RECORD OF PROCEEDINGS
PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXX
CASE NUMBER: PD1101058
BOARD DATE: 20121011

BRANCH OF SERVICE: ARMY
SEPARATION DATE: 20070912

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a National Guard SSG/E-6 (21H/Construction Engineer), medically separated for chronic low back pain (LBP) post anterior decompression and fusion L5/S1. The CI was injured when a co-worker lost their grip on tools being loaded into a truck and the tools fell on the CI injuring both his back and left shoulder. The CI underwent a back surgery and two left shoulder surgeries as a result of this injury. Despite back surgery and extensive physical therapy (PT) and medications, the CI could not meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent U2/L3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded "chronic LBP" and "status post L5-S1 surgery" conditions on the DA Form 3947 to the Informal Physical Evaluation Board (IPEB) as medically unacceptable IAW AR 40-501. Three other conditions, identified in the rating chart below, were also identified and forwarded by the MEB. The IPEB adjudicated the "chronic LBP post anterior decompression and fusion L5/S1" condition as unfitting, rated 0%, with likely application of AR 635-40, B-29. The remaining conditions were determined to be not unfitting. The CI filed an appeal to the Formal PEB (FPEB) which upheld the IPEB decision. The CI then filed a statement of rebuttal with the FPEB. The FPEB reviewed the case and forwarded the entire case file to the U.S. Army Physical Disability Agency (USAPDA). The USAPDA affirmed the FPEB findings and indicated the CI's contended radiculopathy was not ratable. The CI elected transfer to the Retired Reserve List in lieu of discharge with severance pay at a 0% disability rating.

CI CONTENTION: "The reasons this rating should be changed are: 1. I was permanently disabled and unable to return to my civilian job in the same capacity. 2. My military doctors at the time (from West Point Keller) thought my 0% rating was outrageous and encouraged be to appeal it which I did. 3. The MEB did not consider other conditions relevant to my overall disability. 4. MEB told me, during my hearing that if I lose some weight my back might feel better without realizing it was the injury to my back that cause me to gain weight. I found this comment degrading and insulting. 5. After getting out of the military I filed for disability through the VA and is [*sic*] now 90% disabled this is a significant rating increase from the 0% the MEB issued. 6. Due to my service connected disabilities I now have other conditions that are disabling. 7. On my appeal to the MEB I submitted new medical evidence showing that I had right leg neuropathy associated with my service connected degenerative disc disease and that was over looked. 8. I had extensive medical documentation of my sleeping disorder while on active duty and how it affected my social, mental, and occupational health yet the MED would not consider this. VA immediately identified my sleep disorder as sleep apnea and scheduled me for a sleep study. I was diagnosed with acute sleep apnea 3 months after leaving service and later filed a claim. VA granted me 50% for acute sleep apnea. 9. Even with documentation from my commander saying that I was unfit to stay in the service due to the injury to my left shoulder the MEB still did not accept this as a career ending disability."

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in the Department of Defense Instruction (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 right leg neuropathy, left shoulder, sleep apnea and umbilical hernia conditions requested for consideration and the unfitting back condition meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. Any condition 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 FPEB – Dated 20070628			**VA (6 Mo. After Separation) – All Effective Date 20070913**			
Condition	**Code**	**Rating**	**Condition**	**Code**	**Rating**	**Exam**
Chronic LBP Post Anterior Decompression and Fusion L5/S1…	5241	0%	Degenerative Disc Disease (DDD) Lumbar Spine with Chronic LBP	5237	30%*	20080325
			Right Leg Neuropathy a/w DDD Lumbar Spine …	8521	20%	20080325
Sleep Disorder	Not Unfitting		Sleep Apnea	6847	***not noted*	*20110309*
Arthroscopia Left Shoulder Rotor Cuff and Labral Repair	Not Unfitting		Left Rotator Cuff Tear	5299-5201	20%	20080325
Umbilical Hernia Repair	Not Unfitting		Umbilical Hernia with Recurrence	7399-7339	20%	20080325
↓No Additional MEB/PEB Entries↓			Adjustment Disorder with Anxiety and Depression	9440-9434	30%	20080518
			0% x 2			20080325
Combined: 0%			**Combined: *80%**			

* DDD, 5237 rated 30% effective 20070913 based on 20% for ROM and 10% for "spasm, fatigue, decreased motion, stiffness, weakness pain additional pain following repetitive motion." **Per VARD dated 20110719, sleep apnea (6847) added and rated 50% effective 20101116 [exam 20110309] (combined 90%).

