RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: RANCH OF SERVICE: MARINE CORPS

CASE NUMBER: PD0900563 SEPARATION DATE: 20050915

board date: 20110317

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 Marines in 2005. The medical basis for the separation was gunshot wound (GSW) w/left foot drop secondary to peroneal nerve injury. CI was injured in April 2004 while deployed in Iraq. He suffered a GSW to the left upper leg with left distal femur fracture that required open reduction internal fixation (ORIF), vascular bypass of the superficial femoral artery, popliteal artery bypass and lower extremity fasciotomies and grafting. An electrophysiological study showed peroneal nerve injury. The CI had persistent pain and weakness of the left leg, minimal ability to dorsiflex or plantar flex the foot, and used a splint to facilitate ambulation on crutches. Despite physical therapy, he showed little improvement in strength or range of motion (ROM) of the lower extremity. The CI did not respond adequately enough to perform within his military occupational specialty or participate in a fitness test. He was placed on limited duty and underwent a Medical Evaluation Board (MEB). GSW w/left foot drop secondary to peroneal nerve injury was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable. The PEB adjudicated the GSW w/left foot drop secondary to peroneal nerve injury as unfitting, rated 20% with application of SECNAVINST 1850.4E and DoDI 1332.39, respectively. The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: The CI elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

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| **Service IPEB – Dated 20050705** | **VA (3 Mo. After Separation) – All Effective Date 20050916** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| GSW w/L Foot Drop Secondary to Peroneal Nerve Injury | 8523 | 20% | Atrophy L Foot Secondary to Disuse w/Severe Axonal Loss, L Tibial Nerve | 8599-8520 | 40% | 20051213 |
| ↓No Additional MEB/PEB Entries↓ | GSW Injury, Muscle Grp XV, L Thigh | 5315 | 30% | 20060208 |
| S/P GSW L Thigh & s/p ORIF L Femur  | 5255 | 30% | 20051213 |
| Scarring Residuals L Leg | 7801 | 10% | 20051213 |
| Scar Residuals L Leg  | 7801 | 10% | 20051213 |
| Scar Residual Medial R Thigh | 7804 | 10% | 20051213 |
| Donor Site Scar R Anterior Thigh | 7804 | 10% | 20051213 |
| Scar Residual Medial R Thigh | 7804 | 10% | 20051213 |
| Tinnitus | 6260 | 10% | 20051213 |
| PTSD | 9411 | 50%\* | 20051213 |
| R Flat Foot | 5276 | 20% | 20051213 |
| 0% X 0 / Not Service Connected X 1 |
| **Final Combined: 20%** | **Total Combined: 80%\*** |

\*PTSD to 100% based on treatment records to February 2006, effective 20050916 (combined 100%).

ANALYSIS SUMMARY: This case focuses on the CI’s injuries from the GSW to the left thigh and leg. The primary disability was abnormal gait, with foot drop and pain with standing or walking. The Board specifically considered only conditions that had a clear adverse impact to continued service at the time of separation. Post-separation worsening was not included in considering the rating level.

Left Leg. The PEB rated the GSW w/left foot drop secondary to peroneal nerve injury condition, coded anterior tibial nerve (deep peroneal) 8523 at 20%. The narrative summary (NARSUM) approximately four months pre-separation noted symptoms of persistent weakness in the left lower extremity (LLE), minimal ability to dorsiflex or plantar flex the left foot, “minimal 3-4/5 dorsiflexion and plantar flexion strength,” significant muscle wasting of the lower extremity, and a requirement to wear a splint to facilitate ambulation on crutches. The CI underwent compensation and pension (C&P) exams specific to the body part with specialists rendering specified exams. At the VA C&P bone (orthopedic) exam three months post-separation the examiner documented the CI complained of constant aching sharp pain 4-8/10, aggravated by walking and standing, weakness and numbness in LLE involving the lateral aspect of the leg, anterior thigh, and entire left foot. The orthopedist found the CI to have increased pain in the left knee at the end of ROM. His left ankle was noted to have dorsiflexion of zero degrees and plantar flexion was limited, with pain and tenderness over the entire ankle. The CI was noted to have a tight Achilles tendon. The VA C&P muscle exam at five months post-separation documented that the CI had a marked moderate to severe grade of muscle mass loss, Group 13 and 15 in the left thigh and Group 12 in the left leg. The examiner also documented that the CI had “marked moderate to severe grade of muscle mass loss,” and the left knee is “1/3 limited due to loss of muscle which also affects his daily activities.” The left knee and ankle have limited flexion, and the left ankle dorsiflexion, plantar flexion, supination and pronation. The VA C&P neurology exam five months post-separation documented that the CI complained of LLE constant tingling, numbness, paresthesias and burning sensation, weakness and sensitivity to touch. An electromyography (EMG) was consistent with severe, but incomplete left sciatic nerve injury with significant axonal loss. The examiner documented that the motor strength was limited due to pain and contraction, pin-prick and vibration sense was diminished, and that there was “associated deep atrophy noted on the muscles on the left medial thigh and to the left medial aspect of the left leg.” The neurologist opined that the injury resulted in incomplete left sciatic nerve injury and left sciatic neuropathy resulting in LLE weakness and numbness. The VA C&P feet exam three months post-separation documented that the CI complained of pain on standing and, after walking for any long period of time, the CI needed to use crutches for eight months. The examiner documented that the CI had muscle atrophy in the left leg and foot, with the left foot being smaller than the right foot. The CI was unable to dorsiflex the left foot, and was in a plantar flexed position with noticeable weakness. The examiner opined that that there was a severe limp and pain during the gait cycles of the LLE.

The PEB rated the CI’s GSW w/left foot drop secondary to peroneal nerve injury as 8523 code, paralysis of the anterior tibial nerve (deep peroneal) at 20%, and the record indicated “significant muscle wasting of the lower extremity” and minimal strength. VA evidence proximate to separation indicated a higher level of nerve injury than documented by the service EMG that better aligned with the other objective evidence in the service treatment record. The VA rated the atrophy left foot secondary to disuse w/severe axonal loss, the left tibial nerve as 8520 code (paralysis, incomplete of, the sciatic nerve) at 40% (moderately severe), and additionally rated the left lower extremity for muscle injury (30%), femur impairment (30% hip and knee), and scar residuals (10% + 10%). The CI’s disability was predominately due to the peroneal nerve, but there were significant objective findings of sciatic nerve abnormalities, attributable to his GSW and subsequent surgeries, including fasciotomies such as the weakness of the left knee, limited flexion of the knee and leg, pain, marked muscle atrophy, and an EMG “that demonstrated severe but incomplete sciatic nerve injury with significant axonal loss.” Because of the level of the injury which involved the thigh, the sciatic nerve was affected and, although the ankle was also affected by injury to the peroneal nerve, the peroneal nerve is derived from the sciatic nerve which caused the more proximal (higher) injury of the knee.

The Board considered and rejected adding the upper leg muscle condition (5315 Group XV) as a separate unfitting condition. The Board, likewise, considered and rejected adding knee and hip disability as separately unfitting (5255 code, femur, impairment of, with knee or hip disability) in favor of considering the nerve injury and left lower leg and foot as the principle consideration of the PEB unfitness determination. However, the Board considered that the CI’s primary disability was LLE functional loss with nerve injury and muscle atrophy and pain on motion that restricted the CI’s gait and mobility. During the Board deliberations, a vigorous discussion ensued regarding VA Schedule for Rating Disabilities (VASRD) §4.68 Amputation Rule and the Board considered using the below the knee “shall not exceed the 40% evaluation” or “at knee or above using the 60% rating” or considering pathology more proximal to the injury added to the unfitting condition. The predominate factors were the site of the GSW injury, objective evidence of a higher nerve-level involvement, severe muscle atrophy in the upper leg, and impairment in knee function. The Board applied the tenants of VASRD §4.40 (functional loss) and VASRD §4.59 (painful motion) for considering severity as “incomplete severe with marked muscular atrophy,” and speculated that the VA’s lower individual nerve rating was due to attributing the CI’s knee and muscle conditions to separately coded conditions to achieve a higher overall rating level. After due deliberation considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends that the condition be coded as 8520 [paralysis, incomplete of the sciatic nerve] “severe with marked muscular atrophy,” and a separation rating of 60% for GSW with left leg muscle atrophy and foot drop secondary to nerve injury 8599-8520.

