RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXX BRANCH OF SERVICE: army

CASE NUMBER: PD1101129 SEPARATION DATE: 20070425

BOARD DATE: 20120824

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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 (15U/Helicopter Repairer), medically separated for chronic back pain, status post L5-S1 fusion, without neurologic abnormality and limited motion by pain, and right shoulder osteoarthritis*.* The CI injured his lower back and right shoulder when he fell from a helicopter while deployed to Afghanistan in 2003. 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 U3L3 profile and underwent a Medical Evaluation Board (MEB). Chronic back pain and right shoulder osteoarthritis were 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, and right shoulder osteoarthritis condition as unfitting, rated 10% and 0% respectively with presumed application of the US Army Physical Disability Agency (USAPDA) pain policy for the shoulder rating. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “I served 15 years in the Air Force, and Army. I was injured in Afghanistan during OEF IV 2004-2005. I was not allowed to remain active until I retired and was forced out on a medical discharge. I request to be retired from the Army for the amount of years that I served.”

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. 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.

RATING COMPARISON:

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| --- | --- |
| **Service IPEB – Dated 20070411** | **VA (# Mo. Pre/After Separation) – All Effective Date 20070426** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Back Pain, Status Post L5-S1 Fusion, without Neurologic Abnormality, Limited by Pain | 5241 | 10% | Degenerative Disc Disease, Lumbar Spine, Status Post Fusion L5-S1 Disc | 5237 | 20%\* | 2007052320090205  |
| Right Shoulder Osteoarthritis | 5003 | 0% | Degenerative Joint Disease Right Should, (Dominant) | 5010-5201 | 20%\* | 2007052320090205 |
| ↓No Additional MEB/PEB Entries↓ | 0% x 3/Not Service Connected x 6 | 2007052320090205 |
| **Combined: 10%** | **Combined: 40%** |

\*Both ratings were initially 10% but were increased to 20% effective 20070426 based on findings from both examinations noted. 5010-5201 was increased to 100% effective 20100701 for total arthroplasty surgery and then rating code changed to 5051(Total Arthroplasty, Right Shoulder, (Dominant)) and decreased to 30% effective 20110801.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that the gravity of his condition merit consideration for a higher separation rating. The Board wishes to clarify that it is subject to the same laws for service 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 Department of Veteran Affairs (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 his degree of impairment vary over time. The Board utilizes VA 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. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Chronic Back Pain. The CI fell off a helicopter in 2003, injuring his back, and had progressively worsening back pain over time. He was treated conservatively initially but on 28 February 2006 he underwent a transforaminal lumbar interbody fusion at L5-S1. The MEB narrative summary (NARSUM) completed approximately 6 weeks prior to separation noted that after surgery he continued to have intermittent back pain that was throbbing and radiated down to his right leg. His symptoms were aggravated by sitting, bending, standing, and lifting and he was unable to perform any impact activities. His profile limitations were severe; he was unable to perform any part of the Army Physical Fitness Test and was not able to run or march at all. He was able to walk, bike, and swim at his own pace and distance. His treatment included the use of narcotic pain medication. The initial VA Compensation and Pension (C&P) examination completed one month after separation documented a constant pain rated 6/10 with exacerbations to 8/10 after prolonged standing, lifting, or bending. The exacerbations would last 2 hours and ease with pain medication.

There were three 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.

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| --- | --- | --- | --- |
| Goniometric ROM - Thoracolumbar | MEB ~ 1.5-2.5 Months Pre-Separation | VA C&P ~ 1 Month Post-Separation | VA C&P ~ 23 MonthsPost-Separation |
| Flex (0-90) | 50⁰ (53, 43, 53) | 90⁰ (Pain at 60°) | 70⁰ |
| Ext (0-30) | 10⁰ (10, 8, 10) | 20⁰ (Pain at endpoint) | 15⁰ |
| R Lat Flex (0-30) | 10⁰ (12, 10, 14) | 10⁰ (Pain at endpoint) | 25⁰ |
| L Lat Flex 0-30) | 10⁰ (12, 12, 12) | 10⁰ (Pain at endpoint) | 25⁰ |
| R Rotation (0-30) | 25⁰ (25, 25, 25) | 30⁰ | 25⁰ |
| L Rotation (0-30) | 30⁰ (35, 38, 38) | 30⁰ | 25⁰ |
| COMBINED (240) | 135⁰ | 190⁰ | 185⁰ |
| Comment | Tender to palpation of lumbar spine; paraspinal muscle spasm; negative straight leg raise and cross straight leg raise; strength 5/5, sensation intact, no clonus | Normal posture and gait; straight leg raise negative; good strength bilaterally, no atrophy; reflexes 2+ bilaterally and normal sensation to light monofilament touch; negative Waddell’s. | Normal posture and gait; constant pain with increase in pain at ROM endpoints; no change with repeated motion; tenderness to palpation; no spasm or guarding; sensory intact, motor 5/5 bilateral lower extremities, and reflexes 2+/4 bilaterally. Patient had to get up from chair multiple times during clinical history. (Joint exam by same examiner on same day noted antalgic gait.) |
| §4.71a Rating | 20% | 10% | 10% |

An PEB determined the chronic back pain condition was unfitting and applied a 10% disability rating, possibly following the US Army Physical Disability Agency (USAPDA) pain policy. The VA initially also applied a 10% rating based on ROM. However, the VA later increased the rating to 20% effective the day after separation from service. A Decision Review Officer decision, based on the totality of evidence including both the initial C&P examination and a subsequent C&P on 5 February 2009, determined the CI’s degenerative disc disease should have been rated at 20% all along. This was based on functional limitation due to pain. Although the thoracolumbar flexion alone did not support a rating greater than 10%, it was within 10 degrees of the 20% rating and the consistent subjective complaints of difficulty with prolonged sitting (as shown during the second examination) and with activities involving standing, bending, and lifting demonstrated functional limitations sufficient to warrant a 20% rating. This rating was applied retroactively and was not the result of a worsening over time.

The Board directs attention to its rating recommendation based on the above evidence. The MEB NARSUM examination is the only examination completed prior to separation and it clearly supports a 20% rating based on flexion limited to 50 degrees. As it was completed prior to separation and appears to be a complete examination, the Board places more probative value on the NARSUM examination. The initial C&P exam was completed after separation and shows a less limited ROM. However, the CI still had pain at 60 degrees and a rating of 20% is supported by flexion not greater than 60 degrees. The CI was able to continue flexion past this point of pain and generally the actual range is used to determine the disability rating. The Board is unable to determine the day when the CI became able to flex his back greater than 60 degrees, with or without pain, and any attempt to do so would be mere speculation. However, with more probative value placed on the exam prior to separation and the VA determination that a 20% rating should have been applied from the day after separation, the Board determined that, more likely than not, the chronic back pain condition met the 20% rating criteria on the day of separation. 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 chronic back pain condition.

Right Shoulder Osteoarthritis. The CI also injured his right shoulder in the 2003 fall from a helicopter and had progressively increasing right shoulder pain. He is right hand dominant. The MEB NARSUM noted an MRI in January 2004 documented posteriosuperior and anteroinferior labral tears and a cartilaginous defect of the anterior inferior glenoid cartilage. In February 2005, the CI underwent shoulder arthroscopy with right anterior and posterior Bankart and capsular plication. Although he was treated with physical and pain management, he continued to have constant right shoulder pain that occasionally radiated down into his scapula. He also had feelings of decreased strength and decreased range of motion. The pain was aggravated by daily use, especially overhead activities. Repeat MRI in 2006 showed severe osteoarthritic changes in the acromioclavicular joint, mild impingement from hypertrophy at the acromioclavicular joint, and possibly a small rotator cuff tear. The VA C&P examination completed on 23 May 2007 noted he reinjured the shoulder in 2007 with heavy lifting. It is not clear if this happened before or after separation from service. On his C&P examination, the CI reported he had needed another surgery but the Army would not perform it. The record does contain an email form an orthopedic surgeon dated 4 April 2007 that states right shoulder surgery would not return the CI to a fully fit for duty status. Total right shoulder arthroplasty surgery was completed on 2 July 2010. After an initial temporary rating of 100%, the VA applied the minimum 30% rating for right shoulder (dominant) prosthetic replacement using code 5051 Shoulder replacement (prosthesis).

There were three 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.

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| Goniometric ROM – Right Shoulder | MEB ~ 1.5 Months Pre-Separation | VA C&P ~ 1 Month Post-Separation | VA C&P ~ 23 MonthsPost-Separation |
| Flexion (0-180) | 125⁰ (125, 130, 130) | 160⁰ (Pain from 50-160) | 90⁰ (Pain at 90) |
| Abduction (0-180) | 115⁰ (115, 120, 115) | 110⁰ (Pain from 50-110) | 70⁰ (Pain at 70) |
| Comment | PT: Moderate discomfort prior to measurements and increased pain after measurements. Limitations appeared to be mechanical. NARSUM: right cuff strength decreased in the push-off at 4+/5; no objective instability or ligamentous laxity; positive Hawkins, Neer, and O’Brien’s; motor and sensory intact. | No change with repeated motion. Weakness without tenderness was noted; no motor strength exam documented; sensation intact and reflexes 2+/4. | Tenderness to palpation |
| §4.71a Rating | 10% | 10% | 20% |

Physical therapy measured ROM with a goniometer on 14 March 2007. The MEB NARSUM was completed on 9 March 2007 and it had different ROM measurements. However, it is not clear if a goniometer was used for these measurements and if they were active or passive. Although the flexion and abduction measurements of the right shoulder documented in the NARSUM were less restricted with both flexion and abduction of 160 degrees, both are still less than the normal value of 180 degrees and both sets of measurements warrant a 10% disability rating. The higher rating of 20% would require limitation to 90 degrees.

An IPEB determined the right shoulder osteoarthritis condition was unfitting and applied a 0% disability rating, with probable application of the US Army Physical Disability Agency (USAPDA) pain policy. The VA initially also applied a 10% rating based on painful and limited motion of a major joint. However, the VA later increased the rating to 20% effective the day after separation from service. A Decision Review Officer decision, based on the totality of evidence including both the initial C&P examination and a subsequent C&P on 5 February 2009, determined the CI’s degenerative joint disease, right shoulder should have been rated at 20% all along. This was based on the more severe limitation of ROM.

The Board directs attention to its rating recommendation based on the above evidence. Both the NARSUM and the initial VA C&P examinations support a 10% rating based on pain-limited motion, IAW §4.59 Painful motion. The later VA examination does document increased limitation of flexion and abduction of the right shoulder and supports a 20% rating. However, this appears to be a worsening over time and this level of limitation of motion was not present at the time of separation. After due deliberation, considering all of the evidence, and mindful of VASRD §4.3 Reasonable doubt, the Board recommends a disability rating of 10% for the right shoulder osteoarthritis 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. As discussed above, PEB reliance on the USAPDA pain policy for rating both the chronic back pain and right shoulder osteoarthritis conditions may have been operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the chronic back pain, status post L5-S1 fusion condition, the Board unanimously recommends a disability rating of 20%, coded 5241 IAW VASRD §4.71a. In the matter of the Right Shoulder Osteoarthritis condition, the Board unanimously recommends a disability rating of 10%, coded 5010-5201 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 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** |
| Chronic Back Pain, Status Post L5-S1 Fusion | 5241 | 20% |
| Right Shoulder Osteoarthritis | 5010-5201 | 10% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111205, 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 XXXXXXXXXXXXXXXXXXXXXXXXX, AR20120016146 (PD201101129)

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 30% 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 30% 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