RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100292 SEPARATION DATE: 20050929

BOARD DATE: 20120827

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSGT/E-6 (25M3P/19K3P/3183P, Multi-Media Illustrator/Armor Crewman/Corrections SP), medically separated for bilateral ankle pain. He did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Chronic bilateral ankle pain, s/p (statu post) bilateral ankle stabilization procedures, was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Depression, as identified in the rating chart below, was forwarded as a medically acceptable condition. The PEB adjudicated the bilateral ankle pain condition as unfitting, rated 0%, with application of Veterans Administration Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 0% disability rating.

CI CONTENTION: “After separating the military on a 0% medical discharge I was rated at 60% for compensation and 90% overall initially by the Department of Veterans Affairs. This disparity in my medical situation should merit a review.”

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in DoDI 6040.44, Enclosure 3, paragraph 5.e.(2) is limited to those conditions which were determined by the PEB to be specifically unfitting for continued military service; or, when requested by the CI, those condition(s) “identified but not determined to be unfitting by the PEB.” The ratings for unfitting conditions will be reviewed in all cases. The depression, asymptomatic hallux abductovalgus, bilateral asymptomatic hammertoes and bilateral metatarsal head tylomas (callouses) conditions, requested for consideration, meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. The remaining conditions rated by the VA at separation and listed on the DD Form 294 application are not within the Board’s purview. Any conditions or contention not requested in this application, or otherwise outside the Board’s defined scope of review, remain eligible for future consideration by the Army Board for the Correction of Military Records.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service IPEB – Dated 20050712** | **VA (14Mo. After Separation) – All Effective Date 20050930** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Bilateral Ankle Pain | 5099-5003 | 0% | Degenerative Joint Disease Rt Ankle | 5010-5271 | 10% | 20070205 |
|  |  |  | Degenerative Joint Disease Lt Ankle | 5010-5271 | 10% | 20070205 |
| Depression | Not Unfitting | Bipolar Disorder | 9432 | 30% | 20070125 |
| Hallux Valgus | Not Unfitting | No VA Entry |  |  |  |
| Hammer Toes | Not Unfitting | No VA Entry |  |  |  |
| Metatarsal Tylomas | Not Unfitting | Neuromas Bilateral Feet | 5279 | 10% | 20070205 |
| ↓No Additional MEB/PEB Entries↓ | Right Shoulder Subluxation | 5202-5019 | 10% | 20070205 |
| DDD of Cervical Spine | 5242 | 10% | 20070205 |
| DDD of the Lumbar Spine | 5243 | 10% | 20070205 |
| 0% x 3/Not Service Connected x 3 | 20070205 |
| **Combined: 0%** | **Combined: 60%** |

ANALYSIS SUMMARY: The Disability Evaluation System (DES) is responsible for maintaining a fit and vital fighting force. 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 service member’s career, and then only to the degree of severity present at the time of final disposition. 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 nor for conditions determined to be service-connected by the Department of Veterans’ Affairs (DVA) but not determined to be unfitting by the PEB. However the, DVA operating under a different set of laws (Title 38, United States Code), is empowered to compensate all service-connected conditions and to periodically reevaluate said conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment vary over time. The Board’s role is confined to the review of the medical records and all evidence at hand to assess the fairness of PEB rating determinations, compared to VASRD standards, based on severity at the time of separation.

Bilateral Ankle Pain Condition. The CI suffered multiple ankle sprains from 2000 to 2001 resulting in unstable ankles. Successful stabilizing surgery was performed on each, but a chronic pain condition develop post-operatively in both. Both ankle conditions were adjudicated by the PEB as unfitting but bundled for rating purposes. The Board’s initial charge in this case was, therefore, directed at determining if the PEB’s approach of combining conditions under a single rating was justified in lieu of separate ratings. Not uncommon, this approach by the PEB reflected its judgment that the constellation of conditions was unfitting, and there was no need for separate fitness adjudications or implied adjudication that each condition was separately not unfitting. 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. Thus the Board must maintain the prerogative of separate fitness recommendations in this circumstance, with the caveat that its recommendations may not produce a lower combined rating than that of the PEB. The Board then undertook to ascertain if unbundling the conditions could achieve a more appropriate rating benefit for the CI. Following surgery in September 2003, pain condition developed in the right ankle. A magnetic resonance image (MRI) of the right ankle, obtained in 2004, revealed the major ankle tendons of stability (tibia-fibular and talo-fibular) to be normal but chronic tears involving other tendons. At the MEB narrative summary (NARSUM) evaluation obtained three months before separation, the CI reported chronic pain in both ankles, right greater than left with pain progressing from 1/10 to 5/10 with activity throughout the day. The CI further reported difficulty negotiating stairs and inability to walk for more than 20-30 minutes without pain. On examination, the right ankle was stable. Pain occurred with inversion of both ankles, right greater than left. Crunching and grinding of the right ankle was noted with motion. Two podiatric consultations are referenced in the NARSUM. On examination, obtained three months prior to the MEB, mild tenderness was recorded for the right ankle area. Strength in the foot was normal and greater than 10 degrees of dorsiflexion without crepitus was reported for both ankles. A second consult obtained two months before the MEB, reported tenderness over the right lateral ankle. Range-of-motion (ROM) and strength were reported as normal for both in all planes. Routine X-rays revealed swelling of the right ankle without fractures. Two days after this exam, physical therapy recorded reduced ROM of the right ankle of 10 degrees dorsiflexion and 42 degrees plantar flexion (normal 20 degrees/ 45 degrees) and left ankle of 3 degrees dorsiflexion and 39 degrees plantar flexion. At the VA Compension and Pension (C&P) evaluation, performed approximately 15 months after separation, CI reported bilateral ankle and foot pain. On physical examination gait was normal. Active ROM was normal for the the left ankle and plantar flexion reduced to 40 degrees for the right ankle. Pain was recorded for both ROM exams.

Right Ankle Condition. After discussion the Board unanimously agreed that the preponderance of evidence supported an unfitting status for the right ankle condition. The Board directs attention to its rating recommendation for the right ankle based on the above evidence. The PEB and VA chose different coding options and rating approaches for the condition. The PEB combined the left and right ankle conditions as a single unfitting condition, coded analogously to 5003 adjudicated 0%. The VA rated the ankles separately coded 5010-5271 (ankle loss of motion, moderate) at 10% each citing pain at the extremes of ROM testing bilaterally and a moderate reduction of ROM on the right. A higher rating of 20% was not indicated in the absence of marked limited ROM of the ankles. The Board considered the application of VASRD §4.59 (painful motion) and §4.40 (functional loss) to the right ankle condition. It noted that the VASRD states that the intent is that the painful joint is “entitled to at least the minimum compensable rating for the joint.” The Board considered rating the right ankle for limitation of motion under the 5271. The Board agreed that the normal gait and the ROM evaluations on proximate podiatry exams best reflected the condition at separation and were not consistent with a moderate limitation of motion required for the minimum rating under this code. The Board also agreed minimum rating was not attained under ankle codes 5272 and 5273. After due deliberation, considering all of the evidence and mindful of VASRD §4.59 (painful motion) and VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 10% for the right ankle condition coded 5099-5003.

Left Ankle Condition. As previously elaborated, the Board must consider whether left ankle condition remains separately unfitting, having de-coupled it from a combined PEB adjudication. The Board noted the marked improvement in symptoms for the left ankle after corrective surgery in 2003 and that there was little mention in the record of treatment or subsequent diagnostic workup related to the left ankle after post surgical healing. At time of separation, CI reported intermittent achy left ankle pain rated 0/10 to 4/10 and pointed to mid foot area. On examination, the ankle was noted to be asymptomatic and nontender although some pain on inversion was noted. Although the ROM was stated to be normal in some examinations, it was reduced in a manner similar to the right ankle in the physical therapy examination as noted above. The Board considered the evidence of the MEB NARSUM reporting that pain in both ankles interfered with performance of duties. After due deliberation, the Board agreed that there is no preponderance of evidence that supports a conclusion that the left ankle condition, by itself, would not have been unfitting. The Board opined that the left ankle condition, although less symptomatic than the right ankle, contributed to functional disability. After due deliberation, considering all of the evidence and mindful of VASRD §4.59 (painful motion) and VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 10% for the left ankle condition coded 5099-5003. No higher rating was achievable under any other VASRD code as discussed above.

Contended PEB Conditions. The contended conditions adjudicated as not unfitting by the PEB were depression, asymptomatic hallux abductovalgus, bilateral asymptomatic hammertoes and bilateral metatarsal head tylomas (callouses) conditions. The Board’s first charge with respect to these conditions is an assessment of the appropriateness of the PEB’s fitness adjudications. The Board’s threshold for countering 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. Symptoms of depression were treated by mental health beginning in February 2004. Psychiatry consultation for the MEB reported the condition to be in full remission and not medically disqualifying. The CI’s performance report for the period ending November 2004 reflected excellent duty performance, and the commander’s statement dated 18 April 2005 indicated duty limitations due to the ankle condition, but otherwise excellent duty performance. The MEB podiatry evaluation indicated that the hallux abductovalgus, and bilateral hammertoe condtions were asymptomatic. Prior bilateral neuroma’s were noted in the past medical history but were not indicated to be an active problem. Bilateral metatarsal head tylomas (callouses) were noted in the diagnosis list but were not indicated to contribute to duty limitation. All conditions were reviewed by the action officer and considered by the Board. None of the conditions were profiled; none were implicated in the commander’s statement; and, none were judged to fail retention standards. There was no indication from the record that any of these conditions significantly interfered with satisfactory duty performance. After due deliberation in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB fitness determination for the any of the contended conditions; and, therefore, no additional disability ratings can be recommended.

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. The Board did not surmise from the record or PEB ruling in this case that any prerogatives outside the VASRD were exercised. In the matter of the bilateral ankle pain condition, the Board unanimously recommends that the right and left ankle conditions each be separately adjudicated. The Board unanimously recommends that the right ankle condition be adjudicated as unfitting and the left ankle, adjudicated as unfitting. In the matter of the unfitting right ankle condition, the Board unanimously recommends a disability rating of 10%, coded 5299-5271 IAW VASRD §4.71a. In the matter of the unfitting left ankle condition, the Board unanimously recommends a disability rating of 10%, coded 5099-5003 IAW VASRD §4.71a. In the matter of the contended depression in remission, asymptomatic hallux abductovalgus, bilateral asymptomatic hammertoes and bilateral metatarsal head tylomas (callouses) conditions, the Board unanimously recommends no change from the PEB determination as not unfitting. There were no other conditions within the Board’s scope of review for consideration.

RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows, effective as of the date of his prior medical separation:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Right Ankle Condition | 5099-5003 | 10% |
| Left Ankle Condition | 5099-5003  | 10% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20050929 w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans Affairs Treatment Record

 XXXXXXXXXXXXXXXXXXXX

 President

 Physical Disability Board of Review

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency

(TAPD-ZB / ), 2900 Crystal Drive, Suite 300, Arlington, VA 22202

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for XXXXXXXXXXXXXXXXXXXXXXXXXX, AR20120016156 (PD201100292)

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 20% 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 XXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA