PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: ARMY

CASE NUMBER: PD0900110 COMPONENT: ARNG

BOARD DATE: 20090805 SEPARATION DATE: 20040424\*

\* Represents date assigned to TDRL. Adjudication contended is the final

 PEB for permanent retirement, which the CI signed on 20060830.

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SUMMARY OF CASE: This covered individual (CI) was a truck driver medically separated from the Army in 2004 after 12 years of combined service. The medical basis for the separation was cervical disk disease. His neck pain began in 2003, following a motor vehicle accident. He was treated conservatively, returned to duty and deployed to Iraq the same year. The neck condition was aggravated during deployment and he developed bilateral upper extremity radicular symptoms. He failed a trial of conservative treatment in country and was medevac’d. An MRI demonstrated congenital stenosis and multi-level disc disease. He subsequently underwent a four level (C4-7) discectomy and fusion. He did not respond adequately to surgery for continued service and went to MEB. The CI also had right knee pain, from a meniscal injury in 2002. He underwent arthroscopic repair and still deployed, although he had continued pain. Repeat surgery was discussed by orthopedics during the MEB, but the CI deferred to VA care. He was referred to the PEB, found unfit only for the neck condition and associated radiculopathy. He was placed on TDRL at 30% for 28 months, and then permanently retired at 20% disability.

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CI CONTENTION: The CI contends that his ‘medical condition is unchanged’ and cites the higher VA ratings, including the knee condition.

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RATING COMPARISON:

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| --- | --- |
| **Service (PEB)** | **VA**  |
| **PEB Condition** | **Code** | **Rating** | **Date** | **Condition** | **Code** | **Rating** | **Exam** | **Effective** |
| RIGHT C6-7 RADICULOPATHY | 8599-8510 | 20% | 20040315To TDRL | R HAND DECREASED SENSATION | 8513-8613 | 20% | 20041102 | 20040424 |
| S/P C4-7 FUSION | 5241 | 10% | 20040315 | S/P ANTERIOR CERVICAL FUSION | 5242-5241 | 20% | 20041102 | 20040424 |
| DJD R KNEE | Fit |  | 20040315 | RESIDUALS R KNEE INJURY | 5299-5257 | 10% | 20041102 | 20040424 |
| **TDRL** |  |  | **TDRL** | **TDRL** |  |  |  | TDRL |
| NECK PAIN/CERVICAL FUSION | 5241 | 20% | 20060817 | S/P ANTERIOR CERVICAL FUSION | 5242-5241 | 40% | 20050816 | 20050519 |
| (Radiculopathy dropped.) |  |  |  | R HAND DECREASED SENSATION | 8513-8613 | 20% | 20041102 | 20040424 |
|  |  |  |  | RESIDUALS R KNEE INJURY | 5299-5257 | 10% | 20041102 | 20040424 |
|  **TOTAL Combined: 30% TDRL** **20% Separation** |  **TOTAL Combined (*incl non-PEB Dxs*): 40% @ TDRL Date** **60% @ Separation Date**   |

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ANALYSIS SUMMARY:

Cervical Rating. Available range-of-motion (ROM) goniometric exams in the service and VA records are summarized in the following table:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| EXAM | DATE | STR | VA | FLEXION | TOTAL | §4.71a % | PEB/VA % |
| Initial MEB | 03/02/04 | X |  | 15 | 80 | 30% | 10%\* |
| Initial C&P | 11/02/04 |  | X | 20 | 155 | 20% | 20% |
| VA R.D. | 06/18/05 |  | X | 10 | 120 | 30% | 40%\*\* |
| End-TDRL | 04/06/06 | X |  | 10 | 70 | 30% | Not rated. |
| End-TDRL (Repeat) | 07/14/06 | X |  | 30 | 150 | 20% | 20% |

 \* Pain rule. \*\* Rated as unfavorable cervical ankylosis (Rating remains unchanged; no

 repeat exams in evidence).

The initial PEB rating was influenced by the USAPDA pain policy, but is not contended. The final decision at separation is the focus of PDBR review. Two Army exams are in evidence at the time of the end-TDRL PEB adjudication. There is a significant disparity. The first exam followed an initial PEB request for a formal goniometric exam after the periodic TDRL report. There was a follow-up PEB request for an examination of the upper extremities with an inquiry regarding cervical tenderness, but no specific request for a repeat goniometric exam. The results of the later exam were quoted in the final TDRL report to the PEB. The first exam specified ‘pain at end ranges in all ranges 6/10’. The second exam listed active and passive ROM’s without mention of pain points. Both were performed by Physical Therapy. There is no VA examination temporally proximate to the final PEB adjudication. The VA had raised the rating to 40% (the maximal allowed) 10 months prior to the final PEB adjudication. The VA measurements rated at least 30% by the general formula, but were rated as unfavorable cervical ankylosis. The VA rating decision referenced a letter from the CI’s civilian neurosurgeon, noting significant occupational incapacity. The 40% rating has carried through subsequent VA ratings, and more recent ROM exams reflect no improvement.

Radiculopathy. The initial PEB included a 20% rating for a right C6-7 radiculopathy (rated equivalently by the VA). At that time the radiculopathy was demonstrated by electromyelograph (EMG) and objective motor weakness on exam. On the final PEB adjudication for permanent retirement, the radiculopathy was not carried as an unfitting condition. Although no repeat fitness determination was formally adjudicated, it is assumed that improved motor function was the basis for not adding it to the permanent rating. A repeat EMG was normal, as was repeat motor exam, although persistent sensory deficits were noted. The VA exam 10 months earlier noted ‘slightly weakened’ grip strength on the right.

Knee. The right knee condition was forwarded by the MEB as medically unacceptable for the initial PEB adjudication. The physical limitations noted by the MEB examiner, however, were applicable only to upper body function. The profile was L1. The first PEB specifically adjudicated the knee as not unfitting. At the final TDRL exam, the knee was noted with crepitus on motion and slightly impaired flexion at 125⁰. The final PEB decision acknowledged the diagnosis, noting that it could not adjudicate conditions other than those constituting TDRL. It was carried at 10% disability by the VA under the arthritis code, dating to the initial separation.

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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 PDBR to the extent they were inconsistent with the VASRD in effect at the time of the adjudication. In that regard, PEB adherence to the USAPDA pain policy was apparent in this case and was adjudicated independently of that policy by this Board. PDBR consideration was confined to the PEB adjudication of 20060817. The fairness of the cervical rating was deliberated. In defense of the permanent 20% rating, it is consistent with the ROM findings cited to the PEB. There is an open question, however, as to whether pain-on-motion was accurately reflected in the goniometry results reported. The initial examination six weeks earlier did specify pain limitation and would have rate 30% under §4.71a. Although the concurrent VA rating of 40% was not mandated by the VASRD, the opinion of the civilian neurosurgeon was convincing that occupational disability was equivalent to unfavorable ankylosis. Even without that caveat, the cervical rating remained 30% IAW §4.71a. The conflicting service ROM exams, the question of unmeasured pain-on-motion on the second exam and the VA findings all challenge the probative value of the single exam supporting the final PEB rating. IAW §4.3 (reasonable doubt), the Board was in unanimous agreement that the appropriate recommendation is a 30% rating.

The elimination of the radiculopathy from the final rating was considered. The VA commonly carries this coding and rating for even a relatively mild sensory radiculopathy. A reasonable threshold for PEB-assigned disability, however, is that there should be some documented motor impairment (or critical sensory deficit) that interferes with performance of duty. The Board unanimously concluded that the status of the radiculopathy by the time of the second adjudication did not rise to that threshold, although a specific adjudication to that effect by the final PEB would have been preferable. Additionally considered was the fairness of eliminating the knee from PEB disability rating. The finding that the knee was not unfitting in the initial PEB adjudication can be supported from the evidence cited above. Especially since there is no evidence that the status of that condition changed during TDRL, there is no foundation for challenging the final PEB conclusion that it was not eligible for reconsideration at that time.

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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** |
| CHRONIC NECK PAIN, STATUS POST CERVICAL FUSION | 5241 | 30% |
| **COMBINED** | **30%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090203, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

