RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1200116 SEPARATION DATE: 20080612

BOARD DATE: 20120718

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (63H / Track mechanic), medically separated for chronic low back pain (LBP) with degenerative disc disease (DDD). The CI did not improve adequately with treatment to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). Depression, mild obstructive sleep apnea (OSA), pre-hypertension and tobacco dependence, identified in the rating chart below, were also identified and forwarded by the MEB as meeting retention standards. The Physical Evaluation Board (PEB) adjudicated the chronic LBP with DDD condition as unfitting, rated 20%, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). The remaining conditions forwarded by the MEB were determined to be not unfitting. The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: “I was released from active duty for degenerative disc disease with a 20% rating which was my VA rating as well. As of May 27 2009 my VA rating increased to 40%. Along with degenerative disc disease, I have multiple other issues which give me a total 90% disability rating from the VA. Major depressive disorder 50%, TBI 10%, sleep apnea 50%, left knee 10%, right knee 10%. I believe that my depression alone would’ve made grounds for discharge.”

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 major depressive disorder (MDD), and OSA, as requested for consideration meet the criteria prescribed in DoDI 6040.44 for Board purview; and, are addressed below, in addition to a review of the ratings for the unfitting chronic LBP due to DDD. The other requested conditions, and the remaining conditions rated by the Department of Veterans’ Affairs (DVA) at separation are not within the Board’s 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:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20080508** | | | **VA (2 Mos. Post-Separation) – All Effective Date 20080613** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain, Degenerative Disc Disease | 5242 | 20% | Degenerative Disc Disease of Thoracolumbar Spine | 5242 | 20% | 20080814 |
| Depression | Not Unfitting | | Depressive disorder NOS | 9434 | 10% | 20080806 |
| Mild Obstructive Sleep Apnea | Not Unfitting | | Sleep apnea | 6847 | 50% | 20080814 |
| Pre - Hypertension | Not Unfitting | | Hypertension | 7101 | NSC | 20080814 |
| Tobacco Dependence | Not Unfitting | | NO VA ENTRY | | |  |
| ↓No Additional MEB/PEB Entries↓ | | | Bowel incontinence assoc. w/ DDD, TL Spine | 7332 | 10% | 20080814 |
| Radiculopathy, R Lower Ext.. Assoc. w/ DDD TL Spine | 8520 | 10% | 20080814 |
| Radiculopathy, Left Lower Ext. assoc. w/ DDD TL spine | 8520 | 10% | 20080814 |
| Right knee strain | 5014-5260 | 10% | 20080814 |
| Left knee strain | 5014-5260 | 10% | 20080814 |
| Headaches | 8199-8100 | 0% | 20080814 |
| 0% X 3\* / Not Service-Connected x 10 | | | 20080814 & 20080804 |
| **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 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.

Chronic Low Back Pain with Degenerative Disc Disease Condition. The CI experienced recurrent LBP for a few years which gradually became constant in 2007 and was associated with radiation of pain into the legs. A magnetic resonance imaging (MRI) performed on 8 August 2007 demonstrated DDD at L4-5 and L5-S1 with disc bulging and protrusion respectively without neural impingement. Neurosurgical evaluation recommended non-surgical treatment. Treatment including a series of injections and radiofrequency ablation did not significantly improve the CI’s chronic back pain. Multiple examinations in the service treatment record (STR) noted the variable presence of muscle spasm and antalgic gait. The narrative summary (NARSUM) examination performed on 18 April 2008, noted decreased sensation to light touch on the lateral right leg. Strength and reflexes were intact. The CI reported experiencing occasional problems with bladder or bowel function in the past associated with back pain but at the time of the orthopedic examination performed on 6 February 2008, and the NARSUM performed on 18 April 2008, noted absence of bowel or bladder problems. The MRI also did not show objective neurologic compromise to explain the prior intermittent symptoms. At the VA Compensation and Pension (C&P) exam after separation, the CI reported similar symptoms.

There were five 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 | PT  ~ 9 Mo. Pre-Sep.  (20070912) | PT  ~5 Mo. Pre-Sep  (20080109) | Orthopedics  ~4 Mo. Pre-Sep  (20080206) | MEB NARSUM  ~ 2 Mo. Pre-Sep  (20080414) | VA C&P  ~2 Mo. Post-Sep  (20080814) |
| Flexion (90⁰ Normal) | 70⁰ | 55⁰ (56, 55,55) | 70⁰ | 40⁰ | 35⁰ |
| Extension (30⁰) | 15⁰ | 25⁰ (22, 23, 25) | 15⁰, 10⁰ | 15⁰ | 15⁰ |
| R Lat Flex (30⁰) | 20⁰ | 25⁰ (23, 25, 25) | 20⁰ | 20⁰ | 30⁰ |
| L Lat Flex (30⁰) | 25⁰ | 15⁰ (15, 15, 14) | 20⁰ | 15⁰ | 30⁰ |
| R Rotation (30⁰) | N/A | 25⁰ (25, 25, 25) | N/A | 15⁰ | 30⁰ |
| L Rotation (30⁰) | N/A | 20⁰ (20, 20, 20) | N/A | 15⁰ | 30⁰ |
| Combined (240⁰) | N/A | 165⁰ | N/A | 120⁰ | 170⁰ |
| Comment | Painful motion.  Muscle spasm.  Normal gait.  Decreased lordosis. | Painful motion. | Painful motion.  Normal appearance. | Painful motion.  No spasm. | Painful Motion.  No spasm.  Antalgic gait.  Negative Lasegue's sign. |
| §4.71a Rating | 10% | 20% | 10% | 20% | 20% |

The Board directs attention to its rating recommendation based on the above evidence. The PEB adjudicated a 20% rating based on the ROM reported in the MEB NARSUM. The VA also adjudicated a 20% rating based on the ROM examination reported by the C&P examination. Although there were ROM examinations showing less limitation of motion, the Board agreed that the preponderance of evidence of the record supported the 20% rating adjudicated by the PEB. There was no evidence of incapacitating episodes due to intervertebral disc disease that would meet the criteria for a minimum rating under the alternative formula for incapacitating episodes due to intervertebral disease. The Board also considered if additional disability rating was justified for peripheral nerve impairment due to radiculopathy. Symptoms of radiating pain were present, however, examinations indicated normal strength with intact reflexes. Mild sensory changes were noted. Although the MRI showed bulging and protruding lumbar discs, there was no neural impingement evident. The presence of functional impairment with a direct impact on fitness is the key determinant in the Board’s decision to recommend any condition for rating as additionally unfitting. While the CI may have suffered radiating pain from the back condition, this is subsumed under the general spine rating criteria, which specifically states “with or without symptoms such as pain (whether or not it radiates).” Therefore the critical decision is whether or not there was a significant motor weakness which would impact military occupation specific activities. There is no evidence in this case that motor weakness existed to any degree that could be described as functionally impairing. The Board therefore concludes that additional disability rating was not justified on this basis. 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 chronic back pain with degenerative disc disease condition.

Contended PEB Conditions. The contended conditions adjudicated as not unfitting by the PEB were depression and mild OSA. 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 diagnosed and treated for depression in 2007 in the setting of marital separation and increased back pain leading to medical discharge. The psychiatry NARSUM performed on 11 January 2008 concluded the CI’s depression was medically acceptable for continued military service. The MEB referred depression as medically acceptable. The CI was diagnosed with mild OSA by sleep study performed on 9 December 2007. The CI complained of snoring and daytime sleepiness. The Epworth sleepiness scale was 5, a score that falls within the middle of the normal range. Although it was “unclear if the patient will require CPAP,” use of CPAP was advised to for symptoms. The commander’s statement indicated the CI performed assigned duties well. The services do not routinely find OSA, with or without CPAP requirement, unfitting if symptoms are controlled and functioning is unimpaired. The burden of providing CPAP in field and deployment environments is not considered to be a critical factor with the common availability of portable generators and sanitary facilities. None of these conditions were profiled; none were implicated in the commander’s statement; and, none were judged to fail retention standards. All were reviewed by the action officer and considered by the Board. There was no indication from the record that any of these conditions significantly interfered with satisfactory duty performance. 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 contended depression or sleep apnea 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. In the matter of the chronic LBP with DDD condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended depression and mild OSA 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** |
| Low Back Pain, Degenerative Disc Disease | 5242 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120130, 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, AR20120013404 (PD201200116)

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 XXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA