RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: marine corps

CASE NUMBER: PD201100031 SEPARATION DATE: 20080115

BOARD DATE: 20120404

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Gunnery Sergeant (E-7) (0321/Reconnaissance Marine), medically separated for lower back pain, with related Category 2 diagnoses of closed fractures of lumbar vertebral body L1 and closed fractures of lumbar vertebral L2*.* He underwent extensive conservative therapy including pain medications, physical therapy, acupuncture, injections and the use of a brace. 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 (LIMDU) and underwent a Medical Evaluation Board (MEB). Lower back pain, closed fractures of lumbar vertebral body L1 and L2, endocrine disorder, and a condition of the brain (empty sella turcica) were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. No other conditions appeared on the MEB’s submission. Other conditions included in the Disability Evaluation System (DES) packet will be discussed below. The PEB adjudicated the lower back pain, with related category II diagnoses of closed fractures of lumbar vertebral body L1 and L2 as unfitting, rated 20%, with application of the Veterans’ Administration Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 20% combined disability rating.

CI CONTENTION: “I was found unfit for ‘lower back pain’ and rated at 20% by the PEB. I have significantly more disability than 20% from the lumbar fractures (sustained in a military parachute training accident) and they should have been rated higher. I aIso have several conditions which should have been found unfitting but were not; had they been found unfitting my discharge would have been a retirement instead of a severance. Importantly, I was not able to seek advice when my informal PEB findings were returned. My command was deployed and were not in a position to assist me, my PEBLO was undergoing treatment for alcohol abuse and anger management and could not effectively help me, and there were no disability-trained attorneys in Okinawa who could assist. (I did ask other military attorneys for advice but they refused, because they lacked the training.) If I had received effective advice it is clear that I would have been able to prove my case before the formal PEB; because I was told I had to accept my findings and return home I was never afforded that opportunity. I continue to suffer from my conditions to this day, including the ones which should have been declared "unfitting." I have positional vertigo, which is expressly unfitting per the MANMED for a Reconnaissance Marine (I was a platoon sergeant with Third Recon Battalion,) and is similarly unfitting for service within the wider Marine Corps. The VA rated me at 30% for this condition, a reflection of its severity and its obviously unfitting nature (when I have an attack I am completely prostrated for hours at a time, up to a complete day.) I have migraines which must be treated with Nortriptyline and Sumatriptan, a condition which is therefore also expressly unfitting (for service, not just for Recon) per the MANMED Article 15-57. Lastly, my shoulders, my right clavicle, my knees, and my right ankle are all separately unfitting (and are the cumulative result of all of my parachute experience.) All of these conditions should have been found to be separately unfitting, and I ask the Board to both find them unfitting and render appropriate military disability ratings for them.” 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 PEB – Dated 20070907** | | | **VA (2 Mo. After Separation) – All Effective Date 20080116** | | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** | |
| Lower Back Pain | 5235 | 20% | Residuals, Compression Fracture L1 & L2 with DJD T-Spine, Sleep  Disturbance & Bilateral Leg Numbness | 5235 | 20% | 20080310 | |
| Closed Fracture of Lumbar Vertebral Body L1 | Category II | |
| Closed Fracture of Lumbar Vertebral Body L1 | Category II | |
| Endocrine Disorder, No Treatment Required | Category III | | Hypothyroidism | NSC | | | |
| ↓No Additional MEB/PEB Entries↓ | | | Benign Positional Vertigo | 6299-6204 | 30% | | 20080310 |
| Residuals, Right Clavicle Fracture with Rotator Cuff Tendonitis | 5201 | 10% | | 20080310 |
| Left Rotator Cuff Tendonitis | 5201 | 10% | | 20080310 |
| Lt Knee PFS w/ DJD | 5260 | 10% | | 20080310 |
| Rt Knee PFS w/ DJD | 5260 | 10% | | 20080310 |
| Recurrent, Right Ankle Sprains | 5299-5271 | 10% | | 20080310 |
| Tinnitus | 6260 | 10% | | 20080307 |
| 0% x 8/Not Service Connected x 3 others | | | | |
| **Combined: 20%** | | | **Combined: 70%** | | | | |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred condition continues to burden him. The Board wishes to clarify that it is subject to the same laws for service disability entitlements as those under which the DES operates. 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. That role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA), operating under a different set of laws (Title 38, United States Code). It must also be noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to allegations regarding suspected service improprieties or faulty medical care. The Board’s role is confined to the review of medical records and all evidence at hand to assess the fairness of PEB disability ratings and fitness determinations as elaborated above. Redress in excess of the Board’s scope of recommendations must be addressed by the Navy Board for Corrections of Naval Records (BCNR) and/or the United States judiciary system. The Board evaluates DVA evidence proximal to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of DES fitness decisions and rating determinations for disability at the time of separation. The Board further acknowledges the CI’s contention for service ratings for other conditions documented at the time of separation, and notes that its recommendations in that regard must comply with the same governance. 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. The DVA; however, 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.

Lower Back Pain. On 9 February 2006 the CI was involved in a paratrooper accident that resulted in L1 and L2 compression fractures, which were nonsurgical. His initial treatment included pain medications, physical therapy, acupuncture, injections and the use of a brace. Chronic low back pain continued to prevent performance of his duties as a 0321/Reconnaissance Marine and he was referred for a MEB. There was only one goniometric range-of-motion (ROM) evaluation in evidence which the Board weighed in arriving at its rating recommendation. This examination is summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Goniometric ROM - Thoracolumbar | MEB ~ 6 Mo. Pre-Sep  20070801 | VA C&P ~ 2 Mo. After-Sep  20080310 |
| Flex (0-90) | No measurements provided. | 0⁰-80⁰ (w/pain from 50⁰-80⁰) |
| Ext (0-30) | 0⁰-15⁰ (pain throughout) |
| R Lat Flex (0-30) | 0⁰-30⁰ (w/pain from 20⁰-30⁰) |
| L Lat Flex 0-30) | 0⁰-30⁰ (w/pain from 20⁰-30⁰) |
| R Rotation (0-30) | 0⁰-30⁰ (w/pain from 20⁰-30⁰) |
| L Rotation (0-30) | 0⁰-20⁰ (w/pain from 0⁰-20⁰) |
| COMBINED (240) | 205⁰ ( 110⁰ at pain onset) |
| Comment | Neurologically intact. Gait normal. Moderate tenderness to palpation in upper lumbar area. | No assistive devices or special footwear. No tenderness. Lordosis slightly diminished. No muscle spasm and straight leg raising negative. Normal LE strength, 5/5 with no atrophy. |
| §4.71a Rating | 10% (20% assigned) | 20% |

The narrative summary performed on 1 August 2007, 6 months prior to separation, noted tenderness with normal motor and sensory function and normal gait and reflexes. ROM was not addressed. A pain management note on 3 October 2007, 3 months prior to separation, documented lumbar tenderness with no spasm and normal ROM. On 11 September 2007, the PEB found the lower back pain condition unfitting, code 5235 (vertebral fractures or dislocations), with a 20% rating. Closed fracture of the lumbar vertebral body at L1 and closed fracture of the lumbar vertebral body L2 were related category II diagnoses. No specific rationale is provided for the 20% rating and the findings present on the MEB examination warrant a10% rating IAW §4.71a.

The VA Compensation and Pension (C&P) examination on 10 March 2008, 2 months after separation, noted decreased ROM as noted above, with no tenderness or spasm. He did have reduced lumbar lordosis and the examiner noted that he would likely have additional limitation with repetition with no repetitive testing actually documented. There was no ankylosis. He reported pain and numbness in the thighs with occasional shooting pains that lasted only seconds. The original VA Rating Decision (VARD) on 1 April 2008, 2 weeks after separation, rated the residuals, compression fracture L1 and L2 with degenerative joint disease thoracic spine, sleep disturbance and bilateral leg numbness condition at 20%, also coded 5235. The VA assigned a 20% evaluation based on VA examination findings of limited motion and noted that the numbness with no neurologic findings was not separately ratable.

The Board first considered coding options noting that PEB and the VA appropriately used the same code (5235) for the vertebral fractures. Under this code a 20% rating requires forward flexion of the thoracolumbar spine greater than 30 degrees, but not greater than 60 degrees; or, the combined ROM of the thoracolumbar spine not greater than 120 degrees; or, muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis. The VA rating of 20% is supported by thoracolumbar flexion with pain at 50 degrees, the combined ROM of 110 degrees, and reduced lumbar lordosis. No evaluation in evidence supports a 40% rating which would require forward flexion of the thoracolumbar spine 30 degrees or less; or, favorable ankylosis of the entire thoracolumbar spine.

The Board also considered whether the radicular complaints were unfitting at separation. 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 pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a. There is no evidence of functional impairment due to numbness in the thighs in this case. The Board, consistent with the VA determination, cannot support a recommendation for additional rating based on peripheral nerve impairment.

All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s rating decision of 20%, coded 5235, for the lower back pain condition. Additionally the Board supports no recharacterization of the PEB fitness adjudication for the closed fractures of lumbar vertebral bodies at L1 and L2 conditions as related category II diagnoses since the associated impairments overlapped with those attributed to the primary diagnosis of lower back pain and was subsumed under that rating.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were an endocrine disorder and the condition of the brain (partial empty sella turcica). 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 in his MOS duty requirements. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for either of the stated conditions.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for positional vertigo; migraines; right clavicle and shoulder; left shoulder; left knee; right knee; and right ankle. These conditions were service-connected by the VA as benign positional vertigo, residuals of right clavicle fracture with rotator cuff tendonitis, left rotator cuff tendonitis, left knee patellofemoral syndrome with degenerative joint disease, right knee patellofemoral syndrome with degenerative joint disease, recurrent right ankle sprains, and tinnitus. Migraine headaches were not addressed by the VA. 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. Other conditions identified in the DES file were; intermittent bilateral buttock region pain; mild hypocortisolism; headaches; gynecomastia; central obesity; weakness, numbness and tingling in the legs; lipoma, right thigh; chest pain; left hearing loss; and eye disorder. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically active during the MEB period, none were the basis 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. Additionally bilateral elbow tendinitis; scar, right abdominal wall; pituitary cyst; left ankle condition; bilateral hip conditions; hypothyroidism; and respiratory condition were noted in the VA rating decision proximal to 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. In the matter of the lower back pain and closed fractures of the lumbar vertebral bodies at L1 and L2 conditions and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the benign positional vertigo, residuals of right clavicle fracture with rotator cuff tendonitis, left rotator cuff tendonitis, left knee patellofemoral syndrome with degenerative joint disease, right knee patellofemoral syndrome with degenerative joint disease, recurrent right ankle sprains, tinnitus; intermittent bilateral buttock region pain; mild hypocortisolism; headaches; gynecomastia; central obesity; weakness, numbness and tingling in the legs; lipoma, right thigh; chest pain; left hearing loss; and eye disorder conditions, the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation.

RECOMMENDATION: The Board, therefore, recommends that there be no recharacterization of the CI’s disability and separation determination, as follows:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Lower Back Pain | 5235 | 20% |
| **COMBINED** | **20%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110113, 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) RECOMMENDATIONS

Ref: (a) DoDI 6040.44

(b) CORB ltr dtd 23 Apr 12

In accordance with reference (a), I have reviewed the cases forwarded by reference (b), and, for the reasons provided in their forwarding memorandum, approve the recommendations of the PDBR the following individual’s records not be corrected to reflect a change in either characterization of separation or in the disability rating previously assigned by the Department of the Navy’s Physical Evaluation Board:

Assistant General Counsel

(Manpower & Reserve Affairs)