RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXX BRANCH OF SERVICE: NAVY

CASE NUMBER: PD1100025 SEPARATION DATE: 20060119

BOARD DATE: 20111101

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Petty Officer 1st Class / E6 (DC1/5352, Special Warfare Combatant Craft Crewman), medically separated for lumbar degenerative disc disease. The initial injuries occurred from a parachuting accident. Despite conservative treatments for his back pain he did not respond adequately to perform within his Rating or meet physical fitness standards. He was placed on limited duty (LIMDU) and underwent a Medical Evaluation Board (MEB). Lumbar degenerative disc disease and cervicalgia were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. The Informal PEB (IPEB) adjudicated both the lumbar degenerative disc disease condition and cervicalgia condition as unfitting, rated 10% each, with application of SECNAVINST 1850.4E and the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI appealed to the Formal PEB (FPEB) which adjudicated the lumbar degenerative disc disease condition unfitting rated 20%, and the cervicalgia condition not unfitting (and not rated). The CI filed a Petition for Relief with the Navy Council of Review Boards which was denied, and he was thus medically separated with a 20% disability rating.

CI CONTENTION: The CI states: “Currently rate at 90% disabled and awaiting the Department of Veterans Affairs to rate the final two disabilities of PTSD and Spine. The Medical Review Board, which I disputed, was an insult to this service-member and I feel the board did not take all of the proof that I brought up to the board for the Board review. Board was 0700; I dropped off 40lbs of proof at 1930 the evening prior.” 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 FPEB – Dated 20050811** | | | **VA (2 Mo. After Separation) – All Effective 20060120** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Lumbar Degenerative Disc … | 5237 | 20% | Lumbar Strain … | 5010-5243 | 20%\* | 20060329 |
| Cervicalgia | Not Unfitting | | Cervical Intervertebral Disc … | 5243 | 20%\* | 20060329 |
| ↓No Additional MEB Entries↓ | | | Fibromyalgia | 5025 | 40%\*\* | 20070928 |
| Adjustment Disorder | 9411 | 30%\*\* | 20071009 |
| Left Infrapatellar Tendonitis | 5260-5024 | 10%\*\* | 20070928 |
| Left Ankle Achilles Tendonitis | 5271 | 10%\*\* | 20060329 |
| Tinnitus | 6260 | 10%\*\* | 20061205 |
| 0% x 5 / Not Service Connected x 5 | | | 20060329 |
| **Combined: 20%** | | | **Combined: 80%** | | | |

\*Initial VARD 20061114 granted SC ratings of 20% for back condition, 20% for neck condition, and 10% for adjustment disorder based on March 2006 C&P examinations.

\*\*VARD 20080306 added SC ratings for the other conditions listed based on examinations Sep and Oct 07, and increased adjustment disorder to 30% based on new examination October 2007 (service connection for PTSD granted effective 20100805 based on examination 5 October 2010, rated 30%, replacing adjustment disorder).

ANALYSIS SUMMARY: The Military Services, by law, can only rate and compensate for those conditions that were found unfitting for continued military service based on the severity of the condition at the time of separation and not based on possible future changes. The Department of Veterans Affairs (VA) however can rate and compensate all service connected conditions without regard to their impact on performance of military duties, including conditions developing after separation that are direct complications of a service connected condition. The VA can also increase or decrease ratings based on the changing severity of each condition over time. 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. The Board’s threshold for countering DES fitness determinations is higher than the VASRD §4.3 reasonable doubt standard used for its rating recommendations; but, remains adherent to the DoDI 6040.44 “fair and equitable” standard. Furthermore, a ‘crystal ball’ requirement is not imposed on the service PEB’s by the Board; and, the 12 month window specified in DoDI 6040.44 is appropriate for rating comparisons but not for new developments after separation. It must be 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 service improprieties in the processing of his case.

Summary of Injury and Treatment: The CI suffered two independent parachuting accidents, one in 1998 and the other in 1999 while on active duty in his Rating requirement. Both resulted in chronic low back pain and chronic neck pain with sensory loss in the right arm at the cervical 6-7 dermatome. The accidents did not require hospitalizations or surgical attention. The CI did not lose work time but did not participate in sports since the injuries. He had been in chronic nonsurgical therapy for his pain since 1999. He could not perform his normal duties as a special warfare combatant craft crewman, therefore performed duties in the ordinance department, which was still in his Rating requirement. The record did not date when his duties were altered, nor was there a LIMDU until 23 September 2004. He had not performed a physical readiness test since his parachuting accidents.

Back Condition: There were 2 goniometric range-of-motion (ROM) evaluations for the back .in evidence which the Board weighed in arriving at its rating recommendation. Both of these exams are summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM | MEB – 10 Mos Pre Sep | VA C&P –2 Mos Post Sep |
| Flexion 0-90⁰ normal | 10⁰ | 45⁰ |
| Combined 240⁰ normal |  | 145⁰ |
| Comments | With pain | Normal gait, posture,  no muscle spasm |
| §4.71a Rating | 40% | 20% |

The MEB examiner found moderate tenderness of the lower lumbar spine, normal motor exam, and normal sensory examination. Imaging studies showed minimal degenerative changes. Additionally, the service treatment record notes an antalgic gait, but no muscle spasm or abnormal contour, and a less restricted range of motion. The FPEB record of proceedings noted that during the FPEB, the CI was observed to spontaneously “forward flex well beyond 30 degrees and likely closer to 40 degrees but when asked to stand and demonstrate his forward flexion, moved only slightly beyond the vertical plane.” Thus, the FPEB considered the ROM measurements recorded in the MEB to have significantly overestimated the functional impairment. The range of motion exams for the back were found to be quite variable, ranging from “normal lumbar ROM” recorded by a corpsman in November 2005, 70 degrees measured by an orthopedic surgeon in January 2003, to the most restrictive exam of 10 degrees documented by the MEB exam in March of 2005. Of these numerous exams found in the service treatment record and twelve months post separation, they appeared to be most consistent with the FPEB’s findings and the VA compensation and pension exam (C&P). The (C&P), two months after separation, also recorded a normal gait, absent muscle spasm, and normal spinal contour. ROM was measured to the onset of pain. DeLuca criteria were negative. He found “no signs of intervertebral disc syndrome with chronic and permanent nerve root involvement.” There was no incapacitation and the CI was reported as being able to vacuum, drive a car, climb stairs, walk, take out the trash, shop, perform gardening activities, and push a lawn mower. In debating the probative value of the evidence presented, the Board agreed that the VA C&P exam was more complete, better documented, more proximate to the date of separation, and more reflective of the objectively documented spinal pathology and totality of evidence before the Board. The IPEB 10% rating was not consistent with VASRD standards, however the FPEB 20% rating was consistent with VASRD §4.71a standards based on the observed ROM of over 30 degrees during the FPEB proceedings. Although the PEB and VA chose different coding options for the condition, this did not bear on rating. There was no evidence of ratable peripheral nerve impairment in this case. All evidence considered there is not reasonable doubt in the CI’s favor supporting a change from the FPEB’s rating decision for the back condition.

Neck Condition: The Board’s main charge in respect to this condition is an assessment of the appropriateness of the FPEB’s fitness adjudication. There were 2 goniometric range-of-motion (ROM) evaluations for neck in evidence which the Board weighed in arriving at its rating recommendation. Both of these exams are summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Goniometric ROM – Cervical | MEB ~ 10 Mo. Pre-Sep | VA C&P ~ 2 Mo. After-Sep |
| Flex (0-45) | 10⁰ | 20⁰ |
| Ext (0-45) | 5⁰ | 20⁰ |
| Combined (340) | 55⁰ | 160⁰ |
| Comment | With pain | With pain |
| §4.71a Rating | 30% | 20% |

The records document treatment for neck pain. There was an extensive and thorough evaluation of his neck pain to include plain radiographs, MRI and myelogram of the cervical spine and electrodiagnostic studies of the right upper extremity over a period of more than five years. These evaluations revealed multilevel degenerative joint disease, neural foraminal narrowing (right C5-6) and degenerative disc disease with protrusion of the C5-6 disc. Neurosurgery evaluation concluded there were radicular symptoms of the right C6 level; however electrodiagnostic study of the CI’s upper extremity was normal. The negative EMG did not exclude sensory nerve involvement. A 22 July 2004 orthopedics cervical spine examination noted no limitation in flexion, moderate limitation in extension, slight limitation of lateral bend, and no limitation in rotation. Both the MEB and VA examiners documented paraspinous tenderness, but an otherwise unremarkable cervical exam except for ROM as noted in above chart. This condition was not specifically addressed by the commander’s non-medical assessment (NMA) but was included on the LIMDU, noted as failing retention standards by the MEB, and judged unfitting by the IPEB. The FPEB based it’s not unfitting adjudication on a conclusion that that it did not preclude continued performance of duties. The C&P examination stated the cervical spine condition did not cause incapacitation or functional impairment, and found no evidence of radiating pain on movement. There was diffuse tenderness of paraspinal muscles but no evidence of muscle spasm. ROM as noted in chart with pain but without additional loss of ROM. Cervical spine x-ray showed normal alignment. The Board’s threshold for countering DES fitness determinations is higher than the VASRD §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard. Board members noted that treatment records usually addressed the neck and back condition together without specifically detailing impairments with regard to performance of duty attributable to the back versus the neck. After due deliberation, the Board agreed that the preponderance of the evidence with regard to the functional impairment of the neck condition favors its recommendation as an additionally unfitting condition for separation rating. It is appropriately coded 5242 and meets the VASRD §4.71a criteria for a 20% rating. There was no evidence of ratable peripheral nerve impairment in this case.

Other Contended Conditions: The CI’s application implies that compensable ratings should be considered for fibromyalgia, PTSD, left infrapatellar tendonitis, left ankle Achilles tendonitis and tinnitus. Fibromyalgia was a diagnosis considered while in service as a cause of his unfitting neck and back pain. The CI’s neck and back pain were considered by the Board above. Other symptoms that may be associated with fibromyalgia, of sleep impairment and memory disturbance were not considered unfitting for duty. The commander’s NMA reflected excellent duty performance in administrative duties and mental status examinations including the VA C&P examination 2 months after separation indicated intact memory. The CI was diagnosed with adjustment disorder while in service and was returned to duties without limitation. The VA mental health C&P examination diagnosed adjustment disorder with mild symptoms. PTSD symptoms were not manifested in service or endorsed at the time of the C&P examination two months after separation. Service connection for PTSD was granted effective four years after separation based on examination four years after separation. All of these conditions were reviewed by the action officer and considered by the Board. There was no evidence for concluding that any of the conditions interfered with duty performance to a degree that could be argued as unfitting. The Board determined therefore that none of the stated conditions were subject to Service disability rating.

Remaining Conditions: Two other conditions, throat problems and irritable bowel syndrome, were identified in the DES file. Neither of these conditions was profiled, implicated in the non-medical assessment (NMA) or noted as failing retention standards. Both were reviewed by the action officer and considered by the Board. There was no indication from the record that either of these conditions significantly interfered with satisfactory performance of rating duty requirements. It was determined that neither could be argued as unfitting and subject to 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. In the matter of lumbar degenerative disc disease and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB rating of 20%. In the matter of the cervicalgia condition, the Board unanimously recommends that it be added as an additionally unfitting condition for separation rating, coded 5242, and rated 20% IAW VASRD §4.71a. In the matter of the fibromyalgia, PTSD/adjustment disorder, left infrapatellar tendonitis, left ankle Achilles tendonitis, tinnitus, throat problems and irritable bowel syndrome, 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 his prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Lumbar Degenerative Disc Disease | 5237 | 20% |
| Cervicalgia | 5242 | 20% |
| **COMBINED** | **40%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294 dated 20110109, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

President

Physical Disability Board of Review

MEMORANDUM FOR DIRECTOR, SECRETARY OF THE NAVY COUNCIL OF REVIEW

BOARDS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

ICO XXXXX, FORMER USN, XXX-XX-XXXXX

Ref: (a) DoDI 6040.44

(b) PDBR ltr dtd 7 Nov 11

I have reviewed the subject case pursuant to reference (a) and non-concur with the recommendation of the Physical Disability Board of Review as set forth in reference (b). Therefore, Mr. XXXX’s records will not be corrected to reflect a change in either his characterization of separation or in the disability rating previously assigned by the Department of the Navy’s Physical Evaluation Board.

Principal Deputy

Assistant Secretary of the Navy

(Manpower & Reserve Affairs)