RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1100287 SEPARATION DATE: 20020418

BOARD DATE: 20120201

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty member, PVT/E2 (75H, Personnel Service Specialist), medically separated from the Army in 2002 after two years of service. The medical basis for the separation was low back and bilateral knee pain. The CI complained of low back, knee and foot pain of one year duration without any history of trauma or injury. She did not respond adequately to treatment to fully perform within her Military Occupational Specialty (MOS) or meet physical fitness standards. She was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). Mechanical low back pain and knee pain were forwarded to the Physical Evaluation Board (PEB) as separate medically unacceptable conditions IAW AR 40-501; and, symptomatic pes planus was forwarded and designated as existed-prior-to-service (EPTS). No other conditions appeared on the MEB’s submission. Other conditions included in the Disability Evaluation System (DES) file will be discussed below. The PEB combined the back and knee conditions as a single unfitting condition rated 0% with application of the US Army Physical Disability Agency (USAPDA) pain policy; and the foot condition as EPTS without permanent service aggravation. The CI made no appeals, and was medically separated with a 0% combined disability rating.

CI CONTENTION: The CI states: “Before entering the Army, I had normal arches in both feet and was pain-free. During my tenure with the Army, both arches have visibly flattened with much pain. The Army has stated that my exposure in the military did not cause my arches to fall. My initial physical exam report from MEPS clearly shows that I had normal arches when I entered the military. Due to the pain of flat feet, I was medically discharged with a 0% rating. Pain in both feet has worsened and as a result of this, I now have constant pain in both knees, both legs (shins) and my lower back with inability to stand or sit for long periods of time.” She goes on to elaborate currently “ineffective” treatment for her conditions; and, notes asthma (symptomatic, but not diagnosed in service) and migraine headaches (not rated) as Service connected conditions, with the implication that these two conditions be considered for Service disability rating. She concludes with, “I do ask that you consider my case for medical retirement. Thank you so kindly.”

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20020208** | | | **VA (7 Mo. After Separation) – All Effective 20020419** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Mechanical Low Back and Bilateral Knee Pain | 5099-5003 | 0% | Chronic Lumbosacral Strain | 5010-5292 | 10% | 20021119 |
| Left Knee Ligament Damage | 5010 | 10% | 20021119 |
| Right Knee Ligament Damage | 5299-5257 | 0%\* | 20021119 |
| Foot Pain / Pes Planus | 5299-5276 | --- EPTS | Pes Planus | 5276 | NSC\*\* | 20021119 |
| No Additional MEB/PEB Entries | | | Not Service Connected x 2 | | | 20021119 |
| **Combined: 0%** | | | **Combined: 20%\*** | | | |

\*Increased to 10% (retroeffectively); but, based on a review in 2003 that determined the condition had worsened.

\*\*Service connected upon appeal with a 0% rating.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which her service-aggravated conditions continues to burden her, and also acknowledges the CI’s contention that suggests Service ratings should have been conferred for other conditions documented at the time of separation. The Board wishes to clarify that it is subject to the same laws for Service disability entitlements as those under which the DES operates. 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 career, and then only to the degree of severity present at the time of final disposition. However the Department of Veterans’ Affairs (DVA), operating under a different set of laws (Title 38, United States Code), 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. The Board utilizes DVA evidence proximal to separation in arriving at its recommendations; and, DoDI 6040.44 defines a 12 month interval for special consideration to post-separation evidence. The Board’s authority as defined in DoDI 6044.40, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

The PEB combined back pain, right knee pain and left knee pain as a single unfitting condition, coded analogously to 5003 and rated 0%. The PEB may have relied on AR 635.40 (B.24 f.) and/or the USAPDA pain policy for not applying separately compensable Veterans Administration Schedule for Rating Disabilities (VASRD) codes. The Board must apply separate codes and ratings in its recommendations if compensable ratings for each condition are achieved IAW VASRD §4.71a. 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. Not uncommonly, this approach by the PEB reflects its judgment that the constellation of conditions was unfitting; and, that there was no need for separate fitness adjudications, not a judgment that each condition was independently unfitting. Thus the Board must exercise the prerogative of separate fitness recommendations in this circumstance, with the caveat that its recommendations may not result in a lower combined rating than that of the PEB.

Lumbar Spine Condition. The 2002 VASRD coding and rating standards for the spine, which were in effect at the CI’s separation, were updated 23 September 2002 for code 5293 (rating based on incapacitating episodes); and, changed to the current §4.71a rating standards on 26 September 2003. The 2002 standards for rating based on range-of-motion (ROM) impairment were subject to the rater’s opinion regarding degree of severity, whereas the current standards specify rating thresholds in degrees of ROM impairment. The Board reconciles (to the extent possible) its opinion regarding degree of severity for the earlier VASRD rating guidelines with the objective thresholds specified in the current §4.71a general rating formula for the spine. There was one goniometric and one non-goniometric ROM evaluation in evidence which the Board weighed in arriving at its rating recommendation. Both of these exams are summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM | MEB ~4 Mo. Pre-Sep | VA C&P ~7 Mo. Post-Sep |
| Flexion (90⁰ Normal) | Full ROM | 80⁰ |
| Combined (240⁰) | 230⁰ |
| Comments | Normal gait | No spasm; no pain |
| §4.71a Rating | 0% | 10% |

The commander’s statement specifically cited the CI’s back problems as impairing her performance of MOS duties. The MEB examiner noted that there was no history of trauma or radicular symptoms. He recorded normal gait. ROM was described as full with no mention of pain. However, a physical therapy examination the same week described a full ROM with “slow movements” secondary to pain. The motor and sensory exams of the lower extremities were normal. Radiographs were normal. The VA Compensation & Pension (C&P) examiner recorded a history of intermittent low back pain worsened by lifting. The gait was normal and there was no spasm or tenderness of the spine. ROM measurements included 80⁰ of forward flexion and >230⁰ of combined ROM, with “no objective evidence of pain on motion” or decrement with repetitions.

Despite the minimal evidence of thoracolumbar pathology, the Board concedes that the lumbar condition is unfitting based on the PEB and the commander’s judgment. The Board must correlate the above clinical data with the 2001 rating schedule. There was no clinical basis for applying the 5293 code for intervertebral disc syndrome in this case. For convenience the two applicable codes are excerpted below:

**5292** Spine, limitation of motion of, lumbar:

Severe ………………………………………………………..……….………….... 40

Moderate …………………………………….……………….…….…………...…. 20

Slight ………………………………………………………..……………….…..….10

**5295** Lumbosacral strain:

Severe; with listing of whole' spine to opposite side, positive

Goldthwaite's sign, marked limitation of forward bending in

standing position, loss of lateral motion with osteo-arthritic

changes, or narrowing or irregularity of joint space, or some

of the above with abnormal mobility on forced motion ……………….......... 40

With muscle spasm on extreme forward bending, loss of lateral spine

motion, unilateral, in standing' position ...……………...……..………….….. 20

With characteristic pain on motion ………………………………..……....………. 10

With slight subjective symptoms only …………..…………...………………....….. 0

The Board considered the VA’s rating under the 5292 code for limitation of spine motion. It was concluded, however, that the normal ROM documented by the MEB and the minimally impaired ROMs (without painful motion) documented on the post-separation VA C&P examination would not support application of that code; and, furthermore, would not justify a compensable rating if it were applied. All members agreed that the clinically applicable code was 5295, and deliberated at length whether the 0% or 10% criteria were most supported by the evidence. After deliberation, the Board consensus was that “characteristic pain on motion” was not documented to an acceptable standard; and, that furthermore the criteria under VASRD §4.40 (functional loss) were not satisfied in support of the minimal compensable rating. The Board could find no evidence for an unfitting radiculopathy justifying additional Service rating for peripheral nerve impairment. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 0% for the lumbar spine condition coded 5295.

Bilateral Knee Condition. The service treatment record (STR) indicates that the CI experienced left knee pain with vigorous activity for more than one year prior to separation. The condition was diagnosed as retropatellar pain syndrome, treated with rest and anti-inflammatory medications, and later with foot orthotics and physical therapy, without improvement. Six months prior to separation the right knee was minimally symptomatic; and, the narrative summary (NARSUM) reported “left knee pain with slight right knee pain.” No etiologic diagnosis for the right knee pain was established. Radiographs of both knees showed no abnormalities. The commander’s statement specifically cited the CI’s “knee and back problems” as impairing her performance of MOS duties. There was one goniometric and one non-goniometric ROM evaluation in evidence which the Board weighed in arriving at its rating recommendation. Both of these exams are summarized in the chart below.

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| --- | --- | --- | --- | --- |
| Knee ROM | PT ~8 Mo. Pre-Sep | | VA C&P ~7 Mo. Post-Sep | |
| Left | Right | Left | Right |
| Flexion (140⁰ Normal) | Full ROM | Full ROM | 135⁰ | 135⁰ |
| Extension (0⁰ Normal) | 0⁰ | 0⁰ |
| Comments | Nl. exam. | Nl. exam. | Joint stable; mild crepitus. | |
| §4.71a Rating | 10%\* | 0% | 10% | 0% |

\*Conceding §4.40 (functional loss) as below.

The MEB examiner noted that there was no history of trauma to either knee, and that left knee pain symptoms began with running or walking more than one half mile. The gait was normal, as was the neurologic exam. At the VA C&P evaluation, the examiner recorded a history of intermittent pain in both knees, left worse than right, exacerbated by prolonged standing. The examination showed stability of both knees, near full ROM with mild crepitus bilaterally on extension, and no mention of painful motion. At the VA General C&P evaluation the examiner observed that the CI “is walking briskly in the hallway without assistive device. She was able to dress and undress without difficulty and get on the examination table without difficulty.” VA radiographs of the left knee were interpreted as showing mild narrowing of the joint space compatible with early osteoarthritis. The VA rating decision indicates that the left knee condition was awarded a minimal compensable rating based on the radiographic findings and minimally reduced ROM. The right knee condition was initially awarded a non-compensable rating; but, following review, was awarded a 10% rating. The rater supported this decision by citing the presence of ratable findings in the above referenced C&P exam that are, in fact, explicitly refuted in that exam. The VA diagnoses of “ligamental damage” for each knee were derived from a speculative diagnosis cited in the C&P which provided neither history nor physical findings in support of it.

Regarding the left knee, the Board concedes that the condition is unfitting based on the PEB and the commander’s judgment. The documented functional impairment of the left knee together with the minimal objective findings warrant at most a 10% rating under the analogous 5099-5024 (tenosynovitis) code with its default to 5003 (degenerative arthritis) criteria. No other coding or rating option for a higher rating can be supported by the evidence.

As previously elaborated, the Board next considered whether the right knee condition remains separately unfitting, having de-coupled it from a combined PEB adjudication. In analyzing the intrinsic impairment for appropriately coding and rating the right knee condition, the Board is left with a questionable basis for arguing that right knee pain was indeed independently unfitting. The right knee was scantly mentioned in the STR, was minimally symptomatic by the CI’s own assessment, and had no identifiable pathology in evidence. After due deliberation, the Board agreed that evidence does not support a conclusion that right knee pain, as an isolated condition, would have rendered the CI incapable of continued Service within her MOS, and accordingly cannot recommend a separate service rating for it.

Foot Condition. The CI’s application asserts that compensable ratings should be considered for bilateral foot pain diagnosed as pes planus (flat feet). This condition did appear on the permanent profile along with knee and back pain, but was not implicated in the commander’s statement as impairing the CI’s duty performance. Pes planus was judged by the MEB as EPTS and not to have been aggravated by service. The Board’s main charge regarding this condition is evaluation of the PEB’s EPTS determination. The Board’s authority for recommending a change in the Service’s EPTS determination is not specified in DoDI 6040.44, but is considered adjunct to its DoD-specified obligation to review Service fitness adjudications. As with its consideration of fitness adjudications, the Board’s threshold for countering Service EPTS 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 CI appealed the MEB findings, citing her entry physical which checked off normal arches as evidence that the condition was acquired while in Service. Radiographs were consistent with pes planus, but showed no evidence of degenerative changes. It was the treating podiatrist’s opinion, however, that the CI’s “foot structure by her x-rays does not occur over two year's time, unless the patient had a demonstrated arthritic disorder or an injury or surgery that affected the plantar fascia, the spring ligament, the long and short plantar calcaneal ligaments and the posterior tibial tendon. The patient had no such injuries, arthritis, or surgery”; and, therefore the specialist opined that the pes planus was a “pre-existing condition though most probably asymptomatic.” The PEB’s DA Form 199 stated that there was “compelling evidence to support a finding that the [pes planus] was existed prior to Service (EPTS) and was not permanently aggravated by such Service.” The VA initially declined to service-connect pes planus, but upon appeal did concede service-connection with a non-compensable rating. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB’s EPTS adjudication for the pes planus condition.

Other Contended Conditions. The CI’s application implies that compensable ratings should be considered for exercise induced asthma and migraines. Neither of these conditions appeared on the permanent profile, the commander’s statement, or elsewhere in the DES file. Both were specifically denied on the MEB physical examination. 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; although, these conditions remain eligible for consideration by the Army Board for Corrections of Military Records (ABCMR).

Remaining Conditions. Other conditions identified in the DES file were anger/stress problems and swelling of the ankles. Several additional non-acute conditions or 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. No other conditions were service-connected with a compensable rating by the VA within twelve months of separation or contended by the CI. 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. As discussed above, PEB reliance on the USAPDA pain policy for rating the combined back and knee conditions was operant in this case and those conditions were adjudicated independently of that policy by the Board. In the matter of the back and left knee condition, the Board recommends that each condition be separately adjudicated as follows: an unfitting lumbar strain condition coded 5295 and, by a 2:1 vote, rated 0%; and, an unfitting left knee condition coded 5099-5024 and rated, by unanimous vote, 10%; both IAW VASRD §4.71a. The single voter for dissent in the rating for lumbar strain recommended 10% under the same code, but did not elect to submit a minority opinion. In the matter of the right knee condition, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation. In the matter of the pes planus condition, the Board unanimously recommends no change from the PEB adjudication that it was EPTS and was not permanently aggravated by service. In the matter of the contended asthma and migraine headache conditions, the Board unanimously agrees that they are 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, effective as of the date of her prior medical separation:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Lumbar Strain | 5295 | 0% |
| Left Knee Retropatellar Pain Syndrome | 5099-5024 | 10% |
| Right Knee Condition | Not Unfitting | |
| Bilateral Pes Planus | EPTS | |
| **COMBINED** | **10%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110418, 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. I have reviewed the enclosed Department of Defense Physical Disability Board of Review (DoD PDBR) recommendation and record of proceedings pertaining to the subject individual. Under the authority of Title 10, United States Code, section 1554a, I accept the Board’s recommendation to modify the individual’s disability rating to 10% without recharacterization of the individual’s separation. This decision is final.

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.

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)