RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1101019 SEPARATION DATE: 20090519

BOARD DATE: 20120731

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an activated Reserve Soldier, SGT/E-5(74D, Chemical Operations Specialist), medically separated for a low back pain (LBP) condition*.* He did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Sacral-lumbar dysfunction was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. One other condition, as identified in the rating chart below, was forwarded on the MEB submission as a medically acceptable condition. The PEB adjudicated the LBP condition as unfitting, rating it 20% and obstructive sleep apnea (OSA) was determined to be not unfitting with application of the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI requested a formal hearing and a second MEB was held on 29 January 2009, which added eight conditions in preparation for the hearing. The CI withdrew his request therefore the eight additional conditions were never addressed by the PEB and he was medically separated with a 20% disability rating.

CI CONTENTION: The CI states: “Did not include PTSD and knees in rating. I believe that my condition of chronic post-traumatic stress disorder and bilateral knee condition could have been included for a rating. If you need any additional documents contact me as soon as possible. Please review all my conditions that were not unfitting.” [sic] He additionally lists all of his VA conditions and ratings as per the rating chart below. A letter was submitted in support of his application and reviewed by the Board.

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 conditions OSA as requested for consideration meets the criteria prescribed in DoDI 6040.44 for Board purview; and, is addressed below, in addition to a review of the ratings for the unfitting conditions. The other requested conditions posttraumatic stress disorder (PTSD), knees, and the remaining conditions rated by the Department of Veterans’ Affairs (DVA) at separation and listed on the DD Form 294, 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 PEB – Dated 20081223\*** | **VA (1 & 2 Mo. Pre Separation) – All Effective Date 20090520** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5299-5237 | 20% | Thoracolumbar Spine Strain | 5237 | 10% | 20090330 |
| OSA | Not Unfitting | OSA | 6847 | 50% | 20090330 |
| ↓No Additional MEB/PEB Entries↓ | PTSD | 9411 | 30%\* | 20090407 |
| Gastroesophageal Reflux Disease | 7399-7346 | 0% | 20090330 |
| Acute Allergic Rhinitis | 6522 | Deferred |  |
| Plantar Fasciitis, Right | 5276 | 0% | 20090330 |
| R Ankle Strain | 5271 | Deferred |  |
| L Ankle Strain | 5271 | Deferred |  |
| L Knee, Retropatellar Syndrome | 5099-5014 | 10% | 20090330 |
| R Knee, Retropatellar Syndrome | 5099-5014 | 10% | 20090330 |
| Residuals of R Shoulder Strain, Dominant | 5299-5203 | 10% | 20090330 |
| Residuals of L Shoulder Strain, Non-Dominant | 5299-5203 | 10% | 20090330 |
| 0% x 1/Not Service-Connected x 0 |
| **Combined: 20%** | **Combined: 80%\*\*** |

\*PTSD added by VARD of 20090714, effective 20090520. VARD also identified the Deferred conditions as NSC.

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 and for conditions not diagnosed while in the service (but later determined to be service-connected by the DVA). While the Disability Evaluation System (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. The DVA, however, 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.

Unfitting Conditions. The CI’s LBP began in January 2007 while deployed to Iraq. There was no history of trauma, and the narrative summary (NARSUM) indicates the LBP was “insidious in onset.” He was initially seen in orthopedics for his ankles, knees, shoulders, and LBP. He was found fit for duty (FFD) for all of these problems, but his LBP persisted to the point where he could no longer wear his individual body armor. Other limitations included; no deployment, no AFPT, and able to walk at own pace and distance and lift up to 20lbs.

There were two 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.

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| Goniometric ROM - Thoracolumbar | MEB ~ 6 Mo. Pre-Sep | VA C&P ~ 1 Mo. Pre-Sep |
| Flex (0-90) | 45⁰ | 90⁰ |
| COMBINED (240) | 145⁰ | 240⁰ |
| Comment | Painful motion, normal gait, normal spine contour | Painful motion, normal gait, normal spine contour |
| §4.71a Rating | 20% | 10%\* |

\*Conceding §4.59 painful motion

At the MEB exam, the CI reported LBP which radiated to the left buttock with sitting, worse with use of his body armor, and unresponsive to mobic (an anti-inflammatory medication), physical therapy and chiropractic manipulations. He reported playing baseball or basketball, but limited himself when he started to have LBP. The MEB physical exam demonstrated a normal gait, tenderness of the L3 to the paraspinals, no spasms, negative straight leg raise (SLR), and normal neuromuscular findings. Magnetic resonance imaging (MRI) of the thoracic and lumbar spine were normal. The examiner diagnosed LBP refractory to any non-operative measures and he was not a surgical candidate. At the VA Compensation and Pension (C&P) exam performed prior to separation, the CI reported no new historical facts from the MEB exam. The C&P physical exam demonstrated pain limited motion otherwise normal neuromuscular findings. X-rays revealed straightening of the lumbar spine suggesting paraspinal muscle spasm. The examiner diagnosed chronic thoracolumbar spine strain without radiculopathy to both lower extremities.

The Board directs attention to its rating recommendation based on the above evidence. The Board notes that both the MEB and VA exams were complete, well documented, and compliant with VASRD §4.46 (accurate measurement). The PEB and VA chose the same coding options for the condition and both ruled IAW the VASRD §4.71a under the general rating formula for diseases and injuries of the spine. The PEB specifically cited application of the VASRD and assigned a 20% rating for forward flexion of 50 degrees. The Board acknowledges the 20% rating criteria allows for forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees; and therefore the 45 degrees cited for the MEB was still in compliance. The VA assigned a 10% rating and again the Board recognized the VA ROM evidence was non-compensable. However, conceding painful motion allows for the 10% minimum rating. Neither the PEB nor the VA had evidence which suggested functional loss due to pain or flare-ups which would provide for additional or higher rating. There was no evidence of ratable peripheral nerve impairment which would provide for additional or higher rating. 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.

Contended PEB Conditions. The condition adjudicated as not unfitting by the PEB was OSA. 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. This condition was not profiled; not implicated in the commander’s statement; and, was not judged to fail retention standards. The evidence reflects the sleep study was completed due to sleep difficulties up returning from Iraq and later subsumed under the VA PTSD diagnosis and was not due to daytime drowsiness. All were reviewed by the action officer and considered by the Board. There was no indication from the record that any of this 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 OSA; 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 LBP condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended OSA 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 | 5299-5237 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111104, 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 XXXXXXXXXXXXXXXXXXXX, AR20120014292 (PD201101019)

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 XXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA