RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxxxxxxxxxx BRANCH OF SERVICE: Army

CASE NUMBER: PD1200032 DATE OF PLACEMENT ON TDRL: 20040201

BOARD DATE: 20121002 Date of Permanent SEPARATION: 20050201

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (88H20/Cargo Specialist), medically separated for chronic back pain (LBP) with L5-S1 herniated nucleus pulposus (HNP), without neurologic or significant electrodiagnostic abnormality. The CI fell while wearing equipment in December 2001 and injured his lower back. He had severe LBP with intermittent radiation into his left lower extremity (LLE). 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). Lower back pain secondary to L4-5 and L5-S1 degenerative disk disease, and left lower extremity radiculopathy secondary to the L4-5 and L5-S1 degenerative disk disease were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Two other conditions, as identified in the rating chart below, were forwarded on the MEB submission as medically acceptable conditions. The PEB (PEB) adjudicated low back pain subsequent to a fall on stairs in December 2001 and left sciatic radiculopathy manifested by intermittent pain, left leg, as unfitting, each rated 10%, with possible application of the US Army Physical Disability Agency (USAPDA) pain policy and the Veterans Administration Schedule for Rating Disabilities (VASRD). Additionally, hypertension and depressive disorder, not otherwise specified, were adjudicated to be not unfitting. The CI appealed to the Formal PEB (FPEB); the CI was then placed on the Temporary Disability Retired List (TDRL) with ratings as reflected in the chart below. Upon reevaluation under TDRL, the PEB adjudicated chronic back pain with L5-S1 HNP “without neurologic or significant electrodiagnostic abnormality, altered gait, forward flexion 45 degrees, 4/5 Waddell's signs”, as unfitting rated at 20% with no other unfitting conditions. The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: “I was awarded 30% on (February 01 2004) and was later awarded with 20%, on (December 31 2005) which took me off the Temporary Disabled Retirement List. My condition never bettered, it just got worst (sic). So how is it that they decreased my percentage? The reason I believe why it decreased was that when I had done a EMG in Tacoma WA. by Dr. Landes (LTC), he was head of the Physical Medicine at Darnell hospital in FT. Lewis. I had several arguments with him that he was not doing what I believe was right for my health. Heck he was prescribing me OXYCOTIN 80mg. I stay asleep all the time and when I wake up, I was in worse pain and had the shakes, any ways! So then I was boarded out with a Retirement under a program called the TDRL, Temporary Disabled Retirement List with 30%. Next thing was time for a re-evaluation after a year and the re-eval was for my sciatica nerve in San Antonio TX. at BAMC, which again, I met up with Dr. Landes from WA FT. Lewis. I walked in we saw eye to eye, then Landes spoke with the MAJ who was to conduct the test (EMG). After the test I never did hear what he had said to the MAJ. but couple weeks later, I was reduced from 30% to 20% which they took me off the TDRL and gave me a severance pay. The PEB did ask me if i wanted to appeal but the person appointed to me (Female) told me that I had no reason to do it and if I did the appeal, it would most likely stay the same. I felt that I had a person who was appointed to me only to convince me to take what the ARMY offered to me." The CI also states “I was never shown or read the out come of the EMG test conducted by the MAJ. or LTC. LANDES the SECOND time done for the re-evaluation. I want some help to make this right. I earned this retirement and I feel as if it was stripped away from me from vengeance and not from a Medicine or professional stand point.”

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 radiculopathy condition 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 rating for the unfitting lower back condition. 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:

|  |  |
| --- | --- |
| **Final Service PEB – Dated 20050112** | **VA\* – All Effective Date 20040202** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20031024** | **TDRL** | **Sep.** |
| LBP S/P Fall, DDD L4/5, L5/S1, HNP L5/S1 | 5243-5299-5237 | 20% |  | DDD, L-Spine | 5243 | 10% | 20031218 |
| Back Pain w/ L5-S1 HNP | 5243 |  | 20%\*\* |
| Left Sciatic Radiculopathy | 5243-8620 | 10% | \*\* | LLE Radiculopathy | 8720 | 10%\* | 20031218 |
| HTN | Not Unfitting | HTN | 7101 | 10% | 20031218 |
| Depressive D/O, NOS | Not Unfitting | Mood D/O, NOS | 9435 | 30% | 20031203 |
| ↓No Additional MEB/PEB Entries↓ | Rt Knee S/P Trauma | 5260-5019 | 10% | 20031218 |
| 0% x 1/Not Service Connected x 4 | 20031218 |
| Combined: 20% | Combined: 60% |

\* VA rating based on exam most proximate to date of permanent separation; VARD of 20120319 increased radiculopathy, 8720 rating to 20% effective 20110830 based on exam of 20120214

\*\* Final PEB states “without neurologic or significant electrodiagnostic abnormality”; radiculopathy is not mentioned as a separate condition.

ANALYSIS SUMMARY: With regard to the CI’s assertion that there were possible irregularities in his disability counseling and processing, it is noted for the record that 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 improprieties in the processing of his case. The CI’s opinion that he had not improved and that his condition worsened over the course of his TDRL period was considered in the Board’s deliberations. The Board takes the position that subjective improvement or worsening during the period of TDRL should not influence its coding and rating recommendation at the time of permanent separation. The Board’s relevant recommendations are assigned in assessment of the permanent separation and rating determination, and the TDRL-entry rating assignment is not considered a benchmark. It is recognized, in fact, that PEBs across the services sometimes apply an overly generous initial rating in order to meet the DoD requirement of 30% disability for placement on TDRL. This is in the member’s best interest at the time and does not mean that a final lower rating is unfair, even if perceived as incongruent with subjective severity from one rating to the next. Thus the sole basis for the Board’s recommendation is the optimal fitness determination and VASRD rating for disability at the time the CI is permanently separated. 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 and its assessment of other potentially ratable conditions, based on eligibility and the fitness consequences of conditions as they existed at the time of separation. Of special note, although the VASRD spine criteria were changed effective 26 September 2003, which was close to the TDRL-entry timeframe, all PEBs used the current VASRD spine criteria.

Lower Back Condition. There were three back exams (with 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.

|  |  |  |  |
| --- | --- | --- | --- |
| Thoracolumbar ROM | MEB ~8 Mo. Pre-TDRL | VA C&P ~2 Mo. Pre-TDRL | MEB ~2 Mo. Pre-Sep |
| Flexion (90⁰ Normal) |  | 90⁰ | 45⁰ |
| Ext (0-30) |  | 15⁰ | 25⁰ |
| R Lat Flex (0-30) |  | 30⁰ | 25⁰ |
| L Lat Flex 0-30) |  | 30⁰ | 25⁰ |
| R Rotation (0-30) |  | 30⁰ | 20⁰ |
| L Rotation (0-30) |  | 30⁰ | 20⁰ |
| Combined (240⁰) |  | 225⁰ | 160⁰ |
| Comment | Tenderness; walks with a limp; negative SLR; motor, sensory and reflexes normal | Pain on extension; tenderness; motor, sensory and reflexes normal | Antagic gait; + tenderness; - SLR; motor, sensory and reflexes normal |
| §4.71a Rating | 20% | 10% | 20% |

There were two narrative summary (NARSUM) exams prior to entry onto the TDRL. The exams indicated trauma to the lower back with LBP along with intermittent radiation of pain into his LLE without relief from physical therapy or medications including narcotic pain medications (there was no right lower extremity radiculopathy). Neither NARSUM included ROMs. The first NARSUM exam is summarized above. The examiner stated “he is neurologically intact.” The second pre-TDRL NARSUM exam was limited to “Physical examination within normal limits. Waddells 4/5.” Magnetic resonance imagery (MRI) noted Degenerative Disc Disease (DDD) and a left paracentral HNP at L5-S1 which extended into the left neural foramen. Electrophysiological study (EMG) was noted as “nonconclusive.”

Service treatment records (STR) following the NARSUM indicated a worsening of symptoms with a course of systemic steroids, prescription of a cane, and an MRI showing a moderate-sized L5-S1 HNP contacting the S1 nerve root. The CI had subjective tingling and numbness of his LLE and multiple emergency room visits and documented back spasms. The NARSUM exam 2 months prior to TDRL-exit (permanent separation) indicated the CI was being seen by a VA neurosurgeon who recommended surgery following weight loss. The CI complained of 8/10 LBP with exacerbation with any repetitive movement, occasional numbness of his LLE and “occasional incontinence with the last being 2.5 months ago.” The CI had no PT during TDRL and remained on narcotic pain medications. The back exam is summarized above.

The Board directs attention to its rating recommendation based on the above evidence. 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 lower back condition on entry into TDRL or at permanent separation.

