

RECORD OF PROCEEDINGS
PHYSICAL DISABILITY BOARD OF REVIEW

NAME:
CASE NUMBER: PD1200981
BOARD DATE: 20121214

BRANCH OF SERVICE: MARINE CORPS
SEPARATION DATE: 20030215

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Lance Corporal/E-3 (7051/Aircraft Firefighting and Rescue Specialist), medically separated for L4-5 degenerative disc disease (DDD). The CI first presented with a chief complaint of low back pain on 13 September 2001 after a fireman carry while in technical training. She was treated conservatively, but the pain continued after return to her home station. The CI continued to be treated non-operatively with no change in her symptoms. In July 2002 the possibility of a psychiatric contribution to her condition was raised. The CI admitted she had significant depressed mood, and so psychiatry was consulted. The CI was diagnosed with major depressive disorder and treated. The CI could not be adequately rehabilitated to meet the physical requirements of her Military Occupational Specialty (MOS) or satisfy physical fitness standards. She was placed on limited duty (LIMDU) and referred for a Medical Evaluation Board (MEB). The MEB also identified and forwarded depressive disorder not elsewhere classified, as identified in the rating chart below. The Physical Evaluation Board (PEB) adjudicated the L4-5 DDD condition as unfitting, rated 10%, with application of the Veteran's Affairs Schedule for Rating Disabilities (VASRD). The remaining condition was determined to be Category III, which is not separately unfitting and does not contribute to the unfitting condition. The CI made no appeals, and was medically separated.

CI CONTENTION: "I have continued to have problems w/my back (10%), but significant problems w/depression (0%). At the time, I was in therapy on meds, and lost weight (down to 105 – under the minimum), but 0% rated." In Block 4 of her application, the CI also writes "I was hospitalized twice for depression (involuntarily), and have been on and off meds. The same w/back issues – on and off – since discharge. I should be on meds still, but my family is so against it, I'm not." The CI also attached a 1 page memo to her application which was reviewed by the Board and considered in its recommendations.

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 major depressive disorder condition as requested for consideration meets the criteria prescribed in DoDI 6040.44 for Board purview and is addressed below, in addition to a review of the ratings for the unfitting low back pain condition. 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 Marine Corps Board for Correction of Military Records.

RATING COMPARISON:

Service IPEB – Dated 20021212			VA (8 Mos. Post-Separation) – All Effective Date 20030216			
Condition	Code	Rating	Condition	Code	Rating	Exam
L4-5 DDD	5295	10%	DDD L4-5 Low Back	5293-5243	0%	20031023
Major Depressive D/O	Not Unfitting		Depression	9434	0%	20031022
↓ No Additional MEB/PEB Entries ↓			Tinnitus	6260	10%	20031023
			0% X 4 (Includes Above) / Not Service-Connected x 7			
Combined: 10%			Combined: 10%			

ANALYSIS SUMMARY: The Board acknowledges the CI’s contention that suggests ratings should have been conferred for other conditions documented at the time of separation. The CI’s contention indicates that she was “rated 0%” for her mental health condition; however, the PEB found the depressive disorder as Category III (not separately unfitting) and therefore not rated or compensable by DoD. The VA rating of 0% was noted, but does not impact fitness for duty. The Board wishes to clarify that it is subject to the same laws for disability entitlements as those under which the Disability Evaluation System (DES) operates. 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 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 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 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 6044.40, however, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

L4-5 Degenerative Disc Disease Condition. The range-of-motion (ROM) evaluation in evidence which the Board weighed in arriving at its rating recommendation, and other documentation of additional ratable criteria, are summarized in the chart below.

Thoracolumbar ROM (Measurements in Degrees)	MEB ~5 Mo. Pre-Sep	VA C&P ~8 Mo. Post-Sep
Flexion (90 Normal)	“Decreased extension secondary to pain”	90
Extension (30)		40
R Lat Flexion (30)		35
L Lat Flexion (30)		35
R Rotation (30)		-
L Rotation (30)		-
Combined (240)		-
Comment	+ Tenderness; + SLR bilaterally; mild scoliosis; normal gait	SI T-spine scoliosis; no tender or spasm
§4.71a Rating	10%	0%

At the MEB exam, performed 5 months prior to separation the CI reported continuing pain without relief from facet injections or non-surgical therapy. There were no fix neurologic deficits and the CI had concomitant depression. The CI reasonably refused radiofrequency ablation. The back exam is summarized above. Imaging indicated normal plain films and bone scan, with magnetic resonance imaging (MRI) findings of DDD at L4-5 with a mild disc bulge without nerve root or canal impingement. There was also noted facet joint arthropathy.

At the VA Compensation and Pension (C&P) exam performed 8 months after separation, the CI reported complaints of pain across the low back and buttocks with pain and numbness down the posterior right leg to the sole and toes with weakness in the leg and foot drop with running. The CI also indicated bladder incontinence with the pain. The VA exam is summarized above, with no documented abnormalities.

The Board directs attention to its rating recommendation based on the above evidence. The 2003 Veterans' Administration Schedule for Rating Disabilities (VASRD) coding and rating standards for the spine, which were in effect at the time of separation, were changed to the current §4.71a rating standards in 20030926. The 2003 standards for rating based on range of motion (ROM) impairment were subject to the rater's opinion regarding degree of severity, whereas the current standards specify rating thresholds in degrees of ROM impairment. For the reader's convenience, the 2003 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:	
/// deleted ///	
Note (1): For purposes of evaluations under 5293, an incapacitating episode is a period of acute signs and symptoms due to intervertebral disc syndrome that requires bed rest prescribed by a physician and treatment by a physician.	
5294 Sacro-iliac injury and weakness:	
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 osteoarthritic 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 VA coding used the new spine rules which were not effective until after separation, and their rating percentage was for an improved back exam. The MEB exam was closest to the date of separation and had the highest probative value for rating. There was clear evidence of tenderness and characteristic pain on motion meeting the 10% rating criteria.

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. The Board concluded therefore that this condition could not be recommended for additional disability rating.

Contended PEB Conditions. The Board's main charge is to assess the fairness of the PEB's determination that the major depressive disorder condition was not unfitting. 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. The major depressive disorder condition was not part of the CI's LIMDU or implicated in the non-medical assessment (NMA) commander's statement. It was reviewed by the action officer and considered by the Board. There was no performance based evidence from the record that this condition significantly interfered with satisfactory duty performance.

The psychiatric narrative summary (NARSUM) addendum diagnosed mild major depressive disorder with Global Assessment of Functioning (GAF) of 65 in the past year and a current 60, indicating mild to moderate symptoms and the CI was started on medications. By the VA exam 8 months post-separation, the CI was no longer taking medication, had depressive symptoms leading to a GAF of 55-60 indicating moderate symptoms, and was working two jobs. The examiner's history indicated the CI had decreased symptoms while undergoing weekly counseling. The CI's contention dated June 2012 noted two involuntary psychiatric hospitalizations which were not noted in the evidence of record.

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 the contended major depressive disorder condition and so no additional disability rating is 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 L4-5 DDD condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended major depressive disorder condition, the Board unanimously agrees that it cannot recommend it for 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
L4-5 degenerative disc disease	5295	10%
	COMBINED	10%

The following documentary evidence was considered:

- Exhibit A. DD Form 294, dated 20120611, 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 31 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 USMC
- former USMC
- former USN
- former USMC
- former USMC

Assistant General Counsel
(Manpower & Reserve Affairs)