RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: ARMY

CASE NUMBER: PD0900124 BOARD DATE: 20100513

SEPARATION DATE: 20070620

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SUMMARY OF CASE: This covered individual (CI) was an active duty SGT (98G, Linguist) medically separated from the Army in 2007 after 10 years of service. The medical bases for the separation were a cervical spine condition, a lumbar spine condition and a right knee condition. The spine conditions began as neck and back pain in 1997 without a specific history of trauma or precipitating event. Her neck condition was exacerbated when she was kicked by her husband in 2004. The right knee condition began with running and marching in 1996. A Magnetic Resonance Imaging (MRI) in 2000 demonstrated chondromalacia (cartilage disease) but no meniscal or ligamental pathology. All of the conditions were managed conservatively with physical therapy and temporary profiles. MRI’s of the spine were obtained in 2005. The cervical study demonstrated central disc protrusions at C5/6 and C6/7; the lumbar study demonstrated a small disc protrusion at L5/S1. Mild degenerative changes were noted on both studies. A repeat knee MRI in 2005, demonstrated cartilage irregularities and degenerative joint changes. No ligamental or significant meniscal pathology was specifically diagnosed, although a meniscal tear could not be entirely excluded. She was not judged to be a surgical candidate for the disc conditions or the knee condition, and she did not respond adequately to continued conservative measures to fulfill the general requirements of soldiering or to participate in the Army Physical Fitness Test (APFT). She was issued a permanent U-3/L-3 profile and was evaluated by an MOS (military occupational specialty)/Medical Retention Board (MMRB), which in turn referred her for a Medical Evaluation Board (MEB). In addition to her orthopedic conditions, she acquired an HIV infection from her husband in 1997. This was associated with depression and some cognitive impairment, but her CD4 counts (measurement of viral load) were normal on an anti-viral regimen. She did not suffer any opportunistic infections and was not diagnosed with AIDS. A headache condition was also identified by the MEB. The neck, back and right knee conditions were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. The HIV infection, cognitive disorder, depression and headache conditions were designated as medically acceptable on the DA Form 3947. Additional conditions supported in the Disability Evaluation System (DES) packet are discussed below, but were not forwarded for PEB adjudication. The CI was found unfit for the three orthopedic conditions and not unfit for the four remaining conditions. On April 24, 2006 she was placed on the Temporary Disability Retired List (TDRL) with ratings of 10% each for the three unfitting conditions. She was re-evaluated in 2007 and believed to be sufficiently stable for final adjudication. Her spine conditions remained rated at 10% each, but her right knee rating was lowered to 0%. The CI was thus medically separated on June 20, 2007 with a combined disability rating of 20%.

CI CONTENTION: The CI states: ‘I started out with a 30% rating, the board lowered the rating to 20% and I was told that while I could appeal it, it wouldn’t make any difference, they rarely change their minds. By this time I had to file bankruptcy due to the length of the action, and just wanted a decision. The VA gave me a combined evaluation of 100%.’ She notes her other VA-rated conditions on the application, but does not specifically contend for service ratings for them.

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RATING COMPARISON:

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| --- | --- | --- | --- | --- | --- | --- | --- |
| **Service PEB - 20070523** | | | | **VA (4 Mo. Prior to Separation) – All Effective 20060425** | | | |
| **Condition** | **Code** | **Rating** | | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL - 20051228** | **TDRL** | **Sep.** | **No VA Rating at time of TDRL.** |
| Chronic Pain…Cervical | 5259-5237 | 10% | 10% | Degen. Arthritis…Cervical | 5242 | 30% | 20070221 |
| Low Back Pain… | 5259-5237 | 10% | 10% | Degen. Arthritis…Lumbar | 5242 | 40% | 20070221 |
| Right Knee…Arthrosis | 5099-5003 | 10% | 0% | DJD R Knee | 5010 | 10% | 20070221 |
| Immunodeficiency Virus… | | Not Unfitting | | HIV Infection | 6351 | 0% | 20070221 |
| Cognitive Disorder, Mild | | Not Unfitting | | Cognitive Disorder, NOS  and Mood Disorder | 9301-9435 | 70% | 20070227 |
| Depression, NOS | | Not Unfitting | |
| Headache | | Not Unfitting | | Migraine Headaches | 8100 | 0% | 20070221 |
| ↓No Additional DA Form 3947 Entries.↓ | | | | Fibromyalgia | 5025 | 40% | 20070221 |
| Hysterectomy Residuals | 7618 | 30% | 20070221 |
| Non-PEB X 4 / NSC X 3 | | | 20070221 |
| **TOTAL Combined: 20%** | | | | **TOTAL Combined (*Includes Non-PEB Conditions*): 100%** | | | |

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ANALYSIS SUMMARY:

Spine Conditions. The appropriate ratings for the thoracolumbar and cervical conditions are better considered in concert since their goniometric range-of-motion (ROM) measurements were performed concurrently on all of the examinations in evidence. It is incongruent for the Board to assign a higher probative value to one exam in its rating recommendation for one of the conditions and then assign a higher probative value to a different exam for the other condition. In addition to the MEB examination at the time of TDRL placement (for which no concurrent VA examination exists), there is a service TDRL examination two months prior to separation and an initial VA rating examination performed four months prior to separation. Although the TDRL and VA examinations are primarily relevant to the Board’s recommendations, all three exams are summarized in the chart below.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| Goniometric ROM | MEB to TDRL – 11/18/05 | | TDRL Evaluation – 4/23/07 | | VA –2/21/07 | |
| Cervical | Lumbar | Cervical | Lumbar | Cervical | Lumbar |
| Flexion | 35⁰ | 90⁰ | 30⁰ | 85⁰ | 10⁰ | 30⁰ |
| Combined | 325⁰ | >240⁰ | 260⁰ | 240⁰ | 115⁰ | 105⁰ |
| §4.71a Rating | 10% | 10% | 20% | 10% | 30% | 40% |

All of the examinations specified pain as the end-point. The values reflected in the TDRL exam are an average of three active ROM measurements. The values in the VA exam were specified as degree that pain occurs, although they did not differ from the baseline ROM measurements. The TDRL examiner documented tenderness and spasm. The VA examiner noted tenderness, but documented the absence of spasm. The VA examiner further stated ‘no evidence of radiating pain on movement’. The TDRL exam noted no gait disturbance. The VA examiner documented the gait as ‘hysterical’. The Board judged that the service TDRL examination carried the most probative value in weighing options for its rating recommendation. The reasons this was chosen in lieu of the higher-rated VA examination were: 1) The TDRL examination was two months closer to the separation date. 2) The poor ROM values reported in the VA exam are based on subjective pain responses which are not consistent with the objective absence of spasm. 3) The VA examiner’s notation of ‘hysterical’ gait raises the question of an emotional, rather than physical, basis for the ROM pain thresholds. 4) The TDRL examination was more consistent with the baseline impairment evidenced in the STR and by the MEB goniometric examination. The VA examiner did not report a re-injury or any other clinical reason for significant worsening of the cervical or lumbar conditions over the 14-month course of TDRL.

The ROM values reported in the TDRL value are consistent with Veterans Administration Schedule for Rating Disabilities (VASRD) §4.71a ratings of 20% for the cervical spine and 10% for thoracolumbar spine, as entered in the chart above. The PEB’s DA Form 199 for the separation ratings reflected application of the US Army Physical Disability Agency (USAPDA) pain policy in reference to the cervical rating. There was no evidence of ratable peripheral nerve impairment in this case. The Board therefore recommends a rating of 20% for the cervical spine condition and 10% for the lumbar spine condition, both coded 5242.

Right Knee Condition. Knee flexion was measured at 135⁰ by the TDRL examiner and 118⁰ by the VA examiner. Thus there is no compensable ROM impairment for the knee. The TDRL and VA evaluations documented the absence of mechanical instability, clinically significant locking or frequent effusions. Thus there is no route to a rating higher than 10% or criterion for dual coding of the knee. The VA rating of 10% was based on §4.59 (painful motion) and §4.40 (functional loss). The DA Form 199 directly referenced the USAPDA pain policy for the knee rating. Documentation of painful motion is evidenced on the TDRL and VA knee examinations and §4.40 functional loss criteria are documented in the history obtained by the VA examiner. The Board therefore recommends a 10% rating for the right knee coded 5010-5003.

Other DA Form 3947 Conditions (Immunodeficiency Virus, Cognitive Disorder, Depression and Headache). Asymptomatic HIV infection without progression to AIDS is not a basis for separation from the armed forces as evidenced by the CI’s continued service after the diagnosis. There is then no argument that it was unfitting at separation, notwithstanding the link to the cognitive and mood disorders which were independently adjudicated. The cognitive disorder, attributed to HIV, was documented by serial neurocognitive testing. The overall impression from the October, 2005 examination (proximal to the fitness adjudication at hand) noted a ‘deficit in sustained attention’ and ‘clinically mild deficit’ for memory. Intellectual capacity, reasoning and mental/motor speed were all average or better. The CI stated in a letter to the MEB that the attention deficit ‘significantly impairs my ability to do my job as a linguist’ and that ‘I have been passed over for advancement within the work section because of my inability to retain target knowledge.’ These facts are not in evidence, however. The Commander’s statement noted only her physical limitations and stated that promotion limitations were based on the inability to take the APFT. Her enlisted evaluations remained strong, including through the MEB period. The 2005 evaluation was overall ‘among the best’ and documented numerous high-functioning accomplishments. Her physical profile noted only the orthopedic limitations. It can be conceded that, given her MOS, the cognitive impairment was operant. There is, however, insufficient evidence to support an argument that the impairment reached unfitting proportions. The fitness benchmarks for the depressive disorder are essentially the same as those for the cognitive disorder. There is no evidence of incapacitating vegetative symptoms or any psychotic features. No admissions were required. The profile was S-1 without weapons restriction. The headache condition was not associated with any incapacitating episodes and received a non-compensable VA rating. The VA examiner stated, ‘When the headache attacks occur, she is able to go to work but requires medication.’

All four conditions were considered by the MEB and determined to be within AR 40-501 standards. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudications for the immunodeficiency virus, cognitive disorder, depression and headache conditions.

Other Conditions. The narrative summary (NARSUM) and MEB physical identified a history of hysterectomy for fibroid tumors in 2003. No acute symptoms or exam findings were evidenced in the service or VA examinations. The CI received a 30% VA rating for loss of creative organ, but there is no link to military fitness. A history of right ‘foot drop’ was noted on the MEB physical and received a non-compensable rating from the VA. It was noted as ‘resolved’ by the examiner. Several other more minor medical and orthopedic conditions were identified in the NARSUM and MEB physical histories. They had no connection with fitness and are not relevant for Board consideration as additionally unfitting and ratable. A few additional conditions were noted in the VA rating decision, but were not documented in the DES packet. The VA examiner made a diagnosis of fibromyalgia based on a reported two year history of migratory arthralgias. This was rated 40% by the VA. The CI was not diagnosed with fibromyalgia by the service and, as near as can be discerned, the VA diagnosis was not confirmed by a rheumatologist. 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 fibromyalgia and any contended conditions not covered above remain eligible for ABMCR consideration. 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 cervical and right knee conditions was operant in this case and the conditions were adjudicated independently of that policy by the Board. In the matter of the cervical spine condition, the Board unanimously recommends a separation rating after TDRL of 20% coded 5242 IAW VASRD §4.71a. In the matter of the lumbar spine condition, the Board unanimously recommends no change in the PEB separation rating of 10% IAW VASRD §4.71a, although a change in VASRD code to 5242 is preferred. In the matter of the right knee condition, the Board unanimously recommends a separation rating after TDRL of 10% coded 5010-5003 IAW VASRD §4.71a. In the matter of the immunodeficiency virus, cognitive disorder, depression and headache conditions, the Board unanimously recommends no recharacterization of the PEB adjudications as not unfitting. In the matter of the prior hysterectomy, history of right foot drop 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 her prior medical separation.

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Degenerative Arthritis and Disc Disease, Cervical Spine | 5242 | 20% |
| Degenerative Arthritis and Disc Disease, Lumbar Spine | 5242 | 10% |
| Degenerative Arthritis, Right Knee | 5010-5260 | 10% |
| **COMBINED** | **40%** |

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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.

