RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1000019 SEPARATION DATE: 20060619

BOARD DATE: 20110531

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SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT (92A, Automated Logistical Specialist) medically separated for chronic low back pain, chronic neck pain and right shoulder pain*.* The CI’s low back pain began in 2003 and was not attributed to any accident or injury; however, he was performing heavy lifting and carrying vehicle parts as per his military occupational specialty (MOS). The CI’s neck and right shoulder pain began as a result of an accident while deployed in Iraq in 2004. The CI was helping to load a large trash can onto a five-ton truck when the can slipped and dropped onto his head and trunk. This condition was worsened by a motor vehicle accident in May 2005. Despite extensive treatment with physical therapy (PT), transcutaneous electrical nerve stimulation (TENS), non-steroidal anti-inflammatory medications, muscle relaxants and neuropathic pain medications, the CI did not respond adequately to perform within his MOS or participate in a physical fitness test and was issued a permanent U3, L3 profile and underwent a Medical Evaluation Board (MEB). The MEB listed “chronic low back pain secondary to intervertebral disc disease,” “chronic neck pain” and “chronic shoulder pain” forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. The PEB adjudicated the back condition and neck as unfitting, rated 10% each, and the shoulder condition as unfitting rated at 0%; with application of the US Army Physical Disability Agency (USAPDA) pain policy. The CI made no appeals and was medically separated with a 20% combined disability rating.

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CI CONTENTION: “Nine months after separation from the Army the VA awarded me 20% for right shoulder sprain and 10% for my back condition. Currently my right shoulder is rated at 30% by the VA and my back is at 10%. I have not been rated for my neck by the VA, the neck has a rating of 10% by the Army on my PEB, and I should have been rated by the Army at least at 20% right shoulder, 10% low back and 10% neck for combined 35.2% = 40%. My right shoulder is always painful. I have a constant pain level of 7 to 8. The pain intensifies when I raise my arm and radiates from the shoulder to the neck and down my back. The Army rater rated only for pain only. I have limited range of motion and the VA examiner noted forward flexion and abduction limited to 90 degrees with repetition to only 80 degrees. In May of 2007 I had back surgery; I had a microdisketomy and hemilaminectomy of L4-L5. This was 11months after discharge from the Army. And I was awarded from the VA 100% disability on 4/30/2007and then itwas reduced to 40% on 8/1/2007. The accident that I had in Iraq was that we were loading a 5 ton truck with trash dumpsters and one fell on my right shoulder and on my head. Since then I have been diagnosed with traumatic brain injury. The accident also caused left side sciatica currently at 10%, right side peripheral neuropathy currently 10%. I am currently rated 100% disabled, with individual unemployability by the VA.” He additionally lists all of his VA conditions and ratings as per the rating chart below. A contention for their inclusion in the separation rating is therefore implied.

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RATING COMPARISON:

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| **Service IPEB – Dated 20060405** | | | **VA (7 Mo. After Separation) – All Effective Date 20060620** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5299-5237 | 10% | DDD of the Lumbar Spine….. | 5243 | 10% | 20070124 |
| Chronic Neck Pain | 5237 | 10% | No VA Rating | | | |
| Right Shoulder Pain | 5099-5003 | 0% | Right Shoulder Sprain | 5201 | 20% | 20070124 |
| 30% | 20080213 |
| ↓No Additional MEB/PEB Entries↓ | | | R. Peripheral Neuropathy | 8720 | 10% | 20070124 |
| L. Radiculopathy (L sciatica) | 8720 | 10% | 20070124 |
| PTSD | 9411 | 100% | 20070122 |
| 0% x 1 /Not Service Connected x 2 | | | 20070124 |
| **Combined: 20%** | | | **Combined: 100%** | | | |

ANALYSIS SUMMARY: The Disability Evaluation System (DES) is responsible for maintaining a fit and vital fighting force. While the DES considers all of the service member’s medical conditions, compensation can only be offered for those medical conditions that cut short a service members career, and then only to the degree of severity present at the time of final disposition. However the Department of Veteran Affairs (VA), operating under a different set of laws (Title 38, United States Code), is empowered to compensate service connected conditions and to periodically re-evaluate veteran’s for the purpose of adjusting the veterans disability rating, should his degree of impairment vary over time.

Chronic Neck and Low Back Pain. The CI had two goniometric spine range of motion (ROM) evaluations in evidence which the board weighed in arriving at its rating recommendation. All exams are summarized in the chart below, and the MEB exam includes the PT ROMs accomplished the same day. The charted ROMs follow the VASRD for using active ROM (AROM versus passive ROMs [PROM]), and rounding and maximums annotated in the notes under the general rating formula for diseases and injuries of the spine. The low back and neck condition ratings will be discussed separately. The record included an application for worker’s compensation noting a back injury on 16 November 2006 for injuries sustained while employed in construction. This post-separation injury was prior to the VA examination. The Board carefully weighed each set of exams and concluded that the MEB spine exams (including PT) which were comprehensive, closer to the date of separation, and preceded the CI’s work related injury had a higher probative value for separation rating. There appeared to be post-separation worsening of the lower back and post-separation improvement of the neck; however, it is incongruent for the Board to assign a higher probative value to one exam in its rating recommendation for one of the spine conditions and then assign a higher probative value to a different exam for the other condition.

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| Goniometric ROM –Lumbar & Cervical | MEB ~ 4 Mo. Pre-Sep | | VA C&P ~ 7 Mo. After-Sep | |
| Lumbar | Cervical | Lumbar | Cervical |
| Flexion | 75⁰ | 45⁰ | 70⁰ | 45⁰ |
| Combined | 225⁰ | 280⁰ | 130⁰ | 340⁰ |
| Comments | Mild antalgic gait; TTP; painful motion | TTP; guarding & pain at end ROMs | Decr reflexes / sensation; “unsteady going”; c/o spasm QD & shooting pains/numbness; “two canes to walk”; Dx sciatica R>L | Normal ROM |
| §4.71a Rating | 10% (ROM) | 10% | 20%; or  10% +nerve ratings | 0%  (Not coded/rated by VA) |

Low Back Condition. The MEB examination four months prior to separation indicated that the CI had chronic low back pain that was aggravated by lifting and carrying heavy objects and performing intense physical training and wearing load bearing equipment. It was noted by the examiner that neurosurgery at Portsmouth Naval Medical Center did not require any surgical intervention for the chronic low back pain. The CI complained of low back pain that was worsened by lifting and carrying heavy objects and by intense physical training and wearing load bearing equipment. The examiner documented that the CI had a mild antalgic gait, increased pain and tenderness of bilateral paralumbar musculature, left greater than right. The examiner further documented that the CI had undergone multiple PT modalities along with the use of a TENS unit which did not improve his condition. An MRI on 30 October 2005 demonstrated degenerative disc disease at L3 thru S1 and desiccation of L2 through L3 intervertebral disc.

The VA compensation and pension (C&P) examination seven months after separation, documented CI’s complaints of constant stiffness, daily muscle spasms and sharp pain localized at 7 - 8 the worst (pain scale no pain 0 - 10 worst) with numbness that radiated to the left leg, made worse by bending and somewhat better with rest. The CI had an antalgic gait and required the use of two canes to walk. According to the examiner, the CI could only walk ten feet and needed to stop and regain his posture. The examiner documented that the CI had paresthesias, dysesthesias and sensory abnormalities which extended down the back with “decreased sensation in the reflexes,” and increased pain and tenderness on repetitive ROM. The examiner concluded that the CI had intervertebral disc syndrome with disc herniation at S1 and sciatica worse on the right than left. The CI underwent back surgery (L3-4, L4-5 microdiscectomy) ten months after separation with some improvement of symptoms, but documented post-surgical left lower extremity neuropathy proven by electrophysiological study (EMG).

The PEB and VA chose different coding options, but this did not significantly impact the rating as noted above. The general rating formula for diseases and injuries of the spine considers the CI’s pain symptoms “with or without symptoms such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease.” All exams proximate to separation met the ROM criteria for a minimum 10% rating. The Board carefully considered whether the narrative summary (NARSUM) documented tenderness along with a mild antalgic gait and if the MEB exam documented increased paraspinal muscle tone were sufficient to meet the 20% rating criteria of “muscle spasm or guarding severe enough to result in an abnormal gait” when no “spasm” was documented and guarding would have to be inferred from a painful ROM. The PT evaluation specifically indicated “guarding” for the cervical and shoulder ROMs, but did not indicate guarding for the thoracolumbar ROMs. After due deliberation, and all evidence considered, there is not reasonable doubt in the CI’s favor to justify a Board recommendation for other than the 10% rating assigned by the PEB for chronic low back pain condition.

