RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: MARINE CORPS

CASE NUMBER: PD1100687 SEPARATION DATE: 20090429

BOARD DATE: 20120730

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty LCpl/E-3 (0311 / Rifleman), medically separated for a lower back condition (status post (s/p) fusion L4-5 and L5-S1 for HNP). The CI was involved in a motor vehicle crash in May 2007 where he sustained an L2 wedge compression fracture multi-level lower back herniated discs (HNP). He was initially treated with a brace, physical therapy and epidural steroids. In May 2008, he underwent a laminectomy with posterior interbody fusions using cages, screws and rods, but he continued to have low back pain and stiffness. 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). “Nonallopathic lesions of lumbar region, not elsewhere classified; unspecified orthopedic aftercare and lumbago” were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. Only lower spine conditions appeared on the MEB’s submission. The PEB adjudicated the S/P fusion L4-5 and L5-S1 for HNP condition as unfitting, rated 20%, with application of the Veterans Administration Schedule for Rating Disabilities (VASRD). Additionally, the PEB adjudicated the “L2 vertebral fractured healed” condition as Category III (not separately unfitting and do not contribute to the unfitting condition). The CI made no appeals, and was medically separated with a 20% combined disability rating.

CI CONTENTION:The CI states: “CONSTANT PAIN IN LOWER BACK, VERY HARD TIME SLEEPING AT NIGHT, ANYTIME I SIT OR LIE DOWN IN ONE POSITION FOR TOO LONG MY BACK LOCKS UP, HAVING A HARD TIME FINDING A PART-TIME JOB DUE TO LACK OF BEING ABLE TO LIFT 50 POUNDS, HAVE A HARD TIME PAYING ATTENTION IN CLASS DUE TO CONSTANTLY HAVING TO CHANGE MY POSITION IN MY DESK.”

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in DoDI 6040.44, Enclosure 3, paragraph 5.e.(2) is limited to those conditions which were determined by the PEB to be specifically unfitting for continued military service; or, when requested by the CI, those condition(s) “identified but not determined to be unfitting by the PEB.” The ratings for unfitting conditions will be reviewed in all cases. The condition of S/P Fusion L4-5 and L5-S1 for HNP and L2 vertebral fracture healed are considered as requested for consideration and meet the criteria prescribed in DoDI 6040.44 for Board purview and, are addressed below. 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).

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service PEB – Dated 20090225** | **VA (4 Mos. Pre-Separation) – All Effective 20090430** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| S/P Fusion L4-5 and L5-S1 for HNP | 5241 | 20% | Post Op. Fracture L2, Lumbar Spine/Herniated …  | 5241 | 20% | 20081212 |
| L2 Vertebral Fracture Healed | Cat III |
| ↓No Additional MEB/PEB Entries↓ | Scar, Lumbar Spine | 7804 | 0% | 20081212 |
| 0% x 1/Not Service-Connected x 0 | 20081212 |
| **Combined: 20%** | **Combined: 20%** |

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. It is a fact, however, that the Disability Evaluation System (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. This role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA). The Board utilizes DVA evidence proximal to separation in arriving at its recommendations; and, DoDI 6040.44 defines a 12-month interval for special consideration to post-separation evidence. The Board’s authority as defined in DoDI 6040.44, however, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

S/P Fusion L4-5 and L5-S1 for HNP Condition. This includes all thoracolumbar disability (and diagnoses) that are ratable IAW VASRD §4.71a., under the general rating formula for diseases and injuries of the spine (specifically includes any contribution from the healed L2 vertebral fracture). There were two goniometric range-of-motion (ROM) evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation.

|  |  |  |
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| Thoracolumbar ROM | MEB ~6 Mo. Pre-Sep | C&P ~4 Mo. Pre-Sep |
| Flexion (90⁰ Normal) | 45⁰ | 35⁰ |
| Ext (0-30) | 20⁰ | 10⁰ |
| R Lat Flex (0-30) | 10⁰ | 15⁰ |
| L Lat Flex 0-30) | 10⁰ | 15⁰ |
| R Rotation (0-30) | 45⁰ (30⁰) | 20⁰ |
| L Rotation (0-30) | 45⁰ (30⁰) | 20⁰ |
| Combined (240⁰) | 145⁰ | 115⁰ |
| Comment | Normal gait; motor/reflexes normal | Gait & posture normal; + tenderness; - SLR bilat; no spasms; no pain radiation on movement; sensory/motor normal |
| §4.71a Rating | 20% | 20% |

At the MEB exam, the CI reported continued back pain and stiffness with limitations in bending running or performing strenuous physical activity. There was no radicular pain or leg symptom. Imaging indicated good healing with retained hardware and post-surgical changes. The MEB exam indicated well healed scars with limited ROM as charted above. The examiner summarized as “in his personal life he is restricted from most leisure activities and will be unable to perform but basic household work. He suffers from daily episodes of pain requiring intermittent use of non-steroidal anti-inflammatory drugs, acetaminophen, and occasional narcotics.”

At the VA Compensation and Pension (C&P) exam prior to separation, the CI reported similar history and complaints of constant lower back stiffness and pain with variation; “it does not travel.” Pain was aggravated by physical activity or “sitting or lying too long (specified as 5 minutes).” There was no period of incapacitation outside of the surgery period. The pain limited ROM and back exam is charted above. The examiner specified: “with repetitive use of his back, he does have pain. There is no fatigue, weakness, lack of endurance, or incoordination. There is no additional limitation of motion.”

The Board directs attention to its rating recommendation based on the above evidence. Both the PEB and VA used the same coding of 5241, spinal fusion, and both arrived at a 20% disability rating. The general formula for rating the spine included symptoms such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease. There were no periods of incapacitation in evidence. All evidence indicated the CI’s met and did not exceed the 20% rating criteria for “forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees” (VA exam also had combined ROM not greater than 120 degrees).

After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board concluded that there was insufficient cause to recommend a change in the PEB 20% adjudication for the lower back (S/P fusion L4-5 and L5-S1) condition.

Contended PEB Conditions. The other condition forwarded by the MEB and adjudicated as not unfitting by the PEB was L2 vertebral fracture healed. This condition of the lumbar spine was fully considered in rating the CI’s unfitting thoracolumbar condition above. The condition is therefore not separately compensable. There was no benefit to the CI in either changing the unfitting condition description to include the L2 condition, or recommending it be changed to a related non-compensable Category II condition. After due deliberation, in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB fitness determination for the L2 vertebral fracture healed condition; and, therefore, no additional disability ratings can be recommended.

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 S/P Fusion L4-5 and L5-S1 for HNP and L2 vertebral fracture healed conditions, and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudications. There were no other conditions within the Board’s scope of review for consideration.

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** |
| S/P Fusion L4-5 and L5-S1 for HNP | 5241 | 20% |
| L2 Vertebral Fracture Healed | Not Separately Unfitting |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110826, 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 16 Aug 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 that 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 Physical Evaluation Board:

* former USMC
* former USN
* former USN
* former USN
* former USMC
* former USN

 Assistant General Counsel

 (Manpower & Reserve Affairs)