RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1001306 SEPARATION DATE: 20051031

BOARD DATE: 20120210

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Marine Corps Private First Class/E2 (5811, Military Police), medically separated for asthma. She developed persistent shortness of breath and exercise intolerance shortly after entering service, and was diagnosed with asthma by methacholine challenge testing. She did not respond adequately to treatment to fully perform within her Military Occupational Specialty (MOS) or meet physical fitness standards. She was placed on limited duty and underwent a Medical Evaluation Board (MEB). The asthma condition was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. Other conditions included in the Disability Evaluation System (DES) file will be discussed below. The PEB adjudicated the asthma condition as unfitting, rated 10% with application of SECNAVINST 1850.4E. The CI made no appeals and was medically separated with a 10% combined disability rating.

CI CONTENTION: “I was given a 10% by the Marine Corps & then the VA gave me a 0%. I still have breathing issues & when I make an appointment I never get to see anyone soon enough to document the issues. When they are prevalent, I have secondary issues from the asthma & breathing problems & the medications prescribed. Everything has been effected [sic] by my diagnosis including long term stomach problems from the Ibuprofen, Tylenol & naproxen given to me. I have swallowing issues & exercise issues also.” She elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20050908** | | | **VA (28 Mo. After Separation) – All Effective 20070209** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Asthma | 6602 | 10% | Asthma Asymptomatic without Residual | 6602 | 0% | 20080214 |
| No Additional MEB/PEB Entries | | | 0% x 1 | | | 20080214 |
| **Combined: 10%** | | | **Combined: 0%** | | | |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which her service-aggravated condition continues to burden her. 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 Department of Veteran Affairs (DVA). The DVA, 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 his degree of impairment vary over time. 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.

Asthma Condition. The CI developed cough, shortness of breath and exercise intolerance within a few months of entering service. She had no prior history of asthma. Initial treatment with antibiotics and albuterol, followed by a two week course of oral steroids did not resolve her symptoms, leading to methacholine challenge testing that showed a 23% decrease in FEV1 consistent with reactive airway disease/asthma. Baseline spirometry was normal. Advair (fluticasone/salmeterol) two puffs twice daily was then added to the treatment regimen with some improvement of symptoms. Despite treatment, she continued to be very symptomatic with attempted exercise, and a medical board was quickly initiated. VA treatment records dated 4 months and 11 months after separation indicate that the CI continued daily use of Advair while using albuterol as needed. Spirometry testing conducted 19 months after separation was also normal. The VA Schedule for Rating Disabilities (VASRD) provides rating guidance for asthma based on the number and severity of clinical exacerbations; the type and the frequency of medications used to treat the condition; and the results of objective pulmonary function testing (spirometry). Since spirometry testing was normal, the Board devoted ample attention in its deliberations to the issue of whether the requirement for daily bronchodilator and/or anti-inflammatory therapy was met in this case, as that is the pivotal criteria between a 10% or 30% rating IAW VASRD §4.97. It is acknowledged that the VASRD is somewhat outdated for asthma since modern treatment has expanded to include many treatment agents not employed when the existing rating criteria were promulgated. Contemporary regimens routinely employ daily maintenance with a variety of inhaled steroid (anti-inflammatory) and/or bronchodilator agents. The VA generally concedes the 30% rating if there is a prescription for any of these agents. The Board’s precedent has been to follow suit, even though it is clear that this encompasses many cases of relatively mild disease associated with minimal limitations and disability. The Board, however, does take the reasonable position that the evidence in such cases should satisfy an assumption that the treatment regimen supporting the higher rating is necessary to maintain good control of the condition. That question is only raised in cases where there is evidence that the condition is well controlled in spite of documented non-compliance or only sporadic use of the medications in question. The Board ultimately agreed that there was sufficient evidence to conclude that the CI did require daily treatment with Advair in order to maintain moderate control of her asthma and therefore recommends 30% as the fair rating for asthma in this case, coded 6602.

Remaining Conditions. Other conditions identified in the DES file were foot pain, and knee. Several additional non-acute conditions or medical complaints were also documented. None of these conditions was clinically active 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. No other conditions were service connected with a compensable rating by the VA within 12 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. As discussed above, PEB reliance on SECNAVINST 1850.4E for rating asthma was operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the asthma condition, the Board unanimously recommends a rating of 30% coded 6602 IAW VASRD §4.97. In the matter of the foot pain and knee pain 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 and that the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective as of the date of her prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Asthma | 6602 | 30% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20101209, 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

Ref: (a) DoDI 6040.44

1. I have reviewed subject case pursuant to reference (a). Subject member’s official records are to be corrected to reflect the following retroactive disposition:

a. Separation from the Naval Service due to physical disability with placement on the Temporary Disability Retired List with a disability rating of 30 percent for the period 31 October 2005 thru 30 April 2006.

b. Final separation from Naval Service on 1 May 2006 due to physical disability with a disability rating of 10 percent and entitlement to severance pay.

2. Please ensure all necessary actions are taken to implement this decision, including the recoupment of previously paid funds if appropriate, and that subject member is notified once those actions are completed.

Principal Deputy

Assistant Secretary of the Navy

(Manpower & Reserve Affairs)