RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1001184 SEPARATION DATE: 20030718

BOARD DATE: 20120125

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty CPL/E-4 (31U, Communication & Electronics Repair) medically separated for knee pain, and neck/upper back/left arm pain. He was treated, but did not respond adequately to fully perform his military duties or meet physical fitness standards. He underwent a Medical Evaluation Board (MEB). Osteoarthritis (OA) of the knees, cervicalgia, cervical radiculopathy, thoracic disk degeneration, limb pain, and testicular pain with erectile dysfunction were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. One other condition (migraine headache) was listed on the DA Form 3947 as medically acceptable. The PEB found the knee condition unfitting and the neck/upper back/limb pain condition unfitting, and rated them 10% and 0% respectively. The CI made no appeals, and was thus separated with a 10% combined disability rating.

CI CONTENTION: The CI states, “Issue 1 (Knee Condition, MEB diagnosis 1), The PEB deemed both my knees unfitting and rated them a combined 10% disabling. The VA rated the same knee condition at 20% disability effective the date of separation from the Army. The PDBR should rate my unfitting knee conditions as 20% disabling. No doubt my Army PEB limited the rating on my knees to internal and illegal Army rating criteria that were non-compliant with the Veterans’ Administration Schedule for Rating Disabilities (VASRD). Further, the range of motion studies I received did not account for or measure the pain on movement as required. It appears that Army PEB applied illegal rating criteria of AR 635-40 provision B-29e, further described below.” The CI’s contention on DD Form 294 continues, “Issue 2: (Back Condition, MEB diagnosis 2-5): The PEB combined my four DA 3947 back conditions as a single pain condition they called cervical and upper thoracic pain with pain down the left (non-dominant) arm. The PEB deemed these conditions as unfitting and assigned them a combined disability rating of 0%. My DA 199 stated my back condition were “rated as by instruction” and then references DoDI 1332.39. The reliance on non VASRD rating instruction drove the rating of my unfitting back conditions as 0% disability. The VA deemed I had three back conditions causing this pain. Intervertebral disc syndrome rated at 20% effective the date I separated from the Army; Lumbosacral or cervical strain rated at 20% effective the date I separated from the Army; and Traumatic arthritis rated at 20% effective the date I separated from the Army. By Law (Chapter 61 of 10 USC), condition deemed unfitting by a PEB are required to be rated per the rating criteria of the VASRD. (I have continued on separate pages, see attached pages).” The CI has indeed submitted additional pages in support of his contention. All pages of his contention were reviewed by the action officer and considered by the Board.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Army PEB – dated 20030612** | | | **VA (2 mo. After-Separation) – All Effective 20030719** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Bilateral Knee Pain | 5003 | 10% | DJD of Both Knees | 5010 | 20% | 20030910 |
| Neck, Upper Back, and Left Arm Pain | 5293-5003 | 0% | Cervical Spondylosis w/ Arm Tingling | 5295 | 20% | 20030910 |
| Back Pain | 5292 | 10%\* | 20030910 |
| Migraine Headache | Not Unfitting | | Vascular Headaches w/ Photophobia | 8100 | 30% | 20030917 |
| Testicular Pain w/ ED | Not Unfitting | | ED w/Testicular Pain | 7522 | 0% | 20030910 |
| ↓No Additional MEB/PEB Entries↓ | | | Tinnitus | 6260 | 10% | 20030910 |
| Hypertension | 7101 | 10% | 20030910 |
| Not Service Connected (NSC) x 4 | | | 20030910 |
| **Combined: 10%** | | | **Combined: 70%** | | | |

\*VA Rating for Back Pain was later increased to 20%, based on a subsequent VA Rating Decision (dated 20051121)

ANALYSIS SUMMARY:

The Board acknowledges the sentiment expressed by the CI regarding the significant impairment with which his conditions continue to burden him. The Board 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 (DVA). The Board’s authority resides in evaluating the fairness of DES fitness decisions and rating determinations 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. While the DES considers all of the CI's medical conditions, compensation can only be offered for those conditions that cut short a service member’s career, and then only to the degree of severity present at the time of separation. The DVA, however, is empowered to compensate service connected conditions and to periodically re-evaluate said conditions for the purpose of adjusting the CI’s disability rating should the degree of impairment vary over time.

