RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: ARMY

CASE NUMBER: PD0900037 BOARD DATE: 20100506

SEPARATION DATE: 20070219

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SUMMARY OF CASE: This covered individual (CI) was a reserve SFC, Health Care Specialist, medically separated from the Army in 2007 after 20 years of combined service. The medical bases for the separation were a left lower extremity (LLE) radiculopathy and associated lumbar spine (disc) condition. In 2004 he was mobilized in support of medical evacuation operations at Landstuhl, and experienced the onset of low back pain associated with a stretcher lifting mishap. A Magnetic Resonance Imaging (MRI) demonstrated three-level disc disease at L3 - S1 with left S1 nerve encroachment. He was returned to CONUS and was treated conservatively. The condition was complicated by an LLE L5/S1 radiculopathy. This was confirmed by EMG (nerve conduction study) and associated with motor deficit. Surgical intervention was not advised at the time, although he underwent diskectomy soon after separation. A continued trial of medications, physical therapy (PT) and epidural injections was not met with significant improvement. He was unable to perform within his military occupational specialty (MOS) or participate in the Army Physical Fitness Test (APFT), was issued a permanent L-3 profile and underwent a Medical Evaluation Board (MEB). The LLE radiculopathy and lumbar spine conditions were forwarded to the Physical Evaluation Board (PEB) as separate conditions noted to be below AR 40-501 retention standards. Additional conditions established by the MEB were a bladder condition felt to be related to benign prostatic hypertrophy (BPH) and the four others listed on the rating chart below. These were all forwarded to the PEB as medically acceptable IAW AR 40-501. The CI developed a depressive disorder late in the MEB process. This was opined to be a consequence, to a significant extent, of his back condition. The psychiatric condition was not included on the MEB’s DA Form 3947, although a subsequent psychiatric addendum was added to the narrative summary (NARSUM). It was addressed in PEB and US Army Physical Disability Agency (USAPDA) appeals and was not added to the separation rating as an additionally unfitting condition. Additional conditions supported in the Disability Evaluation System (DES) packet are discussed below, but were not forwarded for PEB adjudication on the DA Form 3947. An informal PEB adjudicated the LLE radiculopathy and back conditions as unfitting, rated 10% and 0% respectively. The remaining conditions were adjudicated as not unfitting. A formal PEB rendered the same decision, except for raising the radiculopathy rating from 10% (mild) to 20% (moderate). This was upheld by formal appeals to the PEB and the USAPDA. The CI was thus medically separated with a combined disability rating of 20%.

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CI CONTENTION: The CI states: ‘Documentation supplied for rating for Intervertebral Disc Syndrome based on incapacitating Episodes Code 5243 should be added (see petition). VA rated for Major Depressive Disorder with pain disorder with both psychological factors and a general medical condition should be added. VA rated for bladder dysfunction secondary to sacral nerve damage and prostatic hyperplasia should be added.’ He attaches documentation for contended rating under incapacitating episodes. He does not specifically contend for service ratings for any conditions other than those noted.

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RATING COMPARISON:

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| --- | --- |
| **Service PEB – Dated 20061227** | **VA (6 Mo. Pre-Separation) – All Effective 20070220** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Moderate LLE Weakness | 5243-8520 | 20% | LLE Radiculopathy… | 8520 | 20% | 20060802 |
| Chronic Low Back Pain | 5243 | 0% | S/P L5-S1 Microdiskectomy | 5243 | 20% | 20060802 |
| Benign Prostatic Hypertrophy | Not Unfitting | Bladder Dysfunction 2° to Sacral Nerve Damage and BPH | 7599-7527 | 20% | 20070123 |
| History Nephrolithiasis | Not Unfitting | ↓Not Rated by VA.↓ | 20060802 |
| History Airway Disease | Not Unfitting |
| Allergic Rhinitis | Not Unfitting |
| Hypercholesterolemia | Not Unfitting |
| ↓No Additional DA Form 3947 Entries.↓ | Major Depressive Disorder … with Psychological Factors and a General Medical Condition | 9434 | 50% | 20060802 |
| Lumbar Surgical Scar | 7804 | 10% | 20060802 |
| S/P R 5th Metatarsal Fracture | 5284 | 10% | 20070123 |
| Non-PEB X 2 | 20060802 |
| **TOTAL Combined: 20%** | **TOTAL Combined (*Includes Non-PEB Conditions*): 80%**   |

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ANALYSIS SUMMARY:

LLE Radiculopathy. There is no doubt that the motor weakness associated with the sciatic compromise contributed to the unfitting impairment. The NARSUM noted that it interfered with stair climbing and forced the use of a cane for prolonged walking. Both the NARSUM and the VA rating examination documented 4/5 motor weakness in an L5/S1 distribution. The VA examiner additionally noted some distal dermatomal sensory deficits and mild atrophy of the left gluteus and calf. Rating under peripheral nerve codes entails a judgment call regarding the severity of incomplete paralysis, especially the mild vs. moderate distinction. A rigid assessment could require 3/5 or worse strength testing to merit the moderate rating. More liberal rating applies any objective motor impairment or atrophy as a threshold for the moderate designation. This case is on the cusp between mild and moderate categorization. Either can be justified. Given that reasonable doubt favors the CI and that both the formal PEB and VA applied the moderate rating, the Board agrees that the PEB adjudication for the LLE radiculopathy should not be recharacterized.

Back Condition. The Board first addresses the contention that the lumbar spine condition should be rated for incapacitating episodes. Note (1) in the VASRD §4.71a formula for rating based on incapacitating episodes states, ‘For purposes of evaluations under diagnostic code 5243, 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.’ The Board affirms the PEB and USAPDA opinions that this definition was not met for a sufficient number of active duty days to establish a basis for rating under this formula. The possible exception is a 14 day SIQ (sick in quarters) chit from a Navy physician’s assistant dated in 2006. This was submitted in the application, but was not in evidence in the service treatment records (STR). Especially since this would not provide for a higher rating than can be achieved under the general spine formula, the Board cannot assign enough probative value to this piece of evidence as the sole support for rating based on incapacitating episodes. The other supporting documents submitted by the CI were all dated after separation and consisted primarily of work excuses. It is not reasonable to expect a separation rating based on ‘the past 12 months’ specified in the VASRD to be retroactively derived from a subsequent period. A ‘crystal ball’ requirement is not imposed on the service PEB’s by the Board, and the 12 month window specified in DoDI 6040.44 is appropriate for rating comparisons but not for new developments after separation. It is further noted that the VA has not provided a rating on this basis. The Board therefore cannot support a recommendation based on rating under the incapacitating episodes formula.

The Board turns its attention to a rating recommendation based on the VASRD §4.71a general spine formula. First, it is noted that a significant area of contention between the CI and the Army DES was based on distinction between ‘mechanical’ impairment to range-of-motion (ROM) versus impairment due solely to pain. This was a relevant distinction when rating was governed by the USAPDA pain policy as was the case. For purposes of the Board’s recommendation, however, this is a moot point. Rating under the VASRD with disregard to service policies eliminates the negative influence of a distinction based on mechanical limitations. There were six range-of-motion (ROM) evaluations in evidence which the Board weighed in arriving at its rating recommendation. The exams considered by the PEB and the VA rating examination were all performed six months or more before separation. The exam referenced by the NARSUM was performed by PT on 11 Jul 2006 and the one referenced by the DA Form 199 was performed by PT on 19 Jul 2006. A Navy orthopedist consulted by the MEB performed two separate examinations and a civilian orthopedist provided yet another. The latter did not provide measurements for rotation. All of the examinations did not specifically state that pain was the measured end-point or that a goniometer vs. inclinometer was used. These distinctions would not affect the rating recommendation, however. Spasm and tenderness were common findings. Antalgic gait was documented by the VA examiner and elsewhere. All six of these exams are summarized in the chart below.

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| --- | --- | --- | --- | --- | --- | --- |
| Thoracolumbar ROM | MEB Ortho 6/5/06 | PT 7/11/06 | PT 7/19/06 | VA 8/2/06 | Civ. Ortho 11/2/06 | MEB Ortho 11/20/06 |
| Flexion | 50⁰ | 30⁰ | 65⁰ | 45⁰ | 50⁰ | 50⁰ |
| Combined | 90⁰ | 155⁰  | 205⁰ | 165⁰ | <120⁰  | 90⁰ |
| §4.71a Rating | 20% | 40% | 10% | 20% | 20% | 20% |

One PT exam documented 30° flexion which is the threshold for a §4.71a rating of 40%. It would appear to be an outlier and does not carry the probative value by itself to justify a 40% recommendation from the Board. The same can be said for the PT exam referenced by the PEB which would support a 10% rating. All other examinations, including the VA exam and the two closest to separation, would provide for a 20% rating. Abnormal gait alone provides for a 20% rating. The Board therefore recommends a 20% rating for the lumbar spine condition.

Bladder Condition. The contention for additional rating for the bladder condition is premised on the link between it and the unfitting disc disease. In that regard, the MEB conclusion that it was secondary to BPH contrasted with the VA conclusion that it was secondary to sacral nerve involvement by the disc disease. There is evidence for both links and the Action Officer opines that (more likely than not) the etiologies are co-mingled. More than a cause and effect link between an unfitting condition and another condition is required for a service disability rating, however. The latter condition must be, in itself, unfitting. Regardless of etiology, it was judged by the MEB to be within AR 40-501 retention standards. It was adjudicated as not unfitting by both PEB’s and was reviewed by the USAPDA. Symptoms of urinary frequency, dribbling and change of a pad once a day were documented by the VA examiner. Even in austere conditions, this would not be expected to render a soldier unfit. The bladder condition was not profiled and was not mentioned in the Commander’s statement. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of the bladder dysfunction as an unfitting condition for separation rating.

Major Depressive Disorder. The psychiatric disorder did not reach clinical attention until a few weeks prior to the informal PEB. The CI had checked the block for depression on his MEB physical, but did not elaborate. The examiner noted it as ‘does not interfere with duty’. A MEB psychiatric evaluation was performed by a Navy psychiatrist two weeks prior to the formal PEB, but was not included as a formal adjudication on that DA Form 199. The CI related to the service psychiatrist that he did not bring the issues to light until it was clear that he was being medically separated. Both the MEB and VA psychiatrists opined that the stressors related to his medical condition and the circumstances of separation were significant contributors to his depression. The PEB’s response to the CI’s appeal conceded this. As with the preceding discussion regarding the bladder condition, it is not sufficient to just establish this link without establishing that the associated condition was separately unfitting. The USAPDA advisory opinion stated ‘the PEB found that the preponderance of the evidence did not support that this was a separately unfitting condition.’ The PEB response to appeal, however, did not make a statement to that effect. It rather stated ‘your depression is secondary to your physical impairments and as such is not separately ratable.’ It is not clear what the PEB meant by this statement, but the Board cannot accept it as an opinion relative to fitness. The Board will therefore render an independent judgment as to whether there was unfitting psychiatric impairment.

The VA rating psychiatrist did not formulate an opinion regarding occupational or social impairment. That exam did document excessive sleeping and decreased energy. The GAF (global assessment of functioning) score was 57 denoting moderate impairment. The VA rating of 50% based on this exam is not a good match with the §4.130 description of that rating. The rating decision did not elaborate the rationale. A VA psychiatric examination 10 months after separation documented full-time employment in the medical field at the same job he had held for some years as a civilian. The MEB psychiatric examination was performed two months prior to separation and, invoking SECNAV 1950.4E, stated ‘he is deemed Not Fit for Full Duty from a mental health standpoint.’ The opinion did not elaborate specific tasks or examples for military impairment. The GAF score was 60 and the occupational and social impairment was designated as ‘definite’. This single opinion on the eve of separation, of course, does not account for the total fitness picture in this case. The Board must weigh the following observations: 1) The fact that the CI had completed a 20 year military career with no evidence of mental health impairment is almost *prima fascie* evidence that he was not unfit on a psychiatric basis. He would have been unable to keep it undisclosed if it were associated with significant duty impairments. 2) The physical profile was S1 with no weapon restriction. 3) The Commander’s statement praised his performance within the limits of his physical profile. It stated that he was assisting the unit with ‘administrative duties, including answering the telephone, organizing personnel and training records and filing. Several conversations with the unit ... indicated that he performed his duties well.’ 4) The history obtained by the examiner at the time of the MEB physical resulted in an opinion that the depression was not interfering with duty. 5) Numerous STR entries throughout the MEB period for the CI’s other conditions documented cursory mental status exams and/or the psychiatric component of systems review. These were all normal. No suggestion of psychiatric impairment is evidenced in the service treatments record (STR) other than the MEB psychiatric addendum and a single statement regarding depression from the civilian orthopedist. 6) The CI was not prescribed psychotherapeutic medications at any time while on active duty. 7) The evidence shows that the CI remained fully employed as a civilian in the same position he had previously held.

The Board deliberated at length on arguments for and against recommendation of the depression as a separately unfitting condition. It was determined that there is not reasonable doubt in the CI’s favor supporting the favorable recommendation.

Other Conditions. The remaining conditions adjudicated as not unfitting by the PEB (nephrolithiasis, reactive airway disease, allergic rhinitis, and hypercholesterolemia) were either resolved or chronic and stable. They were not under active treatment during the MEB period and were not profiled or noted in the Commander’s statement. No link to fitness is in evidence for any of them and there is no reasonable basis for recommending recharacterization of any of these fitness adjudications. The Board does not have the authority under DoDI 6040.44 to render fitness or rating recommendations for any conditions not considered by the DES. The only conditions in that regard which have not been addressed are a right wrist injury and right foot fracture which were noted on the MEB physical. The wrist condition was not coded by the VA and not evidenced elsewhere in the MEB record. The foot fracture received a 10% rating from the VA. The foot condition was not profiled and was not under active treatment at the time of separation. There is no good support for an argument that it was unfitting.

The Board, therefore, has no reasonable basis for recommending any additional unfitting conditions for separation rating.

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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 the lumbar spine condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the left lower extremity radiculopathy and IAW VASRD §4.124a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the lumbar spine condition, the Board unanimously recommends a rating of 20% coded 5243 IAW VASRD §4.71a. In the matter of the bladder dysfunction condition, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation. In the matter of the Major Depressive Disorder, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation. In the matter of the nephrolithiasis, reactive airway disease, allergic rhinitis, and hypercholesterolemia conditions, the Board unanimously recommends no recharacterization of the PEB adjudication as not unfitting. In the matter of the right wrist condition, right foot condition or any other medical conditions eligible for Board consideration; the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation.

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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.

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Moderate Left Lower Extremity Weakness | 5243-8520 | 20% |
| Lumbar Disc Disease | 5243 | 20% |
| **COMBINED** | **40%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090119, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

