RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1200015 SEPARATION DATE: 20051110

BOARD DATE: 20120419

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSG/E-6 (92M30/Mortuary Affairs), medically separated for a low back condition. She did not respond adequately to conservative or surgical treatment and was unable to fulfill the demands within her Military Occupational Specialty (MOS), meet worldwide deployment standards or meet physical fitness standards. She was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Lumbago, right lower extremity radiculopathy 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 low back pain (LBP) 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: “Bilateral L4-L5 microdiscectomy with laminectomy resulting in permanent L5 nerve root damage and right lower extremity radiculopathy and weakness. I have constant right leg pain and weakness, and chronic back pain.” She additionally lists all of her VA conditions and ratings as per the rating chart below. A contention for their inclusion in the separation rating is therefore implied.

RATING COMPARISON:

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| --- | --- |
| **Service PEB – Dated 20050729** | **VA (3 Mo. Pre Separation) – All Effective Date 20051111** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5243 | 10% | Status Post Bilateral L4-L5 Microdiscectomy | 5243 | 40% | 20050824 |
| ↓No Additional MEB/PEB Entries↓ | Rt Lower Extremity Radiculopathy | 8520 | 10%\* | 20050824 |
| Temporomandibular Joint Dysfunction | 9905 | 20% | 20050823 |
| Tinnitus assoc w/ TMJ | 6260 | 10% | 20060420 |
| 0% x 2/Not Service-Connected x 4 |
| **Combined: 10%** | **Combined: 60%** |

\* In 20060525 rating decision proposed to decrease to 0% for a normal VA 2006 EMG

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which her service-incurred condition continues to burden her. 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. 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. 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 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. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation. The Board also acknowledges the CI's contention suggesting that service ratings should have been conferred for conditions not diagnosed while in the service (but later determined to be service-connected by the DVA). 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 DVA, however, 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.

Low Back Condition. In February 2003 the CI injured her back weightlifting and was treated conservatively for over a year. She had worsening pain with radiation to her right and left leg which prompted a neurosurgical evaluation. In March 2004 neurosurgery performed definitive surgery for removal of a herniated nucleus pulposus (HNP) at L4 that was evident on MRI. This surgery provided temporary improvement but due to continued radiating pain a MRI was repeated 5 months after surgery. This MRI demonstrated multilevel DDD with patent foramina at all levels and specifically noted improvement at L4-5 level since the interval surgical intervention. A subsequent electromyelogram (EMG) was positive for right L5-S1 paraspinals disease with no evidence of ongoing lumbar radiculopathy, plexopathy, or lower extremity peripheral neuropathy. She continued to be seen in physical therapy attempting all the modalities they had to offer to include; traction, TENS, and rehabilitative back exercises. She was seen in follow-up by orthopedics who documented a normal neurologic exam and recommended an MEB due to her current limitations and not being worldwide deployable. In April 2005, a year post-operatively, she was seen by another neurosurgeon who documented her symptomatic radiculopathy and opined she had a moderate level of nerve root dysfunction at the L4-L5 level and given her limitations would be unable to perform repetitive motions of the lumbosacral spine such as sit-ups or to perform bending and lifting activities which are necessary for her MOS. He further opined she will probably be able to bear about 50 pounds, but it was determined that her sustained long term weight bearing would have to be 25 pounds or less. The permanent profile limitations included inability to carry and fire a weapon, move two miles with a fighting load, dig a fighting position, do 3-5 second rushes, do repetitive exercise, and restricted her from all APFT events. The commander’s statement remarked, despite her back surgery, she continued to perform at the level that far exceeds all expectations, she was fully capable to perform her duties with certain limitations and her limitations will never hamper her professionalism.

There were three range-of-motion (ROM) evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation.

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| ROM - Thoracolumbar | PT(for MEB) ~ 6 Mo. Pre-Sep | VA C&P ~ 3 Mo. Pre-Sep | VA C&P ~ 6 Mo. Post-Sep |
| Flex (0-90) | 45⁰ | 30⁰ | 40⁰ |
| COMBINED (240) | 240⁰ | Not measured | 150⁰ |
| Comment |  | SLR positive | SLR negative, nl gait |
| §4.71a Rating | 20% | 40% | 20% |

The narrative summary (NARSUM) completed for the MEB historically documented the CI’s pain began in the back of her legs upon waking up in the morning, progressed to her low back then moved to her right upper thigh with increasing pain with standing greater than 10 minutes. The pain was not characterized with a pain scale yet her pain medications reflected a broad range of therapy to include a nonsteriodal (Naprosyn), a narcotic (Vicodin) and [serotonin-norepinephrine reuptake inhibitor](http://en.wikipedia.org/wiki/Serotonin-norepinephrine_reuptake_inhibitor) (SNRI, Duloxetine) which is used for radicular neuropathic conditions and for mental health conditions. The physical exam findings demonstrated diffuse tenderness in the lumbar region over the right sacroiliac joint with flexion of 50 to 60 degrees and referenced the physical therapy full ROM exam annotated in the chart above. The examiner did not comment on neurologic exam, spine contour, spasm or gait. In the DD Form 2807, the examiner documented a reinjury of the back after surgery from a rappelling incident yet there was no evidence in the service treatment records (STR) to reflect seeking care for this incident. Additional ROMs evident in the STR include physical therapy entries 2 months after surgery which demonstrated full active ROMs, and 3 months after surgery which demonstrated a normal gait and poor posture which likely contributed to her symptoms. Her pain scale then was documented a 5/10 with 10 being the worst. The VA Compensation and Pension (C&P) exam historically documented no additional history and specifically only labeled the weightlifting as the primary incident leading to her back condition.

