RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1101078 SEPARATION DATE: 20050311

BOARD DATE: 20120719

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Soldier, SGT/E-5(42A, Human Resources Specialist), medically separated for a low back condition*.* He underwent surgical treatment and in June 2003 the Medical Evaluation Board (MEB) found him fit for duty for minimum Army standards, but not as a combat engineer and he was reclassified. Subsequently, he did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS). He was issued a permanent L3 profile and underwent a second MEB. Degenerative disk disease (DDD) of the lumbar spine/chronic low back pain (LBP) s/p lumbar diskectomy, L5-S1 on the right was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions appeared on the MEB’s submission. The PEB adjudicated the low back condition as unfitting, rating at 20%, with application of the Veterans Administration Schedule for Rating Disabilities (VASRD). The PEB additionally adjudicated migraines, which was not listed on the MEB, as not unfitting. The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: The CI states: “VA CODE 5243 was given for my condition when clearly in AR 635-40 the condition should’ve been viewed under VA CODE 5293. Request that my case be review under the correct VA CODE to determine if a rating of 40-60% is warranted.” [sic] He mentions no additional contended conditions.

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. 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 20050211** | | | **VA (No Show for Exams) – All Effective Date 20050312** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Radiating Low Back Pain | 5243 | 20% | Residuals, S/P Lumbosacral Diskectomy, L5-S1 | 5299-5242 | 0%\*\* | No Show |
| Residuals, Scar, S/P Lumbosacral Diskectomy | 7805 | 0% | No Show |
| Migraine Headaches | Not Unfitting | | Migraine Headaches | 8199-8100 | NSC | No Show |
| ↓No Additional MEB/PEB Entries↓ | | | 0% x 0/Not Service-Connected x 2 | | | No Show |
| **Combined: 20%** | | | **Combined: 10%\*** | | | |

\* Awarded 10% for two or more noncompensable service-connected disabilities.

\*\*failed to attend scheduled VA exam 20050516 or 20050518 VARD of 20070821 increased to 40%, effective 20070410, increasing combined to 40%.

ANALYSIS SUMMARY: The Board acknowledges the CI’s assertions that “VA CODE 5243 was given for my condition when clearly in AR 635-40 the condition should’ve been viewed under VA CODE 5293” which resulted in a lower disability assigned for his back condition. It is noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to asserted improprieties in the disposition of a case. 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. It must also judge the fairness of PEB fitness adjudications based on the fitness consequences of conditions as they existed at the time of separation. The Board would like to clarify the 2002 VASRD coding and rating standards for the spine, which were not in effect at the time of separation in this case, were modified on 23 September 2002 to add incapacitating episodes (5293, intervertebral disc syndrome), and then changed to the current §4.71a rating standards on September 2003 which changed the 5293 code to the 5243 code.

Unfitting Conditions. The CI’s back pain began in September 2002 after either “lifting a duffle bag or trying to catch a trainee that was falling from a truck" and was initially treated with nonsteroidal inflammatory medications and physical therapy. These modalities did not resolve his pain and he began to experience right-sided radicular pain. Further evaluation with a magnetic resonance imaging (MRI) showed a mild L4-5 disc bulge with facet hypertrophy and L5-S1 large disc bulge with contact on the right S1 nerve root. He underwent an L5-S1 diskectomy performed in January 2003. By June 2003, his right radicular symptoms had resolved but he still had 6-8 of 10 pain which severely limited his ability to perform his usual MOS duties and was referred to his first MEB. He was found fit for duty and subsequently reclassified. He was seen for a second opinion regarding his persistent back pain and the spine specialist recommended he exhaust all conservative measures to include physical therapy, medications and epidural injections. He received all these modalities and a selective nerve block but still had 8 of 10 pain which would increase to 10 with physical activity to include prolonged walking. He denied radicular pain, bowel or bladder complaints. The commander’s statement corroborated his back history and documented the following limitations; no push-ups, sit-ups running, unlimited walking, biking or swimming. However, the commander documented he was able to perform his duties in his reclassed MOS, documented a passing AFPT in March 2004 and “while assigned to the unit he had done what is asked of him and beyond.”

