RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Marine Corps

CASE NUMBER: PD1100710 SEPARATION DATE: 20040727

BOARD DATE: 20120821

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Second Class Petty Officer/E-5 (IT2/Information Systems Technician Second Class), medically separated for chronic axial neck pain, following cervical discectomy. The CI did not improve adequately with treatment to meet the physical requirements of his Rating or satisfy physical fitness standards. He was placed on limited duty (LIMDU) and referred for a Medical Evaluation Board (MEB). The MEB forwarded no other conditions for Physical Evaluation Board (PEB) adjudication. The PEB adjudicated the chronic axial neck pain, following cervical discectomy condition as unfitting, rated 10%, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “The VA gave me 30% for the disability in which the Navy MEB'd me for. I think the DoD should have considered painful motion, loss of work, limitations in occupational and social functioning, etc when determining a percentage given to seperating [*sic*] service men and women like what the VA had done. I have not felt right by the DoD's decision ever since it was made and deserve a medical returement [*sic*] due to my disabilities.” The CI also stated “Even if I was only MEB'd by the Navy for my C6-C7 fusion, I have 12 disabilities that are service connected and 1 more that will more than likely be approved soon at 50% (Sleep Apnea) by the VA due to my service at a total rating of 70% (90% S/C with sleep apnea if given 50%, which they should because I use a CPAP machine). I would think that the DoD should have retired me at 30% or higher.”

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 other requested conditions are not within the Board’s purview. 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.

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RATING COMPARISON:

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| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20040407** | | | **VA (2.5 Mos. Pre-Separation) – All Effective Date 20040728\*** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Neck Pain . . . . . | 5243 | 10% | Cervical Fusion | 5241 | 30%\* | 20040511 |
| ↓No Additional MEB/PEB Entries↓ | | | DJD Right Knee | 5010 | 10% | 20040511 |
| GERD | 7346 | 10% | 20040511 |
| GAD | 9400 | 10% | 20040511 |
| 0% X 5 / Not Service-Connected x 2 | | | 20040511 |
| **Combined: 10%** | | | **Combined: 50%\*** | | | |

\*VARD 20001215 rated Thoracic Strain @ 10%.; increased Thoracic Strain to 20%. Effective date on both VARDS was 20000711, the day after CI’s separation from the USMC. CI enlisted in the Navy on 20010129 and his VA rating was discontinued. VA ratings in the chart above became effective the day after his date of separation from the Navy.

ANALYSIS SUMMARY: The Disability Evaluation System (DES) is responsible for maintaining a fit and vital fighting force. 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. 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 nor for conditions determined to be service-connected by the Department of Veterans’ Affairs (DVA), but not determined to be unfitting by the PEB. However the DVA operating under a different set of laws (Title 38, United States Code), is empowered to compensate all service-connected conditions and to periodically re-evaluate said conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment vary over time. The Board’s role is confined to the review of medical records and all evidence at hand to assess the fairness of PEB rating determinations, compared to VASRD standards, based on severity at the time of separation.

Chronic Axial Neck Pain Condition. The CI developed chronic neck attributed to an undocumented automobile accident in 1995. Pain was intermittently controlled with conservative measures. In 2002 the CI developed signs of numbness and tingling (neuropathy) in the right arm. A magnetic resonance imaging (MRI) obtained in March 2003 demonstrated a large disc between the lower neck vertebral bodies, C6 and C7, significantly compressing the nerve root to the arm. In June 2003 the CI underwent operative removal of the disc and fusion of the two vertebral bodies. Post-operatively the neuropathy in the right arm resolved but the CI developed chronic neck pain. A 19 November 2003 clinic examination recorded full neck range-of-motion (ROM). A physical therapy examination on 28 February 2004 recorded nearly full cervical spine flexion to within two finger breadths of the chest with normal motion in other directions. At the MEB NARSUM examination, March 2004, the CI noted neck pain related to activity increasing with weight bearing and improved with rest. He reported no radiation of pain to his extremities, no numbness or weakness. The MEB physical exam findings documented normal ROM of the cervical spine, no neuropathy and normal strength, sensation and reflexes in the upper extremities.

At the VA Compensation and Pension (C&P) exam, approximately 3 months prior to separation, the CI reported a burning aching pain in his neck rated 4 -5/10 elicited by activity and stress. Pain was relieved by combinations of rest and medication. He noted that he had been recommended bed rest three to four times a month. The VA examiner reported that the functional impairment is limited ROM and unable to perform heavy lifting. The CI noted he could function with pain medication. On physical examination gait and posture were normal. The cervical spine ROM was decreased to 20 degrees flexion without ankylosis. There was no tenderness, no radiation of pain on motion, and no muscle spasm present. Neurologic, strength, and sensory evaluations were normal.

The Board directs attention to its rating recommendation based on the above evidence. The PEB rated the neck condition 5243, intervertebral disc syndrome, at 10% for painful, but not reduced ROM of the cervical spine. Although the ROM in the C&P examination supported a 20% rating under the general rating formula for diseases and injuries of the spine, the VA rated the neck condition (5241 spinal fusion) at 30% citing the adjudicator’s judgment that the neck functional impairment more nearly approximated the 30% rating. A 20% rating is supported by flexion of the cervical spine greater than 15 degrees but not greater than 30 degrees. The Board notes that a 30% rating requires flexion of the cervical spine 15 degrees or less or favorable ankylosis of the entire cervical spine. A higher rating of 40% under this code would require unfavorable ankylosis of the entire cervical spine, a condition not supported by the record. The Board observes the ROM values reported by the VA examiner, 2 1/2 months prior to separation, are significantly worse than those reported by the MEB dated 5 months prior to separation. There is no record of recurrent injury or other development in explanation of the more marked impairment reflected by the VA measurements. Upon deliberation the Board agreed, in this case, the clinical findings on the C&P examination of absent paraspinous muscle tenderness and spasm, the normal gait and posture and ability to function with pain medications were inconsistent with the degree of functional disability suggested by the ROM measurement. The Board agreed that a lower degree of disability, more reflective of the anticipated severity suggested by the clinical pathology, was present. Upon deliberation the Board agreed in this case that the MEB examination was more consistent with outpatient notes demonstrating normal ROM, and is more reflective of the anticipated severity suggested by the clinical pathology at the time of separation. The Board is therefore relied more heavily on the MEB NARSUM examination.

The Board considered a higher rating of 20% IAW §4.45 (DeLuca). The Board noted the C&P documentation that pain was relieved by medication and that the CI could function with pain medication. The Board found no evidence in the service treatment records that impairment exceeded that represented by the MEB examination. The Board thus concluded that no rating increase was indicated. The Board considered a rating based under incapacitating episodes/intervertebral disc syndrome. Episodes of incapacitation are defined as periods of acute signs and symptoms due to disc disease that require bed rest prescribed by a physician. The commander’s statement addresses no episodes of incapacitation. Service treatment records document the CI was placed on quarters by treating health professionals on one occasion for the neck condition for a total of 3 days in the 12-month period prior to separation. Rating using the alternate formula for incapacitating episodes based on placement on quarters does not achieve a 10% rating and provides no additional benefit to the CI. There was no evidence of unfitting peripheral nerve impairment due to radiculopathy in this case. 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 chronic neck pain 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 chronic neck pain 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:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Axial Neck Pain, Following Cervical Diskectomy | 5243 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110811, 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 19 Sep 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 individual’s 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:

- XXXX former USMC

- XXXX former USMC

- XXXX former USMC

- XXXX former USN

Assistant General Counsel

(Manpower & Reserve Affairs)