RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

 BRANCH OF SERVICE: ARMY

CASE NUMBER: PD0900001 BOARD DATE: 20091216

SEPARATION DATE: 20020430

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SUMMARY OF CASE: This covered individual (CI) was an active duty officer medically separated from the Army in 2002 after 12 years of service. The medical basis for the separation was a bilateral ankle condition. He suffered a severe ligamental injury to the right ankle in 1994 during a parachute landing, and reinjured it with an associated fibula stress fracture the same year. The ankle continued to remain unstable, requiring a brace for stressful activities, and he developed frequent sprain-type injuries of the left ankle as well. Surgical reconstruction (Broström procedure) was performed on the right ankle in 1997, but results were unsatisfactory. He transferred from Infantry to Signal Corps in order to tolerate continued active duty, but remained profiled. He required bilateral braces and was unable to meet even the basic physical requirements for an Army Officer. He was not a candidate for further surgery and was maximized on conservative treatment. He underwent an MEB and both ankle conditions were forwarded to the PEB as medically unacceptable. There were no other conditions entered on the MEB’s DA 3947. He was found unfit for both ankles and adjudicated at a 30% rating by the informal PEB, as reflected in the chart below. This was revised to 20% upon USAPDA review and the CI was separated at that rating.

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CI CONTENTION: The CI states that he was notified of the rating change, but interpreted the wording to mean that he was still being retired. He had out-processed and re-located his family by the time he realized that he was being separated with severance pay. He contends for a 30% rating as per the original PEB and the VA. He further states that the PEB did not consider his other conditions.

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RATING COMPARISON:

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| --- | --- |
| **Service PEB** | **VA ( Pre-Separation)** |
| **Condition** | **Code** | **Rating** | **Date** | **Condition** | **Code** | **Rating** | **Exam** | **Effective** |
| Unfit, Pain In Both Ankles, Right …worse than…Left  | 5099 5003 | 20% | 20020403 | Ligamentous Laxity with Degenerative Changes, Right Ankle | 5271 | 20% | 20020205 | 20020501 |
| Above was USAPDA-revised from IPEB (R 20%/L 10%) > | 5299-5262 | 30% | 20020314 |
| Ligamentous Laxity, Left Ankle | 5271 | 10% | 20020205 | 20020501 |
| No Additional 3947 Entries. | 20020314 | Non-PEB X 1 / NSC X 0 | 20020205 | 20020501 |
| **TOTAL Combined: 20%** | **TOTAL Combined (*Includes Non-PEB Conditions*): 30%**   |

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ANALYSIS SUMMARY:

Ankle Conditions. The degree of the CI’s impairment was considerable as documented in detail by the NARSUM and in two thorough Commander’s statements. Limitations exceeded just the more strenuous demands of the APFT and basic soldiering requirements; they impeded routine activities. He was fitted for bilateral ankle braces for daily use. He slept in air splints and required cold packs every night. He walked with a noticeable limp per both Commanders (unit CO and the Major General for whom he was an Aide). He required stand-ins for ceremonies, briefings, travel, etc., and could not keep pace with others when walking. The NARSUM noted difficulty driving, inability to negotiate stairs, and being able to walk on paved flat surfaces only (stating ‘walks as little as possible’). These impairments were also mirrored in the pre-separation VA rating examination. Physical examinations by the Army orthopedist and VA examiner were similar. Both noted gait disturbance. Both noted edema and pronounced tenderness (more severe on the right). Significant ligamental instability (including a positive anterior drawer sign) was documented for the right ankle. The NARSUM described it as ‘biomechanically functionally unstable’. The VA examiner used subjective symptoms, not physical findings, to arrive at the ‘ligamentous laxity’ diagnosis for the left ankle. Range of motion (ROM) was as follows:

|  |  |  |
| --- | --- | --- |
| Normal = 20⁰ Flexion/45⁰ Extension | MEB | VA |
| R Ankle Flexion/Extension | 10⁰/25⁰ | 10⁰/30⁰ |
| L Ankle Flexion/Extension | 10⁰/35⁰ | 10⁰/30⁰ |

In summary, both ankles demonstrated a substantial reduction of mobility and the right ankle was mechanically unstable as well. Radiographs showed degenerative changes on the right, but not the left.

Regarding PEB coding, it is clear that AR 635-40 was applied to combine the ankles under the 5003 analogous code. There was not ‘x-ray evidence of involvement of 2 or more major joints’ as required by VASRD §4.71a for the 5003 code. The Board must therefore recommend separate coding and rating for each ankle, as applied by the VA. The initial PEB accomplished this, de facto, by coding under 5262 and documenting separate ratings (albeit without separate entries on the DA 199). The memorandum from USAPDA to the PEB in explanation for the coding/rating change stated that 5262 was inappropriate because no nonunion or malunion was present (as stipulated for the code by the VASRD). It is noted, however, that the initial PEB coded with the analogous prefix. This recognized that the code did not represent the literal diagnosis and was IAW VASRD §4.20 (analogous ratings). The memorandum further stated, ‘No VARSD codes regarding ankles is appropriate.’ Code 5271, as applied by the VA, is for ‘ankle, limited motion of’. The USAPDA referenced AR 635-40, B-29e, to assert that all of the ROM impairment was attributable to pain. Neither is this substantiated by the orthopedic examination (stating ‘pain with all movements’, not pain as the limiting point for ROM) nor is it relevant to the Board’s recommendation if it were. Disregarding the service regulation IAW DoDI 6040.44, the 5271 code is precisely applicable to this case. The initial PEB’s choice was not unreasonable, as discussed above, but the Board prefers 5271 in order to use the same ‘ruler’ as the VA for consistency with the medical judgment element inherent in rating recommendations.

Regarding rating under 5271, choices are ‘moderate’ for 10% or ‘marked’ for 20%. The VA rating decision used identical objective data for ROM impairment (which was the same for each ankle on their exam) to justify different ratings under the same code. A logical argument could be made for applying the higher rating to both ankles, since reasonable doubt would favor that over applying the lower rating. However, the VA decision documented the more severe medical history and exam findings for the right ankle vs. the left and it is assumed that this was recognized in conferring the higher rating. It should also be noted that the ‘marked’ 20% rating was decided on the basis of an exam that demonstrated a slightly better ROM than the MEB exam and did not differ from it in any other significant way. In applying the subjective descriptors in the VASRD code for arriving at a rating recommendation, the Board should rely more heavily on the actual degree of disability (being, after all, the purpose for rating). In this case there is an unusually abundant wealth of objective data for estimating disability. The degree of occupational impairment imposed significant limitations on employment options, not to mention impact on quality of life. Since it cannot be argued that nearly a 50% reduction in ROM for the right ankle qualifies for ‘marked’ limited motion, a 20% rating is easily justified in consideration of the overall disability picture. All evidence considered and IAW VASRD §4.3, reasonable doubt is resolved in favor of the CI in recommending a separation rating of 20% for the right ankle. A 10% ‘moderate’ rating is in order for the left ankle since it was not post-operative, not mechanically unstable and was more mobile (at least by MEB measurement) as compared to the right ankle. There is not reasonable doubt in the CI’s favor supporting the higher rating for the less severely affected joint.

Other Conditions. The only other medical condition identified by the pre-separation VA rating was recently diagnosed hypertension for which the CI had not yet started treatment. It was rated 0%, not identified in the DES packet and therefore not under Board pervue for consideration as additionally unfitting for separation rating. Eventually service-connected by the VA were a ‘dry cough’ condition and spermatocele. These received 0% ratings, and only the cough condition (noted on the MEB physical) was in the DES packet. No additional conditions are service-connected by the VA, and a ‘bursitis’ of the right shoulder was the only other condition in the DES packet (MEB physical) subject to Board review. The service records, medical profile and Commander’s statements connected only the ankle conditions to fitness. The Board, therefore, has no reasonable basis for recommending any additional unfitting conditions for separation rating.

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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. As discussed above, PEB reliance on AR 635-40, B-29e, for rating the ankle conditions was operant in this case and the conditions were adjudicated independently of that regulation by the Board. In the matter of the right ankle condition, the Board unanimously recommends a rating of 20% coded 5271 IAW VASRD §4.71a. In the matter of the left ankle condition, the Board unanimously recommends a rating of 10% coded 5271 IAW VASRD §4.71a. In the matter of the hypertension, cough condition, right shoulder condition and all of the CI’s other medical conditions; the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation.

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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 his prior medical separation.

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Right Ankle Instability, Status Post Failed Reconstructive Surgery | 5271 | 20% |
| Left Ankle Instability | 5271 | 10% |
| **COMBINED (Incorporating BLF)** | **30%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090114, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

 MICHAEL F. LoGRANDE

 President

 Physical Disability Board of Review