Bilateral Knee Pain. The CI has had a long history of knee problems. In January 1998, he fell and injured his left knee. He underwent left knee arthroscopy with chondroplasty in February 2000, due to grade III/IV chondromalacia. The CI had a second arthroscopic chondroplasty of his left knee in September 2002. He injured his right knee in January 2001 while playing basketball. Magnetic resonance imaging (MRI) showed a partial anterior cruciate ligament (ACL) tear. He was treated conservatively, but his right knee pain persisted. Arthroscopy of the right knee was done in June 2002. During this procedure, the surgeon performed ACL thermal shrinkage, and medial femoral condyle plasty. Following surgery, the CI continued to have problems with both knees and an MEB was initiated. At his March 2003 MEB evaluation, four months prior to separation, the CI complained of bilateral knee pain that prevented him from running, and was aggravated by prolonged sitting, standing, squatting or lifting. On exam, his weight was 280 lbs and his body mass index (BMI) was 34. Both knees had full range-of-motion (ROM) with negative Lachman’s and negative pivot-shift. He had medial joint line tenderness, with mild effusion of the right knee. Muscle strength was normal bilaterally with no atrophy or erythema noted. MRI of the left knee showed tricompartmental osteoarthritis (OA). At his September 2003 orthopedic VA Compensation and Pension (C&P) exam, eight weeks after separation, the CI complained of left knee pain mainly over the lateral aspect. His right knee also was painful, but with no localization. Exam of the left knee revealed flexion limited to 110 degrees, with moderate crepitus. There was no effusion or instability. X-rays of the left knee showed moderately severe degenerative joint disease (DJD). On examination of the right knee, he had full ROM with no effusion. There was no evidence of instability, and no tenderness to palpation (TTP) of the patellofemoral mechanism. X-rays on the right showed mild to moderate degenerative changes.

The Board carefully reviewed all of the available evidence. The Army PEB had adjudicated the bilateral knee pain as a single unfitting condition, using VASRD code 5003 (degenerative arthritis). The Board evaluated whether or not it was appropriate for the two knees to be “bundled” together. The Board must determine if the PEB’s approach of combining the conditions under a single rating was justified in lieu of separate ratings. Based on precedent and policy, the Board must apply separate codes and ratings in its recommendations if compensable ratings for each condition are achieved IAW VASRD guidelines. If the Board judges that two or more separate ratings are warranted in such cases, however, it must satisfy the requirement that each “unbundled” condition was unfitting in and of itself. The CI clearly had evidence of DJD in both of his knees, left worse than right. With regard to “unbundling,” the key issue therefore, was whether the right knee was separately unfitting and whether a compensable evaluation could be granted for the right (less severe) knee. Based on the evidence in the treatment record, the Board concluded that the CI’s right knee pain did meet the intent of VASRD §4.59 (painful motion) since “the intent of the schedule is to recognize painful motion with joint or periarticular pathology as productive of disability.” The Board found that there was sufficient documentation of painful motion and joint pathology for the right knee. After due deliberation, the Board agreed that the evidence did support a conclusion that the right knee pain, separately, would have rendered the CI incapable of fully performing his military duties, and meeting physical fitness standards. The Board unanimously recommends a separate service disability rating of 10% for each knee, IAW VASRD §4.40 (functional loss), §4.45 (the joints), §4.59 (painful motion) and §4.71a.

Cervical and Upper Thoracic Pain, with radicular symptoms in left arm. The CI was injured in November 2001 when he fell down while carrying communication equipment. MRI showed small disc protrusions at C2-C3, C3-C4, and T2-T3. His pain did not resolve with conservative therapy. In November 2002, he was referred to neurology due to pain radiating down his left arm. His neurological exam was normal. The CI was treated with a five day course of pulsed oral steroids, and he reported resolution of the left arm pain following the steroids. At his February 2003 MEB exam, six months prior to separation, the CI stated that the left arm pain waxed and waned but was never gone. He did not describe any weakness in the left arm. His neurological exam was normal, except for some pain with movement of the distal left arm. Muscle bulk/tone/strength was normal and symmetric. One month later at his orthopedic evaluation, the examiner noted some limitation of cervical motion. The cervical ROM measurements from that March 2003 orthopedic exam are summarized in the chart below.

