RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100895 SEPARATION DATE: 20070227

BOARD DATE: 20120514

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (92A20 / Automated Logistical Specialist), medically separated for chronic back pain. 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) with degenerative disc disease (DDD) at L4/L5 was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions appeared on the MEB’s submission. The PEB adjudicated the chronic back pain condition as unfitting, rated 10% with likely application of the US Army Physical Disability Agency (USAPDA) pain policy. The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: “I was not given a thorough exam upon exiting the military during my Medical Evaluation Board. The Physician that reviewed my case did not perform the exam correctly according to procedures; I was not informed of the different steps in the process that would determine the outcome. I was not aware of flaws in the process, until another VA Physician examined me and explained the process. My range of motion assessment performed before I exit service was not conducted properly and the physician documented the findings incorrectly. I currently continue to have constant pain radiating down my lower back and through my legs, which result in limitations to my lifestyle. I served over 12 dedicated years of service to my country uninterrupted and would still be serving if I wasn't found unfit for duty. It was determined that I would not be able to perform, the basic requirement of all soldiers an APFT, which would hinder me from attending NCOES trainings therefore holding me back from promotions. I was considered a career soldier, I loved my job and the duties that it entailed and would still be serving my country now, and if given the option I would return back to duty today.” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

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 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 service ratings for unfitting conditions will be reviewed in all cases. 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 20061214** | **VA (~3 Mos. After Separation) – All Effective Date 20070228** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Back Pain | 5299-5242 | 10% | DDD, Lumbar Spine | 5242 | 10%\* | STR |
| ↓No Additional MEB/PEB Entries↓ | Sleep Apnea | 6847 | 0% | 20070207 |
| Hypertension | 7101 | 0% | STR |
| Not Service-Connected x 5 |
| **Combined: 10%** | **Combined: 10%** |

\*VA rating for DDD changed to 40% on appeal effective 20071108.

ANALYSIS SUMMARY: The Disability Evaluation System (DES) is responsible for maintaining a fit and vital fighting force. 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 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 nor for conditions determined to be service-connected by the Department of Veterans’ Affairs (DVA) but not determined to be unfitting by the PEB. 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 re-evaluate said conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment vary over time. The Board’s role is confined to the review of medical records and all evidence at hand to assess the fairness of PEB rating determinations, compared to VASRD standards, based on severity at the time of separation. The Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to the CI’s statements in the application regarding suspected DES improprieties in the processing of his case.

Chronic Back Pain. The CI had a history of recurrent low back pain since 1995. Symptoms increased in 2003 without specific injury. Persisting symptoms prompted further evaluation leading to diagnosis of DDD with bulging discs at L4-5 and L5-S1. Back pain radiated into the left buttock and thigh, and an electromyogram in July 2006 indicated a “suggestion of a chronic left L5 radiculopathy without acute entrapment.” Computed axial tomographic myelogram of the lumbar spine on 1 September 2005 demonstrated bulging discs at L4-5 and L5-S1, but concluded there was minimal encroachment of neuroforaminal at L4-5, and “no significant findings” of the nerve roots without evidence of nerve root compression. Neurologic examinations were normal of the lower extremities including strength, reflexes and sensation. Repeat magnetic resonance imaging (MRI) in May 2006 was unchanged from an MRI one year before in April 2005. Evaluation by neurosurgery recommended non-surgical treatment.

Despite treatment that included epidural steroid injections, persistent symptoms prevented performance of strenuous duties including running, jumping, or carrying a loaded rucksack. At the time of the MEB narrative summary (NARSUM) on 24 November 2006, there was tenderness to palpation with muscle spasm, and straight leg raising reproduced pain in the thigh. The gait was normal, and neurologic examination of the lower extremities was normal including sensation, strength and reflexes. Range-of-motion (ROM) was limited by pain. The examiner recorded active flexion was 18 degrees but the CI was able to flex to 45 degrees passively, extension was 10 degrees, 20 degrees passively, right lateral bending was 10 degrees, 20 passively, left lateral bending was 25 degrees, passively 30 degrees, and rotation was 25 degrees bilaterally. Presence of a non-organic examination finding was noted by the examiner. The examiner assessed the pain as slight and constant per AMA guidelines. The PEB adjudicated a rating of 10% with likely application of the USAPDA Pain Policy. Following separation, the VA assigned a 10% rating based on the PEB’s adjudication because the CI cancelled his VA Compensation and Pension (C&P) examination due to employment overseas. The CI appealed the VA rating and was awarded a 40% rating (effective 8 November 2007, the date of appeal) that was based on the MEB examination ROM examination documenting flexion of 18 degrees. The Board considered the ROM examination from the MEB NARSUM and noted that it was dramatically inconsistent with prior examinations. Therefore, the Board carefully considered the whole record in order to develop a consistent picture of the CI’s back condition.

Physical therapy examinations on 26 April 2005, 18 May 2005, 11 October 2005, and 17 October 2005 recorded that the lumbar ROM was normal. The neurosurgery examination of 8 July 2005 recorded “ROM preserved.” A 25 July 2006 physical therapy examination performed “lumbar” spine ROM measurement. The lumbar spine flexed to 40 degrees with pain beginning at 20 degrees; extended 20 degrees with pain at 10 degrees; and rotated 40 degrees bilaterally with minimal symptoms. Lateral bending was stated as 20 degrees but the examiner also recorded the CI was able to touch the fibular head which corresponds more closely to 40 degrees of thoracolumbar lateral bending, and that “normal end range lateral flexion is achieved with near normal lumbar curvature noted and no pain symptoms produced with this movement.” It is not clear whether the physical therapist was measuring isolated lumbar spine movement or combined thoracolumbar ROM. The report of 20 degrees of lateral bending with the ability to reach the fibular head suggests the examiner was reporting lumbar motion and not combined thoracolumbar ROM used for rating with the VASRD as the ability to reach the fibular is consistent with full lateral flexion of the thoracolumbar spine.

Shortly following separation, the CI was employed by a defense contractor and he worked in Iraq in support of upgrading tanks. While back in the U.S. in November 2007, he was evaluated in the VA clinic before returning to Iraq. At that appointment, there was mild lumbar tenderness with intact strength, reflexes and gait. At a June 2008 VA clinic appointment, 16 months after separation, there was persisting back pain without radicular symptoms that was helped by use of NSAIDs and concluded to be muscular in origin by the examiner. The Board agreed in this case that the markedly restricted ROM documented in the NARSUM examination was not consistent with the expected severity suggested by the pathology. The markedly restricted motion recorded in the NARSUM was completely inconsistent with prior examinations, unexplained by repeat injury or evidence of progression of the associated DDD by MRI studies a year apart. The “normal” and “preserved” ROM, but with pain on motion supports a 10% rating. Although muscle spasm was documented in the MEB NARSUM, no abnormality of gait or spinal contour was documented to support the 20% rating. Assuming the July 2006 physical therapy ROM examination documented thoracolumbar ROM rather than movement limited only to the lumbar spine, the results would support a 20% rating based on limitation of motion. Board members agreed that the preponderance of evidence did not approach the 40% rating and discussed a 10% versus 20% rating. The Board concluded that the evidence reflected that the condition at least as nearly approximated the 20% as the 10% rating based on all examinations considered in their totality. There was no evidence of incapacitating episodes due to intervertebral disc disease that would meet the criteria for a minimum rating under the alternative formula for incapacitating episodes due to intervertebral disease. The Board also considered whether a separate rating for radiculopathy was warranted. The presence of functional impairment with a direct impact on fitness is the key determinant in the Board’s decision to recommend any condition for rating as additionally unfitting. Although there was pain that radiated into the left leg and electromyography suggested mild left L5 radiculopathy, there were no objective neurologic findings. Motor strength testing was consistently normal and evidence of the record reflects that pain was the reason the CI was unable to perform all the functions of his military specialty. The VASRD rating criteria under the general rating formula for diseases and injuries of the spine takes into account pain, whether it radiates or not. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of lumbar radiculopathy as an unfitting condition for separation rating. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 20% for the back pain condition, coded 5243, intervertebral disc syndrome.

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 back condition was likely operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the chronic back pain condition, the Board unanimously recommends a 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** |
| Chronic Back Pain due to Degenerative Disc Disease  | 5243 | 20% |
| **COMBINED** | 20% |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111013, 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 XXXXXXXXX, AR20120009405 (PD201100895)

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 XXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA