RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1200057 SEPARATION DATE: 20031027

BOARD DATE: 20120905

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a National Guard 2LT/O1 (70B/Executive Officer), medically separated for chronic low back pain (LBP)*.*  The CI injured her back during the Officer Basic Course (OBC) in early 2001 while doing physical training. The chronic LBP condition did not improve adequately with conservative treatment and surgery was not indicated. The CI was unable to meet the physical requirements of her Military Occupational Specialty (MOS) or satisfy physical fitness standards. She was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded no other conditions for Physical Evaluation Board (PEB) adjudication. The PEB adjudicated the chronic LBP due to degenerative disc disease (DDD) at L5-S1 condition as unfitting, rated 10%, IAW DoDI 1332.39. The CI appealed to the USAPDA which affirmed the PEB findings. She was then medically separated with a 10% disability rating.

CI CONTENTION: “I feel my disability separation rating was not decided with the correct disability rating. I do feel that I have substantial new evidence which, by due diligence, could not have been presented before my disability rating decision was made or I believe that this information was not aggressively pursued which would have warranted at the time of my discharge a higher percentage of disability.”

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.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service PDA – Dated 20030923** | **VA (10 Mo. Pre Separation) – All Effective Date 20020605** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain due to Degenerative Disc Disease at L5-S1 | 5299-5295 | 10% | Lumbar Degenerative Disc Disease with Ruptured Disc | 5293-5292 | 20% | 20021121 |
| ↓No Additional MEB/PEB Entries↓ | 0% x 1/Not Service-Connected x 3 | 20021121 |
| **Combined: 10%** | **Combined: 20%\*** |

\*Increased to 60% effective 20070524 (date of claim for increased rating) with addition of 9434 Depressive disorder at 50% and 8720 Radiculopathy left lower extremity at 10%.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that the gravity of her condition at the time of separation merits consideration for a higher separation rating. The Board wishes to clarify that it is subject to the same laws for service disability entitlements as those under which the Disability Evaluation System (DES) operates. 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. However the Department of Veterans’ Affairs (DVA), operating under a different set of laws (Title 38, United States Code), is empowered to compensate all service-connected conditions and to periodically reevaluate said conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment vary over time. The Board utilizes 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’s authority as defined in DoDI 6040.44, however, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Chronic Low Back Pain Condition. The CI injured her back during training in OBC in April or May 2001 and her pain has gradually increased over time. She was treated conservatively without significant improvement and her treatment included narcotic pain medication, muscle relaxants, and steroid injections for L5 radiculopathy by physical medicine. Her L3 profile is moderately limiting with lifting limited to ten pounds and no ruck sack or sit-ups. She could run at her own pace and distance and perform unlimited walking, bicycling, or swimming.

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.

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM | VA C&P ~11 Months Pre-Separation | MEB ~3 Months Pre-Separation |
| Flexion (90⁰ Normal) | 40⁰ | 25⁰ |
| Ext (0-30) | 10⁰ | Not Measured |
| R Lat Flex (0-30) | 20⁰ | 10⁰ |
| L Lat Flex 0-30) | 20⁰ | 10⁰ |
| R Rotation (0-30) | Not Measured | Not Measured |
| L Rotation (0-30) | Not Measured | Not Measured |
| Combined (240⁰) | NA | NA |
| Comment | Straight leg raise positive on left at 70 degrees, negative on right; no spasm or tenderness; no limp; unable to walk on heels or toes because of left foot weakness; sensation to pinprick and vibration normal bilaterally; reflexes 2+ at bilateral knees, 1+ at right ankle and 0 at left ankle;  | No motor or sensory deficit and reflexes equal bilaterally. MRI 20010708: Small central and right paracentral herniation at L5-S1, indenting the thecal sac and pressing slightly upon the right nerve root. MRI 20020208: Mild disc space desiccation at l5-S1, no canal stenosis or neuroforaminal encroachment. |
| §4.71a Rating |  |  |
| 5292 | 20% Moderate | 40% Severe |
| 5295 | 20% Moderate | 40% Severe |
| Today’s VASRD | 20% | 40% |

On 26 August 2003, the PEB determined the CI was unfit for continued service due to chronic LBP due to DDD at L5-S1. A rating analogous to 5295 was applied with a 10% rating for characteristic pain on motion. The CI had a previous VA rating of 0% for an unrelated condition and a 20% rating for 5293-5292 lumbar DDD with ruptured disc was added effective on 5 June 2002, the date of her claim. The 20% rating was based on the limitation of motion documented on the VA Compensation and Pension (C&P) examination discussed above which was considered moderate. The VA later added a 10% rating for left lower extremity radiculopathy but this was not until May 2007, nearly 4 years after the CI separated from service.

