RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXX BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1000777 SEPARATION DATE: 20030515

BOARD DATE: 20110630

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Sgt/E-5 (0844 / Field Artillery Fire Control Man) medically separated for status post (s/p) lumbar posterolateral lumbar fusion with pedicle screws for degenerative disk disease (DDD) and mechanical instability L3-L4. The CI experienced an insidious onset of low back pain in July 2000 and was prescribed a prolonged course of physical therapy (PT). The CI was referred to neurosurgery and had a magnetic resonance imaging (MRI) which revealed DDD at L3-L4 and mechanical instability. The CI underwent a L3-L4 posterolateral lumbar fusion on 26 March 2002; however, he still had pain with exertional activity. He was unable to tolerate running or heavy lifting and was issued a temporary profile P2 (from an Army provider) for three months with restrictions of no physical training, no prolonged (>15 minutes) standing or sitting, and no tactical vehicles. Despite being issued the P2 temporary profile duty restrictions, the CI was unable to perform his duties or meet physical fitness standards and was referred to a Medical Evaluation Board (MEB). The MEB forwarded the low back condition to the Physical Evaluation Board (PEB) on NAVMED 6100/1. Other conditions included in the Disability Evaluation System (DES) packet will be discussed below. The PEB adjudicated the s/p lumbar posterolateral lumbar fusion with pedicle screws for DDD and mechanical instability L3-L4 condition as unfitting, rated 10%, with probable application of the SECNAVINST 1850.4E. The CI made no appeals and was medically separated with a 10% combined disability rating.

CI CONTENTION: “Chronic back pain that affects work life and re-injury on the back. Also, MRI showed worsening or progressive degeneration of disks on L3-L4 evidenced by 10 May 2004 x-ray reading compared to MRI reading done 28 July 2008. Epidural injection also needed to be done to get any kind of relief on 7 September 2008. Problems persist and last seen for back pain in 2009.”

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20030114** | | | **VA (4 Mo. After Separation) – All Effective Date 20030516** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| S/P Lumbar … Fusion with Pedicle Screws for DDD and Mechanical Instability L3-L4 | 5295 | 10% | DDD w/Mechanical Instability Post Lumbar Fusion L3-L4 | 5292 | 20% | 20030919 |
| ↓No Additional MEB/PEB Entries↓ | | | 0% x 1 / Not Service Connected x 2 | | | 20030919 |
| **Combined: 10%** | | | **Combined: 20%** | | | |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that there should be additional disability assigned for conditions which will predictably worsen over time. It is a fact, however, that 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. This role and authority is granted by Congress to the Veterans Administration. The Board utilizes VA evidence proximal to separation in arriving at its recommendations and DoDI 6040.44 defines a 12-month interval for special consideration to post-separation evidence. The Board’s authority as defined in DoDI 6044.40, however, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Back Condition. The 2003 Veterans’ Administration Schedule for Rating Disabilities (VASRD) coding and rating standards for the spine, which were in effect at the time of separation, included a modification on 23 September 2002 to add incapacitating episodes (5293 intervertebral disc syndrome), and were then changed to the current §4.71a rating standards on 26 September 2003 as indicated in the 2004 VASRD. The 2003 standards for rating based on range of motion (ROM) impairment were subject to the rater’s opinion regarding degree of severity (slight, moderate, severe), whereas the current standards specify rating thresholds in degrees of ROM impairment. There were three back exams with ROM evaluations in evidence which the Board weighed in arriving at its rating recommendation. All three of these exams are summarized in the chart below, and none were full goniometric measurements of ROM.

|  |  |  |  |
| --- | --- | --- | --- |
| ROM - Thoracolumbar | Consult ~6 Mo. Pre-Sep (20021203) | NARSUM ~6 Mo. Pre-Sep (20021125) | VA C&P ~4 Mo. After-Sep (20030919) |
| Flex (0-90) | Full Flexion | - | 40⁰ |
| Ext (0-30) | - | Limited lumbar extension | 15⁰ with pain |
| R Lat Flex (0-30) | - | - | 20⁰with pain |
| L Lat Flex 0-30) | - | - | 20⁰with pain |
| R Rotation (0-30) | - | - | - |
| L Rotation (0-30) | - | - | - |
| COMBINED (240) | - | - | - |
| Comment: “-“ is no value recorded | Right S1 radiculitis; c/o sharp, shooting bilateral lower back pain | Mechanical instability at L3-4 | limitation of motion of, lumbar is moderate; Muscle spasms at times; no radicular symptoms or findings |
| OLD §4.71a Rating | Un-ratable/Nerve rating? | 10% (PEB 10%) | 20% |
| NEW §4.71a Rating | Un-ratable | Minimum 10%/Un-ratable | 20% |

The CI was seen by neurosurgery six months prior to separationfor follow-up of L3-L4 fusion*.* At this time, the CI complained of sharp, shooting bilateral low back pain that radiated down the right popliteal fossa occasionally sharp to the heel. The CI rated the pain at baseline 2/10 to 8/10, with 10 being the worst. The CI noted that this pain was exacerbated by driving and heavy lifting. The examiner noted full flexion on ROM; however, he opined that there was right S1 radiculitis and prescribed neurontin for the radicular pain. The MEB exam six months prior to separationindicated that the CI still experienced pain with exertional activity and he was unable to tolerate running, biking marching or moderate heavy lifting. The examiner documented that there was limited lumbar extension and opined that the CI had mechanical instability. The CI’s treating neurosurgeon five months prior to separation documented that the CI had severe degenerative changes and injury was likely to leave the CI with chronic back pain, limited mobility and physical disability.

The VA compensation and pension (C&P) examination four months after separation indicated that the CI experiences muscle spasms at times. On physical exam, there was pain limited ROM with flexion to 40° and limited extension and lateral flexion as noted in the above chart. Pain was described in the lumbar area. No radicular symptoms were elicited and there was no exam evidence of radiculopathy noted. The VA determined that the 20% evaluation was the best overall rating for this examination by both the older and newer spine rating criteria. The criteria for the older 5292 (spine, limitation of motion of, lumbar; moderate at 20%) and newer 5241 (spinal fusion; forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees) coding were each 20%. Treatment records from 2008 to 2009 indicated back pain exacerbation in July 2008, with spasm, tenderness, weakness and radicular symptoms. This was very remote from separation, adjudged as post-separation worsening, and not indicative of the CI’s condition at separation. The applicable spine rating criteria are extracted below:

The Spine

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Rating

5292 Spine, limitation of motion of, lumbar:

Severe........................................................ 40

Moderate...................................................... 20

Slight........................................................ 10

5295 Lumbosacral strain:

Severe; with listing of whole spine to opposite side, positive 40

Goldthwaite's sign, marked limitation of forward bending in

standing position, loss of lateral motion with osteo-

arthritic changes, or narrowing or irregularity of joint

space, or some of the above with abnormal mobility on forced

motion.......................................................

With muscle spasm on extreme forward bending, loss of lateral 20

spine motion, unilateral, in standing position...............

With characteristic pain on motion............................ 10

With slight subjective symptoms only.......................... 0

The Board considered the above evidence for rating. The CI’s primary complaint was pain following lumbar spine fusion and limitations from lifting and running. The Board considered the PEB’s rating under the 5295 code (lumbosacral strain). The 10% rating for 5295 is fairly specifically defined as noted above. The CI’s condition did not meet the criteria for a rating higher than 10% under the 5295 code based on either the MEB or VA examinations. Alternate coding under 5292 (spine, limitation of motion of, lumbar) would be slight (10%) based on the MEB exam or moderate (20%) based on the VA exam. The Board considered that there were no incapacitating episodes since for purposes of evaluations under 5293; an incapacitating episode is a period of acute signs and symptoms due to intervertebral disc syndrome that requires bed rest prescribed by a physician and treatment by a physician. The VASRD criteria from 2002 for 5293 had addressed sciatic pain, but were not applicable in this case due to the CI’s date of separation. The newer spine criteria includes symptoms such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease under the revised criteria, but they are also not applicable in this case. The Board noted that the CI had numerous complaints of right leg pain radiculopathy (sciatic) and the physical medicine consult referenced by the narrative summary (NARSUM) focused primarily on the CI’s right S1 radiculopathy. The neurosurgery consult indicated severe spine degeneration resulting pain and instability and a poor prognosis, without specifying any exam findings. There was no motor or sensory component to the CI’s radiculopathy and 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 clear mechanism to separate out the CI’s radicular pain from his unfitting back condition and the primary focus on medical evaluations was the CI’s back and S1 radiating pain conditions. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 20% for the s/p lumbar posterolateral lumbar fusion with pedicle screws for DDD and mechanical instability L3-L4 condition.

Remaining Conditions. The depression condition was identified by the CI on the MEB history and physical form. Several additional non-acute conditions or medical complaints were also documented. The conditions were reviewed by the action officer and considered by the Board. They were not significantly clinically or occupationally active during the MEB period, were not mentioned on the Army profile, nor were the basis for limited duty. There was no evidence for concluding that they interfered with duty performance to a degree that could be argued as unfitting. Additionally, residuals of cold injury (both feet) 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 s/p lumbar posterolateral lumbar fusion with pedicle screws for DDD and mechanical instability L3-L4 condition and IAW VASRD §4.71a, the Board unanimously recommends a change in the VASRD code to 5292 and a rating of 20%. In the matter of the depression condition and 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.

RECOMMENDATION:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| S/P Lumbar Posterolateral Lumbar Fusion With Pedicle Screws For DDD and Mechanical Instability L3-L4 condition | 5292 | 20% |
| **COMBINED** | **20%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100624, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

Deputy Director

Physical Disability Board of Review

MEMORANDUM FOR DEPUTY COMMANDANT, MANPOWER & RESERVE AFFAIRS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

ICO XXXXX, FORMER USMC, XXX XX XXXX

Ref: (a) DoDI 6040.44

(b) PDBR ltr dtd 26 Jul 11

1. I have reviewed the subject case pursuant to reference (a) and approve the recommendation of the PDBR (reference (b)).

2. The subject member’s official records are to be corrected to reflect the following disposition:

a. Separation from the Naval service due to physical disability rated at 20 percent (increased from 10 percent) effective 15 May 2003.

3. Please ensure all necessary actions are taken to implement this decision including notification to the subject member once those actions are completed.

Assistant General Counsel

(Manpower & Reserve Affairs)