RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXX. BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1000873 SEPARATION DATE: 20080830

BOARD DATE: 20111107

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a right-handed active duty Corporal/E-4 (0621, Radio Operator) medically separated for left radial head fracture*.* The CI sustained that fracture when he fell while descending from a 20-25 foot guard tower in Iraq in April 2007. He was evacuated to Bethesda where he underwent surgery (open reduction internal fixation-ORIF). Approximately six weeks later, he underwent a second procedure due to hardware failure (of radial head implant). Persistent pain and limited motion prompted a third surgery five months later to shorten the left ulna and remove exostosis from the proximal radius. Despite postoperative rehabilitative care, pain management and narcotics, he did not respond adequately to treatment and was unable to perform within his military occupational specialty (MOS) or meet physical fitness standards. He was placed on limited duty and underwent a Medical Evaluation Board (MEB). Pain in limb; closed fracture of head of radius; concussion, unspecified; and memory loss were forwarded to the Physical Evaluation Board (PEB). The PEB adjudicated the left radial head fracture with loss of extension condition as unfitting, rated 10%, with application of the Veterans’ Administration Schedule for Rating Disabilities (VASRD). The CI did not appeal, and was medically separated with a 10% disability rating.

CI CONTENTION: “Limited mobility of left arm, grinding of cartilage and bone constant pain/short term memory loss (TBI/Post concussion syndrome) PTSD -Anxiety w/mood swings including times of intense anger and irritability-continued sleep disorder.”

RATING COMPARISON:

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| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20080714** | | | **VA (~1 Mo. After Separation) – All Effective Date 20080831** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Left Radial Head Fracture… | 5207 | 10% | S/P Fracture Radial Head, Left Elbow | 5208 | 20% | 20080917 |
| Left Elbow Pain | Category II | |
| Mild TBI | Category III | | Headaches, S/P TBI | 8045-8100 | 30% | 20080928 |
| Memory Loss | Category III | |
| ↓No Additional MEB/PEB Entries↓ | | | Adjustment Disorder with Anxiety and PTSD | 9440 | 50% | 20080916 |
| Tinnitus | 6260 | 10% | 20081203 |
| 0% x 2/Not Service Connected x 8 | | | 20080917 |
| **Combined: 10%** | | | **Combined: 80%** | | | |

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 him. The Board wishes to clarify that it is subject to the same laws for service disability entitlements as those under which the Disability Evaluation System (DES) operates. The DES has neither the role nor the authority to compensate service 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 (VA), operating under a different set of laws (Title 38, United States Code). The Board evaluates VA evidence proximate 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. The Board also acknowledges the CI’s contention for service ratings for other conditions documented at the time of separation, and notes that its recommendations in that regard must also comply with the same governance. While the DES considers all of the service member's medical conditions, compensation can only be offered for those medical conditions that cut short a service member’s career, and then only to the degree of severity present at the time of final disposition. The VA 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.

Left Elbow Condition. The initial radial head fracture was comminuted and subsequent three surgeries were for internal fixation, prosthetic replacement, and ulnar shortening following infection. There were four postoperative goniometric range of motion (ROM) evaluations in evidence which the Board weighed in arriving at its rating recommendation. The two exams having the highest probative value are summarized in the chart below.

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| Goniometric ROM –  Left Elbow | MEB ~ 2 Mo. Pre-Sep | VA C&P ~ 1 Mo. Post-Sep |
| Flexion (145) | 125⁰ | 110⁰ |
| Extension (0) | 45⁰ | 30⁰ |
| Pronation (0-80) | 45⁰ | 40⁰ |
| Supination (0-85) | 60⁰ | 50⁰ |
| Comment: 3rd surgery ~ 9 Mo. Pre-Sep;  right hand dominant | Painful motion, strength 4+/5 secondary to pain in elbow flexion & extension; well-healed scars; 2-pt intact; Hx – unable to turn door knob, push, pull | Pain with last 10⁰ of flexion, supination, and pronation; asymptomatic lateral scar; Hx – difficulty lifting >5 lbs, moderate constant pain; occupation – delivery driver |
| §4.71a Rating | 20% | 20% (VA 20%) |

