IN THE CASE OF: [redacted]

BOARD DATE: 9 December 2024

DOCKET NUMBER: AR20230014711

APPLICANT REQUESTS: increase of his Physical Evaluation Board (PEB)-assigned disability rating to 60%.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record) (two forms)
- DA Form 199 (Physical Evaluation Board (PEB) Proceedings, dated 8 July 1997
- separation orders, dated 4 September 1997
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- DD Form 215 (Correction to DD Form 214)
- nexus letter from Dr. [redacted] MD, Board Certified Orthopedic Surgeon, dated 1 March 2022
- memorandum from the Deputy Assistant Secretary of the Army (DASA) (Review Boards), dated 18 April 2022
- separation orders, dated 15 August 2022
- 12 pages of medical records
- Integrated Disability Evaluation System (IDES) Fact Sheet

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20220000322 on 21 March 2022.

2. The applicant states:

a. He and his treating physician believe an inappropriate rating was made at the Medical Evaluation Board (MEB)/PEB initial rating decision in which the condition pertaining to the lower back was rated at 10% at separation and should have been rated at 60% based upon the VA Schedule for Rating Disabilities (VASRD) diagnostic codes (DC) 5285 and 5295 that were in place at his point of separation from service. He is requesting the correct rating of 60% that is warranted for the disability condition be awarded as a clear and unmistakable error.

b. It is documented in his service medical records that his medical board was not handled properly by a treating Army medical officer. It is believed due to the admitted mishandling of his MEB by the branch of service and the VASRD codes that warrant a 60% rating based on the documented medical condition which the PEB/MEB never rated. Despite his fractured spine condition being documented on his DA Form 199, the PEB/MEB did not adjudicate the medical disability in accordance with VASRD codes 5285 and 5295. Department of Defense Instruction (DoDI) 1332.38, "Physical Disability Evaluation, November 14,1996. The PEB/MEB failed to adhere to the law covered under Code of Federal Regulations Title 38 (38 CFR), Part 4, Schedule for Rating Disabilities, when adjudicating his spine fracture diagnosis. This diagnosis was documented in the service members original DA Form 199. The rating for this diagnosis according to VASRD Codes 5285 and 5295 at the time of his discharge warrant a minimum rating of 60%. This was also supported by former surgeon general spine surgeon of the Air Force and Pentagon advisor on spine disabilities in a nexus letter.

c. The Department of the Army is choosing to ignore the nexus letter from Dr. [redacted] MD, a board-certified and fellowship-trained orthopedic spine surgeon with over 26 years of experience who served in the U.S. Air Force as the chief of spine surgery and was a spine surgery consultant to the surgeon general and the Pentagon. In his nexus letter Dr. [redacted] "It is my expert opinion as a board-certified orthopedic spine surgeon, that the applicant's medical injuries/conditions were not properly rated, based on the requirements under both VASRD Codes 5285 and 5295. At the very least he should have received the next level rating of 60% under VASRD Code 5285 and 20% under VASRD Code 5295, since he has satisfied the conditions for that rating, based on the evidence documented in his military medical records."

d. VASRD Codes 5285/5295 Schedule of Ratings for the Spine in 1997 stated "The next level of rating is 60% for "vertebral fracture" without cord involvement" and despite having a nexus letter from one of the top spine surgeons in the nation who is a former advisor to the Pentagon on spine ratings. Also, § 4.3 Resolution of reasonable doubt, it is the defined and consistently applied policy of CFR 38, to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant.

e. Spine fracture is documented on his original DA Form 199 and yet it was never adjudicated by the PEB/MEB upon his medical discharge. The MEB listed the spine fracture in their Narrative Summary, but the PEB did not rate the spine fracture. Department of the Army has put in writing and admitted that the MEB was not handled properly and admitted in writing that his medical board was inappropriately handled.

f. Under 38 CFR 3.105 (a), a clear and unmistakable error (CUE) exists if all three of the following requirements are met: either the correct facts, as they were known at the time, were not before the adjudicator, or the statutory or regulatory provisions extant at the time were incorrectly applied. CUE is a very specific and rare kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion that the result would have been manifestly different but for the error. His spine fracture was documented on the DA Form 199 and was not rated. The law 38 CFR, VASRD 5285/5295 gives provision for a spine fracture to warrant a 60% rating. The PEB/MEB did not rate his documented medical condition. This is the very definition of a CUE. He is requesting the correction for this CUE be applied to reflect the appropriate rating for the documented medical condition (spine fracture) to receive a rating of 60%, in accordance with VASRD 5285/5295 and be retro actively applied from the date of discharge.

g. The Department of The Army had medical boards conduct two separate reviews. Both instances the PEB ignored and never adjudicated the documented spine fracture and chose not to provide a rating for that documented medical condition. This is considered egregious in nature; therefore, it should be in the interest of the Department of the Army to ensure justice prevails in this case for the Soldier who has been wronged.

3. The applicant enlisted in the Regular Army on 22 January 1992.

4. On 8 July 1997, a PEB found the applicant unfit for further military service due to chronic low back pain (Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD) diagnostic codes (DC) 5285 and 5295) following a motor vehicle accident on 6 April 1996 with x-rays and MRI evidence of L3 par spondylolysis, L3-L4 grade I spondylolisthesis, fracture of the body of L3, L3-L4 disc bulge with mild neuroforaminal stenosis and moderate canal stenosis. The PEB recommended a 10% disability rating and the applicant's separation with severance pay.

5. The applicant was discharged on 9 October 1997 under the provisions of Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation), chapter 4, by reason of disability, severance pay.

6. The applicant has previously applied on various occasions to the ABCMR requesting an increase to his PEB-assigned disability rating and his applications were denied by the Board. However, on 18 April 2022 (ABCMR Docket Number AR20220000322), the DASA (Review Boards) determined there was sufficient evidence to grant partial relief. The DASA directed the referral of the applicant's records to the Office of the Surgeon General for review. As a result, on 27 June 2022, a PEB convened to reevaluate the applicant's original unfitting condition and any additional conditions identified as not meeting retention standards prior to his discharge on 9 October 1997.

7. The PEB determined the applicant was unfit for L3 pars spondylolysis and L3-4 grade I spondylolisthesis and recommended a 40% disability under VASRD DC 5292 and his permanent retirement for physical disability. The PEB indicated the following:

a. After reviewing all of the available evidence, the lumbar spine condition remains the single condition which failed retention standards at the time of the Soldier's military discharge. The medical records indicate the Soldier's back condition was attributed to a motor vehicle accident in April 1996 and was not combat related. DA Form 199 dated 8 July 1997 rated the unfitting back condition at 10% under VASRD DCs 5285-5295. The exam noted in the MEB dated 10 April 1997 was essentially normal other than tenderness to palpation of the lower back. However, a range of motion of the spine which is typically a part of the assessment was not included, but a flight surgeon clinic note dated a moth prior documented a forward flexion of the thoracolumbar spine to 30 degrees.

b. A 30 degree measurement would warrant a 40% rating for severe limitation of motion of the lumbar spine if assessed by VASRD DC 5292. Reasonable performance in the Soldier's primary military occupational specialty 91P (X-Ray Technician) requires he perform certain activities. In accordance with DoDI 1332.18, Appendix 2 to Enclosure 3 para 2.a., the Soldier is unfit because the records indicate that at the time of discharge, the Soldier was not capable of performing the duties required of his grade and rank and was assigned a Permanent (L3) Physical Profile for the lumbar spine condition, and a 26 June 1997 orthopedic consultation note advised the profile be updated to reflect that the Soldier should avoid repeated bending. This would render him unable to bend and lift greater than 40 pounds while wearing usual protective gear. The preponderance of evidence supports the lumbar spine condition previously rated at 10% under VASRD 5285-5295 would be more accurately assessed by VASRD DC 5292 and rated at 40% for severe limitation of motion of the lumbar spine at the time of the Soldier's discharge.

8. Orders issued by Headquarters, U.S. Army Garrison, Fort Bliss, TX, on 15 August 2022 directed the applicant's permanent disability retirement effective 10 October 1997. The orders show he was assigned a 40% disability rating.

9. The applicant provided a nexus letter from Dr. [redacted] MD, Board Certified Orthopedic Surgeon, dated 1 March 2022, stating the following:

a. He is a board-certified and fellowship-trained orthopedic surgeon with over 26 years of experience. He has served in the U.S. Air Force as the Chief of Spine Surgery and was a spine surgery consultant to the Surgeon General and the Pentagon.

b. The applicant is a patient that is currently under his care. He has recently undergone a L4-S1 ALIF/PSFI with a revision at L3/L4 that had previously failed. It is

more likely than not that his current spine condition, which has required surgical intervention, is related to his service-connected bilateral spine fracture of L3, which occurred in April 1996 while he was on active duty. This led to him receiving an L3/L4 spinal fusion that was completed in 2004. The applicant has developed adjacent level disease at L4/L5and L5/S1 which has required extension of his previous fusion which was performed by him on 7 February 2022.

c. He has reviewed the applicant's documented medical conditions notated in his Army medical records, specifically the medical diagnosis of the spine fracture he suffered in April 1996, while serving our country as an active duty Army Soldier. Furthermore, he has reviewed the VASRD Codes 5285 and 5295, listed below, which were in place at the time of the applicant's discharge. It is likely that the initial raters who awarded the applicant a 10% rating upon discharge, were either not aware of VASRD codes 5285 or 5295, or they did not have the information contained in the applicant's Army medical records because the VASRD codes and his medical records from the Army support his appeals for correction of the inappropriate rating received when he was discharged.

d. VASRD Code 5285 pertains to the spine. A rating of 10% is assigned to causes in accordance with definite limited motion or muscle spasm, for demonstrated deformity of the vertebral body. The next level of rating is 60% for "vertebral fracture" without cord involvement and abnormal mobility requiring a neck brace.

e. VASRD Code 5295 pertains to lumbosacral strain. A rating of 10% is assigned for lumbosacral strain with characteristic pain on motion. The next level of rating is 20% for muscle spasm on extreme toward bending and loss of lateral spine motion, unilateral, in standing position. The next level is 40% when it is severe, with listing of the whole spine to the opposite side.

f. Lastly, the radiology reports, PEB Proceedings, and physician notations in the applicant's Army medical records, which document that he suffered a vertebral fracture at L3, neuroforaminal stenosis, moderate spinal canal stenosis, spondylosis, and spondylolisthesis, which has adversely impacted him until today. He was also issued a back brace, along with a permanent physical profile restricting him from bending (ROM). It is his expert opinion as a board-certified orthopedic spine surgeon, that the applicant's medical injuries/conditions were not properly rated, based on the requirements listed above under both VASRD Codes 5285 and 5295. At the very least, the applicant should have received the next level rating of 60% under VASRD Code 5285 and 20% under VASRD Code 5295, since he has satisfied the conditions for that rating, based on the evidence documented in his military medical records.

10. During the processing of this case, an advisory opinion was obtained from the U.S. Army Physical Disability Agency (USAPDA) Legal Advisor.

a. This memorandum is in response to a request for a legal advisory opinion regarding the applicant's request to increase his referred condition's rating from 40% (VA DC 5292 to 60%; VA DC 5285 60% and DC 5295 20%) and that his case be processed in accordance with the Integrated Disability Evaluation System (IDES). For the reasons below, I find the request to be legally insufficient in part and sufficient in part.

b. Background: On 10 April 1997, the applicant was found to have a fracture in his lower back and was required to wear a back brace. Three months later, on 8 July 1997, he was found unfit for his back conditions and was rated at 10% under VA DC 5285-5295 and separated with severance pay. On 27 June 2022, at the direction of the ABCMR, a PEB found him, again, unfit for his back conditions, but now rated under VA DC 5292 at 40% and placed into permanent disability retirement due to a limited forward flexion of 30 degrees. He now appeals seeking to be rated at 60% (although his medical experts opine suggest two separate ratings under VA DCs 5285 (40%) and 5295 (20%)) and requests that his case be processed as an IDES case.

c. Analysis: On 3 April 2024, Ms. [redacted] from the USAPDA responded to the applicant emails explaining why his case was not processed under the IDES. That response is adopted herein. Principally summarized, the IDES did not come into being (1 January 2010) until after he left the service (9 October 1997). Thus, he was not eligible for IDES processing. With respect to the issue on appeal regarding the appropriate VA DC and rating, the rating scheme for VA DC 5292 and 5295 is the same; however, the rational for each rating is different. The rating and rational for VA DC 5285 is entirely different from 5292 and 5295. There are three important principles to consider under 38 CFR Part IV, Sub-part A. Those are: avoid pyramiding (Section 4.14); apply the higher of two evaluations (Section 4.7); and the use of analogous ratings (4.20). With respect to the former, the applicant's back conditions are treated as one condition and rated together to avoid pyramiding similar conditions affecting the same muscular-skeletal system. With respect to the later, it appears from the case file that the original PEB applied an analogous rating of VA DC 5285-5295. Analogous ratings are used when an unlisted condition is encountered. If so, then it is rated to as close of a listed condition as possible. Here, the original PEB found that the back condition was analogous to VA DC 5285 but rated it under VA DC 5295. The reconvened PEB found that due to the range of motion at the time of discharge in 1997, the more appropriate VA DC should have been VA DC 5292 with a rating of 40%.

d. The applicant's provider stated his belief that he should have been rated under both VA DC 5285 (60%) and 5295 (20%). As discussed above, this is not possible due to pyramiding. However, the applicant did provide a medical note, which may not have been consider by the original board as it was dated 10 April 1997, only three months before the original PEB's determination and findings. The note states that he had fractured his lower back and that he was required to wear a back brace. Under the

second principle above (4.7), "the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for rating. Otherwise, the lower rating will be assigned." VA DC 5285 - Vertebra, fracture of, residuals: Without cord involvement; abnormal mobility requiring neck brace Oury mast) equates to a rating of 60%. Based upon his 10 April 1997 medical note, it would appear to that VA DC 5285 maybe more appropriate, if the brace he wore was a jury mast. If not, then VA DC 5285-5292 (PEB original) and/or 5292 (PEB revised) would both appear to be appropriate based upon the forward range of motion (30 degrees) at the time of discharge in 1997, both of which would result in a rating of 40% (severe).

e. Conclusion: Based upon the above, I find the applicant's appeal to be legally insufficient in part and legally sufficient in part.

11. An advisory opinion was also obtained from the U.S. Army Office of the Surgeon General. It states:

> During the time of the claimant's separation in 1997, the Physical Disability Evaluation System (PDES) consisted of the military treatment facility determining medical retention standards and the Physical Evaluation Board (PEB) making fitness determinations, prior to integration with the Veterans Benefit Administration in 2007. The retroactive nature of ABCMR case action requires cases to be processed consistent with standards at the time of SM [service member] separation. Integrated Disability Evaluation System (IDES) processing procedures are not applicable to claimant's request.

12. The advisory opinions were provided to the applicant and given the opportunity provided additional evidence or comments. He responded and stated:

a. The advisory opinion states “his medical spine expert suggests two separate ratings first under 5285 (40%) and 5295 (20%).” This is not accurate. Dr. [redacted] who is a board-certified spine surgeon, former chief of spine surgery, and consultant to the Office of The Surgeon General (Air Force) and Pentagon, with over 27 years of experience suggested he receive a 60% rating. Dr. [redacted] provided a nexus letter citing VASRD 5285 guidance, that warrants a 60% rating for spine for vertebral fracture, without cord involvement requiring a brace (jury mast). The medical expert’s evaluation recommended the applicant receive a higher disability rating based on VASRD 5285. The guidance in 38 CFR 4.7 is clear that when there are two evaluations and the criteria being met, then the service member/veteran should receive the higher rating between the two evaluations.

b. Also, it must be noted that his spine diagnosis included spinal cord involvement, which is substantiated by the multiple medical diagnoses listed on the original DA Form 199 dated 8 July 1997. The medical diagnoses listed on the DA Form 199 are as

follows: (fracture of vertebral L-3, disc bulge with neuro foraminal stenosis and moderate canal stenosis (layman's terms vertebral disc pressing against and causing the spinal cord to be compressed resulting in pain and loss of feeling), L3 para spondylolysis, and L3-L4 spondylolisthesis. These diagnosed medical conditions resulted in the applicant receiving a permanent profile that mandated "No Bending." This medical order could only be achieved with the issuance of an appropriate brace, which was a jury mast brace, and it means that the criteria for the 60% rating was not only met, but exceeded due to medical diagnosis of spinal cord involvement contained in his original DA Form 199. Any group of reasonable-minded individuals would no doubt conclude that issuance of a permanent profile mandating "No Bending", ensured that the treating physician prescribed and issued the appropriate brace to immobilize the affected area and support the "no bending" medical order, which was a jury mast brace. Therefore, Dr. [redacted] evaluation recommends the appropriate adjudication should be 60%, which is the higher of the two evaluations. 38 CFR 4.7 assigns the higher of two evaluations if the disability more closely matches the criteria for that rating.

c. The applicant is not seeking to have his spine rating receive multiple ratings. He is seeking to be awarded the appropriate higher rating based on the medical evaluation recommendation, supported by VASRD DC 5285, and the nexus letter provided by Dr. [redacted] the medical expert in spine surgery and ratings. Ms. [redacted](USAPDA) also provided a statement in writing confirming the VA rating from 2004 was the only evidence used to assign the current 40% rating on 27 June 2022. This can be considered an admission that the aforementioned medical evaluation recommending the higher rating from a subject matter medical expert was not included, nor considered in the 27 June 2022 decision. This prohibited the board from assigning the appropriate rating. Again, the 60% rating should have been assigned based on the evaluation of the subject matter medical expert following the VASRD DC 5285 guidance of a 60% rating, for the diagnosed medical conditions. Assigning the higher of the evaluation by Dr. C brings full compliance to the guidance covered under 38 CFR 4.7 and integrity to the adjudication process.

d. The advisory opinion also states, "it appears from the case file that the original PEB applied an analogous rating of VA DC 5285-5295". The opinion goes on to write "Analogous ratings are used when an unlisted condition is encountered." This is another admission of a clear and unmistakable error because all of the medical conditions listed in the first paragraph of this response were in fact listed on the applicant's original DA Form 199. Why would the PEB apply an analogous rating and choose not to rate the vertebral fracture, which caused the spinal cord injury, that resulted in a permanent profile being issued containing strict medical orders of "No Bending" requiring a jury mast brace being issued to ensure the medical orders were followed? The reconvened PEB also chose to ignore the same listed medical diagnosis on the original DA Form 199. The reconvened PEB chose to only focus on the severe limited range of motion at

the time of discharge, instead of the primary cause of the limited range of motion which was the vertebral fracture, with spinal cord involvement and jury mast brace issuance.

e. The severe limited range of motion could not exist without the cause, which was the vertebral fracture with spinal cord involvement. Therefore, the severe limited range of motion would be considered a secondary condition from a primary cause, and the primary condition should have been rated and received an adjudicated rating of 60% in compliance with VASRD 5285 and the supporting nexus letter from the medical subject matter expert, Dr. [redacted] Again, the applicant is not requesting a pyramid rating, but he is requesting that his rating be assigned the higher evaluation from Dr. [redacted]

f. Lastly, it is worth repeating the applicant's fracture vertebral spine was with spinal cord involvement. According to VASRD 5285, a rating of 60% is warranted for a vertebral fracture without spinal cord involvement and according to VASRD 5285, that condition requires a jury mast brace. It can be reasonably concluded beyond that the more serious condition with spinal cord involvement met the requirements for the jury mast brace issued. If the ARBA's position is that a proper jury mast brace was not issued, then it would mean the three spine surgeries required after he was discharged were a direct result of gross negligence.

g. Conclusion: Based on the above, he believes the appeal to be fully sufficient and request the appropriate disability rating of 60% be assigned retroactively to the initial discharge date in compliance with the Secretary of the Army's order dated 18 April 2022. The Secretary of the Army's order instructs for "these proceedings to serve as the authority to issue him the appropriate separation retroactive to his original separation date, with entitlement to any added pay and allowances and/or retired pay."

MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS), electronic Disability Evaluation System (eDES) and the VA's Joint Legacy Viewer (JLV). The applicant requests change in PEB disability rating for his lumbar condition L3 Pars Spondylolysis and L3-4 Grade I Spondylolisthesis, from 40% to 60%. As this case was recently reviewed by ABCMR and the facts of the case were noted in multiple prior Boards (most recently dated 22Mar2022), this review will focus on VASRD rating criteria (and clinical evaluations delineating the overall severity of the condition) found in the applicant's record near the time of discharge.

2. The applicant was in active service for the Army from 22Jan1992 to 09Oct1997. His MOS was initially 91E Dental Specialist and later 91P Radiology Specialist.

3. Pertinent medical records and related

a. 06Apr1996 Brooke Army Medical Center (BAMC) ER. The applicant sustained injury to his back when his car was hit from behind during a traffic slowdown while driving (restrained) on the freeway. Diagnosis: Myalgia Secondary to Motor Vehicle Accident (MVA). This initial assessment did not capture the extent of his back injury.

b. 06Mar1997 BAMC lumbar spine MRI. There was central broad-based disc protrusion/osteophyte complex at L3-4 with mild bilateral neuroforaminal stenosis; and healing fracture of the L3 vertebral body. There were degenerative disc changes at L3-L4 with preservation of the disc height. The disc spaces were otherwise normal. The conus medullaris (the tapered end of spinal cord which contains S2-5 nerve roots) was normal in caliber and signal. The study interpretation was amended later after review with plain films which confirmed Bilateral Pars Fracture at L3 without Spondylolisthesis.

c. 10Mar1997 Flight Surgeon (Chronological Record of Medical Care, SF 600). The applicant had low back pain for 11 months. He reported constant dull ache which could be sharp after exercise. He also reported sharp pain down the back of the legs and sometimes numbness of feet during running and exercise. He had taken and passed an APFT 2 weeks prior with great difficulty and from which was still recovering. The ROM exam showed flexion limited to 30 degrees (unable to touch the floor due to pain); extension was limited to 8-10 degrees (due to pain). The exam revealed paraspinal muscle spasms.

d. 28Mar1997 Orthopedic Service BAMC. He was status post a car accident April 1996 with complaints of low back pain, without bowel/bladder incontinence or radiation of pain. Bilateral lower extremity strength and reflexes were equal and normal. The radiograph was interpreted as Bilateral L3 Pars Fracture, Rule out Spinal Nonunion.

e. 10Apr1997 Report of Medical History (for MEB/PEB). The applicant endorsed chronic back pain for which he was taking muscle relaxants and Motrin, and for which he reported that he 'was wearing a brace or back support'.

f. The 10Apr1997 MEB Exam. The applicant had a one-year history of low back pain with occasional involvement of his lower extremities to a very minor extent. He denied any loss of bowel or bladder function or any loss of sensation or weakness in both lower extremities. He was unable to do push-ups, sit-ups, run or lift. The examiner stated that the plain film findings of bilateral L3-4 grade I spondylolisthesis and bilateral L3 spondylosis were confirmed by the 06Mar1997 lumbar MRI. On exam, there was diffuse tenderness to palpation throughout the lower back. His gait was non-antalgic (normal). Straight leg raise testing was negative (normal) bilaterally. There was

tenderness to palpation throughout his lower back. Back ROM measurement was not noted. The permanent L3 physical profile dated 04Apr1997 and approved with 2 signatures required no lifting over 25 pounds and he was excused from APFT. 22Apr1997 MEB Proceedings (BAMC) showed that the following condition did not meet retention standards of AR 40-501 chapter 3-39a(3): L3 Pars Spondylosis and L3-4 Grade I Spondylolisthesis.

g. The applicant pcs'd and was reassigned to William Beaumont AMC (WBAMC).

h. 26Jun1997 Orthopedics Consultation Note WBAMC. The specialist noted the grade I L3-L4 spondylolisthesis and bilateral L3 spondylolysis diagnosis. They also noted that a restrictive profile was appropriate, and they added to the current profile the restriction 'avoid repeated bending'.

i. 08Jul1997 PEB found the condition Chronic Low Back Pain following MVA on 06Apr1996 with x-rays and MRI evidence of L3 pars spondylolysis, L3-L4 grade I spondylolisthesis, fracture of the body of L3, L3-L4 disc bulge with mild neuroforaminal stenosis and moderate canal stenosis, unfitting for continued service. The condition was rated at 10% under VASRD code 5285 5295 (evaluated as analogous to 5285 but rated under 5295).

j. 15Aug1997 Orthopedic Clinic WBAMC (SF Form 600). The applicant reported occasional muscle spasm approximately once every 2 weeks which caused him considerable pain that lasted about 10-20 minutes. He could bend forward to have his fingertips within 6 inches of touching the toes; and he could stand fully erect.

k. 27Jun2022 Informal PEB. The reconvened PEB again found L3 Pars Spondylosis and L3-4 Grade I Spondylolisthesis unfitting for continued service. The condition was rated under code 5292 for severe limitation of motion of the lumbar spine at the time of discharge. It was rated at 40% for flexion limited to 30 degrees.

4. Pertinent VA Ratings for the lumbar condition for comparison with acknowledgment that this case was adjudicated prior to the formation of the Integrated Disability Evaluation System (IDES).

a. 07Aug2003 VA Rating Decision revealed 10% rating for Residuals, Fracture L3 with L3 Pars Spondylolysis and L3-4 Spondylolisthesis under code 5285-5292 effective 10Oct1997.

b. 07Jan2004 VA Rating Decision revealed the VA increased the evaluation of

Residuals, Fracture, L3, with L3 Pars Spondylolysis and L3-4 Spondylolisthesis from 10% to 20% effective 26Sep2003.

c. 02Dec2013 Decision Review Officer Decision. The VA increased the rating for degenerative disc disease, L3-L4 lumbar spine, with history of fracture, L3, with spondylolysis and L3-L4 spondylolisthesis, post-operative from 20% to 40% effective 22Jan2013. The 30Apr2013 Back DBQ exam showed forward flexion to 20 degrees.

d. 23Mar2023 VA Rating Decision. This decision included the response to the applicant's request for entitlement to an earlier effective date for the rating for the lumbar condition: "The rating decision dated January 7, 1998, granted service connection for lumbar spine under DC 5285-5292 at 10% effective October 10,1997, based purely on the Medical Evaluation Board/Physical Evaluation Board. The service treatment records showed a Physical Evaluation Board with a recommended disability of 10%. Back pain was noted, and the examiner granted 10% evaluation under DC 5285-5295 based on slight, moderate, or severe limitation of motion and there was no evidence of radiculopathy or spasms. Therefore, our rating decision dated January 7, 1998, did not commit a Clear and Unmistakable Error (CUE)".

5. Pertinent VASRD (Veterans Affairs Schedule for Rating Disabilities) codes

5285 Vertebra, fracture of, residuals
With cord involvement, bedridden, or requiring long leg braces……100
(Consider special monthly compensation; with lesser involvements rate for limited motion, nerve paralysis.)
Without cord involvement; abnormal mobility requiring neck brace (jury mast)……60
(In other cases, rate in accordance with definite limited motion or muscle spasm, adding 10 percent for demonstrable deformity of vertebral body.)

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

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
With signs subjective symptoms only……...0

6. Analysis/Conclusion

a. The original MEB/PEB Brooke AMC showed diagnosis Myalgia rated at 60% under code 5293 for Intervertebral Disc Syndrome. However, based on clinical evidence and imaging available in the record, the etiology of the applicant's lumbar condition (vertebral fracture) and the most salient functional limitation associated (limited forward flexion) are best approximated under the following codes: The vertebral fracture rated under code 5285 (vertebra, fracture of, residuals); and the resulting limitation of motion rated under 5292 (which pertains to the lumbar spine only) for limitation of motion of the lumbar spine or rated under code 5295 for lumbosacral strain (which pertains to the lumbar spine, muscle etc.). The applicant's lumbar condition is currently rated at 40% under 5292 by the PEB based on limited flexion of the lumbar spine, assessed as severe in severity. 40% is the highest schedular rating permitted under code 5292 and 5295 and either could have been chosen although code 5292 arguably more closely reflects the lumbar spine findings in imaging.

b. Code 5285 pertains to fracture of vertebra in the cervical, thoracic, or lumbar spine. There was no documentation of spinal cord involvement warranting a 100% rating under code 5285. For example, the 06Mar1997 lumbar spine MRI specifically noted that the conus medullaris was normal in caliber and signal. To be rated at 60% under code 5285, the spine condition must have demonstrated abnormal mobility requiring neck brace (jury mast). The record showed that the applicant reported use of a brace or back support in the Report of Medical History. That notwithstanding, there was no mention of use of a neck brace of any type as specified in code 5285. Based on current evidence available for review, the applicant's lumbar spine condition did not meet criteria for rating above 40% at the time of discharge from service.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is not warranted.

2. The Board concurred with the reasoning and conclusions of the ARBA Medical Advisor that the available evidence does not demonstrate that a higher disability rating was warranted at the time of the applicant's disability retirement. Based on a preponderance of the evidence the Board determined the rating assigned the applicant by the PEB was not in error or unjust.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
[redacted]	[redacted]	[redacted]	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20220000322 on 21 March 2022.

12/16/2024

X [redacted]

CHAIRPERSON

[redacted]

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 and Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3.

b. The disability evaluation assessment process involves two distinct stages: the MEB and PEB. The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition.

c. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

2. Army Regulation 635-40 establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability. Once a determination of physical unfitness is made, all disabilities are rated using the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD).

3. Title 38, Code of Federal Regulations (CFR), Part 4, Schedule for Rating Disabilities, provides guidance on the VASRD, which lists the detailed requirements for assigning disability ratings to conditions for military disability, assigning a four-digit VASRD Code to each condition or analogous symptom of a condition and regulating the amount of compensation received for each disability.

a. VASRD code 5285, as in effect at the time, was used for the spine, vertebral fracture of, residuals. A rating of 10% was assigned to cases in accordance with definite limited motion or muscle spasm. The next level of rating is 60%, for a vertebral fracture without cord involvement and abnormal mobility requiring a neck brace.

b. VASRD code 5295, as in effect at the time, was used for lumbosacral strain. A rating of 10% was assigned for lumbosacral strain with characteristic pain on motion. The next level of rating was 10%, with muscle spasm on extreme forward bending and loss of lateral spine motion, unilateral, in standing position.

4. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30%. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30%.

5. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to ABCMR applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//