RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100709 SEPARATION DATE: 20090413

BOARD DATE: 20120911

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty PFC/E-3 (11B, Infantry) medically separated for a thoracolumbar spine condition. He injured his neck and mid/lower back in combat training in 2004. The thoracic and lumbar pain persisted and was aggravated during a 2007 deployment to Iraq. He was subsequently diagnosed with multilevel degenerative disc disease (DDD) and diffuse stenosis. Surgery was not indicated; and, the condition could not be adequately rehabilitated to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was consequently issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The thoracolumbar spine condition was forwarded to the Physical Evaluation Board (PEB) as separate diagnoses for thoracic disc and lumbar disc disease, each judged to be medically unacceptable IAW AR 40-501. Three additional conditions (anxiety/mood adjustment disorder, osteoarthritis of the right knee, and chronic headaches) were forwarded by the MEB and judged to meet retention standards. The informal PEB appropriately combined the thoracic and lumbar diagnoses as a single unfitting condition (spinal stenosis), rated 10%, citing criteria of the Veterans Administration Schedule for Rating Disabilities (VASRD). The remaining conditions were determined to be not unfitting. The CI made no appeals and was medically separated with a 10% disability rating.

CI CONTENTION: “I was medically separated from active duty in the US Army for spinal condition, ‘Degenerative Changes and Disc Disease of the Thoracic and Lumbar Spine with Lumbar Dextroscoliosis’ which causes constant back pain which is constantly at a 7 out of 10 on pain. The VA also granted only 10% for this condition. … [CI elaborates his service and medical history, his occupational history, and the current employment and financial consequences of his physical limitations.] … Also the permanent scar on my right side of neck, I've had ever since 2004 I still have no feeling and have not been rated fairly for this injury sustained while performing training in my MOS. … All I am asking for is a fair and accurate review of my US Army MEB and PDA Review and just decision making. Being separated from the US Army and the Infantry had a huge affect [*sic*] on my life as I was depressed for months after separation as I wanted to make a career out of the Army. … I would also like if at all possible to have my rank credited to SPC/E4 as I had no UCMJ or any other disciplinary actions, I am a combat veteran, I served in the non-combat assignments the Army forced me into and did my job well even with being treated with disrespect from superiors and being "passed over" for waivers and promotions due to my conditions. I had enough time in service and time in grade to become a SGT/E5 as an 11B but was never given the chance to be promoted to SPC/E4 and feel as though my chain of command played favorites and since I was injured they turned they're [*sic*] back on me numerous times.” Other than the neck scar, as noted above, the CI does not make a request for Board consideration of any conditions other than the thoracolumbar spine condition.

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in Department of Defense Instruction (DoDI) 6040.44 (Enclosure 3, paragraph 5.e.2) 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 condition(s) “identified but not determined to be unfitting by the PEB.” The rating for the unfitting thoracolumbar spine condition is addressed below; but, since they were not requested for review, the anxiety/mood, right knee, and headache conditions determined to be not unfitting by the PEB are not within the DoDI 6040.44 defined purview of the Board. Those, and any other conditions or contention not requested in this application, remain eligible for future consideration by the Army Board for the Correction of Military Records (ABCMR).

RATING COMPARISON:

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| --- | --- |
| **Service PEB – Dated 20090128** | **VA (3 Weeks Pre-Separation) –Effective 20090414** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Spinal Stenosis | 5238 | 10% | Thoracic/Lumbar DDD, Dextroscoliosis  | 5243 | 10% | 20090305 |
| Anxiety / Adjustment Disorder | Not Unfitting | Post-Traumatic Stress Disorder | 9411 | 10% | 20090316 |
| Osteoarthritis, Right Knee | Not Unfitting | PFS, Right Knee | 5099-5014 | NSC | 20090305 |
| Chronic Headaches | Not Unfitting | Cervical Lordosis / Residual Headaches | 5237 | 10% | 20090305 |
| No Additional MEB/PEB Entries | Tinnitus | 6260 | 10% | 20090319 |
| 0% X 1 / Not Service-Connected x 6 | 20090305 |
| **Combined: 10%** | **Combined: 30%** |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding 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 proximate 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 rating determinations for the disability existing at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability at the time of separation. The Board further acknowledges the CI’s contention that he was unjustly passed over for promotion. It is noted for the record that the Board has neither the jurisdiction nor authority to scrutinize, render opinions, or offer remedy in reference to actions of this nature. That jurisdiction and authority resides with the ABCMR.

Thoracolumbar Spine Condition. The CI suffered blunt neck trauma during combatant training in Korea in September 2004. He was initially treated for the cervical injury (which included a hematoma requiring incision), but developed mid-to-lower back pain in the aftermath. The latter persisted, and was managed with conservative measures and temporary profiles. The thoracolumbar pain was greatly exacerbated by the load-bearing demands of a 2007 deployment to Iraq, and the CI was referred to orthopedics after redeployment. Imaging revealed canal stenosis “likely developmental” throughout its length, degenerative facet changes from T11 to L5, and non-encroaching disc bulges at T11/12, T12/L1, and L4/5. Surgery was not recommended, and the pain did not respond adequately to epidural injection, physical therapy (PT), and medication trials. The narrative summary (NARSUM) noted constant pain rated 8/10, “easily aggravated to a 10/10 with accompanying spasms and radiculopathy posteriorly and bilaterally to his knees.” The MEB spine exam findings are noted below, and the neurologic exam was normal. At the VA Compensation and Pension (C&P) exam performed 3 weeks prior to separation, the examiner did not elaborate the severity or physical limitations associated with the thoracolumbar condition; but, noted that it was “responding adequately” to an anti-inflammatory and muscle relaxant. In addition to the findings below, the VA neurologic findings and gait were normal. The VA examiner commented on “mild scoliotic changes” which was an anatomic observation, not a ratable contour abnormality due to spasm. The goniometric range-of-motion (ROM) evaluations in evidence which the Board weighed in arriving at its rating recommendation, with documentation of additional ratable criteria, are summarized in the chart below.

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| Thoracolumbar ROM | MEB PT ~4 Mo. Pre-Sep | VA C&P ~3 Wk. Pre-Sep |
| Flexion (90⁰ Normal) | 45⁰/30⁰\* | 90⁰ |
| Combined (240⁰) | 160⁰/150⁰\* | 270⁰ |
| Comments | Tenderness, spasm, normal gait. | Painful motion; no spasm. |
| §4.71a Rating | 20%/40%\* (based on flexion) | 10% |

 \* Baseline/3 Repetitions (DeLuca deduction).

The Board directs attention to its rating recommendation based on the above evidence. The PEB’s consolidation of the thoracic and lumbar segments into a single rating is IAW VASRD §4.71a direction. The PEB’s DA Form 199 rating rationale is excerpted below.

ROM exam indicated 30 degrees forward range of motion and 150 degrees combined range of motion with the combined ROM deemed to best represent the Soldier’s capabilities. Rated for a combined ROM of 150⁰.

The §4.71a general spine formula, in its description for a 40% rating, states “for, forward flexion of the thoracolumbar spine 30 degrees or less.” The operant word “or” specifies that this criterion, in and of itself, will support that rating. The Board, therefore, must strongly consider whether this constitutes an imperative recommendation for a 40% rating. It is true that flexion and extension were significantly more painful than all other planes of motion. Outpatient orthopedic notes repeatedly note “abnormal” flexion and extension, but “normal” bilateral flexion and rotation. It does not follow, however, that combined ROM “best represents” the CI’s capabilities. It should be considered, moreover, that the DeLuca factor must be applied to rate for a 30 degree flexion; and, even that is the exact cut-off between 20% and 40% ratings. Board members did concur that if the MEB PT evidence was conceded as predominantly probative, then the unequivocal §4.71a rating language and the DeLuca imperative would warrant a 40% rating recommendation from the Board. Deliberation ensued; however, as to whether the MEB’s PT or VA’s C&P evaluation should be assigned the predominant probative value in this case. Corroborative entries from the outpatient evidence were not specific enough regarding the degree of ROM limitation for flexion to avoid speculation, although they do not reflect an overall severity of disability reasonably characterized as 40%. The Board also notes that the VA physician ROM measurements may be considered more authoritative than those of the MEB physical therapist; but this, too, is subject to the examiner’s experience and other speculative variables. Of most import; however, is the close temporal alignment of the C&P evidence with the date of separation; the latter being the Board’s rating benchmark. After considerable deliberation, and with due deference to VASRD §4.3 (reasonable doubt), members agreed that the VA evidence was the more probative; and, that the single MEB PT measurement of 30 degree flexion (after repetitions) was not sufficient to provide the sole basis for a 40% rating recommendation. 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. Considering the totality of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB adjudication of the thoracolumbar spine condition.

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. The Board did not surmise from the record or PEB ruling in this case that any prerogatives outside the VASRD were exercised. In the matter of the thoracolumbar spine condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. There were no other conditions within the Board’s scope of review for consideration.

RECOMMENDATION: The Board, therefore, recommends that there be no recharacterization of the CI’s disability and separation determination, as follows:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Spinal Stenosis | 5238 | 10% |
| **COMBINED** | **10%** |

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.

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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 XXXXXXXXXXXXXXXXX, AR20120016896 (PD201100709)

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 and hereby deny the individual’s application.

This decision is final. The individual concerned, counsel (if any), and any Members of Congress who have shown interest in this application have been notified of this decision by mail.

 BY ORDER OF THE SECRETARY OF THE ARMY:

Encl XXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA