RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxxxxxxxxxx BRANCH OF SERVICE: navy

CASE NUMBER: PD1100707 SEPARATION DATE: 20021220

BOARD DATE: 20120710

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Seaman (E-3/EW, Electronic Warfare Technician) medically separated for a low back condition. He declined multiple conservative treatment modalities to include heat, ultrasound and epidural injections and surgical intervention therefore was unable to fulfill the physical demands within his Rating or meet physical fitness standards. He was placed on limited duty (LIMDU) for 8 months and underwent a Medical Evaluation Board (MEB). Low Back Pain (LBP) and L5-S1 herniated nucleus pulposus (HNP) were forwarded to the Physical Evaluation Board (PEB) IAW SECNAVINST 1850.4E. No other conditions appeared on the MEB’s submission. The PEB adjudicated the L5-S1 HNP condition as a Category I unfitting condition rated at 10% and LBP as a Category II condition (one that contributes to the unfitting condition), with application of SECNAVINST 1850.4E and the Veterans’ Administration Schedule for Rating Disabilities (VASRD), respectively. The CI made no appeals, and was medically separated with a combined 10% disability rating.

CI CONTENTION: The CI elaborated no specific contention in his application.

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. 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 20021030** | **VA (2 Mo. Pre Separation) – All Effective Date 20021221** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| L5-S1 HNP | 5293 | 10% | L5-S1 Herniated Disc  | 5293 | 40% | 20021031 |
| Low back pain | Category II |
| ↓No Additional MEB/PEB Entries↓ | 0% x 0/Not Service-Connected x 0 | NA |
| **Combined: 10%** | **Combined: 40%** |

Low Back Condition. The Board deliberated the L5-S1 HNP and the associated LBP together as one condition. The CI sought care for a traumatic radiating LBP in January 2001 soon after entry into service. After a thorough evaluation with orthopedics and radiographs he was diagnosed with L5-S1 HNP (central) and was treated with physical therapy and with anti-inflammatory (Celebrex) and narcotic based (Ultram) medications. The CI had good relief with Ultram but continued with pain and declined further conservative treatment including epidural injections or surgical intervention. His non-medical assessment (NMA) documented that he was not working in his Rating due to the intake of certain medications that limited his ability to work around machinery. His limitations included no bending, lifting, carrying greater than five pounds, crouching, twisting, or turning. 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 as summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Goniometric ROM - Thoracolumbar | PT ~ 7 Mo. Pre-Sep | VA C&P ~ 2 Mo. Pre-Sep |
| Flex (0-90) | 80⁰ | 85⁰ |
| Ext (0-30) | 10⁰ | 30⁰ |
| R Lat Flex (0-30) | 30⁰ | 30⁰ (40⁰) |
| L Lat Flex 0-30) | 30⁰ | 30⁰ (40⁰) |
| R Rotation (0-30) | 30⁰ (40⁰) | 30⁰ (35⁰) |
| L Rotation (0-30) | 30⁰ (40⁰) | 30⁰ (35⁰) |
| COMBINED (240) | 210⁰ | 235⁰ |
| Comment |  | Normal Gait |
| §4.71a Rating | 10% | 10% |

\*Although some actual measurements noted in parentheses exceeded normal ROMs, they

cannot exceed the maximum for rating purposes.

At the MEB exam, the CI reported LBP 9/10 on a pain scale which radiated with an associated numbness to both his thighs. The MEB physical exam demonstrated mild lumbar tenderness, the ability to toe touch to the mid anterior tibia with minimal pain, toe and heel walk, and side bend, a negative straight leg raises, and normal neuromuscular findings. Magnetic resonance imaging (MRI) revealed a centrally located L5-S1 HNP that was impinging on the central spinal canal. The medical examiner opined the CI had maximized his benefit from outpatient physical therapy and he had declined any further kind of treatment that would benefit his condition. Due to this unwillingness to accept treatment, the examiner recommended the CI be found unfit for duty and referred him to a PEB. At the VA Compensation and Pension (C&P) exam prior to separation, the CI reported similar symptoms as the MEB. Additionally, he reported the back flared upon lifting heavy weights and bending, and that he had lost one to two hours of work in the last 2 to 3 months. He further reported he was able to do daily activity with minimal restriction. The C&P physical exam documented similar findings to the MEB, and a normal gait. The examiner opined the L5-S1 HNP with intermittent nerve root impingement limited the CI’s motion and restricted his function due to pain.

The Board directs attention to its rating recommendation based on the above evidence. The Board notes that both the MEB and VA exams were complete, well documented and similar in terms of ratable data and therefore assigns them equal probative value. The PEB and VA chose the same coding options for the condition, and based their rating recommendations on the 2002 VASRD coding and rating standards for the spine which were in effect at the time of CI’s separation. These were modified on 23 September 2002 to add incapacitating episodes (code 5293, intervertebral disc syndrome (IDS)), and then changed to the current §4.71a rating standards in September 2003. The 2002 standards for rating based on 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. For the reader’s convenience, the 2002 rating codes under discussion in this case are excerpted below. When older cases have goniometric measurements in evidence and when the VASRD 2001 code 5292 (for limitation of motion, lumbar spine) is applicable, the Board reconciles (to the extent possible) its opinion regarding degree of severity for rating under code 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.

**5292** Spine, limitation of motion of, lumbar:

Severe ………………………………………………………..……….………….... 40

Moderate …………………………………….……………….…….…………...…. 20

Slight ………………………………………………………..…………………...….10

**5293** Intervertebral disc syndrome:

Pronounced; with persistent symptoms compatible with: sciatic

 neuropathy with characteristic pain and demonstrable muscle

 spasm, absent ankle jerk, or other neurological findings appropriate

 to site of diseased disc, little intermittent relief ………………..….……….….. 60

Severe; recurring attacks, with intermittent relief ……………..…….………..….…40

Moderate; recurring attacks ……………………………….……………............…...20

Mild ……………………………………………………………..…………….….…10

Postoperative, cured …………………………………….………..……………....…..0

**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 osteo-arthritic

 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 PEB assigned a 10% rating coded 5293 (IDS) for mild pain with no objective painful motion. The VA assigned a 40% rating coded 5293 (IDS) based on incapacitating episodes having a duration of at least 4 weeks but less than 6 weeks during the past 12 months, defining an incapacitating episode as a period of acute signs and symptoms due to IDS that requires bed rest and treatment prescribed by a physician. The VA coded the low back condition with the VASRD 2002 code yet erroneously applied the September 2003 IDS definition in its rating decision. The challenge before the Board was to carefully review the C&P exam and the service treatment record (STR) for evidence of a disability meeting 40% rating criteria under the old spine rules (severe recurring attacks, with intermittent relief) and the new spine rules which came into effect in September 2003. While there was evidence of multiple light duty chits in the STR there was no evidence of hospitalizations, emergency room visits or quarters slips. In fact, the C&P exam clearly documented a loss of 1-2 hours of work in a 2 to 3 month time frame which the Board agreed was not consistent with severe recurring back disease. The Board looked for higher ratings using the 5292 or 5295 codes but there was insufficient evidence to justify a higher rating under these codes. There was also no evidence of ratable peripheral nerve impairment which would provide for additional or higher rating. 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 adjudication for the low back condition.

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 low back condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. 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:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| L5-S1 HNP | 5293 | 10% |
| **COMBINED** | **10%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110829, 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 13 Jul 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’s Physical Evaluation Board:

 - former USN

 - former USN

 - former USMC

 - former USMC

 - former USN

 - former USMC

 Assistant General Counsel

 (Manpower & Reserve Affairs)