RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxxxxxxxx BRANCH OF SERVICE: NAVY

CASE NUMBER: PD1100772 SEPARATION DATE: 20060701

BOARD DATE: 20120627

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty, E5/HM2, 8407 Radiation Health Tech, medically separated for Lumbar Degenerative Disc Disease (DDD). The CI had non-traumatic gradual onset of lower back pain (LBP) with associated right leg weakness, numbing and tingling. The CI underwent two back surgeries including lumbar discectomy with artificial disc replacement at two levels in August 2005. Subsequent physical therapy and medication did not lead to sufficient improvement to meet the physical requirements of her Rating or satisfy physical fitness standards. She was placed on multiple periods of limited duty (LIMDU) and referred for multiple Medical Evaluation Boards (MEB) including right hip and right thigh muscle vascular conditions, and persistent neurologic deficit. The April 2006 MEB forwarded only the lumbar spine condition for Physical Evaluation Board (PEB) adjudication. On 1 May 2006, the PEB found the CI fit for continuation on duty. On 8 May 2006, PEB adjudicated the lumbar condition as unfitting, rated 20%, with probable application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: “I was not awarded retirement at separation even though I was found unfit per PEB findings DTD 8 May 2006. I have since had my disability rating increased due to increase in severity of conditions.”

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 unfitting Lumbar DDD condition meets the criteria prescribed in DoDI 6040.44 for Board purview, and is accordingly addressed below. The remaining conditions rated by the Department of Veterans’ Affairs (DVA) at separation and noted on the DA Form 294 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 20060508** | **VA (11 Mo. After Separation) – All Effective Date 20060702** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Lumbar DDD | 5237 | 20% | S/P Microdiskectomy HNP | 5237 | 0% | 20070604 |
| ↓No Additional MEB/PEB Entries↓ | Hypothyroidism | 7903 | 10% | 20070604 |
| PTSD | 9411 | 30%\* | 2002072520070604\* |
| Left PFS (knee) … | 5260-5010 | 0%\* | 20070604 |
| 0% x 5/Not Service-Connected x 11 | 20070604 |
| **Combined: 20%** | **Combined: 40%\*** |

\* PTSD rated 10% was increased to 30% effective 20060702 on 20080913 Notice of Disagreement; left knee increased to 10% effective 20101027 in VARD of 20110509 (combined 40%)

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which her service-incurred condition continues to burden her. The Board wishes to clarify that it is subject to the same laws for disability entitlements as those under which the Disability Evaluation System (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 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 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.

Lumbar DDD Condition. There was one goniometric range-of-motion (ROM) evaluations in evidence, with two additional lower back exams including documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation; as summarized in the chart below.

|  |  |  |  |
| --- | --- | --- | --- |
| Thoracolumbar ROM | MEB ~14 Mo. Pre-Sep(20051205) | NARSUM ~4 Mo. Pre-Sep(20060323) | VA C&P ~11 Mo. Post-Sep(20070604) |
| Flexion (90⁰ Normal) | “Not available” | Not measured | 90⁰ |
| Ext (0-30) | 30⁰ |
| R Lat Flex (0-30) | 30⁰ |
| L Lat Flex 0-30) | 30⁰ |
| R Rotation (0-30) | 30⁰ |
| L Rotation (0-30) | 30⁰ |
| Combined (240⁰) | 240⁰ |
| Comment: Artificial disc L4/5 & L5/S1 ~10 Mo. Pre-sep (20050829) | Gait with limp; weakness of R proximal muscles; +pain, tender, SLR; (3 Mo. post-operative) | No weakness or sensory deficit noted; reflexes normal; (7 Mo. post-operative)  | Gait normal; no tenderness, spasm or abnormal contour; no radiation of pain; negative DeLuca |
| §4.71a Rating | 20% | Unk (PEB 20%) | 0% (VA 0%) |

The MEB exam from 14 months prior to separation is charted above, but was during the CI’s post-operative healing and was not considered indicative of the CI’s condition proximate to separation. The MEB DD Form 2807 and DD Form 2808, completed 2 months prior to the final NARSUM, indicated subjective numbness of both feet and use of a cane for neuropraxia (nerve pain). At the final NARSUM exam, the CI reported lower mid back stiffness with right leg weakness, numbness and tingling. Symptoms were aggravated by prolonged standing or carrying heavy objects and the CI was not on any medications for the condition, and was 7 months post-operative. The MEB physical exam noted well healed surgical scars (from lumbar discectomy with artificial disc replacement) increasing ROMs (not specified), subjective pain complaints decreasing, and good progression to union with “expected post-operative course, progressing well”

At the VA Compensation and Pension (C&P) exam performed 11 months after separation, the CI reported no complaints with no current treatments or functional impairments related to the lower back. Back exam and ROMs as charted above were normal aside from scars.

The Board directs attention to its rating recommendation based on the above evidence. Both the PEB and VA applied the same disability code of 5237 which uses the general spine formula criteria. The Service exams were all during the CI’s post-operative recovery period and did not supply formal ROM measurements. Exams indicated that the CI was healing well, and the post-separation VA exam indicated resolution of the CI’s lower back complaints/disability. No PEB worksheet (JDETS) was in evidence to substantiate the rationale for the PEB 20% adjudication. Aside from the surgical admissions, there were no incapacitating episodes. There was no persistent motor or neurologic deficit. Records and exams clearly indicated that proximate to separation, the CI’s lower back condition would rate no higher than 20%, and the Board may not lower a disability 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 lumbar DDD 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 lower 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** |
| Lumbar DDD | 5237 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110919, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 xxxxxxxxxxx

 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 10 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 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:

 XXX XX, former USMC

 XXX XX, former USMC

 XXX XX, former USMC

 XXX XX, former USMC

 XXX XX, former USN

 XXX XX, former USN

 XXXXXXX

 Assistant General Counsel

 (Manpower & Reserve Affairs)