RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: navy

CASE NUMBER: PD1100580 SEPARATION DATE: 20020118

BOARD DATE: 20120315

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty CE3/E-4 (CN/Construction Electrician), medically separated for lumbosacral strain. He did not respond adequately to treatment and was unable to perform within his rating or meet physical fitness standards. He was placed on light duty and underwent a Medical Evaluation Board (MEB). Superior end plate fracture L4, L3-4 degenerative disc disease, and chronic low back pain were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. The PEB found the patient fit for duty. The CI appealed and a Formal PEB (FPEB) adjudicated the CI’s back pain as unfitting, coded as lumbosacral strain, and rated 0% with application of the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI was then medically separated with a 0% combined disability rating.

CI CONTENTION: “My provided JAG attorney at the time felt asking for anything great than 0% would be denied. I am able to work in the civilian world, unfortunately I do suffer pain every day from my injury sustained while on active duty. There are times when my bowing(?) disc will catch causing intense pain and rendering me unable to move. This does happen 1-2 times a month making life difficult. Fortunately, this has been avoided while at work in recent years. The pain casued from the bowing disc does cause pain on a daily basis. This pain range’s from minor to severe, sometimes triggered by a small movement to the harsh Chicago weather. Surgery for me at this point is not an option as I am only 30 years old and do not want a major surgery that could potentially make matters worse. Finally, despite having insurance I feel it should not be my sole responsibility w/ my insurance to treat a problem that was caused while on active duty. If I am told my 0% will not be changed I will except that choice, however I feel that my continuous pain casued by an active duty accident shouldn’t go unnoticed.” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service FPEB – Dated 20011106** | **VA**  |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Lumbosacral Strain | 5295 | 0% | No VA Rating |
| Superior End Plate FX L4 | Not Unfitting |
| L3-L4 DDD | Not Unfitting |
| Chronic Low Back Pain | Not Unfitting |
| ↓No Additional MEB/PEB Entries↓ |
| **Combined: 0%** | **Combined: N/A** |

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 Disability Evaluation System (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). 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.

Lumbosacral Strain Condition. The CI injured his back in January 1999 when he fell 35 feet from a pole while in training. The pain was primarily in his back, but later he developed some radiation into his left thigh and some intermittent left thigh numbness. He was treated with physical therapy and medication. Neurosurgical evaluation revealed a superior endplate fracture of L4, but no surgical disease. Neurosurgery recommended proceeding to a MEB. In the 4 June 2001 MEB narrative summary (NARSUM), the examiner noted back pain worse with sitting and running, with occasional pain and numbness in the left leg. There were no bowel or bladder complaints. On examination there were no neurologic deficits. Straight leg raising was negative. Gait was normal. Range-of-motion (ROM) was not documented. An MRI showed L3-L4 degenerative changes with a central disc bulge. The examiner diagnosed superior end plate fracture of L4, L3-L4 degenerative disc disease, and chronic low back pain, and opined that the CI was not deployable. The examiner stated, “given the length of time since the injury and the persistence of his symptoms, it is not expected that his pain will resolve spontaneously. His physical activity should be limited as tolerated.” The 10 August 2001 PEB found the CI fit for duty. The CI rebutted the findings. On 19 September 2001 the PEB considered the rebuttal. The IPEB made no changes to its findings but did recommend a FPEB. On 3 October 2001, the CI underwent another NARSUM evaluation. The CI’s symptoms were unchanged. On examination, there was tenderness over L4-L5 with “diminished ROM with flexion and extension.” Neurological examination was normal. An electromyogram (EMG) was also normal, confirming the absence of neuropathy or nerve root involvement. The examiner agreed with the original NARSUM diagnoses and stated, “my recommendation stands along with [the first NARSUM examiner] that the patient is not fit for mobility or world wide duty and should perform physical activity as tolerated.” On 6 November 2001, the FPEB found the CI unfit under VASRD Code 5295 lumbosacral strain at 0%. The FPEB noted that the CI “has a well documented history of an injury and objective evidence of a fracture and degenerative disc disease. The member’s pain complaints are consistent in type and severity with this kind of injury.”

The Physical Disability Board of Review (PDBR) carefully reviewed all evidentiary information available. No additional treatment records, VA or civilian, are available for the Board to review. There were no goniometric ROM examinations in evidence for the Board to consider. The 2001 Veterans Administration Schedule for Rating Disabilities (VASRD) coding and rating standards for the spine, which were in effect at the time of separation, were modified on 23 September 2002 to add incapacitating episodes (5293 Intervertebral disc syndrome), and then changed to the current §4.71a rating standards on 26 September 2003.

There was only vague documentation of limited spine motion in the records available to the Board however there was ample documentation of painful motion. There was no evidence of intervertebral disc syndrome. There was no evidence of peripheral nerve impairment and this is confirmed by a normal EMG test. While there was evidence of a superior end plate fracture of the L4 vertebrae, this is a stable finding and did not result in any demonstrable deformity of the vertebral body. Muscle spasm was not documented. Since there was no vertebral deformity, spinal ankylosis, intervertebral disc syndrome, peripheral nerve impairment, or measured loss of motion, the Board agreed with the PEB decision to rate the CI’s back pain condition under code 5295 lumbosacral strain.

5295 Lumbosacral strain:

Severe; with listing of whole spine to opposite side, positive

Goldthwaite's sign, marked limitation of forward bending in

standing position, loss of lateral motion with osteoarthritic

changes, or narrowing or irregularity of joint

space, or some of the above with abnormal mobility on forced

motion....................................................... 40

With muscle spasm on extreme forward bending, loss of lateral

spine motion, unilateral, in standing position............... 20

With characteristic pain on motion............................ 10

With slight subjective symptoms only.......................... 0

The Board opined that the CI had more than slight subjective symptoms. There was characteristic pain on motion, but there was no evidence of muscle spasm severe enough to cause loss of lateral spine motion. While a case could be made for rating the CI’s back condition under code 5292 limitation of lumbar motion, any decision by the Board using this code would be purely speculative since lumbar motion is only vaguely documented. A case could also be made for coding the back pain under code 5099-5003 for painful motion. Under this code a 10% rating could be justified since there was documented pain with motion, but it would not lead to a higher rating than that already adjudicated by the Board under code 5295. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 10% for the back pain condition, Code 5295 lumbosacral strain.

Remaining Conditions. Other conditions identified in the DES file were a left varicocele and a chipped bone in the right foot. Neither of these conditions were significantly clinically or occupationally active during the MEB period, neither carried attached duty limitations, and neither was implicated in the non-medical assessment. These conditions were reviewed by the action officer and considered by the Board. It was determined that neither 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. 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 the lumbosacral strain condition, the Board unanimously recommends a permanent service disability rating of 10%, coded 5295 IAW VASRD §4.71a. In the matter of the left varicocele and chipped bone in the right foot 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, effective as of the date of his prior medical separation:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Lumbosacral Strain | 5295 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110802, w/atchs

Exhibit B. Service 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 19 Mar 12

 (c) PDBR ltr dtd 15 Mar 12

 (d) PDBR ltr dtd 22 Mar 12

 (e) PDBR ltr dtd 22 Mar 12

1. Pursuant to reference (a) I approve the recommendations of the Physical Disability Board of Review 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. Placement on the Temporary Disability Retired List with a 70 percent disability rating for the period 31 August 2005 through 27 February 2006 followed by placement on the Permanent Disability Retired List with a final rating of 50 percent effective 28 February 2006.

 b. Placement on the Temporary Disability Retired List with 60 percent disability rating for the period 5 August 2008 through 4 February 2009 followed by assignment to the Permanent Disability Retired List with a 40 percent disability rating effective 5 February 2009.

 c. Disability separation with entitlement to disability severance pay with a rating of 20 percent (increased from 10 percent) effective 30 April 2002.

 d. Disability separation with entitlement to disability severance pay with a rating of 10 percent (increased from zero percent) effective 18 January 2002.

3. Please ensure all necessary actions are taken to implement these decisions, including 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)