RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1200133 SEPARATION DATE: 20060316

BOARD DATE: 20121018

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (11B/Infantry), medically separated for chronic low back pain with left leg pain and left leg pain with radiculopathy. The CI injured his back while standing in the gunner’s turret of a Humvee when the vehicle was hit by an improvised explosive device (IED). The CI was evacuated to Landstuhl Regional Medical Center and then on to Walter Reed Army Medical Center where he underwent an L5-S1 discectomy on 29 June 2005. His symptoms of back pain and well as extreme left leg pain with constant sharp numbness, tingling, and burning sensation improved after surgery but the CI remained unable to perform the duties required of his MOS. Additionally, although his knee pain had been present prior to his deployment, it got significantly worse after the deployment. None of these conditions could be adequately rehabilitated and the CI remained unable to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent L3 profile for chronic left knee pain and lumbar disc surgery and was referred for a Medical Evaluation Board (MEB). Left knee pain, bilateral shoulder pain and hypertriglyceridemia conditions, identified in the rating chart below, were also identified and forwarded by the MEB. The Physical Evaluation Board (PEB) adjudicated the chronic low back pain with left leg pain and chronic left leg pain with radiculopathy conditions as unfitting, rated 10% each, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). The chronic left leg pain with Radiculopathy condition included two MEB diagnoses: left lower extremity radiculopathy and left knee pain. The remaining conditions were determined to be medically acceptable and were not rated. The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: “I am rated 60% by VA for same condition which since separation has worsened. I received a 2nd back surgery on 2/8/11 which placed titanium screws, rods, cage between vertebrae and spinal fusion. I do now and will always suffer severe pain and discomfort. I have trouble walking, sitting, standing, laying and do normal activities. I have permanent nerve damage L leg, severe headaches requiring oxygen tanks in my home, memory loss, trouble concentrating. Severe PTSD, TBI (mild to moderate). All of this was caused by the same IED explosion in May of 2005 which evac’d me from Iraq to Walter Reed which subsequently cost me my Army career.”

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 chronic low back pain and left leg pain conditions were identified as unfitting and meet the criteria prescribed in DoDI 6040.44 for Board purview. The other requested conditions (headaches, PTSD, and TBI) 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 Correction of Military Records.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service PEB – Dated 20060125** | **VA (10 Days Pre-Separation) – All Effective Date 20060317** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain with Left Leg Pain | 5243 | 10% | Post Operative Herniated Nucleus Pulposus, Lumbosacral Spine | 5243-5237 | 10%\* | 20060307 |
| Left Leg Pain with L5-S1 Radiculopathy | 5243-8520 | 10% | Right Lower Extremity Radiculopathy Residual of Lumbosacral Herniated Nucleus Pulposus | 8599-8520 | 10%\*\* | 20060307 |
| Left Knee Tendonitis | 5010-5260 | 10% | 20060307 |
| Bilateral Shoulder Pain | Medically Acceptable | Right Shoulder Condition | 5201 | NSC | 20060307 |
| Left Shoulder Condition | 5201 | NSC | 20060307 |
| Hypertriglyceridemia | Medically Acceptable | No VA Entry |
| ↓No Additional MEB/PEB Entries↓ | Post Traumatic Stress Disorder | 9411 | 30%\*\*\* | 20060223 |
| 0% X 2 / Not Service-Connected x 1 other | 20060307 |
| **Combined: 20%** | **Combined: 50%\*\*\*\*** |

\*Increased to 40% effective 20101109, increased to 100% from 20110208, and then decreased to 40% effective 20110501.

\*\*Increased to 20% effective 20101109.

\*\*\*Increased to 70% effective 20101202.