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| Left Knee | Separation Date: 20050915 |
| ROM | VA Ortho C&P20051213 | VA C&P Muscles 20060208 | VA C&P Neurology20060208 |
| Flexion (0-140⁰) | 0⁰-90⁰ | 0⁰-50⁰ | - |
| Extension (0⁰) | 0⁰ | 0⁰ | - |
| Comments | ROM 0⁰-90⁰ with increased pain at end of ROM, constant sharp aching pain, aggravated by standing and walking | ROM limited, limited in flexion; Calf muscles 12⁰ left knee; ROM limited 20%; 1/3 limited due to loss of muscle which also affects his daily activities | EMG –incomplete sciatic nerve injury, pain, LLE movements limited, reflex +1. LLE muscle atrophy |

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| Left Ankle | Separation Date: 20050915 |
| ROM | MEB - 20050519 | VA Ortho C&P20051213 | VA C&P Muscles 20060208 | VA C&P - Neurology20060208 |
| Dorsiflexion (0-20⁰) | “Minimal ability to dorsiflex or plantar flex” | 0⁰ | 0⁰-15⁰ | - |
| Plantar Flexion (0-45⁰) | 0⁰-25⁰ | 0⁰-15⁰ | - |
| Comments | Minimal 3-4/5 dorsiflex and plantar flexion strength; LLE sig. muscle wasting  | Dorsiflexion assoc with pain, tenderness to palpation over entire left ankle, very tight Achilles tendon | Mild weakness, fatigue and lack of endurance; Supination 0-30⁰; Pronation 0-10⁰  | Vibration sense reduced; Left ankle eversion and inversion 3/5; left ankle reflex +1 diminished |

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| Left Foot | Separation Date: 20050915 |
|  | VA Ortho C&P 20051213 | VA C&P Muscles 20060208 | VA C&P - Neurology20060208 |
| Comments | Gait deviated to the right side; Impaired light touch sensation; smaller left foot | Difficulty walking and standing; Antalgic gait | Hyperesthesia; Decreased pin prick and light touch, reduced vibration sense |

Posttraumatic Stress Disorder. Posttraumatic stress disorder (PTSD) was rated 50 % by the VA based on an examination three months post-separation, and then retroactively increased to 100% based on VA treatment notes through February 2006. The MEB history and physical documented poor sleep, positive mood liability with counseling, probable Combat and Operational Stress Reaction (COSR). The VA initial PTSD C&P was reviewed, and there was no indication that, prior to separation, any mental health condition rose to the level of being unfitting. No mental health-related impairments were noted on any limited duty or non-medical assessment. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of PTSD or any mental health condition as an unfitting condition for separation rating.

Remaining Conditions. The tinnitus condition was rated 10% by the VA. The right flat foot condition was rated 20% by the VA. However, these conditions were not mentioned in the Disability Evaluation System (DES) package. 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 therefore has no reasonable basis for recommending any additional unfitting conditions for separation rating.

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 left leg GSW condition and IAW VASRD §4.124a, the Board by a vote of 2:1 recommends a change in the VASRD code to 8520 and a rating of 60%. The single voter for dissent (who elected a 40% rating level) submitted a minority opinion. In the matter of the mental health condition (COSR or PTSD) or any other medical conditions eligible for Board consideration, the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation.

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** |
| GSW with Left Leg Muscle Atrophy and Foot Drop Secondary to Nerve Injury | 8599-8520 | 60% |
| **COMBINED** | **60%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090918, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

 Deputy Director

 Physical Disability Board of Review

Minority Opinion:

I agree with the Board that this is a left lower extremity nerve condition appropriately coded as 8520 and rated severe, with marked muscular atrophy at 60%. However, I believe that the amputation rule must be applied because, according to VASRD §4.68 (amputation rule), the combined evaluations for disabilities below the knee shall not exceed the 40 percent evaluation. In my opinion, the unfitting issue was predominantly an ankle and foot nerve condition, and therefore the Board's recommendation of 60% is not in accordance with the rule for below the knee amputation.

I recommend coding and rating 8599-8520 at 40% as an accurate rating of the CI's left lower extremity disability.

MEMORANDUM FOR DEPUTY COMMANDANT, MANPOWER & RESERVE AFFAIRS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

Ref: (a) PDBR ltr of 4 Apr 11

 (b) DoDI 6040.44

1. I have reviewed reference (a) pursuant to 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 40 percent (increased from 20 percent) with placement on the Permanent Disability Retired List effective 15 September 2005.

3. Please ensure all necessary actions are taken to implement this decision, including the recoupment of previously paid funds if appropriate, and notification to the subject member once those actions are completed.

 Principal Deputy

 Assistant Secretary of the Navy

 (Manpower & Reserve Affairs)