

RECORD OF PROCEEDINGS  
PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXX  
CASE NUMBER: PD1200386  
BOARD DATE: 20121106

BRANCH OF SERVICE: ARMY  
SEPARATION DATE: 20060301

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**SUMMARY OF CASE:** Data extracted from the available evidence of record reflects that this covered individual (CI) was an Reserve CPT/O-3 (35D/All Source Intelligence), medically separated for chronic low back pain (LBP) secondary to multilevel degenerative disc disease (DDD). The CI's atraumatic back and muscle spasms began in June 1994. Despite orthopedics consults, epidural steroid injections, spinal fusion surgery, and medication the CI failed to 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 limited range-of-motion (ROM), status post (S/P) multi-level lumbar fusion on the DA Form 199 to the Physical Evaluation Board (PEB). Intermittent right shoulder pain/instability, chronic intermittent left shoulder pain, mild hypercholesterolemia, intermittent staph folliculitis/cellulitis and pes planus existed prior to service (EPTS) conditions, identified in the rating chart below, were also identified and forwarded by the MEB as meeting retention standards. The PEB adjudicated the chronic LBP secondary to multilevel DDD condition as unfitting, rated 0%, with likely application of AR 635-40, B-29. The CI made no appeals, and was medically separated with a 0% disability rating.

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**CI CONTENTION:** "At the time of my discharge I was serving in exemplary fashion and had completed over 12 years of active duty service and another 7 years of Reserve Forces time. It had always been my intention to retire from the Army and I would have done so, were it not for the serious back troubles that I experienced during my time in Iraq in 2003-2004 that ultimately led to my medical discharge. I continue to experience difficulties from this (cont.) condition and it severely limits my employment opportunities, as a result. I am unable to remain on my feet or seated in an upright position for long periods of time without extreme discomfort. In addition, I am sorely limited in the kind of physical activity that I can perform to include yard work, physical exercise, or even walking any real distance. This limitation to my ability to conduct physical activity is not limited to my back condition, as both of my shoulders continue to deteriorate in condition and use."

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**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 rating for the unfitting back condition and the contended bilateral shoulder conditions are within the DoDI 6040.44 defined purview of the Board and are addressed below. 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 IPEB – Dated 20051118			VA (~5 Mos. Post-Separation) – All Effective Date 20060302			
Condition	Code	Rating	Condition	Code	Rating	Exam
Chronic LBP Secondary to Multilevel DDD	5241	0%	Degenerative Changes Lumbar Spine	5010-5242	40%	20060823
			Sciatica Right Lower Extremity Associated with Degenerative Changes Lumbar Spine	8520	10%	20060823
Intermittent Right Shoulder Pain/Instability	Not Unfitting		Degenerative Changes Right Shoulder	5010-5203	20%	20060823
Chronic Intermittent Left Shoulder Pain	Not Unfitting		Degenerative Changes Left Shoulder	5010-5203	20%	20060823
Mild Hypercholesterolemia	Not Unfitting		Hypercholesterolemia	7099-7055	NSC	20060823
Intermittent Staph Folliculitis / Cellulitis	Not Unfitting		No VA Entry			20060823
Pes Planus (EPTS)	Not Unfitting		Bilateral Pes Planus to include Right Great Toe Pain	5276	10%	20060823
No Additional MEB/PEB Entries			Right Foot Plantar Warts	7819-5284	10%	20060823
			0% X 2 / Not Service-Connected x 2			
<b>Combined: 0%</b>			<b>Combined: 80%*</b>			

\*No subsequent VARDs

**ANALYSIS SUMMARY:** The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred back troubles 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. 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. The DVA, however, 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 the degree of impairment vary over time.

**Chronic LBP Secondary to Multilevel DDD Condition.** There were three 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 Consultation ~6 Mo. Pre-Sep	MEB NARSUM ~5 Mo. Pre-Sep	VA C&P ~5 Mo. Post-Sep
Flexion (90 Normal)	"Forward flexion to level of tibial tubercule"	33/24/27 (25)	80 (pain at 15)
Ext (0-30)		25/20/21 (20)	25
R Lat Flex (0-30)		19/21/21 (20)	25
L Lat Flex 0-30)		13/17/18 (15)	25
R Rotation (0-30)		41/46/42 (30)	25
L Rotation (0-30)		41/44/41 (30)	25
Combined (240)		140	205
Comment: Spine formula notes 2 (maximum VA normal) and 4 (rounding to nearest 5°), as well as DeLuca (repetition) considerations were applied	"LBP"; Slight antalgic gait favors right leg; different sensation to light touch in right lateral thigh/dorsum of foot; + FABER; SLR 70° pain in low back; motor and reflex exams normal	All ROMs w/pain; 1 of 8 Waddell's (+ axial load tenderness); absent right Achilles reflex	Gait normal; tenderness; pain with straight leg raising 20°; weakened motion against strong resistance; No additional loss of motion due to repetitive motion. "The neurologic exam shows sciatica." (see text)
§4.71a Rating	10%-20%	40% (PEB 0%)	10%-40% (VA 40%)

The MEB consultation 6 months prior to separation noted pain at rest, with activities and that the CI is "slow on start up but then becomes more fluid as he begins to move." The exam findings are summarized in the chart above, with no goniometric range-of-motion (ROMs) or indication of repetitive testing. The diagnosis was failed back syndrome. The MEB narrative summary (NARSUM) examination, performed 5 months prior to separation documented mild intermittent pain with prolonged standing or sitting and the primary limitation "is now with this ROM." The MEB NARSUM exam findings are summarized in the chart above, with repetitive ROMs accomplished by the examiner. L-spine radiographs performed in September 2005 showed "Status post prosthetic disc placement at the L4-L5, L5 transitional S1 and transitional S1-S2." The VA Compensation & Pension (C&P) examination, performed 5 months after separation, noted that the CI needed to sit in a reclined position, and had an inability to stand or sit for more than 5 minutes and had a moderate to severe lower back functional impairment. The C&P exam findings are in the chart above. There were no incapacitating events that required bed rest. There were no details concerning the neurologic exam "shows sciatica." The examiner's diagnosis was "Spinal fusion is 02-05 for severe stenosis, disc bulging, and degenerative disease. There is moderate to severe functional impairment of his lower back."

The Board directs attention to its rating recommendation based on the above evidence. The PEB coded 5241 (Spinal Fusion) and rated at 0% and the VA coded 5010 (Arthritis, due to trauma) with 5242 Degenerative arthritis of the spine rated 40%. The General Rating Formula for Diseases and Injuries of the Spine considers the CI's pain symptoms "with or without symptoms such as pain (whether or not it radiates), stiffness or aching in the area of the spine affected by residuals of injury or disease." The Board must decide which examination has the higher probative value. The consultation exam was furthest from separation and was not adequate for rating IAW the Veterans Administration Schedule for Rating Disabilities (VASRD). The MEB exam was the most detailed exam and the MEB and VA examinations are both equidistant from the date of separation. The MEB NARSUM exam met the 40% rating criteria for "forward flexion of the thoracolumbar spine 30 degrees or less." The VA exam was rated by the VA at 40%, without detailed rating decision explanation, and there were no details on the "weakened motion against strong resistance" examiner finding. The Board determined that the MEB exam had the highest probative value for rating at separation. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), §4.7 (higher of two evaluations), 4.40 (functional loss) and §4.45 (the joints) the Board recommends a disability rating of 40% for the chronic LBP secondary to multilevel DDD condition.

Contended PEB Conditions (Both Shoulders). The Board’s main charge is to assess the fairness of the PEB’s determination that the intermittent right shoulder pain/instability and chronic intermittent left shoulder pain conditions were not unfitting. 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. The right shoulder condition was profiled as U2, with no left shoulder condition profile, and restriction of no push-ups or overhead lifting. The commander’s statement focused on the low back condition. Neither shoulder condition failed retention standards. All were reviewed by the action officer and considered by the Board. Each shoulder had undergone surgical repair with resolution of most symptoms: The NARSUM indicated no significant limitations from either shoulder following surgery. There was no performance based evidence from the record that either shoulder 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 right or left shoulder conditions and so no additional disability ratings are recommended.

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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 low back condition was operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the chronic LBP secondary to multilevel DDD condition, the Board unanimously recommends a disability rating of 40%, coded 5241 IAW VASRD §4.71a. In the matter of the contended right and left shoulder conditions, the Board unanimously recommends no change from the PEB determinations as not unfitting. There were no other conditions within the Board’s scope of review for consideration.

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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:

<b>UNFITTING CONDITION</b>	<b>VASRD CODE</b>	<b>RATING</b>
Chronic LBP Secondary to Multilevel DDD	5241	40%
	<b>COMBINED</b>	<b>40%</b>

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The following documentary evidence was considered:

- Exhibit A. DD Form 294, dated 20120424, 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 / ), WRAMC, 2900 Crystal Drive, Suite 300, Arlington, VA 22202-3557

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation  
for XXXXXXXXXXXXXXXXXXXX, AR20120020914 (PD201200386)

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

XXXXXXXXXXXXXXXXXX  
Deputy Assistant Secretary  
(Army Review Boards)

CF:  
( ) DoD PDBR  
( ) DVA