At his 10 September 2003 orthopedic C&P exam, eight weeks after separation, the CI reported tenderness around C7, and some tingling in the ulnar digits of the left hand. On exam, he had some discomfort with neck rotation to the left. Flexion and extension were normal. His neurological exam was normal and there was no muscle atrophy. X-rays revealed some mild degenerative changes diffusely in the lower cervical spine, and the disc spaces appeared symmetrical. The diagnosis was cervical spondylosis and left arm tingling. A neurology C&P exam done one week later revealed some possible weakness (4/5) of the left arm that was probably due to pain. There was decreased pinprick perception along the ulnar aspect of the left arm extending from the axilla to the left fifth finger. Mild paravertebral spasm was noted on the left side of his neck, but no abnormalities of curvature. ROM was full in flexion, extension, and lateral bending (right & left), but rotational ROM was not measured. The CI had mild pain with all cervical movements. There were no signs of an underlying radiculopathy or neuropathy. The examiner diagnosed mild degenerative changes of the cervical spine, with no evidence of nerve root impingement or central canal stenosis. The ROM measurements from both of these September 2003 C&P exams are summarized in the chart below.

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| --- | --- | --- | --- |
| Goniometric ROM  Cervical Spine | MEB Orthopedic –  17 wks. Pre-Sep (20030317) | VA Orthopedic C&P –  8 wks. Post-Sep (20030910) | VA Neurology C&P –  9 wks. Post-Sep (20030917) |
| Flexion (45⁰ is normal) | 20⁰ | 45⁰ | 45⁰ |
| Combined (340⁰ is normal) | 95⁰ | 290⁰ | Full ROM not done |
| Comments | No mention of pain | Pain with rotation | Mild painful motion |
| §4.71a Rating | 20% (moderate) | 10% (slight) | 10% (slight) |

Once again, the Board reviewed all the evidence. The Army PEB had adjudicated the neck pain, upper back pain, and arm pain as a single unfitting condition using VASRD code 5293-5003. The Board evaluated whether or not it was appropriate for these conditions to be “bundled.” The Board must determine if the PEB’s approach of combining the conditions under a single rating was justified in lieu of separate ratings. As noted above, the Board must apply separate codes and ratings in its recommendations if compensable ratings for each condition are achieved IAW VASRD guidelines. If the Board judges that two or more separate ratings are warranted in such cases, however, it must satisfy the requirement that each “unbundled” condition was unfitting in and of itself. The evidence clearly shows that the CI had pain in his neck and left arm, as well as his upper back region. It was also clear from the treatment record that the neck condition caused him greater discomfort and disability than the upper back pain. With regard to “unbundling,” the key issue therefore, was whether the back pain was separately unfitting, and whether a compensable evaluation could be granted for the back pain. Based on the evidence in the treatment record, the Board determined that the upper back pain did not, in and of itself, cause a clinically significant limitation of motion. The Board also concluded that the CI’s upper back pain did not meet the intent of VASRD §4.59 (painful motion) since “the intent of the schedule is to recognize painful motion with joint or periarticular pathology as productive of disability.” The Board found that there was insufficient documentation of painful motion and spinal pathology for the upper back region. After due deliberation, the Board agreed that the evidence did not support a conclusion that the back pain, separately, would have rendered the CI incapable of fully performing his military duties, and meeting physical fitness standards. Therefore, the upper back pain was not unfitting at the time of separation from service.

The Board then directed its attention to the CI’s neck and arm condition. The VASRD coding and rating standards for the spine, which were in effect at the time of separation, were changed to the current standards in September 2003. The older standards were subject to the rater’s opinion regarding degree of severity, whereas the current standards specify rating thresholds in actual degrees of ROM impairment. The Board must comply with the DoDI 6040.44 requirement for rating IAW the VASRD in effect at the time of separation from service. The Board noted the disparity between the cervical spine ROM exams. The March 2003 MEB goniometric exam showed moderate limitation of cervical flexion. Six months later, the VA C&P exams showed much improved cervical ROM. Forward flexion was normal, without any limitation. It is clear from the evidence in the treatment record that the CI’s neck ROM improved dramatically during the six months from March to September 2003. The Board determined that the VA C&P exams performed in September 2003 had greater probative value. Both of the September 2003 C&P neck exams were thorough, were performed by specialists, and were closer in temporal proximity to the actual date of separation, than the MEB exam.

The Army PEB and the VA chose different coding options for the neck condition. As elaborated above, the Board determined that there was insufficient evidence of significant thoracodorsal spine impairment to justify rating the thoracic spine separately, under code 5291. The treatment record also contained insufficient evidence to support a higher rating using code 5293 (intervertebral disc syndrome). The Board also determined that his radicular symptoms were primarily subjective, and there was insufficient objective evidence of an unfitting, ratable peripheral nerve impairment. After due deliberation, consideration of all the evidence, and mindful of VASRD §4.3 (reasonable doubt), the Board unanimously recommends a rating of 10% for the cervical spine condition, based on VASRD §4.40 (functional loss), §4.59 (painful motion), and §4.71a (musculoskeletal system).

Other MEB Conditions. The other two MEB conditions (migraine headache, and testicular pain with erectile dysfunction) were reviewed by the action officer and considered by the Board. There was insufficient evidence in the record that these conditions significantly interfered with satisfactory performance of military duties. All evidence considered, there is not reasonable doubt in the CI’s favor supporting reversal of the PEB adjudication of these two conditions.

Remaining Conditions. Bronchitis, sinusitis, high blood pressure, low back pain (LBP), left shoulder pain and several other conditions were noted in the DES file. 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. 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 bilateral knee pain, the Board unanimously recommends that each knee be considered separately unfitting, and coded 5299-5003. Each knee (right and left) warrants a rating of 10%, IAW VASRD §4.40, §4.45, §4.59, and §4.71a. In the matter of the neck, back, and arm pain; the Board unanimously recommends a rating of 10%, coded 5290 IAW VASRD §4.40, §4.59, and §4.71a. In the matter of the migraine headaches, testicular pain, erectile dysfunction, bronchitis, sinusitis, high blood pressure, LBP, left shoulder pain, or any other conditions eligible for 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** |
| Chronic Right Knee Pain | 5299-5003 | 10% |
| Chronic Left Knee Pain | 5299-5003 | 10% |
| Chronic Cervical, Upper Thoracic, and Left Arm Pain | 5290 | 10% |
| **COMBINED (Incorporating BLF)** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294 dated 20101010 w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

President

Physical Disability Board of Review

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

1. Under the authority of Title 10, United States Code, section 1554(a), I approve the enclosed recommendation of the Department of Defense Physical Disability Board of Review (DoD PDBR) pertaining to the individual named in the subject line above to recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 30% effective the date of the individual’s original medical separation for disability with severance pay.

2. I direct that all the Department of the Army records of the individual concerned be corrected accordingly no later than 120 days from the date of this memorandum:

a. Providing a correction to the individual’s separation document showing that the individual was separated by reason of permanent disability retirement effective the date of the original medical separation for disability with severance pay.

b. Providing orders showing that the individual was retired with permanent disability effective the date of the original medical separation for disability with severance pay.

c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, and payment of permanent retired pay at 30% effective the date of the original medical separation for disability with severance pay.

d. Affording the individual the opportunity to elect Survivor Benefit Plan (SBP) and medical TRICARE retiree options.

3. I request that a copy of the corrections and any related correspondence be provided to the individual concerned, counsel (if any), any Members of Congress who have shown interest, and to the Army Review Boards Agency with a copy of this memorandum without enclosures.

BY ORDER OF THE SECRETARY OF THE ARMY:

Encl

Deputy Assistant Secretary

(Army Review Boards)