RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: bRANCH OF SERVICE: marine corps

CASE NUMBER: PD1001121 TDRL ENTRY DATE: 20061014

BOARD DATE: 20111102 Tdrl exit date: 20090209

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty member, PFC/E-3 (9900 / Basic Marine), medically separated for T12 (thoracic spine) burst fracture. In July 2006, the CI fell approximately 15 feet to the ground while fast roping at a repel tower on day 49 of recruit training, sustaining a compression fracture at T12 with no neurological symptoms. The CI was treated by orthopedics with pain management, physical therapy (PT), and placed in a brace (TLSO-thoracic lumbar sacral orthosis). The CI did not respond adequately to treatment and was unable to perform within her military occupational specialty (MOS), or meet physical fitness standards. The CI was placed on limited duty (LIMDU) and underwent a Medical Evaluation Board (MEB). The MEB found “closed fracture (Fx) of dorsal (thoracic) vertebra without mention of spinal cord injury “and “unspecified site of ankle sprain and closed fracture of pubis” to the Physical Evaluation Board (PEB) for final disposition on NAVMED 6100/1. The PEB found the CI’s medical and physical impairment prevented her from reasonable performance of duties and her condition was not sufficiently stable for final adjudication. The CI was placed on Temporary Disability Retired List (TDRL) on 14 October 2006 at 30% for the T12 burst fracture. The CI was reevaluated on 24 June 2008 and a subsequent PEB adjudicated the T12 burst as unfit rated at 10% with probable application of SECNAVINST 1850.4E and Veterans Administration Schedule for Rating Disabilities (VASRD). The PEB adjudicated the “right inferior pubic rami stress fracture and left ankle sprain grade 1” as category III (“Conditions that are not separately unfitting and do not contribute to the unfitting condition” (s)). The CI made no appeals and was medically separated with a 10% disability rating.

CI CONTENTION: The CI states: “I feel that I am unfit. But also deserve a higher rating-I was shown the x-rays in final decision. I’m not physically able to do so much in a work day. As in lifting, exercising and running etc.” She elaborates no specific contentions regarding rating EXCEPT “My rating is at 30% from the VA” or coding and mentions no additionally contended conditions.

RATING COMPARISON:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Final Service IPEB – Dated 20081014** | | | | **VA\* – All Effective Date 20061015** | | | |
| **Condition** | **Code** | **Rating** | | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20061014** |  | **TDRL-In** | **Exit** |
| T12 Burst Fx | 5235 | 30% | 10% | T-12 & L-1 Compression Fx & Spondylosis | 5010-5235 | 20% | 20070402 |
| Right Inferior Pubic Rami Stress Fx | Cat III | | | Right Inferior Pubic Ramus Stress Fx | 5299-5255 | 10% | 20070402 |
| L. Ankle Sprain, Gr. 1 | Cat III | | | No VA Entry | | | 20070402 |
| ↓No Additional MEB/PEB Entries↓ | | | | 0% x 0 / Not Service Connected x 0 | | | 20070402 |
| **Combined: 10%** | | | | **Combined: 30%** | | | |

ANALYSIS SUMMARY: The Board acknowledges the CI’s contention that her combined VA rating of 30% differs considerably from the 10% combined rating conferred by the Navy; but, must emphasize that the Board’s recommendations are confined to those conditions determined to be unfitting at the time of the CI’s placement on TDRL. Unlike the VA which provides compensation for all service connected conditions, the DES (and by extension the Board) provides compensation only for those conditions determined to render the member incapable of further military duty. The Board may review the appropriateness of the PEB’s fitness adjudications for all conditions at the onset of TDRL, but does not have the prerogative of recommending a rating for conditions which did not become unfitting until after that point. It should be noted, however, that conditions determined to be unfitting at the time of temporary retirement are subject to a change in that determination (i.e., no longer unfitting) at the time of permanent separation. In cases encompassing a period of TDRL, although the Board’s review of fitness adjudications is relevant to the time of temporary retirement, the Board’s rating recommendations are based on severity evidenced at the time of permanent separation. The VA’s initial rating evaluation was based on severity evidenced at the time of temporary retirement, which was 28 months prior to permanent separation; and, the first subsequent VA evaluation was performed 6 months after permanent separation. DoDI 6040.44, under which the Board operates, specifies a 12-month interval for special consideration to VA findings. This does not mean that the VA clinical evidence at the time of temporary retirement and VA evaluations after permanent separation were disregarded; but, in matters germane to the severity of the CI’s conditions and disability at the time of her permanent separation, the information in the service record proximal to that date (9 February 2009) was assigned proportionately more probative value as a basis for the Board’s rating recommendations.

T12 Burst FX Condition: The Board considered the PEB diagnosis of T12 burst fracture administratively final: there was mixed evidence of T12 compression fracture or L1 compression fracture diagnoses, however, any/all diagnoses would be rated and coded equivalently. There were three exams and two goniometric range-of-motion (ROM) evaluations in evidence which the Board weighed in arriving at its rating recommendation. These exams are summarized in the chart below.

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| --- | --- | --- | --- |
| Goniometric ROM - Thoracolumbar | MEB ~ 2 Mo. Pre-TDRL | VA C&P ~ 6 Mo. After TDRL  ~ 22 Mo. Pre-TDRL Exit | PT ~ 8 Mo. Pre-TDRL Exit |
| Flex (0-90) | In TLSO Brace:  Not measured | 50⁰ | 65⁰ |
| Ext (0-30) | 20⁰ | 15⁰ |
| R Lat Flex (0-30) | 25⁰ | 30⁰ |
| L Lat Flex 0-30) | 25⁰ | 25⁰ |
| R Rotation (0-30) | 30⁰ | 30⁰ |
| L Rotation (0-30) | 30⁰ | 35⁰ (30⁰) |
| COMBINED (240) | 180⁰ | 195⁰ |
| Comment | Normal gait – non-antalgic; tenderness mid thoracic and paraspinal region and mid thoracic both left and right down sacrum and paraspinal region to sacrum on left and right; negative straight leg raise and cross straight leg raise test bilaterally | Gait and posture WNL; decreased and painful ROM; no radiating pain, muscle spasm or tenderness; negative straight leg raising test bilaterally | Increased pain during ROM; all ROMs increased w/ repetition; unable to perform single leg hop x3; double leg hops x6; pain in low back and sacrum with prolonged sitting |
| §4.71a Rating | 40% (PEB 30%) | 20% | 10% |

The CI had a thoracic CT scan in June 2006 (24 June 2006) which revealed a superior end plate compression fracture at T-12 and body compression of approximately 20%. The MEB exam two months prior to TDRL entry indicated that the CI was wearing her TLSO brace and had positive tenderness to palpation at T-11 and T-12. The CI was placed on TDRL in October 2006. The CI continued to be followed by Orthopedics and PT. At the VA Compensation & Pension examination, six months after TDRL entry, the examiner indicated that the CI still had pain, stiffness and weakness in her lower back with monthly incapacitating episodes. The CI further noted that her physician had recommended bed rest as she had one incident of incapacitation of thirty days. The CI was again evaluated for a periodic TDRL evaluation20 months after TDRL entry and 8 months prior to TDRL exit. At this exam, the CI continued to have low back pain and inability to walk far without difficulty.

The PEB and the VA chose different coding options in that the VA chose to add code 5010 (due to trauma) to code 5235; however, both coding options used the same VASRD general formula for disease and injuries of the spine such as pain (whether or not it radiates), stiffness or aching in the area of the spine affected by residuals of injury or disease”. At the time of entry into TDRL, the PEB rated the T12 burst Fx at 30%. Independent rating of the data available could warrant a temporary 40% rating based on “favorable ankylosis of the entire thoracolumbar spine” as the CI was using a TLSO brace which effectively immobilized the thoracolumbar spine (temporary, for healing the T12 compression/burst Fx).

Although, there is no 30% VASRD rating under 5235 criteria for the thoracolumbar spine (30% is only for cervical spine pathology), it is reasonable to assume that the PEB was hopeful that a trial of TDRL could possibly salvage the Marine’s career and was liberal with assigning the 30% rating required to pursue that approach. The CI did not have Intervertebral disc syndrome, and although analogous coding to 5243 is possible, there was insufficient STR documentation to support incapacitating episodes (~ 30 days of bed rest prescribed by a physician; a total duration of at least 4 weeks but less than 6 weeks during the past 12 months) noted in the VA C&P exam history, which could otherwise support a 40% rating under 5299-5243. Code 5243 does not have any route to a 30% rating.

The Board had a vigorous discussion regarding the PEB 30% temporary rating which could not be supported by the VASRD, and deliberated on independent rating of the DES data. By Board precedent and law, the PDBR cannot lower a PEB rating. Given that the CI was in a brace allowing zero degrees of thoracolumbar ROM, the Board majority considered the CI’s condition closest to analogous coding for “favorable ankylosis of the entire thoracolumbar spine”, which would be rated at 40%. The Board next directed its attention to the final coding and rating recommendation for the thoracolumbar spine condition at TDRL exit. The most proximate source of comprehensive evidence to base the permanent separation rating is the MEB exam with PT ROMs eight months prior to exit from TDRL. This MEB exam documented that the forward flexion was 65 degrees which met the 10% criteria for “Forward flexion of the thoracolumbar spine greater than 60 degrees but not greater than 85 degrees”. After due deliberation, considering all of the evidence, the Board recommends a change in the PEB’s TDRL entry rating to 40% and no change in the permanent separation rating at TDRL exit of 10% coded as 5235 for the T12 Burst Fx.

Right Inferior Pubic Rami (IPR) Stress Fracture: The PEB found the CI’s Right IPR Stress Fracture as a permanent rating of Category III condition (“Conditions that are not separately unfitting and do not contribute to the unfitting condition” (s)). The CI was noted to have developed right hip pain during her initial training and was diagnosed with a right IPR stress fracture in May 2006. At the initial MEB exam, the IPR was noted to be healed. At the VA C&P exam, six months after separation, the examiner indicated that the CI still had weakness when sitting too long and lack of endurance when performing any type of physical activity. At the MEB TDRL evaluation 20 months after TDRL entry and 9 months prior to TDRL exit, the examiner noted that the CI had tenderness over the right thigh joints and flexing the right hip greater than 90 degrees caused her pain in both buttocks. All evidence considered there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the right IPR stress fracture condition.

Left Ankle Sprain Grade 1: The PEB found the CI’s left ankle sprain grade 1 as a permanent rating of Category III condition (“conditions that are not separately unfitting and do not contribute to the unfitting condition” (s)). The CI was noted to have left ankle pain in July 2006; however, the x-ray demonstrated no evidence of arthritic or inflammatory changes. In the service treatment record (STR) in August 2006, the examiner noted that the left ankle did not hurt anymore. All evidence considered there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the left ankle sprain grade 1 condition.

Remaining Conditions: No conditions were identified in the DES documents other than those addressed above. No other conditions were service connected with a compensable rating by the VA within twelve months of separation.

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 T12 burst fracture condition, the Board by a vote of 2:1 recommends a change in the PEB adjudication for entry into TDRL to 40% and no change in the 10% rating at exit from TDRL; both IAW VASRD §4.71a. The single voter for dissent who recommended no recharacterization did not elect to submit a minority opinion. In the matter of the right IPR stress fracture and left ankle sprain conditions or any other medical conditions eligible for Board consideration; the Board unanimously recommends no recharacterization of the PEB adjudications as not unfitting. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as additionally unfitting for rating at separation.

RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows, effective as of the date of her prior DES determinations:

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| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| T12 Burst Fracture | 5235 | 40% | 10% |
| **COMBINED** | **40%** | **10%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20101020, 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 8 Nov 11 ICO XXXXXXXX

(c) PDBR ltr dtd 10 Nov 11 ICO XXXXXXXXXX

(d) PDBR ltr dtd 10 Nov 11 ICO XXXXXXXXXXXXX

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. XXXXXXXXX1716: Separation from the Naval Service due to physical disability rated at 20 percent (increased from 10 percent) effective 28 February 2003.

b. XXXXXXXXXX3144: Correction of records to reflect placement on the Temporary Disability Retired List at 40 percent (increased from 30 percent) with no change to final separation from the Naval Service due to physical disability rated at 10 percent.

c. XXXXXXXXXXX6878: Placement on the Permanent Disability Retired List at 30 percent effective date of discharge (15 July 2002).

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

Assistant General Counsel

(Manpower & Reserve Affairs)