RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: NAVY

CASE NUMBER: PD1200226 SEPARATION DATE: 20070614

BOARD DATE: 20120801

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Petty Officer Second Class/E-5 (6418/Aviation Machinist Mate), medically separated for lumbar fusion L2-L4. The CI did not improve adequately with treatment to meet the physical requirements of his Rating or satisfy physical fitness standards. He was placed on limited duty (LIMDU) three times then referred for a Medical Evaluation Board (MEB). Degeneration of lumbar or lumbosacral intervertebral disc and lumbosacral spondylosis without myelopathy conditions, identified in the rating chart below, were identified and forwarded by the MEB. The Physical Evaluation Board (PEB) adjudicated the lumbar fusion L2-L3 condition as unfitting, rated 20%, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). Lumbosacral spondylosis and degenerative disk disease (DDD) were determined to be a Category II conditions, contributing to the primary unfitting condition but not separately ratable. The CI initially requested a formal board, but 2 months later accepted the decision of the PEB and was medically separated with a 20% disability rating.

CI CONTENTION: The CI contends for addition of post traumatic stress disorder (PTSD), depression, and right shoulder conditions added as unfitting conditions for rating at separation. He states, “I feel that had all my medical issues were truly considered that I would have been granted medical retirement instead of medical separation. I was at 20% with my back issues alone. I feel a great disservice from that Navy doctor who refused to include the PTSD, as this is a service connected issue along with other mental and physical problems I incurred while serving my country. The Navy was well aware that I suffered from PTSD and depression along with my shoulder issues as they were treating me for both prior to my separation. I am including the medical documents from the Navy doctors themselves supporting my statement.”

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 conditions “identified but not determined to be unfitting by the PEB.” The ratings for unfitting conditions will be reviewed in all cases. The lumbar fusion L2-L4 condition requested for consideration and the related Category II diagnoses lumbosacral spondylosis and degenerative disk disease meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. The other requested conditions posttraumatic stress disorder (PTSD), depression, rotator cuff tear and bone spur in right shoulder are not within the Board’s purview. The remaining conditions rated by the Department of Veterans’ Affairs (DVA) at separation and listed on the DD Form 294 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 PEB – Dated 20061220** | | | **VA (~1 Mo. Post-Separation) – All Effective Date 20070615** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Lumbar Fusion L2-L3 | 5242-5241 | 20% | Degenerative Changes, s/p Lumbar Laminectomy with Scar  (previously rated as Lumbosacral and Thoracic Strain) | 5237 | 20%\* | 20070720 |
| Lumbosacral Spondylosis | Related CAT II | |
| Degenerative Disk Disease | Related CAT II | |
| ↓No Additional MEB/PEB Entries↓ | | | Hypertension | 7101 | 10% | 20070720 |
| Major Depressive Disorder | 9434 | 30% | 20070827 |
| Right Shoulder Bursitis | 5201-5019 | 10% | 20070720 |
| Left Knee Strain | 5019-5260 | 10% | 20070720 |
| Right Ankle Strain | 5019-5271 | 10% | 20070720 |
| 0% X 2 / Not Service-Connected x 3 | | | |
| **Combined: 20%** | | | **Combined: 60%** | | | |

\*Rated name change only; rating percentage (20%) stated the same.

ANALYSIS SUMMARY: The Disability Evaluation System (DES) is responsible for maintaining a fit and vital fighting force. 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 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 nor for conditions determined to be service-connected by the DVA but not determined to be unfitting by the PEB. 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 re-evaluate said conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment vary over time. 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. The Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to the CI’s statements in the application regarding suspected DES improprieties in the processing of his case.

Lumbar Fusion L2-L3 Condition. The CI developed chronic back pain with radiating pain associated with DDD beginning in 2004. Magnetic resonance imaging (MRI) in December 2004 demonstrated DDD at T11-12, L1-2 and L5-S1 with disc herniation at T11-12 and L1-2. Evaluation by a neurosurgeon in March 2005 concluded his symptoms were consistent with DDD but that there was no clinical evidence for radiculopathy. Non-surgical treatment including a series of epidural injections was recommended; however, no significant benefit resulted. Discograms performed in 2005 were considered positive at L1-2 and ultimately the CI underwent surgery to fuse L1 and L2 for DDD in August 2006. Post-operative neurosurgery follow up appointments indicated a good response to surgery. On 1 November 2006, the neurosurgeon indicated the CI was “doing well overall.” On examination there was decreased flexion and extension, and an intact neurologic examination. There were some inconsistencies in the record concerning the level of the surgical fusion, L2-L3 vs. L2-L4. The correct level of surgical fusion is L2-L3. This inconstancy would not impact the code or rating of this condition. The MEB narrative summary (NARSUM), dated 1 November 2005, summarized the history noted above. On examination, there was tenderness. Range-of-motion (ROM) is recorded in the chart. Muscle strength, sensation and deep tendon reflexes were intact and straight leg raising was negative for signs of radiculopathy. On 15 February 2007, the neurosurgeon noted that there was some muscular pain in the back but no leg symptoms, motor disturbance, or sensory disturbance. The surgeon recorded a normal neurologic examination, with normal gait, normal strength and reflexes. The VA Compensation and Pension (C&P) examination, was performed on 24 July 2007, a month after separation. The CI reported persistent LBP since surgery without radiation or leg weakness. On examination, there was muscle spasm, moderate loss of the normal lumbar lordosis, and a mildly antalgic gait. ROM recorded in the table was not additionally limited by pain, fatigue, weakness or lack of endurance after repetitive motion during the examination. Muscle strength, sensation and reflexes were intact. The examiner noted that there had not been any incapacitating episodes requiring bed rest prescribed by a physician. The MEB and VA C&P examinations both provide adequate documentation of thoracolumbar goniometric ROM measurements well within the 12-month window specified in DoDI 6040.44 regarding evaluations for Board consideration therefore, significant probative value can be assigned to these measurements. They are summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM  Degrees | MEB  ~7 Mos. Pre-Sep | VA C&P  ~1 Mo. Post-Sep |
| Flexion (90 Normal) | 45 | 50 |
| Extension (30) | 10 | 20 |
| Combined (240) | 165 | 190⁰ |
| Comment | + Tenderness  Normal gait. | + Tenderness  + painful motion  No change after repetition.  +spasm, antalgic gait. |
| §4.71a Rating | 20% | 20% |

The Board directs attention to its rating recommendation based on the above evidence. The PEB and the VA coded the back condition differently, but this had no bearing on the rating and both rated in accordance with the VASRD general rating formula for diseases and injuries of the spine. Board members agreed the ROM documented in both examinations supports the 20% rating. There was no evidence of incapacitating episodes due to intervertebral disc disease that would meet the criteria for a minimum rating under the alternative formula for incapacitating episodes due to intervertebral disease. There was no evidence of an unfitting peripheral nerve impairment in this case. The PEB also listed associated diagnoses of lumbar spondylosis, and DDD, the former term refers more generally to degenerative disease of the spine not limited to DDD. These are the underlying diagnoses for which the surgical fusion procedure was performed and are not separate conditions for which a rating may be assigned (§4.14 avoidance of pyramiding). 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 chronic back pain with DDD 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 lumbar fusion 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** |
| Lumbar Fusion | 5242-5241 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120228, 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 16 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 Physical Evaluation Board:

* former USMC
* former USN
* former USN
* former USN
* former USMC
* former USN

Assistant General Counsel

(Manpower & Reserve Affairs)