

RECORD OF PROCEEDINGS
PHYSICAL DISABILITY BOARD OF REVIEW

NAME:
CASE NUMBER: PD1200361
BOARD DATE: 20121129

BRANCH OF SERVICE: MARINE CORPS
SEPARATION DATE: 20091129

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty, SGT/E-5, 6467/Consolidated Automatic Support System (CASS) Technician (2yrs) – previously 3531/Motor Vehicle Operator (5yrs), medically separated for a low back condition. He did not respond adequately to treatment and was unable to fulfill the physical demands within his Military Occupational Specialty (MOS), meet worldwide deployment standards or meet physical fitness standards. He was placed on limited duty and underwent a Medical Evaluation Board (MEB). Lumbago, displacement of lumbar intervertebral disc without myelopathy, degeneration of lumbar intervertebral disc and unspecified hearing loss were forwarded to the Physical Evaluation Board (PEB) IAW SECNAVINST 1850.4E. The PEB (PEB) adjudicated L4-L5, L5-S1 degenerative disc disease (DDD) as unfitting, rated 20%, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). Herniated intervertebral disc (HNP) L5-S1, sciatica, and low back pain were determined to be not unfitting and Category II (CAT II) conditions. Bilateral hearing loss was determined to be a Category III (CAT III) condition. The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: The CI Contended, “Per DODI 6040.44, 5.e (2).A and 5.e. (2).B: I hereby request my separation be considered for medical retirement due to (conditions found disqualifying for service) AND all other conditions not determined to be unfitting by the PEB but found disabling by VA decisions.”

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 conditions, herniated intervertebral disc L5-S1, sciatica, lower back pain, and bilateral hearing loss, as requested for consideration meet the criteria prescribed in DoDI 6040.44 for Board purview and are 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.

RATING COMPARISON:

Service IPEB – Dated 20090919			VA (~11 Mos. Post-Separation) – All Effective Date 20091130			
Condition	Code	Rating	Condition	Code	Rating	Exam
L4-L5 L5-S1 Degenerative disc disease	5237	20%	Lumbar strain	5242-5237	20%*	20101026
Herniated Intervertebral Disc L5-S1	Cat II					
Lower Back Pain	Cat II					
Sciatica	Cat II		Sciatica	Not Service Connected, No Diagnosis		20101026
Bilateral hearing loss	Cat III		Bilateral hearing loss	Not Service Connected, Hearing Normal for VA Purposes		20100611
↓No Additional MEB/PEB Entries↓			Tinnitus	6260	10%	20100611
Combined: 20%			0% X 0 / Not Service-Connected x 1			
			Combined: 30%*			

*increase lumbar strain to 40 % effective 20110929 for a new combined of 50%.

ANALYSIS SUMMARY: The Disability Evaluation System (DES) is responsible for maintaining a fit and vital fighting force. 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. The DES has neither the role nor the authority to compensate members for anticipated future severity or potential complications of conditions resulting in medical separation nor for conditions determined to be service-connected by the Department of Veterans' Affairs (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. 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's threshold for countering DES 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.

Low Back Condition. The Board deliberated L4-L5 and L5-S1 DDD, HNP L5-S1, lower back pain, and sciatica as a low back condition. The CI had an insidious onset of atraumatic back pain with radiation to the right lower extremity in 2005 for which he sought treatment in May 2006. He was diagnosed with a lumbar strain and treated conservatively. The pain persisted despite treatment with nonsteroidal anti-inflammatory and muscle relaxant medications, physical therapy and chiropractic care. In 2008, a magnetic resonance imaging (MRI) study was ordered which revealed DDD of L5-S1 with a slight broad based effacement of the right S1 nerve root within the canal, minimal broad-based disc bulge at L4-L5 with mild effacement and very mild, early central stenosis. An orthopedic spine specialist diagnosed herniated lumbar disc and opined surgical management was not a good treatment option and referred to pain management. From June 2008, pain management treated the pain with injections and a medial branch nerve block with only transient relief of his pain and ultimately placed him on a medication regimen which included long acting narcotics (Oxycodone sustained released SR, 15mg, twice daily), short-acting narcotics (Oxycodone Immediate Release IR 8mg, 3 times daily) and a chronic non-steroidal medication (Relafen twice daily). A second opinion orthopedic spine consult concurred with the non surgical treatment approach. The CI had responded well to transcutaneous electrical nerve stimulation (TENS) previously and at the recommendation of physical therapy, a home TENS unit was issued. The service treatment record (STR) reflects the

pain was controlled on the referenced above medication regime with a pain scale of 3-4 of 10 in intensity. The LIMDU's identified all the referenced associated low back conditions and the limitations included; no deployment, field duty, kneeling, crawling, lifting greater than 15 pounds, sit-ups, push-ups, running and physical training or testing. The non-medical assessment (NMA) corroborated the non deployable and lifting limitation however recommended he be placed on permanent LIMDU to allow him to complete his tour of duty. 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 20091129

Thoracolumbar ROM (Degrees)	Civilian STR ~11 Mo. Pre-Sep	PT for MEB ~6 Mo. Pre-Sep	VA C&P ~11 Mo. Post-Sep
Flexion (90 Normal)	Flexion to mid tibia	15	0-60
Ext (0-30)	Extension to neutral	10	0-30
R Lat Flex (0-30)	wnl	25	0-30
L Lat Flex (0-30)	wnl	20	0-30
R Rotation (0-30)	wnl	24	0-30
L Rotation (0-30)	wnl	22	0-30
Combined (240)	NA	115	190
Comment	With pain at extremes of motion, no spasm, normal gait	Painful motion, 4/10 pain,	Painful motion; DeLuca observations 40°, no spasm, normal gait & posture;
§4.71a Rating	20%	40%	20%

The MEB physical exam demonstrated normal neuromuscular findings and cited the physical therapy ROMs above. There was one orthopedic spine surgeon STR within 12 months prior to separation with references to ROMs that documented; flexion to the mid tibia, extension to neutral, lateral bending normal, painful motion, normal gait, normal alignment, and no findings with provocative nerve testing. At the VA Compensation and Pension (C&P) exam after separation, the CI reported weekly flares lasting 1-2 days, pain that radiated to right lower extremity exacerbated with lifting, exercising, and sitting, relieved with TENS unit, rest, ice/heat, stretching, no incapacitation episodes and no use of ambulatory devices. The C&P exam after separation demonstrated a normal gait, no abnormal contour, no spasm, no weakness and normal reflexes. Lumbar spine X-rays were normal.

The Board directs attention to its rating recommendation based on the above evidence. There is a clear disparity between the MEB and VA ROM examinations, with very significant implications regarding the Board's rating recommendation. The Board thus carefully deliberated its probative value assignment to these conflicting evaluations, and carefully reviewed the service file for corroborating evidence in the 12-month period prior to separation. In assigning probative value to these somewhat conflicting examinations, the Board notes that: the VA measurements are consistent with corroborating evidence from the orthopedic spine STR; the VA measurements are consistent with the other collateral physical findings; the VA measurements are consistent with the diagnostic and clinical pathology in evidence; there are no STR reflective of the near ankylosis spine as evidence by the PT flexion ROM exam and the 4 of 10 pain at the time of the PT exam is inconsistent with the severe flexion ROM. Therefore, based on all evidence and associated conclusions just elaborated, the Board is assigning probative value to the VA evaluation. The PEB and VA chose the same primary 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 based on a forward flexion greater than 30 degrees and but not greater than 60 degrees. The VA assigned 20% based limited flexion of 40 degrees with a positive DeLuca evaluation and further cited no

additional ratings for flare-ups, incapacitation episodes or peripheral nerve. The Board considered whether additional rating could be recommended under a peripheral nerve code for the residual sciatic radiculopathy at separation. Firm Board precedent requires a functional impairment tied to fitness is required to support a recommendation for addition of a peripheral nerve rating to disability in spine cases. The pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a. There is no motor weakness in evidence. Since no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment. There was no documentation of incapacitating episodes which would provide for higher rating. 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.

Contended PEB Conditions. The contended conditions adjudicated as not unfitting by the PEB was hearing loss. The Board’s first charge with respect to these conditions 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. This condition was not listed on the LIMDU’s; implicated in the NMA statement; and, was not judged to fail retention standards. There was no indication from the record that this condition significantly interfered with satisfactory duty performance. After due deliberation in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB fitness determination for this contended condition, therefore, no additional disability rating can be recommended.

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 hearing loss 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
L4-L5, L5-SI Degenerative disc disease	5237	20%
	COMBINED	20%

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120412, 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 18 Dec 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 individual's 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

Assistant General Counsel
(Manpower & Reserve Affairs)