RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXX BRANCH OF SERVICE: Marine corps

CASE NUMBER: PD0900712 SEPARATION DATE: 20080315

BOARD DATE: 20110531

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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 SSgt (7051, Firefighter Instructor) medically separated from the Marine Corps in 2008. The medical basis for the separation was back pain, herniated disk. The CI developed chronic low back associated with findings of degenerative and bulging intervertebral discs. He did not respond adequately to treatment and was unable to perform physically demanding aspects of his military occupational specialty, or participate in a physical fitness test. He was placed on limited duty and underwent a Medical Evaluation Board (MEB). Back pain, herniated disk, was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. The PEB adjudicated the back pain, herniated disk condition as unfitting, rated 20%. The CI made no appeals, and was medically separated with a 20% disability rating.

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CI CONTENTION: “The condition in my back will never get any better just worse I have already started to have trouble with the nerves in my legs and have a hard time getting around some days due to the condition in my back.” He elaborates no further specific contentions regarding rating or coding and mentions no additionally contended conditions.

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RATING COMPARISON:

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| **Service IPEB – Dated 20080104** | **VA (~1 Mo. After Separation) – All Effective Date 20080316** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Back Pain, Herniated Disk | 5237 | 20% | DDD, Lumbar Spine w/Sciatica | 8260-5243 | 40% | 20080429 |
| ↓No Additional MEB / PEB Entries↓ | R Shoulder Pain … | 5201-5010 | 10% | 20080429  |
| Tinnitus | 6260 | 10% | 20080509 |
| 0% x 0 / Not Service Connected x 3 | 20080429  |
| **Combined: 20%** | **Combined: 50%** |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impact that his service-incurred condition has had on his current quality of life. It is a fact, however, that the Disability Evaluation System (DES) has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions resulting in medical separation. This role and authority is granted by Congress to the Veterans Administration. 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 the VA Schedule for Rating Disabilities (VASRD) standards, as well as the fairness of PEB fitness adjudications at the time of separation.

Back Pain, Herniated Disk. There were two goniometric range of motion (ROM) evaluations in evidence which the Board weighed in arriving at its rating recommendation. These exams are summarized in the chart below:

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| Goniometric ROM - Thoracolumbar | MEB - 7 Mo. Pre-Sep | VA C&P - 1 Mo. After-Sep |
| Flex (0-90) | 69⁰ (70⁰) | 40°; Rep 30° |
| Ext (0-30) | 10⁰ | 30⁰; Rep 20° |
| R Lat Flex (0-30) | 21⁰ (20⁰) | (not measured) |
| L Lat Flex 0-30) | 21⁰ (20⁰) | (not measured) |
| R Rotation (0-30) | 12⁰ (10⁰) | 25⁰ |
| L Rotation (0-30) | 15⁰ | 30⁰ |
| COMBINED (240) | 148⁰ (145⁰) |  |
| Comment: (IAW Spine rule, Note 4) | No muscle spasm; reflexes diminished, but symmetrical;All STR normal gait; | Painful motion; tenderness; antalgic gait (not attrib to spasm / tender / guarding); decr knee reflex bilat |
| §4.71a Rating | 10% (PEB 20%) | 20% or 40% |

 VA C&P flexion: passive to 50°, active to 40°, pain at 30°, 30° after repetition

The service treatment record shows complaint of chronic low back pain beginning in March 2006. In March 2007, increased low back pain with pain shooting into the buttock prompted further evaluation by magnetic resonance imaging (MRI) showing degenerative intervertebral discs with right lateral bulging of discs L3-4 and L4-5 associated with mild encroachment on the right L4 neuroforamen. There were no symptoms of radiculopathy such as pain radiating into the leg, or findings of loss of sensation, weakness or reflex changes on examination. Neurosurgery consultations on April 2, 2007 and July 2, 2007 diagnosed chronic low back pain and advised continued conservative treatment and no duty restrictions. The neurosurgeons documented CI report of pain aggravated by physical activity, radiating into the buttocks. There was no pain radiating into the legs and examinations demonstrated normal findings including gait, strength, sensation and reflexes. At the time of the narrative summary (NARSUM) on August 2007 seven months before separation examination also documented absence of signs or symptoms of radiculopathy (there was a history of a motorcycle accident in 2001 causing residual left leg numbness about the knee [non-radicular pattern and not related to the back]). ROM was documented as in the above chart without comment regarding painful motion. An examination in October 2007 documented pain with flexion and rotation and absence of pain with extension and lateral bending. Gait was normal and there were no findings of radiculopathy. There is no further documentary evidence of care for back pain prior to separation. The PEB rated 20% reportedly based on ROM, but the Board notes the recorded thoracolumbar ROM in the NARSUM correlates with a 10% rating in the VARSD. Flexion exceeded 60°, combined ROM exceeded 120°, and there was no muscle spasm causing abnormal gait or spinal contour. The Board noted the VA compensation and pension (C&P) examination following separation showing report of worsened symptoms (including leg pain, leg paresthesia, and leg numbness), with antalgic gait and decreased ROM. In addition to pain with flexion, there was also pain with extension not present in the service treatment record. The C&P examiner also recorded 4/5 strength in both ankles, but with intact reflexes and intact sensation inconsistent with weakness due to intervertebral disc disease. The examiner recorded an antalgic gait but documented absence of muscle spasm. The gait was also described as “high stepping” which does not correlate with the degree of weakness on physical examination or the clinical history. Although not considered for rating the back, the Board also noted findings of marked weakness (“3/5”) in both upper extremities not explained by known medical conditions. 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 or increased symptom reporting since the examinee is generally quite aware that the severity of symptoms and pain tolerance on ROM and other testing is directly correlated with the resulting rating and financial gain. The measurement of ROM reflecting pain with motion is dependent on the examinee’s reported pain, and strength testing is dependent on examinee effort, with scant ability by the examiner to objectively confirm it. Upon deliberation the Board agreed in this case that the MEB physical examination 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 back condition (5237). The Board also considered a rating using the VASRD formula based on incapacitating episodes due to intervertebral disc syndrome. The criteria are based on the number of incapacitating episodes in the prior 12 months requiring bed rest prescribed by a physician. No service treatment records were identified that documented physician-directed bed rest. The VA C&P exam history of “incapacitation” was not substantiated by any documentation of “bed rest prescribed by a physician and treatment by a physician” IAW Note (1) of the formula for rating intervertebral disc syndrome based on incapacitating episodes. The Board concluded the preponderance of evidence did not support a higher rating using this alternate formula providing no additional benefit to the CI. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s 20% rating decision for the CI’s back condition (coded 5237).

Remaining Conditions. Other conditions identified in the DES file were separated right shoulder (May 2002), left shoulder pain, motor vehicle accident 2002 with residual occasional tingling/weakness above left knee, olecranon bursitis left elbow, and thyroglossal duct cyst. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically or occupationally significant during the MEB period, were the basis for limited duty, or were implicated in the commander’s 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 and hearing loss were noted in the VA rating decision proximal to separation, but were 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 conditions not considered by the DES. 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. In the matter of the back condition (back pain, herniated discs) and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of 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** |
| Back Pain, Herniated Disc | 5237 | 20% |
| **COMBINED** | **20%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20091016, 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 XXXXX, FORMER USMC

Ref: (a) DoDI 6040.44

 (b) PDBR ltr dtd 16 Jun 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 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.

 Assistant General Counsel

 (Manpower & Reserve Affairs)