Left Sciatic Radiculopathy Condition. The FPEB disability description for TDRL-entry rating of VASRD codes 5243-8620 at 10% was “Left sciatic radiculopathy, manifested by chronic variable pain in left leg, with reflexes and motor strength reported unimpaired. Rated for sciatic neuritis, mild.” The commander’s statement, prior to entry into TDRL, specified leg pain and numbness as well as inability to sit or stand for long periods as interfering with duty function and with specific MOS tasks. The final PEB (for TDRL-exit) did not mention the TDRL diagnosis of Left sciatic radiculopathy, but specified “chronic back pain with L5-S1 herniated nucleus pulposus, without neurologic or significant electrodiagnostic abnormality, altered gait, forward flexion 45 degrees, 4/5 Waddell's signs (TDRL eval diag, NARSUM).” The TDRL evaluation diagnosis was “Chronic mechanical low back pain with sciatica and history of disc herniation of L5-S1, with stable exam today.” It is presumed likely that the final PEB considered the CI’s sciatica of radiating leg pain and subjective numbness as not unfitting or separately compensable.

The examinations for the unfitting low back pain condition noted above are applicable to the radiculopathy condition. Pre-TDRL entry, the commander’s statement indicated functional implications from leg pain and numbness and the FPEB considered the sciatica unfitting. In addition to the information from the unfitting back exams, the consult for electrodiagnostic testing (EDX/EMG) 2 months prior to TDRL-exit indicated symptoms of left lower extremity pain 6-9/10 involving the left leg and foot. Medications included daily narcotic pain medication as well as muscle relaxants. Strength was noted as 5/5 with “some breakaway weakness in the left lower extremity.” Sensory and reflex exams were normal with the examiner stating “4/5 Wadell signs.” The impression was “This is an abnormal electrodiagnostic study. There is electrodiagnostic evidence of widespread muscle membrane instability. This could indicate a form of ‘EMG disease’ which is considered a normal familial variant. We are unable to adequately assess this patient electrodiagnostically for a left lumbosacral radiculopathy due to this 'EMG disease'.” The exam was “relatively unchanged” from the pre-TDRL exam. An MRI was recommended, which as noted above, showed a moderate-sized L5-S1 HNP contacting the S1 nerve root. A lumbar diskogram 3 months after permanent separation indicated L4-5 disk leakage with “severe concordant pain including right leg pain” and surgical intervention was being considered. A VA exam over 5 years remote from separation indicated some left lower extremity motor loss, which was not noted proximate to separation. The CI had not undergone spine surgery.

The Board directs attention to its rating recommendation based on the above evidence. All exams for the sciatica condition proximate to TDRL-entry and to permanent separation were similar in that there was no fixed motor loss or abnormal reflexes. EMG results were similarly non-diagnostic and the CI’s complaints of radiating pain and tingling/numbness were similar with essentially the same functional impairment and narcotic pain medication use. The Board considered whether the PEB removal of an unfitting sciatica was deliberate and if additional permanent rating could be recommended under a peripheral nerve code, as conferred by the FPEB for TDRL entry, for the sciatic radiculopathy at separation. Board precedent requires a functional impairment tied to fitness to support a recommendation for addition of a peripheral nerve rating to disability in spine cases. The pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a. No motor weakness was in evidence. Since no evidence of functional impairment specific to the non-pain component of the CI’s sciatica exists in this case, the Board cannot support a recommendation for an additional rating based on peripheral nerve impairment at permanent separation.

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 FPEB unfit 10% adjudication for the left sciatica condition for TDRL entry. The Board also concluded that there was insufficient cause to recommend a change in the final PEB’s presumed not unfit determination for the sciatica condition. The Board concluded therefore that the left sciatic radiculopathy condition could not be recommended for additional disability 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. In the matter of the lower back condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the FPEB adjudication for entry into TDRL or for permanent separation. In the matter of the contended Left Sciatic Radiculopathy condition, the Board unanimously recommends no change from the FPEB determination as unfitting at 10% for TDRL entry; and no change to the implied PEB not unfitting determination at permanent separation. 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** | **TDRL RATING** | **PERMANENT****RATING** |
| LBP S/P Fall, DDD L4/5, L5/S1, HNP L5/S1 | 5243-5299-5237 | 20% |  |
| Back Pain w/ L5-S1 HNP | 5243 |  | 20% |
| Left Sciatic Radiculopathy | 5243-8620 | 10% | Not unfit |
| **COMBINED** | **30%** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111021, 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 XXXXXXXXXXXXXXXXXXXXXXXXXXX, AR20120018944 (PD201200032)

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 XXXXXXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA