

RECORD OF PROCEEDINGS
PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXX
CASE NUMBER: PD1200758
BOARD DATE: 20130130

BRANCH OF SERVICE: ARMY
SEPARATION DATE: 20030719

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (52D10/Power Generator Equipment Repairman), medically separated for low back pain (LBP) on forward motion post disc surgery and L4/L5 disc fusion. The LBP on forward motion post disc surgery and L4/L5 disc fusion condition could not be adequately rehabilitated to meet the physical requirements of his Military Occupational Specialty or satisfy physical fitness standards. He was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded no other conditions for Physical Evaluation Board (PEB) adjudication. The PEB adjudicated the LBP on forward motion post disc surgery and L4/L5 disc fusion condition as unfitting, rated 10%, with application of the Veterans Affairs Schedule for Rating Disabilities (VASRD). The CI initially appealed to the Formal PEB (FPEB) but subsequently withdrew his request and agreed with the decision of the PEB. He was medically separated with a 10% disability rating.

CI CONTENTION: "The rating should have been higher because of the severity."

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 LBP condition, and by implication the right foot numbness, requested for consideration meet the criteria prescribed in DoDI 6040.44 for Board purview and are addressed below. The other conditions rated by the Department of Veterans Affairs at the time of separation or retroactive to the time of separation are not within the Board's purview. 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 20030116			VA (2 Mos. Post-Separation) – All Effective Date 20030720			
Condition	Code	Rating	Condition	Code	Rating	Exam
LBP s/p Disc Surgery & L4/L5 Fusion ...	5299-5295	10%	DDD s/p Lumbar Fusion w/Pain	5293-5292	10%	20030917
			Rt Foot Radiculopathy	8521	10%*	20090409*
			Lt Foot Gout	5017	20%	20030917
			HTN w/ Dizziness	7101	10%	20030917
			0% X 1* / Not Service-Connected x 0			
↓No Additional MEB/PEB Entries↓						
Combined: 10%			Combined: 40%			

*Granted by BVA Decision reported in VARD 20100104 retroactive to 20030720; also granted LLE radiculopathy @ 0% retroactive to 20030720. Original VARD 20031022 deferred rating rt foot numbness. Subsequent VARD 20040113 denied service connection for rt foot numbness. VARD 20090619 granted B/L LE Radiculopathy secondary to lumbar DDD S/P Fusion @10% based on 20090409 C&P. Combined rating on all of these VARDS was 40%.

ANALYSIS SUMMARY: The PEB combined LBP and right foot radiculopathy ["numbness"] as the single unfitting and solely rated condition using code 5299-5295. However, the Board must apply separate codes and ratings in its recommendations, if compensable ratings for each condition are achieved IAW VASRD §4.71a. If the Board judges that two or more separate ratings are warranted in such cases, however, it must satisfy the requirement that each "unbundled" condition was unfitting in and of itself. Not uncommonly this approach by the PEB reflects its judgment that the constellation of conditions was unfitting; and, that there was no need for separate fitness adjudications, not a judgment that each condition was independently unfitting. Thus the Board must exercise the prerogative of separate fitness recommendations in this circumstance, with the caveat that its recommendations may not produce a lower combined rating than that of the PEB.

Low Back Pain on Forward Motion Post Disc Surgery and L4/L5 Disc Fusion Condition. The CI first noted LBP in 1999 after lifting heavy equipment, and he reinjured his back in 2000. Over time, this pain became progressively worse despite treatment including physical therapy (PT), medications, spine injections, nerve blocks, radiofrequency ablation, intradiscal electro-thermal ablation and ultimately spine fusion on 13 May 2002. A discogram was positive for L5-S1 disc disease on 14 August 2001. A nerve conduction velocity/electromyogram (NSV/EMG) performed on 8 January 2002 showed a mild L5-S1 radiculopathy. He had multiple level disc disease with disc bulges confirmed via X-rays and magnetic resonance imaging, the latter done on 19 March 2002. He continued to have pain, required the use of a cane and was diagnosed with a failed back syndrome. A permanent L3 profile was issued and the CI referred to an MEB. The MEB examination was on 25 October 2002, almost 9 months prior to separation. The CI reported right foot dyesthesia and back pain with activity. On examination, he was noted to have normal sensation, but an absent right Achilles reflex. The range-of-motion (ROM) was slightly decreased in rotation and flexion. The narrative summary was dictated on 2 January 2003 (6 months prior to separation). The CI complained of back pain and right foot numbness, but denied incontinence. He was unable to squat or stoop. He obtained relief by lying on his side and sleeping after taking an over the counter sleeping aid. He had an abnormal gait and walked with cane. He had normal reflexes other than the Achilles reflex. Strength was normal in his lower extremities. There was a decrease in sensation on the outside of his right foot. There was no mention of spasm. Signs of non-organic pain were absent. The ROM was slightly reduced in extension, lateral bending and flexion. The CI also underwent an evaluation by PT on 26 February 2003 (4 months prior to separation). He was noted to have a slow gait, stooped posture, but normal transition movements and was removing and putting on his shoes and jacket normally. His flexion was limited to hands to his knees and extension was decreased by 50%, but the contour was normal. He walked with a cane and had a stooped gait. Heel and toe walk were normal and there was no limp. The right ankle reflex was diminished, but present. His strength was normal. No comment was made on sensation. On X-ray, he was noted to have normal alignment with good hardware placement. At the VA Compensation and Pension evaluation on 17 September 2003 (2 months after separation), the CI complained of numbness in the right foot and of pain if he walked or stood too long. He was able to flex his back to 70 degrees and extend to 15 degrees. A straight leg raise provoked pain in his legs. His right heel reflex was decreased. The examiner was unable to confirm the numbness via testing. No other abnormalities were noted. No specific comment was made on the motor examination.

The Board directs attention to its rating recommendation based on the above evidence. The PEB rated the LBP condition 10% and coded it 5299-5295, analogous to lumbosacral strain. The VA rated the degenerative disc disease condition 10% and coded it 5293-5292, intervertebral disc syndrome and lumbar limitation of motion. The Board noted that these codes have been

superseded and are no longer in use. However, in accordance with DoDI 6040.44, the Board is required to recommend a rating IAW the VASRD in effect at the time of separation. The Board noted that the CI consistently had decreased ROM of the lumbar spine. His strength was normal when documented, although a mild motor radiculopathy had been noted on the EMG prior to the fusion. The right foot numbness was not consistently verified on exam. His need for a cane appeared to be related to back pain. There is no record indicating that the right foot numbness interfered with the wear of military equipment. The Board considered if the right foot numbness was a separately unfitting condition for rating. It noted that while this was a consistent subjective complaint, it was not in evidence on every examination and that there was no evidence of duty impairment from it separate from the back condition. The Board determined that this was not a separately unfitting condition. The Board reviewed the different examinations and concluded that the repeated documentation of decreased ROM of the lumbar spine, coupled with the fact the CI needed a cane to ambulate and had a stooped posture supports the conclusion that the CI had moderate limitation of motion of the spine and would rate 20% under code 5292. The Board then considered the coding options 5293 and 5295. The Board notes that there is no documentation in the service treatment records (STRs) of incapacitating episodes related to the back condition to support even a 10% rating under code 5293. The STRs do not document persistent muscle spasm or loss of lateral spine motion to support a higher rating under analogous code 5295. The records do, however, repeatedly document characteristic pain on motion. Accordingly the Board concluded that the back condition would rate 10% using the code 5295. 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% coded 5292 for the LBP 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 LBP condition, the Board unanimously recommends a disability rating of 20%, coded 5292 IAW VASRD §4.71a. In the matter of the (implied) contended right foot numbness condition, the Board unanimously recommends that this cannot be added as separately unfitting and ratable. 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	5292	20%
	COMBINED	20%

The following documentary evidence was considered:

- Exhibit A. DD Form 294, dated 20120607, w/atchs
- Exhibit B. Service Treatment Record
- Exhibit C. Department of Veterans’ Affairs Treatment Record

XXXXXXXXXXXXXXXXXXXX, DAF
Director
Physical Disability Board of Review

SFMR-RB

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

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation
for XXXXXXXXXXXXXXXXXXXX, AR20130003101 (PD201200758)

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

XXXXXXXXXXXXXXXXXXXXX
Deputy Assistant Secretary
(Army Review Boards)