RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: ARMY

CASE NUMBER: PD0900161 BOARD DATE: 20100225 SEPARATION DATE: 20051015

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SUMMARY OF CASE: This covered individual (CI) was a Guard MSG (M.P.) medically separated from the Army in 2005 after 28 years of combined service. The medical basis for the separation was a knee condition. He first developed right knee pain in 1990 during annual training in Panama. He was treated by a civilian orthopedist, but required meniscal (cartilage) debridement (performed at WRAMC) in 2000. In 2004 he twisted the knee during a mobilization to Cuba. He did not respond adequately to conservative management and required a meniscectomy. He remained unable to fully resume his military occupational specialty (MOS) duties and was referred for a Medical Evaluation Board (MEB). He was concurrently evaluated for low back pain by the MEB. This was not associated with any specific injury and he had been treated for back pain during the Cuba deployment. X-rays showed mild degenerative changes and the neurologic exam was normal. The CI was diagnosed in 2005, during the MEB process, with obstructive sleep apnea (OSA) for which he was prescribed CPAP (nocturnal breathing device). The knee, back and OSA conditions were forwarded to the Physical Evaluation Board (PEB) on the DA Form 3947 as medically unacceptable IAW AR-40-501. Additional conditions of glaucoma and bilateral fasciitis were addressed in the narrative summary (NARSUM) and forwarded on the DA Form 3947 as medically acceptable. The PEB found only the right knee condition unfitting with a rating of 0%. This adjudication was upheld on appeal to the US Army Physical Disability Agency (USAPDA) and the CI was medically separated with a 0% disability rating.

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CI CONTENTION: The CI’s application implies that he requests review of ‘Obstructive Sleep Apnea; Chronic Low Back Pain; Right (knee) Joint Arthritis’. He does not elaborate specific contentions.

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RATING COMPARISON:

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| **Service PEB** | **VA (1 Mo. after Separation) – Effective Dates Vary** |
| **Condition** | **Code** | **Rating** | **Date** | **Condition** | **Code** | **Rating** | **Exam** |
| Degenerative Joint Disease, Right Knee | 5010 | 0% | 20050729 | Post Traumatic Arthritis R Knee | 5260-5010 | 10% | 20051118 |
| Torn…Menisci R Knee | 5259 | 0% | 20051118 |
| 5257 | 10% | 20080303 |
| Low Back Pain | Not Unfitting | 20050729 | DJD Lumbar Spine | 5242 | 10% | 20051118 |
| OSA | Not Unfitting | 20050729 | OSA | 6847 | 50% | 20050218 |
| Plantar Fasciitis | Not Unfitting | 20050729 | Plantar Fasciitis | 5299-5278 | 10% | 20051118 |
| Glaucoma | Not Unfitting | 20050729 | Glaucoma | 6013-6078 | 30% | 20051103 |
| No Additional DA 3947 Entries. | PTSD 9411 Deferred → 30% Effective 20051016 | 20060130 |
| **TOTAL Combined: 0%** | **TOTAL Combined (Effective 20051016): 80%**   |

ANALYSIS SUMMARY:

Right Knee Condition. The PEB’s DA Form 199 implied rating of the joint per Veterans Administration Schedule for Rating Disabilities (VASRD) 5003 guidance independently of AR 635.40. There was no compensable range of motion (ROM) impairment, but the NARSUM exam specifically stated ‘pain limits further motion’. It is assumed, therefore, that the USAPDA pain policy was applied in opposition to the VASRD §4.59 (painful motion) mandate for a compensable rating. The knee carried a 10% VA rating under 5010 (rated as 5003) dating to 2000. On the VA rating examination at separation, there was no compensable ROM impairment and the 5010 rating remained 10%. However, at the time of separation the knee carried an additional VA rating of 10% under 5259 for the residuals of cartilage removal. At the time of the 2006 VA rating decision (VARD), however, it was realized that this dual rating was not compliant with 38 CFR 4.14 and the additional 5259 rating was revoked. In 2008 (2+ years after separation), the knee received an additional rating of 10% under the 5257 instability code (which is an authorized separate code). The VARD for the subsequent 5257 rating noted that the joint was not unstable by ligamental exam, but required a brace. The VARD also noted that the knee was unimproved over exams between 2005 and 2008. The Board cannot justify higher than a 10% rating under any single code for the knee, and deliberated if additional rating under 5257 was justified at the time of separation. The CI did receive a brace for the knee during active duty. The NARSUM and other clinical entries in the service treatment record (STR) document the absence of ligamental instability, however, and an Magnetic Resonance Imaging (MRI) conclusively demonstrated that all ligaments were intact. The 5257 code specifies ‘recurrent subluxation or lateral instability’. There is no evidence that the brace was absolutely required or worn constantly on the basis of instability. The Board does not believe, therefore, that the knee meets the requirements for separate ratings as supported by the VA general counsel opinion. The 2008 VARD in this case recognized that the 5257 code was not rigorously applicable and, furthermore, used the clinical course after separation as part of the rationale for the additional rating. The Board, after due deliberation, cannot find firm footing for a recommendation to add an additional code for rating the knee. It does recommend a 10% rating under 5259 which is a close clinical fit for this case.

Low Back Condition. The initial Board consideration is directed to the PEB fitness adjudication for this condition. The MEB orthopedist, in addition to his opinion that the condition did not meet AR-40-501 standards, specifically stated in the NARSUM, ‘Soldier is unable to do a ruck march or do rushes because of both his knee and back symptoms.’ In a clinic note, the orthopedist stated ‘Back hurts mostly with standing over 2 hrs or walking over 1 ½ miles.’ The back pain was also included in a permanent L3 profile. The Commander’s statement, however, indicates that the knee condition was the one that rendered the CI unable to continue meeting the physical requirements of his MOS. The following is excerpted from the Commander’s statement.

Throughout the deployments, there were no special limitations placed on [CI’s name] due to his physical condition. Although there were no special limitations placed on [CI’s name] during the deployments, he did have physical issues in regards to his lower back and right knee in which he did receive treatment while In theatre. Up to the point of the remarkable surgery on his right knee, [CI’s name] was able to perform and satisfy all the duties and responsibilities of an Operations Sergeant in the United States Army.

Although it is possible that he was able to better compensate for the back condition until the knee worsened, there is nothing in evidence suggesting that the back condition had deteriorated significantly from the period described by the Commander. There was no specific injury or exacerbation documented. The PEB’s DA Form 199 did not provide any statement regarding the rationale for its fitness adjudication for the back condition, but presumably applied the logic that the back condition had already demonstrated that it was not unfitting. The MEB’s judgment that a condition does not meet AR 40-501 retention standards is but a factor in the PEB’s fitness determination. This was stated in the USAPDA’s reply to the CI’s appeal, ‘No condition is automatically unfitting simply because it falls below medical retention standards. There are many Soldiers who have medically unacceptable conditions who remain physically fit.’ All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the back condition.

DA 3947 Conditions (OSA, Plantar Fasciitis, Glaucoma). OSA was diagnosed by a sleep study performed eight months prior to separation. An addendum to the NARSUM documented daytime somnolence, nocturnal snoring and weight gain. The condition was ‘completely treated’ with CPAP. The addendum concluded that the condition did not meet retention standards, stating ‘he will require therapy with CPAP which is not field friendly’. PEB’s across the services do not routinely find OSA, with or without CPAP requirement, unfitting if symptoms are controlled and functioning is unimpaired. The burden of providing CPAP in field and deployment environments is not considered to be a critical factor with the common availability of portable generators and sanitary facilities. The PEB’s fitness adjudication was therefore expected and reasonable. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the OSA condition.

Heel spurs, associated with plantar fasciitis, are addressed in the NARSUM. The condition developed in 2003. The CI was fitted for orthotics and followed by podiatry, but did not require surgery. The condition was judged to be within AR 40-501 standards, was not profiled and was not identified as an impairment in the Commander’s statement. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the foot condition. Glaucoma was addressed in the NARSUM. It was diagnosed in 1996 and ocular pressure was stable on eye drops. Vision was not significantly impaired. The VA 30% rating based on Goldman visual field measurements does not correlate with service exams, and is difficult to attribute to stable controlled glaucoma. The condition was judged to be within AR 40-501 standards, was not profiled and was not identified as an impairment in the Commander’s statement. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the glaucoma condition.

Other Conditions. The only additional condition documented in the NARSUM was weight gain attributed to orthopedic impairment. The MEB physical noted a remote small toe fracture and history of blood in the urine associated with periodic urinary tract infections. The weight gain (65 lb.) was under management of a nutritionist at the time of separation and appropriately not entered as a DA Form 3947 condition. The conditions noted from the MEB physical have no connection with fitness and are not relevant for Board consideration as additionally unfitting and ratable. The CI was treated for some pituitary hormonal abnormalities shortly after separation, but these were not diagnosed or overtly symptomatic while on active duty. The CI was diagnosed with post-traumatic stress disorder (PTSD) by the VA shortly after separation. This was attributed to non-combat stressors during the Cuba deployment. No psychiatric treatment was sought on active duty and the CI denied any psychiatric symptoms at the time of the MEB physical. The Board does not have the authority under DoDI 6040.44 to render fitness or rating recommendations for any conditions not considered by the Disability Evaluation System (DES). The endocrine condition, PTSD and any contended conditions not covered above remain eligible for Army Board for Correction of Military Records (ABCMR) 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 right knee condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the right knee condition, the Board unanimously recommends a rating of 10% coded 5259 IAW VASRD §4.71a. In the matter of the low back condition, the Board by a 2:1 vote recommends no recharacterization of the PEB adjudication as not unfitting. The single voter for dissent recommended adding the back as separately unfitting (coded 5242 and rated 10%). A minority opinion is submitted. In the matter of the OSA, plantar fasciitis and glaucoma conditions, the Board unanimously recommends no recharacterization of the PEB adjudication as not unfitting. In the matter of the weight gain, toe fracture, urinary tract infections 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, effective as of the date of his prior medical separation.

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Degenerative Joint and Meniscal Disease, Right Knee | 5259 | 10% |
| **COMBINED** | **10%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090215, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

MINORITY OPINION:

The Action Officer (AO) recommended addition of the low back condition as separately unfitting. The MEB orthopedist’s statement in the NARSUM as quoted (‘Soldier is unable to do a ruck march or do rushes because of both his knee and back symptoms.’) was compelling in that regard. Although the PEB adjudication and the Board majority recommendation are well defended, the AO was not persuaded during Board deliberation that the balance of the evidence was unfavorable to the CI. The AR 40-501 determination by the MEB and the physical profile were additional significant factors favoring him. The AO’s original draft to the Board reflects an opinion that remains unchanged. It is excerpted below:

The Commander’s statement does insinuate that the knee condition was the main offender. [Statement inserted.] Although this would imply that it was the worsening of the knee condition and resulting surgery that rendered the CI unfit, it is more likely that he was able to better compensate for the back condition until the knee worsened. Since the DA 199 did not reference the Commander’s opinion in this regard, it is hard to support the PEB’s recommendation on the basis of it. The USAPDA reply to the CI’s appeal stated, ‘No condition is automatically unfitting simply because it falls below medical retention standards. There are many Soldiers who have medically unacceptable conditions who remain physically fit.’ Although the MEB’s judgment that a condition does not meet AR 40-501 retention standards is but a factor in the PEB’s fitness determination, it does raise the bar for an adjudication of not unfitting. There is a surplus of evidence suggesting that the condition interfered significantly with the basic tasks of soldiering. All evidence considered, the Board cannot find enough strength in the PEB position to overcome a good deal of reasonable doubt in the CI’s favor regarding the fitness adjudication for the low back condition. The Board, therefore, recommends that it be rated as an additionally unfitting condition.

The AO could not support greater than a 10% rating for the back, and therefore the recommendation regarding fitness would have been of no practical benefit to the CI. As a matter of principle, however, the back should have been characterized as the unfitting condition that the AO remains convinced it was. The CI should be assured that his service is gratefully acknowledged by the Board and it recognizes that his acquired disabilities were no small price to pay.