Neck Condition. The exams and ROM evaluations are summarized above. The CI had chronic neck pain that was aggravated by lifting and carrying heavy objects and performing intense physical training and wearing load bearing equipment. The PT documented that there was guarding at the end of PROM with increased pain in the cervico-thoracic region. In the C&P examination seven months after separation, the examiner documented that the CI had a normal x-ray and a normal goniometric examination without noting pain or spasm. The VA did not code nor rate a neck condition. The PEB rated the neck at 10% coded 5237 cervical strain for pain and tenderness although indicated flexion and extension were normal. The MEB exam met the 10% rating criteria for combined ROM of the cervical spine greater than 170 degrees but not greater than 335 degrees. The Board considered that the CI’s neck pain was possibly referred from his right shoulder condition; however, the PEB unfit determination is administratively final and the service exam would rate at 10%. After due deliberation, and all evidence considered, there is not reasonable doubt in the CI’s favor, to justify a Board recommendation for other than the 10% rating assigned by the PEB for the chronic neck pain condition.

Right Shoulder Pain. The right-hand dominant CI had two goniometric ROM evaluations in evidence which the board weighed in arriving at its rating recommendation. All exams are summarized in the chart below.

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| Goniometric ROM –  R Shoulder | PT ~ 4 Mo. Pre-Sep | MEB ~ 4 Mo. Pre-Sep | VA C&P ~ 7 Mo. After-Sep | VA C&P ~ 20 Mo. After-Sep |
| Flexion (0-180) | 170⁰ |  | 80⁰ | 70⁰ |
| Abduction (0-180) | 170⁰ | ~100⁰ | 80⁰ | 70⁰ |
| Comment | Guarding and pain at end ROM | TTP; no crepitus or edema | 90⁰ prior to repetitions; Pain, weakness, stiffness | 90⁰ prior to repetitions; pain and sl tenderness |
| §4.71a Rating | 10% | 10% | 20% | 20%-30% (VA 30%) |

The MEB examination four months prior to separation indicated that the CI had chronic shoulder pain that was aggravated by lifting and carrying heavy objects, performing intense physical training and wearing load bearing equipment. PT documented that there was guarding and pain at the end ROMs located in the posterior shoulder, superior medical scapular region and pain at the end of the ROM. The MEB examiner verified the findings of the PT, although the MEB examiner documented that the abduction ROM was limited at “approximately 100 degrees” whereas the PT found abduction to be 170 degrees ROM.

At the C&P examination seven months after separation, the CI complained of right shoulder weakness, constant stiffness and pain precipitated by cold weather and by extending and moving the shoulders. The examiner documented that there was increased pain and tenderness on repetitive motion to 80 degrees of abduction and to flexion. A VA exam 20 months after separation documented abduction to 70°. The VA initially rated the shoulder at 20% for arm limitation of motion at shoulder level (5201), and on reconsideration, following the 20 months exam indicating abduction to 70°, the VA awarded a retrospective 30% rating (30% rating criteria is “midway between side and shoulder level”). This would likely be with application of §4.7 (higher of two evaluations) or considering non-ROM factors to indicate meeting the higher rating level as “midway between side and shoulder level” would indicate a limit of 45°.

The PEB rated the right shoulder condition as 5099-5003 arthritis, degenerative (hypertrophic or osteoarthritis) at 0% which was specifically based on the USAPDA pain policy and the listed passive (180°), rather than active (175°) ROM limitation. The PEB indicated instability was not found elsewhere in the record. Absent the pain policy, the service exams would rate at 10% for painful motion IAW VASRD §4.59 (painful motion), as documented AROMs were all greater than 90⁰ and less than 180° (The 20% criteria for 5201 is for arm, limitation of motion at shoulder level [90°]). The Board considered that the MEB and PT exams were closer to the date of separation, comprehensive, more indicative of the CI’s level of disability described in the service records, and therefore had a higher probative value. The Board adjudged the post-separation VA exams’ greater limitations of the CI’s shoulder ROMs as post-separation worsening of his condition. After due deliberation, considering all of the evidence, and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 10% for the right shoulder condition, coded 5099-5003.

Posttraumatic Stress Disorder (PTSD): The PTSD condition was rated 100% by the VA. This condition was mentioned by the CI in the MEB history and physical. There was no documentation of this condition in the NARSUM, nor was the CI given a profile for this condition. The commander’s statement does not discuss PTSD, but rather focuses on the CI’s medical problems and physical limitations. The PTSD condition was reviewed by the action officer and considered by the Board. There was no satisfactory indication from the record that any mental health condition significantly interfered with satisfactory performance of MOS requirements. The Board therefore has no eligible basis for recommending PTSD as an additional unfit condition for separation rating.

