RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXX BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1001083 SEPARATION DATE: 20040415

BOARD DATE: 20110914

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty GySgt/E-7 (6112, Helicopter Mechanic) medically separated for chronic low back pain. The CI was in good health prior to a hard landing in a Class A aircraft mishap in November 1998, which resulted in his low back pain. Initially, symptoms improved, but plateaued, and then worsened. He did not respond adequately to treatment and was unable to perform within his military occupational specialty (MOS) or meet physical fitness standards. He was placed on limited duty and underwent a Medical Evaluation Board (MEB). Chronic low back pain, herniated nucleus pulposis, status post L5/S1 fusion, and hypertension were forwarded to the Physical Evaluation Board (PEB) for adjudication. No other conditions appeared on the MEB’s submission. Other conditions included in the Disability Evaluation System (DES) file will be discussed below. The Informal PEB (IPEB) adjudicated the chronic low back pain condition as unfitting, rated 10%, IAW the Veterans Administration Schedule for Rating Disabilities (VASRD). Herniated nucleus pulposis and status post L5/S1 fusion were adjudicated as category II (conditions that are contributing to the unfitting condition); and hypertension was adjudicated as category III (conditions that are not separately unfitting and do not contribute to the unfitting condition.) The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: The CI contends improprieties in the DES process prevented review of all of his service connected conditions by the PEB. In particular, he contends his neck condition also interfered with duty. 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 20040112** | **VA (2 Mo. Pre Separation) – All Effective 20040416** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5295 | 10% | S/P Laminectomy, Microdiscectomy and Fusion L5-S1 w/DDD L4-S1  | 5243 | 20% | 20040224 |
| S/P L5-S1 Fusion | Related Category II |
| Herniated Nucleus Pulposus | Related Category II |
| Hypertension | Category III | Hypertension | 7101 | NSC | 20040224 |
| ↓No Additional MEB/PEB Entries↓ | Cervical Strain | 5238-5237 | 20%\* | 20040224 |
| Left Patellofemoral Syndrome  | 5260-5024 | 10% | 20040224 |
| Tinnitus | 6260 | 10% | 20040309 |
| Neuropathy RUE, D/T Right Spinal Nerve Root Involvement C7-C8 | 8599-8516 | 10% | 20050406 |
| 0% x 7 / Not Service Connected x 1 | 20040224 |
| **Combined: 10%** | **Combined: 50%** |

 \*Rating decreased to 10% effective 20050406

ANALYSIS SUMMARY: The 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 member’s 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 said conditions for the purpose of adjusting the veteran’s disability rating should the degree of impairment vary over time. It is noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to the CI’s statements in the application regarding suspected DES improprieties in the processing of his case. 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 VASRD standards, based on severity at the time of separation. It must also judge the fairness of PEB fitness adjudications based on the fitness consequences of conditions as they existed at the time of separation.

Back Condition. The CI underwent lumbar laminectomy and micro discectomy in 1999, followed by lumber fusion in 2002 for herniated lumber disc resulting from a hard aircraft landing in 1998. At the time of the narrative summary (NARSUM) (six months before separation), the CI complained of “manageable pain; producing some limitation of activity,” without episodes of incapacitation. Physical examination did not include goniometric measurements; however, the examiner did record range of motion (ROM) findings: “flexes at waist only to level of mid shin before pain causes patient to pull back,” which approximates 60⁰ of thoracolumbar flexion. The CI had a slight limp secondary to back pain. The examiner documented that there was no radicular symptoms and no objective examination findings of radiculopathy. At the VA compensation and pension (C&P) evaluation performed two months prior to separation, the CI noted that his back condition caused “no incapacitation nor lost time from work.” On physical examination, posture and gait were reported as normal, and thoracolumbar muscle spasm and tenderness were absent. Goniometric ROM evaluation revealed 45⁰ of flexion (pain occurring at 45⁰) and 180⁰ of combined motion (240⁰ normal). Lumbosacral radiographs were consistent with the surgery previously performed. The PEB and VA chose different coding options for the condition. The PEB’s form reflected use of VASRD rating criteria for lumbosacral strain (5295) that had been superseded by new VASRD criteria three months before the time of the PEB. The 2003 VASRD coding and rating standards for the spine were changed to the current §4.71a rating standards on 26 September 2003. The VA rating was based on the current VASRD §4.71a standards which were in effect at the time of separation. The goniometric evaluation of 45⁰ of thoracolumber flexion in the VA examination is consistent with a rating of 20% using the VASRD general rating formula for diseases and injuries of the spine. There was no evidence of incapacitating episodes due to intervertebral disc disease that would meet the criteria for a minimum rating under the alternative formula for incapacitating episodes due to intervertebral disease. There was no evidence of ratable peripheral nerve impairment in this case. After due deliberation, considering all of the evidence, the Board recommends a separation rating of 20% for the back pain condition, coded 5241 for spinal fusion.

Contended Neck Condition. The CI’s application asserts that compensable ratings should be considered for a neck condition. This condition was addressed in the MEB NARSUM. The examiner noted, “stiff neck occasionally with pain, waxes and wanes but does not interfere with activities” and did not recommend it for PEB adjudication. There is no evidence in the service treatment records that this condition was clinically or occupationally significant during the MEB period, was the basis for limited duty, or was implicated in the non-medical assessment. The condition was reviewed by the action officer and considered by the Board. There was no evidence for concluding that the condition interfered with duty performance to a degree that could be argued as unfitting. The Board determined therefore that the neck condition was not subject to service disability rating.

Other PEB Conditions. The other condition forwarded by the MEB and adjudicated as not unfitting by the PEB was hypertension. This condition was not profiled, implicated in the non-medical assessment or noted as failing retention standards. The above 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 duty requirements. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for any other stated condition.

Remaining Conditions. Other conditions identified in the DES file were anxiety, and healed fractures of the right foot and arm. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically or occupationally significant during the MEB period, none were the basis for limited duty and none were implicated in the non-medical 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, left knee patellofemoral syndrome, tinnitus, right upper extremity radiculopathy, and several other non-acute conditions were noted in the VA rating decision following 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. The Board did not surmise from the record or PEB ruling in this case that any prerogatives outside the VASRD were exercised; however, it appears the PEB applied VASRD criteria that were superseded by new rating criteria. The Board applied VASRD rating criteria in effect at the time of the CI’s separation in contrast to the PEB’s adjudication. In the matter of the chronic back pain condition, the Board unanimously recommends a rating of 20% coded 5241 IAW VASRD §4.71a. In the matter of the cervical pain condition, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation. In the matter of the hypertension, anxiety, and healed fractures of the right foot and arm conditions, 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:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Back Pain |  5241 | 20% |
| **COMBINED** | **20%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100908, 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) RECOMMENDATION

 ICO XXXXXX, FORMER USMC, XXX XX XXXX

Ref: (a) DoDI 6040.44

 (b) PDBR ltr dtd 26 Sep 11

1. I have reviewed the subject case pursuant to reference (a) and approve the recommendation of the Physical Disability Board of Review (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 April 2004.

3. Please ensure all necessary actions are taken to implement this decision and that subject member is notified once those actions are completed.

 Assistant General Counsel

 (Manpower & Reserve Affairs)