RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxxx BRANCH OF SERVICE: MARINE CORPS

CASE NUMBER: PD1100756 SEPARATION DATE: 20090930

BOARD DATE: 20120606

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Corporal/E-4 (3796/Food Service Specialist), medically separated for lumbago. The CI did not improve adequately with treatment to meet the physical requirements of her Rating or satisfy physical fitness standards. She was placed on limited duty and underwent a Medical Evaluation Board (MEB). Lumbago was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. Lumbar disc bulge and cervicalgia were also forwarded on the MEB submission to the PEB. The PEB founded the CI fit for continued duty. On reconsideration, the PEB adjudicated the lumbago condition as unfitting, rated 10% with application of SECNAVINST 1850.4E. The small lumbar disc bulge of L5-S1 was determined to be related to the unfitting condition, and the cervicalgia condition was determined to be not unfitting. The CI made no appeals and was medically separated with a 10% combined disability rating.

CI CONTENTION: “I had several other issues that were not looked at during my PEB board. I have attached my rating from the Veteran Affairs Office.”

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 conditions “identified but not determined to be unfitting by the PEB.” The ratings for unfitting conditions will be reviewed in all cases. The small lumbar disc bulge and cervicalgia conditions as requested for consideration meet the criteria prescribed in DoDI 6040.44 for Board purview; and, are addressed below, in addition to a review of the ratings for the unfitting lumbago condition. The remaining conditions rated by the Department of Veterans; Affairs (DVA) at separation 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 (BCNR).

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service PEB – Dated 20090331** | **VA (4 Mo. After Separation) – All Effective 20091001** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Lumbago  | 5237 | 10% | Lumbar Strain | 5237 | 10% | 20100104 |
| Small Lumbar Disc Bulge of L5-S1 | Cat II |
| Cervicalgia | Cat III | Not VA Rated |
| ↓No Additional MEB/PEB Entries↓ | PTSD | 9411 | 50% | 20100203 |
| Left Hip Pain | 5252 | 10% | 20100104 |
| Left Knee Strain | 5260 | 10% | 20100104 |
| Left Achilles Tendonitis | 5271 | 10% | 20100104 |
| 0% x 2/Not Service-Connected x 10 | 20100104 |
| **Combined: 10%** | **Combined: 70%** |

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 VA but not determined to be unfitting by the PEB. However the VA, 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.

Lumbago Condition. The CI experienced chronic low back pain (LBP) since 2004 that was initially intermittent but became chronic in 2006 during a pregnancy. The CI was also involved in motor vehicle crashes about once a year from 2004 to 2008. Magnetic resonance imaging (MRI) in 2008 demonstrated a small posterior disc bulge at L5-S1 without any significant canal or neuroforaminal compromise. The MEB narrative summary (NARSUM) dated 10 Jun 2008, was 15 months before separation. On examination, gait and stance were normal. Strength and reflexes were normal. Straight leg raising was reported as negative by the examiner. Sensory examination was noted for decreased pin prick sensation of the left lateral calf and foot, and the right anterior thigh. The NARSUM documented only the motion that was painless: “She is able to extend to approximately 10 degrees and flex to approximately 55 degrees before the onset of pain;” but the examiner did not document the entire range-of-motion (ROM) the CI was capable of performing and the examination is therefore of limited probative value.

The VA Compensation and Pension (C&P) examination, 4 January 2010, 3 months after separation, was closer to the time of separation, was a complete examination and is therefore afforded a higher probative value by the Board. The C&P examination documented normal gait and posture. There was no guarding of movement, and no radiating pain on movement. There was tenderness but no muscle spasm. Muscle tone and strength were normal without atrophy. There were no sensory deficits, and reflexes were normal. Spinal contour was preserved and spine motion was symmetric with normal curves. Straight leg raising and Lasegue’s sign were negative. Thoracolumbar ROM was normal with pain at end range (flexion 90 degrees, extension 30 degrees, lateral bending 30 degrees bilaterally, and rotation 30 degrees bilaterally). X-rays were normal. The Board directs attention to its rating recommendation based on the above evidence. All members agreed that the preponderance of evidence supported a 10% rating in accordance with VASRD §4.71a standards under the general rating formula for diseases and injuries of the spine. There was no evidence of incapacitating episodes due to intervertebral disc disease that would meet the criteria for a minimum rating under the alternative formula for incapacitating episodes due to intervertebral disease. There was no evidence of ratable peripheral nerve impairment 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 lumbago condition.

Contended PEB Conditions. The contended conditions adjudicated as not unfitting by the PEB were small lumbar disc bulge of L5-S1 and cervicalgia. The Board’s first charge with respect to these conditions is an assessment of the appropriateness of the PEB’s fitness adjudications. The Board’s threshold for countering fitness determinations is higher than the VASRD §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard. The small lumbar disc bulge at L5-S1 is a radiographic finding associated with her back pain condition and is not a condition that is separately ratable. The NARSUM noted a history of neck pain since a motor vehicle crash in May 2008, a month before the examination. On examination there was mild pain over left lateral trapezius region which increased with turning the head to the right. The neck condition was not profiled, implicated in the commander’s statement, or judged to fail retention standards. At the time of the VA C&P examination, 3 months after separation, no complaint of neck pain was documented. All were reviewed by the action officer and considered by the Board. There was no indication from the record that any of these conditions significantly interfered with satisfactory duty performance. 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 any of the contended conditions 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. In the matter of the lumbago condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended small lumbar disc bulge at L5-S1 and cervicalgia conditions, the Board unanimously recommends no change from the PEB determinations as not unfitting. 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** |
| Lumbago  | 5237 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110910, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 x

 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 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 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:

 XXXXXXX, former USN

 XXXXXXX, former USMC

 XXXXXXX, former USMC

 XXXXXXX, former USN

 XXXXXXX, former USN

 XXXXXXX, former USMC

 XXXXXXX, former USN

 XXXXXXXXXX

 Assistant General Counsel

 (Manpower & Reserve Affairs)