Two occupational therapy notes at six and seven months pre-separation (two to three months postoperative) documented reduced elbow ROMs, weakness of grip strength, and reduced wrist ROM. The narrative summary (NARSUM), which cited the same ROMs documented in the orthopedic addendum, two months pre-separation, noted reduced elbow ROMs, with limitation of extension meeting the 10% criteria under 5207 (limitation of forearm extension), and pronation approximating the 20% criteria under 5213 (limitation of pronation). The examiner also noted weakness (4+/5) secondary to pain in elbow flexion and extension. Radiographs showed a “stable radial head prosthesis without complication and stable hardware for ulnar shortening without evidence of complication.” The VA exam, one month post-separation, noted slightly worse/reduced ROMs, with pronation again consistent with the 20% criteria under 5213. The VA rated the exam at 20% under 5208 (forearm flexion limited to 100° and extension to 45°), stating the CI’s “disability falls between 10% and 20%, closer to 20%.”

Multiple citations in the record indicated the CI was right-hand dominant, so the elbow condition is appropriately rated as a “minor” limb. The Board considered multiple coding options, including 5207 (limitation of forearm extension), 5206 (limitation of forearm flexion), 5211 (ulnar impairment), 5212 (radial impairment), and 5213 (impairment of supination or pronation). The ROMs in evidence did not appear to meet the criteria (20%) for 5208 (forearm flexion limited to 100° and extension to 45°). Pronation deficits in both the NARSUM and VA exams appeared to approximate the 20% criteria under 5213, with “motion lost beyond last quarter of arc, the hand does not approach full pronation.” Well-healed, asymptomatic surgical scars were noted in multiple exams proximate to separation, without evidence of associated impairment. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 20% for the left elbow condition coded 5213 (limitation of pronation).

Left Wrist Condition. The Board noted that the NARSUM limitations to duty included the left wrist. Limitations stated, “Member is unable to function in his fullest capacity in his current MOS as a field radio operator due to his limitations in strength and range of motion at the left elbow and wrist.” Left wrist pain and limitation of motion was evidenced in the record, and the limited duty for the left radial head condition could have provided shelter for the limitations caused by the left wrist condition. Radiographs indicated left wrist pathology consistent with a comminuted radial head fracture (widening of the distal radial-ulnar joint [DRUJ] and possible volar intercalated segment instability), with later radiographs indicating a plate in the mid to distal ulnar shaft with associated fracture. An orthopedic outpatient note one month after the CI’s injury reported the injury included a DRUJ disruption and his initial surgery included a wrist arthroscopy. The orthopedic NARSUM addendum conclusion was “persistent elbow and wrist pain” and addressed the entire left upper extremity as interfering with duty. Occupational therapy records document a preponderance of notes indicating painful left elbow and wrist with limited ROMs.

The VA compensation and pension (C&P) claim and exam was for left hand pain and there was no left wrist evaluation in the C&P exam. The VA found no left hand pathology and provided “not service connected, no diagnosis.” There were two postoperative goniometric ROM evaluations in evidence which the Board weighed in arriving at its rating recommendation. Both exams are summarized in the chart below.

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| Goniometric ROM –  L Wrist | ORTHO ~6 Mo. Pre-Sep | MEB ~ 2 Mo. Pre-Sep |
| Dorsiflexion (Extension) (0-70) | 20⁰ (vs 60⁰ R) | 20⁰ (vs 60⁰ R) |
| Palmar Flexion (0-80) | 70⁰ (& 70⁰ R) | 70⁰ (& 70⁰ R)⁰ |
| Ulnar Deviation (0-45) | - | - |
| Radial Deviation (0-20) | - | - |
| Comment | Strength 4+/5 due to elbow pain | Grip strength 5/5 bilaterally |
| §4.71a Rating | 10% (pain) | 10% (pain) |

After due deliberation, the Board majority agreed that the preponderance of the evidence with regard to the functional impairment of the left wrist favors its recommendation as an additionally unfitting condition for separation rating. It is appropriately coded 5215 and with application of §4.59 (painful motion) meets the VASRD §4.71a criteria for a 10% rating.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were left elbow pain, mild traumatic brain injury (TBI), and memory loss (VA 30% for headaches, status post TBI). The left elbow pain is considered under the unfitting elbow condition, discussed above. The mild TBI was well documented in the record. The service treatment record indicates the CI began experiencing problems with short term memory and “moodiness” in the month following the injury. After the injury, he reportedly experienced approximately 20 minutes of posttraumatic amnesia, without report of unconsciousness. TBI screen was initially negative at Landstuhl, but subsequent neuropsychiatric testing (seven months post-injury; nine months pre-separation) suggested impairment of verbal learning and memory functions, and reduced processing speed. Follow-up neuropsychological evaluation three months later was inconclusive, but did not exclude potential cognitive deficits. The non-medical assessment emphasized the physical impairments caused by the elbow injury, however it did note, “SNM reports slight short term memory loss, and lowered reaction times.” Although the CI was diagnosed with post-concussion syndrome, there was no evidence of incapacitating or otherwise unfitting headaches due to TBI at the time of separation (headaches specifically denied in service treatment record four months pre-separation and on MEB history form). Any behavioral residuals of TBI are included in the posttraumatic stress disorder (PTSD) discussion, below. The evidence suggests the CI’s TBI related cognitive deficits did not significantly interfere with satisfactory duty performance. All evidence considered there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for mild TBI and associated memory loss.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for PTSD, anxiety, and sleep disorder (VA 50% for adjustment disorder with anxiety and PTSD). These symptoms may have been related to the behavioral residuals of TBI, as discussed above. A mental health evaluation at 11 months pre-separation noted symptoms of irritability, anxiety, memory problems (as discussed above), mild hypervigilance, and intermittent depressive symptoms. The examiner diagnosed adjustment disorder with anxiety (possibly secondary to post-concussion syndrome). The CI was “not feeling significantly distressed by his symptoms,” and declined psychotropic medications. Mental status exams (MSEs) in the service treatment record were without significant abnormality other than two entries stating he appeared tired and one that he appeared depressed. At the 11-month pre-separation exam, global assessment of functioning (GAF) was 65, indicating some mild symptoms or some difficulty in social or occupational functioning, but generally functioning pretty well, having some meaningful interpersonal relationships. Subsequent GAFs assessed during neuropsychological testing, were 60 (highest point in “moderate” range) at 9 months pre-separation, and 70 (“mild” range) at 6 months pre-separation. The nine-month pre-separation exam specifically noted, “A PTSD measure identified numerous symptoms of posttraumatic stress; however, his interview data does not support that diagnosis.” The MEB physical exam, four months pre-separation, noted a normal psychiatric evaluation. At one month post-separation, the VA diagnosed PTSD, along with adjustment disorder and anxiety. The CI endorsed symptoms of avoidance, detachment, hypervigilance, and intrusive thoughts, not described in prior exams. The CI was employed full time for the past three weeks as a transmission parts deliveryman, and reported his boss had commented that he appeared tired. MSE was significant for impaired memory, but was otherwise normal. GAF was 55, suggesting moderate symptoms or moderate difficulty in social or occupational functioning. The VA applied a 50% evaluation under 9440 (chronic adjustment disorder).

In accordance with DoDI 1332.38, adjustment disorders are classified under “conditions and circumstances not constituting a physical disability.” There was insufficient evidence to support a diagnosis of PTSD prior to separation, and there was little support that psychiatric symptoms had unfitting features at separation, even if taken together with the cognitive deficits described above. 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 determined therefore that none of the stated conditions were subject to service disability rating.

