RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXX BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1000899 SEPARATION DATE: 20030630

BOARD DATE: 20110706

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Lance Corporal (7051, Aircraft Firefighter) medically separated from the Marine Corps in 2003. The medical basis for the separation was discogenic back pain with herniated nucleus pulposus (HNP) to L5/S1. The CI stated that he fell approximately four feet and injured his back while in boot camp and then reinjured his back while lifting a 180-pound dummy during firefighting training. Neither of these injuries was documented in the CI’s medical records. He first complained of back pain on 4 October 2002 when he complained of progressive back pain with paresthesias radiating down both legs over a two-week time period. A magnetic resonance imaging (MRI) indicated some disc space narrowing and a small central canal disc protrusion at L5/S1. The CI was placed on an eight-month limited duty (LIMDU) with restrictions of no running, no conditioning hikes, no lifting greater than twenty pounds, and no physical fitness tests (PFT) and no deploying. Despite non-steroidal anti-inflammatory (NSAID) medication, muscle relaxants, and the LIMDU, the CI was unable to perform within his military occupational specialty (MOS) and was referred to a Medical Evaluation Board (MEB). The MEB forwarded discogenic back pain with HNP to L5/S1 to the Physical Evaluation Board (PEB) on NAVMED 6100/1. The PEB adjudicated discogenic back pain with HNP to L5/S1 as unfitting rated with the disability code of 5295 at 0%, with probable application of SECNAVINST 1850.4e and DoDI 1332.39. The CI made no appeals and was medically separated with a 0% disability rating.

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

CI CONTENTION: “Injury occurred during active service during a combat training exercise. For this injury, which is on record, the VA gave me a rating. If the VA rated me, but the DoD did not, then is an inconsistency there. My current ratings from the VA are: 10% for tinnitus, 20% back injury, 30% for migraines. Total rating: 50%. These are all considered to be service-connected and I feel were responsible for making me unfit.” The CI also requested his injury be considered combat-related.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service IPEB – Dated 20030415** | **VA ( 7 Mo. Post Separation) – All Effective 20030701** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Discogenic Back Pain w/HNP to L5/S1 | 5295 | 0% | L5/S1 … Disc Bulge, Foraminal Narrowing  | 5237 | \*10% | 20040115 |
| ↓No Additional MEB/PEB Entries↓ | Not Service Connected x 11 | 20040115 |
| **Combined: 0%** | **Combined: 10%\*** |

\*5237 (back) increased to 20% and migraine HA at 30% added effective 20070424 (combined 40%); tinnitus at 10% added effective 20080305 (combined 50%)

ANALYSIS SUMMARY: The Disability Evaluation System (DES) is responsible for maintaining a fit and vital fighting force. 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 members career, and then only to the degree of severity present at the time of final disposition. However the Department of Veteran Affairs, operating under a different set of laws (Title 38, United States Code), is empowered to compensate service connected conditions and to periodically re-evaluate veteran’s for the purpose of adjusting the veterans disability rating should his degree of impairment vary over time. We note that the applicant asks the Board for specific correction of records and specified consequential combat related entitlements. By law, the Board authority is limited to making recommendation on correcting disability determinations. The actual correction of records and consequential entitlement determinations is the responsibility of the applicable Secretary and Accounting service. The applicant's request will of course remain with the application as it is processed.

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, was changed to the current §4.71a rating standards, effective 26 September 2003. The 2003 standards for rating based on range of motion (ROM) impairment were subject to the rater’s opinion regarding degree of severity, whereas the current standards specify rating thresholds in degrees of ROM impairment. The CI’s VA rating determination was dated 23 February 2004 (after the VASRD change) and the narrative and coding indicate VA application of the newer VASRD criteria for the spine. The Board is required to base its rating on the VASRD in effect at the time of separation and not based on subsequent changes in the VASRD or post-separation changes in the CIs condition. There were four back evaluations in evidence which the Board weighed in arriving at its rating recommendation. These exams are summarized in the chart below.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Thoracolumbar ROM | Neurosurgery~ 6 Mo. Pre-Sep | PT~ 6 Mo. Pre-Sep | MEB~ 3 Mo. Pre-Sep | VA C&P~7 Mo. Post-Sep |
| Flexion 0-90⁰ | 60⁰ |  | Bending was reduced by 50% in all planes | 0⁰-64⁰-67⁰[65⁰] |
| Extension 0-30⁰ | 10⁰ |  | 0⁰-36⁰ [30⁰] |
| R Lateral Flex 0-30⁰ | 20⁰ |  | 0-18⁰-24⁰ [25⁰] |
| L Lateral Flex 0-30⁰ | 20⁰ |  | 0-34⁰-41⁰ [30⁰] |
| L Rotation 0-30⁰ |  |  | 0-42⁰ [30⁰] |
| R Rotation 0-30⁰ |  |  | 0-47⁰ [30] |
| Combined 240⁰ |  |  | 210⁰ |
| Comments:Applied notes 2 and 4 (rounding and maximums) for VA exam under 2004 VASRD | No muscle spasms no TTP; - SLR except mild back discomfort; sensory/motor intact | ~ 50% limitation in all planes. He states that motion beyond that causes pain; TTP | SLR resulted in mild back discomfort at 75°; neuro, motor, and sensory normal  | No deformity of spine; no sciatic notch tenderness; no muscle spasm; no muscle tenderness; pain begins at italicized middle number |
| 2003 §4.71a Rating | 10%-20% | 20%% | 20% (PEB 0%) | *10%* |
| 2004 §4.71a Rating | 20% | 20% | 20% | 10% (VA 10%) |

The CI was seen by neurosurgery six months prior to separation, and at the time the CI complained of back pain radiating into the left leg more that the right leg, along with some variable numbness in the left big toes and more pain with forward bending. On physical exam the back was non-tender with no muscle spasms and straight leg raising (SLR) was negative except for back pain. The examiner stated that the CI should continue with conservative therapy and agreed with physical therapy and limited activity. MRI indicated L5/S1 spondlyloarthrophy with mild to moderate neural foraminal narrowing and mild central canal stenosis. There was no vertebral fracture. The 8 October 2002 MRI consult indicated loss of bowel control and lower extremity weakness which were subsequently fully resolved and not documented closer to the time of separation. The PT exam six months prior to separationdocumented that the CI continued to complain of low back pain 4-8/10, with 10 being the worst, along with intermittent bilateral radicular symptoms occurring one time per week and lasting twenty minutes to two hours, each bout. The physical examination noted findings of a “50% limitation in all planes with motion beyond that causes pain,” brisk and symmetric reflexes at ankles and knees and hamstring tightness on SLR. The examiner recommended LIMDU, and continuation of NSAID medication. The MEB examination three months prior to separation documented that the CI had no desire to remain on active duty and continued to complain of intermittent back pain that was 8/10, with radicular type symptoms radiating down either side of the left or right leg. Physical examination findings were SLR caused mild back discomfort at approximately 75 degrees elevation and “bending was reduced by 50% in all planes.” The examiner opined that the CI would likely continue with back pain which would worsen over time. No periods of incapacitation were recorded.

At the VA compensation and pension examination seven months after separation*,* the CI complained of lower lumbar dull nagging achy pain that radiated toward both sacroiliac joints without any lateralization that occurred when he sat or stood too long without moving. The CI further complained that he would experience flare-ups if he lifted or would bend the wrong way and would get relief if he immediately stopped the activity or changed his body position. Flexion was 0-67°, with pain onset at 64°, and noted in the chart above.

Although the CI had an intermittent sensory radiculopathy with pain, there was no significant motor component to the radiculopathy. 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. The sensory component in this case has no functional implications. Since no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment. The Board reconciles (to the extent possible) its opinion regarding degree of severity for the older spine codes and ratings with the objective thresholds specified in the current VASRD §4.71a general rating formula for the spine. This promotes uniformity of its recommendations for different cases from the same period and more conformity across dates of separation, without sacrificing compliance with the DoDI 6040.44 requirement for rating IAW the VASRD in effect at the time of separation. The Board must correlate the above clinical data with the 2003 rating schedule which, for convenience, is excerpted below:

**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

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 …………………..…... 40

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

 motion, unilateral, in standing' position ……………...…….……..…...….….. 20

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

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

The Board noted that both the MEB and VA exams were sufficiently documented in terms of ratable data for the criteria in place at the time of their rating determinations, and that the CI’s overall condition and described history were congruent between these two exams. The VA exam had an apparently improved ROM in most planes than the treatment record’s “50% decrease in all planes” which would roughly equate to 45° flexion and 15° in all other planes. The MEB exam was closest to separation and adjudged to have the higher probative value. There was no complete goniometric examination in the service records; however, if the newer spine criteria were applicable, the 60° forward flexion from the neurosurgery evaluation or the 50% decrease in flexion (~45°) would most likely meet the 20% criteria for “forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees” under the newer spine rule’s 5237 code for lumbar strain.

The Board considered the PEB’s rating under the 5295 code. All exams documented characteristic pain on motion (10%); however, the CI’s condition clearly did not meet the criteria for a 20% rating (fairly specifically defined as noted above) or any higher rating under the 5295 code based on any examinations. However, the Board considered the CI’s abnormal imaging and disc pathology was not purely aligned with a lumbosacral strain and that coding under the more general 5292 (spine, limitation of motion of, lumbar) criteria indicated the CI’s condition was closest to the moderate (20%) criteria than the slight (10%) limitation. The Board could find no evidence for an unfitting radiculopathy justifying additional service rating for peripheral nerve impairment. 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 HNP to L5/S1 coded 5292.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for tinnitus and migraines. The migraine headache condition was mentioned in the DES file on the MEB history and physical as random severe headache; however, this condition was not mentioned in the NARSUM, non-medical assessment (NMA); nor was it the cause of the CI’s LIMDU. The VA initially rated this condition as not service connected. In 2007 the CI filed a claim for increased evaluation of the migraine headache condition and a VA decision review officer decision added the migraine headache condition at 30% as the VA noted the back condition aggravated the migraine headaches. The headache/migraine condition was reviewed by the action officer and considered by the Board. There was no evidence for concluding that the headache conditions interfered with duty performance to a degree that could be argued as unfitting at the time of separation. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of headaches/migraines as an unfitting condition for separation rating. Tinnitus was not noted in the NARSUM, identified by the CI on the MEB physical or found elsewhere 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.

Remaining Conditions. Other conditions identified in the DES file were tinnitus, left shoulder pain, numbness in big toe, fractured left arm, cyst removed from ear, and dizziness due to dehydration. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were significantly clinically or occupationally active during the MEB period, none were the bases for limited duty and none were implicated in the NMA. 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. No other conditions were service connected with a compensable rating by the VA within twelve months of separation or contended by the CI. 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 HNP to L5/S1 condition, the Board unanimously recommends a rating of 20% coded 5292 IAW VASRD §4.71a. In the matter of the migraine headache 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.

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

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** |
| Herniated Nucleus Pulposus to L5/S1 | 5292 | 20% |
| **COMBINED** | **20%** |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100707, 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 XXXX, FORMER USMC, XXX XX XXXX

Ref: (a) DoDI 6040.44

 (b) PDBR ltr dtd 26 Jul 11

1. I have reviewed 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 0 percent) effective 30 June 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)