RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Marine corps

CASE NUMBER: PD09-00478 SEPARATION DATE: 20040831

BOARD DATE: 20110426

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SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty LCpl (0311, Rifleman) medically separated from the Marine Corps in 2004. The medical basis for the separation was sinus tarsi syndrome of the left ankle. While on a field training exercise in May 2003, the CI sustained a fracture of the fibula at the left ankle. He reinjured the left ankle during a training hike in August 2003, and thereafter experienced persisting pain, diagnosed as sinus tarsi syndrome. He did not respond adequately to treatment and was unable to perform within his military occupational specialty or participate in a physical fitness test. He was placed on limited duty and underwent a Medical Evaluation Board (MEB). Sinus tarsi syndrome was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. The PEB adjudicated the sinus tarsi syndrome condition as unfitting, rated 10%, with application of the SECNAVINST 1850.4E and DoDI 1332.39. The CI made no appeals, and was medically separated with a 10% disability rating.

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CI CONTENTION: “I was not fairly rated on my disability. I have undergone 6 surgeries on my ankles and am rated by the VA at 80%, 40% of which is the left ankle which I was found unfit for duty for. My USMC service disability should be re-examined and comply with the VA’s rating.”

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RATING COMPARISON:

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| **Service IPEB – Dated 20040701** | **VA (1 Mo. Pre-Separation) – All Effective Date 20040901** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Sinus Tarsi Syndrome (left ankle) | 5099-5003 | 10% | S/p L Fibula Fracture\* | 5262 | 20% | 20040719 |
| ↓No Additional MEB/ PEB Entries↓ | Lumbar Strain | 5242 | 10% | 20040719 |
| Bilateral Plantar Fasciitis | 5299-5277 | 10% | 20040719 |
| 0% X 1 / Not Service Connected X 1 |
| **Combined: 10%** | **Combined: 40%** |

\*S/p fibular fracture (left ankle condition) rated 40% effective 20050701

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impact that his service-incurred conditions have had on his quality of life. However, the military services, by law, can only rate and compensate for those conditions that were found unfitting for continued military service based on the severity of the condition at the time of separation and not based on possible future changes. The VA, however, can rate and compensate all service connected conditions without regard to their impact on performance of military duties, including conditions developing after separation that are direct complications of a service connected condition. The VA can also increase or decrease ratings based on the changing severity of each condition over time. The Board’s role is confined to the review of medical records and all evidence at hand to assess the fairness of PEB rating determinations, compared to the VA Schedule for Rating Disabilities (VASRD) standards, based on severity at the time of separation. It must also judge the fairness of PEB fitness adjudications based on the fitness consequences of conditions as they existed at the time of separation. Furthermore, a “crystal ball” requirement is not imposed on the service PEBs by the Board, and the 12-month window specified in DoDI 6040.44 is appropriate for rating comparisons but not for new developments after separation. The Board’s threshold for countering DES 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.

Left Ankle Condition. During military training in May 2003, the CI sustained a spiral fracture of the left fibula involving the ankle joint. He healed with casting, but reinjured it while hiking in August 2003, with an apparent re-fracture. He was again casted for several weeks but experienced persistent activity limiting pain, diagnosed as sinus tarsi syndrome. A civilian orthopedic evaluation in March 2004, five months before separation, diagnosed lateral compression syndrome and subtalar joint degenerative arthritis, possibly secondary to the original injury. There was limited range of motion (ROM) with guarding due to pain, but with modest decreased motion compared to the right ankle. There was decreased and painful subtalar joint motion as well. At the time of the narrative summary (NARSUM), seven months before separation, the CI continued to experience pain with walking as well as other activities and was unable to run. He wore a splint to prevent painful movements; however, there was no joint instability by examination or fluoroscopic examination in October 2003. ROM was recorded as normal (dorsiflexion 20°, plantar flexion 45°). The NARSUM addendum, three months before separation, and a military orthopedic surgery examination, two months before separation, recorded no changes. Surgical intervention was proposed by both military and civilian orthopedic surgeons. The NARSUM (May 7, 2004) indicates that the CI declined surgery by military orthopedic surgeons. While home on terminal leave and the day before his date of separation, the CI underwent left ankle surgery by his civilian orthopedic surgeon. Although initially improved, recurrent and persistent symptoms resulted in another surgery in March 2005 to fuse the subtalar joint of the ankle. The PEB rated the condition 10% under diagnostic code 5099-5003. The VA rated the condition 20% using diagnostic code 5262, impairment of tibia and fibula, malunion of, moderate ankle disability. Rating under this code is consistent with the civilian orthopedic surgeon’s conclusion (March 2004) that there was some displacement of the distal fibula at the ankle consistent, with a malunion causing the CI’s painful condition. Following recovery from the second surgery in March 2005, the VA rated the ankle condition 40% under the same code (non-union, with loose motion) due to wear of a brace and pain. Alternate coding options for rating include diagnostic code 5271, ankle limitation of motion which provides two options: moderate 10%, and marked 20%. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt) and §4.7 (higher of two evaluations), the Board recommends a separation rating of 20% for the ankle condition using diagnostic code 5262, impairment of fibula due to malunion, moderate ankle disability. The Board considered rating under different coding options but a higher rating benefiting the member did not result.

Remaining Conditions. No other conditions were noted in the NARSUM, identified by the CI on the MEB physical, or found elsewhere in the Disability Evaluation System (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. The Board thus has no basis for recommending any additional unfitting conditions for separation rating. Additionally, lumbar strain, cervical strain, and bilateral plantar fasciitis were noted in the original VA rating decision, but were not documented in the DES file. In addition to re-injury of the ankle, an August 2003 clinic note recorded complaint of increased back pain related to training activities, with a four-year history of low back pain and a history of herniated disc (CI entered active duty nine months prior). There were also blisters on both heels, diagnosed as cellulitis, a skin infection. There are no further service treatment records reflecting care for back or foot problems other than that related to the ankle discussed above. At the MEB history and physical examination in May 2004 (DD Form 2807-1), the CI denied back pain. 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.

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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. In the matter of the painful left ankle condition (sinus tarsi syndrome), the Board unanimously recommends a rating of 20% coded 5262 IAW VASRD §4.71a. The Board unanimously agrees 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 recommends that the CI’s prior determination be modified as follows, effective as of the date of his prior medical separation.

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Sinus Tarsi Syndrome, Left Ankle | 5262 | 20% |
| **COMBINED** | **20%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090806, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

 Deputy Director

 Physical Disability Board of Review

MEMORANDUM FOR DEPUTY COMMANDANT, MANPOWER & RESERVE AFFAIRS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

Ref: (a) DoDI 6040.44

 (b) PDBR ltr dtd 10 May 11

1. I have reviewed the subject case pursuant to reference (a) and approve the recommendation of the Physical Disability Board of Review (reference (b)).

2. The subject member’s official records are to be corrected to reflect the following disposition:

 a. Separation from the naval service due to physical disability rated at 20 percent (increased from 10 percent) effective 31 August 2004.

3. Please ensure all necessary actions are taken to implement this decision including notification to the subject member once those actions are completed.

 Assistant General Counsel

 (Manpower & Reserve Affairs)