RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxxxxxxxxxxx BRANCH OF SERVICE: MARINE CORPS

CASE NUMBER: PD1100920 SEPARATION DATE: 20090227

BOARD DATE: 20120703

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a Reserve SSGT/E-5 (2846 / Field Radio Technician), medically separated for a low back condition. He injured his low back while participating in physical training (PT) and did not respond adequately to conservative or operative treatment to fulfill the demands within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was placed on limited duty (LIMDU) and underwent a Medical Evaluation Board (MEB). “Degeneration of lumbar or lumbosacral intervertebral disc (DDD); postlaminectomy syndrome of lumbar region; other and unspecified disc disorder of lumbar region and lumbago” were forwarded to the Physical Evaluation Board (PEB) IAW SECNAVINST 1850.4E. No other conditions appeared on the MEB’s submission. The PEB adjudicated the DDD L4/5 HNP condition as unfitting, rated 20%; additionally “chronic low back pain (LBP) and L4/5 status post (s/p) minimally invasive left sided L4/5 laminotomy, foraminotomy, facetectomy and microdiscectomy conditions rated category II, (contributing to the unfitting condition) IAW SECNAVINST 1850.4E and the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI requested a reconsideration of the PEB’s findings, but the decision was upheld and the CI was then medically separated with a 20% combined disability rating.

CI CONTENTION: The CI states: “- Disabilities are causing more pain, range of motion loss and work limitations than the original PEB board determined. - There are several disabilities rated by the VA as service connected that were not considered at the time the PEB board made its rating. - I have been unemployed since being separated, largely because available jobs are too physically demanding. - The necessity to take pain killers most of the time has limited my ability to drive or operate machinery.” He additionally lists all of his 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 condition LBP, l4/5 s/p minimally invasive left sided l4/5 laminotom, as 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 DDD, L4/5 HNP low back condition. The other requested conditions; DDD with cervicalgia s/p cervical fracture, left shoulder bursitis, bilateral plantar fasciitis and gastro esophageal refluxdisease (GERD) 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 Reconsideration PEB – Dated 20081110** | | | **VA (4 Mos. Pre-Separation) – All Effective 20090228** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| DDD, L4/5 HNP | 5237 | 20% | Symptomatic Diskectomy and Residual Scar | 5237 | 40% | 20081029 |
| Chronic LBP | Category 2 | |
| L4/5 S/P Minimally Invasive Left Sided L4/5 Laminotomy, … | Category 2 | |
| ↓No Additional MEB/PEB Entries↓ | | | DDD with Cervicalgia, S/P Cervical Fracture | 5242 | 20% | 20081029 |
|  | | | Left Shoulder Bursitis | 5019 | 10% | 20081029 |
| Bilateral Plantar Fasciitis | 5099-5276 | 10% | 20081029 |
| Esophageal Reflux | 7399-7346 | 10% | 20081029 |
| 0% x 3/Not Service-Connected x 0 | | | 20081029 |
| **Combined: 20%** | | | **Combined: 70%** | | | |

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 and the significant impact that his service-incurred condition has had on his current earning ability and quality of life. 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 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. The Board also acknowledges the CI’s contention that suggests ratings should have been conferred for conditions not diagnosed while in the service (but later determined to be service-connected by the DVA). The Board wishes to clarify that it is subject to the same laws for 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.

DDD L4/5 herniated nucleus pulposis (HNP)Condition. In 2007 the CI injured his back while playing floor hockey during a unit PT session. He presented to the emergency room with back pain that later progressed to include radicular pain in his left leg. He failed a course of conservative management which included chiropractic care, physical therapy and injections. Eight months later, in 2008, he underwent a laminotomy, foraminotomy, facetectomy and microdiscectomy with improvement of the leg pain, but the low back pain continued with radiating buttock and thigh pain. The non-medical assessment (NMA) documented the following limitations; no unsupported lifting of 30 pounds or more, unit PT, attending formation and running. The NMA further documented the CI was an excellent Marine, was working outside his MOS, missed 10 hours of work a week, was non-deployable and recommended he be found unfit for service due to his high risk of further back injury and continual back pain.

At the MEB exam, the CI reported daily back pain ranging from 1/10 at best to 5/10 at its worse, increased with sitting or standing for long periods, pain with walking down hill or downstairs, pain at night, frequent spasms and cramping, subjective left leg weakness, and no bowel or bladder incontinence. The CI was taking Vicodin (narcotic based), Flexeril (antispasmodic) and Motrin (anti-inflammatory) for pain control. The MEB physical exam demonstrated; non tender midline of the back, forward flexion of the spine, the CI reached to the mid portion of his shin with pain, straight leg raise on the left and on the right was positive and extension, right and left lateral bending did not aggravate the pain. X-rays revealed no fractures or dislocations, preserved lumbar lordosis, the L4/5 and L5/S1 disc space appeared slightly narrowed, post surgical changes in the region of the L4/5 disc space with the presence of a left sided laminotomy and facetectomy, no evidence of any spondylosis or spondylolisthesis, no significant anterior osteophytes present along the vertebral bodies, and there was no overt evidence of blastic or lytic bony lesions. At the VA Compensation and Pension (C&P) exam, preformed prior to separation, the CI reported similar symptoms as in the MEB exam. The C&P physical exam demonstrated; normal stance and lordosis, no tenderness of the sacroiliacs or sciatic notch, straight leg raising was positive at 30 degrees on the left and 70 degrees on the right both of which produced pain down the left leg. The range-of-motion (ROM) demonstrated; flexion 0-30 degrees to pain and the CI could push to 55 degrees, painful extension was 0-20 degrees, painful lateral flexion was 0-20 degrees to the left, 0-30 degrees to the right which was normal, right and left rotation was 0-30 degrees both normal. With regards to DeLuca, the examiner documented painful motion was 65 degrees and limited motion was 55 degrees, and concluded for the back, additional functional impairment cannot be specified as degrees of lost motion without resorting to speculation.

The Board directs attention to its rating recommendation based on the above evidence. The Board notes the VA exam was complete, well documented, and demonstrated other ratable data outside the ROMs; and, therefore assigns it more probative value than the MEB exam which was lacking measured goniometric ROMs. The PEB and VA chose the same coding options for the condition and both ruled IAW the VASRD §4.71a general rating formula for diseases and injuries of the spine. The PEB assigned a 20% based on limited flexion, while not measured, based on a forward flexion greater than 30 degrees and but not greater than 60 degrees. The VA assigned 40% based limited flexion of 30 degrees. The Board acknowledges likely this was an error on behalf of the VA rating decision as the flexion was 65 degrees limited to 55 degrees with DeLuca evaluation and the 30 degrees measured was at the onset of pain. Both the combined ROM of 185 degrees and the limited flexion of 55 degrees supported the 20% criteria. The Board carefully reviewed the service treatment record (STR) for corroborating evidence in the 12-month period prior to separation and found an entry10 months prior to separation from his treating back surgeon who documented a normal gait and normal ROM of the L-spine. There was also an STR entry from a physical therapy exam 18 months prior to separation which reflected a limited forward flexion of 50 degrees. The Board therefore agreed the limited forward flexion did not approach the 40% rating criteria and either met the 10% or 20 % criteria and further notes the Board's recommendation may not produce a lower rating than that of the PEB. 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. There was 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 low 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. In the matter of the contended LBP and L4/5 s/p minimally invasive left sided L4/5 laminotomy 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:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| DDD, L4/5 HNP | 5237 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111019, 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 13 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 individuals’ 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:

- former USN

- former USN

- former USMC

- former USMC

- former USN

- former USMC

Assistant General Counsel

(Manpower & Reserve Affairs)