RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXX BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1100765 SEPARATION DATE: 20030228

BOARD DATE: 20120426

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (5711/Nuclear, Biological and Chemical Defense), medically separated for lumbar degenerative disc disease (DDD) with low back pain (LBP). The CI underwent surgical (December 2001 minimally invasive intradiscal electrothermal therapy at L5-S1) correction of buldging lumbar disks, with only temporary relief of symptoms. Additional surgery was not recommended. The CI 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 an Army generated L3 profile with limited duty (LIMDU), and underwent a Medical Evaluation Board (MEB). Lumbar DDD with LBP was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. 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 the lumbar DDD with LBP condition as unfitting, rated 20% with application SECNAVINST 1850.4E. The CI made no appeals, and was medically separated with a 20% combined disability rating.

CI CONTENTION: “Follow-on back surgery and pain management from date of discharge to present. Additional VA findings and pending actions. Follow-on physical therapy and pain management provided from the VA. As a civilian now, over the past years, I have taken sick time for my follow-on back surgery and pain management on numerous occasions. I have missed work due to this debilitating recurrence and have had to be reassigned to desk work duties as well as reduced required travel, which decreases my contribution to the overall productivity of my organization, which I am sure has affected my performance appraisals over the years. My quality of life outside of work has been affected as well. I was once a avid athlete and have fallen to other heath problems stemming from my physical limitations due to this particular disability due to limited activity, such as Migraines, Chronic headaches, Sleep Apnea (diagnosed in 2005), high cholesterol-diagnosed in 2003 and recently been hospitalized for heart releated difficulties. I was also an outdoors man—hunting, fishing, camping etc. My other hobbies of golf and bowling are also distant memories. I still have difficutly even with menial household chores, helping my wife around the house and yard work. I have, on several occasions, had to hire professionals to provide routine house and lawn maintenance, which has become too difficult for me to do on my own. I am currently being treated by my local physician and the VA for these disabilities. The limitations cited herein are described purely from the physical standpint. Thank you for your consideration for this review.”

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service PEB – Dated 20021117** | **VA (4 Mo. After Separation) – All Effective Date 20030301\*** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Lumbar Degenerative Disc Disease with Low Back Pain, (moderate) | 5293 | 20% | Lumbar Degenerative Disc Disease with Back Pain | 5243 | 20% | 20030630 |
| ↓No Additional MEB/PEB Entries↓ | Tinnitus | 6260 | 10% | 20030701 |
| High Blood Pressure (Hypertension) | 7101 | 10% | 20030630 |
| Chronic Headaches | 8199-8100 | 0% | 20030630 |
| Not Service-Connected x 6 | 20030630 |
| **Combined: 20%** | **Combined: 40%** |

\* VARD dated 20031003

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. The Board wishes to clarify that it is subject to the same laws for service disability entitlements as those under which the DES operates. 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. That role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA), operating under a different set of laws (Title 38, United States Code). The Board evaluates DVA evidence proximal to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of DES fitness decisions and rating determinations for disability at the time of separation. The Board further acknowledges the CI’s contention for service ratings for other conditions documented at the time of separation, and notes that its recommendations in that regard must comply with the same governance. 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 DVA, however, is empowered to compensate 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.

Back Condition. The 2003 Veterans’ Administration Schedule for Rating Disabilities (VASRD) coding and rating standards for the spine, which were in effect at the date of separation (DOS), were not yet in effect at the time the PEB adjudication was being developed (PEB worksheet [JDETS]) and were changed effective September 2002. By the time of the VA rating determination, the spine criteria had changed to the current §4.71a rating standards (September 2003). The 2002 and 2003 standards for rating based on range-of-motion (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. Most importantly for this case, the criteria of VASRD code 5293 (intervertebral disc syndrome) changed during each VASRD iteration. The PEB timeframe criteria included radicular symptoms (sciatica); the DOS timeframe criteria was changed to incapacitating episodes only; and the current criteria include either incapacitating episodes or use of the general rating formula for diseases and injuries of the spine which includes radicular pain symptoms. The Board considered (to the extent possible) its opinion regarding appropriate rating thresholds from all three specified in the current VASRD §4.71a general rating formula for the spine. For the reader’s convenience, the 2003 rating codes under discussion in this case are excerpted below. Furthermore, the VA policy of reconciling earlier ratings following changes in VASRD criteria (no decrease in rating solely based on changed criteria) was considered. For the reader’s convenience, the rating codes under discussion in this case are excerpted below.

PRIOR to September 2002:

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

5294 Sacro-iliac injury and weakness:

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 osteoarthritic

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

September 2002 to September 2003 (only 5293 changed):

5293 Intervertebral disc syndrome:

Evaluate intervertebral disc syndrome (preoperatively or postoperatively) either on the total duration of incapacitating episodes over the past 12 months or by combining under Sec. 4.25 separate evaluations of its chronic orthopedic and neurologic manifestations along with evaluations for all other disabilities, whichever method results in the higher evaluation.

With incapacitating episodes having a total duration of at

least six weeks during the past 12 months....................60

With incapacitating episodes having a total duration of at

least four weeks but less than six weeks during the past 12

months.......................................................40

With incapacitating episodes having a total duration of at

least two weeks but less than four weeks during the past 12

months.......................................................20

With incapacitating episodes having a total duration of at

least one week but less than two weeks during the past 12

months.......................................................10

After September 2003:

5243 Intervertebral disc syndrome

Evaluate intervertebral disc syndrome (preoperatively or postoperatively) either under the General Rating Formula for Diseases and Injuries of the Spine or under the Formula for Rating Intervertebral Disc Syndrome Based on Incapacitating Episodes, whichever method results in the higher evaluation when all disabilities are combined under §4.25.

There were two back exams with range-of-motion (ROM) evaluations in evidence, and documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation.

|  |  |  |
| --- | --- | --- |
| Thoracolumbar Exams | MEB ~ 7 Mo. Pre-Sep(20020718) | VA C&P ~ 4 Mo. After-Sep(20030630) |
| Flex (0-90) | 70⁰ | 40⁰ |
| Ext (0-30) | 40⁰ (30⁰) |  |
| R Lat Flex (0-30) |  | 20⁰ |
| L Lat Flex 0-30) |  |  |
| R Rotation (0-30) |  |  |
| L Rotation (0-30) |  |  |
| COMBINED (240) | unk | unk |
| Comment; Surgeries- December 2001 & September 2003 | Limited by pain; moderate myofascial tenderness; palpable spasm; normal gait; normal sensory/motor exams | Limited by pain; tenderness; gait is normal; normal sensory/motor exams |
| §4.71a Rating | 20% | 20% |

For purposes of evaluations under 5293 (or the newer 5243), an incapacitating episode is a period of acute signs and symptoms due to intervertebral disc syndrome that requires bed rest prescribed by a physician and treatment by a physician. There were no post-surgical periods of incapacitation documented. The CI had post-surgical increased lower back pain with pain radiation into his lower back and bilateral hips. Prior lower leg radicular pain was resolved. He was treated with narcotic pain medications and muscle relaxers, and surgery was not recommended. The CI had continued back pain after separation, and underwent L5-S1 posterior lumbar decompression with interbody fusion 6 months after separation on September 2003. On follow-up in May 2004, the provider note indicated “(The CI) has done remarkably well and states that he is no longer having back or leg pain.” Remote VA rating in 2011 indicated worsening of the lumbar spine condition with a VA rating of 40% effective on 17 August 2010.

The Board directs attention to its rating recommendation based on the above evidence. The MEB exam under the oldest spine rating criteria would meet the 20% criteria under code 5293; however, using the rating criteria in effect at the time of separation coding under 5293 would not be strictly IAW the VASRD. Coding at 20% under 5295, Lumbosacral Strain, with documented muscle spasm may be more ideal. Coding the MEB exam under the current VASRD would be closer to the 10% criteria than the 20% criteria. Evidence from the VA exam supports coding at the 20% level under the older criteria 5292, moderate limitation of lumbar spine motion; or under the new spine criteria for “forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees.”

Regardless of VASRD criteria or coding applied to the evidence proximate to separation, there was no schema for rating higher than the PEB’s 20%. Although ideal administrative coding at the time of separation would be 5295 at 20%, it presents no benefit to the CI. After due deliberation in consideration of 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 lumbar DDD condition.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for migraines/chronic headaches, sleep apnea (diagnosed in 2005), high cholesterol-diagnosed in 2003 and heart releated difficulties (recently hospitalized). The sleep apnea and heart conditions were not documented in the DES file. The Board does not have the authority under DoDI 6040.44 to render fitness or rating recommendations for any conditions not considered by the DES. Recurrent headaches and hypertension were mentioned in the DES and these conditions were reviewed by the action officer and considered by the Board. There high cholesterol is an abnormal lab test and not a physical disability. There were no limited duty period, profile restriction (from Army treatment), or mention in the non-medical assessment (NMA) of any duty restrictions due to any condition other than the lower back condition. There was no evidence for concluding that any of the conditions interfered with duty performance to a degree that could be argued as unfitting. The Board determined therefore that none of the stated conditions were subject to service disability rating.

Remaining Conditions. Other conditions identified in the DES file were right knee, left shoulder, right elbow and acid reflux disease (GERD). 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, 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. Additionally tinnitus and several other non-acute conditions were noted in the VA proximal to separation were not documented in the DES file. The Board does not have the authority under DoDI 6040.44 to render fitness or rating recommendations for any conditions not considered by the DES. 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. As discussed above, the Board noted the PEB ruling in this case applied VASRD rating criteria that had changed by the CI’s date of separation. In the matter of the lumbar DDD condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the migraines/chronic headaches and hypertension conditions or any other medical conditions eligible for Board consideration, the Board unanimously agrees that it cannot recommend any findings of unfit for additional service disability rating.

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 Degenerative Disc Disease with Low Back Pain | 5293 | 20% |
| **COMBINED** | **20%** |

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 16 May 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:

 - XXXXXXXXXXXX XXX XX 4593

 - XXXXXXXXXXXX XXX XX 9519

 - XXXXXXXXXXXX XXX-XX-2098

 - XXXXXXXXXXXX XXX XX 6408

 - XXXXXXXXXXXX XXX-XX-6333

 Assistant General Counsel

 (Manpower & Reserve Affairs