RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: MARINE CORPS

CASE NUMBER: PD1100861 SEPARATION DATE: 20090530

BOARD DATE: 20120823

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty LCPL/E-3 (0311/Rifleman), medically separated for a low back condition. He did not respond adequately to conservative treatment and was unable to fulfill the physical demands within his Military Occupational Specialty (MOS), meet worldwide deployment standards or meet physical fitness standards. He was placed on limited duty (LIMDU) and referred for a Medical Evaluation Board (MEB). Lumbago was forwarded to the Physical Evaluation Board (PEB) IAW SECNAVINST 1850.4E. Three other conditions, as identified in the rating chart below, were also forwarded on the MEB submission. The PEB adjudicated the lumbago condition as unfitting, rated 10%, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). Two of the remaining conditions were determined to be Category II (conditions that contribute to the unfitting condition). The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: The CI attached a 5 page statement pleading to his application which was reviewed by the Board and considered in its recommendations.

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 low back condition 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. The other requested conditions; posttraumatic stress disorder (PTSD), neck pain, weight gain and weight loss, diarrhea, constipation, cramping, hypertension, dyslipidemia, abnormal glucose levels, and tinnitus 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.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20090224** | | | **VA (1 Mos. Pre -Separation) – All Effective Date 20090531** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Lumbago | 5237 | 10% | S/P Thoracolumbar Spine Strain with Disc Bulge and Protrusion | 5237-5242 | 10% | 20090422 |
| Lumbar Spondylosis w/ Trace Spondylolisthesis | Cat II | |
| Bulging Disc | Cat II | |
| Myalgia/Myositis | Not addressed by the PEB | |
| ↓No Additional MEB/PEB Entries↓ | | |
| Recurrent Tinnitus | 6260 | 10% | 20090422 |
| 0% X 1 / Not Service-Connected x 6 | | |  |
| **Combined: 10%** | | | **Combined: 20%** | | | |

\*PTSD was added in 20101007 at 30% from 20090531

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred condition continues to burden him. 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 Department of Veterans’ Affairs (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 also acknowledges the CI's contention suggesting that ratings should have been conferred for other conditions documented at the time of separation and for conditions not diagnosed while in the service (but later determined to be service-connected by the DVA). 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 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.

Back Condition. The CI injured his low back while moving a “casualty” while in combat training in June or July of 2007. This did not prevent him from a year deployment to Iraq in August 2007. While in Iraq his back pain persisted and progressively worsened. Upon return he sought care with physical therapy, chiropractic care, pain management and sports medicine. He had limited response with nonsteroidal medications, and had some response to a first corticosteroid injection but none thereafter. A magnetic resonance imaging (MRI) revealed bilateral pars interarticularis defects at L5 (due to a fracture or congenitally) with a mild broad-based disc bulge and a small right disc protrusion at T8-T9. The sports medicine provider diagnosed bulging disc L5-S1, placed him on LIMDU, and recommended another corticosteroid injection as well as consideration of separation from the military as the pain prevented him from maintaining the physical fitness requirements necessary for his job. The non-medical assessment (NMA) documented the CI was not working in his MOS and was missing 10 hours weekly of work.

There were two 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 | Sports Med ~7 Mo. Pre-Sep | VA C&P ~1 Mo. Post-Sep |
| Flexion (90⁰ Normal) | 90⁰ | 80⁰ |
| Ext (0-30) | 25⁰ | 20⁰ |
| R Lat Flex (0-30) | 20⁰ | 30⁰ |
| L Lat Flex 0-30) | 20⁰ | 30⁰ |
| R Rotation (0-30) | #⁰ | 30⁰ |
| L Rotation (0-30) | #⁰ | 30⁰ |
| Combined (240⁰) | #⁰ | 220⁰ |
| Comment | Painful motion, no spasm, moved gingerly from chair to exam table | Painful motion, spasm |
| §4.71a Rating | 10%\* | 10% |

\*Conceding painful motion 4.59

At the MEB exam, the CI reported back pain 6/10 in intensity on a pain scale. He was taking Gabapentin nightly, to relieve neuropathic pain, and a muscle relaxant as needed for pain. The MEB physical exam noted ROM limited in flexion and extension at the lumbar spine, bilateral tenderness of the paraspinal muscles from T7-L3, negative straight leg raise (SLR) bilaterally, negative Waddell’s sign and normal neuromuscular findings. The examiner referenced the MRI reported in the sports medicine note. The examiner diagnosed; lumbago, bulging disc L5-S1, and lumbar spondylosis with trace spondylolisthesis. The examiner opined the CI had not responded to medical management, was not currently a surgical candidate and had a fair prognosis. The examiner documented the CI was unable to lift or carry heavy loads, to run or walk greater than 200 yards without pain, to remain seated or standing for prolonged periods of time without discomfort and to complete a physical fitness test and referred him to a PEB. At the VA Compensation and Pension (C&P) exam performed prior to separation, the CI reported constant low back pain with stiffness and weakness and an intensity of 4/10 on a pain scale exacerbated with walking and stairs. He described flare-ups with an intensity of 9/10 on a pain scale, three to four times per week that responded to rest and medications. He had missed time from work due to his back condition and had episodes of incapacitation of “many days” but could not say precisely. The VA C&P exam noted tenderness of the bilateral paravertebral muscles, negative SLR bilaterally, muscle spasm without an unsteady gait, and normal neuromuscular findings and no Deluca observations. No new additional findings were seen with the MRI’s of the L-spine or T-spine. The examiner diagnosed thoracolumbar spine strain.

The Board directs attention to its rating recommendation based on the above evidence. The MEB did not document ROM evidence; but, there was a ROM measurement within 12 months of separation on which to base a rating grounded in VASRD §4.71a. Although it was not compliant with VASRD §4.46 (accurate measurement) it was similar in ratable data to the VA exam. The Board notes that the VA exam was complete, well documented, and compliant with VASRD §4.46 (accurate measurement) and therefore the Board assigns more probative value to the VA exam. The PEB and VA chose different coding options for the condition, with the VA using the PEB’s chosen code as an analogous for more specificity, but this did not bear on rating and both were IAW §4.71a—schedule of ratings–musculoskeletal system under the general rating formula for diseases and injuries of the spine. Both the PEB and the VA rated based on limited painful flexion which are consistent with a 10% rating IAW §4.71a. The VA exam documented muscle spasm however neither the MEB nor the VA exam documented an abnormal gait or spine contour to consider the 20% rating criteria. The VA’s chosen code 5242 (degenerative arthritis of the spine) allows for consideration of incapacitating episodes. While the C&P exam documented the CI self reported many days of incapacitating episodes, there were no treatment records to corroborate this report and therefore there is no evidence of documentation of incapacitating episodes which would provide for additional or higher rating.

The Board considered the 5243 code (intervertebral disc syndrome) and the 5239 code (spondylolisthesis or segmental instability) which are also clinically appropriate, but the evidence did not allow for additional or higher rating under these codes. There is no evidence of ratable peripheral nerve impairment in this case. 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 back 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 low 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** |
| Lumbago | 5237 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110729, 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 19 Sep 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:

- XXXX former USMC

- XXXX former USMC

- XXXX former USMC

- XXXX former USN

Assistant General Counsel

(Manpower & Reserve Affairs)