

RECORD OF PROCEEDINGS
PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXX
CASE NUMBER: PD1200653
BOARD DATE: 20130228

BRANCH OF SERVICE: MARINE CORPS
SEPARATION DATE: 20020618

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Marine, SGT/E-5 (5544/Musician), medically separated for status post (s/p) left L4-L5 and L5-S1 herniated nucleus pulposus (HNP). The CI injured his back while lifting a heavy desk in January 2001. Despite physical therapy, numerous civilian neurosurgery visits, and limited duty (LIMDU), the CI could not be adequately rehabilitated to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards and he was referred for a Medical Evaluation Board (MEB). The s/p left L4-L5 & L5-S1 HNP condition was forwarded to the Physical Evaluation Board (PEB) IAW SECNAVINST 1850.4E. The MEB forwarded no other conditions for PEB adjudication. The PEB adjudicated s/p left L4-L5 and L5-S1 HNP, with radicular and neurological findings, now resolved, with persistent quadriceps weakness (subjective) as unfitting, rated 10% with cited application of the Veteran's Affairs Schedule for Rating Disabilities (VASRD). The CI agreed to a conditional acceptance of the PEB finding provided he could remain on active duty until 18 June 2002. That request was approved and he was medically separated with a 10% disability rating.

CI CONTENTION: The CI writes: "Upon further medical review by VA and civilian doctors my separating injury (herniated disc at L4-L5) was increased up to 40%. In addition, I discovered that the paralysis in my left leg (10%), which was present during my separation, was considered a separate condition deserving its own rating. This gives me a current disability rating of 50%."

SCOPE OF REVIEW: The Board's scope of review is defined in DoDI 6040.44 Enclosure 3, paragraph 5.e.(2). It is limited to those conditions determined by the PEB to be unfitting for continued military service and those conditions identified but not determined to be unfitting by the PEB when specifically requested by the CI. Ratings for unfitting conditions will be reviewed in all cases. The rated, unfitting condition of HNP as requested for consideration meets the criteria prescribed in DoDI 6040.44 for Board purview. Additionally, the contended radiculopathy condition also meets the Board criteria, and it will be reviewed. 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 20020410			VA - (6 Mos. Pre-Separation)			
Condition	Code	Rating	Condition	Code	Rating	Exam
S/P LEFT L4-L5 AND L5-S1 HNP, W/RADICULAR AND NEUROLOGIC FINDINGS, NOW RESOLVED, W/PERSISTENT QUADRICEPS WEAKNESS (SUBJECTIVE)	5295	10%	HNP, L4-5, L4-S1	5293	20%	20011228
Combined: 10%			Combined: 20%			

ANALYSIS SUMMARY: The Board acknowledges the CI's information regarding the significant impairment with which his service-connected condition continues to burden him but must emphasize that the Disability Evaluation System (DES) has neither the role nor the authority to

compensate members for anticipated future severity or potential complications of conditions resulting in medical separation. The Board’s authority as defined in DoDI 6040.44, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation. The Board utilizes VA 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. Post-separation evidence is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Herniated Nucleus Pulposus. The goniometric range-of-motion (ROM) evaluations in evidence that the Board weighed in arriving at its rating recommendation, with documentation of additional ratable criteria, are summarized in the chart below.

Thoracolumbar ROM (Degrees)	Navy/VA Separation Physical ~6 Mo. Pre-Sep	Medical Board Report ~ 5 Mo. Pre-Sep
Flexion (90 Normal)	80	To Mid-Tibia
Extension (30)	20	Full
R Lateral Flexion (30)	25	Full
L Lateral Flexion (30)	25	Full
R Rotation (30)	No report	Full
L Rotation (30)	No report	Full
Combined (240)	210 to 150	N/A
Comment	Erect posture and normal gait; able to walk on toes and heels and squat; decreased dorsiflexion left foot; some tenderness to percussion over lumbar spine; no spasm or sacroiliac dimple tenderness; positive straight leg raise on left at 45°; slightly flattened lumbar lordosis; left quadriceps strength 60% of right side; some weakness to dorsiflexion of left foot; reflexes equal and reactive; no other motor or sensory loss	Normal gait; negative straight leg raise; motor 5/5 and reflexes 2+ bilateral lower extremities; sensory intact to light touch; MRI Feb 2001: HNP at L4-5 and L5-S1 with possible left L5 nerve root compression; X-ray Feb 2001 normal
§4.71a Rating		
2001 VASRD 5292	10%	10%
2001 VASRD 5293	N/A (VA rated 20%)	N/A
2001 VASRD 5295	10%	10%

The CI underwent a separation/VA physical approximately 6 months prior to his separation from service. Physical exam findings are noted in the ROM chart above. A report of medical board narrative summary (NARSUM) prepared 5 months prior to separation noted the CI’s left leg pain had completely resolved. He continued to report weakness involving his left quadriceps but stated this was improving. Physical exam findings are noted in the ROM chart above.

The VA rating for the HNP was increased to 40% but this was not effective until 19 July 2005, more than 3 years after separation and this was based on a VA Compensation and Pension (C&P) examination completed on 19 July 2005 and VA treatment records for medical care after separation. The VA initially made the 40% rating effective 19 June 2002 but later noted this was an error and the 40% was not warranted prior to 19 July 2005. This 2005 C&P examination documented a worsening of the CI’s condition over time.

The 2001 Veterans Administration Schedule for Rating Disabilities (VASRD) coding and rating standards for the spine, which were in effect at the time of separation, were modified on 23 September 2002 to add incapacitating episodes (5293 Intervertebral disc syndrome), and then changed to the current §4.71a rating standards on 26 September 2003. The 2001 standards for rating based on ROM impairment were subject to the rater’s opinion regarding degree of severity, whereas the current standards specify numerical rating thresholds in degrees of ROM impairment. When older cases have goniometric measurements in evidence, the Board reconciles (to the extent possible) its opinion regarding degree of severity for the older spine

codes and ratings with the objective thresholds specified in the current VASRD §4.71a general rating formula for the spine. This promotes uniformity of its recommendations for different cases from the same period and more conformity across dates of separation, without sacrificing compliance with the DoDI 6040.44 requirement for rating IAW the VASRD in effect at the time of separation.

The Board directs attention to its rating recommendation based on the above evidence. The PEB rated the conditions under VASRD 5295 Lumbosacral strain at 10% presumably for characteristic pain on motion. The VA rated the condition under VASRD 5293 Intervertebral disc syndrome at 20% based on functional impairment and painful motion. No mention of recurring attacks was present in the rating decision or in the examination performed for separation/VA rating. The report of medical board NARSUM did report "...intermittent aching pain in his low back." Later C&P examinations also refer to flare-ups. However, with no reports of recurring attacks prior to separation or the frequency or severity of such attacks, the Board does not have enough information to adequately rate this condition using VASRD 5293. The available information from both prior to separation examinations noted above supports a 10% under either 5292 for slight limitation of motion or 5295 for characteristic pain on motion. No appropriate rating scheme results in a disability rating greater than 10%. 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 herniated nucleus pulposus condition.

Contended PEB Conditions. The CI contended for an additional rating for sciatic nerve radiculopathy. The service treatment record (STR) includes reports of symptoms of a sciatic nerve radiculopathy with compatible magnetic resonance imaging (MRI) findings, symptoms, and physical examination findings. However, the STR includes evidence these symptoms and findings diminished as the CI approached the day of separation. The CI medical board report NARSUM, which is closest to the date of separation and therefore has greater probative value, noted the CI's left leg pain had completely resolved and his neurologic exam was completely normal. While the later C&P exams and treatment records did show a return of symptoms and findings consistent with a radiculopathy, including a positive electromyogram (EMG) test, none of these findings were present at the time of separation. There was no evidence of a radiculopathy or any functional impairment related to a radiculopathy at the time of separation from service. This condition was not implicated in the non-medical assessment. After due deliberation in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a determination that this condition was unfitting at the time of separation from service and therefore, no additional disability ratings 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 Left L4-L5 and L5-S1 Herniated Nucleus Pulposus condition, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended sciatic nerve radiculopathy condition, the Board unanimously agrees that it was not unfitting and cannot recommend any additional disability rating. 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
Left L4-L5 and L5-S1 Herniated Nucleus Pulposus Condition	5295	10%
	COMBINED	10%

The following documentary evidence was considered:

- Exhibit A. DD Form 294, dated 20120606, w/atchs
- Exhibit B. Service Treatment Record
- Exhibit C. Department of Veterans' Affairs Treatment Record

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Acting Director
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 8 Mar 13

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 USMC
- former USMC
- former USN
- former USMC
- former USMC
- former USN
- former USMC

Assistant General Counsel
(Manpower & Reserve Affairs)