RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1100392 SEPARATION DATE: 20070131

BOARD DATE: 20120403

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Cpl/E-4 (0621, Field Radio Operator) medically separated for a right knee condition that began in 2003. She did not respond adequately to conservative and surgical treatment and was unable to perform within her military occupational specialty or meet physical fitness standards. She was placed on limited duty (LIMDU) and underwent a Medical Evaluation Board (MEB). Pain in joint involving lower leg was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. 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 adjudicated the right patella instability status post tibial tubercle osteotomy surgery condition as unfitting, rated 20% IAW the Veterans Administration Schedule for Rating Disabilities (VASRD). Additionally, chronic right knee pain was included as a related category II diagnosis. Upon reconsideration requested by the CI, the PEB confirmed the decision. The CI made no appeals and was medically separated with a 20% disability rating.

CI CONTENTION: The CI states: “I asked for reconsideration before the formal findings came out because I have always felt that my rating was unfair. However since my lawyer never contacted me before the hearing I settled for the unfair rating of 20%. I was later told at a VA hospital in Richmond that they only gave me 10% for my right patella, however on the informal findings dated 6 Sep 2006 it states 20%. The audiologist told me they gave me 10% for my ears. I can only pray and hope that this panel rectifies this injustice.” She elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

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| **Service PEB – Dated 20060928** | | | **VA (22 Mo. After Separation) – All Effective 20080929** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Right Patella Instability | 5299-5257 | 20% | Right Patellofemoral Syndrome | 5099-5024 | 10% | 20081204 |
| Chronic Right Knee Pain | Cat 2 | |
| ↓No Additional MEB Entries↓ | | | Tinnitus | 6260 | 10% | 20081204 |
| Not Service Connected x 1 | | | 20081204 |
| **Combined: 20%** | | | **Combined: 20%** | | | |

ANALYSIS SUMMARY: The DES and the Department of Veterans’ Affairs (DVA) disability compensation system are independent systems operating under different laws. The DES, under Title, 10 United States Code, 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, and not based on possible future worsening. However the DVA, operating under a different set of laws (Title 38, United States Code), is empowered to compensate all service-connected conditions without regard to fitness for 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’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 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’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. Furthermore, a “crystal ball” requirement is not imposed on the service PEB’s by the Board; and, the 12 month window specified in DoDI 6040.44 is appropriate for rating comparisons but not for new developments after separation. The Board notes the significant interval (22 months) between the date of separation and the DVA evaluation and exceeds the 12-month interval specified by DoDI 6040.44, under which the Board operates, for special consideration to DVA findings. This does not mean that the DVA information was disregarded, as it was a valuable source for clinical information and opinions relevant to the Board’s evaluation. In matters germane to the severity and disability at the time of separation, however, the information in the service treatment record (STR) was assigned proportionately more probative value as a basis for the Board’s rating recommendations. It is noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to the CI’s statements in the application regarding suspected DES improprieties in the processing of his case.

Right Knee Condition. The CI experienced chronic recurrent right knee pain and patellar instability beginning approximately December 2002. Magnetic resonance imaging (MRI) showed laxity of the lateral patellar retinaculum without a tear. Because of persistent patellar instability despite extensive physical therapy, she underwent a surgical lateral release and tubercle osteotomy on 13 March 2006. At a physical therapy assessment on 19 July 2006 (4 months after surgery) the CI noted “0/10” knee pain. However, an antalgic gait was observed and moderate edema of the knee was still present. Active range-of-motion (ROM) was noted to be extension of 0 degrees and flexion to 125 degrees (normal extension 0 degrees, flexion to 140 degrees). The narrative summary (NARSUM) examiner on 4 August 2006 reported that the CI experienced an uncomplicated post-operative course, but still complained of knee pain, swelling and a slight feeling of patellar instability. She was unable to walk long distances or stair climb without significant discomfort. Examination showed mild swelling, adequate patellar alignment and tracking, and slight lateral patellar tenderness. ROM was “full.” While she needed 3 to 4 more months for complete recovery, it was uncertain if she would be able to resume full active duty status. A physical therapy follow-up on 18 August 2006 (5 months after surgery) noted a mild antalgic gait and equal ROM in both knees indicating a normal ROM of the right knee. The VA Compensation and Pension (C&P) exam was performed 4 December 2008, 22 months after separation. She continued to complain of knee pain that could make it difficult to kneel in her job. She was able to walk one to three miles and assistive devices were not needed. She complained of giving way and instability but denied episodes of dislocation or subluxation. On examination she had an antalgic gait. ROM was extension 0 degrees, flexion 100 degrees with crepitus and painful motion noted. Signs of instability were absent. The PEB and VA chose different coding options for the condition, but this did not bear on rating. The PEB’s 20% rating under an analogous 5257 code (knee, other impairment of) reflected a “moderate” degree of recurrent subluxation or lateral instability. Since the episodes of subluxation appeared to resolve after surgery, Board members agreed that the next higher 30% rating under this code was not defensible. Under the analogous 5024 code (tenosynovitis) used by the VA, a rating is based on limitation of motion, which in this case was non-compensable. The VA likely assigned a 10% rating on the basis of §4.40 (pain with use) or §4.59 (painful motion).

The Board considered alternate pathways to a higher rating. The CI did not have a torn or dislocated meniscus to warrant consideration using diagnostic code 5258 code (dislocated semilunar cartilage) and a rating higher than 20% is not possible. The CI underwent a tibial osteotomy; however, there was no evidence of non-union or malunion present to warrant consideration for a higher rating under diagnostic code 5262 code (impairment of tibia and fibula) and Board members agreed that “malunion with marked knee disability” was not present and therefore, a 30% rating was not justified on this basis. Chronic right knee pain was designated as a category II condition (condition which contributes to the unfitting condition but is not separately ratable) by the PEB. This condition is appropriately subsumed under the right knee condition already discussed above. After due diligence, the Board was unable to identify a pathway to any higher disability rating. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s rating decision for the right patella instability condition.

Other Contended Conditions. The CI’s application implies that a compensable rating should be considered for tinnitus. This condition was reviewed by the action officer and considered by the Board. There was no evidence for concluding that this condition interfered with duty performance to a degree that could be argued as unfitting. The Board determined therefore that the tinnitus condition was not subject to service disability rating.

Remaining Conditions. Other conditions identified in the DES file were bronchitis, hearing loss, skin infection and flat feet. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were significantly clinically or occupationally significant during the MEB period, none carried duty limitations and none were implicated in the non-medical assessment. 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 12 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. 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 patella instability condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the tinnitus condition, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation. In the matter of the bronchitis, skin infection and flat feet 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 therefore recommends that there be no recharacterization of the CI’s disability and separation determination.

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Right Patella Instability | 5299-5257 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110420, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

President

Physical Disability Board of Review

MEMORANDUM FOR DIRECTOR, SECRETARY OF THE NAVY COUNCIL OF REVIEW

BOARDS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATIONS

Ref: (a) DoDI 6040.44

(b) CORB ltr dtd 23 Apr 12

In accordance with reference (a), I have reviewed the cases forwarded by reference (b), and, for the reasons provided in their forwarding memorandum, approve the recommendations of the PDBR the following individual’s records not be corrected to reflect a change in either characterization of separation or in the disability rating previously assigned by the Department of the Navy’s Physical Evaluation Board:

Assistant General Counsel

(Manpower & Reserve Affairs)