RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100690 SEPARATION DATE: 20030508

BOARD DATE: 20120418

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SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (67R, AH-64 Attack Helicopter Repairer), medically separated for chronic low back pain (LBP). The CI suffered back pain since 1999, without specific history of trauma or injury. The CI underwent an L5S1 transforaminal lumbar interbody fusion in January 2002. The CI did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards and he was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). The MEB forwarded “chronic LBP (moderate/constant) non-radicular, uncomplicated and grade I isthmic L5-S1 transforaminal lumbar antibody fusion, healing well” on a DA Form 3947 to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions appeared on the MEB’s submission. Other conditions included in the Disability Evaluation System (DES) packet will be discussed below. The PEB adjudicated the “chronic LBP” condition as unfitting, rated 10% with likely application of the US Army Physical Disability Agency (USAPDA) pain policy and Veterans Administration Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: The CI states: “I believe the rating for the condition that rendered me unfit should be changed. I think it should be raised to higher percentage because my lower back condition caused me not to be able to sustain gainful employment since being medically boarded from the Army. I also had several other medical conditions at the time of being boarded out of the Army. I think those disabilities should have been taken into consideration also. They also contribute to the fact that I cannot sustain gainful employment.” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service PEB – Dated 20030123** | **VA (5 Mo. After Separation) – All Effective Date 20030509** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5299-5295 | 10% | Post-operative Residuals Transitional Segmentation And Spondylolisthesis Lumbar Spine | 5295-5292 | 20%\* | 20031014 |
| ↓No Additional MEB/PEB Entries↓ | Major Depression With Psychotic Symptoms, Competent | 9434 | 50% | 20031003 |
| Prostatitis | 7599-7527 | 40% | 20031014 |
| Tinnitus | 6260 | 10% | 20030217 |
| Gastroesophageal Reflux Disease | 7399-7346 | 10% | 20031014 |
| 0% x 3/Not Service-Connected x 10 |
| **Combined: 10%** | **Combined: 80% and Individual Unemployability** |

\*Increased from 0% to 20% effective 20030509 per Decision Review Officer Decision 20031125 (20% continued in March 2004 under new spine rules and continued through latest VARD in 2006).

ANALYSIS SUMMARY: The Board also acknowledges the CI's contention suggesting that ratings should have been conferred for other conditions documented at the time of separation and for conditions not diagnosed while in the service but later determined to be service-connected by the Department of Veterans’ Affairs (DVA). 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. The DVA, however, 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.

Chronic Low Back Pain Condition. There were two goniometric range-of-motion (ROM) evaluations in evidence, and one examination with partial goniometric ROM evaluations which the Board weighed in arriving at its rating recommendation.

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| Goniometric ROM - Thoracolumbar | MEB H&P~ 7 Mo. Pre-Sep(20021001) | VA C&P ~ 3 Mo. Pre-Sep(20030214) | VA C&P ~ 5 Mo. After-Sep(20031014) |
| Flex (0-90) | 40⁰ | 90⁰ | 60⁰ |
| Ext (0-30) | 10⁰ | 30⁰ | 30⁰ |
| R Lat Flex (0-30) | 25⁰ | 30⁰ | ”some difficulty” |
| L Lat Flex 0-30) | 25⁰ | 30⁰ | ”some difficulty” |
| R Rotation (0-30) | 30⁰ | 30⁰ | Not measured  |
| L Rotation (0-30) | 30⁰ | 30⁰ | Not measured |
| COMBINED (240) | 160⁰ | 240⁰ | Incomplete |
| CommentL5-S1Fusion Surgery 20020117 | LBP; Gait slightly awkward; straight spine; pain with straight leg raise at 45 degrees; motor exam in the lower extremities normal; deep tendon reflexes normal; no lower extremities atrophy; overall coronal and sagittal alignment back essentially neutral | Chronic pain; Posture normal; gait was normal; walks with a crutch to bear weight on his right side; lumbosacral spine curvature maintained and paraspinal muscles not in spasm; no muscle atrophy noted in the buttock, back or lower extremities; motor exam, sensory perception and deep tendon reflexes wnl; straight leg raise test negative bilaterally; no radiation of pain on movement; range of motion wnl; no restriction or pain; pain, weakness, lack of endurance, fatigue or incoordination did not impact further on the range of motion | Pain worse by bending over to perform ADL’s; tenderness to palpation (TTP) lumbar paraspinals bilaterally; No reproduction of radicular symptoms; negative straight leg raise test; negative Ganser maneuver; Negative Patrick’s test; negative test for any adverse neural tensions with the sciatic or femoral nerve; 5/5 strength in the lower extremities with hypoactive reflexes, but symmetrical bilaterally; sensory intact; give way weakness secondary to pain; areas not measured reported having some difficulties |
| §4.71a Rating 2002 Spine Rules-5295 | 10% for characteristic pain on motion | 0% | 10% for characteristic pain on motion |
| §4.71a Rating 2002 Spine Rules-5292 | 20% if moderate | 0% | 20% if moderate |
| §4.71a Rating Today | 20% (>30 and ≤60) | 0% | 20% (>30 and ≤60) |

The 2002 Veterans Administration Schedule for Rating Disabilities (VASRD) coding and rating standards for the spine, which were in effect at the time of separation, were modified on 23 September 2002 to add incapacitating episodes (5293 intervertebral disc syndrome), and then changed to the current §4.71a rating standards on 26 September 2003. The 2002 standards for rating based on ROM impairment were subject to the rater’s opinion regarding degree of severity, whereas the current standards specify rating thresholds in degrees of ROM impairment. When older cases have goniometric measurements in evidence, the Board reconciles (to the extent possible) its opinion regarding degree of severity for the older spine codes and ratings with the objective thresholds specified in the current VASRD §4.71a general rating formula for the spine. This promotes uniformity of its recommendations for different cases from the same period and more conformity across dates of separation, without sacrificing compliance with the DoDI 6040.44 requirement for rating IAW the VASRD in effect at the time of separation. Furthermore, the Board policy (discussed above) of reconciling recommendations under the older 5295 rating schedule with current §4.71a based recommendations (when reasonable to do so) was considered.

The CI had LBP which started in 1999 and the progressive worsening necessitated an orthopedic referral in October 2001. At this visit, the CI was diagnosed with LBP spondylolisthesis and scheduled for back surgery in early January 2002 after having failed nonsteroidal anti-inflammatory medications. The CI underwent an L5-S1 transforaminal lumbar interbody fusion in January 2002. Post-operatively the CI continued to complain of residual LBP and right anterior thigh numbness and weakness. An electromyelogram in August 2002 demonstrated a normal motor and sensory study along with a normal needle study of the muscles of the right lower extremity and paraspinals. The MEB examination performed 7 months prior to separation documented worsening of symptoms; some right lower extremity numbness; inability to sit for longer than 20 minutes; the failure of medications such as narcotics and NSAIDS and poor response to physical therapy and a transcutaneous electrical nerve stimulation (TENS) unit. The initial VA Compensation & Pension (C&P) examination performed 3 months prior to separation noted that the CI had no improvement in his LBP and was unable to stand or sit for long periods of time; limited in ability to lift weights over thirty pounds and required non narcotic pain medication thrice daily. He was also noted to be walking with a crutch to bear weight on his right side. This assistive device was not constantly used. The physical exam indicated full ROM without pain. The second VA C&P examination, 5 months after separation noted that the CI still experienced stiffness, throbbing pain and paresthesias radiating down both legs in the front to the toes. The back was worse with walking, standing, driving, sitting and bending 10/10 at its worst and 7/10 at baseline; the CI was unable to sleep only 3 to 4 hours nightly with frequent awakenings and he occasionally required a cane for acute flares. The physical examination demonstrated pain worsened by bending over to perform ADL’s; tenderness to palpation (TTP) of lumbar paraspinals bilaterally, and decreased ROM as noted above.

The PEB coded analogous to 5295 Lumbosacral strain and rated at 10%. The VA coded 5295 lumbosacral strain analogous to 5292 spine, limitation of motion of, lumbar initially rated at 0% based on the full and pain-free ROM noted on the February 2003 C&P examination. However, upon review by a decision review officer, the rating was increased to 20% effective as of the original date of 9 May 2003 based on the MEB narrative summary (NARSUM) examination, the February 2003 C&P examination, and the October 2003 C&P examination which documented pain-limited motion. The 20% rating was continued through the latest rating available for review dated August 2006.

