RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1200242 SEPARATION DATE: 20011227

BOARD DATE: 20120810

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSG/E-6 (12B/Combat Engineer), medically separated for chronic low back pain (LBP). The CI’s LBP began in July 1994. He had numerous exacerbations of pain and in spite of utilizing multiple medications, radiographic evaluations and several courses of physical therapy, his back pain persisted. The CI’s LBP could not be adequately rehabilitated and 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). The MEB forwarded the LBP as the only condition for Physical Evaluation Board (PEB) adjudication. The PEB adjudicated the chronic LBP condition as unfitting, rated 10% with specified application of the Department of Defense Instruction (DoDI) 1332.39 and AR 635-40. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “I feel that, at the time of my medical evaluation board, the Army had not done all possible screening to evaluate my lower back injury properly. Since my separation from the army I have had EMG testing, diskogram, myelogram, MRI's, x-rays and multiple epidural steroid injections. Had the Army done these types of testing before my medical evaluation board I feel I would have been granted a disability rating of 70% or more. Since my separation my lower back injury condition has gotten much worse to the point that I am extremely limited in my physical activities. While on active duty, before my lower back condition worsened, I used to score over 300 points when the extended scale was in use for recording physical training test scores and now I hurt when I walk, sit, and stand. My sleep is greatly affected as there is not a single night that I wake numerous times from pain in my back and therefore I am exhausted throughout the day. My testosterone level has been low for some time now due to the pain medications I take for pain management. It is because of these significant health changes and medical findings that I am requesting an evaluation for the consideration of medical retirement.”

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 LBP condition requested for consideration meets the criteria prescribed in DoDI 6040.44 for Board purview, and is accordingly addressed below. 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 20010906** | **VA (2 Mos. Pre -Separation) – All Effective Date 20011228** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5299-5295 | 10% | Chronic Low Back Pain w/ Degenerative Disc Disease L3-S1 | 5293 | 60%\* | 20011012 |
| ↓No Additional MEB/PEB Entries↓ | Depression | 9434 | 50% | 20011105 |
| Residuals R. ACL Reconstruction | 5299-5261 | 10%\* | 20011012 |
| 0% X 1/ Not Service-Connected x 0 |  |
| **Combined: 10%** | **Combined: 80%** |

\* Initial back, 5293 rating of 20% was retroactively changed to 60% (with IU) by Decision Review Officer on 20070613 VARD as a clear and unmistakable error; R. knee increased to 20% effective 20040528.

ANALYSIS SUMMARY: The Board acknowledges the CI’s assertions that the Army did not fully evaluate his lower back injury; but, must note for the record that it has neither the jurisdiction nor authority to scrutinize or render opinions in reference to such allegations regarding suspected service-improprieties in the evaluation of his condition. The Board’s role is confined to the review of medical records and all evidence at hand to assess the fairness of rating and fitness determinations at separation, as elaborated below. The Board further acknowledges the sentiment expressed in the CI’s application regarding the gravity of his condition and the significant impairment with which his service-connected condition continues to burden him. It is a fact; however, that the Disability Evaluation System (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. This role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA). The DVA, operating under a different set of laws (Title 38, United States Code), is empowered to compensate 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 6044.40; 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.

Chronic Low Back Pain Condition. The 2001 Veterans’ Administration Schedule for Rating Disabilities (VASRD) coding and rating standards for the spine, which were in effect at the time of separation, were changed in September 2002 regarding criteria for code 5293 (intervertebral disc syndrome), and then to the current §4.71a rating standards in 2004. The 2001 standards for code 5293 included radicular pain rather than incapacitating episodes. The older spine rating were based on range-of-motion (ROM) impairment were subject to the rater’s opinion regarding degree of severity, whereas the current standards specify rating thresholds in degrees of ROM impairment. The older spine ratings also did not have the general spine rating formula provision of including pain (whether or not it radiates). For the reader’s convenience, the 2001 rating codes under discussion in this case are excerpted below.

 5292 Spine, limitation of motion of, lumbar:

Severe .................................................................... 40

Moderate .............................................................. 20

Slight ..................................................................... 10

 5293 Intervertebral disc syndrome:

Pronounced; with persistent symptoms compatible with sciatic neuropathy with characteristic

pain and demonstrable muscle spasm, absent ankle jerk, or other neurological findings appropriate

to site of diseased disc, little intermittent relief ............. 60

Severe; recurring attacks, with intermittent relief.......... 40

Moderate; recurring attacks ........................................... 20

Mild ............................................................................... 10

Postoperative, cured ...................................................... 0

 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

There were two rating spine evaluations in evidence, with documentation of ROMs and additional ratable criteria, which the Board weighed in arriving at its rating recommendation; as summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM | MEB ~4 Mo. Pre-Sep | VA C&P ~2 Mo. Pre-Sep |
| Flexion (90⁰ Normal) | 30⁰ | 40⁰ |
| Ext (0-30) | 5⁰ | 30⁰ |
| R Lat Flex (0-30) | Not documented | 30⁰ |
| L Lat Flex 0-30) | 30⁰ |
| R Rotation (0-30) | Not documented |
| L Rotation (0-30) |
| Combined (240⁰) |
| Comment | Painful motion; tender; - SLR; motor and sensory normal; see text | Painful motion; tenderness; + SLR on right; motor normal; see text |
| §4.71a Rating\* | 40% (PEB 10%) | 20%-60% (VA 60%)  |
| Current VARD | 40% | 20% |

 \* § 4.71a VASRD 1 July 2001 edition was in effect at time of separation

The narrative summary (NARSUM), performed 4 months prior to separation, noted the initial onset of LBP occurred when the CI lifted a tent from the rear area of a truck. He continued to have LBP with radiation of pain into his left thigh, and knee area intermittently. He had no bowel or bladder dysfunction. Magnetic resonance imaging (MRI) demonstrated disk protrusion at L5-S1 and multilevel degenerative disk disease (DDD) changes with impingement of the right S1 nerve root. He had eight epidural steroid injections in three separate areas and related that physical therapy modalities worsened his pain. Physical examination revealed tenderness in the left lower lumbar region, adjacent to the SI joint. Sensation was intact distally to light touch in all sensory dermatome patterns. Motor examination revealed normal motor strength in all muscle groups bilaterally. Normal heel and toe walking. ROM was stated as “forward flexion was limited to 30 degrees, with his hands reaching just below the knees bilaterally. Extension was limited to 5 degrees before experiencing significant pain.” The examiner stated “there is little if any time that his back pain doesn’t bother him. He also takes Percocet and Celebrex on an intermittent basis, and uses Valium and Vicodin for the rare exacerbations which disable his back.” Percocet was noted as being used three times per week.

At the VA Compensation and Pension (C&P) exam, performed 2 months prior to separation, the CI reported “constant and daily lumbar back pain which waxes and wanes throughout the day dependent upon his level of physical activity. He notes a left lower extremity radiculopathy, which extends to the foot. Currently uses Valium, Percocet and other codeine related drugs to assist with pain control. He required no supports.” Spine exam is summarized above and the service MRI was read as revealing congenital lower lumbar spinal stenosis and disc extrusions of the lower three lumbar levels. VA initially rated this exam at 20% with retroactive correction of a clear and unmistakable error to a 60% rating. Remote VA records indicate continued left leg radicular complaints with a back injury in 2005 exacerbating the CIs symptoms.

The Board directs attention to its rating recommendation based on the above evidence. The PEB specified application of the DoDI criteria and coded analogous to 5295, lumbosacral strain at 10%. The VA coding was under 5293, intervertebral disc syndrome. The MRI indicated multi-level abnormalities and disc extrusions, although the right S1 nerve impingement did not align with the left leg radiculopathy. The 5293 code criteria in effect at the time have no equivalent under current VASRD guidance. Imaging and symptoms support coding under intervertebral disc syndrome. The MEB exam documented ROM limitation of 30⁰ forward flexion may be considered a severe limitation of ROM (40%), however, the VA exam prior to separation, indicated some improved ROM closer to the moderate (20%) level under code 5292 limitation of motion. The Board discussed rating under code 5293 and noted there was no objective neurologic finding (no motor or sensory deficit), but a consistent history of near constant radiating pain. The Board deliberated on which exam had the highest probative value and if the CI’s radicular symptom picture was closer to the 60%, 40% or 20% criteria. The Board considered that the ROM limitations and radicular pain symptoms combined did not reach the 60% disability level. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt) and §4.7 (higher of two evaluations), the Board recommends a disability rating of 40% coded 5292-5293 for the chronic LBP 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. As discussed above, PEB reliance on DODI 1332.39 and AR 635-40 for rating the chronic LBP condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the chronic LBP condition, the Board unanimously recommends a disability rating of 40%, coded 5292-5293 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:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Low Back Pain | 5292-5293 | 40% |
| **COMBINED** | **40%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120302, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 XXXXXXXXXXXXXXXXX

 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 22203

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for XXXXXXXXXXXXXXXXXXXXXXXXXX, AR20120015468 (PD201200242)

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 40% 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 40% 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 XXXXXXXXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA