RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1200148 SEPARATION DATE: 20040405

BOARD DATE: 20120927

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a National Guard SPC/E-4 (51B10, Construction Engineer), medically separated for chronic back pain with sacroiliitis condition. The CI had a 6-year period of service with the Navy prior to entering the Army National Guard in September 1997. He was ordered to active service in January 2003 and within 7 months was evaluated for exacerbation of his low back pain.” After conservative treatment failed to alleviate the pain, the CI could not be adequately rehabilitated to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards, he was issued a permanent L3 and referred for a Medical Evaluation Board (MEB). He did not desire MOS Medical Review Board proceedings. The MEB forwarded chronic low back pain (designated EPTS; permanently aggravated by service) as the only medically unacceptable condition for PEB adjudication. Another six conditions, as summarized in the rating comparison chart below, were identified and forwarded as medically acceptable conditions. The PEB adjudicated the chronic back pain with sacroiliitis condition as unfitting, rated 10%, citing AR 635-40 paragraph B-29e for rating purposes and possible application of the US Army Physical Disability Agency (USAPDA) pain policy. The remaining conditions were adjudicated as not unfitting. The CI initially requested a Formal PEB hearing but 6 weeks later submitted a memorandum informing the PEB that he now declined a formal board hearing and “elected to accept the original findings of 10%, separate with severance pay.” The CI was medically separated with a 10% disability rating.

CI CONTENTION: “Initial medical consultation conducted by US Army physician indicated that SPC Townsend would be given a Medical Retirement. This declaration was determined for chronic low Back, IgA (immunoglobulin A Nephropathy, Hypertension, pes planus, tinea pedis, myopia, cluster-like headaches and Diabetes.”

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 chronic low back condition requested for consideration and the medically acceptable IGA nephropathy, hypertension, pes planus, tinea pedis, myopia, and cluster-like headaches conditions meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. The other requested condition, diabetes, is 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 IPEB – Dated 20040211** | | | **VA (~1 Mo. Post-Separation) – All Effective Date 20040406** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Back Pain with Sacroiliitis | 5299-5237 | 10% | Sacroiliitis with Chronic Low Back Pain | 5236 | 20%\* | Service Treatment  Records (STR) |
| Tinea Pedis | Not unfitting | | Tinea Pedis | 7806 | 0% | STR |
| IgA Nephropathy | Not unfitting | | IgA Nephropathy with Hypertension | 7599-7502 | NSC | STR |
| Hypertension | Not unfitting | |
| Pes Planus | Not unfitting | | Pes Planus | 5276 | NSC | STR |
| Myopia | Not unfitting | | Myopia | 6099-6006 | NSC | STR |
| Cluster-like Headaches | Not unfitting | | Cluster Like Headaches | 8199-8100 | NSC | STR |
| ↓No Additional MEB/PEB Entries↓ | | | Not Service-Connected x 2 additional | | | |
| **Combined: 10%** | | | **Combined: 20%\*** | | | |

\*VARD code 5236 Increased to 40% effective 20050114; VARD added Diabetes code 7913 Rated 20% effective 20050831; initial VA combined rating 20%, increased to 40% effective 20050114 then to 50% effective 20050831.

ANALYSIS SUMMARY: The Board acknowledges the CI's contention suggesting that ratings should have been conferred for other conditions documented at the time of separation, some of which were evaluated and determined not to be individually unfitting for continued service. With regard to the CI’s assertion that he was told he would be medically retired, the Board must note for the record that it has neither the jurisdiction nor authority to scrutinize or render opinions in reference to suspected improprieties in the disposition of a case. 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. 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. 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 re-evaluate said conditions for the purpose of adjusting the veteran’s disability rating should the degree of impairment vary over time. The Board is empowered to evaluate the fairness of service fitness determinations, and to make recommendations for rating of conditions which it concludes would have independently prevented the performance of required duties (at the time of separation). The Board’s threshold for countering DES fitness determinations is higher than the Veteran’s Admiration Schedule for Rating Disabilities (VASRD) §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard.

Chronic Back Pain with Sacroiliitis: The narrative summary (NARSUM) prepared 3 months prior to separation, notes 4 years of low back pain at the sacroiliac area after an injury while in the Navy. CI’s current pain had insidiously worsened after increased lifting. Pain was 6/10 without radiation and rendered him unable to carry 100 pounds or occasionally lift 140 pounds as required by his MOS. There were two goniometric range-of-motion (ROM) evaluations in evidence, with documentation of an additional exam and additional ratable criteria, which the Board weighed in arriving at its rating recommendation; as summarized in the chart below.

|  |  |  |  |
| --- | --- | --- | --- |
| Thoracolumbar ROM | MEB Exam ~ 8 Mo. Pre-Sep | PT ~3 Mo. Pre-Sep | VA C&P ~10 Mo. Post-Sep |
| Flexion (90⁰ Normal) | No measurements | 40⁰ | 30⁰ |
| Ext (0-30) | 10⁰ | 10⁰ |
| R Lat Flex (0-30) | 15⁰ | 10⁰ |
| L Lat Flex 0-30) | 10⁰ | 10⁰ |
| R Rotation (0-30) | 10⁰ | 10⁰ |
| L Rotation (0-30) | 15⁰ | 10⁰ |
| Combined (240⁰) | 100⁰ | 800 |
| Comment | + Tenderness; + painful motion; + SLR at 30⁰ bilat.; Sl. flexed standing posture; 3/8 Waddell’s | Stands with forward flexion; fully erect with flexion and extension measurement; + painful motion; + cervical compression; +braced trunk/hip rotation; + SLR supine/-SLR seated | + Tenderness; + painful motion; + tightness of paraspinal muscles with some straightening of lordotic curve; neg. SLR; normal STR & DTR bilat; no DeLuca decrease |
| §4.71a Rating | 10% | 20% (PEB 10%; VA 20%) | 40% |

At the NARSUM, the CI reported frequent back pains that limited him from standing erect. The MEB physical exam performed 8 months prior to separation demonstrated tenderness at L4-L5 level and paraspinal tenderness along with back pain with leg rise at 300. The physical therapy (PT) exam performed 3 months prior to separation is summarized above with the examiner indicating patient’s “subjective eval not (equal to) objective findings.” X-rays of the sacroiliac joint and lumbar spine on 25 September 2003 were reported as normal. The first VA Compensation and Pension (C&P) exam, performed 10 months after separation, indicated the CI had continued back pain and limitations with the exam summarized above. X-rays of the back were reported as unremarkable.

The Board directs attention to its rating recommendation based on the above evidence. The PEB applied an analogous code of 5299-5237 rated at 10%. The PEB cited AR 635-40, paragraph B-29e for rating, which indicated ROM ratings are based on mechanical limitation without use of pain-limited motion. The initial VA rating of 20% was based on the STR. VA increased the spine rating to 40% was based on the VA post-separation exam above. Both the PEB and VA codes, 5236 (sacroiliac injury and weakness) and 5237 (lumbosacral or cervical strain) respectively, use the general spine rating formula and neither is predominant. The Board deliberated on the probative value of the two disparate exams and assigned the higher probative value to the service exam which was closer to the date of separation and more closely aligned with the totality of the record. 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 back pain with sacroiliitis condition, coded 5299-5237.

Contended PEB Conditions. The contended conditions adjudicated as not unfitting by the PEB (tinea pedis, IgA nephropathy, hypertension, pes planus, myopia, and cluster-like headaches) are listed in the rating comparison chart above. 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 only contended condition with a profile was the IgA nephropathy. A military Nephrologist’s recommendation resulted in a P2 profile as the CI’s proteinuria was not in nephritic range and his hypertension was controlled. None of the other conditions were profiled. None of the contended conditions were implicated in the commander’s statement and none were judged to fail retention standards. All were reviewed 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 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. As discussed above, PEB reliance on AR 635-40 para B-29e for rating chronic back pain with sacroiliitis and likely application of the USAPDA pain policy was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the chronic back pain with sacroiliitis condition, the Board unanimously recommends a disability rating of 20%, coded 5299-5237 IAW VASRD §4.71a. In the matter of the six additional contended conditions (tinea pedis, IgA nephropathy, hypertension, pes planus, myopia, and cluster-like headaches) listed in the ratings comparison chart above, the Board unanimously recommends no change from the PEB determination as not unfitting. 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, effective as of the date of his prior medical separation:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Back Pain with Sacroiliitis | 5299-5237 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120225, 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 XXXXXXXXXXXXXXXXXXXXX, AR20120019877 (PD201200148)

1. 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 to modify the individual’s disability rating to 20% without recharacterization of the individual’s separation. This decision is final.

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.

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