RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: MARINE CORPS

CASE NUMBER: PD1200080 SEPARATION DATE: 20081030

BOARD DATE: 20121002

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (0331/Infantry Machine Gunner), medically separated for multilevel lumbosacral spondyloarthropathy, degenerative disc disease*.* The CI initially had intermittent back pain that responded to conservative treatment. However, his condition progressed, it did not respond to multiple treatment modalities, and surgery was not indicated. The CI was unable to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was placed on limited duty (LIMDU) three times and referred for a Medical Evaluation Board (MEB). Hypertension, left tympanic membrane, and hyperlipidemia conditions, identified in the rating chart below, were also identified and forwarded by the MEB. The Physical Evaluation Board (PEB) adjudicated the lumbosacral spondyloarthropathy condition as unfitting, rated at 10%. The remaining conditions were determined to be Category III, neither separately unfitting nor contributing to the unfitting condition. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “Lower back. I can no longer run and have trouble moving about. PTSD, this affects me on a daily basis and was not included in my PEB board. TBI for which affects me on a daily basis, with my memory, sex drive, ability to get an erection and other things.”

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in the Department of Defense Instruction (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 other requested conditions were not identified by the PEB and are therefore 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 IPEB – Dated 20080804** | **VA (18 Months Post-Separation) – All Effective Date 20081031\*** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Multilevel Lumbosacral Spondyloarthropathy, Degenerative Disc Disease | 5243 | 10% | Lumbar Strain | 5237 | 10%\* | 20100423 |
| Hypertension | Cat III | Hypertension | 7101 | 0% | 20090511 |
| Left Tympanic Membrane Rupture status post Myringoplasty | Cat III | Not Addressed |
| Hyperlipidemia | Cat III | NSC | 20100423 |
| ↓No Additional MEB/PEB Entries↓ | Traumatic Brain Injury | 8045 | 40% | 20100412 |
| Post Traumatic Stress Disorder | 9411 | 30% | 20090710 |
| Cervical Arthritis | 5242 | 10% | 20100209 |
| Left Ankle Strain | 5299-5024 | 10% | 20090511 |
| Right Ankle Strain | 5299-5024 | 10% | 20090511 |
| Right Knee Strain | 5299-5024 | 10% | 20090511 |
| Left Knee Strain | 5299-5024 | 10% | 20090511 |
| Left Rotator Cuff Strain | 5299-5024 | 10% | 20090511 |
| Tinnitus | 6260 | 10% | 20090512 |
| Allergic Rhinitis with Recurrent Sinusitis | 6522-6510 | 10% | 20090511 |
| Left Ulnar Nerve Impingement | 8616 | 10% | 20090511 |
| 0% x 7/Not Service Connected x 5 | 20090511   |
| **Combined: 10%** | **Combined: 90%\*\*****Bilateral factor of 3.4 percent for diagnostic codes 5024,5024,5024,5024** |

\*5237 Lumbar Strain rating not effective until 20090209, the day of his new claim.

\*\*Initially 80% effective 20081031 and increased to 90% effective 20100209 when Lumbar Strain added at 10%.

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 acknowledges the CI’s contention that suggests ratings should have been conferred for other conditions documented at the time of separation. 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. While the DES considers all of the member's medical conditions, compensation can only be offered for those medical conditions that cut short a member’s career, and then only to the degree of severity present at the time of final disposition. However the Department of Veterans’ Affairs (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 his degree of impairment vary over time. 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 and is limited to conditions adjudicated by the PEB as either unfitting or not unfitting. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Multilevel Lumbosacral Spondyloarthropathy, Degenerative Disc Disease. The CI was first seen for back pain in June 2006 and over time his condition progressed and did not respond to multiple treatment modalities including physical therapy , epidural steroid injections, primary rami blocks, and sacroiliac joint injections. A neurosurgery evaluation determined surgical intervention was not indicated. The CI had a VA Compensation & Pension (C&P) exam performed on 1 November 2004 and it stated he was “scheduled to be released January 15, 2005.” However, he did not separate from service until 30 October 2008 and no rating was done based on this exam. Prior to separating on 30 October 2008, he filed a new claim on
14 April 2009 and a C&P exam for his back was performed on 23 April 2010. The VA rating was effective 9 February 2010, the day of the claim for the back condition.

There were two goniometric 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.

DOS 20081030

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM | MEB ~4 Months Pre-Separation | VA C&P ~16 Months Post-Separation |
| Flexion (90⁰ Normal) | 90° (110) | 90⁰  |
| Ext (0-30) | 25⁰ | 30⁰  |
| R Lat Flex (0-30) | 30⁰ | 30⁰ |
| L Lat Flex 0-30) | 30⁰ | 30⁰ |
| R Rotation (0-30) | 30° (45) | 30⁰ |
| L Rotation (0-30) | 30⁰ | 30⁰ |
| Combined (240⁰) | 235⁰ | 240⁰ |
| Comment | ROM from PT February 2008 and Waddell’s signs all negative. MEB exam: nearly full ROM though slow secondary to pain; positive mild tender to palpation along l2-5 area, left greater than right ; negative straight leg raise bilaterally with slight increase in lumbar pain; motor 5/5 in lower extremities; reflexes 2+; neurological examination normal. MRI: multilevel Spondyloarthropathy, L3-4, L4-5, L5-S1 and mild to moderate right foraminal stenosis at L4-5. EMG normal 20070305. | No evidence of radiating pain on movement; no muscle spasm; no tenderness or guarding; negative straight leg raise bilaterally; no ankylosis; normal head position and symmetry; No sensory deficits (pinprick) L1-5 or S1. normal motor tone and no muscle atrophy; reflexes 2+ bilaterally; no additional limitation after repeated motion. No non-organic signs. Normal x-rays. Pain noted at end of flexion and extension. |
| §4.71a Rating | 10% | 10% |

The Board directs attention to its rating recommendation based on the above evidence. Although they used different diagnostic codes, both the PEB and the VA rated the condition at 10% for painful motion. There are no findings to support a rating greater than 10% under any code. 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 multilevel lumbosacral spondyloarthropathy, degenerative disc disease 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 multilevel lumbosacral spondyloarthropathy, degenerative disc disease 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** |
| Multilevel Lumbosacral Spondyloarthropathy, Degenerative Disc Disease | 5243 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120122, 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 15 Oct 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:

- XXX XX former USMC

- XXX XX former USMC

- former USN, XXX-XX

- former USN, XXX-XX

 Assistant General Counsel

 (Manpower & Reserve Affairs)