RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxx BRANCH OF SERVICE: Army

CASE NUMBER: PD1100834 SEPARATION DATE: 20090826

BOARD DATE: 20120627

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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 CW2/WO2 (152DO/OH-58D Scout Pilot), medically separated for lumbar intervertebral disk syndrome (IDS)*.* He did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Chronic low back pain (LBP) due to herniated nucleus pulposus at L4-L5, status post disk replacement surgery was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Seven other conditions, as identified in the rating chart below, were forwarded on the MEB submission as medically acceptable conditions. The PEB adjudicated the lumbar intervertebral disk syndrome condition as unfitting, rated 20% with application of Veterans Administration Schedule for Rating Disabilities (VASRD). The PEB also determined the seven other conditions were not unfitting and therefore were not rated. The CI made no appeals, and was medically separated with a 20% combined disability rating.

CI CONTENTION: “Please take into consideration that my Lumbar intervertebral disk syndrome is a permanent disability that has left me stripped of my helicopter flight status, and unable to complete an APFT. At the time of my separation I was only rated 20% for my back by the Army, however I was rated 40% by the VA within a six month period of time. It is noted in my PEB that I was taking Percocet, and six-800mg Motrin daily during my Exam process, however, during my VA exam (while still on Active Duty) I took no pain medicine as advised by the my VA representative; to “give a clear picture of my disability.” Also, none of my VA recognized, service connected disabilities were considered during my involuntary medical separation from the Army including PTSD, which has taken a more significant hold upon separation from the military.”

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in DoDI 6040.44, Enclosure 3, paragraph 5.e.(2) is limited to those conditions which were determined by the IPEB 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.” The ratings for unfitting conditions will be reviewed in all cases. The conditions of left elbow osteoarthritis with loose osteophyte, right thumb pain due to previous fracture, intermittent styes of both eyelids, bilateral knee pain, and left foot pain as requested for consideration meet the criteria prescribed in DoDI 6040.44 for Board purview; and are addressed below, in addition to a review of the Service ratings for the unfitting condition of lumbar IDS. The other requested condition of posttraumatic stress disorder as well as the remaining Department of Veterans’ Affairs (DVA) service-connected conditions noted in the rating comparison chart below are not within the Board’s purview. Any conditions or contention not requested in this application, or otherwise outside the Board’s defined scope of review, remain eligible for future consideration by the Army Board for the Correction of Military Records (BCMR).

RATING COMPARISON:

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| --- | --- |
| **Service PEB – Dated 20090511** | **VA (~1 Mo. After Separation) – All Effective Date 20090827** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Lumbar Intervertebral Disk Syndrome | 5243 | 20% | Status Post L4-L5 Disc Replacement Surgery with Residual Strain and Intermittent Right-sided L4-5 Radiculopathy | 5237 | 40% | 20090708 |
| Left Elbow Osteoarthritis with Loose Osteophyte | Not Unfitting | Left Elbow Degenerative Joint Disease | 5207 | 10% | 20090708 |
| Seasonal Allergies | Not Unfitting | Not addressed by VA |
| Gastroesophageal Reflux Disease | Not Unfitting | Acid Reflux | 7346 | NSC | 20090708 |
| Right Thumb Pain Due To Previous Fracture | Not Unfitting | Status Post Fracture Right Thumb with Residual Bony Fracture | 5228 | 0% | 20090708 |
| Intermittent Styes of Both Eyelids | Not Unfitting | Stye | 6099-6018 | 0% | 20090708 |
| Bilateral Knee Pain | Not Unfitting | Right Knee Strain | 5261 | 0% | 20090708 |
| Left Knee Strain | 5261 | 0% | 20090708 |
| Left Foot Pain | Not Unfitting | Bilateral Pes Planus | 5276 | 10% | 20090708 |
| Bilateral Plantar Fasciitis | 5099-5020 | 0% | 20090708 |
| ↓No Additional MEB/PEB Entries↓ | Adjustment Disorder with Mixed Affect Associated with Status Post L4-L5 Disc Replacement Surgery with Residual Strain and Intermittent Right-sided L4-5 Radiculopathy | 9440 | 10%\* | 20090716 |
| Tinnitus | 6260 | 10% | 20090708 |
| 0% x 4 others/Not Service-Connected x 3 others | 20090708 |
| **Combined: 20%** | **Combined: 60%\*\*** |

\*Diagnosis changed to 9411 PTSD and increased to 30% effective 20090827 based on exam of 20100506.

\*\*Increased to 80% effective 20090827 with 9440 at 10% changed to 9411 at 30%, 8100 Headaches increased from 0% to 30% based on VA treatment records, and addition of 7522 Erectile Dysfunction at 0%.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred condition continues to burden him. The Board acknowledges the CI’s contention that suggests ratings should have been conferred for other conditions documented at the time of separation. The Board wishes to clarify that it is subject to the same laws for disability entitlements as those under which the Disability Evaluation System (DES) operates. 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. However the DVA, operating under a different set of laws (Title 38, United States Code), is empowered to compensate all service-connected conditions and to periodically reevaluate 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 6040.44, however, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation and is limited to conditions adjudicated by the PEB as either unfitting or not unfitting. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Lumbar Intervertebral Disk Syndrome. The CI noticed back pain in March 2007 when he was lifting weights and felt a sharp pain in his back that was accompanied by muscle spasms and a burning sensation radiating down his left leg. He was treated conservatively and was deployed to Iraq from June to October 2007. While deployed he injured his back running on a treadmill with severe pain and a feeling of a “catch” in his back with muscle spasms. His symptoms did not resolve with conservative treatment and he was evaluated by neurosurgery in theater. He was evacuated to Germany and had a magnetic resonance imaging (MRI) in October 2007 which showed degenerative disc changes and posterior disc bulge pericentric and to left of midline at L4-L5 causing left lateral recess stenosis and left neuroforaminal encroachment. He was evacuated to Fort Lewis for neurosurgical consultation. The neurosurgeon initially treated the CI conservatively with epidural steroid injections (ESI) and physical therapy. The ESI provided some temporary relief of his leg pain only and did not help his back pain. When his symptoms did not resolve, surgery was performed in February 2008. An L4-5 total disc arthroplasty was done with ProDisc-L prosthesis for discogenic LBP at L4-5 with a right L5 radiculopathy secondary to a right paracentral disc bulge at L4-5. He appeared to be doing well at a post-operative appointment approximately 2 weeks later. However, in early March he experienced LBP and pain in his right buttock that occurred after exercise and was aggravated by sitting. There was no evidence of implant failure and the provider recommended the CI decrease his level of exertion until the pain resolved. At the end of April, approximately 3 months after surgery, he continued to have LBP with activities and some occasionally dysesthesias of the left lateral leg. He was referred to both physical therapy and the pain clinic.

A pain clinic note from early May 2008 noted continued back pain that radiated into his right hip and diagnostic lumbar medial branch blocks were planned. These nerve blocks were performed in July 2008. Follow-up with neurosurgery, in late July, noted some improvement of his back and right hip pain after surgery but significant pain was still present. The neurosurgeon recommended a second nerve block. However, a pain clinic visit in early August noted no relief with the nerve blocks and the CI was given Tramadol. In October 2008, the CI reported that although his back pain was much improved, he was not able to perform the tasks required of his MOS. His back pain was 2-4 out of 10 and could increase to 6/10 with any increased activity. He also continued to have intermittent burning of his right thigh that was also worsened with prolonged activities. He continued to require intermittent narcotics in addition to his regular pain medication and Tramadol. In December 2008, EMG and nerve conduction testing were performed and the results were normal.

The MEB narrative summary (NARSUM), completed 7 months prior to separation, documented persisting back pain that radiated to both gluteals which was 2/10 on a good day and 6/10 on bad days. Flare-ups occurred approximately once every 2 weeks with the increased pain lasting all day. The physical exam findings with range of motion (ROM) are noted in the chart below. Decreased sensation was noted in the right foot despite normal EMG/NC testing. A VA Compensation and Pension (C&P) examination was completed approximately 2 months prior to separation and it reported a similar clinical history. It noted the CI had constant pain with periodic flare-ups that required daily nonsteroidal anti-inflammatory (NSAIDs) medications and intermittent Tramadol and narcotic pain medication. His back felt weak and he was easily fatigued. No assistive devices were needed. He also reported right lower leg sciatica almost daily. The ROM measurements and other exam findings are in the chart below.

There were two ROM evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation.

