RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100559 SEPARATION DATE: 20060120

BOARD DATE: 20120430

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a mobilized Reserve SPC/E-4 (63B, Light Wheeled Vehicle Mechanic) medically separated for a lumbar spine condition*.* He first injured his back during training after a 2003 mobilization, and reinjured it that same year during a subsequent deployment to Iraq. He was ultimately diagnosed with a herniated disc, and underwent surgical intervention in 2005. His back could not be adequately rehabilitated to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent L3 profile and referred to a Medical Evaluation Board (MEB). The lumbar spine condition 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 condition as unfitting, rated 10%, citing criteria of the US Army Physical Disability Agency (USAPDA) pain policy. The CI made no appeals, and was medically separated with that service disability rating.

CI CONTENTION: “Because of my service connected disability, I have lost my civilian job as a police officer, I cannot stand for long periods of time because of pain that I have in my lower back and right leg. This disability has had an impact on my life considering I was in good shape before I was deployed and past [sic] all my civilian annual physicals for my job. Since being discharged, my disability has gotten worse over time. … I officially lost my job in December of2010, I lost all of my benefits from my job, therefore I cannot see my primary doctor about my leg and back, I cannot afford to pay the out of pocket premiums, My family do not have any medical insurance, My wife and I was turned down for medicaid, and I was turned down for SSI. As of right now, I still have continuous pain in my lower back and numbness tingling and pain in my right leg. I go to VA now for a doctor, but my wife and kids are still without medical benefits.” He mentions no additionally contended conditions.

RATING COMPARISON:

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| --- | --- |
| **Service PEB – Dated 20051209** | **VA (21 Mo. Pre-Separation\*) – All Effective Date 20040314\*** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5299-5237 | 10% | Intervertebral Disc w/ Neuralgia | 5243 | 30% | 20040414 |
| No Additional MEB/PEB Entries | Hypertension | 7101 | 10% | 20040414 |
| R Lower Leg Condition | 5299-5260 | NSC | 20040414 |
| **Combined: 10%** | **Combined: 40%** |

\* The CI was scheduled for separation and had received a DD-214 dating separation to 13 March 2004, which served as the basis for the above VA ratings and effective date. The CI was subsequently extended on active duty for medical care and was not separated until 20 January 2006. The orders and DD-214 were amended, but VA records remain uncorrected. The next VA rating examination was not performed until 7 October 2009 (45 months after separation); thus the ratings noted above are derived from the VA evidence most proximate to the date of separation under adjudication.

ANALYSIS SUMMARY: The Board wishes to clarify that the scope of its review as defined in DoDI 6040.44 (4.a) 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.” Any condition which is not requested in this application or otherwise within the Board’s defined scope of review remains eligible for future consideration by the Army Board for Correction of Military Records (ABCMR).

The Board notes that the CI’s application cites a separation date of 20 February 2004; although, as elaborated in the footnote to the rating comparison chart, the official date of separation and date of the PEB’s adjudication are confirmed as noted above. The Board’s rating recommendation must therefore reflect the disability related to the lumbar spine condition as it existed on 20 January 2006. The Board’s operative instruction, DoDI 6040.44, specifies a 12-month interval for special consideration to VA findings; and, the cited VA evidence preceded the Board’s adjudication date by 21 months. Furthermore the interval between the Department of Veterans’ Affairs (DVA) rating and separation encompassed surgical intervention, rendering the probative value of the DVA evidence even less applicable to the Board’s recommendation. The Board also acknowledges the sentiment expressed in the CI’s application regarding the worsening severity and significant impact that his service-incurred condition has had on his current earning ability and quality of life. 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. 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. That role and authority is granted by Congress to the DVA, operating under a different set of laws (Title 38, United States Code). The Board’s authority, as previously noted, resides in evaluating the fairness of service rating determinations for the disability existing at the time of separation.

Lumbar Spine Condition. The CI was mobilized in February 2003 and injured his back in March, when he suffered a 10 foot fall negotiating an obstacle course. He improved adequately to deploy to Iraq, but re-injured his back in June 2003 when his vehicle evasively swerved during an ambush. The consequent pain, now with right leg radiation, required medical evacuation. His evaluation after redeployment included imaging confirmation of an L5/S1 disc herniation with compression of the right sciatic nerve root. He underwent a protracted trial of conservative management which included epidural steroid injections, but ultimately required an L5/S1 discectomy in January 2005. Post-operative notes document a favorable response, with initial resolution of radicular pain; although, some residual pain (rated 1-2 of 10) in the right buttock had returned at the time of the narrative summary (NARSUM). An electromyelogram was normal. 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 | VA ~21 Mo. Pre-Sep | PT ~8 Mo. Pre-Sep  | MEB ~4 Mo. Pre-Sep |
| Flexion (90⁰ Normal) | 45⁰ | 50⁰ | 50⁰ |
| Combined (240⁰) | 155⁰ | Incomplete | 165⁰ |
| Comment | Painful motion; “guarded” gait. | Extension & lateral flexions were ~80% of normal.  | Painful motion.  |
| §4.71a Rating | 20%\* | 20% | 20% |

 \*VA derived its 30% rating by subsuming an additional 10% for active neuropathy.

The NARSUM recorded an overall pain level at 2/10, “increasing to 5 at its worst.” The CI was prescribed non-narcotic analgesics; and, the examiner stated that he could “walk around a track carrying 10 lbs. of weight for 20-30 minutes,” “do crunches,” and “do push-ups, but he says it hurts his back.” Physical findings were relevant for a normal gait without assistive device and a normal neurologic exam of the lower extremities.

The Board directs attention to its rating recommendation based on the above evidence. The PEB’s 10% rating was supported by the USAPDA pain policy, but was not consistent with the VASRD §4.71a general rating formula for the spine. All ROM evidence, including the marginally probative VA evaluation during the more symptomatic period, is consistent with a 20% rating IAW §4.71a. 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 action officer recommended, and the Board concurred with, the code 5243 (intervertebral disc syndrome) for its clinical compatibility.

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 5243 IAW VASRD §4.71a. 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** |
| Surgical Residuals, Lumbar Disc Disease | 5243 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110723, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 XXXXXXXXXXXXX

 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 XXXXXXXXXXXXXX, AR20120008658 (PD201100559)

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