RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1200007 SEPARATION DATE: 20060129

BOARD DATE: 20120426

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (11B10/Infantryman), medically separated for low back condition. He did not respond adequately to conservative non-operative 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). Chronic low back pain (LBP) was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions appeared on the MEB’s submission. Other conditions included in the Disability Evaluation System (DES) packet will be discussed below. The PEB adjudicated the chronic LBP with radiation down the right leg as unfitting, rated 10%; with application Veterans Administration Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: “The medical records used for evaluation where incorrect, the X-ray imaging used to base the decision had another soldiers name on them and do not reflect testing done after service showing the true condition of back. When this issue was brought up at time of separation my chain of command ordered me to discontinue trying to bring the issue up and threatened USMJ action if I did not cooperate with the discharge process. Further I have been diagnosed more properly by the VA with more consistent results showing underling medical issues that lead and contributed to the back condition worsening and never being treated properly. In addition the Army never provided any treatment for PTSD although I requested on many occasions after my second combat tour. Never was PTSD brought up in the review process by the Army and again when I asked for treatment I was threatened with USMJ action with the option of a dishonorable discharge if I did not conform to the process.” He additionally lists all of his VA conditions and ratings as per the rating chart below. A contention for their inclusion in the separation rating is therefore implied.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20051019** | | | **VA (1 Mo. Pre Separation) – All Effective Date 20060130** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5237 | 10% | Degenerative Disc Disease | 5243 | 10%\* | 20051214 |
| ↓No Additional MEB/PEB Entries↓ | | | Recurrent Erosion, Lt Cornea | 6099-6001 | 10% | Future Eye Exam |
| PTSD | 9411 | 10%\*\*\* | 20051213 |
| 0%\*\* x 2/Not Service-Connected x 4 | | | 20051214 |
| **Combined: 10%** | | | **Combined: 30%\*\*\*** | | | |

\*Increased to 20% and

\*\*radiculopathy, right lower extremity from 0% to 10% effective 20070830 for a combined rating 60%

\*\*\*increased to 30% effective 20070830 then 50% 20090213 for combined 80%\*\*\*

ANALYSIS SUMMARY: The Board acknowledges the CI’s assertions that the medical records used for the evaluation were not his and furthermore did not reflect testing done after service. It is noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to asserted service 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. It is also noted for the record that the Board will review the evidence submitted with the CI’s application and further notes the Board utilizes Department of Veterans’ Affairs (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 finally acknowledges the CI's contention suggesting that service 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 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.

Low Back Condition. The CI’s back condition started after two falls in Afghanistan, the first in November 2003 and the second in June 2003. There were no service treatment records (STR) to review for these incidents. Upon his return to his home station, Fort Drum, he was evaluated by orthopedics and subsequently underwent an electromyleogram (EMG) which was normal and an MRI which demonstrated mild degenerative joint disease (DJD) without foraminal narrowing. Due to the lack of progress, despite physical therapy and chiropractic care, he was issued a permanent profile in April 2005. He underwent an MMRB who denied a reclassification and referred him to an MEB. The L3 profile documented the following functional limitations; unable to move with a fighting load for at least two miles, construct an individual fighting position, do 3-5 second rushes under direct and indirect fire, and with regards to training limitations, unable to run or do sit-ups for the AFPT, ruck, jump, heavy lifting greater than 45 lbs. The commanders statement documented performance above average for someone his rank and experience yet he was unable to perform in his MOS. There were two range-of-motion (ROM) evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation.

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| --- | --- | --- |
| Goniometric ROM - Thoracolumbar | PT ~ 4 Mo. Pre-Sep  (20050929) | VA C&P ~ 1 Mo. Pre-Sep  (20051214) |
| Flex (0-90) | 90⁰ | 90⁰ |
| Ext (0-30) | 20⁰ | 15⁰ |
| R Lat Flex (0-30) | 30⁰ measured 35⁰ | 25⁰ |
| L Lat Flex 0-30) | 30⁰ measured 45⁰ | 25⁰ |
| R Rotation (0-30) | 30⁰ measured 35⁰ | 30⁰ |
| L Rotation (0-30) | 30⁰ measured 45⁰ | 30⁰ |
| COMBINED (240) | 240⁰ measured 270⁰ | 215⁰ |
| Comment |  | Normal Gait, station, |
| §4.71a Rating | 0% | 10% |

The narrative summary (NARSUM) completed for the MEB did not document his back symptoms but documented Ambien (a sleeping medication) as the only medication taken by the CI.

The physical exam demonstrated a normal neuromuscular with no mention of gait, posture or spasm. The VA Compensation & Pension (C&P) exam was similar to the NARSUM, in addition, demonstrated a normal gait and station.

The Board directs its attention to its rating recommendations based on the evidence just described. The PEB and VA chose different coding options for the condition, but this did not bear on rating. The PEB ruling chose the 5237 code (lumbosacral or cervical strain) without using an analogous code and the Board recognized this would rate at 0% with the evidence, however the Board's recommendation may not produce a lower rating than that of the PEB. The VA ruling the 5243 code (intervertebral disc syndrome) and rated 10% based on the combined ROMs. The Board considered the 5010 code (arthritis, due to trauma) and the 5003 code (arthritis, degenerative) which both would warrant a 10% rating and looked for documentation of incapacitating episodes which would provide for additional or higher rating. There was no evidence of ratable peripheral nerve impairment in this case. There is not reasonable doubt in the CI’s favor, therefore, to justify a Board recommendation for other than the 10% rating assigned by the PEB for the low back condition. Since the choice of VASRD code conferred no rating advantage, and no code was clinically predominant, no change from the PEB designation is recommended.

Other Contended Conditions. The CI’s application asserts that a compensable rating should be considered for posttraumatic stress disorder (PTSD). This condition was reviewed by the action officer and considered by the Board. Although there is documentation of sleep disturbance with use of occasional sleep aids, and documentation which “suggested he see mental health for possible PTSD symptoms, but he refused to do this” there is no service evidence for a psychiatric diagnosis or treatment. There was no psychiatric impairment profiled or documented by the commander. The CI was not identified with symptoms specific to PTSD until a month prior to separation by the VA; citing the stressor of witnessed casualties in support of Operation Anaconda. The Board acknowledges the presence of PTSD as a currently rated condition by the VA, but the scope of its recommendations does not extend to conditions which were not diagnosed or in evidence at the time of medical separation. This includes conditions which may have had early manifestations during active service, since such sub-clinical conditions cannot be correlated with a fitness determination requisite for a service rating. The condition, especially since it is contended that the symptoms were not properly addressed by the service, remains eligible for appeal to the ABMCR.

Remaining Conditions. Other conditions identified in the DES file were, left knee pain, bilateral hearing loss, and erosion of left cornea. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were significantly clinically or occupationally active during the MEB period, none carried attached profiles, and none was/were implicated in the commander’s statement. These conditions were reviewed by the action officer and considered by the Board. It was determined that none could be argued as unfitting and subject to separation rating. Additionally deviated nasal septum, recurrent and several other non-acute conditions were noted in the VA rating decision proximal to separation were not documented in the DES file. The Board does not have the authority under DoDI 6040.44 to render fitness or rating recommendations for any conditions not considered by the DES. The Board, therefore, has no reasonable basis for recommending any additional unfitting conditions for separation rating.

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 at separation or permanently. In the matter of the left knee pain, bilateral hearing loss, and erosion of left cornea conditions or any other medical conditions eligible for Board consideration; the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation. The Board unanimously agrees that there were no other conditions, specifically the contended PTSD condition, eligible for Board consideration which could be recommended as additionally unfitting for rating at separation.

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% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110818, 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 XXXXXXXXXXXXXXX, AR20120008441 (PD201200007)

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 XXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA