RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxxxxxxxxxx BRANCH OF SERVICE: navy

CASE NUMBER: PD1100809 SEPARATION DATE: 20050311

BOARD DATE: 20120605

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a mobilized Reserve HM2/E-5 (8384/Surgical Technologist), medically separated for a low back pain (LBP) condition. The CI injured her low back while on active duty in 2003 which did not respond adequately to conservative, nonoperative treatment and was unable to perform within her Rating or meet physical fitness standards. A line of duty (LOD) determination was filed and approved for LBP. There were no other LODs filed for other medical conditions. She was placed on temporary profile and underwent a Medical Evaluation Board (MEB). Multilevel lumbar spondyloarthropathy, LBP, occasional bilateral lower extremity numbness and right lower radiating pain, were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. The PEB adjudicated the LBP condition as unfitting, rated 20% and additionally occasional bilateral lower extremity numbness, multilevel lumbar spondyloarthropathy, and right lower extremity radiating pain conditions rated category II, with application of SECNAVINST 1850.4E and the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI appealed to a Formal PEB (FPEB) which met on 8 February 2005 and after hearing formal testimony from the CI, reviewing the PEB case file and reviewing new VA records, the FPEB upheld the PEB decision for the low back condition and category II conditions; additionally adjudicated major depression disorder (MDD), posttraumatic stress disorder (PTSD) H. Pylori gastritis as newly diagnosed conditions rated category III and finally adjudicated Raynaud's syndrome, and gastroesophageal reflux disease (GERD) conditions as existed prior to service (EPTS), rated category III, and was medically separated from the Naval Reserves with a 20% combined disability rating.

CI CONTENTION: “Rating of 20% was given and change to 10% with combining 10%, I had previous acquired prior to the 2005 MEDICAL BOARD. Unfitting CATEGORY III did contribute to in Service Claim of aggravated injury. Still on Active Duty I was being treated for an Ulcer and P.T.S.D. and Mental Depression, Suffering in Lind of Duty. I “Simply Loss it” The Legal representation and Board Ignord The medical psychiatrist letters. IF I was found unfitting for a possible rating of 81% ther Should have been a rating more fiting than what I received. My health has deteriorated Since my recent Fall.” She additionally lists all of her VA conditions and ratings as per the rating chart below.

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 PEB conditions that were not determined to be unfitting and requested for consideration meet the criteria prescribed in DoDI 6040.44 for Board purview; and, are addressed below, in addition to a review of the ratings for the unfitting conditions. The remaining conditions rated by the Department of Veterans’ Affairs (DVA) at separation and listed 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 FPEB – Dated 20050113** | | | **VA (~3 years After Separation) – All Effective Date 20030909** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Low Back Pain | 5237 | 20% | Degenerative Disc Disease of The Thoracolumbar Spine | 5243 | 10% | 20080331 |
| Multilevel Lumbar Spondyloarthropathy | CAT II | |
| Occasional Bilateral Lower Extremity Numbness | CAT II | |
| Right Lower Extremity Radiating Pain Conditions | CAT II | |
| Major Depression | CAT III | | Posttraumatic Stress Disorder with Depression | 9411 | NSC/0%\* | 20080331 |
| Post Traumatic Stress Disorder | CAT III | |
| Raynaud's Syndrome | CAT III | | Raynaud's Disease | 7199-7122 | NSC/0%\* | 20080331 |
| Gastroesophageal Reflux Disease | CAT III | | Stomach Ulcers | 7305 | NSC/0%\* | 20080331 |
| H. Pylori Gastritis | CAT III | |
| ↓No Additional MEB/PEB Entries↓ | | | Laceration Scar, Left Leg | 7804 | 10% | 20020508 |
| Residuals Right Knee Injury | 5257 | NSC/0%\* | 20080331 |
| NSC/0%\*x 2/Not Service-Connected x 0 | | | 20080331 |
| **Combined: 20%** | | | **Combined: 20%** | | | |

\* NSC/0% considered for VA Pension

ANALYSIS SUMMARY: The Board acknowledges the CI’s assertions that a rating changed occurred for her back condition, that she was still on active duty while being treated for stomach ulcer, PTSD and MDD which she suffered in the line of duty and the PEB process ignored her psychiatric letters. First, the Board would like to recognize the Navy assigned a 20% rating for the low back condition and the VA assigned a 10% rating and each of these entities operate under a different set of laws. 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. There was no evidence of any other rating discrepancy for the low back condition. Next, it is also noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to the CI’s statements in the application regarding suspected improprieties in the processing of her case. 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. It must also judge the fairness of PEB fitness adjudications based on the fitness consequences of conditions as they existed at the time of separation. The Board’s operative instruction, DoDI 6040.44, specifies a 12-month interval for special consideration to VA findings. The Board notes the evidence did reflect a LOD for the low back condition but could not find evidence for a LOD for ulcer, PTSD or MDD. Finally, the Board acknowledges the sentiment expressed in the CI’s application, i.e., that the gravity of her condition and predictable consequences which merit consideration for a higher separation rating. It is a fact, however, that 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. This role and authority is granted by Congress to the VA. 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 reevaluate said conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment vary over time.

Low Back Pain Condition. The Board would like to clarify that low back pain, multilevel lumbar spondyloarthropathy, occasional bilateral lower extremity numbness, right lower extremity radiating pain conditions will be addressed under low back pain condition. In April 2003 the CI injured her low back after she pulled a surgical instrument cart while mobilized at National Naval Medical Center, Bethesda, Maryland. She felt a pop and a sense of shifting and then had pain radiating down her right lower extremity. She was thoroughly evaluated and treated by orthopedic spine clinic, physical therapy, chiropractic care and pain management. A magnetic resonance imaging (MRI) in July 2003 revealed multilevel lumbar degenerative joint (DJD) and disc disease (DDD) with mild narrowing of the central canal with right neural foraminal narrowing at L4/L5. She was diagnosed with facet syndrome and DDD L5-S1 and deemed a non surgical candidate and underwent extensive physical therapy for range-of-motion (ROM), stretching, and strengthening which did not improve her symptoms. Her temporary duty limitations included no prolong sitting, prolong standing, lifting greater than 15 pounds and able to walk at own pace and distance. There were two ROM evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation.

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| Goniometric ROM - Thoracolumbar | MEB ~ 10 Pre-Sep  (20040503) | VA C&P ~ 3 years After-Sep  (20080331) |
| Flex (0-90) | 80⁰ | 90⁰ |
| COMBINED (240) | 190⁰ | Not measured⁰ |
| Comment | Normal gait | No spasm, minimal flattening of the lumbar lordosis |
| §4.71a Rating | 10% | 0% |

At the MEB exam, the CI reported an average pain level of seven to nine of ten (ten being the worse), bilateral feet numbness at night, difficulty standing greater than five minutes, increased pain in her right lower extremity and must shift her position frequently when she was sitting. Her current medications included Flexeril (antispasmodic) at night, Celebrex (anti-inflammatory) daily, Amitriptyline (for pain or depression) at night, Neurontin (for nerve pain) three times daily and Tramadol (narcotic like pain medication) two per day. In addition to the ROMs, the MEB physical exam demonstrated tenderness of the thoracic and lumbar paraspinals, a positive straight leg at 60 degrees, normal motor exam, decreased sensation along the L3-4 of the right lower extremity, and symmetric patellar reflexes but asymmetric ankle jerks being diminished on the right. The examiner referenced the MRI completed in July 2003 and diagnosed low back pain (LBP) and right lower extremity radiating pain with occasional bilateral lower extremity numbness due to multilevel lumbar spondyloarthropathy that did not exist prior to enlistment. He further opined her prognosis to continue with military duty was poor as she could not run, bend, lift, stand or sit without increased pain and referred her to the PEB for fitness determination. At the VA Compensation and Pension (C&P) exam 3 years after separation, the CI reported LBP but denied any radicular component. The examiner reviewed service treatment records (STR) and VA records and noted she was treated for discogenic disc pain, bulging disk pain without nerve impingement and DJD. The C&P physical exam demonstrated minimal flattening of the lumbosacral spine without evidence of spasm or tenderness, negative straight leg raise, able to stand on toes and heels without difficulty, squatting was normal and all ROMs were without pain and Deluca negative. X-rays were consistent with the clinical pathology and the examiner opined mild lumbar spine DJD. Future VA records revealed a normal electromyogram (EMG) in 2009.

The Board directs attention to its rating recommendation based on the above evidence. It is noted for the record that the Board recognizes the significant interval (3 years) between the date of separation and the VA evaluation. DoDI 6040.44, under which the Board operates, specifies a 12-month interval for special consideration to VA findings. This does not mean that the VA information was disregarded, as it was a valuable source for clinical information and opinions relevant to the Board’s evaluation. In matters germane to the severity and disability at the time of separation; however, the information in the service record was assigned proportionately more probative value as a basis for the Board’s rating recommendations. The PEB and VA chose different coding options for the condition, but this did not bear on rating and both ruled IAW the VASRD §4.71a general rating formula for diseases and injuries of the spine. The PEB specifically cited application of the VASRD and assigned a 20% rating and the Board recognized this would rate at 10% with the evidence; however the Board's recommendation may not produce a lower rating than that of the PEB. The VA assigned a 10% rating and the again the Board recognized the VA ROM evidence did not meet the minimal compensable 10% criteria. Neither the PEB nor the VA had evidence which suggested functional loss due to pain or flare-ups which would provide for additional or higher rating. The Board also considered whether an additional rating for radiculopathy for right lower extremity was appropriate in this case. Board precedent is that a functional impairment tied to fitness is required to support a recommendation for addition of a peripheral nerve rating at separation. Although radiating radicular pain was well documented, the pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a; i.e., that rating encompasses “symptoms such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease.” The sensory component in this case (radiating pain, numbness, tingling) has no functional implications. Prior to separation there was consistently and explicitly no physical finding of motor weakness by any examiner, and no electrodiagnostic indication of nerve impairment even 4 years later. At the time of separation all evidence suggests that a motor impairment was not present and cannot be linked to significant functional impairment. All members agreed, therefore, that a recommendation for additional rating based on peripheral nerve impairment was not supported. 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 low back pain condition.

Contended PEB Conditions. The conditions adjudicated as not unfitting by the FPEB were MDD, PTSD, H. Pylori gastritis, Raynaud's syndrome, and GERD. The Board’s first charge with respect to these conditions is an assessment of the appropriateness of the PEB’s fitness adjudications. The Board’s threshold for countering fitness 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. None of these conditions were profiled; none were implicated in the commander’s statement; and, none were judged to fail retention standards. All were reviewed by the action officer and considered by the Board. MDD, PTSD, H. Pylori gastritis were not forwarded by the MEB but rather were newly diagnosed conditions after the CI’s active duty separation in September 2003. The FPEB’s position is captured in the following excerpt from those proceedings.

The following diagnoses [listed in brackets below] are added based on the member's petition and the medical evidence. The Formal PEB was concerned that the Notice of Eligibility (LOD) was granted based on the low back pain incurred during a period of active duty. However, there was no evidence that the member had symptoms of a mood disorder or gastrointestinal condition that impacted her performance of duties while activated. Furthermore, the member had evidence of a preexisting Gastro-Esophageal Reflux Disease and was prescribed medication before activation and her later treatment for H Pylori Gastritis cannot be directly attributable to active military service or the low back condition. Likewise, the member testified about non military interpersonal stressors that likely contributed to her mood disorder. Based on all the above, diagnoses 5, 6, 7, 8 and 9 [major depression, PTSD, Raynaud’s syndrome, GERD, H. Pylori gastritis] are considered Category III and do not preclude the continued performance of duties and are not separately unfitting or contributing to the unfitting conditions.

The FPEB’s premises that the PTSD stressors were not service-connected, and that the Raynaud’s and GERD disorders were EPTS (without permanent service-aggravation), are borne by the evidence before the Board. It should also be noted that the DES regulations applicable to new conditions arising during periods on the Temporary Disability Retired List (TDRL), i.e., that they must have been established as unfitting at the time of entering TDRL, have a very close counterpart in the circumstances of this case. The CI’s active duty extension was expressly provided for service disposition of the low back pain condition, and she was not required to perform duty for that period; mirroring exactly the circumstances of TDRL. Finally the Board must note that the determination of fitness is performance based; and, in this case there is no MOS performance on which to assess the functional impact of the contested conditions. The VA, in their decision, corroborated that there was no evidence of treatment for MDD or PTSD while on active service and in addition the VA did not find any of these conditions service connected despite multiple requests and appeals over 5 years. After due deliberation in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB fitness determination for the any of the contended PEB conditions and, therefore, no additional disability ratings can be recommended.

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 lumbar spine condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended MDD, PTSD, H. Pylori gastritis, Raynaud's syndrome, and GERD conditions, the Board unanimously recommends no change from the PEB determinations as not unfitting. 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:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Low Back Pain | 5237 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110825, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

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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)