RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXX BRANCH OF SERVICE: marine corps

CASE NUMBER: PD0900647 SEPARATION DATE: 20011001

BOARD DATE: 20110114 TDRL DATE: 19961031

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Corporal (2542, Communication Center Operator) medically separated from the Marine Corps after over four years of service. The medical basis for the separation was Seronegative Arthritis, Most Likely a Reiter's Like Syndrome. The CI’s multiple joint complaints (right knee [with effusion], wrists, jaw [TMJ], lower back, and ankles) and abdominal pain led to a diagnosis of Seronegative Arthritis. X-ray imaging was normal aside from the right knee effusion and a non-related lumbar vertebrae finding. Lab tests were positive for HLA-B27 antigen and negative for all other arthritis markers. The CI was placed on Limited Duty (LIMDU) multiple times for predominately right knee arthritis pain, and despite therapy was unable to return to full duty. The CI underwent a Medical Evaluation Board (MEB) in 1995. “Seronegative Arthritis Most Likely a Reiter’s Like Syndrome” and “Probable Appendolith, Pending Appendectomy” conditions were listed on the NAVMED 6100/1 as interfering with duty and forwarded to the Informal Physical Evaluation Board (IPEB). The IPEB found the CI unfit for “Seronegative Arthritis Most Likely a Reiter’s Like Syndrome” at 40% with “Abdominal Pain Resolved after Appendectomy” as a Category III condition. The CI was entered onto the Temporary Disability Retired List (TDRL) at 40% effective January 1996. The CI underwent continued treatment and periodic TDRL re-evaluations for five years. The MEB diagnosis in December 2000 was Seronegative Polyarthritis, and the IPEB found the CI unfit for “Seronegative Arthritis Most Likely a Reiter’s Like Syndrome” at 20% with “Abdominal Pain Resolved after Appendectomy” as a Category III condition. The CI appealed the determination to a Formal PEB (FPEB) where the same decision was rendered. A subsequent Petition for Relief was denied. The CI was then separated with a 20% disability rating.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

CI CONTENTION: In summary, the CI contends that his “condition had worsened and spread” during the TDRL period and he should be retired at 40%. He additionally contends post-separation worsening of his condition and irregularities and/or shortcomings in his DES process.

The CI states: ‘’My Original Rating from CMC was 40% for all my medical disabilities. I was put on TDRL. I then continuously sought medical treatments and checkups for approximately the next 18 months until my first Periodic Physical Exam (PPE) at which time my disabilities had deteriorated. After my first PPE was finalized on 29 October 1997 I was retained on TDRL with the same rating of 40%. After this, I again continuously [sic] sought medical treatments and checkups for approximately the next 18 months with my conditions (arthritis) worsening and spreading to other parts of my body until my 2nd PPE. After this PPE was finalized on 30 Jul 1999 I was retained on TDRL with the same rating of 40%. After this PPE I continued the medical treatments and checkups all the way to my final PPE. During this time, my arthritis had spread even more through my body to almost all my joints and my lower back pain had increased. My final PPE was in San Diego. Before I went to this final PPE, I was contacted by the council that they had given me for this hearing. The council warned me that the current board had been reducing all the medical cases to at least half if not more of what they are currently receiving. My council suggested I not come to the hearing and let them drop my rating in half. I disagreed and went to the hearing. When I met with my council in San Diego whom was a Navy 0-1 that worked directly with the board, she stated that there was not much she could do for me. I went to the board which was a USN-Capt, USMC-Col, and a USMC Lt-Col, At the board, I plead my case and explained that my condition had worsened and spread. The board lasted 15 minutes top. They stated that my living in Okinawa was part of the reason I had these medical conditions due to the humidity and that it was my choice to live there. I was dropped to 20% and discharged on 1 October 2001. My current condition is: The arthritis is in all the joints in my body and my lower back pain is a lot worse. I have to take Motrin 2 to 3 times a day for the pain and inflammation. I even have a hard time writing now. My stomach has heart burn all the time now from the Motrin and I have to eat Rolaids to treat the heart burn. I seek medical attention at local Japanese hospitals now since I lost my retirement from the Marine Corps and can no longer use the Naval hospital here. When my arthritis acts up real bad, there are days that I can't even get out of bed due to the pain and loss of movement in my joints. Final Note: 5 Years plus of Medical and Doctor visits for a medical ailment all down played and changed in 20 minutes.”

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

RATING COMPARISON:

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Service FPEB - 20010803** | | | | | **VA (5 years Prior to Separation) – All Effective 19960201** | | | |
| **Condition** | **Code** | **Rating** | | | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL - 19960131** | **TDRL** | | **Sep.** | **No VA Rating at time of Sep.** |
| Seronegative Arthritis | 5099-5002 | 40% | | 20% | Seronegative Polyarthritis | 5009 | 40% | 19960719 |
| Abdominal Pain Resolved after Appendectomy | | | Category III | | Residuals, Scar From Laparoscopic Appendectomy | 7805 | 0% | 19960719 |
| ↓No Additional MEB Entries↓ | | | | | Nasal Bridge Fracture … | 6502 | 0% | 19960719 |
| Pterygium, Left Eye | 6034 | 0% | 19960719 |
| **TOTAL Combined: 20%** | | | | | **TOTAL Combined (*Includes Non-PEB Conditions*): 40%** | | | |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

ANALYSIS SUMMARY: The CI’s opinion that he had not improved and/or worsened over the course of his TDRL period can be both supported and questioned by various notes. The Board takes the position that subjective improvement or worsening should not influence its coding and rating recommendation at the time of final separation. It is recognized, in fact, that PEB’s across the services sometimes apply an overly generous initial rating in order to meet the requirement of 30% disability for placement on TDRL. This is in the member’s best interest at the time and does not mean that a final lower rating is unfair, even if the applicant does not perceive any improvement. The sole basis for the Board’s recommendation is the optimal VASRD rating for disability at separation. The CI’s contentions on potential irregularities and/or shortcomings in his Disability Evaluation System (DES) process were similar to those provided to the Petition for Relief and are outside the scope of this Board. By law the Board authority is limited to making recommendation on correcting disability determinations. The applicant's contentions will of course remain with the application as it is processed.

Seronegative Arthritis: The Board focused on the final rating for this condition at the time of removal from TDRL and final separation. The Board requested additional materials from the CI regarding missed work, hospital and emergency visits and treatment notes in Japan, and the Board considered those documents in the rating determination. The CI’s final TDRL reevaluation and MEB stated the CI was found to “have not much pain” and his flare “has regressed.” The examiner documented that the CI’s joints “are doing alright”, there was no joint warmth or tenderness and knees had full range of motion (ROM) without pain. During this period, the CI took NSAIDs and Sulfasalazine, but was not taking any narcotic pain medication. The CI’s rebuttal claimed he had constant pain in his jaw, right elbow, wrists, right knee, ankles, fingers, toes and back and that he sometimes had a limp; however, he was never prescribed a cane for ambulation. The CI appeared in person to the FPEB Formal Hearing Panel. The Panel noted that the testimony that the CI gave was “quite dramatic, crawling on the floor like a baby because of his back pain, and feeling paralyzed.” The Board further documented that the CI stated that he lost 3-5 days per month from work; however, the CI also testified that he had only gone to the Emergency Room (ER) once and didn’t go back because it was a “waste of time.” The first ER visit (1993) was for lower abdominal ‘crampy’ intermittent pain. The second ER visit (19990629) was for abdominal pain, diarrhea and high fever after travel to an exotic location after eating local fruits and vegetables. Regarding the CI’s work performance, submitted from his current employer’s memo (20101210) stated that since his employment (July 1999), the CI has not been able to lift heavy items, and perform physical workloads, nor is he able to travel as his position dictates due to his condition. It did indicate episodes (unspecified number or dates) when the CI was unable to meet with clients: “we are aware that he has been limited to when he can actually be on a site at times due to his condition…” The VA Compensation and Pension (C&P) exam was performed over four years prior to the CI’s separation from TDRL. There were no further VA exams or treatment notes in the record. The VA exam has minimal probative value for the final rating determination due to the remoteness from the rating timeframe. The VA 40% rating was for “significant, objective, painful symptoms in three separate areas of his body which are all related to this seronegative polyarthritis.” The PEB (5099-5002) and VA (5009) chose different coding options for rating the condition; however, they are both rated under the same criteria (VASRD 5002). There was no indication in the record that any joint other than the knee may have been alternatively coded as unfitting; however, at no greater than 10% for §4.59, painful motion. Therefore the arthritis coding (5002) is predominate. The “well-established diagnosis” portion of the 5002 rating criteria was considered administratively final from the FPEB determination and final separation. The seronegative arthritis as an “ongoing active process” was also considered as being met. There was no indication that the CI was totally incapacitated (100%); or had weight loss, anemia, or severe impairment of health (60%); or definite impairment of health objectively supported by examination findings (40%). There was no evidence of “severely incapacitating exacerbations” in the record. The rating focused, therefore, on the frequency of “incapacitating exacerbations” as delineated in the rating criteria (three or more times a year-40%; one or two exacerbations a year-20%). Aside from the CI’s statements of lost work days and the non-specific history from the CI’s employer, there were no hospitalizations, ER visits, or provider entries indicating incapacitation in the record after 1999. There was insufficient objective evidence in the record to substantiate the CI’s claim of greater than one or two incapacitating episodes per year proximate to his separation from TDRL. After due deliberation, and consideration of all evidence, there is not reasonable doubt in the CI’s favor, therefore, to justify a Board recommendation for other than the 20% rating assigned by the PEB for the Seronegative Arthritis condition coded as 5099-5002.

Abdominal Pain resolved after Appendectomy: The CI noted his continuing stomach heartburn on his contention. This condition was adjudicated as resolved as the CI had the appendectomy on 19951023. Postoperatively, all subsequent exams document the abdomen to be non-tender. The CI continued with complaints of abdominal upset without nausea, vomiting, change in bowel habits, or weight loss. All evidence considered, there is not reasonable doubt in the CI’s favor supporting re-characterization of the PEB fitness adjudication for the abdominal condition.

Other Conditions. Several relatively minor medical conditions were identified in the NARSUM and MEB physical. These were reviewed by the action officer and considered by the Board. It was determined that none could be argued as unfitting and subject to separation rating. No other conditions were service connected with a compensable rating by the VA within twelve months of separation. The Board, therefore, has no reasonable basis for recommending any additional unfitting conditions for separation rating.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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 Seronegative Arthritis condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the abdominal pain, the Board unanimously recommends no re-characterization of the PEB adjudications as not unfitting. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as additionally unfitting for rating at separation.

RECOMMENDATION: The Board therefore recommends that there be no re-characterization of the CI’s original TDRL disability and permanent separation determination.

|  |  |  |  |
| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Seronegative Polyarthritis | 5099-5002 | 40% | 20% |
| **COMBINED** | **40%** | **20%** |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

The following documentary evidence was considered:

Exhibit A. DD Form 294 dated 20091027, 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 2 Feb 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. XXXXX’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)