RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1200060 SEPARATION DATE: 20081202

BOARD DATE: 20120830

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty, SGT/E-5, 56M, Chaplain Assistant, medically separated for degenerative arthritis of the lumbar spine. The lumbar spine condition did not improve adequately with conservative treatment, which included injections and nerve ablation, to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent P3L3H2 profile and referred to a Medical Evaluation Board (MEB). Asthma and vertigo were also identified and forwarded by the MEB as medically unacceptable. The Physical Evaluation Board (PEB) adjudicated the lumbar degenerative arthritis condition as unfitting, rated 20%, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). The remaining conditions were determined to be not unfitting. The CI made no appeals and was medically separated with a 20% disability rating.

CI CONTENTION: “My condition of degenerative arthritis is not stable. I live in pain every day. It hurts for me to complete simple task such as getting up from my chair or bending to over to do just about anything. My primary care doctor and I have not been able to control the pain with anti-inflammatory drugs. Frequently the narcotic pain medication does not relieve the pain. My vertigo condition has worsened as the years have progressed. I am experiencing more dizzy spells and ear infections from poor drainage of my inner ear. As for the asthma I have found self having to use my inhaler more frequently. I also now suffer with a bulging disc in my lower back compounded with the pain of the arthritis.”

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 asthma and vertigo conditions also meet the criteria for Board 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:

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| --- | --- |
| **Service PEB – Dated 20080902** | **VA (1 Mos. Post-Separation) – All Effective Date 20081203** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Degen. Arthritis Lumbar Spine | 5242 | 20% | Degen. Arthritis Lumbar Spine | 5242 | 20% | 20090106 |
| Asthma | Not Unfitting | Asthma | 6602 | 20% | 20090924 |
| Vertigo | Not Unfitting | R ET dysfunction w/vertigo | 6299-6204 | 20% | 20090106 |
| ↓No Additional MEB/PEB Entries↓ | Sleep Apnea | 6847 | 50% | 20090106 |
| TMJ | 9905 | 30% | 20090108 |
| 0% X 1 / Not Service-Connected x 6 | 20090106 |
| **Combined: 20%** | **Combined: 80%** |

ANALYSIS SUMMARY: The Disability Evaluation System (DES) is responsible for maintaining a fit and vital fighting force. 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 DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions resulting in medical separation nor for conditions determined to be service-connected by the Department of Veteran Affairs (DVA), but not determined to be unfitting by the PEB. However, the DVA, operating under a different set of laws (Title 38, United States Code), 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. 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.

Low Back Condition. The CI presented for treatment on 28 September 2006 with a history of low back pain (LBP) since participation in combative training 3 weeks before. A magnetic resonance imaging (MRI), dated 15 September 2007, demonstrated degenerative changes of the facet joints without disc disease. The MEB narrative summary (NARSUM) noted that non-surgical treatment was recommended by a neurosurgeon. The CI continued to report activity limiting pain despite medication, physical therapy, injections and radiofrequency nerve ablation and was referred for MEB at the end of January 2008. The MEB NARSUM examination was performed on 6 June 2008 and updated 11 August 2008. The CI reported that he used a cane and had increased LBP after sitting for 20 minutes, standing for 10 minutes, walking for 10-15 minutes, lifting, carrying, bending and climbing. The MEB physical exam noted normal sensation, motor function and deep tendon reflexes (DTRs). Gait was documented as normal, however, it was also noted that he limped on the right side, using a cane. Toe walk was normal, but heel walk painful. The back was tender from L2-S1, sacroiliac joints tender (L>R), and lower lumbar spasm present. Active flexion was measured at 54 degrees with an additional ten degrees of flexion after repetition, rounding to 65 degrees. At the VA Compensation and Pension (C&P) exam, performed a month after separation, the CI reported a similar history and denied bowel or bladder problems. Sensory, motor and DTR examinations were again normal. Flexion was 45 degrees. Gait was antalgic, favoring the left, and a cane used. DeLuca criteria were absent. Imaging was normal. Neither examiner documented incapacitating episodes. The Board considered its rating recommendation based on the above evidence. The PEB and VA both coded the back condition as 5242, degenerative arthritis of the spine, and rated it at 20% for reduced ROM with flexion greater than 30 degrees but less than 60. The Board determined that no other coding options for the back were more appropriate nor did any offer a rating advantage to the CI. There was no associated radiculopathy for a separate peripheral nerve rating. The Board noted that the flexion measurement after repetition, 65 degrees, would be appropriately rated at 10%; however, the Board does not recommend reductions in the PEB 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 back condition.

Contended PEB Conditions. The contended conditions adjudicated as not unfitting by the PEB were asthma and vertigo. The Board’s first charge with respect to these conditions 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. The CI was initially referred into the DES system dated 28 January 2008 for his back condition discussed above. The asthma and vertigo conditions were diagnosed subsequent to referral into the DES and added to the MEB submission to the PEB. The asthma condition was discovered during an evaluation for a sleep disorder in May 2008. The CI noted a prior history of shortness of breath with exertion such as the physical fitness test which he had last taken in July 2006 and passed. At the time of the MEB history and physical examination 17 April 2008, the CI indicated he had a history of bronchitis but he checked “no” to a history of wheezing, problems with wheezing, shortness of breath, asthma or any breathing problems related to exercise, weather, or pollens. Spirometry was normal. The CI noted vertiginous symptoms at a clinic entry dated 26 March 2008, when he reported that the lidoderm patch made him dizzy. At the time of the MEB history and physical examination, the CI indicated dizziness in February and March of 2008. The examiner further detailed the dizziness was related to pain medication and after not eating for a long period of time. In June 2008 the CI reported vertigo symptoms with leaning his head forward. The CI was evaluated by otolaryngology and treated with medication.

The MEB NARSUM and service treatment record stated the dizziness/vertigo was well controlled with medication. Neither was specifically implicated in the commander’s statement. Both were reviewed by the action officer and considered by the Board. The Board notes for the record that it is not uncommon for the PEB to determine a condition to be not unfitting for service even if it does not meet retention standards. There was no indication from the record that either of these conditions significantly interfered with satisfactory duty performance. Both were well controlled on medications and diagnosed during the course of the MEB process for the back condition. 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 any of the contended conditions 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 back condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended asthma and vertigo conditions, the Board unanimously recommends no change from the PEB determinations 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** |
| Degenerative Arthritis, Lumbar Spine | 5242 | 20% |
| COMBINED | 20% |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120116, 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 XXXXXXXXXXXXXXXXXXXXX, AR20120016286 (PD201200060)

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