Remaining Conditions. Other conditions identified in the DES file were a history of asthma treated with albuterol, and frequent bilateral ankle sprains. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were occupationally significant during the MEB period, none were basis for limited duty, and none were implicated in the non-medical assessment. These conditions were reviewed by the action officer and considered by the Board. It was determined that none could be argued as unfitting and subject to separation rating. Additionally tinnitus and several other non-acute conditions were noted in the VA rating decision proximate to separation, but were 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. 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. 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 left elbow condition, the Board unanimously recommends a rating of 20% coded 5213 IAW VASRD §4.71a. In the matter of the left wrist condition, the Board, by a vote of 2:1, recommends that it be added as an additionally unfitting condition for separation rating; coded 5215 and rated 10% IAW VASRD §4.71a. The single voter for dissent (who recommended no additional finding of unfit for the wrist condition) submitted the addended minority opinion. In the matter of the left elbow pain, mild TBI, and memory loss conditions, the Board unanimously recommends no change from the PEB adjudications as not unfitting. In the matter of the adjustment disorder, anxiety, sleep disorder conditions 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** |
| Status Post Fracture, Radial Head, Left Elbow | 5213 | 20% |
| Left Wrist Limitations | 5215 | 10% |
| **COMBINED** | **30%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100604, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

President

Physical Disability Board of Review

MINORITY OPINION:

Although I agree with the majority recommendation regarding the change in code and service disability rating for the unfitting left elbow condition, I disagree with the majority’s conclusion that the contiguous left wrist joint was in itself separately unfitting. The preponderance of service and VA evidence was directed at the dominant orthopedic injuries, the fractures and surgical sequelae at the elbow. This is forthrightly apparent from the basic facts of this case; i.e., that separate wrist pathology was not forwarded as a condition for adjudication by the MEB, and that the VA did not recognize a distinct ratable wrist condition. The majority recommendation in effect constructs a condition from ratable evidence, as is apparent in its recommended nomenclature “wrist limitations.” Having extrapolated a previously unadjudicated condition from the evidence, I submit that the Board has a considerable burden to then establish that this derived condition was independently unfitting and thereby subject to service rating. The majority recommendation concludes that the left wrist impairment alone, with an otherwise intact upper extremity, would have rendered this Marine incapable of further service as a radio operator. In the non medical assessment, the commander mentions extensive injuries to the CI’s elbow, and pain in his injured arm, but there was no specific mention of his wrist, and speculation would be required to infer that the commander implied the wrist also. The second (and closest to separation) period of limited duty was for: no use of left arm, heavy lifting, pushups, pull ups, jumping jacks, running or marching due to closed fracture of the left radial head. Again, there was no specific mention of duty limitations attributable to the left wrist, and the majority’s rationale speculates that the wrist impairment was thereby sheltered and would have been apparent and unfitting otherwise. I submit that this degree of speculation exceeds the reasonable latitude expected of this Board. A recommendation of this nature should be based on an at least “more likely than not” standard. It is the opinion of this voter that, more likely than not, the CI would have been capable of continued service to the Corps if hampered only by the disability in evidence for his non-dominant wrist.

RECOMMENDATION: I respectfully recommend 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** |
| Status Post Fracture, Radial Head, Left Elbow | 5213 | 20% |
| **COMBINED** | **20%** |

MEMORANDUM FOR DIRECTOR, SECRETARY OF THE NAVY COUNCIL OF REVIEW

BOARDS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

ICO XXXX, FORMER USMC, XXX XX XXXX

Ref: (a) DoDI 6040.44

(b) PDBR ltr dtd 23 Nov 11

I have reviewed subject case pursuant to reference (a) and non-concur with the recommendation of the Physical Disability Board of Review as set forth in reference (b). Therefore, Mr. XXXX’ records will not be corrected to reflect a change in either his characterization of separation or in the disability rating previously assigned by the Department of the Navy’s Physical Evaluation Board.

Principal Deputy

Assistant Secretary of the Navy

(Manpower & Reserve Affairs)