Remaining Conditions. The right-sided peripheral neuropathy condition and left leg radiculopathy conditions were each rated 10% by the VA. Board precedent is that a functional impairment tied to fitness is required to support a recommendation for addition of a peripheral nerve rating at separation. The pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a. The sensory component in this case has no functional implications, and there was no motor deficit. Since no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment. The CI contended traumatic brain injury (TBI). The MEB indicated negative responses for loss of consciousness, memory problems or amnesia. The examiner noted a history of a trashcan hitting the CI’s head (as above for spine and shoulder condition) without any loss of consciousness. Psychiatric was listed as normal. Profile was S1, and the commander’s statement noted only musculoskeletal type of duty limitations with no indication of cognitive or neurocognitive impairments. VA records indicated a post-separation increasing of mental health and/or neurocognitive symptoms that were not indicated as occupationally significant at the time of separation. The Board therefore has no eligible basis for recommending any additional unfit 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. In the matter of the chronic low back pain condition, the Board in a 2:1 vote recommends no change in the PEB adjudication as 5299-5237 IAW VASRD at 10%. The single voter for dissent (who recommended a 20% rating) submitted the addended minority opinion. In the matter of the chronic neck pain condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication of 10% coded 5237. In the matter of the right shoulder pain condition, the Board unanimously recommends a rating of 10% coded 5099-5003 IAW VASRD §4.71a. In the matter of the PTSD, right-sided peripheral neuropathy, left leg radiculopathy or TBI conditions 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** |
| Chronic Low Back Pain | 5299-5237 | 10% |
| Chronic Neck Pain | 5237 | 10% |
| Right Shoulder Pain | 5099-5003 | 10% |
| **COMBINED** | **30%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100107, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record

Minority Opinion: The Action Officer (AO) recommends that the chronic low back pain condition be rated at 20% for an abnormal gait due to the CI’s back condition.

The record clearly indicated that the CI had mild antalgic gait on both the MEB exam and in the NARSUM. There was no evidence of non-physiologic findings (exaggeration of symptoms or Waddell’s) in the record, nor did the CI have any foot, ankle, knee, or hip conditions which might conceivably have led to an antalgic gait that was not directly related to the CI’s lower back condition. The MEB exam indicated “increased muscle tone and tenderness” (MEB exam), and the NARSUM stated, “He has a mild antalgic gait, decreased range of motion with lumbar flexion….He also has increased pain and tenderness of bilateral paralumbar musculature, left greater than right.”

The general rating formula for diseases and injuries of the spine 20% criteria of “muscle spasm or guarding severe enough to result in an abnormal gait” differs from the 10% criteria of “muscle spasm, guarding, or localized tenderness not resulting in abnormal gait” principally in the presence (or absence) of an abnormal gait -- which the CI demonstrated. The majority held that there had been no evidence to substantiate the position that the CI’s symptoms of increased pain and tenderness of the bilateral paralumbar muscles and increased muscle tone was severe enough to cause an antalgic gait. However, there was no other etiology for the CI’s documented abnormal gait. The lack of specific wording of “guarding” or “spasm” was not sufficient to overcome the near certainty that the CI’s increased pain, tenderness, and increased muscle tone led to an abnormal gait attributable to his back condition. Although the pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a, any pain which led to an abnormal gait should be considered as equivalent to guarding and support a 20% rating. The VA ratings for radiculopathies (which were not unfitting) may have led to a different apportionment of symptoms for the overall VA rating.

There is therefore more than sufficient reasonable doubt IAW VASRD §4.3 to attribute the CI’s abnormal gait to the back condition and a rating of 20% IAW VASRD §4.71a. Consideration of VASRD §4.7 (higher of two evaluations) and §4.10 (functional impairment) also support the higher 20% back rating.

AO RECOMMENDATION: The AO recommends that the CI’s prior determination be modified as follows and that the discharge with severance pay be recharacterized to reflect permanent disability, effective as of the date of his prior medical separation.

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Low Back Pain | 5299-5237 | 20% |
| Chronic Neck Pain | 5237 | 10% |
| Right Shoulder Pain | 5099-5003 | 10% |
| **COMBINED** | **40%** |