The Board directs attention to its rating recommendation based on the above evidence. The 2003 Veterans Administration Schedule for Rating Disabilities (VASRD) coding and rating standards for the spine, which were in effect at the time of separation, had been modified on 23 September 2002 to add incapacitating episodes (5293 intervertebral disc syndrome), and then were later changed to the current §4.71a rating standards on 26 September 2003. The 2003 standards for rating based on ROM impairment were subject to the rater’s opinion regarding degree of severity, whereas the current standards specify rating thresholds in degrees of ROM impairment. When older cases have goniometric measurements in evidence, the Board reconciles (to the extent possible) its opinion regarding degree of severity for the older spine codes and ratings with the objective thresholds specified in the current VASRD §4.71a general rating formula for the spine. This promotes uniformity of its recommendations for different cases from the same period and more conformity across dates of separation, without sacrificing compliance with the DoDI 6040.44 requirement for rating IAW the VASRD in effect at the time of separation. For the reader’s convenience, the 2003 rating codes under discussion in this case are excerpted below.

**5292 Spine, limitation of motion of, lumbar**:

Severe................................................................................................ 40

Moderate........................................................................................... 20

Slight.................................................................................................. 10

**5293 Intervertebral disc syndrome:**

Evaluate intervertebral disc syndrome (preoperatively or postoperatively) either on the total duration of incapacitating episodes over the past 12 months or by combining under Sec. 4.25 separate evaluations of its chronic orthopedic and neurologic manifestations along with evaluations for all other disabilities, whichever method results in the higher evaluation.

With incapacitating episodes having a total duration of at least six weeks during the past 12 months................................................................................................ 60

With incapacitating episodes having a total duration of at least four weeks but less than six weeks during the past 12 months.............................................................................. 40

With incapacitating episodes having a total duration of at least two weeks but less than four weeks during the past 12 months................................................................... 20

With incapacitating episodes having a total duration of at least one week but less than two weeks during the past 12 months............................................................................... 10

**5295 Lumbosacral strain:**

Severe; with listing of whole spine to opposite side, positive Goldthwaite's sign, marked limitation of forward bending in standing position, loss of lateral motion with osteoarthritic changes, or narrowing or irregularity of joint space, or some of the above with abnormal mobility on forced motion.................................................................................................. 40

With muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral, in standing position ................................................................................................. 20

With characteristic pain on motion ........................................................ 10

With slight subjective symptoms only ...................................................... 0

The MEB narrative summary (NARSUM) examination was completed closer to the date of separation than the VA C&P examination but was still completed prior to separation and the Board therefore placed more probative value on the NARSUM examination. It clearly documents a worsening of the limitation of motion over the intervening 8 month period and meets the criteria for a 40% rating using today’s VASRD based on forward flexion of the thoracolumbar spine at 30 degrees or less. A 40% rating is also supported using the 2003 VASRD criteria for code 5292 with severe limitation of motion of the lumbar spine and for 5295 with severe lumbosacral strain with marked limitation of forward bending in standing position. The available record does not contain information regarding any incapacitating episodes and a rating using 5293, intervertebral disc syndrome cannot be determined. While the VA also rated a radiculopathy of the left lower extremity, this was not added until May of 2007, nearly 4 years after the CI separated from service. Board precedent is that a functional impairment tied to fitness is required to support a recommendation for addition of a peripheral nerve rating at separation. The sensory component in this case has no functional implications. While the VA C&P examination noted weakness and abnormal reflexes, neither of these were present on the NARSUM examination and it was closer to the date of separation. Since no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 40% for the chronic LBP due to DDD at L5-S1 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. As discussed above, PEB reliance on DoDI 1332.39 for rating the chronic LBP condition was operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the chronic LBP due to DDD at L5-S1 condition, the Board unanimously recommends a disability rating of 40%, coded 5292 IAW VASRD §4.71a. There were no other conditions within the Board’s scope of review for consideration.

RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows; and, that the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective as of the date of her prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Low Back Pain due to Degenerative Disc Disease at L5-S1 | 5292 | 40% |
| **COMBINED** | **40%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120104, 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, AR20120016852 (PD201200057)

1. Under the authority of Title 10, United States Code, section 1554(a), I approve the enclosed recommendation of the Department of Defense Physical Disability Board of Review (DoD PDBR) pertaining to the individual named in the subject line above to recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 40% effective the date of the individual’s original medical separation for disability with severance pay.

2. I direct that all the Department of the Army records of the individual concerned be corrected accordingly no later than 120 days from the date of this memorandum.

 a. Providing a correction to the individual’s separation document showing that the individual was separated by reason of permanent disability retirement effective the date of the original medical separation for disability with severance pay.

 b. Providing orders showing that the individual was retired with permanent disability effective the date of the original medical separation for disability with severance pay.

 c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, and payment of permanent retired pay at 40% effective the date of the original medical separation for disability with severance pay.

 d. Affording the individual the opportunity to elect Survivor Benefit Plan (SBP) and medical TRICARE retiree options.

3. I request that a copy of the corrections and any related correspondence be provided to the individual concerned, counsel (if any), any Members of Congress who have shown interest, and to the Army Review Boards Agency with a copy of this memorandum without enclosures.

BY ORDER OF THE SECRETARY OF THE ARMY:

Encl XXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA