

RECORD OF PROCEEDINGS
PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXX
CASE NUMBER: PD1200356
BOARD DATE: 20121206

BRANCH OF SERVICE: ARMY
SEPARATION DATE: 20040420

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 low back condition. He did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS), meet worldwide deployment standards or meet physical fitness standards. He was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Spondylolysis and low back pain without focal neurological deficit was forwarded to the Physical Evaluation Board (PEB) IAW AR 40-501. No other conditions appeared on the MEB’s submission. The PEB adjudicated the low back 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: “I feel that my back condition has prevented me to do activities and live life. I was ready and willing to take any number the MEB gave me because I was miserable in my unit after my injury. I could not perform and I was treated bad. I didn’t want to fight or prolong the process. I felt like I was just pushed through.”

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 Correction of Military Records.

RATING COMPARISON:

Service PEB – Dated 20040301			VA (2 Mos. Post-Separation) – All Effective Date 20040421			
Condition	Code	Rating	Condition	Code	Rating	Exam
Spondylolisthesis with Grade II Anterolisthesis	5239	10%	Herniated Nucleus Pulposus, L1-L2 with Spondylosthesis	5239	20%	20040629
↓No Additional MEB/PEB Entries↓			Left Hip Strain	5299-5252	10%	20041201
			Right Hip Strain	5299-5252	10%	20041201
			Chondromalacia Patella, Right Knee	5299-5260	10%	20041201
			Chondromalacia Patella, Left Knee	5299-5260	10%	20041201
			Left Ankle Strain	5271	10%	20041201
			Right Ankle Strain	5271	10%	20041201
			Not Service-Connected (NSC) x 4			
Combined: 10%			Combined: 60%			

ANALYSIS SUMMARY: The Board acknowledges the CI’s assertions of feeling “being pushed through” the MEB process. It is noted for the record that the Board has neither the jurisdiction

nor authority to scrutinize or render opinions in reference to asserted improprieties in the disposition of a case. The Board also 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 wishes to clarify that it is subject to the same laws for disability entitlements as those under which the Disability Evaluation System (DES) operates. The DES has neither the role nor the authority to compensate members for anticipated future severity or potential complications of conditions resulting in medical separation. That role and authority is granted by Congress to the Department of Veterans Affairs (DVA), operating under a different set of laws (Title 38, United States Code). The Board evaluates DVA evidence proximal to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of DES fitness decisions and rating determinations for disability at the time of separation.

Low Back Condition. In May 2003, while in basic training, the CI stepped in a hole and injured his low back. He received conservative treatment from physical therapy (PT), Physical medicine and rehabilitation (PM&R) and pain management to include rehabilitative back exercises, medications and injections. Subsequently he was seen by neurosurgery and after a confirmed magnetic resonance imaging (MRI) of spondylolisthesis of L5-S1 was offered surgery but declined. His profile limitations included no running, jumping, sit-ups, marching, wearing of rucksack or load-bearing vest (LBV), lifting greater than 40 pounds, plyometric exercises, and no physical fitness testing. The commander's statement additionally documented that the CI chronic back pain improved upon completion of rear detachment duties and with not pulling CQ or staff duty. The commander further documented that while the CI claimed "none of the vast array of Army specialists have relieved his pain" he personally witnessed over 3 months the CI "completing many tasks that required a lot of bending over and squatting without pain." There were 2 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.

Thoracolumbar ROM	MEB ~5 Mo. Pre-Sep	VA C&P ~2 Mo. Post-Sep
Flexion (90° Normal)	20°/100	35°
Ext (0-30)	10°	10°
R Lat Flex (0-30)	20°	15°
L Lat Flex 0-30)	20°	15°
R Rotation (0-30)	25°	30°
L Rotation (0-30)	25°	30°
Combined (240°)	120°	135°
Comment	Tenderness; painful motion, increased lumbar lordosis,	Tenderness; spasm; abnormal gait
§4.71a Rating	40%/20%/10%* See text	20%

*Conceding §4.59

At the MEB exam, the CI reported pain was constant which increased with activity with intermittent radiation into lower extremities and upper back and that he had not received lasting benefit from any treatment. The MEB physical exam demonstrated; tenderness bilaterally from T8-S1 (thoracic-sacral), greatest at the L1 (lumbar) bony prominence and paraspinals, positive Waddell's 5/5 connoting a nonorganic disease process contributing to the back pain, flexion to 100 degrees without pain for rectal exam (the evidence did not document specifically how this exam was performed) and no neuromuscular findings. MRI revealed spondylolisthesis of L5-S1 (movement of one bony prominence on another away from normal), a possible spina bifida occulta in the sacral segment (congenital defect) and an incidental small left paracentral protrusion at L4-5, without stenosis. A Computer Tomography (CT) revealed L5 spondylolysis with Grade II anterolisthesis. The medical examiner diagnosed spondylolysis and

low back pain without focal neurological deficit and additionally documented unable to lift greater than 20 pounds or wear a Kevlar helmet. At the Compensation and Pension (C&P) exam after separation, the CI reported constant pain, 6 Of 10 in intensity which radiated to both legs, worsened with lifting or bending, and also reported three episodes of complete incapacitation which were relieved after a few hours in the ER with a long acting injection of a narcotic pain medication, Demerol or Morphine. He was not employed but reported going to truck driving school 6 months after separation. The C&P exam demonstrated loss of the normal lumbosacral curve with exaggeration of the curve in the upper lumbar region, muscle spasm at the maximum ROMs, no kyphosis or lordosis, decreased sensation to light touch of the left lateral thigh, bilateral positive straight leg raises (neurologic signs suggestive of herniated disc disease) and normal motor, reflexes and gait findings. X-rays revealed joint space narrowing of the L5-S1 and grade II spondylolisthesis of L5 on S1. The examiner diagnosed herniated nucleus pulposus (HNP) L1-L2 with spondylolisthesis on MRI.

The Board directs attention to its rating recommendation based on the above evidence. There is clear disparity between the flexion ROM between the MEB and VA examinations with very significant implications regarding the Board's rating recommendation. The Board also notes in the MEB exam the examiner documents a normal flexion exam of 100 degrees while performing an anal wink test giving speculation to the 20 degree measured flexion exam. The Board notes the flexion exam inconsistencies is also consistent with the 5/5 positive Waddell's sign and with the commander's statement. The Board thus noted these inconsistencies, carefully deliberated its probative value assignment and carefully reviewed the service file for corroborating evidence for either the limited or normal flexion exam documented in the MEB exam in the 12-month period prior to separation. There is only one service treatment record (STR) entry in evidence, 8 months prior to separation, which reflects a 40 degree flexion exam which is consistent with the VA exam. The Board also notes the VA measurements are consistent with the other collateral physical findings; and the VA measurements are consistent with the diagnostic and clinical pathology in evidence. Therefore, based on all evidence and associated conclusions just elaborated, the Board is assigning preponderant probative value to the VA evaluation. The PEB and VA applied the same VASRD code 5239 (Spondylolisthesis or segmental instability) and both were subject to the same rating criteria IAW §4.71a—Schedule of ratings—musculoskeletal system under the general rating formula for diseases and injuries of the spine. The PEB assigned 10% for pain which is consistent with application of §4.59 and the noted 100 degree flexion MEB exam. The VA assigned 20% for forward flexion greater than 30 which is consistent with §4.71a. The incapacitating episodes in evidence do not support a higher rating and there is no evidence of ratable peripheral nerve impairment which would provide for additional or higher 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 low back 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. As discussed above, PEB reliance on the USAPDA pain policy for rating low back was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the low back condition, the Board unanimously recommends a disability rating of 20%, coded 5239 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:

UNFITTING CONDITION	VASRD CODE	RATING
Spondylolisthesis with Grade II Anterolisthesis	5239	20%
	COMBINED	20%

The following documentary evidence was considered:

- Exhibit A. DD Form 294, dated 20120409, w/atchs
- Exhibit B. Service Treatment Record
- Exhibit C. Department of Veterans' Affairs Treatment Record

XXXXXXXXXXXX, DAF
President
Physical Disability Board of Review

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency
(TAPD-ZB / XXXXXXXXXX), 2900 Crystal Drive, Suite 300, Arlington, VA 22202-3557

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation
for XXXXXXXXXXXX, AR2013000043 (PD201200356)

1. I have reviewed the enclosed Department of Defense Physical Disability Board of Review (DoD PD BR) 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

XXXXXXXXXX
Deputy Assistant Secretary
(Army Review Boards)

CF:
() DoD PD BR
() DVA