RECORD OF PROCEEDINGS
PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XX
CASE NUMBER: PD1201858
BOARD DATE: 20130205

BRANCH OF SERVICE: NAVY
SEPARATION DATE: 20031029

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty ET2/PO2/E-5 (Electronics Technician), medically separated for degenerative disc disease (DDD), L5-S1. The CI was first examined for low back and right lower extremity (RLE) leg pain in 2000. She was treated with physical therapy (PT), traction and nonsteroidal anti-inflammatory medications, but did not improve adequately to meet the physical requirements of the rating or satisfy physical fitness standards. She was placed on limited duty and referred for a Medical Evaluation Board (MEB). DDD, L5-S1 and radiculopathy RLE were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. There were no other conditions on the MEB submission. The PEB adjudicated the DDD, L5-S1 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 II, not unfitting but contributing. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: "I have struggled with this injury for more than 10 years. I have had my VA disability rating increased to 30% and currently qualify as a surgical candidate for spinal fusion at L5, the same injury I was medically discharged with. My private insurance denied to pay for a disc replacement but authorized the fusion. I was originally rated at 20% as I had "partial use" of my right leg, however was obviously unfit for continued naval service. (continued) I appreciate this review. It never seemed right I didn't qualify for more than 10% for my sciatica as I still had "partial use" of my right leg; and the other only 10% for my back injury although I qualified for many high risk procedures for this injury to avoid surgery. It was also documented at the time I was discharged I could not make much progress in physical therapy or with the epidural injections. It was not recommended I have surgery at that time due to my age and the possible development of scar tissue, and I was told I would have a hard time walking in 10 years either way (with the surgery or left alone). Although this was known and explained to me at the time of my discharge the disability was still rated the same percentage as people I know who were diagnosed with "tinnitus", which they do not have to manage daily with limited physical activity and medications. I have not been able to stand or walk for more than 30 minutes without pain (or pain medications) for more than a decade, and "I have not been able to run again ever since my initial injury. I have braces for my right foot to help keep me from tripping when I walk and have developed tendonitis in my right ankle. The comments and the rating seemed a little heartless. I have seen no progress in my injury, only degradation. Once out of the military I struggled to qualify for a job in my field, due to physical limitations, and although I am successfully employed some days after work I can no longer stand up enough to make dinner. (continued) The VA also rated me another 10% service-connected for GERD due to the anti-inflammatories I was prescribed while on active duty for back pain and inflammation."

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 radiculopathy, RLE condition requested for consideration and the unfitting DDD, L5-S1 condition meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. 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 20030804			VA (~6 Mos. Pre-Separation) – All Effective Date 20031030			
Condition	**Code**	**Rating**	**Condition**	**Code**	**Rating**	**Exam**
DDD, L5-S1	5293	10%	DDD Lumbar Spine	5243	10%	20030415
Radiculopathy, RLE	Cat II		Right Leg Radiculopathy…	8520	10%	20030415
No Additional MEB/PEB Entries			Not Service-Connected x 3			20030415
Combined: 10%			**Combined: 20%**			

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI's application regarding the significant impairment with which his service-incurred condition continues to burden her. 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. 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. That role and authority is granted by Congress to the Department of Veterans Affairs (DVA), operating under a different set of laws (Title 38, United States Code). The Board evaluates DVA evidence proximal to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of DES fitness decisions and rating determinations for disability at the time of separation. 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 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.

DDD, L5-S1 Condition. The CI developed nontraumatic back pain with associated radiation into the right led in 2000. Magnetic resonance imaging (MRI) obtained in 2001 revealed degenerative joint disease (DJD) and a bulging disc at the L5-S1 level with mild compression of the S1 nerve root. Follow-up MRI obtained 6 April 2003 revealed no change in the size of the L5-S1 disc, no change in or any new nerve compression, but evidence of disc herniation. On orthopedic evaluation, 19 November 2002, the CI noted no lower extremity weakness, but her leg would sometimes 'give out' during flare-ups of pain. Motor strength was 5/5 in both legs, reflexes were reduced at the right ankle, but sensory exam was normal. Surgical intervention was not recommended.

There were two range-of-motion (ROM) evaluations in evidence, one goniometric, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation; as summarized in the chart below.

Thoracolumbar ROM in Degrees	VA C&P ~6 Mo. Pre-Sep (20030415,)	MEB ~5 Mo. Pre-Sep (20030528)
Flexion (90 Normal)	90	FF w/ fingertips to floor w/ knee in extended position
Ext (30)	25 (Limited by pain)	--
Combined (240)	235	--
Comment	Posture, gait and reflexes normal. No radiation of pain on movement, muscle spasms or TTP	Motor 5/5 bilateral, 20/20 single leg and heal rises on bilateral LE; Nerve root tension with paresthesias lateral side of foot; reflexes wnl
§4.71a Rating	VA 10% 5243	PEB 10% 5293

At the VA Compensation and Pension (C&P) exam, performed on 15 April 2003, 6 months prior to separation, the CI reported occasional mild symptoms of foot drop while climbing stairs. She noted debilitating pain occurring one to two times a month requiring bed rest for 24 hours. Findings on physical examination are noted above. At the MEB narrative summary (NARSUM) evaluation on 28 May 2003, 5 months before separation, the CI reported pain in back, buttock, thigh and right lower extremity, and some functional weakness climbing stairs. She noted no bowel or bladder difficulties. Findings on physical examination are reported above. The CI was able to do 20 bilateral single leg and heel raises.

The Board directs attention to its rating recommendation based on the above evidence. The 2002 Veterans' Administration Schedule for Rating Disabilities (VASRD) coding and rating standards for the spine, 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 PEB and VA both rated the back condition 10% using rating criteria in effect at the time of their adjudications. The PEB adjudication, 4 August 2003, appropriately utilized the 2002-2003 standards and coded 5293, intervertebral disc syndrome. The VA appropriately utilized the new codes in effect after September 2003, and coded 5243 (Intervertebral disc syndrome), citing painful ROM. The Board noted the CI's date of separation to be 29 October 2003, and is mandated IAW DoDI 6040.44 to use the VASRD codes in effect at time of separation. The Board unanimously agreed that the preponderance of evidence before separation supported a painful, but normal ROM the spine, both clinically and goniometric ally, compensable at the 10% rating IAW §4.59. The Board considered a rating under 5243 based on incapacitating episodes. Under this code 'incapacitation' is defined as bed rest prescribed by a physician. A 10% rating requires total episodes of one, but less than 2 weeks per 12 month period. A higher rating of 20% requires total episodes of at least two, but less than 4 weeks per 12 month period. The commander's statement reported the CI to leave work early due to pain (no frequency noted), and to be away from work 6 hours a week for "treatment, evaluation and recuperation". The Board noted the CI report at the C&P exam of debilitating pain one to two times a month requiring bed rest for at least a day. Service treatment records (STR) document the CI was placed on quarters by treating health professionals on one occasion for back pain in the 12 months prior to separation totaling 4 days. After review, the Board unanimously opined that no higher rating than 10% could be recommended under this code. The Board opined that the radiculopathy condition was an integral part of the low back condition and addressed whether additional rating was justified. The Board agreed that the radiating pain was subsumed under the back code IAW 4.71a and could not be considered for additional rating. The Board noted the CI references to difficulty climbing stairs, continuously climbing ladders, intermittent foot drop, and leg 'sometimes giving out without specific weakness', but agreed that no fixed motor disability was present given the multiple proximate examinations documenting normal motor strength, functional studies and gait. The Board noted the recorded slight decrease in sensation of the lower lateral foot. The Board agreed there was no evidence for ratable peripheral nerve impairment in this case, since motor strength was normal and sensory symptoms had no functional implication. 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 to the 10% rating adjudication for the back condition, but a change to the rating code utilizing VASRD dated 26 September 2003 was appropriate.

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. In the matter of the DDD, L5-S1 condition, the Board recommends by a vote of 2:1 a change in the disability rating code to 5243 and retention of the 10% disability rating IAW VASRD §4.71a. The single voter for dissent, who recommended 20% code 5243, did not elect to submit a 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, effective as of the date of her prior medical separation.

UNFITTING CONDITION	VASRD CODE	RATING
Degenerative Disc Disease, L5-S1	5243	10%
	COMBINED	**10%**

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20121013, 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 21 Feb 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 USN
- former USN
- former USMC
- former USN
- former USMC
- former USN
- former USN
- former USN
- former USMC
- former USMC
- former USMC
- former USMC

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Assistant General Counsel
(Manpower & Reserve Affairs)