RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100284 SEPARATION DATE: 20070706

BOARD DATE: 20120621

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (15B20/Aircraft Power Plant Repairer), medically separated for lumbar spondylosis and cervical spondylosis*.* Despite both conservative care and multiple surgeries, the lumbar spondylosis and cervical spondylosis conditions could not be adequately rehabilitated and the CI remained unable to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent U3 and L3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded no other conditions for Physical Evaluation Board (PEB) adjudication. The PEB adjudicated the lumbar spondylosis status post L5-S1 fusion and cervical spondylosis status post C4-7 fusion conditions as unfitting, rated 10% each; with probable application of the US Army Physical Disability Agency (USAPDA) pain policy. The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: “My disability rating with the VA has changed from 20% to 60% and is now at 80% with IU giving me a current rating of 100%.” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

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 conditions “identified but not determined to be unfitting by the PEB.” The ratings for unfitting conditions will be reviewed in all cases. Any conditions or contention not requested in this application, or otherwise outside the Board’s defined scope of review, remain eligible for future consideration by the Army Board for the Correction of Military Records.

RATING COMPARISON:

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| --- | --- |
| **Service PEB – Dated 20070608** | **VA (1 Mo. After Separation) – All Effective Date 20070707** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Lumbar Spondylosis Status Post L5-S1 Fusion; without Neurologic Abnormality | 5241 | 10% | Degenerative Disc Disease, Lumbar Spine Status Post Fusion with Residuals | 5237 | 10%\* | 20070815 |
| Cervical Spondylosis Status Post C4-7 Fusion; without Neurologic Abnormality | 5241 | 10% | Degenerative Disc Disease, Cervical Spine Status Post Surgical Fusion with Residuals | 5237 | 10%\*\* | 20070815 |
| ↓No Additional MEB/PEB Entries↓ | 0% x 4/Not Service-Connected x 4 |
| **Combined: 20%** | **Combined: 20%\*\*\*** |

\*Increased to 20% effective 20090204; temporary increase to 100% effective 20090604 for surgery and then decreased back to 20% effective 20091101. \*\*Increased to 20% effective 20090204.

\*\*\*Increased to 60% effective 20090204 with above changes and with increase of right knee, left knee, and migraine headache from 0% to 10% each and addition of tinnitus at 10%; temporary increase to 100% after lumbar spine surgery effective 20090604; return to 60% effective 20090901; Depression added at 50% effective 20091028. Final combined disability rating of 80% effective 20091101.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that the gravity of his condition and predictable consequences merit consideration for a higher separation rating. The Board wishes to clarify that it is subject to the same laws for disability entitlements as those under which the Disability Evaluation System (DES) operates. 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. However, the Department of Veterans’ Affairs (DVA), operating under a different set of laws (Title 38, United States Code), is empowered to compensate all service-connected conditions and to periodically reevaluate said conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment vary over time. The Board utilizes DVA evidence proximal to separation in arriving at its recommendations; and, DoDI 6040.44 defines a 12-month interval for special consideration to post-separation evidence. The Board’s authority as defined in DoDI 6040.44, however, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Lumbar Spondylosis status post L5-S1 Fusion; without Neurologic Abnormality Condition. There were three goniometric range-of-motion (ROM) evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation; as summarized in the chart below.

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| Thoracolumbar ROM | PT ~8 Months Pre-Separation(20061107 and 20061113) p.123 | MEB ~2 Mos. Pre-Separation(20070430-ROM and 20070525-Exam) | VA C&P ~1 Mo. Post-Separation(20070815) |
| Flexion (90⁰ Normal) | 55° | 65° | 60° (60⁰, 65°, 60°) | 75⁰ |
| Ext (0-30) | 10° | 25° | 15° (15⁰, 15°, 15°) | 30⁰ |
| R Lat Flex (0-30) | 20° | 30° (40°) | 25° (25⁰, 25°, 25°) | 25⁰ |
| L Lat Flex 0-30) | 20° | 30° (35°) | 20° (20⁰, 20°, 25°) | 25⁰ |
| R Rotation (0-30) | 30° (35°) | 30° (35°) | 30° (30⁰, 30°, 30°) | 30⁰ |
| L Rotation (0-30) | 30° | 30° (35°) | 30° (30⁰, 30°, 30°) | 30⁰ |
| Combined (240⁰) | 165° | 210° | 180⁰ | 215⁰ |
| Comment:Fusion Surgery L5-S1 June 2006 | Tightness (muscle spasm) in LS back | ROM limited by pain; slight decrease in lordosis; paraspinal tenderness and muscle spasm; negative straight leg raise and negative cross straight leg raise; sensation intact to light touch, motor 5/5, and normal reflexes | Painful motion without spasm, weakness, or tenderness; motor, sensory, and reflexes intact; normal posture with mild loss of lumbar lordosis and normal gait |
| §4.71a Rating | 20% | 10% | 10% | 10% |

The CI had a long history of both neck and back pain. He injured his neck and upper back while deployed to Iraq in 2003. Although there was no specific injury in 2005, his back pain worsened in 2005. His back pain condition failed to respond to conservative treatment and a magnetic resonance imaging (MRI) in February 2005 documented a herniated disc at L5-S1 and muscle spasm. He had fusion surgery at L5-S1 in June 2006. He initially did better but his pain never fully resolved and he continued to have radicular pain that radiated down both legs in addition to numbness in both legs.

An MEB narrative summary (NARSUM) was completed on 25 May 2007 but the ROM measurements in the chart above were from a physical therapy examination performed on 30 April 2007. The exam included a negative straight leg raise test and a normal neurologic examination. Lumbar spine x-rays showed the consolidating fusion at L5-S1. The CI’s pain was noted to be moderate and frequent but this NARSUM does not specifically state whether this applies to both the back and neck together or to each condition separately. The initial VA Compensation and Pension (C&P) examination was completed on 15 August 2007, approximately a month after the CI separated from service. It documents a similar clinical history and characterized the CI’s back pain as dull and throbbing. His posture was normal with mild loss of lumbar lordosis and he had a normal gait and normal neurological examination.

A VA C&P examination performed in May 2009, documented a much more limited ROM with flexion limited to 35 degrees and X-rays documented multilevel degenerative disc disease (DDD). The VA disability rating for this condition was increased to 20% effective on 4 February 2009, the date of his claim. He required a revision of his spine surgery in June 2009 for a failed fusion. He required 4 months of convalesce; instead of the regular 2 months. Incapacitations overall were limited to the times of convalescence after surgeries. This clearly documents a worsening over time but this occurred almost 2 years after the CI separated and is not relevant for rating at the time of separation.

The PEB completed on 8 June 2007 determined the lumbar spondylosis status post L5-S1 fusion without neurologic abnormality was unfitting and rated it as 5241 Spinal fusion at 10%. The VA also applied a 10% rating for pain-limited ROM. Although the VA used a different code 5237, lumbosacral strain, both are rated the same IAW with the VASRD general rating formula for diseases and injuries of the spine. Ratings are based on the limitation of ROM with or without pain and whether or not the pain radiates. Although this condition did worsen over time, both the MEB NARSUM and the VA C&P examinations near the time of separation support a 10% disability rating. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board concluded that there was insufficient cause to recommend a change in the PEB adjudication for the lumbar spondylosis status post L5-S1 fusion without neurologic abnormality condition.

Radiculopathy. The NARSUM examination noted back pain that radiated into his buttocks and thighs as well as numbness in his toes in no radicular pattern. The initial C&P examination in August 2007 noted the patient reported that his back pain radiated to both legs touching the lateral aspect of his foot, usually occurring once per week and lasting for 60 minutes. It improved with position changes, such as sitting on the opposite buttock to relieve the discomfort. However, the neurological examination was normal and the examiner noted no obvious signs of acute radiculopathy. The VA determined that bilateral lower extremity radiculopathy was not service-connected because no chronic disability or permanent residual was present.

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 with intermittent numbness in this case has no functional implications and no motor impairment was present. As no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment.

Cervical Spondylosis status post C4-7 Fusion; without Neurologic Abnormality. There were three goniometric ROM evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation; as summarized in the chart below.

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| Cervical ROM | PT ~8 Months Pre-Separation(20061107 and 20061113) | MEB ~2 Months Pre-Separation(20070430) | VA C&P ~1 Month Post-Separation(20070815) |
| Flex (45⁰ Normal) | 20° | 30° | 20° (20⁰, 25°, 20°) | 40⁰ |
| Ext (0-45) | 20° | 20° | 35° (35⁰, 35°, 35°) | 40⁰ |
| R Lat Flex (0-45) | 25° | 25° | 20° (20⁰, 20°, 20°) | 35⁰ |
| L Lat Flex (0-45) | 20° | 20° | 20° (20⁰, 20°, 20°) | 35⁰ |
| R Rotation (0-80) | 65° | 65° | 40° (40⁰, 45°, 45°) | 70⁰ |
| L Rotation (0-80) | 60° | 60° | 45° (45⁰, 45°, 45°) | 70⁰ |
| COMBINED (340⁰) | 210⁰ | 220° | 180⁰ | 290⁰ |
| Comment:Fusion SurgeryC5-6 June 2004C4-7 February 2006 | Nine months after surgery | ROM limited by pain; tenderness to palpation and muscle spasms in cervical paraspinal muscles; motor 5/5, sensory intact to light touch, normal reflexes; pain 7/10 with all movements | Painful motion without spasm, weakness, or tenderness; motor, sensory, and reflexes intact; |
| §4.71a Rating | 20% | 20% | 10% |

The CI had a long history of both neck and back pain. He injured his neck and upper back while deployed to Iraq in 2003. Initially cervical stenosis was noted. He failed to respond to conservative treatment and underwent cervical spinal fusion at C5-6 in June 2004. However he continued to have pain along with radiating pain and numbness in both upper extremities. An August 2005 MRI noted loss of disc space between C4 and C5 and between C6 and C7 as well as the surgical changes at C5-6. The CI underwent a second cervical spine surgery in February 2006 when he had multilevel fusion from C4 to C7.

An MEB NARSUM was completed on 25 May 2007; but, the ROM measurements in the chart above were from a physical therapy examination performed on 30 April 2007. The exam noted cervical paraspinal muscle spasm and tenderness as well as significantly limited ROM. As would be expected with a multilevel cervical spine fusion, the rotational ROMs were much larger than those for flexion or extension. It also documented a normal neurologic exam. The CI’s pain was noted to be moderate and frequent but this NARSUM does not specifically state whether this applies to both the back and neck together or to each condition separately. The initial VA C&P examination was completed 15 August 2007, approximately a month after the CI separated from service. It documents a similar clinical history and characterized the CI’s neck pain as sharp and stabbing and rated at 7/10. Incapacitations were noted to be limited to the times of convalescence after surgeries. This examination documents significantly less limited ROMs in all planes or movement.

In August 2009, the CI required a third cervical spine surgery as the fusion at C4-5 had pseudoarthrosis. At this time, he was already on 100% disability from the VA subsequent to the lumbosacral spine surgery that occurred in June 2009. He remained at 100% for 4 months instead of the normal 2 months. However, this occurred more than 2 years after the CI separated from service and is not relevant for disability rating at the time of separation.

The PEB completed on 8 June 2007, determined the cervical spondylosis status post C4-7 fusion without neurologic abnormality was unfitting and rated it as code 5241, spinal fusion at 10%. The VA also applied a 10% rating for pain-limited ROM. Although the VA used a different code 5237, cervical strain, both are rated IAW with the VASRD general rating formula for diseases and injuries of the spine. Ratings are based on the limitation of ROM with or without pain and whether or not the pain radiates.

The ROM measurements of the MEB NARSUM and previous measurements available in the record for review document cervical spine flexion of more than 15 degrees but not more than 30 degrees and this supports a 20% rating. The VA C&P exam performed in August 2007 appears different from other exams both before and after this examination. Also, after having steel plates applied from C4 to C7, it is unlikely that the CI would ever be physically capable of the near normal cervical spine flexion of 40 degrees. While movement in this plane is mostly from the upper cervical spine, it is unlikely that this exam was correctly performed. Additionally, no other exam documents flexion anywhere near this great of a range. The Board determined this VA C&P examination has less probative value based on medical implausibility*.* After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 20% for the cervical spondylosis status post C4-7 fusion; without neurologic abnormality condition.

Radiculopathy. The NARSUM examination noted pain referred into his shoulders and arms as well as numbness in his fingers in no radicular pattern. The initial C&P examination in August 2007 noted the patient reported that his neck pain radiated to both arms in an ulnar pattern. However, the neurological examination was normal and the examiner noted no obvious signs of acute radiculopathy. The VA determined that bilateral upper extremity radiculopathy was not service-connected because no chronic disability or permanent residual was present.

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 with intermittent numbness in this case has no functional implications and no motor impairment was present. As no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment.

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 conditions was probably operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the lumbar spondylosis status post L5-S1 fusion; without neurologic abnormality condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the cervical spondylosis status post C4-7 Fusion; without neurologic abnormality condition, the Board unanimously recommends a disability rating of 20%, coded 5241 IAW VASRD §4.71a. In the matter of bilateral upper and lower extremity radiculopathies, the Board unanimously agrees that it cannot recommend any finding of unfit for additional rating at separation. 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; 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** |
| Lumbar Spondylosis Status Post L5-S1 Fusion; without Neurologic Abnormality | 5241 | 10% |
| Cervical Spondylosis Status Post C4-7 Fusion; without Neurologic Abnormality | 5241 | 20% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110413, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 XXXXXXXXXXXXXXXX

 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 XXXXXXXXXXXXXXXXXXXXXXX, AR20120012342 (PD201100284)

1. Under the authority of Title 10, United States Code, section 1554(a), I approve the enclosed recommendation of the Department of Defense Physical Disability Board of Review (DoD PDBR) pertaining to the individual named in the subject line above to recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 30% effective the date of the individual’s original medical separation for disability with severance pay.

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:

 a. Providing a correction to the individual’s separation document showing that the individual was separated by reason of permanent disability retirement effective the date of the original medical separation for disability with severance pay.

 b. Providing orders showing that the individual was retired with permanent disability effective the date of the original medical separation for disability with severance pay.

 c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, and payment of permanent retired pay at 30% effective the date of the original medical separation for disability with severance pay.

 d. Affording the individual the opportunity to elect Survivor Benefit Plan (SBP) and medical TRICARE retiree options.

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 XXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA