RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXX BRANCH OF SERVICE: marine corps

CASE NUMBER: PD0900571 SEPARATION DATE: 20020315

BOARD DATE: 20101104

SUMMARY OF CASE: Data extracted from the available records reflects that this covered individual (CI) was an active duty E-5/Sgt (6124, Helicopter Power Plant Mechanic) medically separated from the Marine Corp in 2002 after ~5 years of service. The medical basis for the separation was a lumbar spine condition (Herniated Nucleus Pulposus L5/S1 [HNP]). The CI was seen in December 2000 and placed on a 30-day Limited Duty (LIMDU) for right-sided low back pain. CI was treated with medications and was evaluated by a Chiropractor and a Sports Medicine specialist. In April 2001 he was placed on LIMDU for eight months. The CI was unable to maintain his physical readiness requirements consistent with his duty and was referred to a Medical Evaluation Board (MEB). HNP with Bilateral Lower Extremity Radiculopathy was addressed in the narrative summary (NARSUM) and listed on the NAVMED 6100/1 forwarded to the Informal Physical Evaluation Board (IPEB). The IPEB adjudicated the HNP condition as unfitting, rated 20%; with application of the DoDI 1332.39. Bilateral Lower Extremity Radiculopathy was found not separately unfitting. The CI made no appeal at the time and was separated at 20% disability. The CI later made an appeal to the Board of Correction of Naval Records (BCNR) in June 2006 requesting that his military discharge code be changed to a RE code that would not require a waiver for enlistment and that the reason for discharge and separation be changed to an Administrative Discharge. The CI stated that his health was “excellent” and that his past medical condition was healed.

CI CONTENTION: The CI states: “After being discharged from the Marine Corps I attempted to enlist in the National Guard and was advised I could have a disability of up to 30% and still enlist; however, my enlistment was denied several times because of my service related disability and I was told not to submit any further paperwork for enlistment in any branch of military service. I request my service connected disabilities be considered for more than 20%. The VA has rated an additional disability, being bilateral lumbar radiculopathy at 10%, which is related to the herniated disc disability. A total disability rating from the VA at discharge totaled 20% and is now rated at a total of 60%. I respectfully request my service connected disability rating be considered for a higher rating.” He additionally lists all of his VA conditions and ratings as per the rating chart below. A contention for their inclusion in the separation rating is therefore implied.

\*\* Rating Comparison Table located on the next page.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service IPEB – Dated 20020201** | **VA (1 Mo. After Separation) – All Effective 20020316\*** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| HNP L5/S1 | 5293 | 20% | Residuals, HNP L5/S1 | 5293 | 10% | 20020226 |
| Bilateral Lower Extremity Radiculopathy | Not separately unfitting |  |  | \* |  |
| ↓No Additional MEB Entries↓  | Tinnitus | 6260 | 10% | 20020226 |
| T- Spine Schmorl’s Node | 5299-5291 | 0% | 20020226 |
| Tonsillectomy | 6599-6516 | 0% | 20020226 |
| Sinusitis | 6512 | 0% | 20020226 |
| Left Foot Plantar Fasciitis … | 5280-5284 | 0% | 20020226 |
| Right Foot Plantar Fasciitis … | 5280-5284 | 0% | 20020226 |
| Left Plantar Tendonitis… | 5099-5024 | 0% | 20020226 |
| Right Plantar Tendonitis… | 5099-5024 | 0% | 20020226 |
| Asbestos, Nose, Left Knee & Hearing  | NSC |
| **TOTAL Combined: 20%** | **TOTAL Combined: 20%\*** |

\*VA added 10% L. & 10% R. Leg Radiculopathies; 30% MH Disorder (60% combined) from 20080714

ANALYSIS SUMMARY:

HNP (Lumbar Spine) Condition. The HNP condition was rated IAW 2003 VASRD standards which are no longer in effect. The current spine formula is based on range of motion (ROM) measurements and, therefore, more objective. The 2003 ratings were based on the examiner’s or rater’s opinion as to whether the disability was mild, moderate or severe. The MEB and VA examinations were similar, thus the different ratings were based on the PEB opinion that disability was moderate (20%) versus the VA rater’s opinion that disability was mild (10%). Many cases rated under the old rules do not provide the ROM criteria required for rating under the current formula. In these cases, the Board must base its recommendation on its own opinion as to severity of disability. This case, however, does document all elements required to rate under current VASRD §4.71a spine rating criteria. Although a default to the VASRD criteria in effect at the time is mandated by DoDI 6040.44, the Board sees no reason why current criteria cannot be used as a guide to its recommendation regarding estimated disability under the old standards. Since the objective elements applied to our recommendations for the majority of our back cases are present in this case, it allows us to use the same ‘yardstick’ for purposes of uniformity and equity. There were three ROM exams that were documented in the Disability Evaluation System (DES) file which the Board weighed in arriving at its rating recommendation. All three of these exams are summarized in the chart below.

|  |  |
| --- | --- |
| Thoracolumbar | Separation Date: 20020315 |
| Goniometric ROM | PT - 20010506 | MEB - 20011207 | VA C&P -20020225 |
| Flexion 0-90⁰ normal | 90⁰ | 90⁰ | 85⁰ |
| Combined 240⁰ normal |  | 240⁰ | 235⁰ |
| §4.71a Rating | 10% | 20% | 20% |
| Comments | TTP, +SLR | Spasm; tenderness; painful motion; -SLR; recurring LBP/sciatica | abnormal posture; pelvic tilt; antalgic gait; VA rating 10% |

All examinations yielded an independent 20% rating under the existing §4.71a formula which underpins the majority of Board recommendations for back cases. The Board also evaluated application of the 2003 VASRD codes and ratings disregarding the current standards. The 5293 code applied by the PEB “lumbosacral strain shows with muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral, in standing position” rated 20%. The 20% rating for 5295 lumbar spine required ‘muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral, in standing position’. The CI’s condition clearly did not meet that threshold, so coding under 5293 was predominate; the PEB rating was consistent with the 5293 code and included characteristic sciatic pain. On the CI’s BCNR application, he stated that his back was well-healed and that he was requesting an administrative discharge code be changed to a code that does not require a waiver to serve in the National Guard. He further stated that his “back is well-healed” and there is no herniated disc. The Board cannot deduct, nor increase the CI’s rating for either apparent clinical improvement, or worsening post-separation that does not reflect on his condition at the time of separation. The VA applied the code 5293 for intervertebral disc syndrome. The Board reviewed the symptomatology that CI exhibited along with the various coding options and agreed that the rating of 5293 at 20% for moderate recurring attacks was a fair and accurate disability determination and was justifiable by the record. All evidence considered, there is not reasonable doubt in the CI’s favor for recommending an increase in the rating for the lumbar spine condition.

Bilateral Lower Extremity Radiculopathy. The PEB found the “Bilateral Lower Extremity Radiculopathy” as a Category II condition (conditions that contribute to the unfitting conditions). The CI’s LIMDU referenced this condition. The NARSUM noted that the CI had “on/off paresthesias bilateral legs” although there were no abnormal electrophysiological studies. The CI had the diagnosis of bilateral lower extremity (LE) L5-S1 radiculopathy. The MEB Orthopedist found on examination 18 days prior to separation that the pain in CI’s posterior legs is “worse on the right than the left. The tingling travels from time to time down to both calves and into the right heel.” The MEB Orthopedist described intact sensation, normal motor strength and reflexes. The MEB internist‘s exam documented the same findings. The VA C&P exam confirmed the same findings along with mentioning the bilateral paresthesias and antalgic gait with a pelvic tilt to the right. As was documented in all of the exams, there was a leg length discrepancy of two centimeters. The CI did not require narcotic pain medications, did not have motor deficits, and did not have fixed sensory deficits that would interfere with performance duty. Pain-radiculopathy from spine conditions was not a part of every back rating IAW the VASRD in effect at the time of separation; however, for the CI’s unfitting HNP coded 5293 sciatic pain was specifically included as “symptoms compatible with sciatic neuropathy”. The Board discussed in detail if this condition should be found separately unfitting and ratable at the time of separation, or if the leg pains were included in the HNP rating or not unfitting. The first time that the VA noted ratable bilateral radiculopathy was in 2008, and was for 8520 at 10% each leg (Mild). This may demonstrate worsening of the CI’s condition, but is not an indicator for increased disability at the time of separation. The Board determined that the record of disability attributable to the bilateral leg radiculopathy, absent the back pain, was insufficient to overturn the PEB’s determination of Category II (not separately unfitting). All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the Bilateral Lower Extremity Radiculopathy condition.

Other DES-Noted Conditions (Tinnitus, Thoracic Schmorl’s Node, Tonsillectomy, Sinusitis, Left Foot Plantar Fasciitis, Right Foot Plantar Fasciitis). These conditions were mentioned in the DES file, including the MEB physical. Although not specifically mentioned by diagnosis, the symptoms attributable to bilateral plantar tendonitis were noted with the bilateral plantar fasciitis and the condition was adjudged to be within the purview of the Board for adjudication. None of the conditions were considered to interfere with duty; they did not restrict the CI from duty, and were not noted in the non-medical assessment. No link to fitness is in evidence for any of the conditions. The only documented physical limitations were those attributed to the adjudicated conditions. No link to fitness can be drawn for the tinnitus, thoracic Schmorl’s node, tonsillectomy, sinusitis, left foot plantar fasciitis, right foot plantar fasciitis or bilateral plantar tendonitis conditions. These conditions were reviewed by the action officer and considered by the Board. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of any of these conditions as unfitting for separation rating. There were no other conditions (than those noted above) that had a bearing on fitness noted in the DES or VA ratings. The Board, therefore, has no reasonable basis for recommending any additional unfitting conditions for separation rating.

Mood Disorder Condition: The CI contended for ratings similar to his VA rating which included Mood Disorder coded 9435 at 30% effective from 20080714. The CI did not have a mental health diagnosis noted within the DES file, nor any indication of impairment related to any potentially missed mental health diagnosis at the time of separation. The Board does not have the authority under DoDI 6040.44 to render fitness or rating recommendations for any conditions not considered by the DES. The Mood Disorder condition not covered above remains eligible for Board for Correction of Naval Records (BCNR) consideration.

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 HNP (Lumbar spine) condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the left and right lower extremity radiculopathy conditions, the Board unanimously recommends no recharacterization of the PEB adjudications as not unfitting. In the matter of the tinnitus, thoracic Schmorl’s node, tonsillectomy, sinusitis, left foot plantar fasciitis, and right foot plantar fasciitis conditions, or any other medical conditions eligible for Board consideration, the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation.

RECOMMENDATION: The Board therefore recommends that there be no recharacterization of the CI’s disability and separation determination.

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090917, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

 Deputy Director

 Physical Disability Board of Review

MEMORANDUM FOR DIRECTOR, SECRETARY OF THE NAVY COUNCIL

 OF REVIEW BOARDS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

 ICO XXXXXX, FORMER USMC, XXX XX XXXX

Ref: (a) DoDI 6040.44

 (b) PDBR ltr dtd 21Feb 11

 I have reviewed the subject case pursuant to reference (a) and, for the reasons set forth in reference (b), approve the recommendation of the Physical Disability Board of Review that Mr. XXXX’s records not be corrected to reflect a change in either his characterization of separation or in the disability rating previously assigned by the Department of the Navy’s Physical Evaluation Board.

 Principal Deputy

 Assistant Secretary of the Navy

 (Manpower & Reserve Affairs)