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.

|  |  |  |
| --- | --- | --- |
| Goniometric ROM - Thoracolumbar | MEB ~ 6 Mo. Pre-Sep | VA C&P ~ 28 Mo. After-Sep |
| Flex (0-90) | 35⁰ | 20⁰ |
| Ext (0-30) | 10⁰ | 5⁰ |
| R Lat Flex (0-30) | 20⁰ | 15⁰ |
| L Lat Flex 0-30) | 25⁰ | 20⁰ |
| R Rotation (0-30) | 25⁰ | 30⁰ |
| L Rotation (0-30) | 30⁰ | 20⁰ |
| COMBINED (240) | 145⁰ | 110⁰ |
| Comment |  |  |
| §4.71a Rating | 20% | 40% |

At the MEB exam, the CI reported that his back pain had a significant negative impact on his activities of daily living “I go to work and then go home to rest to get ready for the next day.” “I basically cannot do anything except for walking and taking care of myself.” The MEB physical exam demonstrated a normal tandem, nonantalgic gait, no abnormal contour of the spine, intact heel-toe walk, a 5-cm scar in the lumbosacral area with keloid, a straight leg raise positive bilaterally at a 30-degree angle, tenderness to the L4-5 through L5-Sl as well as bilateral sacroiliac joints, normal neuromuscular findings, and 1 of 5 positive Waddell’s signs. An MRI performed in August 2005, revealed moderately severe right neuroforaminal narrowing, mild left neuroforaminal narrowing, DDD which was evident in the 2004 imaging and no change from prior post-operative study was seen. An electromyogram (EMG) on 13 January 2005 was normal. At the VA Compensation and Pension (C&P) exam, performed 28 months after separation, the CI reported he injured his back while assisting another soldier who was falling out of a truck, pain was chronic, moderate and unremitting, much worse than that prior to surgery and radiated into the middle of his back. He was taking medications to include Lortab (narcotic base Tylenol), Baclofen (for spasticity) and Piroxicam (anti-inflammatory). He was unable to walk more than a few yards and left his job as a truck driver secondary to pain. The C&P physical exam demonstrated an antalgic gait, pain with motion, no spasm, no abnormal spine contour and normal neuromuscular findings. Guarding was present in all attempts at ROM, but is marked with attempts at flexion/extension and the examiner further remarked the measurements were unreliable due to the severity of guarding. X-rays reported as no bony abnormality.

The Board directs attention to its rating recommendation based on the above evidence. There is a clear disparity between these examinations, with very significant implications regarding the Board's rating recommendation. The Board thus carefully deliberated its probative value assignment to these conflicting evaluations, and carefully reviewed the service treatment records for corroborating evidence in the 12-month period prior to separation. In assigning probative value to these somewhat conflicting examinations, the Board notes that: the MEB measurements are consistent with the diagnostic and clinical pathology in evidence; the VA exam was performed 28 months later which may account for progression of the disease as there was no further injury or surgery in evidence for worsening disease; and VA rating evaluations based on ROM rely on subjective pain thresholds with motion during an exam performed in the context of expressly providing a basis for disability rating; thus subject to loss of objectivity which clearly was annotated by the VA examiner. Therefore, based on all evidence and associated conclusions just elaborated, the Board is assigning preponderant probative value to the MEB evaluation. The PEB and VA chose different coding options for the condition, but this did not bear on rating and both assigned a rating IAW §4.71a general spine formula or under the formula for rating based on incapacitating episodes. The PEB chose code 5242 (degenerative arthritis of the spine) which defaults to the 5003 code (arthritis, degenerative) and rated for forward flexion of 35 degrees with painful motion. The Board agreed there was no evidence of incapacitating episodes to support the 20% rating under the 5003 code. The VA chose code 5243 (intervertebral disc syndrome) and rated 40% despite the speculation raised by the examiner of the probative value of the flexion and extension exam and assigned based on forward flexion 30 degrees, weighing on behalf of the member to account for reasonable doubt. The 5243 code may be rated for incapacitating episodes which there was no evidence to support. 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 low back 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. 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 low back condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. 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:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Radiating Low Back Pain | 5242 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111116, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans Affairs Treatment Record.

XXXXXXXXXXXXXXXX

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 XXXXXXXXXXXXXXXXXXXXXX, AR20120013388 (PD201101078)

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 XXXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA