RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1100386 SEPARATION DATE: 20040824

BOARD DATE: 20120305

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a Reserve member, SSG/E-6 (92A, Supply/Logistics Specialist), medically separated for a lumbar spine condition. The CI first reported low back pain in 2000; and, re-injured her back in 2001 with a duty-related strain injury. After a rigorous training exercise in 2003, she reported a recurrence of low back pain with radicular radiation. She was subsequently diagnosed with non-surgical disc disease; and did not improve adequately with conservative management to perform within her Military Occupational Specialty (MOS) or meet physical fitness standards. The MEB further addressed numerous other conditions as listed below. She was issued a permanent L3/S3 profile and underwent a Medical Evaluation Board (MEB). Low back pain, pes planus with plantar fasciitis, posttraumatic stress disorder (PTSD), and depression were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable conditions IAW AR 40-501. Four other conditions, as identified in the rating chart below, were forwarded by the MEB as medically acceptable conditions. The PEB adjudicated the lumbar condition as unfitting, rated 10%, with presumptive application of the US Army Physical Disability Agency (USAPDA) pain policy. The remaining conditions were adjudicated as not unfitting. The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: “My DA Form 3947, Sep 83 has 8 injuries, diseases or illnesses listed that the military took responsibility for either incurring while entitled to base pay or permanently aggravating but I was rated on only my back, although all these should have been rated collectively. At the time of discharge from Ft Knox, KY on Aug. 24, 2004, I had a VA disability rating of 70% which is now 90% and 100% based on unemployability which I received shortly after my discharge. I also have a 20 yr letter but my type of separation on my DD214 is listed as discharge, not medical.” The CI further submitted a handwritten letter which further elaborates upon the additionally contended conditions adjudicated by PEB (included in the chart below).

RATING COMPARISON:

 \*Increased to 10% effective 20050718 based on exam of 20050820 (12 months post-separation).

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| **Service PEB – Dated 20040716** | **VA (2 Mo. Post-Separation) – All Effective Date 20040826** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5299-5237 | 10% | Chronic LBP w/ Bulging Discs | 5237 | 20% | 20031218 |
| Depression | Not Unfitting | Adjustment Disorder … | 9434 | 30% | 20031218 |
| PTSD | Not Unfitting | No VA Entry | 20031218 |
| Pes Planus/ Plantar Fasciitis | Not Unfitting | Pes Planus/ Plantar Fasciitis | 5276 | 0%\* | 20031218 |
| Neck Pain | Not Unfitting | Arthritis Cervical Spine | 5010-5242 | 20% | 20031218 |
| Polyarthralgias | Not Unfitting | No VA Entry | 20031218 |
| Lupus | Not Unfitting | NSC | 20031218 |
| Fibromyalgia | Not Unfitting | NSC | 20031218 |
| ↓No Additional MEB/PEB Entries↓ | Hysterectomy | 7618 | 30% | 20031218 |
| 0% x 1/Not Service Connected x 4 | 20031218 |
| **Combined: 10%** | **Combined: 70%** |

ANALYSIS SUMMARY: The Board acknowledges the CI’s contention that suggests service ratings should have been conferred for other conditions documented at the time of separation. The Board wishes to clarify that it is subject to the same laws for service 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 6044.40, 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. The Board further wishes to clarify that it does not have jurisdiction over the issues related by the CI regarding her length of service and type of discharge. Such matters are under the jurisdiction of the Army Board for Corrections of Military Records (ABCMR), and remain eligible for appeal to same should the CI elect to seek specific remedy in that regard.

Lumbar Spine Condition. The CI first complained of a low back injury in 2000, which was further exacerbated while moving generators in 2001; and, significantly exacerbated during live fire training exercises associated with a 2003 mobilization. At this point she reported weakness and pain throughout her lumbar spine with bilateral radiation down her legs. Magnetic resonance imaging (MRI), eight months prior to separation revealed bulging discs at L4-L5 and L5-S1 with some associated neuroforaminal narrowing. She was not considered a surgical candidate; and, failed conservative measures with epidural steroid injections, physical therapy and medications. A pre-separation nerve conduction study (EMG) performed on the eve of separation suggested a left L5-S1 radiculopathy. A neurology exam three months after separation noted that the CI’s condition was “essentially negative for a surgical etiology. Her motor exam is normal and her sensory exam appears to be inconsistent. The etiology of her low back pain is not clear.” A repeat MRI (five months after separation) was normal, as was a repeat EMG (six months after separation). There were two goniometric range-of-motion (ROM) evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation.

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| Thoracolumbar ROM | VA C&P ~9 Mo. Pre-Sep | MEB ~7 Mo. Pre-Sep |
| Flexion (90⁰ Normal) | 30⁰ | 35⁰ |
| Combined (240⁰) | 210⁰ | 200⁰ |
| Comments | Pain on forward flexion only. | Normal gait/posture. |
| §4.71a Rating | 40% | 20% |

At the MEB exam, the CI reported occasional sharp radiating pain in her low back sometimes with tingling in her left thigh. On examination, the MEB physician noted a normal posture and gait, no tenderness or other positive physical findings, and normal neurologic findings. The ROM recorded in the exam was only limited in forward flexion, and was not noted to be limited by pain. The MEB exam followed a pre-separation VA Compensation and Pension (C&P) exam performed two months earlier; at which the CI had related significantly more severe pain with bilateral radiation, and more significant physical limitations. Similar benign physical findings and normal neurologic testing were documented by the VA examiner, however; and, the ROM findings were similar. That exam also measured flexion disproportionally limited compared to the other planes of motion; but, with a 5⁰ difference in flexion which would be pivotal to §4.71a rating. The VA examiner documented pain only with flexion, and no increased pain or degradation of ROM with repetition (no positive DeLuca criteria). The Board deliberated its probative value assignment to the two exams, with their critical variance in measured flexion. There were no timely outpatient exams reflecting gross ROM observations for corroborating the formal goniometric exams. The Board considered however that the more proximal MEB exam was consistent with the clear trend in improvement reflected by the progressive objective evaluations described earlier. Considering the remaining time to separation from both exams with presumptive significant improvement up to the day of separation, members agreed that the MEB examination was the logical choice for dominant probative value. It is of interest that the VA rating decision quoted the MEB ROM’s, although taking note of negative DeLuca findings per the C&P, in its 20% determination.

Both the MEB and VA rated the lumbar spine condition under VASRD code 5237 (lumbosacral strain), although the MEB relied on the USAPDA pain policy for its 10% determination. The Board considered whether there was an associated ratable neuropathy, but the lack of any demonstrable motor weakness left no support for additional rating on that basis. Likewise there was no documentation of incapacitating episodes as a route to higher rating. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 20% for the lumbar spine condition. With the absence of degenerative changes or disc pathology on the more proximate MRI, the Board is in agreement with the 5237 coding assignment.

Pes Planus with Plantar Fasciitis (Adjudicated and Contended). The CI first experienced left foot pain associated with a plantar wart in 1997; and, was diagnosed with duty-related plantar fasciitis in 2002. In 2003 she was treated for pes planus and plantar fasciitis with orthotic devices and ankle supports, but stopped using them since they provided no relief. At the MEB podiatry exam, the CI reported moderate, frequent pain. The examiner noted low arches bilaterally with good strength and reflexes. Radiographs demonstrated low calcaneal inclinations. The examiner stated, “the service member finds it very difficult to run, march, jump or wear boots. She has exhausted all conservative means of treatment, and surgical treatment is not indicated at this time.” At the VA C&P exam prior to separation, the CI reported sharp pain in her feet when walking (6-8 of 10). The VA examiner noted non-tender bilateral flatfeet without pain on motion, and normal gait and posture. Although the MEB podiatrist did not render a direct opinion regarding retention standards, the MEB’s DA Form 3947 (submitted by an orthopedist) listed the foot condition as failing AR 40-501 retention standards. The L3 profile encompassed the foot condition and prescribed non-regulation foot gear; the other profile restrictions would have been equally applicable to the back condition. The commander’s statement specified only the spine condition. Although there was an individual sick slip in April 2004 which included right foot pain among other multiple other orthopedic complaints, there was no evidence in the service file linking the foot condition to MOS-specific limitations. It is also noted that the foot condition did not achieve a compensable rating by the VA at separation

The Board’s main charge in respect to this condition is an assessment of the appropriateness of the PEB’s fitness adjudication. The Board’s threshold for countering DES fitness determinations is higher than the VASRD §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard. Based on the evidence just described, the Board deliberated whether the bilateral foot condition interfered with duty performance to a degree that made the CI unfit for duty at the time of separation. The Board considered the MEB podiatrist’s opinion (as quoted above) implicating the foot condition as interfering with essential soldiering requirements; as well as the profile restriction regarding regulation footwear which would preclude duty outside a garrison environment. Referencing the CI’s spine condition, the commander stated, “the MOS requires the soldier to lift heavy equipment, stand and sit extended periods of time. Her condition further precludes her from performing critical field duties such as individual maintenance.” These requirements were also not compatible with the limitations imposed by the foot condition, as opined by the MEB podiatrist and stated on the profile. After due deliberation, the Board agreed that the preponderance of the evidence with regard to the functional impairment of the foot condition favors its recommendation as additionally unfitting and eligible for service rating.

The Board, therefore, directs attention to its rating recommendation for the condition. The Board first considered the VA’s coding and 0% rating under 5276 (pes planus, acquired). A 0% rating under 5276 is for “mild: symptoms relieved by built-up shoe or arch support;” and, that is not a fair characterization of the severity in evidence. The Board, however, did not believe that this case met the quite specific criteria cited in VASRD §4.57 (static foot deformities) for acquired (vs. congenital) pes planus. The pes planus condition itself was not service-aggravated, but rather the painful complication of plantar fasciitis was the acquired and unfitting condition. The Board considered separate analogous ratings under 5299-5284(foot injuries, other) or 5399-5310 (muscle code for plantar group); but, all members agreed that it was overly speculative to concede that each foot could be considered individually unfitting; and, that a combined code was indicated. Deliberations settled on application of the analogous code 5099-5024 (tenosynovitis, rated per 5003 criteria), which would yield a 10% rating for two major joints. The Board agreed, therefore, that the preponderance of the evidence supports a recommendation for adding pes planus with plantar fasciitis as an additionally unfitting condition rated 10% under that bilateral code.

Other PEB (and Contended) Conditions. The two additional conditions forwarded as medically unacceptable by the MEB, but adjudicated as not unfitting by the PEB, were depression and PTSD. The CI was first seen for mental health in November 2003. She reported significant stress and depression related to her medical conditions and the MEB process. She additionally reported PTSD symptoms related to being sexually abused by her stepfather as a child. The MEB psychiatric addendum noted anger and frustration with the chain of command and MEB process, along with insomnia, as the prominent symptoms. The CI was prescribed an antidepressant and sleep medication, and outpatient mental health notes documented sporadic improvement and labile engagement with psychotherapy. The mental status examination was normal except for an anxious mood, and there was no cognitive impairment. The mental health conditions were not implicated in the commander’s statement, which praised the CI’s performance outside the realm of her physical impairment. There was an S3 profile in effect at separation, although specific psychiatric limitations were not specified. Carrying and firing of assigned weapon was proscribed; but, it is unclear if this was on an orthopedic or psychiatric basis; and, weapons engagement is not intrinsic to the MOS under consideration. In assessing the PEB’s fitness adjudication for the psychiatric conditions, the Board recognizes that service fitness determinations are performance based. There is no evidence associating psychiatric disability, divested from the concurrent physical limitations and painful medical conditions, with impaired performance within the requirements of the CI’s MOS. The Board members concluded therefore that there was insufficient cause to recommend a change in the PEB fitness adjudication for the depression and PTSD conditions.

The remaining conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were neck pain, polyarthralgias, lupus, and fibromyalgia. None of these conditions were noted as failing retention standards; none carried attached profiles; and, none were implicated in the commander’s statement. All were reviewed by the action officer and considered by the Board. There was no indication from the record that any of these conditions significantly interfered with satisfactory duty performance. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change in the PEB fitness adjudication for any of the above listed conditions.

Remaining Conditions. Other conditions identified in the DES file were history of hysterectomy, sinusitis, and a persistent rash. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were significantly clinically or occupationally active during the MEB period; none carried attached profiles; and, none were implicated in the commander’s statement. These conditions were reviewed by the action officer and considered by the Board. It was determined that none could be argued as unfitting and subject to separation rating. The Board therefore has no reasonable basis for recommending any additional unfitting conditions for separation rating.

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 lumbar spine condition 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 5237 IAW VASRD §4.71a. In the matter of the pes planus with plantar fasciitis condition, the Board unanimously recommends that it be added as an additionally unfitting condition for separation rating; coded 5099-5020 and rated 10% IAW VASRD §4.71a. In the matter of the depression and PTSD, the Board unanimously agrees that it cannot recommend any finding of unfit for additional rating at separation. In the matter of the contended neck pain, polyarthralgias, lupus, and fibromyalgia conditions; the Board unanimously recommends no change from the PEB adjudications as not unfitting. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as additionally unfitting for rating at separation.

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 her prior medical separation:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Low Back Pain | 5237 | 20% |
| Pes Planus with Plantar Fasciitis | 5099-5020 | 10% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110505, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans Affairs Treatment Record

 President

 Physical Disability Board of Review

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

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

 Deputy Assistant Secretary

 (Army Review Boards)