RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100433 SEPARATION DATE: 20061013

BOARD DATE: 20120418

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a National Guard member, SPC/E-4 (31R, Multichannel Switch Operator), medically separated for a lumbar spine condition. The CI was mobilized in 2003 and injured his back in November 2004 participating in unit sports (football). He manifested radicular symptoms and was diagnosed with an annular tear and disc protrusion at L4-5. He failed a trial of conservative management and underwent a fusion and laminectomy procedure in February 2006. His radiculopathy resolved, but pain and functional limitations persisted. His spine could not be adequately rehabilitated to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was thus issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The lumbar spine condition, characterized as “chronic back pain, status post L4-5 laminectomy and fusion, without significant neurologic abnormality” was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions were submitted by the MEB. The PEB adjudicated the lumbar spine condition as unfitting, rated 10%, citing criteria of the US Army Physical Disability Agency (USAPDA) pain policy. The CI appealed to a Formal PEB (FPEB), which affirmed the PEB findings; and, was thus medically separated with a 10% service disability rating.

CI CONTENTION: “My back injury resulted in titanium rods being put in for stabilization. I feel my rating is equivalent to someone with minor back muscle spasms and not a severe injury. … Subsequently, I was told to accept whatever was offered to me as a disability rating because I could be discharged with no rating even though the injury occurred during active duty hours. I was not given the opportunity to consult with my family or seek legal representation to determine the fairness of the rating. … I am not able to do many activities that I used to be able to do with ease and my medications limit my ability to work in any occupation I choose. … I feel my injury should have resulted in a medical retirement from the Army and not a 10% lump sum payout. Thank you for your consideration in my case, I am appreciative of this opportunity.” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

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| --- | --- |
| **Service FPEB – Dated 20061013** | **VA (3 Mo. Post-Separation) – All Effective Date 20061014** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Back Pain S/P Fusion and Laminectomy  | 5241 | 10% | Laminectomy and Fusion of L4-5 | 5243 | 20% | 20070111 |
| ↓No Additional MEB/PEB Entries↓ | DJD, R Shoulder | 5010 | 10% | 20070111 |
| Tinnitus, L Ear | 6260 | 10% | 20070111 |
| 0% X 2 / Not Service-Connected x 3 | 20070111 |
| **Combined: 10%** | **Combined: 40%** |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the gravity of his condition and the significant impairment with which his service-connected condition continues to burden him. It is a fact, however, that the Disability Evaluation System (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. This role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA). The DVA, operating under a different set of laws (Title 38, United States Code), is empowered to compensate 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 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 acknowledges the CI’s assertions that he was denied the opportunity for outside consultation or to seek legal review of his service rating; but, must note for the record that it has neither the jurisdiction nor authority to scrutinize or render opinions in reference to alleged service improprieties of this nature. The Board’s role is confined to the review of medical records and all evidence at hand to assess the fairness of service rating and fitness determinations at separation, as elaborated above.

Lumbar Spine Condition. After his 2004 sports injury, the CI was diagnosed with an annular tear and disc protrusion at L4-5. This was followed by a protracted trial of conservative treatment which included epidural steroid injections; but, he ultimately required surgical intervention. The 2006 laminectomy/fusion resulted in resolution of the radiculopathy, but pain and functional limitations persisted. The narrative summary (NARSUM) reflected the CI’s symptoms 4 months after surgery; and, reported constant pain rated 5/10 with aggravations to 7/10 with driving, prolonged sitting or standing, bending and lifting. 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; as summarized in the chart below.

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| Thoracolumbar ROM | MEB ~4 Mo. Pre-Sep(4 Mo. Post-Op) | VA C&P ~3 Mo. Post-Sep(11 Mo. Post-Op) |
| Flexion (90⁰ Normal) | 20⁰ | 45⁰ |
| Combined (240⁰) | 175⁰ | 175⁰ |
| Comments | Flexion stopped 2⁰ to pain. Normal gait/contour. | + Tenderness; + painful motion. No spasm; normal gait/contour. |
| §4.71a Rating | 40% | 20% |

The MEB examiner, who recorded the ROMs charted above from physical therapy (PT) 9 days earlier, noted tenderness over the well-healed surgical site. The CI had just started PT a month earlier following his surgery, and was still in a brace. He demonstrated pain to light touch, but not with axial load, straight leg raise or “simulated rotation.” Neurologic testing was normal with 5/5 motor strength and symmetric reflexes. At the VA Compensation and Pension (C&P) exam after separation, the CI reported “persistent dull pain” in the lower lumbar area. Pain was aggravated by prolonged sitting or standing, and bending; and, he remained free of radicular symptoms (except “rare” numbness of the left shin area). The VA examiner reported, “he no longer wears a back brace and walks with no assistive devices.” At that time the CI was a full time student. The VA examiner’s ROM measurements and physical findings are charted above, and the neurologic findings remained normal. There was no DeLuca degradation of ROM with repetitions.

The Board directs attention to its rating recommendation based on the above evidence. All members agreed that the VA evidence was most probative since it was closest to separation; but, more importantly, was performed after a more adequate recovery period. The MEB’s ROM evaluation was fairly premature; given that the CI had only recently begun PT and rehabilitation, and was still in a post-op brace. Also the discontinuation of flexion at the pain threshold (as noted in the ROM chart) does not meet an acceptable standard for a ratable measurement. The PEB and VA applied different VASRD codes which did not affect rating. The PEB’s 10% rating was compliant with the USAPDA pain policy, but was not consistent with the VASRD §4.71a general rating formula for the spine. Based on the distinctly more probative ROM evaluation performed by the VA proximate to separation, the appropriate §4.71a rating is 20% as conferred by the VA. There was no evidence of ratable peripheral nerve impairment or documentation of incapacitating episodes in this case which would provide for additional or higher rating. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a service disability rating of 20% for the lumbar spine condition. The Board concurred with the PEB’s code 5241 (spinal fusion).

Remaining Conditions. The Board routinely screens the service file and VA evidence proximate to separation for all conditions present at separation. These conditions are reviewed by the action officer and Board members for fitness implications and eligibility for additional service rating. Particularly scrutinized are conditions which were contended in service; conditions which were clinically acute during MEB proceedings; conditions which were referenced in the commander’s statement as impairing performance; conditions which were profiled or imposed duty restrictions; or, conditions which were judged by a physician to fail retention standards. No unaddressed condition was identified in this case which was judged by the Board to have significantly interfered with satisfactory duty performance; and, therefore no additional recommendations are forthcoming.

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 condition was adjudicated independently of that policy by the Board. In the matter of the lumbar spine condition, the Board unanimously recommends a service disability rating of 20%, coded 5241 IAW VASRD §4.71a. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as unfitting for additional service disability rating.

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** |
| Surgical Residuals, Fusion/Laminectomy of L4-5 | 5241 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110512, 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 XXXXXXXXXXX, AR20120008659 (PD201100433)

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 XXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA