RECORD OF PROCEEDINGS
PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXX
CASE NUMBER: PD1200248
BOARD DATE: 20130109

BRANCH OF SERVICE: ARMY
SEPARATION DATE: 20020326

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (31L20/Wire System Team Chief Installer), medically separated for a residual lumbar radiculopathy. He did not respond adequately to operative 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 underwent a Medical Evaluation Board (MEB). Residual lumbar radiculopathy w/motor deficit & sensory deficit, degenerative lumbar disc disease (DDD) and status post (s/p) L5-S1 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 low back condition as unfitting, rated 20%, with application of the Veteran's Affairs Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: "It is my firm opinion that the PEB failed to adequately review all information from the MEB and did not use the proper evaluation tools. Thus this resulted in a lower rating by the PEB. The PEB did not consider the reduced motor deficit and sensory during the evaluation. The was considered under the VA rating of May 22, 2002. (continued) I am requesting a complete review of my records and that the board review the VA rating the MEB Board Plus Addendum and the PEB Board results. I further more request that the board review that the MEB found that I had occasional paresthesias of left foot, and enlarged and swollen S1 nerve root which was not covered in the PEB. At the time of Discharge I was considered unfit for duty by the PEB, but due to the failure to consider all of the evidence and the use of proper rules I was denied service retirement. Furthermore I do not believe that the PEB fairly adjudicated my case, I have personal knowledge of people with the same disability that were medically retired. One was from the Air Force and the other from the Navy. I have continually had complications with this condition (See Section 4 and attachments). As recently as 2008 I had to undergo surgery again to correct the pain related to the previous actions. While this relieved some of the pain, I continue to have pain while seated and while standing. I have nerve damage in my left leg. The VA recently informed me that I would not regain any additional dexterity in that limb and that the nerve damage is permanent. I expect the PDBR find that the PEB failed to rate my disability correctly under the VA Guidelines and used the improper diagnostic code 8521 when they should have used diagnostic code 5293. Furthermore I expect the PDBR to find that I should have been placed on the Permanent Disability Retirement List with a rating 60%. I also expect to be notified of the PDBR results as well as the determination of the Department of the Army in a timely and efficient manner."

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:

Service PEB – Dated 20011217			VA (STR) – All Effective Date 20020327			
Condition	**Code**	**Rating**	**Condition**	**Code**	**Rating**	**Exam**
Residual Lumbar Radiculopathy, DDD S/PL5-S1 Discectomy	8521	20%	Residuals, Herniated Nucleus Pulposus, s/p Microdiscectomy w/ DDD and Radiculopathy	5010-5293	60%*	STR 1991-2001
No Additional MEB/PEB Entries			Not Service-Connected x 2			
Combined: 20%			Combined: 60%			

*Subsequent and only other VARD dated 20030826 indicates no change in rating

---

ANALYSIS SUMMARY: The Board acknowledges the CI's opinion that the PEB failed to review all the information from the MEB and used improper coding, with the implication that the disability rating was lower than that which was assigned by the VA. It must be noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to allegations regarding suspected service improprieties. The Board's role is confined to the review of medical records and all evidence at hand to assess the fairness of PEB disability ratings and fitness determinations as elaborated above. 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.

Residual Lumbar Radiculopathy. The CI had long standing low back pain (LBP) since 1992 after a lifting injury which had been treated conservatively with medications and physical therapy. In October 2000 he had an exacerbation of his back pain while performing physical training with radiation of pain to his left leg and foot which worsened to the point of requiring a cane to walk and having neurologic deficits consistent with a herniated disc. Magnetic resonance imaging (MRI) confirmed a L5-S1 herniated disc and the CI opted for operative care with a L5-S1 microdiscectomy, December 2000. One month post-operatively he was doing well without radicular pain, however he had a reoccurrence of and persistence of back, left leg and foot pain 3 months post-operatively and residual left lower extremity weakness, without intervening injury. Six months post-operatively a temporary profile was written in June 2001 that superseded the permanent profile of January 2001 for 30 days which was more restrictive with lifting limitations of up to 20 pounds and no Army Physical Fitness Test. The permanent profile had lifting restrictions up to 40 pounds and allowed an alternate physical training test in addition included; no riding in tactical vehicles, no sit-ups, and physical training at own pace and distance. The CI was referred to an MOS/Medical Retention Board (MMRB) for consideration for cross-training; however the MMRB decision was that the CI did not meet Army retention standards and referred to an MEB. The commander's statement corroborated the medical condition and limitations and additionally documented he was no longer able to perform many of the tasks of his MOS and no longer able to wear his personal equipment.

At the MEB exam the CI reported continued intermittent LBP referred to as sciatica and spasms as well as continued residual weakness of his left lower extremity with paresthesias of the left foot. He also reported new onset intermittent right ache similar to the left. The MEB physical

exam demonstrated a well healed incision in the lower back, left calf muscle bulk appeared to be about 7mm smaller in circumference compared to the right side, motor strength was 5/5 except 4+/5 strength in the left quadriceps, tibialis anterior, gastrocnemius and extensor hallicus longus, without any pain, left S1 hypoesthesia and negative straight leg raise (neurologic sign for disc disease). The exam was silent to gait, posture and spine contour. MRI, of the lumbosacral spine performed in June 2001 revealed previous laminotomy defect at left L5-S1 and an enlarged swollen left S1 nerve root, but no recurrent disc herniation or residual fragment. Electromyogram and nerve conduction velocity studies of lower extremities also from June 2001 revealed findings consistent with a persistent left S1 radiculopathy with an absent left ankle reflex. The treating MEB neurosurgeon examiner diagnosed residual lumbar radiculopathy, opined he was not a surgical candidate and conservative management was recommended from then on. He further opined that due to the persistent deficits as well as the chronic pain complaints; the patient was unlikely to be able to meet Army retention standards. There was no VA Compensation and Pension exam, and the VA relied on the service treatment record for its rating recommendation.

The Board directs attention to its rating recommendation based on the above evidence. The 2002 VASRD coding and rating standards for the spine, which were in effect at the time of separation, were changed to the current §4.71a rating standards in 2004. For the reader's convenience, the 2002 rating code under discussion in this case is excerpted below.

> **5293** Intervertebral disc syndrome:
> Pronounced; with persistent symptoms compatible with: sciatic neuropathy with characteristic pain and demonstrable muscle spasm, absent ankle jerk, or other neurological findings appropriate to site of diseased disc, little intermittent relief 60
> Severe; recurring attacks, with intermittent relief 40
> Moderate; recurring attacks 20
> Mild 10
> Postoperative, cured 0

The PEB and VA chose different coding options for the condition which had significant implications on the rating for the Board to consider. The PEB assigned a rating of 20% with code 8521 (External popliteal nerve [common peroneal] paralysis of) IAW §4.124a—Schedule of ratings–neurological conditions and convulsive disorders for moderate in consideration of the residual motor deficits, and sensory deficits of the S1 radiculopathy. The Board notes this code describes the residual motor and a sensory deficit of the lower leg however does not include the quadriceps motor deficit of the upper leg. The Board agreed the more clinically appropriate peripheral code to describe all the motor deficits in this case is the sciatica code. The VA assigned a rating of 60% with code 5293 (Intervertebral disc syndrome) for continued residual symptoms of lumbar radiculopathy with motor deficit and sensory deficit, muscle atrophy, and DDD disease which was consistent with §4.71a. The action officer notes the most proximate clinical data in totality supports an S1 radiculopathy without evidence of a herniated nucleus pulposus and clinically could manifest as the residual symptoms in this case which were identified in the MEB that contributed to preventing the CI's activity. Board members concluded therefore that coding a neurologic code rather a musculoskeletal code is therefore more clinically appropriate. The Board considered the 8620 and the 8720 code (paralysis of sciatica) for its clinical specificity to the peripheral nerve pathology in evidence IAW §4.123 neuritis or §4.124 neuralgia. The VASRD specifies §4.123 is "characterized by loss of reflexes, muscle atrophy, sensory disturbances, and constant pain, at times excruciating," is to be rated on the scale provided for injury of the nerve involved, with a maximum equal to severe, incomplete, paralysis. The maximum rating which may be assigned for neuritis not characterized by organic changes referred to in this section will be that for moderate, or with sciatic nerve involvement, for moderately severe, incomplete paralysis. The Board notes the

evidence reflects the organic changes consistent with §4.123 and the pain ranged from 2 to 6 of 10 in intensity which was intermittent not constant and therefore the Board agreed the evidence did not approach the severe criteria. The Board acknowledges the residual pain component evidence meets the moderate criteria and approaches the moderate severe criteria. The challenge before the Board is the lack of evidence with regards to post surgical functional impairment from the lower extremity weakness. The Board recognizes while the pre surgical evidence supports use of a cane for ambulation, the record is silent to this evidence post surgery in addition it is silent to gait, posture or spasm. The Board acknowledges that any evidence up to 12 months after separation that may give insight into the CI's functional impairment due to the residual weakness was not available in the evidence before it, and could not be located after the appropriate inquiries. However, while the Board recognizes the temporary profile was for only 30 days and then reverted back to the permanent profile it is 6 months post-operative and is more restrictive and gives some indication the CI's functional impairment is worse. Therefore the Board agreed the disability meets the moderate severe criteria. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (Resolution of reasonable doubt), the Board recommends a disability rating of 40% for the residual lumbar radiculopathy 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. In the matter of the residual lumbar radiculopathy condition, the Board unanimously recommends a disability rating of 40% coded 8520 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:

UNFITTING CONDITION	VASRD CODE	RATING
Residual Lumbar Radiculopathy, Degenerative Disc Disease S/P L5-S1 Discectomy	8520	40%
	COMBINED	**40%**

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120307, w/atchs
Exhibit B. Service Treatment Record
Exhibit C. Department of Veterans' Affairs Treatment Record

XXXXXXXXXXXXXXX, 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 XXXXXXXXXXXXXXXXXX, AR20130001359 (PD201200248)

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 40% 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 40% 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

XXXXXXXXXX
Deputy Assistant Secretary
(Army Review Boards)

CF:
( ) DoD PDBR
( ) DVA