RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: marine corps

CASE NUMBER: PD201000717 SEPARATION DATE: 20040915

BOARD DATE: 20111130

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty, SGT/E5, 3043, Supply Administration & Operations, medically separated for polymyositis. The CI became symptomatic in 2001 with arthralgias, myalgias, weight gain, and fatigue as well as elevated liver enzymes. Polymyositis was diagnosed in 2003; he was treated with steroids and placed on limited duty (LIMDU), but did not respond adequately to perform within his military occupational specialty (MOS) or participate in a physical fitness test (PFT) and underwent a Medical Evaluation Board (MEB). The MEB forwarded “polymyositis; obstructive sleep apnea (OSA), dependant on C-PAP; gastroesophageal reflux disease (GERD), requiring medical therapy; and, hypertension (HTN)” 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 Disability Evaluation System (DES) packet will be discussed below. The Informal PEB (IPEB) adjudicated the polymyositis condition as unfitting, rated 10%, with application of the Veterans’ Administration Schedule for Rating Disabilities (VASRD). The GERD, HTN and OSA were rated as Category III, not unfitting. The CI made no appeals and was medically separated with a 10% combined disability rating.

CI CONTENTION: “10% for both sleep apnea and polymyositis.” Item #14 states: “Sleep Apnea evaluated at 50%; Polymyositis evaluated at 20%; Left Ventricular Hypertrophy to include Dyspnea (Heart Murmur) evaluated at 30%; Hypertension evaluated at 10%; Rheumatoid Arthritis evaluated at 0%; Both Left and Right Ankles evaluated at 10%; Both Left and Right Knees evaluated at 20%; Lower Back Strain evaluated at 10%; Gastroesophageal Reflux Disease evaluated at 10%”. 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.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20040618** | | | **VA (3 Mos. After Separation) – All Effective Date 20040916** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Polymyositis | 6399-6354 | 10% | Polymyositis | 5099-5025 | 20% | 20041216 |
| OSA | Not Unfitting | | Sleep Apnea | 6847 | 50% | 20041216 |
| GERD | GERD | 7346 | 10% | 20041216 |
| Hypertension | Hypertension\* | 7101 | 0% | 20041216 |
| ↓No Additional MEB/PEB Entries↓ | | | Left Ventricular Hypertrophy\*\* | 7007 | 10% | 20041216 |
|  | | | Left Ankle | 5271 | 10% | 20041216 |
|  | | | Right Ankle | 5271 | 10% | 20041216 |
| Thoracolumbar Strain | 5242 | 10% | 20041216 |
| Right Knee | 5260 | 20% | 20041216 |
| Left Knee | 5260 | 20% | 20041216 |
| Residual L Shoulder Dislocation | 5299-5203 | 10% | 20041216 |
|  | | | 0% x 3/Not Service Connected x 5 | | | 20041216 |
| **Final Combined: 10%** | | | **Total Combined: 90%** | | | |

\* Increased 7101 to 10% effective 20050107 and \*\*Increased 7007 to 30% effective 20060307; both from VA treatment records

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred condition continues to burden him. The Board wishes to clarify that it is subject to the same laws for Service disability entitlements as those under which the Disability Evaluation System (DES) operates. The 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. That role and authority is granted by Congress to the Department of Veterans’ Affairs (VA), operating under a different set of laws (Title 38, United States Code). The Board evaluates VA evidence proximal to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of DES fitness decisions and rating determinations for disability at the time of separation. The Board also acknowledges the CI’s contention suggesting that Service ratings should have been conferred for other conditions documented at the time of separation. 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. The VA, however, is empowered to compensate service connected conditions and to periodically re-evaluate said conditions for the purpose of adjusting the veteran’s disability rating should his degree of impairment vary over time.

Unfitting Condition: Polymyositis. The CI first presented in 2001 with symptoms of arthralgias, myalgias, weight gain and fatigue. At the time, he was taking several metabolic enhancers which contained Ephedra. His muscle enzymes, liver function tests and blood pressure were elevated. He was advised to stop the enhancers. He did, but only for a short period, before substituting another Ephedra product until he was advised that it was also potentially harmful. It is noted that these products were subsequently taken off of the market for numerous side effects including cardiovascular, renal and liver damage. He underwent extensive evaluations by neurology with included muscle biopsy on 21 July 2003, nerve conduction velocity/electromyograms (NCV/EMGs) on 9 July 2003 and 30 March 2004, lab work and serology. A rheumatoid factor was mildly positive at 1:8, but ANA and ESR were normal. A diagnosis of polymyositis was made in 2003 by his treating neurologist. He was treated with a trial of prednisone with a suboptimal response. He was referred to a second neurologist at the Kansas University Medical School who was concerned that this could be an underlying metabolic myopathy. The second NCV/EMG showed lumbosacral segmental spontaneous EMG activity which could have been neurogenic or myogenic. A lumbosacral MRI was therefore accomplished and, reportedly, was normal. The final neurology evaluation before separation (and in the record) was 22 June 2004, three months prior to separation. At that time, the CI was off prednisone, but continued to complain of “myalgias and fatigability in the arms and legs” along with residual side effects from the steroids including “swelling and continued overweight.” It was recommended that he continue to exercise, return for follow up in three months and that he be referred to a tertiary specialist, at the University of Texas Southwestern Medical Center.

The MEB exam was on 6 April 2004, five months prior to separation. He had previously been put on a six month LIMDU in December 2003. He was noted to have a normal gait, to be obese, to have reduced strength (4+/5) in the upper extremities. He was still unable to pass a PFT despite an eight month treatment trial of prednisone. As it was “debatable” whether or not he would improve sufficiently to meet the requirements of his MOS or be deployed, PEB was recommended. The VA compensation and pension (C&P) exam on 16 December 2004, three months after separation, showed that he was off steroids and continued to have fatigue, weakness, pain and swelling of the calves, forearms and neck. On exam, his strength was normal. No comment was made on swelling. The IPEB found the polymyositis unfitting and rated it at 10%, coded 6399-6354, analogous to chronic fatigue syndrome. The VA coded the condition 5099-5025, analogous to fibromyalgia, and rated it at 20% for weakness and fatigue, although the examiner noted that the muscle strength was normal. In the 6 February 2007 VA rating decision (VARD), the adjudication stood and the 20% rating was continued. The Board considered both coding options and noted that both were analogous, but that the IPEB coding better reflected the actual condition of ongoing weakness, fatigue, and myalgias. The Board then considered the associated disability and noted that there were no periods of documented “incapacitation.” It noted that his commander stated that he was still working in his specialty, but missed an average of five hours per week for medical issues including appointments. He was not recommended to be retained on active duty due to his inability to participate in PFT or be deployed. The Board notes that the commander listed sleep apnea, myalgias, dyspnea on exertion, restrictive/obstructive lung disease and chronic fatigue on the non medical assessment. The IPEB specifically noted that “weakness and fatigue” keep him from carrying out the duties that require “sustained physical activity.” The action office opined that while he was not on daily medications, he had not responded to steroids adequately. His daily activities were curtailed but evidence supports the restriction was less than 25%. After due deliberation, in consideration of the totality of the evidence, the Board recommends that the PEB fitness adjudication for the polymyositis condition be rated at 20% and that the 6399-6354 code retained.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were GERD, HTN and OSA. The HTN and GERD were controlled with medications. The OSA was profiled and implicated in the non-medical assessment. However, it was very mild and symptoms of daytime drowsiness were eliminated by nasal continuous positive airway pressure (CPAP). The Board notes that the CI had stopped use of CPAP by the time of the VA C&P exam, three months after separation. The Board notes that all the services routinely return members to duty with the diagnosis of OSA treated with CPAP. All three 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 duty requirements except OSA, treated with CPAP. 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. The CI’s application asserts that compensable ratings should also be considered for left ventricular hypertrophy (LVH) to include dyspnea (heart murmur); rheumatoid arthritis (RA); bilateral ankles; bilateral knees and low back strain. All of these conditions were reviewed by the action officer and considered by the Board. There was no evidence for concluding that any of the conditions interfered with duty performance to a degree that could be argued as unfitting. The Board notes that the diagnosis of RA was apparently made by the VA rating examiner, not by a clinician, and that the clinical evidence does not support this diagnosis. The Board determined therefore that none of the stated conditions were subject to Service disability rating.

Remaining Conditions. Other conditions identified in the DES file were a history of a nose injury, tension headaches, chip left forearm, acanthosis nigrans, increased liver function tests, restrictive lung disease, and gall bladder disease. Several additional non-acute conditions or medical complaints were also documented. 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 left shoulder pain, gall bladder disease, onychomycosis and a left fifth finger injury as well as several other non-acute conditions 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.

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 polymyositis condition, the Board unanimously recommends no change from the PEB rating code, but that the rating is increased to 20%. In the matter of the GERD, HTN and OSA conditions, the Board unanimously recommends no change from the PEB adjudications as Category III, not unfitting. In the matter of the left ventricular hypertrophy (LVH) to include dyspnea (heart murmur); rheumatoid arthritis (RA); bilateral ankles; bilateral knees and low back strain headaches or any other condition eligible for Board consideration, the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation.

RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows, effective as of the date of his prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Polymyositis | 6399-6354 | 20% |
| **COMBINED** | **20%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100610, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

President

Physical Disability Board of Review

MEMORANDUM FOR DEPUTY COMMANDANT, MANPOWER & RESERVE AFFAIRS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATIONS

Ref: (a) DoDI 6040.44

(b) PDBR ltr dtd 1 Dec 11 ICO xxxxxxxxxxx

(c) PDBR ltr dtd 6 Dec 11 ICO xxxxxxxxxxx

(d) PDBR ltr dtd 6 Dec 11 ICO xxxxxxxxxxx

1. Pursuant to reference (a) I approve the recommendations of the Physical Disability Board of Review set forth in references (b) through (d).

2. The official records of the following individuals are to be corrected to reflect the stated disposition:

a. XXX XX 4635: Separation from the Naval Service due to physical disability rated at 20 percent (increased from 10 percent) effective 31 Dec 2003.

b. XXX XX 0896: Separation from the Naval Sservice due to physical disability rated at 20 percent (increased from 10 percent) effective 15 April 2006.

c. XXX XX 5197: Separation from the Naval Service due to physical disability rated at 20 percent (increased from 10 percent) effective 15 September 2004.

3. Please ensure all necessary actions are taken to implement these decisions including notification to the subject members once those actions are completed.

Assistant General Counsel

(Manpower & Reserve Affairs)