RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1200161 SEPARATION DATE: 20071128

BOARD DATE: 20120814

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (31B, Military Police), medically separated for a low back condition following a blunt injury while standing in the gunners position, from an improvised explosive device (IED) explosion, while deployed in Afghanistan. He did not respond adequately to conservative treatment and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded no other conditions for PEB adjudication. The PEB adjudicated the low back condition as unfitting, rated 10%, with application of the US Army Physical Disability Agency (USAPDA) pain policy. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “I was given a disability severance for my back injury. I do not feel that the rating of 10% properly reflects the degree of disability I was experiencing. The Army did not take into consideration that I was suffering from several other disabilities including PTSD, headaches, and tinnitus.

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 other requested conditions posttraumatic stress disorder (PTSD), tinnitus and headaches 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 20071025** | **VA (1&2 Mos. Post-Separation) – All Effective Date 20071129** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Lumbosacral Strain | 5237 | 10% | Low Back Strain w/deg changes | 5242 | 10% | 20071231 |
| ↓No Additional MEB/PEB Entries↓ | TBI w/cephalgia | 8045-8100 |  10%\* | 20071231 |
| Tinnitus | 6260 | 10% | 20071231 |
| 0% X 1 / Not Service-Connected x 3 |  |
| **Combined: 10%** | **Combined: 30%** |

\*TBI increased to 30% 20081023

Adjustment Disorder added @30% 20100126

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that the gravity of his condition and predictable consequences which merit consideration for a higher separation rating. The Board also acknowledges the CI's contention suggesting that ratings should have been conferred for other conditions documented at the time of separation and for conditions not diagnosed while in the service but later determined to be service-connected by the Department of Veterans’ Affairs (DVA). While the Disability Evaluation System (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 DVA, however, 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 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. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Low Back Condition. The CI was in good health until he deployed to Afghanistan when he experienced an IED explosion 11 months into his deployment injuring his low back. He was taken to Bagram Air Base and monitored for 24-hours for a concussive injury only, primarily on the left side. Service treatment records (STR) from theater were not in evidence for review. He was placed on light duty for the remaining month until his unit redeployed to Hawaii in April 2005. He was treated conservatively for his back with nonsteroidal anti-inflammatory drugs, muscle relaxers, temporary profiling, occasional narcotic based pain medications, physical therapy and chiropractic therapy. He had no improvement in his back pain with any of these treatments. An X-ray in April 2005 reported a normal lumbosacral spine. A computer tomography (CT)of the lumbar spine, in June 2005, reported mild degenerative changes with mild disc bulges at L4-LS and L5-S1 and a magnetic resonance imaging (MRI), in January 2006, reported a normal lumbar spine. He was placed on a permanent L2 profile and had a change of duty to Ft Bragg, NC. He continued to seek conservative treatment now including physical medicine rehabilitation and pain management. Repeat X-rays in January 2007 reported a normal lumbosacral spine and a repeat MRI in May 2007 reported disc osteophyte complex at L4-L5 with no significant canal or foraminal stenosis and no disc protrusions were identified. His profile was change to a permanent L3 with the following limitations; no army physical fitness testing, rucking, sit-ups, push-ups, flutter kicks, prolonged standing greater than 15 minutes at one time, and able to lift up to 15 pounds.

There were two 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.

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| Thoracolumbar ROM | MEB ~3 Mo. Pre-Sep | VA C&P ~1 Mo. Post-Sep |
| Flexion (90⁰ Normal) | 45,42,40⁰ | 70⁰ |
| Ext (0-30) | 15,15,16⁰ | 30⁰ |
| R Lat Flex (0-30) | 13,12,10⁰ | 30⁰ |
| L Lat Flex 0-30) | 15,15,15⁰ | 30⁰ |
| R Rotation (0-30) | 24,24,24⁰ | 30⁰ |
| L Rotation (0-30) | 30,30,30⁰ | 30⁰ |
| Combined (240⁰) | 135⁰ | 220⁰ |
| Comment |  | Painful motion, Normal gait; no spams; no tenderness;  |
| §4.71a Rating | 20% | 10% |

At the MEB exam, the CI reported back pain, 5/10 intensity on a pain scale, worsened with lifting, carrying weight, prolong standing, climbing stairs, bending or twisting and with impact activities with a maximum intensity of 10/10 with radiation of pain to his right leg and use of daily Motrin, a nonsteroidal and Percocet, (narcotic based) as needed for pain. The MEB physical exam demonstrated tenderness to palpation in the midline of the lower lumbar spine and in the bilateral sacroiliac joints, 1/5 Waddell’s positive, and normal neuromuscular findings. There was one service treatment record (STR) within 12 months prior to separation which documented a forward flexion of 45 degrees. At the VA Compensation and Pension (C&P) exam, performed a month after separation, the CI reported his back was hyperextended when an IED blast force pushed him backwards and he had residual back pain reported as 6/10 in intensity on a pain scale which was constant and sharp. The pain radiated into the right buttocks, the inner posterior right thigh and stopped behind the right knee with no numbness tingling or weakness. He reported flare-ups that would last for 5 minutes and occur on a daily basis and 14 incapacitating episodes of back pain during the past 12 months that would last for and hour and both responded to pain medication and rest. He reported working fulltime as a car salesman of less than 12 months and had no time lost from work due to his back pain. The C&P physical exam demonstrated no tenderness to palpation over the lower lumbar spine, right or left sacroiliac joints, right or left sciatic notches or adjacent right or left paraspinal muscles, palpable spasm, and no objective DeLuca observations.

The Board directs attention to its rating recommendation based on the above evidence. The Board notes that both the MEB and VA exams were complete, well documented, and compliant with VASRD §4.46 (accurate measurement) and similar in terms of ratable data and therefore the Board assigns both exams equal probative value. The PEB and VA chose different coding options for the condition, but this did not bear on rating. The PEB assigned 10% coded 5237 (Lumbosacral or cervical strain) based on the ROM limited by pain with application of the pain policy which is inconsistent with VASRD §4.71a general rating formula for diseases and injuries of the spine. The Board agreed the forward flexion documented at the time of the MEB exam meets the 20% criteria. The VA assigned 10% coded 5242 (degenerative arthritis of the spine) based on limited forward flexion and degenerative changes on X-ray and both are consistent IAW the VASRD §4.71a and more clinically appropriate. While the C&P exam documented the CI self reported 14 days of incapacitating episodes and daily flare-ups, there were no treatment records to corroborate this report. Further the evidence reflects the CI is fully employed as a car salesman, and had not lost any time to work due to pain. In addition, the VA did not consider either the flare-ups or incapacitations for additional or higher rating. For the above stated conclusions the Board agreed therefore there was no evidence of documentation of incapacitating episodes or flare-ups which would provide for additional or higher rating. There is no evidence of ratable peripheral nerve impairment in this case. The Board agreed likely there is an improvement of the forward flexion of the back after separation likely due to the decreased demands of his back; however his condition at the time of separation clearly meets the 20% criteria. 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 low back 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. As discussed above, PEB reliance on the USAPDA pain policy for rating low back condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the low back condition, the Board unanimously recommends a disability rating of 20%, coded 5237 IAW VASRD §4.71a. 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** |
| Lumbosacral strain | 5237 | 20% |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120206, 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 XXXXXXXXXXXXXXXXXXXXXXXX, AR20120015229 (PD201200161)

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 XXXXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA