RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100275 SEPARATION DATE: 20050909

BOARD DATE: 20120717

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Sergeant First Class/E-7 (25S40, Satellite Communications Systems Operator-Maintainer), medically separated for chronic low back pain (LBP) with fusion L4-S1*.* Despite conservative and surgical intervention, the CI continued to experience LBP and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent L3 profile and underwent an MOS Medical Retention Board (MMRB) which referred the CI to a Medical Evaluation Board (MEB). The MEB forwarded chronic LBP to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Two other conditions were forwarded on the MEB submission as medically acceptable conditions. The PEB adjudicated the chronic LBP condition as unfitting, rated 20%. The CI requested a Formal PEB (FPEB). It was accomplished 21 July 2004 and upheld the PEB; however, this PEB was administratively discontinued. A second MEB was accomplished on 9 June 2005. Again, Chronic LBP was forwarded to the PEB as medically unacceptable IAW AR 40-501 along with five other conditions determined to be medically acceptable. The PEB dated 17 August 2005, adjudicated the lower back pain condition as unfitting rated at 10% with probable application of the US Army Physical Disability Agency (USAPDA) pain rule, since rescinded, and the Veterans’ Administration Schedule for Rating Disabilities (VASRD). The CI made no further appeals and was medically separated with a 10% combined disability rating.

CI CONTENTION: “Constant severe back pain. Pain has never decreased or gone away.”

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in DoDI 6040.44, Enclosure 3, paragraph 5.e.(2) is limited to those conditions which were determined by the PEB to be specifically unfitting for continued military service; or, when requested by the CI, those condition(s) “identified but not determined to be unfitting by the PEB.” The ratings for unfitting conditions will be reviewed in all cases. Any contention not requested in this application, or otherwise outside the Board’s defined scope of review, remains eligible for future consideration by the Army Board for the Correction of Military Records (BCMR).

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RATING COMPARISON:

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| **Service PEB – Dated 20050817** | **VA (4 Mo. After Separation) – All Effective Date 20050910** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic LBP w/Fusion L4-S1 | 5241 | 10% | DDD and DJD L4-5 and L5-S1 | 5243 | 20% | 20060110 |
| Hypothyroidism | Medically Acceptable/Not Unfitting | Hypothyroidism | 7903 | 10% | 20060110 |
| Hypertension | Hypertension | 7101 | 0% | 20060110 |
| Hypertriglyceridemia | Hypertriglyceridemia | 7099-7005 | NSC |
| Hemorrhoids | Hemorrhoids | 7336 | NSC |
| Hay Fever | Seasonal Allergies | 6522 | NSC |
| No Additional MEB/PEB Entries | No Additional VA Entries |
| **Combined: 10%** | **Combined: 30%** |

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 member’s career, and then only to the degree of severity present at the time of final disposition. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions resulting in medical separation nor for conditions determined to be service-connected by the Department of Veterans’ Affairs (DVA) but not determined to be unfitting by the PEB. However the DVA, operating under a different set of laws (Title 38, United States Code), is empowered to compensate all service-connected conditions and to periodically re-evaluate said conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment vary over time. The Board’s role is confined to the review of medical records and all evidence at hand to assess the fairness of PEB rating determinations, compared to VASRD standards, based on severity at the time of separation.

Chronic Low Back Pain with Fusion L4 to S1 Condition. The CI had onset of his low back pain (LBP) while doing sit ups for physical fitness in the summer of 2000. Management included activity modification, narcotics, neuro-stabilizers, physical therapy, epidural steroid injections, nerve blocks, and intradiscal thermography. These were unsuccessful. Per the VA records, an MRI showed degenerative disc disease (DDD) at L4-5 and L5-S1. On 16 December 2002 he underwent transforaminal lumbar interbody fusion (TLIF) at L4-5 and L5-S1. This resolved the pain radiating to the right lower extremity, but the LBP persisted. Imaging, including CT scan, bone scan and flexion/extension films all showed a solid fusion. However, due to the persistent pain, he had hardware removal in October 2004. This did not provide any relief of his pain which precluded him from meeting his military duties. The MEB narrative was dictated 8 June 2005, 3 months prior to separation. He was noted to have unremitting, daily LBP rated at 7/10 without radiation (“and is currently nonexistent”). Range-of-motion (ROM) was accomplished separately 2 months later. At this examination he was observed to have limitation in flexion to 10 degrees and combined ROM of 120 degrees. The examiner stated “I do not under (stand, sic) his severely restricted motion. Active muscle contraction seems to block additional passive motion, but short of examining him under anesthesia, I do not think we can document additional motion.” The VA Compensation and Pension (C&P) exam was performed on 10 January 2006, 4 months after separation. LBP was described as constant, localized to the back without radiation (“does not really radiate to any other parts of his body.”) He was observed to have a normal tandem gait without use of an assistive device. Curvature of the spine was normal. Sensory, motor and deep tendon reflex (DTR) exams were all normal. The examiner stated “he has severe pain starting at 60 degrees on forward flexion,” did not record if flexion exceeded 60 degrees, and noted there was 30 degrees loss of flexion from the normal of 90 degrees. The examiner recorded that lateral flexion and rotation were 30 degrees both directions but associated with a lot of pain and opined “because of the pain associated with bilateral and rotation, I feel we should take off at least a 10-degree in rotation to the left and to the right and a 10 degree in lateral flexion to the left and to the right because of his persistent pain.” There was no evidence of any muscle wasting. Straight leg raise was positive at 45 degrees bilaterally but the examiner did not specify if the maneuver produced radiating pain or not. The CI was noted to be cautious in his movements. The examiner did note that the CI missed around 20 days of work a year secondary to his back pain, but did not specify if this was due to incapacitation, medical appointments or a combination of these two. The PEB rated the back pain at 10% with probable application of the since rescinded USAPDA pain policy for rating and coded it as 5241, spinal fusion. The VA rated the back at 20% for ROM restriction and coded it as 5243, intervertebral disc syndrome (IDS). It also noted degenerative joint disease (DJD) in its rating decision. The Board notes that although the MEB ROM measurements correlate with a 40% rating, they are inconsistent with other examinations and the examiner could not account for the severity of the ROM limitation. Both exams are proximate to separation and both are relatively remote from the last surgical procedure in Oct 2004. The Board notes that the VA upheld the 20% rating in the 2 May 2006 rating decision after the receipt of additional records and also on 6 June 2008 after a second C&P was accomplished on 22 April 2008. In the 2008 rating, the VA documented that there had been six incapacitating episodes and that the ROM had worsened in both flexion and extension since the 2006 C&P, but still met the criteria for 20%. The Board also notes that a primary care note dated 5 July 2005, 2 months prior to separation, documented “FROM” (full ROM), inconsistent with the marked limitation seen a month later in the PEB exam.

After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board assigns a higher probative value to the VA C&P examination and recommends a separation rating of 20% for the LBP condition. The Board notes that this is consistent with subsequent VA evaluations and the primary care note prior to separation; and better reflects the permanent disability. It also notes that the condition rates at 20% whether coded 5241 or 5243 and, therefore, recommends retention of the PEB coding.

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 LBP was likely operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the chronic LBP condition, the Board, by a two to one vote, recommends that the disability rating be increased to 20%. The minority voter, who favored no re-characterization, elected not to submit a minority opinion. There were no other conditions within the Board’s scope of review for consideration.

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** |
| Chronic Low Back Pain with L4-S1 Fusion  | 5241 | 20% |
| **COMBINED** | **20%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294 dated 20110407, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

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 President Physical Disability Board of Review

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency

(TAPD-ZB / ), 2900 Crystal Drive, Suite 300, Arlington, VA 22202

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for XXXXXXXXXXXXXXXXXXXXXXXXXX, AR20120012973 (PD201100275)

1. I have reviewed the enclosed Department of Defense Physical Disability Board of Review (DoD PDBR) recommendation and record of proceedings pertaining to the subject individual. Under the authority of Title 10, United States Code, section 1554a, I accept the Board’s recommendation to modify the individual’s disability rating to 20% without recharacterization of the individual’s separation. This decision is final.

2. I direct that all the Department of the Army records of the individual concerned be corrected accordingly no later than 120 days from the date of this memorandum.

3. I request that a copy of the corrections and any related correspondence be provided to the individual concerned, counsel (if any), any Members of Congress who have shown interest, and to the Army Review Boards Agency with a copy of this memorandum without enclosures.

 BY ORDER OF THE SECRETARY OF THE ARMY:

Encl XXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA