

RECORD OF PROCEEDINGS
PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXX
CASE NUMBER: PD1200746
BOARD DATE: 20130109

BRANCH OF SERVICE: ARMY
SEPARATION DATE: 20021231

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (95B/Military Policeman), medically separated for a low back (LBP) condition. He did not respond adequately to surgical and post rehabilitative treatment to meet; the physical requirements of his Military Occupational Specialty; worldwide deployment standards or physical fitness standards. He was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). LBP 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 application of the Department of Defense Instruction (DoDI) 1332.39 and AR 635-40, appendix B-39. The CI made no appeals and was medically separated with a 10% disability rating.

CI CONTENTION: "My initial rating and after further review 2nd rating was higher than the medical board."

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 IPEB – Dated 20021112			VA (1 Mos. Post-Separation and 5+ years for radiculopathy) – All Effective Date 20030101 and 20030811			
Condition	Code	Rating	Condition	Code	Rating	Exam
Low Back Pain w/o neurologic abnormality	5299-5295	10%	S/P Lumbar surgery for herniated disc and spondylolisthesis	5293-5241	40%*	20030203
No Additional MEB/PEB Entries			L5-S1 radiculopathy L foot/toes	8799-8721	10%**	20081203
			L5-S1 radiculopathy R foot/toes	8799-8721	10%**	20081203
			Hypertension	7101	10%	20030203
			GERD	7346	10%	20030203
			0% X 3 / Not Service-Connected x 4			20030203
Combined: 10%			Combined: 70%			

*Condition originally rated 20% and increased after an appeal effective DOS

**Left and Right foot radiculopathy added on 20090605 VARD with effective date of 20081203 then was back dated to DOS on the 20111020 Appeal decision. Rated at 10% and was increased to 20% effective 20090504.

ANALYSIS SUMMARY: The Board acknowledges the CI's contention that his VA rating for his service--connected condition is higher than the PEB's. The Board must emphasize that its rating recommendations are premised on severity of the condition at the time of separation. The VA ratings which the Board considers in that regard are those rendered most proximate to separation. The Disability Evaluation System 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). The Board's operative instruction, DoDI 6040.44, specifies a 12-month interval for special consideration to DVA findings. This does not mean that the later DVA evidence was disregarded, but the Board's recommendations are directed to the severity and fitness implications of conditions at the time of separation.

Low Back Condition. The CI injured his back playing softball in 1998 and was treated conservatively with on and off pain for the next few years. In 2001, his pain worsened and he additionally had radicular symptoms of the right buttocks, groin and calf pain, which was aggravated with bending and stooping. After a trial of physical therapy (PT) his condition did not improve and he was referred to orthopedics. Orthopedics performed two surgical procedures in February and March of 2002 for a magnetic resonance imaging confirmed L5-S1 herniated nucleus pulposus (HNP) with displacement of the right S1 nerve. The surgical procedures included; a L5-S1 discectomy followed by epidural steroid injections, followed by a spinal fusion due to spondylolisthesis and compression of his right S1 nerve root. The CI suffered a postoperative tear in the lining of the spinal canal, which responded to a blood patch and fatty tissue suture surgical repair procedure. The CI continued to have intermittent back pain with temporary improvement in his radicular symptoms, which resurfaced without trauma as intermittent left lower extremity pain. The profile limitations included: no prolonged standing or sitting greater than 20 minutes without the ability to move around and seek relief, no lifting greater than 20 pounds and the bicycle fitness test option. The commander's statement corroborated his medical condition and documented the CI inability to wear a pistol belt and was on and off convalescent leave for the last 13 months. There were four 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 ~5.5 Mo. Pre-Sep	PT ~5 Mo. Pre-Sep	VA C&P ~1 Mo. Post-Sep	VA C&P ~24 Mo. Post-Sep
Flexion (90° Normal)	20°	20°	25°	30°
Ext (0-30)	5°	5°	15°	10°
R Lat Flex (0-30)	-	30°	22°	20°
L Lat Flex 0-30)	-	20°	18°	30°
R Rotation (0-30)	-	-	40°	45°
L Rotation (0-30)	-	-	40°	35°
Combined (240°)	-		160°	170°
Comment	TTP; neg SLR; normal gait	Non antalgic gait; TTP	Tenderness to percussion; normal posture; w/o antalgic gait	Painful motion, moderate muscle spasm, flattening of lumbar lordosis; normal posture; w/o antalgic gait
§4.71a Rating	20% vs.40%	20% vs. 40%	20% vs. 40%	40%

At the MEB exam, the CI reported severe LBP aggravated with standing, prolonged sitting, exertional ambulation of any kind with occasional low left extremity radicular symptoms. The MEB physical exam demonstrated paravertebral muscle tenderness; negative straight leg raise

(SLR) testing; normal bilateral lower extremity neuromuscular findings; normal gait and stiffness when going from a sitting to a standing position secondary to pain. An electrodiagnostic study revealed a mild right L5-S1 radiculopathy. The examiner opined the CI was no longer able to participate in the military police's aggressive lifestyle duties. The examiner also documented that the CI required narcotic pain relief medication many times throughout the week and the CI experienced pain while sitting at his desk for a prolonged period. The examiner opined his condition was stable and may improve. During the VA Compensation and Pension exam a month after separation the CI reported: morning pain 2-4 out of 10 in intensity, which rose to 8 of 10 during the day. His pain was aggravated by standing or sitting greater than 15 minutes and while bending, which he avoided at all costs. He had no flare-ups and worked as an insurance salesman without loss of work. This exam demonstrated tenderness; back pain, but no radicular pain; positive left SLR; normal right SLR; normal gait, station, heel and toe walk; normal squat maneuver and normal bilateral lower extremity neuromuscular findings. X-rays revealed a post surgical spine. The examiner diagnosed status post (s/p) lumbar surgery for HNP and spondylolisthesis; and, opined the CI had severe functional loss due to pain.

The Board directs attention to its rating recommendation based on the above evidence. The Board notes that VA exam a month post separation was complete, well documented, contained similar ratable data to the MEB and PT exams and was most proximate to the date of separation. Therefore, the Board assigned more probative value to this VA exam. The PEB and VA chose different coding options for the low back condition, but used the 2002 Veterans Affairs Schedule for Rating Disabilities (VASRD) for rating the spine, which were in effect at the time of separation. The 2002 VASRD added incapacitating episodes 5293 (Intervertebral disc syndrome) on 23 September 2002 to the spine ratings and then was modified to the current §4.71a rating standards on 26 September 2003. The 2002 spine rating standards are subjective to the rater's opinion regarding degree of severity; whereas the current VASRD spine standards specify the objective degree of ROM impairment. For the reader's convenience, relevant 2002 rating codes are excerpted below:

5292 Spine, limitation of motion of, lumbar	
Severe	40
Moderate	20
Slight	10

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

5294 Sacro-iliac injury and weakness: *[Defaults to 5295 criteria below.]*

5295 Lumbosacral strain:

Severe; with listing of whole' spine to opposite side, positive Goldthwaite's sign, marked limitation of forward bending in standing position, loss of lateral motion with osteo-arthritic changes, or narrowing or irregularity of joint space, or some

of the above with abnormal mobility on forced motion	40
With muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral, in standing' position	20
With characteristic pain on motion	10

The PEB applied DoDI 1332.39 (E2.A1.1.20.2) and AR 635.40 (B-39) to arrive at a 10% rating. However, this 10% rating is inconsistent with 2002 VASRD §4.71a standards based on the limited flexion exam. The VA’s original rating decision coded 5293-5241 analogous to the new §4.71 VASRD code 5241 (Spinal fusion) utilizing the old spine code 5293 (Intervertebral disc syndrome) for a 20% rating for moderate limitation of motion of the lumbar spine. This was increased to a 40% disability rating for severe limitation of motion through the DVA appeal process. The Decision Review Officer cited a higher rating above 40% was not warranted for either the 5293 code or IAW VASRD §4.10 (Functional impairment). There was no evidence of pronounced intervertebral disc syndrome, frequent hospitalization or marked interference with employment. The Board considered the PEB’s analogous rating under the 5295 code from the 2002 VASRD. A 20% rating for 5295 requires “muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral, in standing position.” The MEB exam is silent to muscle spasm and documents loss of forward motion not lateral spine motion loss; therefore, the Board agreed this was not the best code to capture the CI’s disability. The Board considered the 5293 code, which fit with the CI’s underlying pathology, and the 5292 code. The Board agreed while the 5293 code was clinically specific for the pathology of this case, the 20% rating for “moderate, recurring attacks” could not be justified based on an absence of objective neurologic findings for disc disease on the MEB exam or the post separation VA exam. The Board notes one extensive convalescent leave documented in the prior to separation treatment records corroborated by the commander’s statement could justify a 40% rating for severe, recurring attacks with intermittent relief; however, the evidence reflects this leave is used in conjunction with recuperation from surgery not from disc disease requiring bed rest. Finally the Board considered the evidence for limitation of motion. The Board agreed that the limited flexion ROM impairment in evidence at the MEB examination is sufficient justification for either the 20% or 40% rating under the 5292 code. The thoracolumbar ROM chart corroborates this limited flexion finding in both the 12 months prior and post separation periods.

A lengthy deliberation ensued as to the appropriate rating for the CI’s low back disability. The Board assigned probative value to the initial VA exam due to its proximity to separation and similarity to the ratable evidence found in the MEB and PT exams. The Board considered lateral spine motion and the combined ROM found in the VA exam. Exam findings showed a slight loss of ROM, a normal gait, station, squat maneuver and heel and toe walk, while the CI work as an insurance man without loss of time from work or flare-ups. The Board agreed with this ratable evidence; that a 20% rating best fits the disability of this low back condition. The Board considered whether additional rating could be recommended under a peripheral nerve code for the residual sciatic radiculopathy at separation. Board precedent requires a functional impairment tied to fitness to justify a recommendation to add a peripheral nerve rating to disability in spine cases. The pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a. The subjective radicular symptoms and the positive objective electrodiagnostic S1 radiculopathy evidence in this case has no functional implications; and no motor weakness is in evidence consistent with the S1 nerve. Since no 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, considering all of the evidence and mindful of VASRD §4.3 (Resolution of 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. As discussed above, PEB reliance on DoDI 1332.39 for rating 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 low back condition, the Board unanimously recommends a disability rating of 20%, coded 5292 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
Low Back Pain without Neurologic Abnormality	5292	20%
	COMBINED	20%

The following documentary evidence was considered:

- Exhibit A. DD Form 294, dated 20120611, w/atchs
- Exhibit B. Service Treatment Record
- Exhibit C. Department of Veterans' Affairs Treatment Record

xxxxxxxxxxxxxxxxxxxxxxx, DAF
Acting President
Physical Disability Board of Review

SFMR-RB

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

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation
for xxxxxxxxxxxxxxxxxxxx, AR20130003057 (PD201200746)

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

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Deputy Assistant Secretary
(Army Review Boards)