RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: ARMY

CASE NUMBER: PD0900242 BOARD DATE: 20100629

SEPARATION DATE: 20080928

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SUMMARY OF CASE: This covered individual (CI) was an active duty SPC (25U, Signal Support Systems Specialist) medically separated from the Army in 2008 after 8 years of service. The medical bases for the separation were right knee and left ankle conditions. The CI injured his left ankle and underwent successful surgical repair in 2004. During Fireman’s school in 2005 he injured his right knee, which precipitated renewed left ankle symptoms as well. Right knee surgery in 2007 failed to resolve that pain and, along with his right ankle pain, continued to limit his duty performance. He did not respond adequately to continued conservative measures to meet the physical requirements of his MOS. He was issued a permanent L-3 profile and underwent a Medical Evaluation Board (MEB). Right knee and left ankle conditions were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions appeared on the MEB’s DA Form 3947 submission. Other conditions included in the narrative summary (NARSUM) and Disability Evaluation System (DES) packet will be discussed below. The PEB found the CI unfit for his ‘chronic right knee and ankle pain’ at 10%. The CI appealed the informal PEB findings, contending additional conditions of Obstructive Sleep Apnea (OSA) requiring CPAP (nocturnal breathing device) and a facial nerve condition. The formal PEB found the CI unfit for his right knee condition at 10% and his left ankle condition at 10% and did not add either OSA or facial nerve conditions to the DA Form 199. The decisions were upheld on appeal to the US Army Physical Disability Agency (USAPDA) and the CI was medically separated with a combined disability rating of 20%.

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CI CONTENTION: The CI contends for the addition of OSA and facial nerve conditions as unfitting and rated. He states: ‘I have permanent nerve damage on the right lower half of my jaw and I have sleep apnea and sleep with CPAP machine.’ He elaborates his current impairments from these conditions. He makes no further specific contentions regarding his ankle and knee conditions and does not note other contended conditions.

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RATING COMPARISON:

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| --- | --- |
| **Service FPEB – Dated 20080213** | **VA (8 Mo. after Separation) – All Effective 20080929** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| R. Knee …Chondromalacia | 5009-5003 | 10% | Right Knee …Arthritis  | 5010-5261 | 0% | 20090514 |
| Left Ankle …Limited Motion | 5271 | 10% | Left Ankle …DJD | 5271 | 10% | 20090514 |
| ↓No Additional DA 3947 or 199 Entries↓ | OSA  | 6847 | 50% | 20071024 |
| Right Facial Nerve…  | 8205 | 10% | 20090514 |
| Jaw Surgery Residuals | 6276 | 0% | 20090514 |
| Gout, Right Great Toe | 5017 | 20% | 20090514 |
| Right shoulder ...condition  | 5201 | 20% | 20090514 |
| DDD Lumbar Spine | 5242 | 20% | 20090514 |
| Non-PEB X 4 / NSC X 10 Conditions | 20090514 |
| **TOTAL Combined: 20%** | **TOTAL Combined (*Includes Non-PEB Conditions*): 80%**   |

ANALYSIS SUMMARY:

The Board makes incidental note that service treatment records and clinical notes were scant and incomplete in this case, although the critical MEB and Veterans Administration (VA) documents were in evidence. Clinical notes and other findings were referenced, but not present, in available records. These were not located on initial request. Further such attempts would be likely futile and would introduce further undue delay in processing the case. Since the missing material preceded the primary MEB evaluation, it is not suspected that any of that evidence would significantly alter our recommendations.

Right Knee Condition. Knee flexion was measured at 73° (normal 140°) by the MEB and 70° by the VA. This does not constitute compensable range-of-motion (ROM) impairment for the knee. The MEB and VA evaluations documented the absence of mechanical instability, thus there is no provision for dual ratings of the joint. The VA examiner stated there was no ‘objective evidence of pain’ on the exam, which is the reason that §4.59 (painful motion) was not applied to achieve a compensable rating by the VA. The 10% rating adjudicated by the PEB fairly reflected the presence of painful motion documented by the MEB examiner and the physical therapist. A more specific Veterans Administration Schedule for Rating Disabilities (VASRD) code in this case is 5259 for post-menisectomy symptoms, although this would yield the same 10% rating. The Board considered application of the 5258 code (Cartilage, semilunar, dislocated, with frequent episodes of ‘locking’, pain, and effusion into the joint) which would yield a 20% rating. Although frequent joint effusions were not in evidence, several entries in the records referred to locking. The NARSUM, referring to stair climbing and other repetitive activities, stated that they ‘sometimes cause locking up of his knee’. The VA rating examiner also documented ‘weekly’ in response to the VA template query regarding ‘locking episodes’ for the right knee. It should be noted in that regard that the VA examiner answered yes to that query on several of the joint exams, including ‘one to three times a month’ for the left (unaffected) knee. It is dubious therefore that this finding accurately referred to mechanical locking for either the right knee or the other joints. Both examiners also documented the absence of signs of cartilage impingement by physical. It is opined by the Action Officer that the references to ‘locking’ did not constitute the mechanical locking from cartilage disease which is covered under the 5258 code. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB adjudication for the right knee condition.

Left Ankle Condition. Both the PEB and the VA chose the 5271 code for limited motion of the ankle and rated 10% for ‘moderate’ severity. The only other available joint code, 5270, is defined by ankylosis (frozen joint) of the ankle. Ankylosis does not accurately describe the condition of the joint and no alternative coding would justify a rating greater than 10%. The condition is therefore appropriately coded and the only consideration for a higher rating would be premised on ‘marked’ limitation of motion under 5271 justifying a 20% decision. The MEB exam demonstrated pain-limited ROM with dorsiflexion of 13° (normal 20°) and plantar flexion of 31° (normal 41°). This equates fairly to ‘moderate’ limited motion. The VA exam indicated 0° of dorsiflexion and 30° of plantar flexion. The 0% dorsiflexion can be characterized as ‘marked’ limitation, but the impairment is confined to one plane of motion and was not rated higher by the VA. This finding is not reproduced elsewhere in the record, and the VA exam was eight months after separation. The MEB findings therefore carry the higher probative value and were appropriately rated by the PEB. All evidence considered, there is not reasonable doubt in the CI’s favor to support a Board recommendation for other than the 10% rating assigned by the PEB for the ankle condition.

OSA (requiring CPAP) and Facial Nerve Condition. The CI specifically contended for the addition and rating of these conditions. As these conditions were documented in the DES file and in appeals to the PEB and PDA, they are eligible for Board consideration as additionally unfitting conditions subject to rating at separation. OSA was diagnosed by a sleep study in 2007 and CPAP was prescribed. The facial nerve condition was documented in the service treatment records (STR) as chronic and stable since 2006. The records reflect repeated rebuttals and appeals at the Military Treatment Facility (MTF) level for addition of these conditions to the MEB and for a permanent P-3 profile. Additional supporting medical evidence was requested of the CI and was not forthcoming at the time of the MTF decision to deny the appeals. The contended conditions were not forwarded to the MEB or added to his profile. The PEB and PDA, citing the lack of new evidence, declined further appeals. The OSA was reported as ‘moderate’ and was controlled with CPAP. At the time of the CI’s separation, the service PEBs did not routinely find OSA, with or without CPAP requirement, unfitting if symptoms were controlled and functioning was unimpaired. The burden of providing CPAP in field and deployment environments was not considered to be a critical factor with the common availability of portable generators and sanitary facilities. The facial nerve condition was evaluated at National Naval Medical Center by the Chairman of the Department of Oral and Maxillofacial Surgery in Mar 2008 without indication of any motor loss or disability that would have impaired duty performance. There was no evidence that the facial nerve condition was associated with significant eating or breathing impairments or other unfitting symptoms. There is no support in the record that either condition would have been considered unfitting if they had undergone a MEB evaluation and specific PEB adjudication. There is thus no convincing argument that the MTF decision was unreasonable in that regard. Neither of the conditions were profiled at the time of separation nor noted in the Commander’s statement. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of OSA or his facial nerve condition as unfitting conditions for separation rating.

Other Conditions. Right shoulder, lumbar spine, gout, and multiple other medical conditions were identified in the DES file to include the MEB history and physical as well as in a list of numerous medical conditions forwarded by the CI as part of his DES appeals up through the USAPDA. None of these conditions were profiled at the time of separation or noted in the Commander’s statement. They had no connection with fitness and are not relevant for Board consideration as additionally unfitting and ratable. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of any other condition as unfitting conditions for separation rating. The tinnitus condition rated by the VA was not documented in the DES file. The Board does not have the authority under DoDI 6040.44 to render fitness or rating recommendations for any conditions not considered by the DES. A few additional relatively minor conditions were noted in the VA rating decision, but were not documented in the DES file. These and any contended conditions not covered above remain eligible for Army Board for Correction of Military Records (ABCMR) consideration. 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. 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 right knee condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the left ankle condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the obstructive sleep apnea and right facial nerve conditions, specifically contended by the applicant, the Board unanimously agrees that it cannot recommend either as unfitting for additional rating at separation. In the matter of the right shoulder, lumbar spine, gout, and multiple other medical conditions identified in the DES file, the Board unanimously agrees that it cannot recommend any other condition as unfitting for additional rating at separation. The Board unanimously agrees, in addition, that there were no other conditions eligible for Board consideration which could be recommended as additionally unfitting for rating at separation.

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RECOMMENDATION: The Board therefore recommends that there be no recharacterization of the CI’s disability and separation determination.

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090209, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