ANALYSIS SUMMARY: The Disability Evaluation System (DES) is responsible for maintaining a fit and vital fighting force. While the DES considers all of the member's medical conditions, compensation can only be offered for those medical conditions that cut short a member's career, and then only to the degree of severity present at the time of final disposition. However the Department of Veterans' Affairs (DVA), operating under a different set of laws (Title 38, United States Code), is empowered to compensate service-connected conditions and to periodically re-evaluate said conditions for the purpose of adjusting the Veteran's disability rating should his degree of impairment vary over time. The Board notes the current DVA ratings listed by the CI for all of his service-connected conditions, but must emphasize that its recommendations are premised on severity at the time of separation. The DVA ratings which it considers in that regard are those rendered most proximate to separation. The Board is empowered to evaluate the fairness of fitness determinations, and to make recommendations for ratings of conditions which it concludes would have prevented the performance of required duties (at the time of separation). 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.

Lower Back condition (Chronic LBP Post Anterior Decompression and Fusion L5/S1 with Right Leg Neuropathy). There were four exams, one with range-of-motion (ROM) evaluation, 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 ~12 Mo. Pre-Sep	PT ~11 Mo. Pre Sep	MEB ~6 Mo. Pre-Sep	VA C&P ~6 Mo. Post-Sep
Flexion (90º Normal)	No ROM's	35º	No ROM's	40º (38º pain begins)
Ext (0-30)		30º		30º
R Lat Flex (0-30)		20º		30º
L Lat Flex 0-30)		20º		30º
R Rotation (0-30)		30º		30º
L Rotation (0-30)		30º		30º
Combined (240º)		165º		190º
Comments:	Reflexes 2+ symmetrical; muscle tone nml; strength 5/5		Normal gait; right gastroc soleus 4/5 strength; reflexes nml; muscle tone nml;- SLR	Normal gait; pain with ROM; pain following repetitive motion; lumbar flattening; tenderness; Right ankle dorsiflexion/plantar flexion 4/5; Right great toe 4/5; sensation intact
§4.71a Rating	See text	20%	See text	20% (VA 30%)
§4.124a Rating	-	-	*10% (PEB fit)*	*20%*

The CI had a well documented history of back pain in the service treatment record (STR). A magnetic resonance imaging (MRI) performed in June 2005 indicated an L5-S1 degenerative disc disease (DDD) affecting the right L5 nerve root. The CI's pain continued and he underwent a discogram performed in January2006 which demonstrated L5-S1 excruciating concordant pain with lower extremity radiculopathy. In March 2006, the CI underwent an anterior decompression laminectomy. The CI continued with PT and follow-up with Orthopedics, however, the pain was unresolved. An Orthopedic note in July 2006 noted an increase in low back pain, difficulty with sleep and decreased ROM in all planes with pain without radiculopathy. The initial MEB examination, 12-months prior to separation, noted adequate pain relief with a moderate degree of pain which was increased with power walking and running. The second MEB examination, 6 months prior to separation documented increased pain and disability with power walking, running, prolonged standing and prolonged sitting, however, most pain was relieved with rest and no pain medication was needed. The exam documented mild right lower leg weakness. The examiner recommended wearing soft athletic shoes as needed for relief of the LBP along with a restriction in sitting or standing for greater than thirty minutes. An electromyogram (EMG) performed in July 2007, 2 months prior to separation, demonstrated moderate right lower extremity radiculopathy. Neither MEB exam documented ROMs. A comprehensive functional evaluation was performed proximate to the MEB exam. This exam documented truncal weakness and decreased "true Lumbar flexion" on repetition of 24, 18, and 26 from a normal of 60 (AMA 5th edition standards valid and at 38% of normal).

The VA Compensation & Pension (C&P) examination performed 6 months after separation noted complaints of constant sharp stabbing low back pain radiating into the right buttock and right leg weakness worse in the AM on rising from bed, with standing, walking and sitting for

prolonged periods. There was no documentation of foot drop, antalgic gait on exam. There was right lower extremity weakness. All exams are summarized above.

The Board directs attention to its rating recommendation based on the above evidence. The PEB coded the chronic LBP post anterior decompression and fusion L5S1 as 5241 (Spinal fusion) rated 0%, stating "Range of motion is decreased with pain being the limiting factor." The VA coded the lower back pain as 5237 (Lumbosacral strain) rated 30% with 20% for "forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees …with an additional 10% because of decreased motion, spasm, stiffness, weakness pain and additional pain following repetitive motion."

The Board considered that the C&P exam was the single exam detailing ROM measurements of the thoracolumbar spine and addressing repetitive motion. The VA exam was adjudged the highest probative value exam. Independent rating of that exam would be 20%. 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 LBP post anterior decompression and fusion L5/S1 condition.

Board precedent is that a functional impairment tied to fitness is required to support a recommendation for addition of a peripheral nerve rating at separation. The USAPDA specifically addressed the radiculopathy (abnormal EMG and 4/5 motor strength) as being non-ratable in their response to the CI's rebuttal. The pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a. The motor impairment was relatively minor and cannot be linked to significant physical impairment. Since insufficient evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment. After due deliberation in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change in the USAPDA fitness determination for the radiculopathy condition.

Contended PEB Conditions. The contended conditions adjudicated as not unfitting by the Army were right leg neuropathy; sleep disorder; arthroscopia left shoulder rotor cuff and labral repair; and umbilical hernia repair with mesh. The Board's first charge with respect to these conditions is an assessment of the appropriateness of the PEB's fitness adjudications. The Board's threshold for countering 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.

Right Leg Neuropathy condition. The right leg neuropathy condition was discussed above with the chronic LBP condition.

Sleep Apnea condition. The sleep apnea condition was not profiled; this was not implicated in the commander's statement; nor was this condition judged to fail retention standards. Sleep apnea was reviewed by the action officer and considered by the Board. There was no indication from the record that the sleep apnea condition significantly interfered with satisfactory duty performance. After due deliberation in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB fitness determination for the contended sleep apnea condition; and, therefore, no additional disability rating can be recommended.

Left Shoulder condition. The PEB diagnosis was arthroscopia left shoulder rotor cuff and labral repair. The CI was right-handed. There were three ROM evaluations in evidence and two without ROM's, with documentation of additional ratable criteria, which the Board weighed in arriving at its fitness and rating recommendation; as summarized in the text and chart below.

Left Shoulder ROM	MEB~12 Mo. Pre-Sep	PT ~11 Mo. Pre Sep	MEB ~6 Mo. Pre-Sep	VA C&P ~6 Mo. Post-Sep
Flexion (0-180°)	No ROM's	125°	ROM limited in forward flexion and abduction secondary to pain	155°
Abduction (0-180°)		130°		130°
Comments: Right hand dominant	+ impingement sign; muscle testing 5/5' "unable to move with a fighting load carry and fire his weapon"		+ impingement sign; muscle testing 5/5; (see text)	Tenderness; pain with active motion (abduction-pain begins at 127°); pain with repetitive motion
§4.71a Rating	10%-20%	10%	10%-20% (PEB fit)	10%-20% (VA 20%)

The CI had numerous Orthopedic and PT notes in the STR. During the CI's injury he dislocated his left shoulder and was evaluated in-theater. An MRI revealed a SLAP (superior labrum from anterior to posterior) tear. The CI was diagnosed with a left rotator cuff tear and underwent an arthroscopic repair. The CI continued with left shoulder persistent pain and limited ROM. The CI was given a permanent U2 prolife for left shoulder pain in March 2005 with restrictions of no pushups. Despite medications and aggressive PT a second left shoulder surgery was performed to repair the labrum in March 2006. The initial MEB exam indicated a positive impingement test and an inability to carry and fire his assigned weapon and move with a fighting load. The commander's statement in December 2006 documented that the CI had an inability to move with a fighting load at least two miles, an inability to construct an individual fighting position and could not perform an Army Physical Fitness Test (APFT) test. The second MEB exam 6 months prior to separation indicated a positive impingement test and pain limited motion in forward flexion and abduction. A comprehensive functional evaluation was performed proximate to the MEB exam. The left shoulder ROM was limited, but greater than 90 degrees (83% of normal) and demonstrated slight weakness of the left arm and grip.

The VA C&P exam noted progressive symptom worsening of left shoulder stiffness, with limited ROM, weakness and pain as summarized above. The examiner assessed functional limitations of decreased manual dexterity, inability to lift, carry and reach.

The Board directs attention to its recommendations based on the above evidence. The CI had two surgeries for left shoulder injury without pain resolution. Both MEB's listed shoulder and back pain as the principle reason for the disability determinations. Both examinations documented a positive impingement sign, an inability to move with a fighting load and carry and fire a weapon. The CI was granted a permanent U2 profile for left shoulder pain, although there were specific limitations from the shoulder that prevented carrying a weapon or ruck that were attributed to the shoulder condition. The Board discussed the requirements and functional capacity of the CI for his specific MOS of 21H/Construction Engineer, and closely considered the commander's statement. After due deliberation, the Board majority agreed that the preponderance of the evidence with regard to the functional impairment of the left shoulder condition favors its recommendation as an additionally unfitting condition for disability rating. It is appropriately coded 5299-5024 and meets the VASRD §4.71a. criteria for a 10% rating.

Umbilical Hernia Repair Condition. Umbilical hernia repair was mentioned in the narrative statement (NARSUM) under medical history. The profile and commander's statement both noted the hernia condition. Exams did not focus on the abdominal condition aside from mentioning well healed surgical scars. The duty limitations from the unfitting low back

condition may have overlapped impairment from the hernia condition, which would be unduly speculative. Treatment notes indicated good healing of recurrent hernia repair with mesh from January 2007 surgery. VA exam indicated recurrent hernia. At the time of separation, there was insufficient indication from the record that the hernia repair condition significantly interfered with satisfactory duty performance. After due deliberation in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB fitness determination for the contended hernia condition; and, therefore, no additional disability rating can be recommended.

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 AR 635-40 for rating the lower 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 LBP post anterior decompression and fusion L5/S1 condition, the Board unanimously recommends a disability rating of 20%, coded 5024 IAW VASRD §4.71a. In the matter of the contended arthroscopia left shoulder rotor cuff and labral repair condition, the Board by a vote of 2:1 agrees that it was unfitting and recommends a disability rating of 10%, coded 5299-5024 IAW VASRD §4.71a. The single voter for dissent, who recommended adopting the PEB adjudication as not unfitting (not rated), submitted the appended minority opinion. In the matter of the contended sleep apnea, right leg neuropathy and hernia repair conditions, the Board unanimously recommends no change from the determinations as not unfitting. 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
Chronic Low Back Pain Post Anterior Decompression and Fusion L5/S1	5241	20%
Arthroscopia Left Shoulder Rotor Cuff and Labral Repair	5299-5024	10%
	COMBINED	**30%**

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111001, w/atchs
Exhibit B. Service Treatment Record
Exhibit C. Department of Veterans' Affairs Treatment Record

XXXXXXXXXXXXXXXXX
President
Physical Disability Board of Review

MINORITY OPINION: I feel that the shoulder condition was not based off of the preponderance of evidence and that the commander's letter made no mention of the injury. I also feel that the examinations were inconclusive to the injury and did not show that the injury in itself was unfitting. There was also no mention to pain with motion or limited ROM that would warrant an unfitting rating or compensable rating. I feel that the appropriate rating would be chronic low back pain post anterior decompression and fusion L5/S1, 5241, 20% and the shoulder remains as not unfitting.

SFMR-RB

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

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation for XXXXXXXXXXXXXXXXXXX, AR20120021427 (PD201200377)

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 and hereby deny the individual's application.
This decision is final. The individual concerned, counsel (if any), and any Members of Congress who have shown interest in this application have been notified of this decision by mail.

BY ORDER OF THE SECRETARY OF THE ARMY:

Encl

XXXXXXXXXXXXXXXXXX
Deputy Assistant Secretary
(Army Review Boards)

CF:
( ) DoD PDBR
( ) DVA