RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXX BRANCH OF SERVICE: marine Corps

CASE NUMBER: PD0900718 SEPARATION DATE: 20090630

BOARD DATE: 20110517

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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 Captain (4401/Student Judge Advocate) medically separated from the Marine Corps in 2009. The medical basis for separation was fibromyalgia syndrome, chronic pain syndrome. The CI did not respond adequately to perform within her military occupational specialty (MOS) or to participate in a physical fitness test. On 24 June 2008 she was given a four-month limited duty and she underwent a Medical Evaluation Board (MEB). An addendum to the MEB from Mental Health stated that the CI suffered from an anxiety disorder not otherwise specified (NOS), mild, existed prior to service. An addendum to the MEB from family practice stated that the CI suffered from fatigue and excessive daytime sleepiness which are frequently associated with fibromyalgia. The MEB listed rheumatism, unspecified and fibrositis on the NAVMED 6001/1. The Physical Evaluation Board (PEB) adjudicated the fibromyalgia, chronic pain syndrome as unfitting rated 20% with likely application of SECNAVIST 1850.4E and/or DoDI 13329.39 E2.A1.5. The PEB adjudicated the excessive daytime sleepiness and sleep disturbance as category II and nonviolent marital discord; and anxiety disorder, NOS, mild as category III. The CI made no appeals and was medically separated with a 20% disability rating.

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CI CONTENTION: “Disproportionate VA rating of 40% - all rating are due to issues related to Fibromyalgia”

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RATING COMPARISON:

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| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20081205** | | | **VA (3 Mo. after Separation) – All Effective 20090701** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Fibromyalgia Chronic Pain Syndrome | 5025 | 20% | Fibromyalgia | 5025 | 10% | 20090316 |
| Excessive Daytime Sleepiness | Cat II | | No corresponding VA entries | | | |
| Sleep Disturbance | Cat II | | No corresponding VA entries | | | |
| Nonviolent Marital Discord | Cat III | | No corresponding VA entries | | | |
| Anxiety Disorder NOS Mild | Cat III | | Adjustment Disorder | 9499-9434 | 10% | 20090313 |
| ↓No Additional Entries.↓ | | | L Knee Strain | 5260-5024 | 10% | 20090316 |
| R Patellofemoral Syndrome | 5260-5024 | 10% | 20090316 |
| 0% x 4/NSC X 17 | | | |
| **Combined: 20%** | | | **Combined: 40%** | | | |

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ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that there should be additional disability assigned for her other conditions and for the gravity of his condition and predictable consequences which merit consideration for a higher separation rating. While the Disability Evaluation System (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 (VA), operating under a different set of laws (Title 38, United States Code), is empowered to periodically re-evaluate veterans for the purpose of adjusting the disability rating, should his degree of impairment vary over time.

Fibromyalgia, Chronic Pain Syndrome. The narrative summary on 28 July 2007 twenty-eight months pre-separation noted the CI had neck, upper back, and muscle stiffness along with low back pain, 16-paired tender points above and below the waist, daily pain unrelieved by treatment, sleep disturbances, Raynaud’s phenomenon, with severe exacerbations that were incapacitating. The CI was prescribed non steroidal anti-inflammatory (NSAID) medications and topical analgesics along with physical therapy (PT) and chiropractic care, which all were ineffective. The VA compensation and peension exam on 19 March 2009 three months pre-separation documented that the CI had daily pain and stiffness bilaterally, above and below the waist, including the axial spine at all levels, with periods of more exacerbation. She also had Raynaud’s phenomenon, fatigue, sleep disturbance, constipation, and headaches. The CI was treated with NSAID medications and topical analgesics along with PT and chiropractic care, which all were ineffective. The examiner further documented that the CI had received a recent trial of prednisone, which the Board noted is a very intense treatment regimen for fibromyalgia. In spite of the intense treatment and treatment compliance, the CI had minimal improvement.

The PEB applied the code 5025 for fibromyalgia and chronic pain syndrome rated 20%. The VA chose the same code and rated for fibromyalgia alone at 10%. In considering the rating, the Board readily agreed that the MEB, VA examinations, and the service treatment record all indicated that the CI’s symptoms were not controlled by medications, and that the pain was present daily. However, the Board majority agreed that the CI was able to function at a level appropriate for the requirements of her rank and rating except for physical activity. The CI’s MOS related performance was adequate, if not exemplary. The Board majority considered that the physical exertion required to perform caused her to be unfit. The Board majority considered the most appropriate rating to be 20% rating (widespread musculoskeletal pain and tender points, with or without associated fatigue, sleep disturbance, stiffness, paresthesias that are episodic, with exacerbations often precipitated by environmental or emotional stress or by overexertion, but that are present more than one-third of the time). Robust deliberations centered upon whether to grant a 40% rating since the Board members all agreed that the 40% criteria of constant or nearly constant symptoms refractory to therapy were actually present. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board by simple majority recommends a separation rating of 20% for fibromyalgia, chronic pain syndrome.

Other PEB Conditions. The other conditions forwarded by the MEB, and adjudicated as not unfitting by the PEB, were non-violent marital discord and anxiety disorder, NOS, mild. The VA rated the adjustment disorder at 10%. The Board notes the CI’s contention that her non-violent marital discord and anxiety disorder should be found unfitting and given a separation rating. However, the mental condition is part the syndrome of fibromyalgia. Even if the condition had not already been included in the fibromyalgia syndrome, the mental condition was not unfitting according to the psychiatric evaluation of 22 September 2008 which deemed the CI fit for duty from a psychiatric standpoint. A mental condition was not profiled, or implicated in the non-medical assessment. The mental condition was reviewed by the action officer and considered by the Board. There was no indication from the record that the condition significantly interfered with satisfactory performance of MOS requirements. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the mental condition.

Remaining Conditions. The left knee strain and patellofemoral syndrome right knee were each rated 10% by the VA. These conditions were mentioned in the DES package. All of these conditions 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 MOS requirements. The Board therefore has no eligible basis for recommending any additional unfitting conditions for separation rating. The headache syndrome and coccydynia were rated 0% by the VA. These conditions were mentioned in the DES package. These conditions were reviewed by the action officer and considered by the Board. There was no indication from the record that any of the conditions significantly interfered with satisfactory performance of MOS requirements. The Board therefore has no eligible 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. In the matter of the fibromyalgia condition, the Board, by a vote of 2:1, recommends a rating of 20% coded 5025 IAW VASRD §4.71a. The single dissenting voter recommends 5025 at 40%, and submitted the addended minority opinion. In the matter of the non-violent marital discord and anxiety disorder conditions or any other medical condition eligible for Board consideration and IAW VASRD §4.71a, the Board unanimously agrees that it cannot recommend a finding 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, effective as of the date of her prior medical separation.

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Fibromyalgia, Chronic Pain Syndrome | 5025 | 20% |
| **COMBINED** | **20%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20091201, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

Deputy Director

Physical Disability Board of Review

MINORITY OPINION: The applicant should be assured that her service is gratefully acknowledged by the Board and that it recognizes that her acquired disabilities were no small price to pay. The Board majority recommendation for a 20% rating is not supported by the evidence. The CI clearly fit the 40% criteria of, constant or nearly constant symptoms refractory to therapy. The Board admitted the presence of constant symptoms refractory to therapy; however, because the CI had even worse exacerbations induced by intense exercise, the Board majority used the presence of exacerbations to support the 20% rating by noting the presence of exacerbations being a 20% criterion. The Board majority ignored the fact that between severe exacerbations the CI was still symptomatic (neck, upper back, and muscle stiffness along with low back pain, 16-paired tender points above and below the waist, daily pain unrelieved by treatment, sleep disturbances, Raynaud’s phenomenon, and anxiety). The Board majority also argued that the CI was able to perform excellent office work (in spite of her baseline symptoms listed above) and thus claimed that she was not unfit except when she was required to perform strenuous exercise, which by the way, caused her to be totally incapacitated. The CI was a Marine, and of course was required to be able to perform strenuous exercise. The CI cannot be considered to be both fit and unfit. Again, the CI was always symptomatic in spite of an intensive therapeutic regimen, was compliant with all her therapeutic options, and was still symptomatic meeting all criteria for a 40% rating.

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 15 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 Ms. XXXX’s records not be corrected to reflect a change in either her 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)