RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: navy

CASE NUMBER: PD1101116 DATE OF PLACEMENT ON TDRL: 20021224

BOARD DATE: 20120802 Date of TDRL SEPARATION: 20080227

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Sailor, OS1/E-5(9999, Navy Seal), medically separated for diabetes mellitus (DM), type 1*.* He did not respond adequately to treatment and to fulfill the physical demands within his Rating. He was placed on limited duty (LIMDU), and underwent a Medical Evaluation Board (MEB). A Physical Evaluation Board (PEB) adjudicated DM, type I to be unfitting rated 40% and placed the CI on the Temporary Disability Retirement List (TDRL) as identified on the chart below and hypercholesterolemia as a Category IV condition, a condition which does not constitute a physical disability, with application of SECNAVINST 1850.4E and the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI underwent a periodic TDRL review in June 2004 which retained him on the TDRL and a final periodic TDRL review was completed in October 2007. The IPEB adjudicated the DM, type I as unfit rated 20% with separation from TDRL. The CI appealed to the Formal PEB (FPEB) and the majority opinion upheld the PEB decision of unfit and rated 20%. The minority opinion, rendered by the medical officer, was fit for continued Naval service. The CI was then medically separated with a 20% disability rating.

CI CONTENTION: The CI states: “DISCHARGED FOR TYPE I DIABETES. SHOULD HAVE BEEN AT 40%. RATED AT 40% WITH VA IN 2004; 2 YEARS FROM THE DATE OF DISCHARGE WAS RECONFIRMED AT 40% FROM VA, AS WELL AS 10% FOR EACH FOOT, AND 10% FOR EACH HAND AS HAVING NEUROPATHY. ACCORDING TO THE NOTES IN THE RATIONALE FOR LOWERING MY RATING FROM 40% TO 20%, THE MEMBERS OF THE BOARD SAID,"IN SUMMARY, THE PURPORTED DEVELOPMENT OF DIABETIC NEUROPATHY IN THE TIME PERIOD WHILE AWAITING FORMAL HEARING IS, AT BEST SUBJECTIVE, AND AT WORST, SUSPECT." THAT STATEMENT INDICATED THAT THE MEMBERS OF THE BOARD MAY HAVE SUSPECTED THAT I WAS LYING ABOUT PERIPHERAL NUEROPATHY. HOWEVER, THE FACT THAT I HAD PERIPHERAL NUEOPATHY IN BOTH HANDS AND BOTH FEET WERE FIRST DOCUMENTED BY A NAVY DOCTOR (DR. JEFFERY COLE) IN 2003, AND LATER RECONFIRMED BY A SEPERATE VA DOCTOR BEFORE AND AFTER THE HEARING. AS STATED IN THE VA FINDINGS DATED FEB272004, IT WAS DOCUMENTED THAT I HAD TINGLING IN MY HANDS AND FEET. WHETHER THIS AFFECTED THE MEMBERS OBJECTIVE DUTY TO MAKE A FAIR DETERMINATION IS "SUSPECT" TO ANY REASONABLE PERSON. THE BOARD FOUND THAT MY INSULIN SENSITIVITY WOULD "PORTEND A BETTER PROGNOSIS FOR THE NEAR FUTURE." SHORTLY AFTER MEETING WITH THE BOARD, I WAS SENT TO A SPECIALIST (ENDOCRINOLOGIST) DUE TO THE FACT THAT MY DIABETES WAS INCREASINGLY GETTING HARDER AND HARDER TO CONTROL AND HAS SINCE BECOME INCREASINGLY HARDER. OVERALL, MY RATING FROM THE VA HAS BEEN AT 40% SINCE 2004, AND IN 2010 INCREASED TO 60%.” [sic]

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. 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:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| Final Service FPEB – Dated 20080227 | | | | VA – All Effective Date 20021224 | | | |
| Condition | Code | Rating | | Condition | Code | Rating | Exam |
| On TDRL – 20021224 |  | TDRL | Sep. |
| Diabetes Mellitus, Type I | 7913 | 40% | 20% | Type I Diabetes Mellitus | 7913 | 40%\* | 20031230 |
| Hypercholesterolemia |  | Cat IV | Cat IV | Hypercholesterolemia | 7099-7005 | NSC | 20021016 |
| ↓No Additional MEB/PEB Entries↓ | | | | 0% x 0/Not Service-Connected x 1 | | | 20021016 |
| Combined: 20% | | | | Combined: 40%\*\* | | | |

\*20040130 VARD increased rating from 20% to 40%.

\*\*compensable upper and lower extremity neuropathy was coded 8515 and 8520, respectively, and rated 10% each extremity effective 20090929 for a combined 60% with the BLF

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that the disability assigned by the service should reflect the same rating assigned by the Department of Veterans’ Affairs (DVA) and in addition that there should be additional disability assigned for conditions which will predictably worsen over time. 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 DVA. The Board acknowledges that the MEB, a DD Form 214, the non-medical assessment (NMA), the JDETS, orders placing/removing the CI from the TDRL, VA exams during TDRL status and exhibits, separation orders, exhibits to the FPEB, and the 20071025 periodic TDRL review were referenced, but not available in the evidence before it; and, could not be located after the appropriate inquiries. Further attempts at obtaining the relevant documentation would likely be futile and introduce additional delay in processing the case. The missing evidence will be referenced below in relevant context; and, it is not suspected that the missing evidence would significantly alter the Board’s recommendations. The Board agreed to assign 27 February 2008 as the date of TDRL separation which is the date the FPEB convened. The Board’s operative instruction, DoDI 6040.44, specifies a 12- interval for special consideration to DVA findings. This does not mean that the later VA evidence, the 29 October 2009 C&P exam completed 20 months after TDRL separation, was disregarded, but the Board’s recommendations are directed to the severity and fitness implications of conditions at the time of TDRL separation.

Diabetes Mellitus, Type I. The CI was first evaluated for hyperglycemia in 2002, diagnosed with type I DM and received treatment with outpatient medications and nutrition management. He was initially tried with oral medications but was then rapidly switched to insulin. His control of DM was rapid with insulin without any requirement for hospitalizations for either ketoacidosis or hypoglycemic episodes. The CI was placed on LIMDU and recommended for a PEB. His original hemoglobin A1c (HA1c) was 13.2% and by the time he was placed on TDRL it was 7.0% (normal less than 6.5%).

At the VA Compensation and Pension (C&P) exam, completed 2 months prior to placement on TDRL, the CI reported some mild finger and toe numbness and tingling during increased levels of glucose found in the serum and noted also increased healing time of lacerations or abrasions. He denied any hospitalization for inadequate control. The C&P physical exam demonstrated normal findings of the skin, eye, cardiovascular and sensation to pinprick and light touch throughout. A HA1c and monofilament testing were not performed but a blood sugar of 112 was reported (normal 65-109). The examiner diagnosed type II diabetes insulin requiring with no signs of peripheral diabetic neuropathy or diabetic nephropathy and no signs of subjective or objective association to suggest diabetic retinopathy.

The FPEB documented the HA1c had remained at or below 7.0% throughout his TDRL and, in October 2007 his final TDRL, it was 6.7%. His insulin demands had not increased since his initial control and he was on low doses likely reflecting he was insulin sensitive and would portend an overall better prognosis. The FPEB also documented there were no complications of diabetes recorded in the final TDRL exam. There was a lengthy discussion by the medical corps (MC) officer of the FPEB regarding the finding of diabetic peripheral with a monofilament testing reported by the VA in 13 February 2008 exam which was not in evidence for review. The MC officer noted that there was no sensory deficit at the October 2007 TDRL evaluation and the development of peripheral neuropathy over the span of 4 months in the context of excellent blood sugar control was “attention-grabbing” as neuropathy develops from long-term effects of elevated blood sugars. Further the MC noted the reported symptoms of intermittent tingling were not consistent with diabetic neuropathy as it remains present at all times, and finally monofilament testing is subjective and relies on the individual to report. For these stated conclusions the MC opined the development of diabetic peripheral neuropathy was “at best subjective, and at worst, suspect.” There was also a lengthy testimony from the CI regarding his set exercise routine, which was planned for ahead of time, whereby he exercised for 30-45 minutes every morning by either walking, using his solo flex machine, jumping rope, doing sit-ups and push-ups of which he could do 75 to 100 repetitions. He experienced one to two times’ symptomatic hypoglycemia which he treated with food intake which rapidly corrected the symptoms. He had not sought acute care treatment for the last 1-2 years for hypoglycemia or hyperglycemia.

The Board directs attention to its rating recommendation based on the above evidence. The PEB and VA chose the same coding options for the condition 7913 (diabetes mellitus) and both were IAW §4.119 schedule of ratings-endocrine system. The Board agreed with the initial 40% rating criteria placing the CI on TDRL based on uncontrolled hyperglycemia which required treatment and recognized this was the first rating percentage under the 7913 code at or above 30% to meet TDRL requirements. The two interim TDRL exams and PEB decisions were not in evidence for review and therefore the Board could not discern the reasoning for continuance on TDRL, but agreed if the recommendation was to remain on TDRL, the % criteria that allowed this was the 40% rating. The final PEB rated 20% and this criteria requires insulin and restricted diet, or; oral hypoglycemic agent and restricted diet. The VA rated 20% based on the same criteria from an August 2003 exam which was not available for review. In 2004, the VA increased the rating to 40% based on the same exam and in addition with an exam from December 2003 in which the examiner documented subjective loss of strength and that the CI could not do physical labor as it caused hypoglycemia. Further the examiner cited a statement from Dr. Cole that indicated he could not be as active as before due to diabetes. The 40% criteria requires insulin, restricted diet, and regulation of activities. The Board agreed the evidence clearly meets the 20% rating criteria. The Board engaged in a lengthy discussion to determine if the evidence reflects the VASRD definition of regulation of activities, which is cited in the 100% criteria as “avoidance of strenuous occupational and recreational activities.” While the service did find him unfit for his MOS, which the Board agreed was a strenuous occupation; the Board majority agreed the FPEB did not have evidence of the CI avoiding strenuous activity at the time of TDRL separation. The FPEB cited in October 2007, an exercise routine of 30-45 minutes that the CI followed daily and further could do 75 to 100 pushups which the medical member of the board found to be significant, as well as laudable. The Board also agreed the evidence does not demonstrate a material difference from the regulation of activities that any other insulin-dependent diabetic would have to undertake. Furthermore, the Board considered VASRD §4.1 (essentials of evaluative rating), which states “this rating schedule the percentage ratings represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations,” and VASRD §4.10 (functional impairment) which states “the basis of disability evaluations is the ability of the body as a whole, or of the psyche, or of a system or organ of the body to function under the ordinary conditions of daily life including employment.” The Board acknowledges the evidence reflects the CI is fully employed as insurance agent/mortgage loan officer, working from home, and did not require hospitalizations for hypoglycemic episodes.

The Board acknowledges the FPEB decision was a split decision based on fitness, not a split based decision on the 20% versus 40% criteria. The Board also acknowledges the VA original decision was 20% and it was not until an examiner statement submitted 6 months after separation and an exam 10 months after separation with which they changed the rating to the 40% criteria. Finally, the definition of regulation of activities (“avoidance of strenuous occupational and recreational activities”), has been clarified by case law as the situation where avoidance of strenuous activities is medically necessary, prescribed and supported by medical evidence (lay evidence alone is insufficient to meet this component of the rating criteria). The majority of the Board found no evidence that reflects impairment in the CI’s earning capacity, impairment under the ordinary conditions of daily life, including employment, acute care treatment for hypoglycemic episodes and prescribed avoidance of strenuous activities due to his DM and for these stated conclusions the Board majority agreed the evidence does not meet the 40% criteria.

The Board next considered if the evidence reflects any complications from his DM. The VASRD allows the evaluator to evaluate compensable complications of diabetes separately unless they are part of the criteria used to support a 100% evaluation or if there are non-compensable complications which can be used for the 60% evaluation. The Board agreed there was no evidence of neuropathy on the pre-TDRL C&P 2002 exam and the action officer concurs with the associated conclusions the MC officer documented in the FPEB proceedings, specifically that neuropathy symptoms are constant and unlikely to develop with well controlled DM which had been the case with near normal HA1c throughout the TDRL and at separation. In addition, the VA, in spite of the 13 February 2008 exam, did not rate diabetic neuropathy until a rating decision in 2010 with an effective date of 30 September 2009, based on a C&P exam performed on 29 October 2009 which documented subjective symptoms and without monofilament testing. The Board therefore agreed the evidence does not reflect neuropathy as a complication of DM at the time of TDRL separation and there was no evidence for other complications of DM for consideration. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the majority of the Board concluded that there was insufficient cause to recommend a change in the PEB adjudication for the DM 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. As discussed above, PEB reliance on SECNAVINST 1850.4E for rating DM was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the DM condition and IAW VASRD §4.119, the Board, by a vote of 2:1, recommends no change in the PEB adjudication. The single voter for dissent (who recommended adopting the VA rating 7913 at 40%) submitted the appended minority opinion. 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 |
| Diabetes Mellitus, Type I | 7913 | 20% |
| COMBINED | 20% |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111205, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

President

Physical Disability Board of Review

MINORITY OPINION. This case is missing key documents. Nonetheless, careful reading of the documents present and a reliance on their accuracy in reporting information from cited reports that those authors had at the time does afford an opportunity to correctly adjudicate this application. There are three relevant discussions, all of which direct one to a recommendation for a 40% disability rating.

On five different occasions, the Navy (2002 PEB and 2004 TDRL) and the VA (January and November 2004 VA decisions and 2010 decision) concluded that the CI’s condition met the criteria for 40%: in that he required insulin; required a restrictive diet; and required the regulation of activities. It is understandable that the PEB may have in fact chosen the 40% rating when making their 2002 and 2004 decisions to ensure that he stayed in a TDRL status in hopes that his condition may have remedied; unfortunately that did not happen. While the record is absent definitive evidence that regulation of activities was indeed medically required, these five decisions required such evidence (even with an acknowledged PEB predisposition to a TDRL convalensce). Assuming the regularity of these decisions, it is implied that such evidence was present when those decisions were made. There is no evidence or reference to any evidence which would indicate that such direction was not continuous or that any medical professional responsible for the CI’s care altered the implied medical directive from medically regulating his activities to not doing so between 2004 and 2009/2010.

Secondly, while one might applaud the CI’s exercise regime, it is notably less than that of any regular combat unit member and unquestionably regulated from the routine that he or any other OSI member would normally execute on a daily basis. The FPEB acknowledged that the CI has measurably adjusted his activities and modified his lifestyle to cope within the constraints of diabetes. This exercise regime clearly illustrates an avoidance of the strenuous and physically stressful activities of an OSI sailor. Just as the FPEB line officers said, the CI’s ”diabetes is of such an impact to the member that it would materially impair [his] ability to perform the duties of an OSl in the United States Navy.” This infers that his diabetes requires the avoidance of strenuous activities in that the duties of an OSI are assumed to be strenuous. This CI choose to live the strenuous life of an OSI sailor, as a special breed of warrior, one forged by adversity. His current life with its 75 push-ups and 75 sit-ups is the life of a mortgage broker, not that of the man this CI was until diabetes. At the time of TDRL separation, the CI was no longer pursuing the OSI life but rather he was avoiding that type of strenuous activity and merely staying fit. There is no question that the CI’s daily life at separation was notably impaired by his DM 1.

Lastly, the majority decision of the FPEB is based on an illogical interpretation of the VASRD. Their conclusion that his regulation of activities is not “materially different from the regulation of activities that any other motivated, insulin-dependent diabetic would have to undertake” may in fact be true, but is an invalid interpretation of the VASRD. The VASRD only asks whether an applicant must regulate his activities to avoid strenuous activities, whether they need insulin and if a restrictive diet is required. They were called upon to evaluate this CI not to compare him to other diabetics. In their statement they acknowledge that his activities were regulated. Past decisions imply this regulation was medically required. The 40% criteria are met.

The FPEB minority opinion indicated that the CI is “fit for continued Naval service.” To achieve a satisfactory (minimum) rating in a USN physical fitness test, a 34 year old sailor must meet body/fat standards, run 1.5 miles in 14:15 or swim 500 yards in 12:30, and do 44 sit-ups and 35 push-ups in a 2 minute period each. While the CI can in fact do a variety of calisthenics, we have no evidence that he has the endurance to either run or swim. That opinion is suspect.

I strongly recommend that the CI’s TDRL rating be continued: TDRL at 40% from 24 December 2002 through 27 February 2008 and then a permanent combined 40% disability retirement as below.

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| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** | |
| **TDRL** | **PERMANENT** |
| Diabetes Mellitus, Type I | 7913 | 40% | 40% |
| **COMBINED** | **40%** | **40%** |

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 24 Aug 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 USMC

- former USN

- former USN

- former USN

- former USMC

- former USMC

Assistant General Counsel

(Manpower & Reserve Affairs)