RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxx Branch OF SERVICE: marine corps

CASE NUMBER: PD1100116 SEPARATION DATE: 20040430

BOARD DATE: 20110930

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty member, Sergeant (E-5) (6173 Aircrew Chief) medically separated for right L5/S1 discectomy, chronic low back pain with radicular symptoms, and persistent right and some S1 radiculopathy. 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). Status post right L5/S1 discectomy, persistent right and some S1 radiculopathy, and associated chronic low back pain with radicular symptoms 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 Informal PEB (IPEB) adjudicated the Status Post Right L5/S 1 Discectomy condition as unfitting, rated 20%, with application of SECNAVINST 1850.4E. The CI made an appeal to the FPEB, and was medically separated with a 20% combined disability rating.

CI CONTENTION: The CI stated “The condition was a direct result of a Doctors admitted error and was debilitating to the point that VA found me Individually Unemployable. Also Social Security has rated me 100% disabled”. He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

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| --- | --- |
| **Service (IPEB – Dated 20031222** | **VA (1 Mo. Pre Separation) – All Effective Date 20040501** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Right L5/S1 Discectomy | 5295 | 20% | S/P HNP, L5-S1 with residuals | 5243 | 20% | 20040413 |
| Chronic LBP  | Cat II |
| Right S1 Radiculopathy |
| ↓No Additional MEB/PEB Entries↓ | Depressive Disorder, NOS | 9434 | 30% | 20040409 |
| Patellofemoral Syndrome, Left Knee | 5260-5024 | 10% | 20040413 |
| Hypertension | 7101 | 10% | 20040413 |
| Tinnitus | 6260 | 10% | 20040413 |
| Patellofemoral Syndrome, Right Knee | 5260-5024 | 10% | 20040413 |
| 0% x 3/Not Service Connected x 3 | 20040413 |
| **Combined: 20%** | **Combined: 60%** |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impact that his service-incurred conditions have had on his quality of life. However, 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 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 PEBs 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 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 medical errors of his case.

Right L5/S 1 Discectomy. The CI first experienced the onset of low back pain in January 2002 with no specific mechanism of injury. An MRI in September 2002 demonstrated a protruding intervertebral disc at L5-S1 with mild effacement of the right S1 nerve root (there was also a minimally bulging intervertebral disc at L4-L5 apparently not causing symptoms). Initial non-surgical therapy did not improve his symptoms and a repeat MRI demonstrated progression of the disc protrusion at L5-S1 consistent with his radiculopathy symptoms. The CI underwent L5/S1 discectomy on 22 July 2003 which was complicated by damage to the L5/S1 nerve root (the operative report states, “…several fascicles of the S1 nerve root were disrupted.”). Post-operatively the CI’s back pain was unresolved, and there was lack of sensation on the lateral right foot. MRI imaging following surgery showed post-operative changes without findings that suggested additional surgery was indicated. At the MEB examination 6 October 2003, the CI had a decrease in forward flexion; the examiner stated, “He is unable to bend [and touch] his toes secondary to back pain.” Although there was absence of the right ankle reflex and lack of sensation along the lateral right foot and posterior-lateral calf, strength in both legs was normal (5 out of 5), and gait was normal. A neurosurgery progress note dated 2 October 2003 recorded thoracolumbar flexion of 75⁰ with intact strength. The 20 February 2004 neurosurgery note reports that at the time of an 11 February 2004 follow up appointment the CI stated his pain was controlled with medication and felt he could continue to serve in the Marine Corps. The neurosurgeon initially thought this was reasonable since the CI’s strength was intact and the non-narcotic medications he was using did not interfere with mentation. However, service treatment records documented emergency room visits for pain for which narcotic medication was prescribed. At the VA compensation and pension (C&P) examination 13 April 2004, one month prior to separation, the examiner recorded that the back condition did not cause incapacitation, and when experiencing pain the CI could function with medication (narcotic pain medications listed). However, pain inhibited his ability to function in a normal manner and he avoided lifting heavy objects. Other than the marked decrease in forward flexion of 30⁰ compared to the previous recorded examination, the remainder of the examination was similar to the October 2003 NARSUM and neurosurgery examinations with decreased sensation over the right lateral foot, normal strength, intact reflexes, absence of muscle spasm, with normal gait and normal posture. A C&P examination 15 months after separation, 22 July 2005, was noted for increased range of motion with flexion of 50⁰ and combined range of motion of 170⁰, but with an antalgic gait.

The PEB’s DA Form 199 reflected use of Veteran Administration Schedule for Rating Disabilities (VASRD) rating criteria for lumbosacral strain (5295) that had been superseded by new VASRD criteria four 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 PEB rated the CI’s back condition 20% using 5295, lumbosacral strain. Applying the new VASRD criteria in effect at the time of the PEB, the CI’s back condition would rate 10% based on the examination evidence available at the time of the PEB. The VA use of the code 5243, for intervertebral disc syndrome, reflects use of current VASRD guidelines that were in effect at the time of VA adjudication. While the C&P examination stated there were no incapacitating attacks, the VA rating decision indicated its 20% rating was based on recurrent moderate attacks and range of motion considerations.

The Board notes that both the MEB and VA exams were sufficiently well documented in terms of ratable data for the current VASRD, and that the CI’s overall condition and described physical findings were congruent between these two exams except for the degree of forward flexion. In its assignment of probative value to the disparate flexion results, the Board must acknowledge that VA C&P spine examinations may predispose a lowered pain threshold or increased symptom reporting since the examinee is generally quite aware that the severity of symptoms and pain tolerance on ROM and other testing is directly correlated with the resulting rating and financial gain. The measurement of ROM reflecting pain with motion is dependent on the examinee’s reported pain, and strength testing is dependent on examinee effort, with scant ability by the examiner to objectively confirm it. The Board carefully considered the whole record in order to develop a consistent picture of the CI’s back condition and agreed in this case that the range of motion documented in the October 2003 neurosurgery examination likely reflected an underestimation of the impairment while the flexion recorded in the first C&P examination reflected an overestimation of the impairment compared to other features of the examination and subsequent C&P examination. Board members agreed the condition most nearly approximated the 20% rating based on the preponderance of evidence of all examinations considered in their totality. 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 disc disease. While the reported mild sensory changes and decreased Achilles tendon reflex were consistent with the CI’s radiculopathy, they were not impairing of functioning and would not be considered separately unfitting. Motor strength testing was consistently normal and evidence of the record reflects that pain was the reason the CI was unable to perform all the functions of his military specialty. VASRD rating criteria under the general rating formula for diseases and injuries of the spine takes into account pain, whether it radiates or not. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of lumbar radiculopathy as an unfitting condition for separation rating. After due deliberation, considering all of the evidence, the Board concludes that a separation rating of 20% for the back pain condition, coded 5243, intervertebral disc syndrome is warranted. Although the Board considered the CI’s back condition under the new VASRD spine rules in effect at the time of his PEB, no recommendation for an increase in the rating for the back condition resulted and therefore no change to the original PEB coding or rating is recommended.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were chronic low back pain with radicular symptoms and persistent right and S1 radiculopathy. Both of these conditions were related category 2 diagnoses associated with the primary unfitting diagnosis rated by the PEB and are discussed above.

Remaining Conditions. Other conditions identified in the DES file were hypertension, hypercholesterolemia, gastroesophageal reflux, history of knee problems (patellofemoral pain syndrome), alcohol dependence, and depressive disorder. The CI had a longstanding history of alcohol dependence since prior to military service. In March 2002, over one year before the MEB, he self referred for treatment of alcohol dependence with depression. At the time of the MEB NARSUM, the CI was abstaining from alcohol and was not requiring treatment for depression. Although the C&P examination in April 2004 at the time of separation recorded moderate symptoms, there was no evidence in service records between the time of the MEB and separation to indicate it interfered with performance of duties. 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 commanders 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, tinnitus 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 back condition, right L5/S1 discectomy with associated chronic low back pain and right S1 radiculopathy, and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication at separation. In the matter of hypertension, hypercholesterolemia, gastroesophageal reflux, history of knee problems (patellofemoral pain syndrome), alcohol dependence, and depressive disorder, 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, 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** |
| Right L5/S1 Discectomy | 5295 | 20% |
| **COMBINED** | **20%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110321, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

 Director

 Physical Disability Board of Review

