I had taken the methacoline test along with several PFT's that all showed inconclusive results. I had been prescribed several types of medications to combat the symptoms of asthma.”

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 remaining conditions rated by the VA at separation 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.

TDRL RATING COMPARISON:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Final Service IPEB – Dated 20050923** | | | | **VA\* – All Effective Date 20040723** | | | |
| **Condition** | **Code** | **Rating** | | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20040430** |  | **TDRL** | **Sep.** |
| Asthma | 6602 | 30% | 10% | Asthma | 6602 | 10% | 20040928 |
| ↓No Additional MEB/PEB Entries↓ | | | | Thoracolumbar Spine Strain | 5237 | 10% | 20040928 |
| 0% x 2/Not Service Connected x 2 | | | 20040928 |
| Combined: 10% | | | | Combined: 20% | | | |

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 Veterans’ 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. The Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to the Texas Veterans’ Commission representative’s statements in the application regarding suspected DES improprieties in the processing of his case.

Asthma Condition. There were three spirometry evaluations in evidence documenting the ratable parameters which the Board weighed in arriving at its rating recommendation. These exams are summarized in the chart below:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Spirometry | | MEB~4 Mos Pre-TDRL 20040305 | TDRL NARSUM ~4 mos Pre-Removal from TDRL  20050607 | C&P ~ 4 Mos Pre-Removal from TDRL  20050627 |
| Pre-Bronchodilator | FVC | 5.78 (100%) | 5.16 (84%) | 5.20 (92%) |
| FEV1 | 4.61 (97%) | 4.27 (86%) | 4.3 (98%) |
| FEV1/FVC | 80% | 101% | 82% |
| Comments | | Advair daily | Advair daily | Advair daily |
| §4.97 Rating | | 30% | 30% | 30% |

The CI was diagnosed with asthma beginning in 2002 and was subsequently referred for MEB in 2004. At the time of the MEB narrative statement (NARSUM), performed on 31 March 2004, the CI was on twice daily inhaled Advair, an inhaled anti-inflammatory medication. Spirometry was normal. The PEB placed the CI on the TDRL with a rating of 30%. At the time of the TDRL evaluation, performed on 7 June 2005, 11 months after placement on the TDRL, the CI continued treatment with inhaled Advair twice daily. Three weeks after the TDRL evaluation the CI underwent a VA Compensation and Pension (C&P) examination on 27 June 2005, with normal spirometry using Advair twice daily. The PEB initially rated zero percent based on a conclusion that no medication was used, later corrected to 10% based on intermittent bronchodilator use. The Board directs attention to its rating recommendation based on the above evidence. The first considered the rating at the time of placement on TDRL. The spirometry was normal however the CI was using Advair, an inhaled anti-inflammatory medication twice daily consistent with the 30% rating. The Board next considered the rating at the time of removal from the TDRL. The TDRL NARSUM as well as the contemporaneous VA C&P examination documented similar findings of normal spirometry and the daily use of inhaled Advair. The spirometric results do not attain a minimum rating however the use of daily inhalational anti-inflammatory medication supports the 30% rating IAW VASRD 6602 (§4.97). After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a permanent disability rating of 30% for the asthma condition (6602) at the time of removal from the TDRL.

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 asthma condition and IAW VASRD §4.97, the Board unanimously recommends a 30% rating both at entry on the TDRL and permanently at the time of removal from the TDRL. 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 his prior medical separation:

|  |  |  |  |
| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** | |
| **TDRL** | **PERMANENT** |
| Asthma, with normal spirometry | 6602 | 30% | 30% |
| **COMBINED** | **30%** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110907, 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 22202-3557

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for XXXXXXXXXXXXXXXXXX, AR20120018935 (PD201101014)

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 30% 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 30% 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 XXXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA