RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXX BRANCH OF SERVICE: marine corps

CASE NUMBER: PD0900698 SEPARATION DATE: 20030615

BOARD DATE: 20110318

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SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Sergeant (6672, Material Control Expediter) medically separated from the Marine Corps in June 2003 after seven years of service. The medical basis for the separation was multiple level degenerative cervical disk disease. CI had chronic low back and neck pain due to degenerative disk disease. He underwent two lower back surgeries for degenerative disk disease with radiculopathy in the year leading up to his Medical Evaluation Board (MEB). Following his second back surgery, he developed neck pain with radicular symptoms. Despite these surgeries, he was unable to perform his military occupational specialty (MOS) or participate in a physical fitness test. He underwent an MEB. Left cervical radiculopathy was forwarded to the Physical Evaluation Board (PEB) and determined to be a Category II condition (contributes to the unfitting condition but was not separately unfitting or ratable). Six other conditions, four of which related to the CI’s back condition, were also forwarded to the PEB and determined to be Category III conditions (not separately unfitting and do not contribute to the unfitting condition). The PEB adjudicated the multiple level degenerative cervical disk disease condition as unfitting, rated at 10%. The CI made no appeals, and was medically separated with a 10% disability rating.

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CI CONTENTION: The CI states: “I continue to have chronic back pain before and after surgery. The medicines I am on methadone and cyclobenzaprine cause me to sleep off and on throughout the day. I am also very forgetful, and my wife continually has to remind me to do stuff. My pain and condition has had very negative impact on my quality of life and mental state. I don’t get the right amount of sleep due to pain radiating down both arms legs and neck throughout the night and day, not to mention weight gain which has affected my feet, and torn ligaments therein. My added condition is depression and right hand radiculopathy.”

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Rating Comparison Chart found on page 2.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20030211** | | | **VA (6 Mo. Pre-Separation) – All Effective 20030616** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Multiple Level Degenerative Cervical Disk Disease | 5299-5290 | 10% | Degenerative Joint Disease, Cervical Spine | 5010-5290 | 30% | 20021206 |
| Left Cervical Radiculopathy | Not Unfitting | | Left Arm Radiculopathy, Status Post Cervical Spine Degenerative Joint Disease | 5290-8515 | 10% | 20021206 |
| Lumbar Disk Disease At L4-5 | Not Unfitting | | Status Post Lumbar Spine Surgeries | 5292 | 40% | 20021206 |
| Lumbar L4-5 Diskectomy, Decompression and Post-erolateral Interbody Fusion |
| History of Lumbar Spondylo-listhesis and Spondylolysis |
| Chronic Mechanical Low Back Pain |
| Gastritis, Resolving | Not Unfitting | | Gastroesophageal Reflux Disease | 7346 | 10% | 20021206 |
| Diverticulitis | Not Unfitting | | Diverticulitis | 7327 | NSC | |
| ↓No Additional MEB/PEB Entries↓ | | | Left Leg Radiculopathy, Status Post Lumbar Surgeries | 5292-8520 | 10% | 20021206 |
| Right Knee Tendonitis | 5024 | 10% | 20021206 |
| Right Wrist Strain | 5215 | 10% | 20021206 |
| Left Wrist Strain | 5215 | 10% | 20021206 |
| **TOTAL Combined: 10%** | | | **TOTAL Combined: 80%\*** | | | |

\*Added RUE Radiculopathy (8515) at 30% effective 20070710; Reduced LS-spine to 10% and C-spine to 10% effective 20080901; continued radiculopathy ratings (combined 90%)

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ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impact that his service-incurred conditions have had on his quality of life. However, the military services, by law, can only rate and compensate for those conditions that were found unfitting for continued military service based on the severity of the condition at the time of separation and not based on possible future changes. The VA, however, can rate and compensate all service connected conditions without regard to their impact on performance of military duties, including conditions developing after separation that are direct complications of a service connected condition. The VA can also increase or decrease ratings based on the changing severity of each condition over time. The Board’s role is confined to the review of medical records and all evidence at hand to assess the fairness of PEB rating determinations compared to VA Schedule for Rating Disabilities (VASRD) standards, as well as the fairness of PEB fitness adjudications at the time of separation. The Board’s threshold for countering DES fitness determinations is higher than the VASRD §4.3 reasonable doubt standard used for its rating recommendations but remains adherent to the DoDI 6040.44 “fair and equitable” standard. The changes in the VASRD rating criteria following the CI’s separation are not applicable in this case.

Cervical Spine Degenerative Disk Disease with associated Left Cervical Radiculopathy. The PEB found the cervical spine multi-level degenerative disk disease unfitting and the associated left cervical radiculopathy as contributing to the unfitting condition but not separately unfitting or ratable. In addition to considering the appropriate rating at separation for the unfitting degenerative disk disease of the cervical spine, the Board must consider whether left cervical radiculopathy should be recommended as a separately unfitting condition. First, the Board considered the appropriate rating for the unfitting cervical spine multi-level degenerative disk disease at separation. This case was adjudicated under the “old” spine rules (2003 VASRD). The current general rating formula for the spine was not effective until September 26, 2003 (2004 VASRD). However, the VASRD criteria for intervertebral disc syndrome (5293) changed on September 23, 2002, and were considered by the Board. The Board IAW DoDI 6040.44 must base its coding and rating recommendations on the VASRD standards in effect at the time of separation and must use the rating criteria in effect prior to 2004 (i.e. the 2003 rating criteria). The 2003 ratings were based on judgment as to whether the disability or limitation of motion was slight, moderate or severe. The available evidence for review includes the spine surgery narrative summary (NARSUM), MEB history and (H&P) exam, and VA compensation and pension (C&P) examination, 10, 8, and 6 months before separation, respectively. In addition, the Board considered service treatment records and post-separation treatment records.

According to the NARSUM in August 2002, CI presented in July 2002 with increasing neck pain and radicular left arm pain with associated tingling (two months after his second lumbar spine surgery discussed below). Magnetic resonance imaging of the cervical spine in August 2002 demonstrated degenerative disk disease at multiple levels. On examination by the spine surgeon, there were no sensory deficits, and upper extremity strength and reflexes were normal. The surgeon opined that, due to the combination of neck and low back conditions, he was unlikely to meet retention standards. At the MEB H&P examination in October 2002, CI complained of pain radiating into the left arm with intermittent numbness. On examination, the cervical spine had “near full range of motion (ROM),” with intact sensation and strength of the upper extremities. A November 6, 2002 (seven months before separation) spine surgery clinic note records that the “neck pain and left arm pain have improved somewhat.” Examination was recorded as normal with normal strength and intact sensation, without reference to cervical spine ROM. At the time of the C&P examination, six months before separation, the CI reported ten months (placing onset in January 2002) of neck pain with radicular pain down the left arm with tingling. The CI reported that the symptoms were constant with limited movement. The CI stated that he could not lift or work due to the spine condition (unclear if this was a global reference of lumbar and cervical spine conditions together). He reported that he had not required bed rest with treatment by a physician for this condition, but stated six lost days of work due to the neck. The examiner reported that there was muscle spasm and radiation of pain into the left arm and hand with movement. The examiner concluded there were signs of radiculopathy on the left. Goniometric ROM was decreased with flexion to 30° and combined ROM was 80°. There was reported pain with all motion, but no worsening with repeated movement.

The Board agreed that the evidence of the NARSUM, MEB H&P exam, and November 2002 spine surgery note most nearly approximated slight limitation of motion supporting a 10% rating under the spine rules in effect at the time, while the VA C&P examination approximated “moderate limitation of motion” supporting a 20% rating, despite a 30% rating by the VA (the VA rating decision rationale, however, indicated a 20% rating). The September 23, 2002 VASRD intervertebral disc syndrome (5293) rule changes were considered; however, the Board concluded the minimum rating under that code was not attained by the evidence of any of the examinations. In its assignment of probative value to the disparate exams, the Board must acknowledge that VA C&P spine examinations may predispose a lowered pain threshold since the examinee is generally quite aware that the severity of symptoms and pain tolerance on ROM is directly correlated with the resulting rating and financial gain. The measurement of ROM reflecting pain with motion is dependent on the CI’s reported pain with scant ability by the examiner to objectively confirm it. Upon deliberation, the Board agreed in this case that the MEB H&P exam was more consistent with outpatient notes, more reflective of the anticipated severity suggested by the clinical pathology, and less vulnerable to the undue influence just elaborated. The Board therefore relied primarily on the MEB evidence and does not find adequate reasonable doubt in the CI’s favor for recommending a higher rating for the cervical spine multi-level degenerative disk disease condition.

The Board next considered whether the associated left cervical radiculopathy was separately unfitting and ratable. The Board’s main charge, with respect to this condition, is an assessment of the appropriateness of the PEB’s fitness adjudication. The evidence pertaining to cervical radiculopathy has already been summarized and reviewed above. The Board noted the absence of objective findings of sensory loss, loss of strength or reflex changes consistent with a radiculopathy that would impact duty performance. The marked increase in symptoms at the time of the C&P compared with prior examinations was discussed above, with respect to probative value. The Board noted the commander’s statement of December 23, 2002 did not differentiate between the CI’s back condition, neck pain or arm pain with regard to limitations in the physically demanding aspects of the CI’s job. After due deliberation and in consideration of the totality of the evidence, the Board cannot find adequate justification for recommending the left cervical radiculopathy as additionally unfitting for separation rating.

Back Condition with Lumbar Radiculopathy. Four of the PEB diagnoses determined to be not unfitting (Category III) pertained to CI’s low back condition: Degenerative lumbar disk disease at L4-5, status post L4-5 diskectomy, decompression and posterolateral interbody fusion, history of lumbar spondylolisthesis and spondylolysis, and chronic mechanical low back pain. The Board’s main charge, with respect to this condition, is an assessment of the appropriateness of the PEB’s fitness adjudication. The evidence of the record pertaining to the back condition and lumbar radiculopathy include the same documents previously listed. CI had chronic low back pain associated with pain radiating into his right leg associated with imaging findings of degenerative disk disease with bulging disk at L4-5. After failing conservative therapy, he underwent a diskectomy in February 2002. Recurrent symptoms unresponsive to non-surgical treatment prompted a second lumbar spine surgery in May 2002 (decompression and fusion). The spine surgery NARSUM reported that since the May 2002 surgery there had been gradual improvement in mechanical low back pain and resolution of right sciatica (lumbar radiculopathy). On examination, lower extremity strength was normal, reflexes were intact, and there were no sensory deficits. The MEB H&P exam recorded moderately reduced ROM; the CI was able to flex enough to get his hands to his knees. There were no lumbar radicular signs or symptoms at that time. The November 2002 spine surgery encounter note recorded that the low back pain was “now reduced to chronic LBP, though not as severe as pre-op…No further sharp, persistent radicular leg pain.” Examination again demonstrated normal strength, intact sensation, and no clinical signs of radiculopathy. A November 20, 2002 primary care clinic entry recorded chronic pain and stiffness of the low back with “no lumbar radicular symptoms.” On examination, there was normal lower extremity strength and absence of radicular signs. ROM was again moderately reduced (hands-to-knees), consistent with the MEB H&P exam. At the time of the VA C&P examination, CI reported chronic low back pain with radicular pain into the legs interfering with physical activity including walking, standing, climbing stairs, sitting, lifting, and mowing the lawn. He reported difficulty getting dressed due to problems bending over. CI report that, “He requires bed rest with treatment by a physician two to three times per month.” The examiner recorded radicular pain and muscle spasm on motion, positive provocative testing, and pain with all motion. However, the CI was observed to be in no acute distress, have normal strength in all extremities with normal reflexes, no deformities, and no tenderness.

The Board next considered whether the degenerative disk disease of the lumbar spine status post surgery was separately unfitting and ratable. In its deliberations, the Board considered the fact that the CI remained on narcotic medication and muscle relaxants for his back condition as well as the spine surgeon’s opinion, and the commander’s statement reflecting impact on performance of military duties. With regard to the lumbar spine condition, the spine surgeon opined, “The patient is making recovery from previous surgery; however, he is unlikely to gain enough progress to be able to meet physical demands and retention standards of the United States Marine Corps.” The spine surgery NARSUM appeared written predominately for the lumbar spine condition and lumbago was the number one diagnosis of the MEB. Although the commander’s statement did not differentiate between the CI’s back or neck conditions, he stated that the CI was unable to perform the physically demanding aspects of his job such as lifting. The commander did, however, state that the CI was “currently serving in a billet appropriate for a Marine of his rank and level of training,” and was “generally capable of performing his current duties as a Material Control Expediter.” After due deliberation, the Board agreed that the preponderance of the evidence with regard to the functional impairment of the degenerative disk disease of the lumbar spine status post surgery favors its recommendation as an additionally unfitting condition for separate rating. As in the discussion regarding the cervical spine, the Board members agreed that the NARSUM, MEB H&P exam, and clinic notes had the highest probative value. Board members concluded that the back condition coded 5292 most nearly approximated the criteria for moderate limitation of motion rated 20% under the VASRD criteria in effect at time. The ROM reported in the MEB H&P examination correlates with a lumbar flexion of more than 30° but not more than 60°, also consistent with a 20% rating under the new spine criteria. The Board also considered a rating under the 5293 code for intervertebral disc syndrome, updated September 2002, which fit with the CI’s underlying pathology. The criteria are based on the number of incapacitating episodes in the prior 12 months requiring bed rest prescribed by a physician. The Board acknowledged that prior to the May 2002 lumbar spine surgery there may have been incapacitating episodes requiring bed rest; however, no service treatment records were identified that documented physician directed bed rest. Following recovery from the May 2002 surgery, the CI sought care for flares of pain; however, no physician-prescribed bed rest was noted. The Board concluded the preponderance of evidence did not support a higher rating under this code, providing no additional benefit to the CI.

The Board next considered whether the associated lumbar radiculopathy was separately unfitting and ratable. The NARSUM, MEB H&P examination, and clinic notes had the highest probative value and documented resolution of lumbar radicular symptoms and the absence of objective findings of lumbar radiculopathy. Although the newer VASRD spine criteria consider any pain radiculopathy under the general spine rating, the VASRD in effect at the time of separation generally did not. However, the MEB did not refer lumbar radiculopathy to the PEB as not interfering with duty. After due deliberation and in consideration of the totality of the evidence, the Board cannot find adequate justification for recommending the left lumbar radiculopathy as additionally unfitting for separation rating.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were gastroesophageal reflux disease and a history of diverticulitis. None of these conditions were indicated as limiting duty, implicated in the commander’s statement or noted as failing retention standards. All were reviewed by the action officer and considered by the Board. There was no indication from the record that any of these conditions significantly interfered with satisfactory performance of the CI’s military specialty requirements. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for any of the stated conditions.

Other Contended Conditions. CI has been granted VA service connected ratings for right hand radiculopathy related to cervical spine degenerative disk disease effective 2007 (four years after separation), and adjustment disorder with depression in 2008 (five years after separation). DES documentation and service medical records do not document complaints of or treatment for these conditions developing after separation. The Board acknowledges the presence of right hand radiculopathy and adjustment disorder with depression as a currently rated condition by the VA, but notes that the scope of its recommendations does not extend to conditions which were not diagnosed or in evidence at the time of medical separation.

Remaining Conditions. Other conditions identified in the DES file and noted in the VA rating decision proximal to separation included right knee tendonitis and left and right wrist strain. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically active during the MEB period, carried limited duties, or were implicated in the commander’s statement. These conditions 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 or contended by the CI. The Board therefore has no reasonable basis for recommending any additional unfitting conditions for separation rating.

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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 the cervical spine condition was operant in this case and the condition was adjudicated independently of that instruction and regulation by the Board. In the matter of the cervical spine condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB unfitting adjudication of 5299-5290 at 10%. In the matter of the left arm radiculopathy condition, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation. In the matter of the lumbar spine condition, the Board, by a vote of 2:1, recommends that it be added as an additionally unfitting condition for separation rating, coded 5292 and rated 20% IAW 2003 VASRD §4.71a. The single voter for dissent (who recommended no change in the PEB determination) submitted the addended minority opinion. In the matter of the right lumbar radiculopathy condition, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation. In the matter of gastroesophageal reflux disease and history of diverticulitis, adjustment disorder with depression and right hand radiculopathy, 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.

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RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows and that the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective as of the date of his prior medical separation.

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Multiple Level Degenerative Cervical Disk Disease | 5299-5290 | 10% |
| Lumbosacral Spine Degenerative Disk Disease | 5292 | 20% |
| **COMBINED** | **30%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20091130, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

Deputy Director

Physical Disability Board of Review

Minority Opinion: I agree that the CI’s neck condition at the time of separation was unfitting and appropriately coded as 5299-5290 and rated at 10%. However, I do not see enough evidence in the record to support overturning the Navy PEB’s adjudication of the CI’s lower back as not unfitting. There is a higher bar for changing a service PEB determination of not unfitting to unfit, and I feel that a strong enough case cannot be made in order to overturn the PEB ruling of not unfitting (Category III) for the back condition. The majority voters heavily weighed the commander’s comments in this case to bring in the lower back as an additional unfitting condition. It did say that the CIs “physical condition does appear to interfere with his Material Control Expediter duties;” however, to interpret “physical condition” as “back condition” requires speculation on the part of the Board. There is not a reasonable basis for the Board to conclude that lumbar issues were implicated by the commander. Also, it appeared that after the second surgery in May 2002, the lower back condition was improving. Treatment visits starting around July 2002, with an ER visit for cervical/radiculopathy, were more related to neck and arm complaints than the lower back.

I do not believe that the total disability of the CI’s back at the time of separation is accurately reflected at 30%, and I recommend no change in the characterization of the CI’s separation rating as shown in the chart below.

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Multiple Level Degenerative Cervical Disk Disease | 5299-5290 | 10% |
| **COMBINED** | **10%** |

MEMORANDUM FOR DIRECTOR, SECRETARY OF THE NAVY COUNCIL OF REVIEW

BOARDS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

ICO XXXXX, FORMER USMC, XXX XX XXXX

Ref: (a) DoDI 6040.44

(b) PDBR ltr dtd 22 Apr 11

I have reviewed the subject case pursuant to reference (a) and non-concur with the recommendation of the Physical Disability Board of Review as set forth in reference (b). Therefore, Mr. XXXX’ records will 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)