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| Date of Separation: August 26, 2009 |
| ROM - Thoracolumbar | MEB NARSUM~7 Months Pre-Separation(20090121) | VA C&P~2 Months Pre-Separation(20090708) |
| Flex (0-90) | 50⁰ (50°, 50°, 50°) | 25⁰ |
| Ext (0-30) | 25⁰ (25°, 30°, 30°) | 5⁰ |
| R Lat Flex (0-30) | 30⁰ (30°, 30°, 30°) | 15⁰ |
| L Lat Flex 0-30) | 25⁰ (25⁰, 25⁰, 25⁰) | 20⁰ |
| R Rotation (0-30) | 30⁰ (30°, 30°, 30°) | 20⁰ |
| L Rotation (0-30) | 25⁰ (25⁰, 25⁰, 25⁰) | 20⁰ |
| COMBINED (240) | 185⁰ | 105⁰ |
| CommentSurgery February 2008 | Deceased ROM due to pain; no spasms; no tenderness to palpation; normal gait; negative straight leg raise bilateral; decreased sensation noted in right foot on the 1st through 4th toes; normal strength at 5/5 and reflexes bilateral | Mild to moderate spasm with mild tenderness throughout the lumbar paraspinous muscles as well as straightening of the lumbar lordosis; straight leg raising produced spasm and pain in the hamstring muscles but no sciatica; no weakness, numbness, or atrophy; repetitive motion lead to increased pain and spasm but did not affect ROM. |
| §4.71a Rating | 20% | 40% |

It is obvious that there is a clear disparity between these examinations, with very significant implications regarding the Board's rating recommendation. The Board thus carefully deliberated its probative value assignment to these conflicting evaluations, and carefully reviewed the service file for corroborating evidence both prior to separation and within the 12-month period following separation. The ROM limitations documented in the VA exam were much more limited than the measurements documented on the MEB NARSUM and are more consistent with a flexion of 35 degrees measured at a physical therapy examination from October 2007, prior to the CI’s surgery. The VA examination was completed prior to separation and shows the CI’s symptoms continued to worsen after surgery. The presence of palpable muscle spasms and loss of lumbar lordosis support a worsening of the CI’s back condition that remained within the realm of normal progression of disease. A VA outpatient visit in March 2010, 7 months after separation, documented continued constant LBP with intermittent flares, reduced lordosis, and moderate limitation of flexion. Actual ROM measurements were not accomplished at this visit.

After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 40% for the lumbar IDS condition.

Contended PEB Conditions. The contended conditions adjudicated as not unfitting by the PEB were left elbow osteoarthritis with loose osteophyte, right thumb pain due to previous fracture, intermittent styes of both eyelids, bilateral knee pain, and left foot pain. The Board’s first charge with respect to these conditions is an assessment of the appropriateness of the PEB’s fitness adjudications. The Board’s threshold for countering fitness determinations is higher than the VASRD §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard. None of these conditions were profiled, implicated in the commander’s statement, or noted as failing retention standards. All were reviewed by the action officer and considered by the Board. There was no indication from the record that any of these conditions significantly interfered with satisfactory duty performance. After due deliberation, in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB fitness determination for the any of these contended conditions; and, therefore, no additional disability ratings can be recommended.

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 lumbar IDS condition, the Board unanimously recommends a disability rating of 40%, coded 5243 IAW VASRD §4.71a. In the matter of the contended left elbow osteoarthritis with loose osteophyte, right thumb pain due to previous fracture, intermittent styes of both eyelids, bilateral knee pain, and left foot pain conditions, the Board unanimously recommends no change from the PEB determinations as not unfitting. 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 and that the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective as of the date of his prior medical separation:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Lumbar Intervertebral Disk Syndrome | 5243 | 40% |
| **COMBINED** | **40%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, CI did not sign form, 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 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, AR20120012343 (PD201100834)

1. Under the authority of Title 10, United States Code, section 1554(a), I approve the enclosed recommendation of the Department of Defense Physical Disability Board of Review (DoD PDBR) pertaining to the individual named in the subject line above to recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 40% effective the date of the individual’s original medical separation for disability with severance pay.

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:

 a. Providing a correction to the individual’s separation document showing that the individual was separated by reason of permanent disability retirement effective the date of the original medical separation for disability with severance pay.

 b. Providing orders showing that the individual was retired with permanent disability effective the date of the original medical separation for disability with severance pay.

 c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, and payment of permanent retired pay at 40% effective the date of the original medical separation for disability with severance pay.

 d. Affording the individual the opportunity to elect Survivor Benefit Plan (SBP) and medical TRICARE retiree options.

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 XXXXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA