RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXX BRANCH OF SERVICE: navy

CASE NUMBER: PD1100551 SEPARATION DATE: 20011031

BOARD DATE: 20120515

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active HM2/E-5 (HM-8408/Medical Field Service Technician), medically separated for major depressive disorder and chronic back pain. He did not respond adequately to treatment and was unable to perform within his Rating or meet physical fitness standards. He was placed on limited duty and underwent a Medical Evaluation Board (MEB). Major depressive disorder (MDD) and chronic back pain were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. No other conditions appeared on the MEB’s submission. The PEB adjudicated the MDD condition and a chronic back pain condition as unfitting, rated 10% and 10% respectively with application of the SECNAVINST 1850.4E and 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 believe that I should be rated more for my major depression which I am still suffering.”

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20010914** | | | **VA (~2 Mo. Before Separation) – All Effective Date**  20011101 | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Major Depressive Disorder | 9434 | 10% | Major Depression with Psychotic Features | 9434 | 70% | 20010830 |
| Chronic Back Pain | 5299-5295 | 10% | Degenerative Changes, Lumbosacral Spine, s/p Lumbar Laminectomy / Discectomy with Residuals | 5010-5293 | 40% | 20010830 |
| ↓No Additional MEB/PEB Entries↓ | | | Cervical Spine Sprain | 5290 | 10% | 20010830 |
| Migraine Headaches | 8100 | 30% | 20010830 |
| Left Plantar Fasciitis with Heel Spurs | 5015-5284 | 10% | 20010830 |
| Right Plantar Fasciitis with Calcaneal Spur | 5015-5284 | 10% | 20010830 |
| Tinnitus | 6260 | 10% | 20010830 |
| 0% x 3/Not Service-Connected x 1 | | | 20010830 |
| **Combined: 20%** | | | **Combined: 90%** | | | |

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in DoDI 6040.44 (4.a) is limited to those conditions which were determined by the PEB to be specifically unfitting for continued military service; and, when requested by the CI, those conditions “identified but not determined to be unfitting by the PEB.” Any conditions or contention not requested in this application, or otherwise outside the Board’s defined scope of review, remain eligible for future consideration by the Board for Correction of Naval Records (BCNR).

ANALYSIS SUMMARY: The Board notes that the 2002 Veteran Administration Schedule for Rating Disabilities (VASRD) standards for the spine, which were in effect at the time of separation, were changed to the current §4.71a rating standards in 2004. The 2002 standards for rating based on range-of-motion (ROM) impairment were subject to the rater’s opinion regarding degree of severity, whereas the current standards specify rating thresholds in degrees of ROM impairment. When older cases have goniometric measurements in evidence and when the VASRD 2002 code 5292 (for limitation of motion, lumbar spine) is applicable, the Board reconciles (to the extent possible) its opinion regarding degree of severity for 5292 with the objective thresholds specified in the current §4.71a general rating formula for the spine. This promotes uniformity of its recommendations for different cases from the same period and more conformity across dates of separation, without sacrificing compliance with the DoDI 6040.44 requirement for rating IAW the VASRD in effect at the time of separation.

Major Depressive Disorder. The CI developed depression in the setting of chronic low back pain (LBP) following back surgery in 1998. In 1999, the CI was referred for MEB due to chronic back pain, and he experienced increased symptoms of depression due to worry about his ability to remain in the U.S. and care for his family since he was not yet a U.S. citizen. The PEB found the CI unfit with a combined rating less than 30%. The CI appealed to the Formal PEB contending he was fit and was able to perform his job. The commander's non-medical assessment (NMA) at this time confirmed he was satisfactorily performing his duties. The service treatment record (STR) falls silent for care of depression following the August 1999 PEB until September 2000. On 5 September 2000, the CI presented to the mental health clinic reporting increased symptoms of depression associated with self discontinuing his anti-depressant medication approximately 2 months before. He stated he had obtained his citizenship and wanted to get out of the Navy. His mood was mildly dysthymic with full range of affect. Treatment with medication and therapy was initiated but the treatment plan did not include referral for MEB. On 26 September 2000, the CI presented to the emergency department with suicidal ideation with a plan and was hospitalized for approximately 11 days. With treatment, symptoms of depression significantly improved. At a follow up appointment, 23 October 2000, the CI was very despondent about his ability to remain in the Navy for the 5 more years necessary to attain length of service retirement with his severe chronic LBP, noting that he had been unable to perform in any physical fitness tests. He was also despondent about his prospects for advancing in rank. In April 2001, the CI stopped his medications and experienced worsened symptoms that included auditory hallucinations. At this time, MEB was initiated and the MEB psychiatry narrative summary (NARSUM) was prepared.

The MEB psychiatry NARSUM diagnosis was major depressive disorder with psychotic features. By the end of April, the CI had resumed all of his medications, and was observed to be improving through May and June. The commander’s NMA, dated 13 June 2001, noted that when healthy, the CI was capable of performing his duties. The commander stated that his condition did on occasion, prevent him from doing his job (decision making process at times questionable) and to miss some days at work; “his record over the past 6 months clearly supports that he is a team player when healthy, and can be counted on in time of need. When he is well enough to perform his duties, he does quite well, is a good Sailor, and does a good job in his NEC. He contributes immeasurably to this command mission when he is in good health.”

By the end of July he was improved, mood was good to normal, with full affect. The CI denied suicidal thoughts and hallucinations, and mental status examinations (MSE) were normal. The 14 September 2001 PEB , noted the improvement with medication since the April NARSUM and rated the depression 10%. A mental health clinic encounter on 18 September 2001 recorded that the CI had stopped all of his medications 3 weeks before to see if he still needed them. He experienced a return of symptoms and at the time of the appointment was mildly dysphoric, without suicidal thoughts or hallucinations. Cognition remained intact. The CI underwent the VA Compensation and Pension (C&P) examination on 25 August 2001, 2 months prior to separation. The time of this examination coincided with the time the CI reported he had stopped taking his medications. The CI reported a 9 year history of depression since his first back injury that worsened in 1998 following back surgery. The CI reported continued sadness, lack of concentration with some difficulty focusing on daily activities, decreased energy, social isolation at times, lack of motivation at times, and sleep disturbance at times. He reported auditory hallucinations off and on. He got along well with family, friends and neighbors. He denied thoughts of suicide. On MSE, mood was depressed with congruent affect. Speech was normal, coherent and relevant, eye contact was good and there were no abnormal body movements. Tests of concentration and memory were normal. Abstract thinking was intact and insight was good. The examiner assigned a Global Assessment of Functioning (GAF) of 55 (moderate symptoms) and commented: “from a psychiatric standpoint, the patient is able to understand, carry out, and remember simple instructions. The patient would have difficulty following complex instructions. The patient is able to interact with co-workers, supervisors, and the general public. The patient would have difficulty focusing and tolerating stress related to work and work-like situations.”

The VA assigned a 70% rating based on the C&P examination citing the severity of symptoms in September 2000 and April 2001 while off of medications. There are no VA mental health treatment records in the several months after separation in the file for review. It is unknown whether he received care elsewhere or he did not feel the need for continued mental health care services. At an internal medicine examination in February 2002, 3 months after separation, MSE was documented: “The Veteran is oriented to person, place, time, and space during this evaluation. Short-term and long-term memory is normal. Behavior is normal. Comprehension is normal. The Veteran is coherent, and emotional reaction is appropriate. Social and occupational capacity is not restricted. Mentally, the veteran can handle his own funds.” All Board members agreed the evidence of the STR at the time of separation did not approach the 50% rating; therefore Board deliberations centered on a 10% versus a 30%. Social and occupational impairment consistent with a 30% evaluation (“occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks”) could be surmised from some of the documented symptoms while the CI was not taking medications. The Board noted that the CI’s symptoms worsened in September 2000 related to discontinuation of medication by the CI. At the time of the April 2001 MEB NARSUM there was worsening of symptoms related to non-medically advised discontinuation of medication by the CI.

Similarly, around the time of the August 2001 VA C&P examination, the CI had again discontinued medication against medical advice. At the C&P examination, the CI reported continuing auditory hallucinations that contemporaneous STR documented as absent since July. When on medication, the CI’s symptoms were controlled and he was able to perform duties in a satisfactory manner (“quite well”). Although he reported there was social isolation at times, there were no problems with interpersonal function with family, neighbors, coworkers or supervisors. On MSE, there was no impairment in memory or concentration. After due deliberation and in consideration of all evidence and mindful of VASRD §4.3 (reasonable doubt), the Board concluded the impairment due to major depression while on mediation more nearly approximated the 10% rating (“occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or; symptoms controlled by continuous medication”) and recommends no change in the PEB’s adjudication.

Chronic Back Pain. The CI had a several year history of chronic low back pain   
(LBP). In 1998, he underwent surgery for herniated L5-S1 disc with left sided radiculopathy. He experienced recurring pain attributed to scar tissue (epidural fibrosis). Treatment with medication and epidural steroid injections did not result in significant improvement. Examinations in 1999 demonstrated intact strength and reflexes. Due to chronic back pain the CI was referred for an MEB in May 1999. The PEB found the CI unfit and rated the back condition 10%. The CI appealed to the FPEB, on 16 November 1999, and contended he was fit and could do his job. The FPEB noted the CI had not sought any care for back pain since May 1999 and returned the CI to full duty. The CI experienced recurrent back pain with radicular symptoms in the left leg and sought care in June 2000. Magnetic resonance imaging (MRI) in July 2000 demonstrated degenerative disc disease at L1-2 and L4-5 and “some” fibrosis at the L5-S1 level, but no recurrent herniated disc. Repeat epidural steroid injection did not provide benefit. Chronic pain was rated 3/10 ten scale with increased pain to eight with exertion. The orthopedic NARSUM, dated 13 July 2001, recorded that there had been no change in chronic low back pain since surgery 3 years before. Neurologic examination, including strength, reflexes and sensation was normal. Straight leg raising to 80 degrees was “without significant radiating pain.” There is no ROM examination documented in the NARSUM or STR. No further STR for back pain are present in the file after the date of the orthopedic NARSUM in July 2001. The VA C&P examination on 30 August 2001, 2 months prior to separation, documented lumbar ROM: flexion 50 degrees, extension 20 degrees, lateral bending 20 degrees bilaterally, and rotation 30 degrees bilaterally (combined 170 degrees). There was tenderness, mild muscle spasm, and straightening of the normal lordosis. Gait was normal. Strength was normal, with intact sensation and intact, normal reflexes.

An internal medicine examination in February 2002 also documented normal gait and normal strength, reflexes and sensation of the lower extremities. Pain medications were listed in the current medication list. The PEB rated the chronic back pain (coded 5299-5295) 10% using the guidelines for lumbosacral strain (5295). The VA rated the back condition (degenerative changes, lumbosacral spine, status post lumbar laminectomy/discectomy with residuals) 40% (coded 5010-5293) using the guidelines for intervertebral disc syndrome (5293). As noted previously, the CI’s back condition was rated in accordance with VASRD guidelines in effect at that time. The Board must correlate the above clinical data with the 2001 rating schedule (applicable diagnostic codes include: 5292 limitation of lumbar spine motion; 5293 intervertebral disc syndrome; and 5295 lumbosacral strain. There was no ankylosis for rating under 5289). Neither the PEB nor the VA adjudicated a rating using the code for limitation of lumbar spine motion (5292). At that time, the VASRD rating guidelines in effect provided for separate ratings for limited motion of the dorsal (thoracic) spine (5291) and lumbar spine (5292). VA C&P examinations therefore would be expected to be performed in a manner that would report examination findings consistent with the rating guidelines, in this case a lumbar range of motion rather than the combined thoracolumbar ROM that is measured and used under the current VASRD guidelines that became effective after the CI was separated. The reported lumbar flexion of 50 degrees is close to the normal lumbar flexion of 60 degrees and more nearly approximates the 10% rating under 5292 than the 20%. This conclusion is consistent with the fact that the VA chose to rate under 5293, intervertebral disc syndrome, as a higher rating resulted under that code.

The Board next considered rating under the code used by the PEB, 5295, lumbosacral strain. Board members agreed that the preponderance of evidence did not support a rating higher than the 10% adjudicated by the PEB using this diagnostic code. Finally, the Board considered rating under the code for intervertebral disc syndrome (5293) applied by the VA. The CI had intervertebral disc disease with radicular symptoms but without objective neurologic findings and negative provocative examination tests. Board members agreed the absence of objective neurologic findings did not support the 60% rating under the 5293 diagnostic code. Board members also agreed that the preponderance of evidence did not support the 40% level for severe recurring attacks with intermittent relief. The Board made note of the fact that the orthopedic NARSUM recorded CI report that the pain had been unchanged since surgery in 1998 and that at the time of the FPEB in November 1999, the CI testified that he was able to perform his duty despite his low back pain. The severity of complaints of back pain correlated with his motivation to remain or get out of the Navy. The Board deliberated whether the CI’s LBP condition more nearly approximated moderate with recurring attacks (20%) or mild (10%). A flare was noted in June 2000, over a year prior to separation. No care for exacerbations was documented in the STR after December 2000, and there are no VA treatment records for back pain in the months after separation (it is unknown if received care elsewhere or he did not require care). The commander’s NMA reported good duty performance despite the chronic back pain but the CI was assigned to sedentary duties that allowed for avoidance of prolonged standing or sitting. The CI’s chronic pain prevented his ability to perform the physical fitness test or engage in strenuous activities. The Board considered the underlying pathology including post-operative epidural fibrosis refractory to treatment, and the functional impairments reflected in examinations and the commander’s NMA. Board members concluded that using the guidelines under 5293, the CI’s back condition more nearly approximated the 20% rating based on moderate impairment due to the back condition. After due deliberation, considering all of the evidence, and IAW §4.3 (reasonable doubt), the Board concluded that there was sufficient cause to recommend a separation rating of 20% for the back pain condition, coded 5293.

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 MDD condition and IAW VASRD §4.130, the Board unanimously recommends no change in the PEB adjudication. In the matter of the chronic LBP condition, the Board unanimously recommends a disability rating of 20%, coded 5293 IAW VASRD §4.71a. There were no other conditions within the Board’s scope of review for consideration.

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** |
| Major Depressive Disorder, Recurrent, Severe | 9434 | 10% |
| Chronic Back Pain | 5293 | 20% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110718, 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

COMMANDER, NAVY PERSONNEL COMMAND

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATIONS

Ref: (a) DoDI 6040.44

(b) PDBR ltr dtd 7 May 12 ICO XXXXXXXXXXXXXXX

(c) PDBR ltr dtd 22 May 12 ICO XXXXXXXXXXXXXXX

(d) PDBR ltr dtd 10 May 12 ICO XXXXXXXXXXXXXXX

(e) PDBR ltr dtd 3 May 12 ICO XXXXXXXXXXXXXXX

1. Pursuant to reference (a) I approve the recommendations of the PDBR set forth in references (b) through (e).

2. The official records of the following individuals are to be corrected to reflect the stated disposition:

a. former USMC: Placement on the Temporary Disability Retired List for the period 1 December 2003 through 30 November 2008 with a 60 percent disability rating (increased from 40 percent) with final disability separation on 1 December 2008 with a 20 percent disability rating.

b. former USN,: Placement on the Permanent Disability Retired List with a 30 percent disability rating (increased from 20 percent) effective 31 October 2001.

c. former USMC: Placement on the Permanent Disability Retired List with 30 percent disability rating (increased from 10 percent) effective 30 August 2009 .

d. former USMC: Disability separation with entitlement to disability severance pay with a rating of 20 percent (increased from 10 percent) effective 31 October 2006.

3. Please ensure all necessary actions are taken to implement these decisions, included the recoupment of disability severance pay if warranted, and notification to the subject members once those actions are completed.

Assistant General Counsel

(Manpower & Reserve Affairs)