RECORD OF PROCEEDINGS
PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XX
CASE NUMBER: PD1200530
BOARD DATE: 20130110
BRANCH OF SERVICE: MARINE CORPS
SEPARATION DATE: 20030731

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSgt/E-6 (3381/Food Service Specialist), medically separated for a low back condition. The CI did not respond adequately to surgical and post rehabilitative treatment to fulfill the physical demands of her Military Occupational Specialty (MOS), meet worldwide deployment standards or satisfy physical fitness standards. She was placed on limited duty and referred for a Medical Evaluation Board (MEB). Degeneration of lumbar or lumbosacral intervertebral disc and lumbago were forwarded to the Physical Evaluation Board (PEB) IAW SECNAVINST 1850.4E. No other conditions appeared on the MEB's submission. The PEB adjudicated the low back condition as unfitting, rated 20%, with application of the Veterans Affairs Schedule for Rating Disabilities (VASRD). The remaining condition was determined to be category II (contributing to unfit condition). The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: The CI elaborated no specific contention in her application.

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 condition 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 20030529		
Condition	**Code**	**Rating**
Lumbar DDD	5295	20%
Low Back Pain	Cat II	
No Additional MEB/PEB Entries		
Combined: 20%		

VA (~3 Mos. Post-Separation) – All Effective Date 20030801			
Condition	**Code**	**Rating**	**Exam**
S/P Diskectomy L5-S1 w/Residual Arthritis	5242*	40%*	20050519
Surgical Scar Lower Back	7805	0%	20031021
Radiculopathy LLE associated w/ S/P Diskectomy L5-S1 w/ Residual Arthritis	8520	10%*	20050519
Radiculopathy of RLE	8520	10%*	20050519
Gastric Ulcer	7304-7346	10%	20031021
Endometriosis	7629	10%	20031021
0% X 1 / Not Service-Connected x 3			20031021
Combined: 60%			

*Original VARD rated 20% based on exam 20031021 then rating increased to 40% via an appeals and based on a 20050519 exam effective DOS. Radiculopathy was not on original VARD for RLE and LLE was added based on later exam effective DOS.

ANALYSIS SUMMARY: While the Disability Evaluation System 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 Department of Veterans Affairs (DVA), however, is empowered to compensate 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 operative instruction, DoDI 6040.44, specifies a 12-month interval for special consideration to DVA findings. This does not mean that the later DVA evidence was disregarded, but the Board's recommendations are directed to the severity and fitness implications of conditions at the time of separation.

Low Back Condition. The CI injured her low back while practicing the fireman's carry. She was treated conservatively for musculoskeletal back pain with anti-inflammatory and muscle relaxants medications and physical therapy (PT) with significant improvement. Six months later she reinjured her back after doing a physical training test with new intermittent radicular symptoms of tingling and numbness in the left leg. The CI was evaluated and treated conservatively by orthopedics for a magnetic resonance imaging (MRI) confirmed L5-S1 central disk protrusion (HNP). In September 2000, she underwent a microdiscectomy of the L5-S1 without complication and was returned to duty, 7 months later, in April 2001 with resolution of her symptoms. However, due to a new onset of persistent pain and radicular symptoms she underwent a second surgical procedure in November 2001 to include; a L5-S1 fusion and fixation, removal of scar tissue from the prior surgery and removal of S1 epidural scar tissue. She had a post operative complication of left leg weakness that gradually improved while in the hospital, which was documented as full strength 2 weeks after surgery. 4 weeks into rehabilitation she had a fall that aggravated her back pain that resurfaced radicular symptoms of pain, numbness and weakness to her left leg. X-rays revealed that the hardware and fusion bone were in place. She was seen 3 months later with the same symptoms as prior to her second surgery. The neurosurgeon diagnosed likely failed fusion, due to persistent symptoms, and documented an exam consistent with mild diffuse weakness; especially at left foot dorsiflexion. In June 2002, she underwent her third and final back surgery for a failed fusion with a redo of the L5-S1 fusion with extension of fusion and fixation to S2 without complications. Three months post surgery, she reported intermittent worsening low back pain, especially when lying down and sitting, but an improvement in the numbness and tingling. Neurosurgery referred her to pain management and mental health clinics, requesting other treatment modalities for her persistent pain reported as 6-8 of 10 in intensity post surgery. Her pain decreased after epidural steroid injections down to 4-6 of 10 with decreased numbness and paresthesias; she reported a 60% improvement from baseline. The non-medical assessment corroborated her low back and leg pain and documented her restriction to dining facility administrative duties and inability to physically supervise other cooks in garrison. During the 24 months period prior to separation, the CI visited neurosurgery 18 times, pain management at 5 times, received 2 documented sets of epidural steroid injections; and 11 other outpatient clinic, ER or hospitization visits to treat her low back and radicular pain conditions.

Seven months after separation the evidence reflected: her continued need to seek care for her back pain; a daily requirement for Neurontin pain modifying medication and an intermittent muscle relaxant; she attended PT; had pain at 4-5 of 10; and a bilateral antalgic gait. In November 2005, 28 months post separation she was implanted with an intrathecal pain pump, which provided pain relief, but was removed due to complications and in August 2006, 37 months post separation, she underwent a permanent dorsal column stimulator, but there was no evidence detailing pain relief.

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.

Thoracolumbar ROM Degrees	MEB ~5 Mo. Pre-Sep	VA C&P ~3 Mo. Post-Sep
Flexion (90 Normal)	Very limited	60
Ext (0-30)	Very limited	0
R Lat Flex (0-30)	--	20
L Lat Flex 0-30)	--	20
R Rotation (0-30)	--	30
L Rotation (0-30)	--	30
Combined (240)	--	160
Comment		All movement slow and guarded; could not perform repetitions adequately due to pain
§4.71a Rating	20% vs. 40%	20%

The MEB physical exam, completed by the treating neurosurgeon, demonstrated diffuse give away weakness in both lower extremities, 4 of 5 strength due to pain in her low back, normal knee and ankle reflexes and decreased sensation along the medial side of her left foot. X-rays revealed a good fusion with hardware in place from L5-S2. The final diagnosis was lumbar degenerative disc disease (DDD) and low back pain. At the VA Compensation and Pension (C&P) exam approximately 3 months after separation, the CI: appeared in acute distress; had a slow unassisted gait; spine showed no postural abnormalities or deformities such as kyphosis or scoliosis; no spasm of paravertebral muscles in lumbar region; significant tenderness to percussion over lumbar spine; had to roll to her side to get on and off the exam table; ROMs noted in chart above with all movements performed slowly with guarding and exacerbation on forward flexion and attempted extension of lumbar spine; pain prevented any attempt for repetitive motions; positive for bilateral straight leg raises (neurologic sign for disc disease); and MRI showed degenerative changes.

The Board directs attention to its rating recommendation based on the above evidence. The Board utilized 2002 VASRD standards for the spine, which were in effect at the time of separation. For the reader's convenience, the 2002 rating codes under discussion in this case are excerpted below.

5292 Spine, limitation of motion of, lumbar:
Severe 40
Moderate 20
Slight 10

5293 Intervertebral disc syndrome (to include incapacitating episodes):
Pronounced; with persistent symptoms compatible with: sciatic neuropathy with characteristic pain and demonstrable muscle spasm, absent ankle jerk, or other neurological findings appropriate to site of diseased disc, little intermittent relief 60
Severe; recurring attacks, with intermittent relief 40
Moderate; recurring attacks 20
Mild 10
Postoperative, cured 0

5295 Lumbosacral strain:
Severe; with listing of whole' spine to opposite side, positive Goldthwaite's sign, marked limitation of forward bending in

standing position, loss of lateral motion with osteo-arthritic changes, or narrowing or irregularity of joint space, or some of the above with abnormal mobility on forced motion 40
With muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral, in standing' position 20
With characteristic pain on motion 10
With slight subjective symptoms only 0

The Board directs its attention to the coding and rating recommendation for the low back condition. The PEB assigned a 20% rating under the 5295 code of the 2002 VASRD. The 20% rating for 5295 requires 'muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral, in standing position'. The Board agreed the MEB exam was silent to lateral bending, spasm, posture or gait and likely assigned the 20% for the very limited flexion and extension exam without goniometric detail. The Board carefully reviewed the service file for corroborating ROM evidence in the 12-month period prior to separation and did not find any. The Board agreed the CI's condition did not meet the code 5295 severe threshold at the VA examination 3 months as well as 22 months post-separation with either the flexion or combined thoracolumbar exam. A lengthy deliberation ensued as to how to best capture the disability in this case under the old spine rules. The Board considered the code 5292 and agreed the very limited flexion exam could meet either the moderate or severe criteria under this code. The VA originally assigned a 20% for limited forward flexion of 60 degrees under the new VASRD code 5242(Degenerative arthritis of the spine). However, the Decision Review Officer (DRO), 22 months later, changed the code to the more clinically appropriate code 5241 (spinal fusion) and assigned a higher rating, 40%, for severe functional impairment IAW VASRD §4.10, due to pain despite having a measured flexion exam meeting the 20% rating in the 22-month exam. Therefore the next challenge before the Board is to consider the evidence for the higher rating with; VASRD §4.10, VASRD §4.40 (Functional loss), VASRD §4.45 (DeLuca), or under the code 5293 (Intervetebral disc syndrome). None of the exams documented additional ROM impairment to meet VASRD §4.45, however the Board acknowledges this could not be tested due to the inability to do repetitive motion. The evidence clinically supports; residual motor weakness with left foot dorsiflexion, sensory deficits consistent with an S1 radiculopathy and moderate to moderate-severe pain impairment for which the CI continued to seek alternative treatment modalities after separation to mitigate her pain. Prior to separation she sought care for her back pain 36 times including neurosurgery, pain management, mental health and primary care specialties. The Board also acknowledges her ability to do only desk administrative duties at the time of separation; which demonstrates her physical functional limitations. Therefore, the Board agreed based on all evidence and associated conclusions just elaborated that a higher rating is supported due to severe functional impairment IAW VASRD §4.10. The Board deliberated the higher rating with either the 5292 code for severe limitation of motion or the 5293 code for severe pain with intermittent relief. The Board agreed to recommend the higher rating under the more objective 5293 code IAW VASRD §4.7. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (Resolution of reasonable doubt), the Board majority recommends a disability rating of 40% for the low back 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 low back condition, the Board, by a vote of 2:1, recommends a disability rating of 40%, coded 5293 IAW VASRD §4.71a. The single voter for

dissent (who recommended no recharacterization) submitted the appended minority opinion. There were no other conditions within the Board's scope of review for consideration.

RECOMMENDATION: The Board recommends that the CI's prior determination be modified as follows; and, that the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective as of the date of her prior medical separation:

UNFITTING CONDITION	VASRD CODE	RATING
Lumbar DDD	5293	40%
	COMBINED	**40%**

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120602, w/atchs
Exhibit B. Service Treatment Record
Exhibit C. Department of Veterans' Affairs Treatment Record

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Director
Physical Disability Board of Review

MINORITY OPINION:

The Minority concluded that the 20% rating adjudicated by the PEB was appropriate due to the documented evidence that best described the medical condition of the CI on the date of separation. There is no evidence presented in the majority recommendation that introduces reasonable doubt regarding the accuracy and fairness of the PEB rating. On the contrary, there is documented evidence to support the original 20%. The CI had numerous reported sources of pain, including pelvic, lower extremity, lumbar, gastrointestinal, and abdominal, among others. For the back condition rated as unfitting, only lumbar and lower extremity can be connected. When able, pain rating scales must be parsed to decide which pain the CI was reporting if the evidence is to be considered probative. It is acknowledged that the CI's condition and pain did and will continue to wax and wane. The majority cites 36 visits to various clinics in 2 years; this in no way is indicative of severity. There is nothing presented in the majority opinion, other than unsubstantiated conjecture, that reasonably leads towards rating higher than 20%.

A month prior to separation (June 2003) a pain management cinic reported positive improvement, decreased numbness, paresthesia 60% improvement from baseline, and good relief from epidural steroid injection.

The MEB exam (6 months prior to separation) is uninformative regarding ROM for rating. The majority's assumption that "very limited" equates to "severe" limitation of motion is speculative and not based on significantly probative evidence. That exam indicates 4/5 motor strength ("give away" weakness is an equivocal sign of diminished strength), which would lead any rating away from "severe." The first VA exam (3 months after separation) rated at 20% based upon the new spine rules in effect and is supported by evidence (goniometric measurements) in the corresponding C&P exam. Whereas the majority above incorrectly quotes that October, 2003 C&P exam reporting the CI in acute distress, in actuality the exam reads "well appearing young woman in *on* acute distress" (emphasis added), an almost certain misspelling of "no" as "on." The sentence unquestionably should be read "Well appearing woman in no acute distress." For old spine rules, the reported flexion of 60 degrees and total ROM of 160 degrees would lead one to more reasonably characterize the ROM limitation as "moderate" (i.e., rated 20%); characterizing it as "severe" is not a reasonable conclusion. That same exam reported no postural abnormalities and lower extremity distal muscle strength 5/5; it stated "Low back pain radiates down her left lower extremity from time to time" and "gait was slow, but normal." No spasm was reported and no evidence in that most proximate, most informative exam could reasonably lead to a rating of "severe" under any of the old spine rules. In fact, the rating from that exam was an accurate, well-supported 20%.

A VA DRO increased the lumbar spine rating to 40% based upon that C&P exam, retroactive to the day after separation. The evidence section of the VA decision does not support that increase; it cites functional impairment despite the fact no functional impairment is mentioned in the associated C&P exam cited as evidence in the VARD (acknowledged by the majority during board deliberation). In fact, functional impairment is contradicted in that C&P exam.

As documented, the CI was able at separation to perform administrative duties, which indicates employability in the average civilian job up to the date of separation. The C&P exam in May 2005 documented "[CI] is in a work study program with no limitation at this time." At that same exam, it was noted "…no bowel or bladder incontinence. No brace, no cane or crutch. No physician-directed bed rest." As the Board noted, unemployability was granted by the VA as of October 2005. The majority conflates the DRO decision, incorrectly based upon non-existent evidence, to produce a claim of functional impairment for consideration. The evidence of record, in fact, directly refutes that interpretation and the functional impairment invoked for the VA rating increase. So any reference to functional impairment, for coding purposes or otherwise, is also inaccurate.

The minority recognizes the dedicated service to the nation by the CI as well as the pain and discomfort brought on by this unfitting condition. Neither the evidence of record nor the information as presented in the report of the majority, however, justifies reasonable doubt that the PEB made an accurate and fair rating of 20% disability based upon the VASRD rules in effect and the medical condition at the time of separation.

RECOMMENDATION: The Board minority recommends no recharacterization of the PEB adjudicated disability and separation determination, as follows:

UNFITTING CONDITION	**VASRD CODE**	**RATING**
Lumbar DDD	5295	20%
	COMBINED	**20%**

MEMORANDUM FOR DEPUTY COMMANDANT, MANPOWER & RESERVE AFFAIRS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATIONS

Ref: (a) DoDI 6040.44
(b) PDBR ltr dtd 11 Feb 13 ICO
(c) PDBR ltr dtd 7 Feb 13 ICO
(d) PDBR ltr dtd 27 Feb 13 ICO
(e) PDBR ltr dtd 7 Mar 13 ICO

1. Pursuant to reference (a) I approve the recommendations of the Physical Disability Board of Review set forth in references (b) through (d).

2. The official records of the following individuals are to be corrected to reflect the stated disposition:

a. former USMC: Disability separation with a final disability rating of ten (10) percent (increased from zero percent) with entitlement to disability severance pay effective 5 April 2002.

b. former USMC: Disability retirement with a final disability rating of 30 percent (increased from 20 percent) with retroactive placement on the Permanent Disability Retired List effective 31 January 2002.

c. former USMC: Disability separation with a final disability rating of ten (10) percent (increased from 0 percent) with entitlement to disability severance pay effective 15 July 2003.

d. former USMC: Disability separation with a final disability rating of 40 percent (increased from 20 percent) with retroactive placement on the Permanent Disability Retired List effective 31 July 2003.

3. Please ensure all necessary actions are taken, included the recoupment of disability severance pay if warranted, to implement these decisions and that subject members are notified once those actions are completed.

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Assistant General Counsel
(Manpower & Reserve Affairs)