RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD11-01015 SEPARATION DATE: 20070110

BOARD DATE: 20121003

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (44C/Finance Management Technician), medically separated for chronic back pain without neurologic abnormality due to lumbar degenerative disc disease (DDD) without neurologic abnormality. Onset was in September 2004 after the CI slipped in a shower. He was managed with duty limitations and medications until his symptoms worsened from the increased activity while deployed to Iraq. In May 2006 he was referred to the neurosurgical service at Landstuhl Hospital in Germany. Magnetic resonance imaging (MRI) showed DDD at L4-5 and L5-S1. The neurosurgeon offered to return the CI to his unit in Iraq, but the CI requested evacuation back to his home station. The chronic back pain condition did not improve adequately with treatment to meet the physical requirements of his Military Occupational Specialty (MOS) outside of garrison work or satisfy physical fitness standards. He was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded lumbar DDD to the Physical Evaluation Board (PEB) as medically unacceptable. Adjustment disorder with depressed mood condition was forwarded by the MEB as medically acceptable. The PEB adjudicated the chronic back pain without neurologic abnormality due to lumbar DDD without neurologic abnormality (sic) condition as unfitting, rated 10%, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). Adjustment disorder with depressed mood was determined to be medically acceptable by the MEB and not unfitting by the PEB. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “1) Adjustment disorder not properly evaluated under criteria for PTSD which is now rated by the VA at 50%; 2) Lumbar Disc Disease w/left lower sciatica is now at 20%; both were reasons used for MEB purpose; both not properly evaluated before MEB hearing; files were reviewed without direct input from me. Improper continuance of treatment and care not given - all I had was pain RX and don't remember much during that time because of all the medications prescribed; never reached next level for pain management; I never saw mental health doctor until I was out processing; I did see a social worker at FT HOOD TX, but not follow up for what to do next; I have vague memory's of care due to the amount of anti-depressants and pain medication. These issues combined have now worsened and has caused me a marriage and employment. I am just now understanding and just now getting the care and treatment that I needed from that time back in 2007. I have had 3 different jobs in the last 4 years and from those companies used Workman’s Compensation to help support medical attention. From the time of my injuries, up to the time I was given the MEB, was only back on post 4 to 5 months before separation date. I know things did not go well, but at the time did not know what steps to take to make things better. Nothing was done properly. When I did speak to an actual physiatrist she pushed me through by telling me I would be okay - since the VA would take care of me. My most recent VA letter is dated 9/22/2011 - that was a long time to wait for things to get taken care of. The back doctor - let me know I was too young for surgery - so I probably needed surgery - I did not get any MRI's done or any treatment to correct my issues. I believe if the issues would have been addressed correctly I could have still been serving the military today. These issues and the cause and effect from day-to-day stand point make me angry - frustrated - disappointed - with a feeling of being "hung out to dry" Consider what you can from this application.”

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 adjustment disorder condition requested for consideration and the unfitting chronic back pain without neurologic abnormality due to lumbar DDD, without neurologic abnormality conditions meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. The remaining conditions rated by the VA at separation and listed on the DA Form 294 application 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 IPEB – Dated 20061109** | **VA (~1 Mo. Post-Separation) – All Effective Date 20070111** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Back Pain without Neurologic Abnormality | 5299-5242 | 10% | Lumbar Disc Disease with Left Lower Extremity Sciatica | 5243 | 10% | 20070314 |
| Adjustment Disorder with Depressed Mood | Not Unfitting | Adjustment Disorder | 9440 | 10% | 20070314 |
| No Additional MEB/PEB Entries | Right Shoulder Rotator Cuff | 5201-5024 | 10% | 20070314 |
| 0% X 4 / Not Service-Connected x 1 | 20070314 |
| **Combined: 10%** | **Combined: 30%** |

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 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 the 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 CI’s statements in the application regarding suspected DES improprieties in the processing of his case.

