RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXXXXX BrANCH OF SERVICE: Army

CASE NUMBER: PD1200099 SEPARATION DATE: 20030531

BOARD DATE: 20121022

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSGT/E-6 (92Y30/Unit Supply Specialist), medically separated for polyarthralgia, degenerative disc disease (DDD) and sleep apnea. The CI had a long history of multiple joint and back pain and difficulty sleeping and was diagnosed with polyarthralgia, DDD, and sleep apnea. These conditions could not be adequately rehabilitated with treatment to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent P3/U3/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 PA, DDD and SA conditions as unfitting, rated 10%, 10%, and 0% respectively, with application of Department of Defense Instruction (DoDI) 1332.39 and US Army Physical Disability Agency (USAPDA) pain policy. The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: “I received 0% for sleep apnea even though i will be using a CPAP machine for the rest of my life and I was not even rated for the problems that the VA rated me for. I am currently 70% disabled by the VA.”

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 Correction of Military Records

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20030304** | | | **VA(1 Month Before Separation ) – All Effective Date 20030601** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Polyarthralgia | 5099-5003 | 10% | Polyarthralgia | 5002 | 0%\* | STR |
| Degenerative Disc Disease | 5299-5295 | 10% | Denerative Disc Disease | 5292-5293 | 10%\*\* | STR |
| Sleep Apnea | 8108 | 0% | Obstructive Sleep Apnea | 6847 | 50% | STR |
| ↓No Additional MEB/PEB Entries↓ | | | 0% X 1 / Not Service-Connected x 1 | | | STR |
| **Combined: 20%** | | | **Combined: 60%** | | | |

\*Deferred on original VARD, 20030508 (CI no-show). 0% awarded by VARD 20060531 based on STR; 0% continued on VARD 20070802 (based on the first C&P exam, 2007013) and VARDS X 3 up to 20101109.

\*\* 10% by VARD 20030508 based on STR; 10% continued by VARD 20070802 based on C&P 20070122.

ANALYSIS SUMMARY: The Disability Evaluation System (DES) is responsible for maintaining a fit and vital fighting force. While the DES considers all of the member's medical conditions, compensation can only be offered for those medical conditions that cut short a 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 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 Veterans’ 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.

Polyarthralgia Condition. The CI developed pain and swelling in multiple joints in late 2001. There was no history of trauma or other cause at that time (such as infection). Evaluation by a rheumatologist, performed on 7 March 2002, revealed no evidence of inflammatory arthritis (such as rheumatoid arthritis), or fibromyalgia as the etiology for the joint pain. Examination revealed full range-of-motion (ROM) of the joints without swelling or pain. Gait was normal and the CI noted to transfer to the examination table without assistance. The examining physician opined the condition might be secondary to non-restorative sleep attributed to the CI’s sleep apnea, discussed below. A pain clinic consultation in 2003 concurred with this analysis. A total body bone scan performed on 29 August 2002 was normal. A diagnosis of polyarthralgia was made and the CI treated medically. At the MEB narrative summary (NARSUM) exam performed on 19 February 2003, 5 months prior to separation, the CI reported painful, swollen joints in his shoulders, elbows, fingers and toes. On physical exam, the musculoskeletal was normal without swelling. Hand X-rays were reported as normal. ROM evaluation performed on 3 February 2003, by physical therapy (PT) for the MEB, revealed slight decreases in several joints without pain. No VA Compensation and Pension (C&P) examination was performed. The Board directed attention to its rating recommendation based on the above evidence. The PEB rated the condition 10% analogous to degenerative arthritis (5003). The Board opined the polyarthralgia condition, although considered non-inflammatory by the rheumatologist, could also reasonably be rated analogously under VASRD code 5002 (similar to the VA rating approach) as it manifested similar to a systemic arthritis condition with intermittent expression in varying joints. The Board noted however that at the time of separation, the condition was without evidence of primary joint pathology and to be quiescent without functional impact. Therefore rating under 5002 would achieve no rating benefit to the CI. The Board considered rating for residuals of individual joints but unanimously agreed that there was no residual of individual joints sufficient to attain a minimum rating. The VA deferred rating of the polyarthralgia condition in absence of C&P evaluation, but, 3 years after separation, rated the condition 0%, code 5002 arthritis (31 May 2006 VARD). The Board notes that this rating was continued on four subsequent VARDS through 2010, including the VARD performed on 2 August 2007 which was based on a C&P examination performed in January 2007. 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 polyarthralgia condition.

Degenerative Disc Disease L4-5 Condition. The CI had low back pain since 1986. MRI performed on 24 September 2002 revealed DDD at L3-4, L4-5 and L5-S1 with a left paracentral disc protrusion at the L5-S1 level contacting the left S1 nerve root. The CI reported radiation of pain in the left leg on multiple occasions. On rheumatology examination, performed on 7 March 2002, gait was normal and the CI noted to transfer to the examination table without assistance. At the MEB NARSUM evaluation, performed on 5 September 2002, the CI reported low back pain and radiation of pain down left leg. The spine and neurologic exams were normal. Straight leg raise maneuver was negative. ROM examination performed by physical therapy (PT), on 3 February 2003, reported flexion as four inches, and extension 15 degrees. The Board opined this to reflect flexion bringing the fingers to within four inches the floor and consistent with full flexion (90 degrees) given findings on examinations just discussed. No pain on motion was described. A neurologic examination performed on 2 January 2003 for the MEB documented, normal lower extremity strength without muscle atrophy, intact reflexes and sensation. On a clinic visit, performed on 1 October 2004, 1-1/2 years after separation, ROM and gait were normal without neurological defects. At this time, the CI was preparing to go to Kuwait as a contract security officer.

The Board directed attention to its rating recommendation based on the above evidence. The PEB rated the back condition 10% code 5295, lumbosacral strain. A higher code of 20% requires muscle spasm affecting spine motion, not supported by the record. 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, were modified to the current §4.71a rating standards on 26 September 2003. The prior to September 2003 VASRD spine limitation of motion standards were based on the rater’s assessment of limitation as slight, moderate, or severe, 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. The VA rated the back condition 10% coded 5292, spine limitation of motion slight, citing the PT exam of February 2003. The Board agreed that the findings of the MEB exam were consistent with a rating of 10% IAW §4.71a. There was no evidence or ratable peripheral nerve impairment in this case, since no motor weakness was present and sensory symptoms had no functional implication. There was no evidence of incapacitating episodes for a higher rating under 5293. 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.

Sleep Apnea Condition. The CI had obstructive sleep apnea (OSA) diagnosed on polysomnographic studies, performed on 19 January 2000. The condition was described as moderate and treated with continuous positive airway pressure (CPAP). This condition was included on permanent profile on 12 November 2002. The use of CPAP was documented in the MEB and a clinic appointment, performed on 1 September 2004, approximately 1-1/2 years after separation, when level of CPAP was increased. The Board directed attention to its rating recommendation based on the above evidence. The PEB rated the condition 0% code 8108, narcolepsy, citing OSA mild, improved with CPAP. The VA rated the condition 50% code 6847 sleep apnea syndrome, also citing OSA requiring CPAP. A higher evaluation was not warranted unless there is chronic respiratory failure with carbon dioxide retention or tracheotomy is required, not supported by the record in evidence. The Board unanimously agreed that the CI had OSA and was treated with CPAP at the time of separation. This meets the criteria for 50% rating, coded 6847 (VASRD in effect at the time of separation). After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 50% for the sleep apnea 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, the PEB reliance on the USAPDA pain policy for rating polyarthralgia condition and on DoDI 1332.39 for rating disc and sleep apnea conditions was operant in this case and these conditions were adjudicated independently of those policies by the Board. In the matter of the polyarthralgia condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. 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 sleep apnea condition, the Board unanimously recommends a disability rating of 50%, coded 6847 IAW VASRD §4.97. 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 his prior medical separation:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Polyarthralgia | 5099-5003 | 10% |
| Degenerative Disc Disease | 5299-5295 | 10% |
| Sleep Apnea | 6847 | 50% |
| **COMBINED** | **60%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120127, 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

for XXXXXXXXXXXXXXXXXXXXXX, AR20120020024 (PD201200099)

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 60% 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 60% 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