RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1000925 SEPARATION DATE: 20070427

BOARD DATE: 20100803

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Staff Sergeant (6323, Avionics Technician) medically separated from the Marines for bilateral hammer toe deformities. He did not respond adequately 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). Bilateral hammer toe deformities, moderate flat foot, and moderate pronation were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E (referred as “other hammer toe [acquired], congenital pes planus, and other acquired deformities of ankle and foot” on NAVMED form 6100/1). Other conditions included in the Disability Evaluation System (DES) packet will be discussed below. The PEB adjudicated the bilateral hammertoe deformities as unfitting, rated 0%; with application of SECNAVINST 1850.4E. The CI made no appeals, and was then medically separated with a 0% disability rating.

CI CONTENTION: “All conditions were not evaluated and the conditions that were evaluated have become worse.” The CI also submits a copy of a sleep study. A contention for inclusion of all VA conditions and ratings per the chart below, and sleep disorder in the separation rating is therefore implied.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20070314** | | | **VA (~4 Mo Pre-Separation) – All Effective 20070501** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Bilateral Hammer Toe Deformities | 5282 | 0% | Bilateral Pes Planus w/ Bilateral Plantar Fasciitis S/P Bilateral Hammer Toe Repair of 2nd, 3rd and 4th Toes | 5276 | 10% | 20070103 |
| Moderate Flat Foot | Cat II | |
| ↓No Additional MEB/PEB Entries↓ | | | Thoracolumbar Strain; DDD L5-S1 | 5237 | 20% | 20070103 |
| Right Shoulder Strain | 5299- 5024 | 10% | 20070103 |
| Left Shoulder Strain | 5299-5024 | 10% | 20070103 |
| GERD and Hiatal Hernia | 7346 | 10% | 20070103 |
| Tinnitus | 6260 | 10% | 20070103 |
| 0% x 2 / Not Service Connected x 1 | | | 20070103 |
| **Combined: 0%** | | | **Combined: 60%** | | | |

ANALYSIS SUMMARY: 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, as well as the fairness of PEB fitness adjudications at the time of separation.

Bilateral Foot Pain; Hammer Toe Deformities and Flat Feet (Pes Planus). The CI experienced foot pain due to residuals of bilateral hammer toe surgery. He underwent surgery in 1996 to correct hammer toe deformities of the left second, third and fourth toes. Ten years later, he underwent surgery to correct the hammer toe deformities of the right second, third and fourth toes in July of 2006. He continued to experience bilateral toe pain with running and strenuous military duties, particularly wearing military boots. The PEB rated the CI’s bilateral foot pain condition 0% IAW VASD rating guidance for the CI’s primary foot condition, hammer toes (5282, single toes 0%; all toes 10% unilateral). To attain a higher rating using the code for hammer toes, all toes must be involved. The PEB classified the moderate flat foot as a related category 2 condition in the unfitting conditions. The VA rated the CI’s bilateral foot pain 10% using VASRD code 5276 for acquired flat feet, noting the history of surgical correction of hammer toes, the pre-separation VA compensation and pension (C&P) examination diagnosis of pes planus with plantar fasciitis, and pain on manipulation and use of the feet (a single 10% rating applies to bilateral or unilateral condition). Although rating under different VARSD code, the PEB considered the hammer toes and flat foot conditions together under one rating that took into consideration the complete disability picture caused by the conditions together. IAW VASRD §4.14 (avoidance of pyramiding), the evaluation and rating of the same manifestation under different diagnoses is to be avoided.

The Board agreed that evidence of the record showed that the CI did not have hammer toe deformities of all toes meeting the criteria for the 10% rating. The hammer toe deformities had been surgically corrected and the CI had residual toe pain with strenuous physical activity. The Board considered rating the CI’s bilateral foot pain under the VASRD diagnostic code for acquired pes planus (5276) used by the VA. CI had congenital flat feet that did not appear to cause any impairment. Although not documented in the entrance examination, there was no history of injury or disease process that would cause flat feet. The flat feet were diagnosed by the MEB podiatrist as congenital and, following separation, a VA C&P examiner (August 2010) also diagnosed the CI’s flat feet as congenital pes planus. IAW VASRD §4.57 (static foot deformities), congenital pes planus alone is not compensable. The congenital condition, with depression of the arch, normally shows no evidence of abnormal callosities, areas of pressure, strain or demonstrable tenderness. Although the congenital pes planus itself is not compensable, foot disabilities incurred in service associated with flat feet can be. Service treatment records prior to the narrative summary (NARSUM) document toe pain associated with hammer toes and residuals of hammer toe surgery, not pain due to flat feet or treatment for complaints related to flat feet. At the time of an April 1, 2005 podiatry appointment, the CI completed a pain diagram indicating only toe pain. There was no report or indication of plantar pain. On examination, there were no callouses or blisters indicative of abnormal weight bearing due to flat feet, and there was no tenderness of the plantar fascia of either foot. The NARSUM documents the CI’s report of a dull numbing sensation of the soles of the feet with high impact activity; however, the NARSUM diagnosis did not include plantar fasciitis, and examination findings did not support such a diagnosis. Although the C&P examiner (January 3, 2007) diagnosed bilateral plantar fasciitis, this was based on “slight tenderness of palpation of both soles.” However, there was no contraction or shortening of the plantar fascia, or pain with dorsiflexion of the toes to support the diagnosis. Further, the gait was normal and there was no evidence of abnormal weight bearing.

The Board agreed the evidence was clear that the CI’s flat foot condition was not acquired, and that the service medical records contained no clear evidence to support a diagnosis of plantar fasciitis or other manifestation overshadowing the hammer toe condition that would warrant rating using the code for acquired flat feet. The Board also considered rating using the code for other foot injuries (5284), but agreed the severity of symptoms did not more nearly approach the minimum rating of moderate for 10% in view of records reflecting the CI was playing football with his son just prior to the second surgery combined with evidence that the outcome of the second surgery did not result in worsened functioning than the pre-surgery functional status. After due deliberation considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board concluded that there was insufficient cause to recommend a change in the PEB adjudication for the bilateral hammer toe condition.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for back pain with degenerative disc disease, bilateral shoulder strain, sleep disorder, gastroesophageal reflux disease (GERD, with hiatal hernia) and tinnitus. All of these conditions were documented in the NARSUM or MEB history and physical examination present in the DES package. The CI had a history of chronic low back pain with degenerative disc changes noted on x-rays for over six years. The CI was treated in the chiropractic clinic on a regular basis since approximately 2005. Records document a stable pattern of intermittent pain with pain scores ranging from 0 to 3 on the 10 scale. There were occasional flares of severe pain reported. Medical records report the CI was playing football with his son in June 2006 (injuring his thumb for which he sought care). A chiropractic clinic form completed by the CI on August 6, 2006 indicated he could lift heavy weight without pain, had no walking limitation and no problem with sitting. There was, however, pain with standing and some pain with traveling (similar to form completed in June 2005). A chiropractic clinic record entry dated February 26, 2007 noted the six-year history of chronic low back pain. The CI reported a pain level of 3.3 / 10. There were no signs or symptoms of radiculopathy. Gait and stance were normal and examination was unremarkable. The MEB NARSUM reported that the CI was able to perform his job limited by toe pain without mention of any significant job limitations due to his chronic back condition. He was receiving treatment with a transcutaneous electrical nerve stimulation (TENS) unit, medication, and was reportedly scheduled for an injection. At the time of the C&P examination (January 2007), the CI reported he could not garden or push a lawnmower because of his back but stated he could generally function without medication. There was painful motion reported but posture and gait were normal. The back condition was not profiled or the basis for limited duty and was not implicated in the non-medical assessment (NMA) or noted as failing retention standards.

The service treatment records show treatment on two occasions, 2001 and 2005, for left shoulder strain. There was no other documentary evidence of medical care for shoulder problems.

The CI underwent sleep study in January 2007 for symptoms of daytime drowsiness, snoring and apneas. The sleep study did not support a diagnosis of significant sleep apnea or abnormal periodic limb movement. There was moderate snoring with good sleep quality. Three years after separation, the CI reported progressively worse symptoms since onset, and repeat sleep study demonstrated severe obstructive sleep apnea.

The CI was also treated for GERD and a complaint of tinnitus was recorded. These conditions were not profiled, were not the bases for limited duty and were not implicated in the NMA or noted as failing retention standards.

All of these conditions were reviewed by the action officer and considered by the Board. There was no evidence for concluding that any of the conditions interfered with duty performance to a degree that could be argued as unfitting. 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, surgical scars of the toes, chronic memory loss, dry / watery eyes, knees give out on occasion, and obesity (CI was denied reenlistment January 2007 due to his overweight condition). Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically or occupationally significant during the MEB period, none carried attached profiles, none were the bases for limited duty and none were implicated in the NMA. 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.

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 bilateral hammer toe condition, the Board unanimously recommends no recharacterization of the PEB adjudication. In the matter of the back pain, bilateral shoulder strain, sleep disorder, GERD and tinnitus 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 therefore recommends modification of the disability description without modification of the combined rating or recharacterization of separation.

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| **UNFITTING CONDITION** | | **VASRD CODE** | **RATING** |
| Right Hammer Toe | | 5282 | 0% |
| Left Hammer Toe | | 5282 | 0% |
| **COMBINED (Incorporating BLF)** | | **0%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100819, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

President, Physical Disability Board of Review

MEMORANDUM FOR DIRECTOR, SECRETARY OF THE NAVY COUNCIL OF REVIEW

BOARDS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

Ref: (a) DoDI 6040.44

(b) PDBR ltr dtd 23 Aug 11

I have reviewed the subject case pursuant to reference (a) and, for the reasons set forth in reference (b), approve the recommendation of the Physical Disability Board of Review XXXXX records 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.

Assistant General Counsel

(Manpower & Reserve Affairs)