RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1100661 SEPARATION DATE: 20070507

BOARD DATE: 20120319

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (92A, Logistical Supply Supervisor) medically separated for a lumbar spine condition. The CI first experienced low back pain while deployed to Iraq in 2004. The pain, with left leg radicular symptoms, persisted after redeployment. He was subsequently diagnosed with intervertebral disc syndrome, and underwent an L5/S1 microdiscectomy in 2006. Although the radiculopathy responded to surgery, the lumbar pain persisted. The back condition 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 low back pain with radiculopathy status-post discectomy for a herniated L5-S1 intervertebral disc” was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions were submitted by the MEB; but, other conditions evidenced in the Disability Evaluation System (DES) file are addressed below. 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 made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “I feel that the rating was unfit simply because I was injured while on active duty in the U.S. Army. This injury was not caused by outside activities but results of constant training; much of which was not properly executed by the chain of command. 14 yrs of active duty time that was almost in a way rendered meaningless. Although this surgery was not a super major surgery, I still had my lower back opened up to have something removed. I will never be the same, and to the day I wake up with a stiff and sore back. I have always felt that 10% for a back surgery was well below what the Army should give. Soldiers who have lesser injuries have received a higher rating from the Army. Something has to be done.” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

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| --- | --- |
| **Service PEB – Dated 20070305** | **VA (3 Mo. Post-Separation) – All Effective Date 20070508** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic LBP w/ History of Radiculopathy, Left Leg | 5299-5243 | 10% | Intervertebral Disc Syndrome | 5243 | 20% | 20070419 |
| Sensory Deficit, Left Foot | 8721 | 10% | 20070419 |
|  | Mood Disorder | 9435 | 10% | 20070524 |
| 0% x 1 / Not Service Connected x 1 | 20070419 |
| **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 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 VA 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 his back condition resulted, at least partly, from poorly executed training activities imposed by the service; but, must note for the record that it has neither the jurisdiction nor authority to scrutinize or render opinions in reference to such allegations. 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. The onset of the CI’s back pain was attributed to the load bearing requirements of full combat gear during deployment. He was treated conservatively in theatre and completed the full tour. Persistent pain and radicular symptoms after redeployment prompted an MRI (magnetic resonance imaging) in September 2005, revealing degenerative disc disease with a desiccated disc and posterior disc herniation at L5/S1. After a failed trial of epidural steroid injections and other conservative modalities, a left microdiscectomy and foraminotomy was performed in July 2006. The surgery relieved much of the CI’s radicular pain and reported left leg weakness, although the radicular sensory symptoms persisted; and, the lumbar pain failed to significantly resolve. An electromyelogram (EMG) of January 2007 demonstrated “a residual left S1 radiculopathy.” 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 ~6 Mo. Pre-Sep | VA C&P ~3 Wk. Pre-Sep |
| Flexion (90⁰ Normal) | 40⁰ | 70⁰/60⁰\* |
| Combined (240⁰) | 155⁰ | 220⁰ |
| Comments | Pain with all motion. | ↓flexion by 10⁰ w/ repetition. |
| §4.71a Rating | 20% | 20%\* |

 \* With DeLuca deduction for flexion.

The MEB’s ROM measurements were performed by physical therapy 5 months after surgery; and, it could be reasonably concluded that residual post-operative pain still contributed significantly to limitation of motion. To the MEB examiner (4 months prior to separation), the CI reported constant tightness throughout the low back and episodes of sharp pain (rated 4/10). The pain was aggravated by wearing body armor, exercise, standing for more than 10 minutes, bending, and impact activities. The physical exam noted mild tenderness and decreased sensation on the dorsum of the left foot. At the VA Compensation & Pension (C&P) exam prior to separation, the CI continued to report constant pain; but, it was noted that he could function without medication. He also stated that his back pain incapacitated him for 14 days during the prior year. On physical exam, the VA physician noted normal gait and posture, mild tenderness, and no evidence of radiating pain. Sensory findings equivalent to those of the MEB examiner were noted; motor and reflex exams were normal. The CI demonstrated a significantly improved ROM, but pain was still noted across the full range in all planes. A 10⁰ degradation of flexion with repetitions was specified as charted above.

The Board directs attention to its rating recommendation based on the above evidence. Regarding probative value assignment, all members agreed that the VA evaluation on the eve of separation and after full surgical recovery was more reflective of the ratable disability. The PEB’s 10% rating, derived from the USAPDA pain policy, was not compliant with VASRD §4.71a given the MEB evidence. The PEB and VA chose the same coding option, 5243 (intervertebral disc syndrome), which was appropriate to the diagnosis. This code may be rated under the §4.71a general spine formula or under the formula for rating based on incapacitating episodes. The 14 days of incapacitating episodes quoted by the VA examiner just meets the threshold for a 20% rating under that formula. Although the requisite “bed rest prescribed by a physician and treatment by a physician” specified in the formula was not specifically documented in the available evidence, the rating interval would have encompassed the full post-op recovery period; and, the 14 days could be reasonably conceded. The VA rating decision; however, premised its 20% determination on the DeLuca modified flexion of 60⁰ (the baseline flexion of 70⁰ would have yielded a 10% rating). After deliberation the Board consensus was that the well documented DeLuca criterion, the supportable rating under the incapacitating episodes formula, and the residual probative value of the MEB’s ROM evidence all swayed the rating recommendation to 20%.

The Board considered whether additional service rating could be recommended under a peripheral nerve code, as conferred by the VA, for the residual sciatic radiculopathy at separation. Firm Board precedent requires a functional impairment tied to fitness to support a recommendation for addition of a peripheral nerve rating to service disability in spine cases. The pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a. The sensory component in this case has no functional implications; and, there was no objective motor impairment. Since no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional service rating based on peripheral nerve impairment. 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 under code 5243.

Remaining Conditions. Other conditions identified in the DES file were mild depression, knee discomfort, and high blood pressure. 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 condition was adjudicated independently of that policy by the Board. In the matter of the lumbar spine condition, the Board by a vote of 2:1 recommends a rating of 20% coded 5243 IAW VASRD §4.71a. The single voter for dissent (who recommended no change from the PEB’s 10% rating under 5243) did not elect to submit a minority opinion. 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** |
| Lumbar Disc Disease | 5243 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110809, 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. 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

 Deputy Assistant Secretary

 (Army Review Boards)