Symptomatically the examiner documented daily medication use to include Naprosyn and Duloxetine but did not document any characteristics of her pain. The physical exam findings included; stiff back which was tilted forward to the pelvis approximately 3 degrees, inability to twist at the waist, a straight leg positive at 50 degrees bilaterally with pain in the low back, a normal neurologic exam and opined her back condition “appears to give her a moderate amount of physical impairment.” The examiner did not document exam findings regarding spine contour, spasm nor gait. Review of the records up to 12 months after release from active duty reflected a VA exam 6 months after separation, without interval back injury or surgery, that demonstrated a normal gait without the use of assisted devices and new ROMs reflected in the chart above.

The Board directs its attention to its rating recommendations based on the evidence just described. The PEB and VA chose the same coding options for the condition, but this did not bear on rating. The PEB’s DA Form 199 reflected application of the USAPDA pain policy for rating, and its 10% determination was inconsistent with §4.71a standards for the general rating formula for diseases and injuries of the spine and the VA’s 40% determination was consistent with §4.71a standards based on forward flexion. The Board thus carefully deliberated its probative value assignment to these disparate flexion results, and carefully reviewed the service file for corroborating evidence in the 12-month period prior to separation and post separation. In its assignment of probative value to the disparate flexion results, the Board must acknowledge that VA C&P spine examinations may predispose a lowered pain threshold or increased symptom reporting since the examinee is generally quite aware that the severity of symptoms and pain tolerance on ROM and other testing is directly correlated with the resulting rating and financial gain. The Board notes that both the MEB and VA exams were sufficiently well documented in terms of ratable data for the current VASRD, and that the CI’s overall condition and described physical findings were congruent between these two exams except for the degree of forward flexion.

The Board carefully considered the whole record IAW VASRD §4.2 (Interpretation of examination reports) in order to develop a consistent picture of the CI’s back condition and agreed in this case that the ROM documented in the STR and the VA exam 6 months after separation consistently reflected a forward flexion found in the MEB exam. There is no record of recurrent injury or other development in explanation of the more marked flexion impairment reflected by the VA measurements prior to separation. Board members agreed the condition most nearly approximated the 20% rating based on the preponderance of evidence of all examinations considered in their totality. There was no evidence of documentation of incapacitating episodes 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 separation rating of 20% for the low back condition.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for right lower extremity radiculopathy and weakness. All of these conditions were reviewed by the action officer and considered by the Board. The Boards’ main charge in respect to this condition is an assessment of the appropriateness of the PEB’s fitness adjudication. The Board’s threshold for countering DES 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. While the neurosurgeon reported a moderate degree of L4-5 nerve root dysfunction, EMG performed in service was not consistent with an L4-5 radiculopathy, motor strength testing was consistently normal in all exams and evidence of the record reflects that pain was the reason the CI was unable to perform all the functions of her military specialty. In addition, while the VA rated the right lower extremity radiculopathy with the original rating decision, in a rating decision 6 months post separation, the VA proposed to decrease the current 10% rating to 0% based on a normal 2006 EMG. 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.

Remaining Conditions. Other conditions identified in the DES file were right shoulder pain, temporomandibular joint disease (TMJ) and left ear persistent effusion. Several additional non-acute conditions or medical complaints were also documented. These conditions were reviewed by the action officer and considered by the Board. It was determined that none could be argued as unfitting and subject to separation rating. Additionally tinnitus and several other non-acute conditions were noted in the VA proximal to separation, but were not documented in the DES file. The Board does not have the authority under DoDI 6040.44 to render fitness or rating recommendations for any conditions not considered by the DES. The Board therefore has no reasonable basis for recommending any additional unfitting conditions for separation rating.

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 condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the chronic low back pain condition, the Board unanimously recommends a rating of 20% coded 5243 IAW VASRD §4.71a. In the matter of the right lower extremity radiculopathy and weakness condition, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation. In the matter of the right shoulder pain, TMJ and left ear persistent effusion conditions or any other medical conditions eligible for Board consideration; the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation.

RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows, effective as of the date of her prior medical separation:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Low Back Pain | 5243 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111228, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans Affairs Treatment Record

 XXXXXXXXX

 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 XXXXXXXXXXXX, AR20120008207 (PD201200015)

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 XXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA