RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1200172 SEPARATION DATE: 20030825

BOARD DATE: 20120925

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (91W10/Medic), medically separated for low back condition with a history of a war wound. The CI sustained shrapnel wounds to his right hand and left hip/buttock region and a gunshot wound (GSW) to his left foot, in March 2002, in Iraq during Operation Anaconda. He received inpatient care over the next 16 days, with operative care of his right hand and debridement and wound care of his left foot and left hip. After discharge and convalescent leave he began an extensive rehabilitation program for all of his war wounds. He did not respond adequately to conservative treatment for his residual back pain and was unable to perform within his Military Occupational Specialty (MOS), meet worldwide deployment standards or meet physical fitness standards. He was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Shrapnel wound to the left hip, shrapnel wound to right hand, gunshot wound to left foot, and chronic lower back pain were bundled together and forwarded to the Physical Evaluation Board (PEB) as a single medically unacceptable condition IAW AR 40-501. The PEB adjudicated the chronic low back pain condition as unfitting, rated 10%, with application of the US Army Physical Disability Agency (USAPDA) pain policy. The PEB was silent regarding the remaining MEB conditions. The CI made no appeals and was medically separated with a 10% disability rating.

CI CONTENTION: “10% seemed very unfair for the amount of injuries I had suffered and the physical ailments I was and am going through, I was blown up by an 82mm mortar round and shot through the foot and as a result it equals 10%, I do not feel the disability board took my conditions into real consideration. For example my PTSD and its severity it dominates the most part of my life, I am by no means the person l once was and I feel that at that time their (sic) was very little to no information regarding the impact PTSD has on soldiers. Being that at the time I was one of the the first soldiers to be medically discharged from the newest conflict I feel their (sic) was not the sufficient amount of data to make a good determination on my medical discharge. My chronic back pain I have, the ringing in my ears, the issues with my right hand and wrist the corneal scaring in my eyes from the shrapnel, joint pain, my flat feet that cause me pain. The lack of consideration for TBI.”

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. Shrapnel wound to right hand, left hip and gunshot wound (GSW) to left foot 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 conditions. Posttraumatic stress disorder (PTSD), traumatic brain injury (TBI), corneal scarring, ringing in the ears and flat feet 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 IPEB – Dated 20030610** | | | **VA (1 Mos. Pre -Separation) – All Effective Date 20030826** | | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | | **Rating** | **Exam** |
| Chronic Back Pain | 5299-5295 | 10% | Low back condition associated w/ S/P shrapnel wound, lt buttock | 5237 | | 10%\* | Post-Sep VA records |
| Shrapnel Wound Lt Hip | Noted on MEB only | | Shrapnel Wound Lt Buttock | 5317 | | 20% | STR |
| Scar Lt Hip S/P Shrapnel Wound | 7801 | | 10% | STR |
| Shrapnel Wound Rt Hand | Noted on MEB only | | Numbness & Decreased Sensation Rt 4th & 5th Fingers & Decreased ROM Rt Wrist, S/P Shrapnel Injury | 5299-8516 | | 10% | STR |
| GSW Lt Foot | Noted on MEB only | | Fracture 5th Metatarsal, S/P Through & Through Bullet Wound Foot | 5283-5310 | | 10% | STR |
| ↓No Additional MEB/PEB Entries↓ | | | PTSD | 9411 | 30% | | 20030801 |
| Bilateral Tinnitus | 6260 | | 10% | 20030731 |
| Right knee condition w/ persistent pain & swelling | 5299-5257 | | 10%\* | Post-Sep VA records |
| Shrapnel injury to rt eye, corneal scarring w/ blurred vision, sensitivity to light, keratoconus | 6009 | | 10%\* | 20040113 |
| 0% X 2 / Not Service-Connected x 4 | | | | Various |
| **Combined: 10%** | | | **Combined: 80%\*** | | | | |

\*Original VARD dated 20030819 did not include the back, knee or eye conditions. The combined rating was 60%. VARD dated 20050318 added these based on STR and post-separation VA treatment records retroactively effective to 20030826. Combined rating increased to 80%.

ANALYSIS SUMMARY: The Board acknowledges the CI's contention suggesting that his 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 VA). 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 Department of Veterans’ Affairs (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 his degree of impairment vary over time.

Low Back Condition. In May 2002 the CI began having low back pain that he related as secondary to his lower extremities being uneven due to wearing a Cam walker on his left foot. The medical provider documented that orthopedics and physical therapy (PT) had been able to return good function of the CI’s hip and back region, but back pain prompted the CI to keep returning for follow up visits, specifically in August and October 2002, and again in January and February 2003. Service treatment records (STRs) documenting these visits were not in evidence nor were any other STRs after August 2002. The CI’s physical profile listed chronic low back pain, s/p shrapnel wound to the hip: physical limitations included no running, jumping, or ruck marching, although he was able to do unlimited walking, bicycling, and swimming. He could also wear a helmet, and could carry and fire a rifle but was limited to lifting no more than 45 pounds. For the APFT, he was able to do push-ups, walk, swim, or bike, but he was unable to run, crawl, climb, carry casualties or perform unit physical training. The examiner opined the CI had received extensive rehabilitation and treatment for his war wounds and chronic back pain with only moderate improvement in function.

The MEB exam documented low back flexion of 65 degrees, extension of 20 degrees and was negative for spasms, straight leg raise (SLR) and FABERS testing. Waddell's testing was negative for tenderness, distraction, rotation, overreaction, and sensation. The left hip demonstrated a 10 inch scar and full abduction and adduction range-of-motions (ROMs). There was no VA Compensation and Pension (C&P) exam.

The Board directs attention to its rating recommendation based on the above evidence. The 2003 VASRD coding and rating standards for the spine, which were in effect at the time of separation, were changed to the current §4.71a rating standards in 2004. For the reader’s convenience, the 2003 rating codes under discussion in this case are excerpted below. The two potentially applicable codes from the 2003 VASRD are:

**5292** Spine, limitation of motion of, lumbar:

Severe ………………………………………………………..……….………….... 40

Moderate …………………………………….……………….…….…………...…. 20

Slight ………………………………………………………..……………….…..….10

**5295** Lumbosacral strain:

Severe; with listing of whole' spine to opposite side, positive

Goldthwaite's sign, marked limitation of forward bending in

standing position, loss of lateral motion with osteo-arthritic

changes, or narrowing or irregularity of joint space, or some

of the above with abnormal mobility on forced motion ……………….......... 40

With muscle spasm on extreme forward bending, loss of lateral spine

motion, unilateral, in standing' position ...……………...……..………….….. 20

With characteristic pain on motion ………………………………..……....………. 10

With slight subjective symptoms only …………..…………...………………....….. 0

The PEB assigned a 10% rating coded 5295 (Lumbosacral strain) for characteristic pain on motion which was consistent with the VASRD general rating formula for diseases and injuries of the spine. The Board considered the PEB’s rating under the 5295 code of the 2003 VASRD. The 20% rating for 5295 required “muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral, in standing position.” The CI’s condition clearly did not meet that threshold even at the post-separation VA examination. The VA assigned a 10% rating coded 5237 (Lumbosacral or cervical strain) for painful motion. The Board considered the VASRD 5292 code for limitation of spine motion and agreed the forward flexion demonstrated in the MEB exam was sufficient justification for the 10% rating. There were no findings of abnormal gait or contour, or evidence of incapacitating episodes, which would support a higher rating. There is no evidence of ratable peripheral nerve impairment which would provide for additional or higher rating. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 10% for the low back condition.

Contended PEB Conditions. The contended conditions of shrapnel wound to right hand, shrapnel wound to left hip and GSW to left foot were bundled by the MEB and forwarded to the PEB as a single condition with the low back pain. Although the PEB did not specifically adjudicate these conditions separately, they were included in the MEB evidence before the PEB. The Board therefore concluded this was a *de facto* determination that the PEB considered the contended conditions to be not unfitting conditions. In this regard, the Board’s threshold for countering DES 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 shrapnel wound to right hand and left hip and the GSW to left foot were all implicated in the commander’s statement. All conditions were judged to fail retention standards but the right hand and left foot conditions were not profiled. While the left hip was not separately profiled it was mentioned with the back condition on the profile. The MEB examiner also noted that the occupational therapist was able to return normal function of the right hand, that orthopedics documented normal function of the left hip, and that podiatry documented a good return of function to the left foot. All of these conditions 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 *de facto* fitness determination for any of the contended conditions and therefore no additional disability ratings are 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 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 and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended shrapnel wound right hand and left hip and GSW to left foot conditions, the Board unanimously recommends no change from the PEB *de facto* determinations that they were 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:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Back Pain | 5299-5295 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100216, 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 XXXXXXXXXXXXXXXXXXXX, AR20120019093 (PD201200172)

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 XXXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA