RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1100295 SEPARATION DATE: 20080630

BOARD DATE: 20120223

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (0331, Machine Gunner) medically separated for a right lower extremity condition. This condition was a result of a blast injury in 2007 and required multiple surgical interventions. He did not respond adequately to treatment and was unable to perform within his rating or meet physical fitness standards. He was placed on limited duty and underwent a Medical Evaluation Board (MEB). Open fracture of calcaneus, malunion of fracture, traumatic arthropathy involving ankle and foot, traumatic compartment syndrome of lower extremity, injury due to war operations by antipersonnel bomb and late effects of injury due to war operations were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. Traumatic arthropathy involving hand and ankylosis of hand joint were also forwarded on the MEB submission. Other conditions included in the Disability Evaluation System (DES) file will be discussed below. The PEB adjudicated the malunion of open right calcaneus fracture condition as unfitting, rated 20% IAW the Veterans Administration Schedule for Rating Disabilities (VASRD). Additionally, war wound blast and posttraumatic arthrosis with ankylosis of right subtalar joint were determined to be related category II diagnoses; and right lower extremity foot compartment syndrome and post traumatic arthrosis of left ring finger as category III, conditions that are not separately unfitting and do not contribute to the unfitting condition. The CI made no appeals and was medically separated with a 20% disability rating.

CI CONTENTION: The CI states: “There have been changes to the rating system and I feel I should have been rated higher than I received.” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20080506** | | | **VA (2 Mo. Pre Separation) – All Effective 20080701** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Right Calcaneus Fracture Malunion | 5273 | 20% | Right Calcaneus Fracture | 5010-5284 | 30% | 20080509 |
| Right Ankle Osteopenia | 5271 | 20% | 20080509 |
| War Wound Blast | Cat II | | No Corresponding VA Entry | | | 20080509 |
| Right Subtalar Ankylosis | Cat II | | No Corresponding VA Entry | | | 20080509 |
| Compartment Syndrome | Cat III | | No Corresponding VA Entry | | | 20080509 |
| Left Ring Finger Arthrosis | Cat III | | Left Ring Finger Fracture | 5230 | 0% | 20080509 |
| ↓No Additional MEB Entries↓ | | | Post Traumatic Stress Disorder | 9411 | 50% | 20090613 |
| Traumatic Brain Injury | 8045 | 10%\* | 20090528 |
| Right Foot Scars | 7804 | 10%\*\* | 20080509 |
| 0% x 2 / Not Service Connected x 2 | | | 20080509 |
| **Combined: 20%** | | | **Combined: 80%\*\*\*** | | | |

\*Increased to 40% effective 20081023. \*\*Increased to 20% effective 20081023. \*\*\*Increased to 90% effective 20081023

ANALYSIS SUMMARY: The 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. However the Department of Veterans’ Affairs (DVA), operating under a different set of laws (Title 38, United States Code), is empowered to compensate all service connected conditions without regard to impact on performance of military duties 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 acknowledges the presence of posttraumatic stress disorder (PTSD) and traumatic brain injury (TBI) as currently rated conditions by the VA, but notes that 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.

Right Lower Extremity Condition. The CI sustained a right lower extremity injury from an IED blast in Iraq on 29 June 2007. Initial surgical stabilization while in theater included external fixation and right lower leg and foot fasciotomies for compartment syndromes. CI was medically evacuated to the Naval Medical Center, San Diego, for definitive and recuperative care. The surgeon performed two debridement surgeries, the first requiring removal of skin, subcutaneous tissue, muscle fascia and muscle, the second requiring removal of skin and subcutaneous tissue. Ten days later he was able to perform the definitive open reduction and internal fixation of a comminuted calcaneus (heel bone) fracture. At the time of the CI’s MEB, eight months into his recuperation, he was unable to ambulate without the assistance of an ankle-foot orthotic (AFO) device, a rigid rocker-bottom shoe and a cane. There were two goniometric range-of-motion (ROM) evaluations 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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| --- | --- | --- |
| Right Ankle ROM | MEB ~ 4 Mo. Pre-Sep | VA C&P ~ 2 Mo. After-Sep |
| Dorsiflexion 0-20⁰ normal | 0⁰ | 10⁰ |
| Plantar Flexion 0-45⁰ normal | 25⁰ | 30⁰ |
| Comments | Pain with use  Brace, rocker shoe, cane | Pain with use  Brace, rocker shoe, cane |
| §4.71a Rating 5273 | 20%\* | 20%\* |

\*Conceding “marked” limitation of motion and considering functional loss §4.40.

On 12 March 2008, the narrative summary (NARSUM) examiner reported mild to moderate pain that intermittently increased in severity, and CI’s inability to run. The CI could not carry out reciprocal gait on stairs without the aid of a banister or cane. Swelling of his lower extremity occurred with standing greater than 30 minutes. Examination revealed two 30 centimeter (cm; 30 cm is 11.8 inches) well-healed incisions on the medial and lateral aspects of the right calf, and two 10 cm well-healed incisions of the medial and lateral dorsal aspects of the foot. An additional 12 cm incision was present on the lateral aspect of the right hindfoot. A significant varus hindfoot alignment was noted. The subtalar joint was ankylosed, resulting in inability to invert or evert the ankle. He had decreased sensation over the lateral and dorsal aspect of his foot. Distal pulses were palpable. With plantar foot flexion the right gastrosoleus demonstrated a strength of 4/5 compared to a normal left of 5/5. Weakness was also demonstrated with the muscles used for dorsiflexion and eversion demonstrating 3-4/5 strength. The posterior tibial tendon was also weak. A CT scan showed retained hardware without evidence of hardware failure, varus malunion and posttraumatic arthrosis of the subtalar joint, and cystic changes in the talus and distal tibia. The NARSUM examiner opined that the CI “will have progression of his post-traumatic arthrosis, and will be unable to stand for periods of time greater than 30-40 minutes and will be limited in his ambulatory capabilities.” He also opined CI would continue to require orthotic and assistive devices and would likely require future surgeries of his hindfoot. The VA Compensation and Pension (C&P) examiner on 9 May 2008 documented a near similar exam to the NARSUM exam and additionally noted right ankle locking, fatigue and lack of endurance. Pain, (7/10 on a pain scale), was described as aching and sharp. CI could perform activities of daily living to include; household chores, driving, grocery shopping, gardening and pushing a lawn mower. The three foot scars all exhibited tenderness but none caused any functional limitation. The calcaneus was tender but not the ankle. Limited and painful ankle motion was reported with evidence of ankle weakness, but specific muscle testing was not in evidence. The examiner recorded however that “strength is 4/5 in the right lower extremity, secondary to ankle and foot pain,” and “there is no evidence of muscle atrophy.” The physical exam also noted a normal Achilles tendon alignment, no pes planus, pes cavus and no evidence of inversion or eversion deformities. There was no additional limitation of ankle motion after repetitive use. Plain radiographs showed marked periarticular osteopenia with surgical hardware in place. The PEB’s 20% rating is the highest available under the 5273 code (malunion of calcaneus or talus, “marked deformity”). The VA assigned a 30% rating for the right calcaneus fracture and associated foot conditions coded 5010-5284 (traumatic arthritis and foot injuries, “severe”). The VA added a separate 20% rating for right ankle osteopenia coded 5271 (limitation of ankle motion, “marked”). In a VA rating decision dated 5 January 2009 the VA recognized they were not compliant with the “amputation rule” (§4.68) in rating the right lower extremity and proposed a reduction to 40% to include right calcaneus fracture status post open reduction internal fixation, right first metatarsophalangeal degenerative joint disease, right plantar fasciitis, right ankle osteopenia and right foot scars.

The Board members agreed with the VA that their rating approach involved pyramiding for the arthrogenic component of the disability (the evaluation of the same disability under various diagnoses), which is proscribed under §4.14. However, Board members agreed that the rating approach by the PEB using the VASRD code for malunion of the calcaneus did not completely describe the unfitting impairments resulting from the blast injury to his right foot and lower leg. The Board debated alternative pathways to a rating higher than the 20% assigned by the PEB. The highest rating under VASRD ankle codes 5271, 5272, and 5273 is 20% (marked). The highest rating under VASRD foot codes 5283 and 5284 is 30% (severe). Both the MEB and VA exams noted residual arthrogenic disease resulting in ankylosis of the subtalar joint and limited ROM of the ankle, right ankle weakness, right foot sensory loss and right ankle and foot pain requiring the CI to permanently use three devices for assistance in ambulation. The Board agreed the residual disabilities included both the right ankle (anklyosis of talus and calcaneus bones under the ankle joint), and the right foot. Both right ankle and right foot residuals resulted in significant ambulation issues, to include motor weakness contributing to the diminished dorsiflexion and plantar flexion. The Board was in agreement that the right ankle and the right foot disabilities contributed to the overall inability to perform in the CI’s Military Occupational Specialty (MOS). The Board was mindful of VARSD §4.63—Loss of use of hand or foot, §4.68—amputation rule and §4.40—functional loss as it approached its rating recommendation. The Board was in agreement the blast injury encompassed not only the skeletal system but also the muscle, nerve, and skin. The Board concluded that use of VASRD code 5284 was appropriate in this case and agreed the impairment more nearly approximated the 30% rating.

The Board discussed if an additional rating for weakness of the right ankle movement was warranted but noted that the weakness was attributed to ankle and foot pain and that there was no significant atrophy, and therefore concluded there was no muscle impairment separate from the impairment already considered and rated. Sensory loss was documented involving the lateral and dorsal foot however this did not result in any functional impairments. The Board also considered additional rating on the basis of the tender surgical scars of the right foot, as conferred by the VA. The Board noted that the C&P examiner did not find the scars functionally limiting, and debated if the scars were sensitive enough to impose additional pain with the use of regulation footwear and thereby arguably render them unfitting. By precedent, the Board does not recommend separation rating for sensory loss or scars unless their presence imposes a direct limitation on fitness. The Board agreed that the preponderance of the evidence does not suggest the muscle weakness, sensory loss, or scars were separately unfitting. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a rating of 30% for the right lower extremity condition coded 5010-5284.

Other PEB Conditions. The other conditions forwarded by the MEB included right lower extremity compartment syndrome and posttraumatic left ring finger arthrosis. Right lower extremity compartment syndrome and posttraumatic left ring finger arthrosis were adjudicated as not unfitting by the PEB. The PEB concluded the acute lower leg compartment syndrome due to trauma was resolved after the fasciotomies. The NARSUM makes no mention of persistent symptoms of compartment syndrome and documents foot and ankle pain. As discussed above, weakness of ankle movement was attributed to ankle and foot pain without significant atrophy, and therefore the Board concluded there was no muscle impairment separate from the impairment already considered and rated. A left ring finger fracture occurred in 2005 and required surgery of the distal interphalangeal joint. It remained ankylosed in a functional five degrees of flexion. Neither of these conditions carried attached duty limitations, were implicated in the non-medical assessment or noted as failing retention standards. Both were reviewed by the action officer and considered by the Board. There was no indication from the record that either of these conditions significantly interfered with satisfactory performance of duty requirements. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for either of the stated conditions.

Remaining Conditions. Other conditions identified in the DES file were a painful hip and latex allergy. Neither of these conditions was significantly clinically or occupationally active during the MEB period, and neither carried attached duty limitations or was implicated in the non-medical assessment. These conditions were reviewed by the action officer and considered by the Board. It was determined that neither could be argued as unfitting and subject to separation rating. Additionally PTSD, TBI and several other non-acute conditions were noted in the VA rating decision proximal to separation, but were not reflected in the DES file. The Board also noted that the CI specifically denied the presence of PTSD or TBI symptoms to both the NARSUM and MEB history and physical examiners. These conditions were not mentioned in the commander’s statement or on the CI’s profile and were not active during the MEB process. Therefore, even conceding the conditions existed at the time of separation; there is no basis for arguing they were unfitting.

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 right lower extremity condition, the Board unanimously recommends a rating of 30% coded 5010-5284 IAW VASRD §4.71a. In the matter of the right lower extremity scars condition, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation. In the matter the right lower extremity compartment syndrome and post traumatic left ring finger arthrosis conditions, the Board unanimously recommends no change from the PEB adjudications as not unfitting. In the matter of the painful hip and latex allergy conditions or any other medical conditions eligible for Board consideration, the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation. 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** |
| Right Calcaneus Fracture Malunion | 5010-5284 | 30% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110404, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

President

Physical Disability Board of Review

MEMORANDUM FOR DEPUTY COMMANDANT, MANPOWER & RESERVE AFFAIRS

COMMANDER, NAVY PERSONNEL COMMAND

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATIONS

Ref: (a) DoDI 6040.44

(b) PDBR ltr dtd 22 Feb 12 ICO

(c) PDBR ltr dtd 28 Feb 12 ICO

(d) PDBR ltr dtd 24 Feb 12 ICO

1. Pursuant to reference (a) I approve the recommendations of the PDBR set forth in references (b) through (d).

2. The official records of the following individuals are to be corrected to reflect the stated disposition:

a. XXXXXX, former USN, : Placement on the Temporary Disability Retired List (TDRL) with a 50 percent disability rating for the period 26 October 2006 through 25 April 2007 followed by disability separation with a final rating of 10 percent effective 26 April 2007.

b. XXXXX, former USMC: Placement on Permanent Disability Retired List with a 30 percent disability rating effective 30 June 2008.

c. XXXXXX, former USMC: Placement on the TDRL with a 50 percent disability rating for the period 15 July 2008 through 14 January 2009, followed by disability separation with a final rating of 10 percent effective 15 January 2009.

3. Please ensure all necessary actions are taken, including the recoupment of disability severance pay if warranted to implement these decisions, and notification to the service members once those actions are completed.

Assistant General Counsel

(Manpower & Reserve Affairs)