\*\*\*\*Increased to 80% effective 20101109 with above increases and addition of 8100 Post Traumatic Headache at 30% and 8045 Mild Traumatic Brain Injury at 10%. Also increased to 100% effective 20110208 and then decreased to 90% effective 20110501 with changes in ratings for 5243-5237.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that the gravity of his condition and predictable consequences merit consideration for a higher separation rating. The Board also acknowledges the CI’s contention that suggests ratings should have been conferred for other conditions documented at the time of separation. The Board wishes to clarify that it is subject to the same laws for disability entitlements as those under which the Disability Evaluation System (DES) operates. 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. 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 and is limited to conditions adjudicated by the PEB as either unfitting or not unfitting. 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 with Left Leg Pain Condition. There were three 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 | NARSUM ~5 Months Pre-Separation | PT for PEB ~2 MonthsPre-Separation | VA C&P ~9 Days Pre-Separation |
| Flexion (90⁰ Normal) | 60⁰ | 30° (30⁰/32⁰/32⁰) | 70⁰ (Pain at 55°) |
| Ext (0-30) | 30⁰ | 20° (18⁰/18⁰/18⁰) | 30⁰ |
| R Lat Flex (0-30) | 30⁰ | 15° (15⁰/17⁰/17⁰) | 25° (27⁰) |
| L Lat Flex 0-30) | 30⁰ | 15° or 20° (14⁰/14⁰/18⁰) | 30⁰ |
| R Rotation (0-30) | Not Measured | 30° (50⁰/51⁰/51⁰) | 30⁰ (45⁰) |
| L Rotation (0-30) | Not Measured | 30° (38⁰/38⁰/38⁰) | 30⁰ (45⁰) |
| Combined (240⁰) | NA | 140⁰ (or 145°) | 215⁰ |
| Comment | Motor 5/5 bilateral lower extremities except gastrocsoleus is 4+/5 on left and 5/5 on right. Decreased sensation on lateral border of left foot. Reflexes 1+ and equal bilateral lower extremities. | Active ROM measured with a goniometer and limited by pain. | Normal gait. Tender throughout the L5-S1 paravertebral area; well healed scar; no spasm; straight leg raise (Lasegue’s) negative; motor 5/5 bilaterally; reflexes 2+ knees, 1+ ankles; normal sensation throughout right and left lower extremities with vibration, position, and light touch; some pain getting on and off the table; He cooperated well and Waddell’s were negative. |
| §4.71a Rating | 20% | 40% | 10% |

The CI did have a previous history of a significant back injury when he fell approximately six feet off a ladder in October 2004. ROM measurements were not taken at the time, but flexion of the spine was noted to be restricted by pain. He was treated with physical therapy and although he achieved full ROM after approximately 4 weeks his pain persisted at a significant level and was not relieved with narcotic pain medication. A magnetic resonance imaging (MRI) was performed in December 2004 and it documented moderate-sized disc herniation to the left of midline at the L5-S1 level that displaced the left S1 nerve root slightly posteriorly. There was also a minimal disc bulge at the L1-L2 level and bilateral pars defects at the L5-S1 level without evidence of spondylolisthesis. A December 2004 note documenting an appointment with the division physician assistant noted the herniated disc on MRI, complaints of bilateral lower extremity paresthesias radiating down to the toes, full ROM, a negative straight leg raise test, and normal motor strength. The plan was for orthopedic consult, apparently to determine ability to deploy. There is no evidence in the record of such a visit and the CI did deploy. While deployed, the CI suffered a second serious back injury in May 2005 that required surgical treatment in June 2005. Although the MEB narrative summary (NARSUM) examination contained ROM measurements, no right or left rotation measurements were noted and it is not clear if a goniometer was used. The disability case was returned from the PEB to the military treatment facility in December 2005 with instructions to obtain a complete set of cervical and thoracolumbar ROM measurements from a physical therapist using an inclinometer. The requested thoracolumbar ROM measurements were performed on 10 January 2006 and are in the chart above. The MEB NARSUM ROM measurements obtained 5 months prior to separation support a disability rating of 20% based on thoracolumbar flexion not greater than 60 degrees and the physical therapy ROM measurements obtained 2 months prior to separation support a 40% rating for thoracolumbar flexion of 30 degrees or less. The DA Form 199 noted the forward flexion of 60 degrees but assigned a 10% rating. The VA Compensation and Pension (C&P) examination was completed just days prior to separation and it supports a 10% rating with thoracolumbar flexion of greater than 60 degrees but not greater than 85 degrees. The VA applied a 10% disability rating based on the VA examination.

The Board directs attention to its rating recommendation based on the above evidence. It is not clear why the PEB did not apply a 20% rating as required by VASRD §4.71a for thoracolumbar spine flexion not greater than 60 degrees. It is also not clear why the PEB did not use the ROM measurements it specifically requested from the military treatment facility and were obtained by physical therapy in January 2006. As discussed above, those measurements support a 40% rating. There is no cause for doubting the accuracy of any of the examinations on the day they were completed. The CI’s back condition appears to wax and wane over time. While these three examinations appear to document a terminal upward trend of increasing flexion, the record documents that, overall, the CI’s condition was not at the level documented on the initial VA C&P examination, either continuously or for a majority of the time. His condition ranged from slightly worse to significantly worse both before and after separation. After separation, the CI continued to receive regular and continuing treatment for continued back pain with significant flare-ups related to increased activity both from the VA and from a private physician. Treatment included numerous transforaminal epidural steroid injects which brought good but only temporary improvement. Evaluation by a private physician in January 2010 documents essentially identical findings as the MEB NARSUM examination in October 2005. Although a second VA C&P examination of the spine was not performed until December 2010, it documented flexion limited to 30 degrees as was present in January 2006. Findings of moderate degenerative disc disease (DDD) at L5-S1 were noted on MRI examinations in both 2007 and 2010, only slightly improved from the moderately large left L5-S1 disc herniation noted on MRI in 2005, prior to the first surgery. Ultimately, a second spinal surgery was required in 2011 with transforaminal interbody fusion with percutaneous hardware at the site of the 2005 L5-S1 microdiskectomy. The VA applied a 40% disability rating both before and after this surgery, initially effective in November 2010, the date of the CI’s first claim for increased evaluation. This evidence supports a determination that the VA examination performed in March 2006 and is not representative of the CI’s true overall disability picture but that the condition waxes and wanes over time with flexion ranging from 30 to 70 degrees supporting disability ratings ranging from 10% to 40%. Paragraph §4.7 of the VASRD (Higher of two evaluations) states that where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned. In this case, the overall disability more nearly approximates the 20% rating criteria, as opposed to either the 10% or the 40% rating. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 20% for the chronic low back pain with left leg pain condition.

Left Leg Pain with Radiculopathy Condition. The MEB NARSUM and C&P exam findings are presented in the thoracolumbar spine ROM chart above. Additionally, a nerve conduction study performed in November 2005 documented denervation in the muscles of the left lower extremity suggestive of an L5-S1 nerve root compression with mild re-innervation in these muscles suggestive of a chronic process. The PEB noted constant pain and decreased strength in the gastrocsoleus muscle group. Both the PEB and the VA rated the radiculopathy at 10% for mild incomplete paralysis of the sciatic nerve. The VA later increased the rating to 20% after a second C&P examination in December 2010. However, this appears to be based on a worsening of symptoms over time and the presence of new objective findings.

The Board directs attention to its rating recommendation based on the above evidence. Both the Army and VA examinations at the time of separation support a 10% finding and no appropriate rating scheme affords a rating greater than 10%. 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 left leg pain with radiculopathy 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. 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 chronic low back pain with left leg pain condition, the Board unanimously recommends a disability rating of 20%, coded 5243 IAW VASRD §4.71a. In the matter of the left leg pain with L5-S1 radiculopathy condition and IAW VASRD §4.124a, the Board unanimously recommends no change in the PEB adjudication. 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** |
| Chronic Low Back Pain with Left Leg Pain | 5243 | 20% |
| Left Leg Pain with L5-S1 Radiculopathy | 5243-8520 | 10% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120203, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 XXXXXXXXXXXXXXXXXX

 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 XXXXXXXXXXXXXXXXXXXXX, AR20120020011 (PD201200133)

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 30% 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 30% 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 XXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA