RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1100643 SEPARATION DATE: 20070531

BOARD DATE: 20120314

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Sgt/E-5 (0861/Artillery Scout Observer), medically separated for lumbar degenerative disk disease (DDD)*.* The CI began to experience low back pain (LBP) with radiation to his right leg and foot after combat operations in Fallujah, Iraq in 2004. He continued to have radicular LBP pain despite aggressive, conservative treatment and was not able to fulfill the physical demands within his Military Occupational Specialty (MOS) or meet physical fitness standards. The CI was placed on limited duty (LIMDU) and underwent a Medical Evaluation Board (MEB). The MEB forwarded “lumbago and degeneration of lumbar or lumbosacral intervertebral disc” on NAVMED 6100/1 to the Physical Evaluation Board (PEB). 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 “lumbago and degeneration of lumbar or lumbosacral intervertebral disc” condition as fit to continue on active duty. The CI appealed to a reconsideration PEB which adjudicated “lumbar DDD” condition as unfitting, rated with the disability code of 5243 at 10% IAW with the Veterans Administration Schedule for Rating Disabilities (VASRD) and “lumbar radiculopathy and lumbago” as category II (“conditions that contribute to the unfitting condition”). The CI was then medically separated with a 10% disability rating.

CI CONTENTION: The CI stated “I was discharged prior to the implementation of policy guidance for the disability evaluation system. I had a host of physical and mental disabilities which were not considered as part of my unfitting conditions. I have since been treated, evaluated and have been given a Department of Veteran's (sic) Affairs disability rating for these conditions.” 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 (Recon) IPEB – Dated 20070326** | | | **VA (3 Mo. After Separation) – All Effective Date 20070601** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Lumbar DDD | 5243 | 10% | Degenerative Joint Disease, Lumbar Spine | 5242 | 10% | 20070831 |
| Lumbago | Category II | |
| Lumbar Radiculopathy | Category II | | Radiculopathy, Right Leg… | 8621 | 10% | 20070831 |
| ↓No Additional MEB/PEB Entries↓ | | | Post Traumatic Stress Disorder | 9411 | 30%\* | 20070831 |
| Not Service Connected x 3 | | | 20070831 |
| **Combined: 10%** | | | **Combined: 40%\*\*** | | | |

\*PTSD increased to 50% from 20100622;

\*\*From 20100622; Post Traumatic Migraine Headaches to 30% Chronic Right Shoulder Rotator Cuff to 10%; Cervical Spine Degenerative Disc Disease to 10%; Chronic Right Knee Patellofemoral Chondromalacia to 10%; Left Ankle Degenerative Joint Disease; Tinnitus to 10% **Combined 80%**

ANALYSIS SUMMARY: The Board acknowledges the CI’s contention that suggests service ratings should have been conferred for other conditions documented at the time of separation. 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. 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. However the Department of Veterans’ Affairs (DVA), operating under a different set of laws (Title 38, United States Code), is empowered to compensate all service-connected conditions and to periodically reevaluate said conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment vary over time.

Low Back Condition. The CI suffered atraumatic low back pain (LBP) with radiculopathy to his right leg greater than left leg for over two years. He was seen by specialists in the orthopedic spine and pain management clinic (PMC). MRI’s documented disc protrusion right paracentrally at L5-S1 with some narrowing and minimal dorsal displacement of the S1 nerve root and L4-5 mild degenerative changes. There were no electro diagnostic tests in evidence for review. He was deemed a nonsurgical candidate and aggressively treated to include medications (non-steroidal, muscle relaxants, and narcotics), chiropractic care, physical therapy and epidural injections. LIMDU restrictions included no lifting greater than 15 lbs, bending, twisting, prolonged standing or sitting, group physical training or physical training test. His non-medical assessment (NMA) documented his non-deployable status and not meeting height and weight standards. There were two complete goniometric range-of-motion (ROM) evaluations and one limited goniometric ROM in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation.

|  |  |  |  |
| --- | --- | --- | --- |
| Goniometric ROM - Thoracolumbar | PMC ~ 7 Mo. Pre-Sep  (20061009) | MEB ~ 4 Mo. Pre-Sep  (20070129) | VA C&P ~ 3 Mo. After-Sep  (20070831) |
| Flex (0-90) | 80⁰ | 90⁰ | 75⁰ |
| Ext (0-30) | 30⁰ | 45⁰ | 10⁰ |
| R Lat Flex (0-30) | N/A | 30⁰ | 30⁰ |
| L Lat Flex 0-30) | N/A | 30⁰ | 20⁰ |
| R Rotation (0-30) | Not Measured | 40⁰ | 25⁰ |
| L Rotation (0-30) | Not Measured | 40⁰ | 25⁰ |
| COMBINED (240) | N/A | 240⁰ | 185⁰ |
|  | Pain on ROM; sensory/motor intact; lumbar. | No tenderness, nl gait,  nl spinal contour; motor/sensory intact, SLR negative | Mild tenderness to palpation (TTP) and muscle spasm; Straight Leg Raise(SLR) positive |
| §4.71a Rating | 10% | 10%\* | 10% |

\*Conceding §4.40

The MEB examiner documented LBP with radiation described 3 to 8/10 with 10 being the worst, exacerbated with high impact activities and prolonged sitting or standing. The physical examination findings revealed a normal motor and sensory exam. The VA Compensation & Pension (C&P) examination documented constant localized pain in the right lower back along with radicular symptoms in the right leg with flares to an 8/ 10 causing him to self treat with prolonged bed rest. The physical examination findings revealed tenderness to palpation (TTP) and muscle spasm in the paraspinal muscles and painful ROM along with radicular pain. Motor and sensory exams were not completed. The PEB and VA chose different coding options for the condition, but this did not bear on rating. The VA additionally coded the radiculopathy, right leg at 10%, coded 8621 IAW §4.124a schedule of ratings –neurological conditions and convulsive disorder. 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. The sensory component in this case has no functional implications and there was no motor impairment. Since no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on nerve impairment. The Board considered an avenue for a higher rating based on the formula for rating intervertebral disc syndrome and agreed the evidence did not reveal incapacitating episodes requiring bed rest prescribed by a physician and treatment by a physician. After due deliberation, there is not reasonable doubt in the CI’s favor supporting a change from the reconsideration PEB’s rating decision for the lumbar DDD.

Other PEB Conditions. The reconsideration PEB adjudicated “lumbar radiculopathy and lumbago” as category II (“conditions that contribute to the unfitting condition”). Lumbar radiculopathy was discussed under the low back condition. Lumbago, back pain, was considered under the general spine rating as specified in §4.71a and IAW VASRD §4.14 (avoidance of pyramiding) an evaluation of the same disability under various diagnoses is to be avoided. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for any of the stated conditions.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for posttraumatic stress disorder (PTSD). This condition was reviewed by the action officer and considered by the Board. The CI was seen for mental health care for insomnia and depression after returning from Iraq but a formal diagnosis of PTSD was not established nor was it in the DES file. By policy and precedent the Board has limited its jurisdiction for recommending unadjudicated conditions as unfitting and subject to additional separation rating to those conditions which are evidenced in the core DES file. The core DES file consists of the MEB referral document the PEB adjudication document, the NARSUM (including any addendums or referenced examinations), the MEB physical exam, the NMA, the LIMDU’s and any written appeals or internal DES correspondence. Contended conditions which are not eligible for Board recommendations on this basis remain eligible for submission to the Board for Correction of Naval Records (BCNR).

Remaining Conditions. Other conditions identified in the DES file were fatty lipoma removed from lower back, right shoulder pain and s/p testicular cancer. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were significantly clinically or occupationally active during the MEB period; none carried attached duty limitations or LIMDU; 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. 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. In the matter of the lumbar DDD condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication at separation. In the matter of the lumbar radiculopathy and lumbago conditions, the Board unanimously recommends no change from the PEB adjudications as not unfitting. In the matter of the fatty lipoma removed from lower back, right shoulder pain, s/p testicular cancer and PTSD 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, therefore, recommends that there be no recharacterization of the CI’s disability and separation determination, as follows:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Lumbar DDD | 5243 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110809, 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 2 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 individuals’ 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)