Chronic Back Pain Condition. The CI developed low back pain in September 2004 following a fall in his shower. He was managed conservatively with duty restrictions, physical therapy (PT) and medications until the increased work tempo, while deployed, led to increased pain. He was evacuated to Landstuhl Hospital in late May 2006 where he underwent neurosurgical and MRI evaluations, which showed mild DDD of the L4-5 and L5-S1 discs. The neurosurgeon offered to return him to duty, but the CI requested to be returned to his home station. There, he was evaluated by orthopedics and continued on conservative management. Another MRI performed in July 2006 showed disc space narrowing and broad disc bulges at L4-5 and L5-S1 with minimal compromise of the left L5 nerve root. He was given an L3 profile on 24 August 2006 and referred to MEB. At the MEB exam performed on 12 September 2006, 4 months prior to separation, the CI reported pain in the lower back, right knee and hip, as well as pain in the left leg to his feet early in the morning. The examiner noted normal strength, reflexes and gait. There was tenderness to palpation from L3 to S1. Range-of-motion (ROM) was limited and painful in flexion, extension, rotation and left lateral flexion. The narrative summary (NARSUM) was dictated on 27 October 2006, a little over 2 months prior to separation. The orthopedic surgeon who dictated it noted that the CI had been treated with PT, manipulation, narcotics, profiling (duty limitations) and muscle relaxants. The CI stated that the pain had been progressive since December 2005 and was sharp in nature with radiation to the posterior thigh (side not specified, but presumably on the left) with some numbness and tingling in the left foot. On examination, sensation, strength and reflexes were all normal as were provocative tests for nerve root irritation. There was no objective evidence of a radiculopathy. He was noted not to be a surgical candidate. The CI had ROM measurements on 14 March 2006, 4 months prior to separation, as noted in the chart. At the VA Compensation and Pension (C&P) exam performed on 14 March 2007, 2 months after separation, the CI reported that his symptoms had improved and that his response to medications was fair. The CI reported that he had been incapacitated 26 days over the prior 12-months and reported a pain pattern the examiner thought consistent with sciatica. Gait was normal and no assistive devices were used. On examination, there was no guarding, spasm or tenderness. Sensation, strength and reflexes were again normal, but provocative testing for nerve root irritation was positive. DeLuca criteria were negative and ROM as in the chart. There was pain on motion. Lumbar spine films were normal.

The Board directed its attention to the rating recommendation based on the above evidence. There were two goniometric 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 ROMDegrees | PT ~4 Mos. Pre-Sep | VA C&P ~2 Mos. Post-Sep |
| Flexion (90) | 80 | 0-70; pain at 60 |
| Extension (30) | 20 | 0-30; pain at 00 |
| Combined (240) | 205 | 220 |
| Comment | + Tenderness; painful motion | + Tenderness; painful motion |
| §4.71a Rating | 10% | 10% |

The Board found no evidence of physician prescribed bed rest for incapacitating episodes in the service treatment record (STR). There were no instances where the CI had been placed on quarters for the back pain. There was one note indicating that the CI was placed on convalescent leave for his back to allow his spine to “calm down” prior to repeating the MRI; however, there was not bed rest prescribed meeting the VASRD definition for incapacitating episode. The Board determined that the record does not support the history of incapacitation provided by the CI to the VA C&P examiner and that the use of VASRD code 5343, intervertebral disc syndrome, offers no advantage to the CI. The Board noted that the PEB rated the back at 10% and coded it as 5299-5242, analogous to degenerative arthritis of the spine. The VA did use code 5343, but rated it at 10% based on restrictions in ROM. The Board considered other coding options, but none offered an advantage to the CI. It also noted that the VA continued the 10% rating after re-examination in 2010 and did not raise it to 20% until after the 2011 examinations. 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 back condition.

Contended PEB Conditions. The contended conditions adjudicated as not unfitting by the PEB was adjustment disorder. While the PEB did not consider the contended PTSD, the Board notes that the VA changed the diagnosis from adjustment disorder to PTSD sometimes after the
28 July 2008 rating decision, well over one year after separation, and continued the 10% rating until, 3 years after separation. 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 notes that the PEB psychiatric statement dated 18 October 2006, 3 months prior to separation, specifically stated that the CI met retention criteria. The condition was never profiled. The commander noted that the CI performed “exceptionally well” in the office. The VA rating was for use of medications. The Board noted that the use of medications for mental health conditions is neither disqualifying for retention nor is it unfitting. There was no indication from the record that the mental health 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 adjustment disorder 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. 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 back condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended adjustment disorder/PTSD 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 Back Pain without Neurologic Abnormality | 5299-5242 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111027, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 XXXXXXXXXXXXXXXXXX

 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 XXXXXXXXXXXXXXXXXXX, AR20120019357 (PD201101015)

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 XXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA