RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxx BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1100778 SEPARATION DATE: 20021015

BOARD DATE: 20120516

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SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSGT/E-6 (0193/Personnel Chief), medically separated for herniated nucleus pulposis. His condition worsened over time and did not respond adequately to conservative treatment. Surgery was not recommended. He was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a placed on limited duty (LIMDU) and underwent a Medical Evaluation Board (MEB). Herniated nucleus pulposis was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. One other condition, as identified in the rating chart below, was forwarded on the MEB submission as medically acceptable conditions. The PEB adjudicated the lower back pain (LBP) condition as unfitting, rated 20% respectively; additionally mechanical LBP condition rated category II, with application of SECNAVINST 1850.4E, respectively. The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: “Progression of lumbar and cervical degenerative disease.”

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SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in DoDI 6040.44 (4.a) 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 condition of lumbar spine degenerative disc disease (DDD) as requested for consideration meets the criteria prescribed in DoDI 6040.44 for Board purview and it is addressed below. The other contended condition of cervical spine degenerative disc disease is 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 20020712** | **VA (5 Months After Separation) – All Effective Date 20021016** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Herniated Nucleus Pulposis | 5293 | 20% | Lumbar Spine Degenerative Disc Disease, Degenerative Joint Disease, Severe Limitation of Motion, with Compression Fracture and Scoliosis by X-Ray | 5010-5292 | 50%(40%+10%) | STR20030304 |
| Mechanical Lower Back Pain | CAT II |
| ↓No Additional MEB/PEB Entries↓ | 0% x 1/Not Service-Connected x 0 |
| **Combined: 20%** | **Combined: 50%\*** |

\*Increased to 60% effective 20070118 when cervical strain added at 10%. Increased to 70% effective 20110520 when rating for muscle tension headaches increased from 0% to 30%.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that there should be additional disability assigned for conditions which will predictably worsen over time. It is a fact, however, that the Disability Evaluation System (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. This role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA). The Board wishes to clarify that it is subject to the same laws for service disability entitlements as those under which the DES operates. 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. 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 reevaluate said conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment vary over time. The Board utilizes DVA 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 6040.44, 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.

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Herniated Nucleus Pulposis Condition. The CI was first seen for LBP in January 1998. No preceding injury was identified and the CI received conservative treatment. In June 1998 the CI was involved in a motor vehicle accident in June 1998 and was initially treated for cervical strain which appeared to resolve. However, the CI subsequently had a worsening of his back pain and was seen regularly for this until he separated in October 2002. Medical evaluation included radiographic evidence of multilevel disc bulges with the most severe disease at the L5-S1 level where narrowing of the neural foramina was noted bilaterally. The CI was prescribed bed rest three times for severe herniation of the L5-S1 level and had symptoms of left lower extremity radiculopathy. No EMG was performed. He was evaluated by orthopedic surgery multiple times but surgical treatment was not recommended. He was able to perform in-garrison but not field duties and was referred for an MEB.

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

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| --- | --- | --- |
| Thoracolumbar ROM | MEB ~8 Months Prior to Separation(20020129) | VA C&P ~5 MonthsAfter Separation(20030304) |
| Flexion (90⁰ Normal) | Not measured | 90⁰, pain at 90° |
| Ext (0-30) | Decreased | 10⁰, pain at 10° |
| R Lat Flex (0-30) | Not measured | 30⁰, pain at 30° |
| L Lat Flex 0-30) | Not measured | 30⁰, pain at 30° |
| R Rotation (0-30) | Not measured | 30⁰, pain at 30° |
| L Rotation (0-30) | Not measured | 30⁰, pain at 30° |
| Combined (240⁰) | Not measured | 220⁰ |
| Comment | Right > left muscle tone in the lower limbs; 4/4 reflexes x 4.Compression fractures on x-rays 19990901 and 20010730. Multilevel degenerative disc disease on MRI 20001017 and CT 20010615. | Pain increased with repetitive flexion; normal posture; normal gait; no brace or orthosis; normal sensory, motor, and reflex exam; SLR equivocal in seated position, negative when supine; negative Lasegue’s sign. Reports pain occurs daily at 7/10 with flares approximately 2 times per year with pain 10/10 and lasting 4 days; numbness and weakness in left leg during a flare-up with radiation and pain; missed 2-3 days of work per year due to bed rest. Compression fractures (15% of L1 vertebral body compressed), anterior corner fracture of L4, compression deformities of T9-T11 and L1), degenerative changes of LS spine, straightened lordosis, and scoliosis documented on x-ray 20030227. |
| §4.71a Rating |  |
| 2002 VASRD 5293 | 20% for moderate, recurring attacks (PEB) | 20% for moderate, recurring attacks |
| 2002 VASRD 5292 | 10% for slight | 10% for slight (VA assigned 40% for severe) |
| 2002 VASRD 8520 | Not applicable with 5293; 10% with 5292 |
| 2002 VASRD 5285 | 10% additional for demonstrable deformity of vertebral body |

The Veterans Administration Schedule for Rating Disabilities (VASRD) coding and rating standards for the spine were modified on 23 September 2002 to add incapacitating episodes (5293 intervertebral disc syndrome), and then changed to the current §4.71a rating standards on 26 September 2003. The 2002 standards, which were in effect at the time of separation, 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. When older cases have goniometric measurements in evidence, the Board reconciles (to the extent possible) its opinion regarding degree of severity for the older spine codes and ratings with the objective thresholds specified in the current VASRD §4.71a general rating formula for the spine. This promotes uniformity of its recommendations for different cases from the same period and more conformity across dates of separation, without sacrificing compliance with the DoDI 6040.44 requirement for rating IAW the VASRD in effect at the time of separation. For the reader’s convenience, the 2002 rating codes under discussion in this case are excerpted below.

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

5292 Spine, limitation of motion of, lumbar:

 Severe .............................................................................................. 40

 Moderate.......................................................................................... 20

 Slight................................................................................................. 10

5285 Vertebra, fracture of, residuals:

 With cord involvement, bedridden, or requiring long leg braces.. 100

 Consider special monthly compensation; with lesser

 involvements rate for limited motion, nerve paralysis.

 Without cord involvement; abnormal mobility requiring neck

 brace (jury mast).............................................................................. 60

 In other cases rate in accordance with definite limited motion or muscle spasm, adding 10 percent for demonstrable deformity of vertebral body.

The PEB rated the CI’s herniated nucleus pulposis condition as 5293 intervertebral disc disease and determined it was moderate with recurring attacks warranting a 20% rating. The JDETS notes document consideration of three episodes of bed rest with loss of feeling in the left foot along with severe herniation at the L5-S1 level. The VA rated the CI’s back condition based on limitation of motion and also applied an additional 10% for the vertebral compression fracture with demonstrable deformity of the vertebral body. The VA examiner stated “limitation of function would be 50% because of bending, and rotational and lateral types of bending are not able to be completed when he is having a flare-up. When he is having his worst flare-up, he has to spend at least a day in bed.” The 50% rating is comprised of a 40% rating for severe limitation of motion of the lumbar spine and a 10% rating for demonstrable deformity of a vertebral body form vertebral fracture. The VA considered the ROM limitations during the CI’s worst flare-up as the basis for the 40% rating even though this was not present on the day of the VA Compensation and Pension (C&P) examination. Review of the STR documents only one visit with severe limitation of motion in January 2001 when the CI had no active ROM and was considered to have a “locked back.” Other visits document either full ROM or slightly deceased ROM. 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 herniated nucleus pulposis condition.

Radiculopathy. The MEB narrative summary (NARSUM) examination noted the CI had been prescribed bed rest by a physician three times during the prior 2 years and had had loss of feeling in the left foot. The physical examination noted the left lower extremity had less muscle tone than the right. However, reflexes were symmetric in the lower extremities. No sensory or muscle strength examination was documented. The VA C&P examination documented that the CI would experience left leg numbness and weakness with some of his pain flare-ups. However, the physical examination noted normal sensory, motor, and reflex examination of both lower extremities. This examination also noted an equivocal straight leg raise (SLR) test when sitting and a negative SLR when supine. The STR includes multiple visits with positive SLR tests. The PEB used the code 5293 intervertebral disc syndrome when coding the CI’s unfitting condition and this code includes symptoms of sciatic neuropathy. The Board therefore infers the PEB determined the CI’s sciatic radiculopathy to be part of his unfitting condition. If code 5293 is used, an additional code for radiculopathy cannot be combined as this would require using the same symptoms to support two different rating codes. However, if the back is rated based on limitation of motion (as the VA did with code 5292) an additional rating of 10% could be added for radiculopathy. However, both the MEB NARSUM and the VA C&P examinations support a rating of 10% for slight limitation of motion of the lumbar spine under 5292, combining 5292 with an additional 10% for radiculopathy would offer no advantage to the CI over the 20% applied by the PEB for 5293.

Vertebral Compression Fracture. Multiple vertebral compression fractures are noted on multiple different radiographic studies completed by the both the service and the VA. Vertebra L1 is noted to be 15% compressed and compression deformities are also noted on T9 to T11. The 2002 VASRD notes that in the absence of spinal cord involvement or abnormal mobility, 10% should be added for demonstrable deformity of a vertebral body. The VA explained their application of this in both the original rating decision and the Decision Review Officer Statement of the Case. The VA determined the CI’s back should be rated at a combined 50% with 40% for severe limitation of motion and added 10% for the compression fracture. Therefore, IAW with the 2002 VASRD §4.71a, the Board will also add 10% for the compression fracture.

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 herniated nucleus pulposis condition and IAW the 2002 VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the vertebral compression fracture with demonstrable deformity condition and IAW 2002 VASRD §4.71a, the Board unanimously recommends a permanent disability rating of 10%, coded 5285 IAW the 2002 VASRD §4.71a.

RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows and that the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective as of the date of his prior medical separation:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Herniated Nucleus Pulposis  | 5293 | 20% |
| Vertebral Compression Fracture with Demonstrable Deformity | 5285 | 10% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110916, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 XXXXXXXXXXXXXX

 President

 Physical Disability Board of Review

MEMORANDUM FOR DIRECTOR, SECRETARY OF THE NAVY COUNCILOF REVIEW

 BOARDS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

 XXXXXXXXXXXXXX

Ref: (a) DoDI 6040.44

 (b) PDBR ltr dtd 22 May 12

 I have reviewed the subject case pursuant to reference (a) and non-concur with the recommendation of the Physical Disability Board of Review as set forth in reference (b). I found his case was properly adjudicated by the Physical Evaluation Board (PEB) and the recommended additional 10 percent rating not justified by the evidence of record. Therefore, XXXXXXXXX records will not be corrected to reflect a change in either his characterization of separation or in the disability rating previously assigned by the Department of the Navy’s PEB.

 XXXXXXXXXXXX

 Principal Deputy

 Assistant Secretary of the Navy

 (Manpower & Reserve Affairs)