RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1200291 SEPARATION DATE: 20041215

BOARD DATE: 20121025

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a mobilized National Guard SSG/E-6 (31C/Radio Operator-Maintainer), medically separated for a low back condition. He did not respond adequately to operative and post rehabilitative treatment 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). Ongoing back pain status post (s/p) lumbar surgery was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions appeared on the MEB’s submission. The PEB adjudicated the low back condition as unfitting, rated 10% with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “Based on my disability I was not able to continue in service of my country. I have over 20 years of service, 14 active duty and approximately 8 years of National Guard service. Because of the injury I was not able to retire because of the 20% rating, Medically or otherwise”. The VA also found Radiculopathy of the left lower extremity and degenerative disc disease. My lower back has been in constant pain, sometimes worse than most days. The 20% rating was not fair and it appeared the Ft. Bliss medical hold unit just wanted to get the service members out of the facility because they had very little room left and more soldiers coming in, it was not a pleasant experience at all.

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. 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:

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| --- | --- |
| **Service PEB – Dated 20041026** | **VA (5 Mos. Post-Separation) – All Effective Date 19980529** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5243 | 10% | Status/Post Laminectomy with Low Back Strain and Degenerative Disc Disease | 5243 | 20% | 20050525 |
| Radiculopathy, Left Lower Extremity, Associated w/S/P Laminectomy w/Low Back Strain and DDD | 8520 | 10% | 20050525 |
| ↓No Additional MEB/PEB Entries↓ | Tinnitus | 6260 | 10%\* | 20050525 |
| 0% X 5 / Not Service-Connected x 1 |  |
| **Combined: 10%** | **Combined: 40%\*\*** |

\*Tinnitus rating effective 19990610. \*\*Combined rating effective 20041216

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred 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 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 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.

Chronic Low Back Pain Condition. The CI sought care for worsening back pain in 2003 due to duty requirements while mobilized. He was treated conservatively and magnetic resonance imaging (MRI) was completed due to radiating pain down his left leg and ongoing numbness of his lateral lower leg and foot. The MRI revealed diffuse disc disease and referrals were made to both interventional pain clinic as well as neurosurgery. He received several different injections without success and then opted for an operative lumbar laminectomy which was performed on 19 December 2003. Postoperatively he was doing reasonably well but still had ongoing pain after 15 to 20 minutes of standing and reoccurrence of the numbness of his left lower lateral leg as well as lateral foot. The profile limitations included no running, sit-ups and no functional activities except to wear his chemical gear. The profile was not specific with regards to a lifting limitation. 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 | PT ~2 Mo. Pre-Sep | VA C&P ~5 Mo. Post |
| Flexion (90⁰ Normal) | 75⁰ | 90⁰ Deluca 80⁰ |
| Ext (0-30) | 20⁰ | 20⁰ Deluca 15⁰ |
| R Lat Flex (0-30) | 20⁰ | 30⁰ |
| L Lat Flex 0-30) | 10⁰ | 30⁰ |
| R Rotation (0-30) | 30⁰ | 30⁰ |
| L Rotation (0-30) | 30⁰ | 30⁰ |
| Combined (240⁰) | 185⁰ | 230⁰ |
| Comment | Significant asymmetrical motion with pain to 55 degrees then pain free to 75 degrees, difficulty rising from a chair | Painful motion |
| §4.71a Rating | 10% | 10%\* |

\*Conceding §4.59 painful motion

At the MEB exam, the CI reported low back pain with numbness of the left calf, worse in the morning and at night; a 3-4 of 10 on a pain scale and the anti-inflammatory medication, Naprosyn helped very little. The MEB physical exam demonstrated a 6 cm vertical scar of the lower back, tenderness around the scar, decreased ROM with extension and lateral bending and decrease pain stimulus in the left lateral side of the calf with paresthesias of the lower leg. The neurosurgeon exam completed for the MEB exam additionally demonstrated a radiculopathy signs; a positive straight leg raise test on the left, decreased patellar and Achilles reflexes on the left side compared to the right, an abnormal sensory exam just distal to the knee on the left lateral leg extending about three quarters of the way down, rather diffusely of the foot including the lateral surface and the sole, normal muscular findings and able to do 10 toe raises in a row with some fatigue on the left side in between the 5th and 10th toe raise. The neurosurgeon examiner diagnosed ongoing lumbar radiculopathy, s/p L4-5 lumbar laminectomy and opined he had probably achieved his maximal improvement. At the VA Compensation and Pension (C&P) exam, the CI reported atraumatic back pain that started in 1989 with flares up to his 2003 mobilization whereupon it worsened with his military activities. He reported a mild constant ache, non-radiating, along the lower back with stiffness with episodes of flare-ups twice a week that were intermittent, sharp, and moderate to severe in intensity and responded to Tylenol. He worked as a police officer since 1996 in a supervisory position and denied any period of incapacitation from work for the past 12 months. The C&P exam demonstrated no new additional findings from the MEB exam. X-rays revealed surgical absence of the posterior elements of L4 and L5, preserved vertebral body height and narrowing of L4-5 and L5-S1 intervertebral disc spaces.

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 the same coding options for the condition, however the PEB assigned a rating under the general rating formula for diseases and injuries of the spine and the VA continued the previous 20% rating which was assigned using old VASRD spine criteria. The PEB assigned a 10% rating for limited flexion which was consistent with §4.71a. The PEB further noted there were no objective signs of radiculopathy. The VA continued the 20% rating for painful motion and for the degree of limitation during flare-ups which supported the 20% criteria and also citing the VA examiner opined a 30% limitation of motion during flare-ups. The Board agreed there was no documentation of incapacitating episodes which would provide for higher rating under the formula for rating intervertebral disc syndrome based on incapacitating episodes. The VA additionally rated a sensory radiculopathy for the objective loss of light touch on the left extremity in the L5 distribution with no evidence of motor deficits. The Board considered whether additional ratings could be recommended under a peripheral nerve code for the residual radiculopathy at separation. Board precedent is that a functional impairment tied to fitness is required to support a recommendation for addition of a peripheral nerve rating at separation. The pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a. The sensory component in this case has no functional implications; and no motor weakness was in evidence. Since no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment. 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 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. In the matter of the low back condition, the Board unanimously recommends a disability rating of 10%, coded 5243 IAW VASRD §4.71a. 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:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Low Back Pain | 5243 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120219, 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 XXXXXXXXXXXXXXXXXXXXXXXX, AR20120020026 (PD201200291)

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 XXXXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA