RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXXXXXXX BRANCH OF SERVICE: NAVY

CASE NUMBER: PD1100798 SEPARATION DATE: 20030419

BOARD DATE: 20120525

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty AE3/E-4 (AE-8832-EA-6B, Systems Organizational Initial Maintenance Technician), medically separated for recurrent nephrolithiasis, temporomandibular joint disorder, and polycystic ovary disease*.* The CI did not respond adequately to treatment and was unable to meet the physical requirements of her Rating or satisfy physical fitness standards and was therefore referred for a Medical Evaluation Board (MEB). The Physical Evaluation Board (PEB) adjudicated the recurrent nephrolithiasis and temporomandibular joint disorder conditions as unfitting, rated 20% and 0%, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD) and SECNAVINST 1850.4E. The PEB determined that the recurrent nephrolithiasis condition was unfitting but had existed prior to service (EPTS). The PEB also determined the condition had been permanently aggravated by service. The PEB determination was a current rating of 30% for nephrolithiasis coded 7508 with a 10% deduction for the level of disability existing at the time of entry into active service. The polycystic ovary disease condition was determined to be EPTS but not service-aggravated. The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: “I was discharged with only 20% combined rating when one of my conditions according to the rating tables rates 30% by itself. I was also given a 60% disability rating by the VA upon discharge and application for benefits for the same conditions. I have since been bumped to 90% permanent and 100% unemployable rating.” The CI also submitted a “Statement by Danielle Marie Rainbow” dated 20030510 but unsigned, describing her medical history during her time in the Marines and the Navy. No specific contentions are stated.

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 condition polycystic ovary disease, as requested for consideration, meets the criteria prescribed in DoDI 6040.44 for Board purview; and, is addressed below, in addition to a review of the ratings for the unfitting conditions of recurrent nephrolithiasis and temporomandibular joint disorder. 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 20030213** | | | **VA (~8-10 Months Post-Separation) – All Effective Date 20030420** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Recurrent Nephrolithiasis | 7508 | 20%\* | Recurrent Nephrolithiasis | 7508 | 20% | 20031211 |
| Temporomandibular Joint Disorder | 5299-5003 | 0% | Temporomandibular Joint Disease | 9905 | 0%\*\* | STR |
| Polycystic Ovary Disease | EPTS | | Polycystic Ovary Disease | NSC, Not Aggravated by service | | |
| ↓No Additional MEB/PEB Entries↓ | | | Gastroesophageal Reflux Disease | 7399-7346 | 10% | 20040123 |
| Low Back Strain | 5237 | 10% | 20040123 |
| Residuals, Left Femoral Stress Fracture | 5255 | 10% | 20040123 |
| Bilateral Tinnitus | 6260 | 10% | 20040206 |
| 0% x 2 (includes above)/ Not Service-Connected x 9 (includes above) | | | |
| **Combined: 20%** | | | **Combined: 50%\*\*\*** | | | |

\*EPTS but service aggravated – Rating 30%, reduced by 10%.

\*\*Initially 0% based on the service treatment record (STR) and increased to 10% effective 20030930 after VA C&P exam dated 20040121. Later increased to 30% effective 20070430.

\*\*\*Increased to 60% from 20030930 when 9905 increased to 10%. Increased to 70% from 20070430 when 9905 increased to 30% and 8100 Migraine headache added at 10%. Increased to 90% and individual unemployability added from 20070822 when 8100 increased to 50% and 7399-7346 increased to 30%.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that the gravity of her condition and predictable consequences merit consideration for a higher separation rating. 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. 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 Department of Veteran Affairs (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.

Recurrent Nephrolithiasis. The CI had multiple episodes of nephrolithiasis of both kidneys with no treatable cause identified despite a comprehensive work-up by urology and nephrology. This prevented her from performing activities required of rate and rank and she was not worldwide assignable. A progress note from 17 July 2000 documented a history of a kidney stone in June 1997 and obstruction on the left side noted with an intravenous pyelogram (IVP) in 1999. A nephrology clinic note dated 9 November 2001 noted a reported history of a passed stone in 1997. No metabolic reason for stones was found, no treatment was indicated, and the nephrologist recommended return to full duty. However, she continued to have recurrent kidney stones and was referred for MEB. A physical examination completed as part of an MEB narrative summary (NARSUM) dated 27 November 2002 (four months prior to separation) was normal and no costovertebral angle (CVA) tenderness was noted at that time. A VA Compensation and Pension (C&P) examination completed 11 December 2004, 8 months after separation, revealed a similar history. This examination documented “tenderness to punch over the left CVA.” However, there was no tenderness on the right side. The diagnosis was nephrolithiasis bilateral, recurrent, intermittently symptomatic.

The PEB determined this condition was unfitting but had EPTS, presumably because of the reported history of a kidney stone in 1997. However the PEB also determined the condition had been aggravated by service. They determined a current rating of 30% for 7508 nephrolithiasis with a 10% deduction for the level of disability existing at the time of entry into active service. Although it is not clear how the 10% rating was determined, this deduction appears to be in compliance with VASRD §4.22 (rating of disabilities aggravated by active service).This paragraph states, “in cases involving aggravation by active service, the rating will reflect only the degree of disability over and above the degree existing at the time of entrance into the active service whether the particular condition was noted at the time of entrance into the active service, or it is determined upon the evidence of record to have existed at that time.” The VA did not consider the condition to have EPTS and assigned a 20% disability rating for 7508 nephrolithiasis for frequent attacks of colic requiring catheter drainage.

A rating of 30% for VASRD code 7508 is warranted if there is recurrent stone formation requiring one or more of the following: 1) diet therapy, 2) drug therapy, or 3) invasive or non-invasive procedures more than two times/year. If none of these are present, the condition is rated under 7509, hydronephrosis. The 7509 code requires impaired kidney function for a rating of 30% and this was not present. A 20% rating is warranted for frequent attacks of colic requiring catheter drainage and a 10% rating is warranted for infrequent attacks which are not infected and do not require catheter drainage. The CI did have recurrent stone formation which could be considered frequent. However, she did not require any treatment, invasive or noninvasive procedures, or catheter drainage. 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 recurrent nephrolithiasis condition.

Temporomandibular Joint Disorder (TMJ). The CI was evaluated by a dentist in July 2001 for jaw pain and was given a mouth guard and advised to reduce stress. A consult for TMD (temporomandibular disorder) was requested in September 2002 for continued pain. A night guard and nonsteroidal anti-inflammatory (NSAID) medication was prescribed. In December 2002 she was treated by a chiropractor and in November 2002 elavil was added for chronic pain. The MEB NARSUM examination four months prior to separation noted bilateral masseter tenderness to palpation. Also noted was a popping with closing of the temporomandibular joint that was accompanied by pain. An addendum to the NARSUM dated 17 January 2003 noted a normal magnetic resonance image (MRI) in November 2002 and current treatment with muscle relaxant and narcotic pain medication in addition to NSAIDs. She had been unable to wear gear required for her duties because it significantly increased her pain and this presumably was why the PEB determined this to be an unfitting condition. An oral surgery examination in November 2002 noted extreme tenderness and a midline incisal distance of 25mm. A VA dental rating examination was completed in January 2004, approximately nine months after separation, and it included a history of another servicemember stepping on her head while both were on a ladder. She had immediate pain in her jaw and neck and her jaw locked shut. She was treated with muscle relaxants and pain medications. The treatment history and lack of response to medication is similar to that reported in the NARSUM and addendum. This examination noted no apparent pain at rest and no asymmetry or lateral deviation. The maximal opening was 36mm and she had pain throughout the opening movement. Pain was also present with lateral movement but no clicking or popping was observed. All muscles of mastication were tender to palpation.

The PEB determined this condition was unfitting and applied a 0% rating under code 5299-5003. The VA coded the TMJ under 9905. Initially a 0% rating was applied based on the service treatment record (STR). However, there was no mention of the November 2002 examination or the measurement of 25mm. After a VA dental rating examination was completed in January 2004, the rating was increased to 10% effective 30 September 2003 based on the maximal inter-incisal range of 36mm documented on that examination. A 10% rating is applied for measurements from 31 to 40mm and a 20% rating is applied for measurements from 21-30mm. The service oral surgery examination was completed five months prior to discharge and the VA examination was nine months after separation. The CI’s inter-incisal distance improved from 25mm to 36mm over this fourteen month time period. However, any attempt to estimate the distance present on the day of separation would be mere speculation. As the service oral surgery examination is closer to the date of separation, the Board majority afforded it higher probative value. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board, by simple majority, recommends a disability rating of 20% for the TMJ condition for maximal inter-incisal opening of 25mm.

Polycystic Ovary Disease. In January of 2003, the CI was noted to have a one year history of abdominal pain and abnormal menstrual periods. While at a routine exam, a left adenexal mass was noted on bimanual examination and a pelvic ultrasound in September 2001 noted polycystic ovaries and a retroflexed uterus. A few months later the CI experienced symptoms similar to those present with previous kidney stones. However, the work-up did not reveal any evidence of a stone and this pain may have been due to the polycystic ovarian disease. Follow-up with gynecology noted recurrent left lower quadrant pain. Oral contraceptive pills were recommended and the provider planned to perform an ultrasound during the next episode of acute pain. No evidence of any further testing is available in the STR. The MEB NARSUM noted a normal abdominal examination although the MEB physical recorded on the DD Fm 2808 dated 13 December 2002 documented mild tenderness to palpation in both the left and right lower quadrants. The MEB NARSUM Addendum noted the CI started treatment with Provera in January 2003 and she was continuing to follow-up with gynecology.

The PEB determined this condition had EPTS and was not aggravated by service. It is not clear what evidence was used by the PEB to determine this condition was EPTS. The VA based its initial rating decision on the STR and citing the PEB, determined this condition was not service connected because it EPTS but was not aggravated by service.

The Board’s main charge regarding this condition is evaluation of the PEB’s EPTS determination. The Board’s authority for recommending a change in the service’s EPTS determination is not specified in DoDI 6040.44, but is considered adjunct to its DoD-specified obligation to review service fitness adjudications. As with its consideration of fitness adjudications, the Board’s threshold for countering service EPTS 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. While there is insufficient evidence present in the record available for Board review to support a determination of EPTS, there is also insufficient evidence to support addition of polycystic ovary disease as an unfitting condition at the time of separation. After due deliberation, and in consideration of the totality of the evidence, the Board cannot find adequate justification for recommending the polycystic ovary disease condition as an additionally unfitting condition 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. In the matter of the recurrent nephrolithiasis condition and IAW VASRD §4.115b, the Board unanimously recommends no change in the PEB adjudication. In the matter of the temporomandibular joint disorder condition, the Board, by 2 to 1 vote, recommends a disability rating of 20%, coded 9905 IAW VASRD §4.150. The single voter for dissent (who recommended adopting the VA coding under 9905 at 10%) did not elect to submit a minority opinion. In the matter of the polycystic ovary disease condition, the Board unanimously recommends no change from the PEB determination as EPTS.

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 her prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Recurrent Nephrolithiasis | 7508 | 20% |
| Temporomandibular Joint Disorder | 9905 | 20% |
| Polycystic Ovary Disease | EPTS | |
| **COMBINED** | **40%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110822, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

President

Physical Disability Board of Review

MEMORANDUM FOR COMMANDER, NAVY PERSONNEL COMMAND

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATIONS

Ref: (a) DoDI 6040.44

(b) PDBR ltr dtd 31 May 12 ICO

(c) PDBR ltr dtd 24 May 12 ICO

(d) PDBR ltr dtd 31 May 12 ICO

1. Pursuant to reference (a) I approve the recommendations of the PDBR set forth in references (b) through (d).

2. The official records of the following individuals are to be corrected to reflect the stated disposition:

a. former USN: Disability separation with entitlement to disability severance pay with a rating of 20 percent (increased from 10 percent) effective 10 December 2004.

b. former USN: Disability separation with entitlement to disability severance pay with a rating of 20 percent (increased from 10 percent) effective 1 August 2005.

c. former USN: Placement on the Permanent Disability Retired List with 40 percent disability rating (increased from 20 percent) effective 19 April 2003.

3. Please ensure all necessary actions are taken to implement these decisions, including the recoupment of disability severance pay if warranted, and notification to the subject member once those actions are completed.

Assistant General Counsel

(Manpower & Reserve Affairs)