RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: ARMY

CASE NUMBER: PD0900167 BOARD DATE: 20100629

SEPARATION DATE: 20071120

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SUMMARY OF CASE: This covered individual (CI) was an ARNG officer (O-4, Field Artillery) medically separated from the Army in 2007 after over 20 years of combined service (4 years active duty). The medical bases for the separation were low back and right shoulder conditions. His back was initially injured in 1994 during military exercises. The symptoms increased during a deployment to Kuwait in 2004 and a Magnetic Resonance Imaging (MRI) documented disc herniation at L5/S1. Following completion of his tour and return to CONUS, he underwent rehabilitation and medical treatment for the condition. He subsequently developed bilateral lower extremity radicular symptoms. EMG (nerve conduction) studies were normal. Continued symptoms prompted two surgical interventions, an L5/S1 diskectomy and subsequent two-level fusion (L4-S1), in 2006. The surgeries provided some pain relief, but did not restore him to full activities. The CI also developed persistent right (dominant) shoulder pain attributed to the use of crutches. An MRI showed tendinosis, bursitis and degenerative changes, and he was diagnosed with right shoulder impingement syndrome. Despite maximal conservative measures, the CI did not respond adequately to perform within his Army Occupational Code (AOC) or participate in the Army Physical Fitness Test (APFT) due to both his spine and right shoulder conditions. He was issued a permanent U-3/L-3 profile and underwent a Medical Evaluation Board (MEB). Both of the discussed orthopedic conditions were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Seven other conditions, as identified in the rating chart below, were forwarded on the DA Form 3947 as medically acceptable conditions. Two other conditions, adjustment disorder and obesity, were identified that do not constitute a physical disability IAW DoDI 1332.38. The CI was referred to the PEB and determined unfit for the back condition (rated 10%) and right shoulder condition (rated 0%). All other conditions were adjudicated as not unfitting or not ratable. A formal PEB changed the language of the condition descriptions but upheld the fitness and rating adjudications. The CI was thus medically separated with a combined disability rating of 10%.

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CI CONTENTION: The CI states: ‘The Rating does not reflect the level of disability incurred. The Veterans Administration (VA) rating of 60% is so different and reflects the impact and ongoing pain and limitations as a result of these injuries.’ The application lists a left ankle condition, bilateral pes planus and tinnitus as additional conditions rated by the VA.

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RATING COMPARISON:

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| --- | --- |
| **Service FPEB – Dated 20071001** | **VA (1 Mo. after Separation) – All Effective 20071121** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Spinal Fusion | 5241 | 10% | Degenerative Disc Disease L5-S1 | 5243 | 20% | 20071213 |
| Arthritis … Right Shoulder | 5003 | 0% | Right Shoulder … Arthritis | 5010 | 10% | 20071213 |
| Chronic bilateral hip pain | Not unfitting | No VA entry  | 20071213 |
| Chronic neck/upper back pain | Not unfitting | Cervical Spine Condition  | 5299-5237 | 10% | 20071213 |
| Chronic bilateral foot pain | Not unfitting | Bilateral Pes Planus | 5270 | 10% | 20071213 |
| Adjustment disorder … | Not a Disability | No VA entry | 20071213 |
| Hypercholesterolemia | Not unfitting | No VA entry | 20071213 |
| Mild hyperglycemia … | Not unfitting | No VA entry | 20071213 |
| GERD | Not unfitting | Dyspepsia  | 7399-7301 | NSC | 20071213 |
| Seasonal allergies | Not unfitting | No VA entry | 20071213 |
| Obesity | Not a Disability | No VA entry | 20071213 |
| ↓No Additional DA 3947 Entries↓ | Left Ankle s/p surgical repair | 5241 | 20% | 20071213 |
| Tinnitus | 6260 | 10% | 2005 |
| **TOTAL Combined: 10%** | **TOTAL Combined (*Includes Non-PEB Conditions*): 60%**   |

Note: The VA had rated the CI for back pain (DDD L5-S1, 5243 at 10%) since 20050102, with an increase to 20% proximate to the CI’s PEB separation date. Tinnitus was also VA rated (6260 at 10%) since 20050102.

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ANALYSIS SUMMARY:

Back Condition. There were two goniometric range-of-motion (ROM) evaluations in evidence which the Board weighed in arriving at its rating recommendation. These exams are summarized in the chart below and are consistent with other exams proximate to separation.

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM | MEB – 20070824 | VA C&P - 20071213 |
| Flexion | 42⁰ | 50⁰ |
| Combined | 150⁰ | 160⁰ |
| §4.71a Rating | 20% | 20% |

The PEB and VA chose different coding options for the condition (5241 for spinal fusion versus 5243 for disc syndrome), but this did not bear on rating under the general spine formula. The PEB’s DA Form 199 reflected application of the US Army Physical Disability Agency (USAPDA) pain policy for rating and, absent the pain policy, its 10% determination was not consistent with §4.71a standards. Both the MEB and VA exams for pain-limited ROM meet the 20% rating criteria IAW §4.71a. There was no evidence of ratable peripheral nerve impairment in this case. Therefore, the Board recommends a 20% rating for the back condition under code 5241.

Right Shoulder Condition. The MEB and VA shoulder examinations were similar. There was not compensable ROM impairment on either exam (both noted abduction of 120⁰). The VA applied §4.59 (painful motion) to achieve their 10% rating. The MEB exam likewise documented some limitation of motion on the basis of pain. The §4.59 stipulation is thus supported by the MEB examination as well, absent application of the USAPDA pain policy. The Board therefore recommends a 10% rating for the right shoulder condition. The choice of VASRD code is irrelevant to rating since there was no compensable ROM impairment under any of the joints. The Board recommends the 5010 traumatic arthritis code, rated under 5003 criteria.

Other DA Form 3947 Conditions. The other conditions documented on the MEB’s DA Form 3947 were chronic bilateral hip pain, chronic neck/upper back pain, chronic bilateral foot pain, adjustment disorder with depressed mood (not unfitting for military duty), hypercholesterolemia, mild hyperglycemia (possible early glucose intolerance), gastroesophageal reflux disease (GERD), seasonal allergies, and obesity. All of these conditions were judged to be within AR 40-501 standards, were not profiled and were not identified as impairments in the Commander’s statement. No link to fitness is in evidence for any of them. The adjustment disorder and obesity conditions are not compensable under DoDI 1332.38 or the VASRD, and are therefore not considered by the Board. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for any of the noted conditions.

Other Conditions. The CI’s ankle surgery is mentioned in the narrative summary (NARSUM) as a co-existing medical condition and as potentially causing the CI’s shoulder condition due to use of crutches following that surgery. The ankle was not profiled, however, nor was it identified in the Commander’s statement. Therefore no link to fitness is in evidence for the ankle condition which would support a Board recommendation as unfitting and ratable. The tinnitus condition rated by the VA and contended by the CI is not evidenced in the NARSUM, MEB physical exam or other DES documents. 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 tinnitus and any contended conditions not covered above remain eligible for Army Board for Correction of Military Records (ABMCR) consideration. No other conditions were service connected with a compensable rating by the VA within twelve months of separation. 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 both the lumbar spine and right shoulder conditions was operant in this case and the conditions were adjudicated independently of that policy by the Board. In the matter of the lumbar spine condition, the Board unanimously recommends a rating of 20% coded 5241 IAW VASRD §4.71a. In the matter of the right shoulder condition, the Board unanimously recommends a rating of 10% coded 5003 IAW VASRD §4.71a and §4.59. In the matter of the bilateral hip pain, neck/upper back pain, bilateral foot pain, adjustment disorder, hypercholesterolemia, mild hyperglycemia, gastroesophageal reflux disease and seasonal allergy conditions, the Board unanimously recommends no recharacterization of the PEB adjudications as not unfitting. In the matter of the left ankle 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** |
| Disk Disease and Surgical Fusion, Lumbar Spine | 5241 | 20% |
| Degenerative Arthritis, Right Shoulder | 5010 | 10% |
| **COMBINED** | **30%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090219, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

