RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1101089 SEPARATION DATE: 20050429

BOARD DATE: 20120904

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty CWO2 (Aviation)/CWO2 (152D0/OH-58D Scout Pilot), medically separated for chronic back pain, status post lumbar discectomy and fusion, without neurologic abnormality. CI underwent removal of lumbar disc and spinal fusion for back pain in 2003. Post-operatively, the back pain condition continued and could not be adequately rehabilitated. The CI did not improve adequately with treatment to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded no other conditions for Physical Evaluation Board (PEB) adjudication. 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% disability rating.

CI CONTENTION: “My original rating which was decided using the DoDI 1332.39 standards in instead of the VASRD standards that should have been used. Also, my rating should be changed IAW the (10 USC 1554a) Which allows for the recharacterization of the separation of such individual to retirement for disability are separated from the armed forces due to unfitness for duty due to a medical condition with a disability rating of 20 percent disabled or less; and are found to be not eligible for retirement. Furthermore, The 10 USC 1554a states that, "covered

individuals are members and former members of the armed forces who, during the period beginning on September 11,2001, and ending on December 31, 2008. I was discharged in 2005 after having L4-L5 S1 fusion, my limited range of motion and pain should have resulted in a higher rating, I would also like the board to take into consideration the post surgery life style change and chronic depression that has resulted from failed back surgery.”

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 ratings for unfitting conditions will be reviewed in all cases. The other requested condition, depression, is 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.

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RATING COMPARISON:

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| --- | --- |
| **Service PEB – Dated 20050321** | **VA (3 Mos. Post-Separation) – All Effective Date 20050430** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Back Pain S/P Lumbar Discectomy & Fusion | 5241 | 10% | S/P Laminectomy of L5 w/ Post-Surgical Fusion at L5/S1 | 5241 | 20% | 20050811 |
| ↓No Additional MEB/PEB Entries↓ | MDD Associated w/ Back Condition | 9434 | 50% | 20050726 |
| Lt Ankle Strain | 5271 | 20% | 20050811 |
| Lt Knee Strain | 5260 | 10% | 20050811 |
| B/L Tinnitus | 6260 | 10% | 20050801 |
| Hiatal Hernia w/ GERD | 7346 | 10% | 20050811 |
| 0% X 3 / Not Service-Connected x 3 |  |
| **Combined: 10%** | **Combined: 80%\*** |

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.

Chronic Back Pain, Status Post Lumbar Discectomy and Fusion Condition. CI underwent disc removal and spinal fusion for a L5-S1 disc for back pain in 2003. A success rate of 20% was projected for control of symptoms based on pre-operative studies. Post-operatively, the surgery sites healed satisfactorily, but back pain persisted, requiring large doses of oral narcotics for control. 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. All measurements are active ROM with associated pain.

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| Thoracolumbar Spine Degrees  | PT ~1.5 Mo. Pre-Sep(20050317) | VA C&P ~3.5 Mo. Post-Sep(20050811)  |
| Flexion (90 Normal) | 10 | 35  |
| Extension (30) | 5 | 20  |
| Combined (240) |   | 110 |
| Comment | Painful motion | Painful motionNo change after repetitionMuscle spasm without tendernessDecreased lordosisAntalgic gait |
| §4.71a Rating | 40% | 20% |

At the MEB exam, obtained approximately 2 months prior to separation, the CI reported constant daily pain from 4/10 to 8-9/10 requiring constant narcotic medication. He noted ability to sit only 5-10 minutes then having to move to relieve pain. The CI reported he could perform administrative and academic duties with some difficulty daily. The MEB narrative summary (NARSUM) physical exam contains no physical exam of the back and references pre-operative neurosurgical and orthopedic clinic notes and the physical therapy (PT) consult.

At the VA Compensation and Pension (C&P) exam, performed approximately 4 months after separation, the CI again reported constant back pain at level of 5/10. He stated the back condition did not interfere with walking up to a 1/4 mile, bathing or his occupation, but did so with dressing, driving and recreational activities. The CI stated that he had some numbness and tingling in his left leg but that it did not interfere with occupation or daily activities; he noted no periods of incapacitation as a result of the lumbar spine condition. Pertinent physical findings from the C&P examination are contained above. With repetitive motion, there was no weakness, fatigue, lack of endurance or additional limitation of motion. Although severe muscle spasm of the paraspinal muscles was said to be present, there was no tenderness. Decreased lumbar lordosis was observed. Gait was antalgic. Muscle strength, reflexes and sensation were intact. Straight leg raising (Lasegue’s sign) produced no back or radicular pain. The Board directs attention to its rating recommendation based on the above evidence. The PEB and VA both rated the back condition under code, 5241, spinal fusion, but with different disability ratings. The PEB rated 10% citing ROM limited by pain and tenderness with the likely application of the USAPDA pain policy. The VA rated 20% citing reduced ROM of 35 degrees flexion on physical examination. A higher rating was not warranted unless forward flexion of 30 degrees or less or ankylosis of the entire thoracolumbar spine was present.

The Board agreed that the ROM of the MEB supported a rating of 40% IAW VASRD §4.71a. The Board observed the ROM values referenced by the MEB examiner are significantly worse than those recorded by the VA C&P. At a clinic visit in January 2005, a tapering of narcotic prescriptions was initiated. At a clinic visit on February 28, 2005, a plan to “further decrease the amount over the next 2 months” was initiated. A prescription for a reduced number of pills was issued, it being the last one prior to the MEB. After discussion, the Board agreed that the reduced ROM findings, recorded 2 weeks later at the PT evaluation, were related to this proximate decrease in pain medication. At the C&P evaluation 4 months later, the CI reported his pain controlled on this reduced dose of medication with improved ROMs. The Board unanimously agreed that the findings on C&P examination are most consistent with the treatment records prior to separation and most accurately reflect the functional status of the CI, with treatment, at time of separation. In the absence of incapacitation and significant neuropathy, the Board was unable to find a pathway to a higher rating under 5243, §4.124, §4.45, §4.59 or any other VASRD code. 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 condition coded 5241.

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 back condition was likely operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the chronic back pain condition, the Board unanimously recommends a disability rating of 20%, coded 5241 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 S/P Lumbar Discectomy & Fusion | 5241 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111129, 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 XXXXXXXXXXXXXXXXXXXXX, AR20120016847 (PD201101089)

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 XXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA