RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Marine corps

CASE NUMBER: PD0900703 SEPARATION DATE: 20070515

BOARD DATE: 20110510

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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 Sgt/E-5 (0411, Maintenance Technician), medically separated from the Marine Corps. The medical basis for the separation was Herniated Intervertebral Disk Cervical Spine, C2-3 and C3-4, Status Post (S/P) Right C4 Facetectomy with Debridement of C3-C4 Herniated Disk and postoperative wound infection*.* He did not respond adequately to rehabilitation and treatment and was unable to perform within his Military Occupational Specialty or to participate in a physical fitness test. He was placed on Limited Duty (LIMDU) and underwent a Medical Evaluation Board (MEB). Herniated intervertebral disk cervical spine, C2-3 and C3-4, S/P right C4 facetectomy with debridement of C3-C4 herniated disk was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. No other conditions appeared on the MEB’s submission. Other conditions included in the narrative summary and Disability Evaluation system (DES) packet will be discussed below. The Informal PEB (IPEB) adjudicated the herniated intervertebral disk cervical spine, C2-3 and C3-4, S/P right C4 facetectomy with debridement of C3-C4 herniated disk as unfitting, rated 20%; with application of the SECNAVINST 1850.4E. The CI made no appeals, and was medically separated with a 20% disability rating.

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CI CONTENTION: “Discrepancy between DoD and VA ratings. DoD 20%, VA 30% for same injury.” 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.

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RATING COMPARISON:

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| **Service IPEB – Dated 20070305** | **VA (6 Mo. After Separation) – All Effective Date 20070516** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| DDD C2-3, C3-4, s/p R C4 facetectomy w/debridement of C3-4 herniated disk  | 5237 | 20% | Post op cervical laminectomy | 5299-5237 | 10% | 20071126 |
| Scar s/p cervical laminectomy | 7800 | 10% | 20071126 |
| ↓No Additional MEB Entries↓ | R cervical radiculopathy | 8515 | 10% | 20071126  |
| 0% X 2 / Not Service Connected X 2 | 20071126  |
| **Final Combined: 20%** | **Total Combined: 30%** |

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ANALYSIS SUMMARY: While the DES considers all of the service member's medical conditions, compensation can only be offered for those medical conditions that cut short a service member's career, and then only to the degree of severity present at the time of final disposition. However, the Department of Veterans Affairs, operating under a different set of laws (Title 38, United States Code), is empowered to assign ratings for conditions that were not separately unfitting at separation and periodically re-evaluate veterans for the purpose of adjusting the disability rating should his degree of impairment vary over time.

Cervical spine condition: An EMG, 8 March 2006, showed electrophysiologic evidence for a mild, chronic right cervical radiculopathy predominately in the C6 nerve root distribution without evidence of ongoing denervation. MRI of his cervical spine, 30 March 2006, revealed right paracentral disk protrusions at C2-3 and C3-4. He underwent a right C3-4 medial facetectomy and decompression of the C4 nerve on 27 July 2006 without relief. There were two goniometric range-of-motion (ROM) evaluations in evidence which the Board weighed in arriving at its rating recommendation. Both of these exams are summarized in the chart below. The MEB examination was closer to the time of separation, therefore, was considered to be of higher probative value; however, both exams result in the same rating based upon range of motion.

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| Cervical Spine | Separation Date: 20070515 |
| Goniometric ROM – Cervical | MEB - 3 Mo. Pre-Sep20070208 | VA C&P - 6 Mo. After-Sep20071126 |
| Flex (0-45 normal) | 45⁰ | 45⁰ |
| Ext (0-45 normal) | 35⁰ | 30⁰ |
| R Lat Flex (0-45 normal) | 45⁰ | 40⁰ |
| L Lat Flex (0-45 normal) | 35⁰ | 40⁰ |
| R Rotation (0-80 normal) | 80⁰ | 80⁰ |
| L Rotation (0-80 normal) | 80⁰ | 80⁰ |
| COMBINED (340 normal) | 320⁰ | 315⁰ |
| §4.71a Rating | 10%\* | 10% |

 \*PEB granted 10% more for wound infection

The PEB examination documented ROM findings consistent with a 10% rating. The PEB notes indicated that an additional 10% was assigned due to his significant post-operative infection, for a 20% total rating. The VA rated 10% based upon range of motion. The VA additionally rated the surgical scar at 10% and the radiculopathy at 10%. Cervical radiculopathy was documented in this case. Board precedent is that a functional impairment tied to fitness is required to support a recommendation for addition of a peripheral nerve rating at separation. There was no functional impairment separately unfitting from the surgical scar or the radiculopathy secondary to the degenerative disc disease of the cervical spine. Thus the Board cannot support a recommendation for additional rating based on the scar or peripheral nerve impairment. Both the MEB/PEB and the VA examinations support a 10% rating for the only unfitting condition; however, by precedent the Board does not revoke ratings granted by the PEB and will not revoke the additional 10% granted for wound infection. In the matter of the cervical spine condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication.

Remaining Conditions: Other conditions identified in the Disability Evaluation System (DES) file were residual surgical scar post operative cervical laminectomy, right elbow pain, right foot pain, gastroesophageal reflux, obesity, poor sleep, asthma, right ear low frequency hearing loss, and impaired fasting glucose. None of these conditions were clinically active during the MEB period; none carried attached profiles; and, none were implicated in the Non Medical Assessment. 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. Additionally, tinnitus was noted in the VA rating decision proximal to separation, but was not documented in the DES file. The Board does not have the authority under DoDI 6040.44 to render fitness or rating recommendations for any condition not considered by the DES.

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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. In the matter of the herniated intervertebral disk cervical spine, C2-3 and C3-4, status post right C4 facetectomy with debridement of C3-C4 herniated disk condition the Board unanimously recommends no change in the PEB adjudication as not unfitting. In the matter of the right shoulder radiculopathy, to include right shoulder, right arm and right hand condition; the residual, surgical scar post operative cervical laminectomy condition: 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, therefore, recommends that there be no recharacterization of the CI’s disability and separation determination.

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Degenerative Disc Disease -Cervical Spine | 5237 | 20% |
| **COMBINED** | **20%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20091126, 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

Ref: (a) DoDI 6040.44

 (b) PDBR ltr dtd 23 May 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 PDBR xxxxxxxxx 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.

 Assistant General Counsel

 (Manpower & Reserve Affairs)