The Board reconciles (to the extent possible) its opinion regarding degree of severity for the older spine codes and ratings with the objective thresholds specified in the current VASRD §4.71a general rating formula for the spine. This promotes uniformity and more conformity of cases across dates of separation, without sacrificing compliance with the DoDI 6040.44 requirement for rating IAW the VASRD in effect at separation. The Board must correlate the above clinical data with the 2003 rating schedule which, for convenience, is excerpted below:

5295 Lumbosacral strain:

Severe; with listing of whole spine to opposite side, positive

Goldthwaite's sign, marked limitation of forward bending in

standing position, loss of lateral motion with osteoarthritic

changes, or narrowing or irregularity of joint

space, or some of the above with abnormal mobility on forced

motion..........................................................................................….. 40

With muscle spasm on extreme forward bending, loss of lateral

spine motion, unilateral, in standing position..................................... 20

With characteristic pain on motion.................................................... 10

With slight subjective symptoms only................................................. 0

5292 Spine, limitation of motion of, lumbar:

 Severe................................................................ 40

 Moderate.......................................................... 20

 Slight................................................................. 10

The Board considered the PEB’s rating under the 2002 VASRD code 5295. Under this code a 10% is warranted. However, if the 2002 VASRD code 5292 were applied, a 20% rating would result. IAW VASRD §4.7 higher of two evaluations, the 20% rating for code 5292 should have been applied. Today’s VASRD rating criteria for diseases and injuries of the spine focuses on forward flexion and total combined ROM. Under these rating criteria, a 10% rating is applied for forward flexion of the thoracolumbar spine greater than 60 degrees but not greater than 85 degrees and a 20% rating is applied for forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees. If today’s rating criteria were applied to the MEB NARSUM examination, a 20% rating would be supported based on thoracolumbar flexion limited to 40 degrees. If today’s criteria were applied to the initial VA C&P a 0% rating would result. If today’s criteria were applied to the second VA C&P examination a 20% rating would result. Although it is not clear why the initial VA C&P exam did not document any abnormal physical findings, the MEB NARSUM and second VA C&P examinations document similar levels of dysfunction and limited motion. Multiple progress notes around the time of the MEB exam also document flexion limited to 40 degrees. While this VA C&P examination was completed after separation, it was done within 6 months of separation and therefore still has relatively high probative value. Also, the VA continued the 20% rating as late as 2006, the latest VARD available for Board review, and there is no evidence supporting a continuation of the clinical picture shown in the initial VA C&P examination. 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 chronic LBP condition.

The Board could find no evidence for an unfitting radiculopathy justifying additional rating for peripheral nerve impairment. 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. There was no evidence of any motor, sensory, or functional impairment and EMG testing was normal, therefore the Board cannot support a recommendation for additional rating based on peripheral nerve impairment.

Remaining Conditions. Other conditions identified in the DES file were numbness of the right quadriceps, burning sensation of the joints, stomach problems, frequent urination, dysuria, dizziness, frequent headaches, trouble sleeping, depression/dysthymia, and high blood pressure. 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. Additionally prostatitis, tinnitus, and gastroesophageal reflux disease (GERD) were noted by the VA proximal to separation but were not documented in the DES file. The Board does not have the authority under DoDI 6040.44 to render fitness or rating recommendations for any conditions not considered by the DES. The Board therefore has no reasonable basis for recommending any additional unfitting conditions for separation rating.

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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. In the matter of the chronic LBP condition, the Board unanimously recommends permanently permanent service disability rating of 20%, coded 5292 IAW VASRD §4.71a. In the matter of the radiculopathy, numbness of the right quadriceps, burning sensation of the joints, stomach problems, frequent urination, dizziness, frequent headaches, trouble sleeping, depression/dysthymia, and high blood pressure, conditions; the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation.

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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** |
| Chronic Low Back Pain | 5292 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110825, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

 XXXXXXXXXXXX

 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, AR20120008434 (PD201100690)

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 XXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA