RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1200540 SEPARATION DATE: 20030403

BOARD DATE: 20121031

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (11B1O, Infantry), medically separated for chronic low back pain (LBP) and obstructive sleep apnea (OSA). The back pain condition began in 2002, was not a consequence of trauma and was not associated with a surgical indication. Sleep apnea was diagnosed in August 2002, and did not respond to surgical intervention and required continuous positive airway pressure (CPAP) therapy. Neither condition improved adequately with treatment to meet the physical requirements of his Military Occupational Specialty or satisfy physical fitness standards. He was issued a permanent P3/L3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded pain at lumbar regions secondary to herniated nucleus pulposus and OSA to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. The MEB forwarded no other conditions for PEB adjudication. The PEB adjudicated the chronic LBP with L4-5 herniated pulposus and OSA conditions as unfitting, rated 10% and 0% respectfully, with application of the Department of Defense Instruction (DoDI) 1332.39. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “Arthritis in lower back; flat feet; DJD arthritis thoracolumbar spine; left knee; DJD acromioclavicular joint.”

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 unfitting lower back arthritis (DJD arthritis thoracolumbar spine) and OSA conditions meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. The flat feet, left knee, and DJD acromioclavicular joint are not within the Board’s purview. Any condition 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 20030312** | | | **VA – All Effective Date 20030404** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic LBP | 5293-5299-5295 | 10% | Chronic Low Back Pain | 5293-5295 | 10%\* | STR |
| OSA | 6847 | 0% | Sleep Apnea | 6847 | 50% | STR |
| No Additional MEB/PEB Entries | | | Right Shoulder DJD | 5010-5203 | 10% | STR |
| 0% x 1 / Not Service-Connected x 17 | | | STR |
| **Combined: 10%** | | | **Combined: 60%** | | | |

\*After first active duty tour, VA rated 0% effective 19880309; 20040921 VA decision changed code to 5242; 20050408 decision increased to 20% effective 20040426 based on later exams; 20090914 decision increased to 40% effective 20040426; 20110322 decision reduced to 10% effective 20111201

ANALYSIS: The Board notes the VA’s ratings and all service-connected conditions, but must emphasize that its recommendations are premised on severity at the time of separation. The VA ratings which it considers in that regard are those rendered most proximate to separation. 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. That role and authority is granted by Congress to the Department of Veterans’ Affairs.

Chronic Low Back Pain Condition. The 2003 Veteran Administration Schedule for Rating Disabilities (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, and were identical to the 2003 VASRD standards used by the VA in its initial rating decision. The pre-2004 ratings were based on a judgment as to whether the disability was mild, moderate or severe. The 2004-to-current standards are grounded in range-of-motion (ROM) measurements. IAW DoDI 6040.44, this Board must consider the appropriate rating for the CI’s back condition at separation based on the VASRD standards in effect at the time of separation (i.e. pre-2004 standards). The CI’s low back pain condition began during his first active duty tour. The VA subsequently assigned a 0% rating for degenerative changes of the lumbosacral spine, effective 9 March 1988. At the MEB exam performed on 3 February 2003 (2 months prior to separation), the CI reported pain localized to the lumbar region with periodic pain radiating to the right foot. Back pain severity sometimes required narcotic medication. His profile restricted him from running, jumping, road marching, performing sit-ups or flutter kicks, and heavy lifting. Examination revealed a normal heel-toe gait, no spinous process tenderness and a negative straight leg raise (SLR) test. Muscle strength and deep tendon reflexes (DTR) were normal. ROM measurements were 170 degrees (normal to 90 degrees based on current standards), lateral flexion 45 degrees bilaterally (normal 30 degrees) and rotation 45-65 degrees bilaterally (normal 30 degrees). The extension was not specified. Painful motion was present. Magnetic resonance imaging (MRI) showed small multi-level disc protrusions with a moderate herniated disc at the L4 to L5 vertebral level causing mild left neuro-foraminal narrowing. Mild degenerative changes were present. Bone scan was normal. At a VA Compensation and Pension (C&P) exam performed on 21 July 2004, the CI reported pain severity of 8 on a 0-10 scale. He further stated that his condition prevented employment and sometimes required bed rest at his discretion, but not due to a physician recommendation. Examination revealed a normal posture and gait without muscle spasm or tenderness. No evidence of radiculopathy was present, and motor and sensory findings were normal. ROM was limited by pain; measurements were normal except for mild limitation in extension (20 degrees instead of normal 30 degrees) and left lateral flexion (20 degrees instead of normal 30 degrees).

The Board directs attention to its rating recommendation based on the above evidence. The Board must correlate the above clinical data with the 2003 rating schedule which, for convenience, is excerpted below:

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

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

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

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

**5293** Intervertebral disc syndrome: Evaluate intervertebral disc syndrome (preoperatively or

postoperatively) either on the total duration of incapacitating episodes over the past 12 months or by

combining under Sec. 4.25 separate evaluations of its chronic orthopedic and neurologic manifestations

along with evaluations for all other disabilities, whichever method results in the higher evaluation.

With incapacitating episodes having a total duration of at

least six weeks during the past 12 months...............................................................60

With incapacitating episodes having a total duration of at

least four weeks but less than six weeks during the past 12

months......................................................................................................................40

With incapacitating episodes having a total duration of at

least two weeks but less than four weeks during the past 12

months......................................................................................................................20

With incapacitating episodes having a total duration of at

least one week but less than two weeks during the past 12

months......................................................................................................................10

Note (1): For purposes of evaluations under 5293, an

incapacitating episode is a period of acute signs and

symptoms due to intervertebral disc syndrome that requires

bed rest prescribed by a physician and treatment by a

physician. ``Chronic orthopedic and neurologic

manifestations'' means orthopedic and neurologic signs and

symptoms resulting from intervertebral disc syndrome that are

present constantly, or nearly so.

**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 and VA both assigned a 10% rating under the 5295 code (analogously by the PEB), and the 5293 code (intervertebral disc syndrome). The VA in a later rating decision modified the code to reflect newer VASRD coding options, but the rating was unaffected. A 10% rating is justified if the condition is reflected by “slight” limitation of lumbar motion under 5292 or “characteristic pain on motion” under 5295. The Board debated if a higher rating was justified using the older VASRD rules in effect at the time. Board members agreed that elements of the 20% rating were not present on any of the cited examinations and further noted that there was no evidence of “incapacitating episodes” that would justify a minimal rating under the 5293 code. The Board also considered if additional disability rating was justified for peripheral nerve impairment. Although intermittent episodes of radiating pain were reported, and an MRI showed mild L4-L5 neuro-foraminal narrowing, there was no evidence on multiple exams of functional impairment due to neuropathy. The Board therefore concludes that additional disability rating was not justified on this basis. 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 chronic low back pain condition.

Obstructive Sleep Apnea Condition. The OSA condition was well documented in the service treatment record (STR). After attempted surgical correction performed on 18 October 2002, a sleep study confirmed the persistence of moderate to severe sleep apnea, and he required continued treatment with titrated CPAP. The CI was placed on a permanent profile that required him to use a CPAP machine and to obtain 6-8 hours of sleep per night. The PEB’s DA Form 199 assigned a 0% rating under DODI 1332.39 (E2.A1.2.21). Contemporary PEBs across all of the services no longer consider sleep apnea syndromes to be unfitting on the basis of impediments to the use of CPAP in the field; but, the Board, by legal opinion and firm precedent, does not make contrary recommendations to a PEB determination that a condition was unfitting. VASRD §4.100 mandates a minimum rating of 50% under 6847 for sleep apnea syndromes requiring a breathing assistance device. In consideration of the unequivocal evidence, and IAW DoDI 6040.44, the Board must recommend a separation rating of 50% for the OSA 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 for rating chronic low back pain and obstructive sleep apnea was operant in this case and the conditions were adjudicated independently of that instruction by the Board. In the matter of the chronic low back pain condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the OSA condition, the Board unanimously recommends a disability rating of 50%, coded 6847 IAW VASRD §4.100. 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; and, that the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective as of the date of his prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Low Back Pain, with L4-5 Herniated Pulposus | 5293-5299-5295 | 10% |
| Obstructive Sleep Apnea | 6847 | 50% |
| **COMBINED** | **60%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120605, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

XXXXXXXXXXXXXXXXXXXXX

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 XXXXXXXXXXXXXXXXXX, AR20120020017 (PD201200540)

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 60% 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 60% 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 XXXXXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA