RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxxxxxxxxxxxxxx BRANCH OF SERVICE: navy

CASE NUMBER: PD1101039 SEPARATION DATE: 20021112

BOARD DATE: 20122806

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty FCI/E-6 (FC-0000/Fire Controlman), medically separated for restless leg syndrome (RLS). He was initially placed on limited duty in October 1999, did not respond adequately to treatment and was unable to fulfill the physical demands within his Rating or meet physical fitness standards and underwent a Medical Evaluation Board (MEB). The first MEB completed on 31 October 2000 forwarded RLS and periodic leg movements of sleep and mild obstructive sleep apnea (OSA), which was further qualified as “this does not seem to be a significant contributor to his problems,” to the Physical Evaluation Board (PEB). The PEB found him fit for duty in February 2001 IAW the SECNAVINST 1850.4E. The CI appealed to the PEB president requesting reconsideration of the fit decision and further requested to be placed on the “Temporary Disabled Retirement List (TDRL) at a rating of not less than 30% under code 6847 (sleep apnea syndromes) or the analogous code deemed by the PEB to best reflect the symptoms that I display on a daily basis.” Additionally the CI requested continuance of 60 days to complete medical referrals to evaluate the chronic debilitating condition resulting in generalized fatigue that has rendered him unfit and allow him treatment for return to full duty. Finally, if the president did not agree with his appeal, he requested formal hearing. This PEB action was terminated in June 2001, while the CI underwent further consultations. Another MEB was completed on 27 September 2001 which forwarded five conditions as identified in the rating chart below to the PEB IAW SECNAVINST 1850.4E. The PEB adjudicated the RLS condition as unfitting, rated 0%, additionally chronic fatigue syndrome (CFS) and periodic limb movement syndrome (PLMS) rated Category II, asymptomatic microhematuria rated Category III, and hyperlipidemia rated Category IV; IAW SECNAVINST 1850.4E and Veterans Administration Schedule for Rating Disabilities (VASRD), respectively. The CI appealed to a Formal PEB (FPEB) for a disability rating of 40% and TDRL placement under code 6354 (chronic fatigue syndrome, CFS). The FPEB adjudicated RLS as unfitting, rated at 20%, upheld the remaining as PEB condition Category decisions and additionally rated paroxysmal nocturnal muscle spasms Category II and the CI was then medically separated with a 20% combined disability rating.

CI CONTENTION: “The Petitioner, by and through Counsel, having exhausted all other potential avenues for relief, does hereby petition the PDBR to correct an injustice that occurred while processing his Navy PEB case. 2. The focus of this petition is on a mistake of law that occurred during the processing of the Petitioner's Navy PEB case denying him Category I status for the Chronic Fatigue Syndrome from which he suffered while on active duty. See Enclosure One. 3. This resulted in the Petitioner being separated by reason of disability vice being medically retired as per his original petition. See Enclosures One and Two. 4. The Petitioner was subsequently assigned a 60% disability rating for chronic fatigue syndrome within a year of his separation from active duty. See Enclosure Three. 5. Counsel would contend that the findings in Enclosure Three make it manifestly clear that the Navy PEB system grossly underestimated the extent to which this injury impaired the Petitioner. 6. Based upon this evidence, the Petitioner seeks a review by the PDBR of his military health records and VA medical records to correct this injustice and recommend assigning him a 30% or greater disability rating for the conditions listed above. 7. Should there be any doubt regarding this issue, Counsel would argue that a review of the governing statute would militate in giving the claimant the benefit of the doubt in resolving such issues. See 38 USC 51 07(b). 8. This benefit of the doubt doctrine, known within the VA by its earlier label "reasonable doubt" has been an essential part of disability adjudication policy for many years: "When, after careful consideration of all procurable and assembled data information, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant." 38 CFR 4.3 (2009). 9. The failure to apply the "benefit of the doubt" doctrine in adjudicating disability claims under the provisions of Title 38 and ref (c) constitutes legal error. See Caffrey v. Brown, 6 Vet. App. 377, 383 (1994); see also Gilbert v. Derwinski 1 Vet. App. 49,57-58 (1990). 10. Counsel also requests that the Board grant any and all other relief not specifically addressed in this petition that the panel finds logically raised by the evidence of record. 11. Thank you for your consideration of the matters raised in this petition.”

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 chronic fatigue syndrome condition requested for consideration and the unfitting restless leg condition meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. 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 20020523** | | | **VA (~1 Mo. After Separation) – All Effective Date 20021113** | | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | | **Rating** | **Exam** |
| Restless Leg Syndrome | 6399-6354 | 20% | Restless Leg Syndrome, Left Lower Extremity | 8520 | | 10% | 20031205 |
| Restless Leg Syndrome, Right Lower Extremity | 8520 | | 10% | 20031205 |
| Periodic Limb Movement Syndrome | CAT II | |
| Paroxysmal Nocturnal Muscle Spasms Conditions | CAT II | |
| Chronic Fatigue Syndrome | CAT II | | Chronic Fatigue Syndrome | 6354 | | 60% | 20031205 |
| Asymptomatic Microhematuria | CAT III | | No VA Entry | | | | 20031205 |
| Hyperlipidemia | CAT IV | | No VA Entry | | | | 20031205 |
| ↓No Additional MEB/PEB Entries↓ | | | Status post Left Ulnar Nerve Transposition | | 8599-8516 | 10% | 20031205 |
| **Combined: 20%** | | | **Combined: 70%** | | | | |

ANALYSIS SUMMARY: The Board acknowledges the CI’s assertions that there was a mistake in the law while processing his case by denying him Category I for chronic fatigue syndrome and grossly underestimating his disability impairment. It is noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to asserted service improprieties in the disposition of a 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 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 service 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.

Restless Leg Syndrome and Chronic Fatigue Syndrome. In November 1998, the CI sought treatment with the neurology service for worsening episodic nocturnal leg cramps and jerking that had been occurring for over 9 years, increased in the evening, if more physically active and resulted in only getting 1-2 hours sleep. He was diagnosed with RLS, had some relief for 7 months on the medication Sinemet, but represented with worsening symptoms aggravated with shipboard activity, specifically climbing ladders and standing on hard surfaces. In 1999 he was placed on an 8-month ashore limited duty (LIMDU) while undergoing other medication treatment regimens. At his LIMDU reevaluation, the CI continued to have nighttime leg symptoms, worse if more physically active or with prolong sitting and poor sleep. He denied other daytime symptoms, sensory symptoms or low back pain. A polysomnogram had been performed which revealed mild OSA and severe periodic leg movements. He had some improvement with the chronic use of the medication Mirapex and, as necessary, use of the medications Ultram and Klonipin. The medical examiner opined the CI had been tried on numerous medications with suboptimal response, he would unlikely be able to return to shipboard duty and recommended the case be referred to the PEB. In February 2001 the PEB found the CI fit for duty and subsequently the case was terminated while the CI underwent further consultations for his chronic fatigue. The most proximal LIMDU in evidence, dated March 2000, documented the following limitations; station in the continental United States near a military treatment facility with shore duty, specifically no shipboard duty. The May 2002 non-medical assessment (NMA) documented; the CI was working in a billet appropriate for his rank and level of training, could not be assigned leadership roles due to his varying state of awareness, his physical condition prevented him from participating in physical training (PT) or physical readiness test (PRT). The NMA further documented the CI suffered from a debilitation condition that had been diagnosed as CFS and his inability to obtain restorative sleep at night caused loss of concentration and focus, lack of energy, drive, lethargic behavior and an increased consumption of coffee. Finally the NMA documented the CI was an outstanding performer.

At the MEB exam, completed 14 months prior to separation in September 2001, the CI reported; severe and debilitating fatigue which had impaired his ability to adequately perform his duties, non-refreshing sleep, daytime fatigue, intermittent leg pain which would get worse after a poor night sleep as well as other symptoms of hip pain, debilitating elbow pain and significant post-exertional malaise with a significant reduction in activity over the past two years. The CI use to be quite active, running, biking, surfing and now any of these types of activities would result in severe pain and fatigue 24 hours following said activities. The CI reported taking Lipitor, Klonopin and Mirapex. The MEB physical exam demonstrated a fatigued-appearing CI with dark circles under his eyes, normal vitals, a heart murmur and otherwise normal general exam. The laboratories were labeled normal except for a mild elevated liver enzyme. Consultant evaluations included; a negative evaluation by urology, nephrology, rheumatology, and psychology. In August 2001, the internal medicine examiner diagnosed CFS based on the criteria; symptoms of greater than 6 months duration, fatigue, myalgias, joint pain, non-refreshing sleep and postexertional malaise; however, further documented “must check if RLS is an exclusionary factor.” The NARSUM examiner opined the CI continued to have severe debilitating fatigue requiring limitation in activity, marked limitation in aerobic type physical activity, intermittent fevers and severe post-exertional malaise. In November 2001, in an addendum to the PEB, the MEB examiner further clarified his medical opinion documenting the CI was diagnosed with RLS/periodic leg movements of sleep, his symptoms did wax and wane some, but were certainly constant. He was using Demerol occasionally for the pain and in general had no significant response to his medical management.

At the VA Compensation and Pension (C&P) exam performed 13 months after separation, the CI reported he had suffered from RLS since 1990 with involuntary jerking of both legs with sleep, no loss of strength, weakness, fatigue, pain or impairment of coordination and took Mirapex for treatment. He was able to return to the original service duty at full duties absent physical and ship activity, but further stated he could not keep up with his normal work requirements because of fatigue caused by lack of sleep. He reported he also suffered with CFS since 1989 with migrating joint pain, low grade fever, frequent sore throat, generalized muscle aches or weakness, fatigue lasting 24 hours or longer after exercise, headaches, and swollen lymph nodes. These symptoms were intermittent but occurred 80% of the time brought on by activity. He had no restriction in activity until after the onset of CFS and now described he could only hold a part-time job. He worked full time, but had an understanding boss who allowed him to rest and take time off from work. He denied incapacitation episodes or treatment for this condition. The C&P physical exam demonstrated a normal general physical exam except for slight decrease of function of the left hand muscles and tingling of the left ulnar nerve with slight increase in 2 point discrimination. Specifically, there were no findings of palpable or tender lymph nodes or of non-exudative pharyngitis. The examiner diagnosed RLS, CFS and ulnar nerve transposition/release conditions. The examiner opined the CI met both primary and at least six of ten secondary criteria for CFS that was severe enough to reduce or impair average daily activity below 50 percent of his pre-illness level.

The Board directs attention to its rating recommendation based on the above evidence. The Board’s first charge with respect to the CFS condition 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. The evidence reflects a diagnosis of RLS for over 10 years which worsened with activity and significantly impacted sleep which led to daytime fatigue which impacted the CI’s functional capabilities and led to shore and administrative duties within his rating. While the internal medicine examiner documented the diagnosis of CFS, the Board notes this did not occur until August 2001 which was after the first PEB fit for duty determination. Furthermore, the Board agreed the Internal Medicine examiner did not give a final diagnosis of CFS as the examiner stated “that CFS must be a diagnosis of exclusion.” This diagnosis is set for in paragraph 4.88a of the VARSD which specifies the criteria that must be met to establish this diagnosis for VA purposes is the requirement for “exclusion, by history, physical examination, and laboratory tests, of all other clinical conditions that may produce similar symptoms.” The Board notes the rheumatology evaluation and addendum did not give CFS as a diagnosis but simply indicated a diagnosis of chronic fatigue felt to be due to the known sleep disorder of restless leg syndrome. The Board also notes the MEB did not document the other criteria required for the CFS diagnosis and, in fact, these were documented 13 months later in the C&P exam to include the additional symptoms of migrating joint pain, frequent sore throat, headaches, and swollen lymph nodes. The Board finally notes the CI reported, in the C&P exam, as having CFS since 1989, clearly different than the August 2001 date when this diagnosis was first documented by the internal medicine examiner. The Board agreed with the FPEB’s statement “in this case, the history and sleep test established the diagnosis of restless leg syndrome as the cause for the member's chronic fatigue”

Another significant issue confronted in this case is the probative value of the CI’s stated history as it relates to the timing and severity of his CFS symptoms. The Board’s default posture regarding the accuracy of history and severity of symptoms as reported by the applicant in the medical record is one of acceptance as factual evidence. The Board, however, must assign limitations to that principle in some cases. If there are provider notes questioning the accuracy of the history, or logical inconsistencies of the reported and subjective history with the overall evidence, the Board must take these into account in arriving at its recommendations. It was judged that such factors were evidenced in this case and they were elaborated above. The Board hastens to add that such factors are treated only as variables, not as accepted conclusions, with the emphasis remaining on meeting the “fair and equitable” standard of DoDI 6040.44. The Board’s recommendation must incorporate a probative value judgment between the disparate evidence from the service file and the VA’s C&P examination regarding CFS symptoms. The probative value judgment has to acknowledge a normal tendency to maximize symptoms in the context of VA rating evaluations with their attendant secondary gain pressure, but the Board concedes the validity of all evidence unless contradicting evidence can be cited. The Board recognizes the CI’s symptoms at the time of his C&P exam may reflect worsening of disease and must emphasize that its recommendations are premised on severity at the time of separation. The Board therefore agreed in this case there was either evidence of maximizing symptoms or worsening of disease and assigns more probative value to the MEB exam.

The PEB and VA chose different coding options for the RLS condition which had significant implications on the rating for the Board to consider. The PEB’s choice of coding analogous to the 6354 (chronic fatigue syndrome) was reasonable in capturing the residual fatigue from the RLS and gave the benefit of the doubt to the CI and assigned 20% and further stated the evidence indicated the CI was between the criteria for the 10% and the 20% rating. The VA chose to rate RLS with the sciatica code 8520 and assigned each leg 10% for mild pain which the action officer opined was an inconsistent rating assignment for the clinical pathology. The VA chose to separately rate CFS with code 6354 and assigned 60% for debilitating fatigue or a combination of other signs and symptoms which are nearly constant and restrict routine daily activities to less than 50 percent of the pre-illness activity level. The Board agreed as elaborated above the most appropriate code to capture the disabling fatigue from RLS was the 6354 code and furthermore agreed IAW VASRD §4.14, avoidance of pyramiding, that both RLS and CFS diagnoses could not be used for the unfitting condition. The Board agreed the evidence did not reflect incapacitation episodes and further agreed the evidence did not restrict routine daily activities by less than 25% to meet the 20% code 6354 criteria for the CI was working in his Rating and had an outstanding performance. 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. There was no viable approach to a higher rating for the RLS which was countenanced by the VASRD. 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 RLS condition and there was insufficient cause to recommend a change in the PEB fitness determination for the CFS 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 RLS condition and IAW VASRD §4.88b, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended CFS condition, 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** |
| Restless Leg Syndrome | 6399-6354 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111031, 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)