RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100082 SEPARATION DATE: 20060407

BOARD DATE: 20111209

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a National Guard member, SPC/E-4 (21B, Combat Engineer), medically separated for a lumbar spine condition. In 2004 the CI experienced an abrupt onset of back pain related to duties during training. Clinical evaluation revealed multi-level disk and degenerative disease, and in 2005 he underwent surgical intervention (L4-S1 posterior decompression and fusion). He did not improve adequately with post-operative treatment to fulfill the physical demands of his military occupational specialty (MOS) or meet physical fitness standards. He was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The CI was also evaluated by the MEB for a right knee condition, resulting from an injury during deployment to Iraq in 2004. The MEB forwarded the lumbar spine condition to the Physical Examination Board (PEB) as medically unacceptable IAW AR 40-501; and, the right knee condition was forwarded as medically acceptable. An Informal PEB (IPEB) adjudicated the lumbar spine condition as unfitting, rated 10% with application of the US Army Physical Disability Agency (USAPDA) pain policy; and, the right knee condition as not unfitting. Although the IPEB recommended placement on the Temporary Disability Retired List (TDRL), a reconsideration decision by the USAPDA dropped the TDRL stipulation. IPEB ratings and fitness determinations were affirmed. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “I believe that the rendered disability rating on 20060225 (encl 1) failed to properly document my PTSD and knee meniscal injury incurred and aggravated by my combat service in Operation Iraqi Freedom from 20040229 to 20040617 (encl 2). On 20040513 as indicated at encl 3, I injured my knee in the LOD while in a combat environment, and during the period of Nov 2005 through 31 Mar 06 I provide documentary evidence (encl 4) that I was suffering symptoms which were subsequently diagnosed by the Department of Veterans’ Affairs (VA) as posttraumatic stress disorder (PTSD). These very symptoms were neither diagnosed nor treated, although I repeatedly complained to the doctor of my nightmares, episodes, and awakening at night. The PEB physician failed to diagnose and record the findings in the PEB report (encl 1). At the time of finalizing my PEB board findings, MSG [Name] (encl 1) informed me that submittal of a VA claim for my PTSD and knee injury would be more advantageous than requesting a formal hearing of my PEB case. Based on this information and no clear of understanding of PEB appellate procedures I opted to waive a formal hearing of my case. Subsequent to the final PEB I was issued Transition Orders (encI 5), stating that my disability is based on injury received in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LODduring a period as defined by law.” 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 20060315** | **VA (2 Mo After Separation) – All Effective Date 20060408** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5241 | 10% | HNP L5-S1 … | 5235-5242 | 40% | 20060614 |
| Right Knee Pain, Arthritis | Not Unfitting | Residuals, R Knee … | 5099-5010 | 10% | 20060614 |
| No Additional MEB/PEB Entries | PTSD | 9413 | 30% | 20060614 |
| Cervical Strain | 5237 | 20% | 20060614 |
| Not Service Connected x 1 | 20060614 |
| **Combined: 10%** | **Combined: 70%\*** |

ANALYSIS SUMMARY: The Board acknowledges the CI’s assertions that that some of his Service-incurred conditions were not addressed, that unfair procedures were followed, and that he was inadequately informed regarding due process. It is noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to alleged or suspected Service improprieties in the processing of a case. 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 Veterans Administration Schedule for Rating (VASRD) standards, based on severity at the time of separation. It must also judge the fairness of PEB fitness adjudications based on the fitness consequences of conditions as they existed at the time of separation. The Board further has no purview over Service line-of-duty or armed conflict/instrumentality of war determinations. Pursuit of corrections of such determinations and of remedy for alleged Service procedural violations remains under the authority of the Army Board for Corrections of Military Records (ABCMR).

Lumbar Spine Condition. The CI initially responded poorly to post-operative attempts at rehabilitation, and was separated seven months after surgery. Subsequent VA evidence reflects significant improvement (and decreased rating to 20%) at about a year post-separation. There were two goniometric range-of-motion (ROM) evaluations in evidence available to the Board for arriving at its rating recommendation; and, only the post-separation VA Compensation and Pension (C&P) evaluation was fully compliant with VASRD §4.46 (accurate measurement). These exams are summarized in the chart below.

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| **Thoracolumbar ROM** | **MEB PT (3 Mo. Pre-Sep)** | **VA C&P (2 Mo. Post-Sep)** |
| Flexion (90⁰ Normal) | 26⁰ | 30⁰ |
| Combined (240⁰ Normal) | Incomplete | 100⁰ |
| §4.71a Rating  | 40% | 40% |

The narrative summary (NARSUM) documented “little flexion due to pain” without goniometric detail. All examiners described normal gait and spinal contour. All examiners described normal neurological findings, although the CI continued to manifest radicular pain bilaterally. The PEB and the VA chose different codes for the lumbar condition, although this did not bear on rating. The PEB’s 10% rating was supported by the USAPDA pain policy, but was not consistent with VASRD §4.71a standards for the ROM evidence provided by the MEB. All of the ROM data in evidence supports a §4.71a-based rating of 40%. There was no evidence of ratable peripheral nerve impairment or documentation of incapacitating episodes which would provide for additional or higher rating. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 40% for the lumbar spine condition. The PEB assigned code, 5241 (spinal fusion), was appropriate to the pathology.

Right Knee Condition: The CI twisted the knee in a fall during his 2004 Iraq deployment, and was subsequently transferred to Landstuhl where a meniscal tear was diagnosed; he underwent arthroscopic repair later in 2004 after redeployment. The Board’s main charge in respect to this condition is an assessment of the appropriateness of the PEB’s fitness adjudication. The Board’s threshold for countering DES fitness determinations is higher than the VASRD §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard. The condition was judged by the MEB orthopedist to meet retention standards. An outpatient entry a year before separation documented that the knee had been “cleared” and the treatment was confined to home exercises; and, there is no documentation in the Service file of active issues after that. An outpatient note six months prior to separation stated, “He still has a little bit of intermittent, achy pain back of right knee.” He was place on a permanent L2 profile for the knee, with the only restriction directed at deep knee bends. The knee was incorporated into the permanent L3 profile for the back; but, the profile in effect at separation contained the specific comment, “Revision of existing permanent profile modified to reflect L2 status of the right knee condition.” The commander’s statement made note of the knee injury, but provided no information relating it to MOS impairment; citing only that the CI was “still in a body brace” and that he carried a P3 profile. Neither the NARSUM nor MEB physical documented exam abnormalities of the knee. The VA post-separation C&P exam noted painful ROM, but no instability or gait disturbance. After due deliberation, and in consideration of the totality of the evidence, the Board cannot find adequate justification for recommending the right knee condition as additionally unfitting for separation rating.

Contended Posttraumatic Stress Disorder. The CI’s application asserts that a compensable rating should be considered for PTSD. Although there is documentation of sleep disturbance (as contended), there is no Service evidence for a psychiatric diagnosis or treatment. On the MEB physical questionnaire, the only positive psychiatric response was “trouble sleeping for a year and half since coming back from Iraq – take nothing for it.” There was no psychiatric impairment profiled or documented by the commander. The CI was not identified with symptoms specific to PTSD until two months after separation; citing the stressor of witnessed casualties during transfer for his knee injury. The Board acknowledges the presence of PTSD as a currently rated condition by the VA, but the scope of its recommendations does not extend to conditions which were not diagnosed or in evidence at the time of medical separation. This includes conditions which may have had early manifestations during active service, since such sub-clinical conditions cannot be correlated with a fitness determination requisite for a Service rating. The condition, especially since it is contended that the symptoms were not properly addressed by the Service, remains eligible for appeal to the ABMCR.

Remaining Conditions. Other conditions identified in the DES file were sinusitis, psoriasis, heartburn, and a remote fracture of the left middle finger. Some additional non-acute conditions and medical complaints were also documented. None of these conditions were clinically active during the MEB period; none carried attached profiles; and, none were implicated in the commander’s statement. 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. A cervical spine condition identified by the VA soon after separation 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 thus has no 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. As discussed above, PEB reliance on the USAPDA pain policy for rating the lumbar spine condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the lumbar spine condition, the Board unanimously recommends a rating of 40%, coded 5241, IAW VASRD §4.71a. In the matter of the right knee condition, the Board unanimously recommends no change from the PEB adjudication as not unfitting. In the matter of the contended PTSD, the Board unanimously agrees that it is ineligible for a recommendation regarding Service disability rating. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as additionally unfitting for 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** |
| Surgical Residuals, Lumbar Disc Disease | 5241 | 40% |
| **COMBINED** | **40%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110122, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

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 President

 Physical Disability Board of Review

