RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXX BRANCH OF SERVICE: Marine corps

CASE NUMBER: PD1000996 SEPARATION DATE: 20081030

BOARD DATE: 20110803

SUMMARY OF CASE: This covered individual (CI) was a Reserve Sgt/E-5 (3531, Motor Vehicle Operator) medically separated from the Marine Corps for status post (s/p) excision recurrent neuroma right foot and chronic right foot pain s/p open reduction and internal fixation (ORIF) right great toe fracture. He did not respond adequately to perform within his military occupational specialty (MOS) or meet physical fitness test standards. He was issued a permanent P3 profile and underwent a Medical Evaluation Board (MEB). Chronic right foot pain was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1895.4E. Other conditions included in the Disability Evaluation System (DES) will be discussed below. The PEB adjudicated the s/p excision recurrent neuroma right foot and chronic right foot pain s/p ORIF right great toe as unfitting, rated 10% each; with application of the SECNAVINST 1850.4E. The CI made no appeals, and was medically separated with a 20% combined disability rating.

CI CONTENTION: “One or more injuries were not included on my medical board (right ankle) which is service connected and part of the right fibula fracture injury which I have had several surgeries on *[sic].*”

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20080731** | | | **VA – Dated 20081024 – all effective 20081031** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| S/P Excision Recurrent Neuroma Right Foot | 5279 | 10% | S/P Right Toe Fracture w/ORIF, Right Foot with Neuroma | 5299-5284 | 10% | 20081024 |
| Chronic Right Foot Pain S/P ORIF R Great Toe Fx | 5299-5003 | 10% |
| ↓No Additional MEB/PEB Entries↓ | | | Scar, Right Foot Surgery | 7804 | 10% | 20081024 |
| Fracture, Right Fibula with Right Ankle Strain | 5299-5262 | 10%\* | 20081024 |
| Right Hip Strain | 5299-5251 | 10% | 20081024 |
| Not Service Connected x 3 | | | 20081024 |
| **Combined: 20%** | | | **Combined: 30%\*** | | | |

\*Right fibula fracture with ankle strain: 100% from 20090407(post op convalescence); 20% from 20090801; 100% from 20100103 (post op convalescence); 20% from 20100501

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.

Right Foot Condition, S/P ORIF Right Great Toe Fracture and Excision of Recurrent Neuroma. The CI fractured the right great toe metatarsal bone while riding a motorcycle, requiring surgical repair in November 2005. His anterior right foot pain led to surgical removal of inter-metatarsal neuromas from the second and third web spaces of his right foot in August 2006 and again in July 2007. He reported he was unable to perform the physical components of his military duties because of chronic foot pain and was referred to the Medical Evaluation Board in January 2008. At the time of the MEB narrative summary (NARSUM) on May 6, 2008, the surgical incisions were well-healed and there was no erythema, edema or induration. There was decreased sensation noted over the deep web spaces affected by prior surgery; however, sensation of the foot was otherwise intact. The examiner recorded that the CI was able to demonstrate good range of motion (ROM) about the ankle as well as able to demonstrate motion of his toes. At the time of the VA compensation and pension (C&P) examination, one week before separation, the CI was experiencing right ankle pain secondary to an injury that occurred after the MEB (see below). With respect to the foot pain, the CI complained of mild pain with weight bearing. On examination, there was no swelling, or edema of the right foot. There was decreased sensation similar to that documented in the NARSUM. The PEB provided two ratings for the chronic right foot pain: 10% for s/p excision of neuroma right foot (5279) and 10% for chronic right foot pain s/p ORIF, right great toe (7295). The VA provided a single 10% rating for the CI’s chronic right foot pain, combining s/p right toe fracture s/p ORIF with neuroma, post-operative, analogously under diagnostic code 5299-5284 (other foot injuries). The VA also provided a separate rating of 10% for surgical scars. Although the CI had two distinct diagnoses affecting the right foot, the Board concluded that the PEB inappropriately provided two ratings based on the same impairment, foot pain with use. The Board agreed with the rating approach by the VA, which provided one rating for the painful foot condition since the impairments contributed by the two foot related diagnoses overlapped, to the extent that rating each diagnosis would be based on the same symptoms and functional impairment (IAW VASRD §4.14, avoidance of pyramiding; the evaluation and rating of the same manifestation under different diagnoses is to be avoided). Based on the evidence of the MEB NARSUM and the C&P examination, the Board members agreed that the VA rating of 10% under 5299-5284 (other foot injuries) was most appropriate. However, the Board noted evidence that was not available to the PEB at the time of disability rating adjudication. Medical documentation in June 2008 reflected that the CI was playing racquetball (VA documentation indicates the CI was an avid competitive racquetball player). The Board agreed this level of functional capacity would not warrant a minimum rating and a 0% rating would have been appropriate for the foot condition. Although the VA provided a 10% rating for the surgical scars, there was no evidence the scar or localized numb sensation interfered with performance of military duties or wearing of military clothing or equipment. The Board does not recommend separation rating for scars unless their presence imposes a direct limitation on fitness for performance of military duties. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s rating decision for the right foot condition.

Contended Fractured Right Fibula with Right Ankle Sprain. The CI fell, fracturing his right fibula and incurring a severe sprain of his right ankle, while playing racquetball on June 14, 2008. This injury occurred following the MEB (May 5, 2008) and there is no evidence that this new injury was documented in the DES package for consideration by the PEB. The CI was receiving care in an Army medical treatment facility when it was determined his ankle injury required surgical correction within two weeks of separation. There is no available evidence that shows there was consideration for placement on medical hold for treatment or reevaluation in the DES. By policy and precedent, the Board has limited its jurisdiction for recommending unadjudicated conditions as unfitting and subject to additional separation rating to those conditions which are evidenced in the core DES file. The core DES file consists of the MEB referral document, PEB adjudication document, NARSUM (including any addendums or referenced examinations), MEB physical exam, commander’s statement, physical profiles, and any written appeals or internal DES correspondence. The Board therefore has no reasonable basis for recommending the ankle condition for separation rating. Contended conditions which are not eligible for Board recommendations on this basis remain eligible for submission to the Board for Correction of Naval Records (BCNR).

Remaining Conditions. A history of surgery in 2004 for removal of a benign parotid gland mass was recorded in the DES documentation. There were no residual impairments associated with this surgery. Surgical scars, history of broken collar bone and a facial laceration requiring stitches were also documented. None of these conditions were clinically or occupationally significant during the MEB period. They were not the basis for a limited duty and were not implicated in the commander’s non-medical assessment. These conditions were reviewed by the action officer and considered by the Board. It was determined none could be argued as unfitting and subject to separation rating. Additionally, right hip strain was noted in the VA rating decision proximal to separation but 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. 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 right foot condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication at separation. In the matter of contended right ankle condition, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation.

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

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| S/p Excision Recurrent Neuroma , Right Foot | 5279 | 10% |
| Chronic Right Foot Pain S/p ORIF Right Great Toe Fracture | 5299-5003 | 10% |
| COMBINED | 20% |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100908, 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

ICO XXXXXX, FORMER USMC, XXX XX XXXX

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 Mr. XXXX’s 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)