RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxxxxxxxxx BRANCH OF SERVICE: navy

CASE NUMBER: Pd1100777 SEPARATION DATE: 20060622

BOARD DATE: 20120619

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Petty Officer First Class (E01) / E-6 (5713/Equipment Operator), medically separated for multilevel degenerative disk disease (DDD) of the lumbosacral spine with chronic persisting low back pain (LBP). 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 and referred for a Medical Evaluation Board (MEB). The MEB forwarded no other conditions for PEB adjudication. The PEB adjudicated multilevel DDD of the lumbosacral spine condition as unfitting, rated 20% with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). Chronic persisting LBP was a related category II diagnosis contributing to the unfit condition, but not separately ratable. The CI made no appeals, and was medically separated with a 20% combined disability rating.

CI CONTENTION: “PEB was initiated prior to separating from the Navy for ICD-9 727.2 due to unsuitability for deployment. However, no decision was collectively rendered for IDC 780.53 which was diagnosed 20 November 2001 and also prevented deployment eligibility. Since both conditions existed at the time of my separation, I believe that the PEB should have rendered a collective rating decision. I am requesting the board make a collective rating decision based on all existing medical conditions at the time of separation. Supporting documentation includes: Overseas Screening dated 27 August 04, Medical Board Notification dated 07 February 05, Medical Board Notification dated 10 August 05, Abbreviated Medical Evaluation Report dated 10 August 05, Abbreviated Medical Evaluation Report dated 07 February 05, Medical Board Notification dated 01 February 06, Medical Board Memo dated 01 February 06, Abbreviated Medical Evaluation Report dated 01 February 06, Northridge Hospital Medical Center letter (Sleep study enclosed) dated 02 December 01, Northridge Hospital Medical Center letter (Sleep study enclosed) dated 23 January 02, Northridge Hospital Medical Center letter (Sleep study enclosed) dated 05 May 05, Report of Medical History (Separation Physical) DD Form 2807-1 (3/3 pages), E-maiI from Ken Peters (Branch Medical Clinic) 17 November 05.”

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 chronic persisting LBP condition requested for consideration and the unfitting multilevel degenerative disk disease condition meet the criteria prescribed in DoDI 6040.44 for Board purview and are accordingly addressed below. Obstructive sleep apnea (OSA) was listed on a MEB notification memorandum dated 7 February 2005. A sleep study on 26 April 2005 was negative for OSA and CPAP was not required. An updated MEB notification memorandum dated 10 August 2005 did not list OSA. Therefore, the requested OSA condition, and the remaining conditions rated by the Department of Veterans’ Affairs (DVA) at separation and listed on the DD Form 294 application 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 IPEB – Dated 20060508** | | | **VA (9 Mos. After Separation) – All Effective 20060623** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| DDD of the Lumbosacral Spine, Multilevel | 5237 | 20% | Degenerative Arthritis, Lumbar Spine … | 5242-5010 | 10% | 20070319 |
| Chronic Persistent Low Back Pain | Category 2 | |
| ↓No Additional MEB/PEB Entries↓ | | | Degenerative Arthritis, Cervical Spine | 5242-5010 | 10% | 20070319 |
|  |  | | Hypertension | 7101 | 10% | 20070319 |
|  | | Obstructive Sleep Apnea | 6847 | 50% | 20070410 |
| 0% x 4/Not Service Connected x 9 | | | 20070319 |
| **Combined: 20%** | | | **Combined: 60%** | | | |

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. The Board utilizes VA evidence proximal to separation in arriving at its recommendations; and, DoDI 6040.44 defines a 12-month interval for special consideration to post-separation evidence. The Board’s authority as defined in DoDI 6044.40, however, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Degenerative Disc Disease of the Lumbosacral Spine, Multilevel, with Chronic Persistent Low Back Pain. There were three 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.

|  |  |  |  |
| --- | --- | --- | --- |
| Thoracolumbar ROM | Orthopedics ~ 8 Mo. Pre-Sep  (20051116) | MEB ~ 4 Mo. Pre-Sep  (20060209) | VA C&P ~ 9 Mo. Post-Sep  (20070319) |
| Flexion (90⁰ Normal) | 80⁰ | 35⁰ | 75⁰ |
| Combined (240⁰) | 180⁰ | 120⁰ | 150⁰ |
| Comment | + Tenderness. | + Tenderness.  Motion limited by pain. | + Tenderness.  No muscle spasm.  Normal gait and posture. |
| §4.71a Rating | 10% | 20% | 10% |

The CI had a history of recurrent LBP for several years that became chronic and interfered with physically strenuous duties. Magnetic resonance imaging (MRI) demonstrated multilevel DDD with disc bulge at L4-5 and facet joint degenerative changes. Treatment with medication, physical therapy and injection therapies did not improve his symptoms sufficiently for return to performance of unrestricted military duties. A 16 November 2005 orthopedics appointment recorded pain that radiated into both legs. On physical examination there was tenderness of paraspinal muscles. Muscle strength was normal, reflexes intact, sensation intact, and straight leg raising negative. ROM was mildly reduced and is recorded in the table. The MEB narrative summary (NARSUM) dated 9 February 2006 recorded tenderness, with negative straight leg raising. The ROM noted in the table above was markedly reduced compared to the prior examination. Gait was documented as normal at a 6 December 2005 pain clinic appointment. The VA Compensation and Pension (C&P) examination was on 19 March 2007, 9 months after separation. The CI had lost no time from his current job due to back problems and was able to perform routine activities, chores and travel, but could not participate in sports. Pain was recorded as 0, the gait was normal, posture erect. There was left L3-4 facet region tenderness, but the rest of the back was non-tender without muscle spasm. Range of motion is recorded in the table. Strength was normal, sensation intact and straight leg raising negative. The PEB adjudicated a 20% rating based on the MEB NARSUM examination ROM, while the VA based its 10% rating on the C&P examination ROM. The PEB’s rating was in accordance with the VASRD general rating formula for diseases and injuries of the spine which takes into account pain whether it radiates or not. There was no evidence of ratable peripheral nerve impairment in this case and no incapacitating episodes that would warrant rating under the alternate rating criteria for intervertebral disc syndrome based on incapacitating episodes. The PEB listed chronic persisting low back pain as a category II condition, one related to the primary unfitting condition, but that is not separately ratable. VASRD §4.14 prohibits granting two ratings based on the same symptoms or impairment. After due deliberation in consideration of the totality of the evidence, the Board concluded that there was insufficient cause to recommend a change from the PEB adjudication for the lumbar DDD with chronic persisting LBP 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. In the matter of the multilevel degenerative disk disease of the lumbosacral spine (primary unfitting diagnosis) with chronic persistent LBP condition (related category II diagnosis), 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** |
| Degenerative Disk Disease of the Lumbosacral Spine, Multilevel | 5237 | 20% |
| Chronic Persistent Low Back Pain | Category II | -- |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110904, 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 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)