RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1100451 SEPARATION DATE: 20020725

BOARD DATE: 20120214

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (31U/Signal Support Specialist), medically separated from the Army for chronic back pain and right knee pain. The CI developed chronic back pain after a motor vehicle accident in June 2001, he was treated with medication and physical therapy. The CI injured his right knee during a jump in airborne school in May 2000. His right knee pain persisted despite physical therapy. The CI did not respond adequately to treatment for either his knee pain or his back pain and he 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). Mechanical back pain and right knee pain were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. The PEB adjudicated the chronic back pain and right knee pain condition as unfitting, rated 0%, with application of the US Army Physical Disability Agency (USAPDA) pain policy and Veterans’ Administration Schedule for Rating Disabilities (VASRD). The CI appealed to a Formal PEB (FPEB), and was then medically separated with a 10% combined disability rating.

CI CONTENTION: “The rating for the conditions which rendered this member unfit should be changed because these same injuries have hindered this member’s ability to perform in a civilian capacity as well. This member loved serving his county but became unable to do so due to injury thus leading to a medical honorable discharge. These injuries have not disappeared since this member was honorably discharged in 02, but instead have worsened with time. Since receiving a medical discharge from military service in July of 2002 this member has only been employed once for two short weeks following his exit from the Army. The ongoing physical and mental trauma that this member experiences combined with the side effects from his prescribed medications leaves him with a very significant occupational impairment. On June 17, 2002 the Physical Evaluation Board (PEB) concluded that this member’s medical condition prevents performance of duty in his grade and specialty based on his chronic back pain and right knee pain and recommended a combined rating of 10%. The exam the PEB relied on showed the lumbar spine normal, range of motion acceptable and a MRI of right knee showed an effusion. However, examinations conducted by the Department of Veterans Affairs revealed pain radiating into both legs and feet, limited flexion of 85 degrees, and X-rays finding a narrowing of posterior L4-5 disc space (or degenerative disc disease) and retrolethesis of the L1 in relation to L4, resulting in 20% being granted for this back condition alone. The VA exam of the right knee revealed swelling on lateral side of patella, patellar grind, and limited flexion of 130 degrees resulting in another 10% grant for the knee. An additional 10% was granted for cervical spine strain w/loss of lordotic curve because the VA exam revealed limited flexion of 60 degrees, and X-ray findings of loss of normal lordotic curve. The initial overall VA combined rating was 40%. This members combined disability rating was increased 10% effective November 25, 2010 because of a clinical diagnosis of post traumatic stress disorder resulting in a 50% overall combined disability rating for this member. This member feels that if the PEB had the same exam results as the VA to make their recommendation then they would of came back with a much more appropriate rating than 10%. The results revealed by the VA examinations are actual clinical diagnosis for the same disabilities that resulted in the member being honorably separated from the military in the first place. These VA examinations were conducted on July 2, 2002 which was before the member was separated from service.” He additionally lists all of his VA conditions and ratings as per the rating chart below. A contention for their inclusion in the separation rating is therefore implied.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service FPEB – Dated 20020617** | | | **VA (4 Mo. Pre Separation) – All Effective Date 20020726** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Back Pain and Right Knee Pain | 5099-5003 | 10% | Lumbar Spine DDD with Radiculopathy, Retrolethesis, and Lumbosacral Strain | 5295-5293 | 20% | 20020307 |
| Right Patellofemoral Pain Syndrome | 5099-5019 | 10% | 20020307 |
| ↓No Additional MEB/PEB Entries↓ | | | Cervical Spine Strain with Loss of Lordotic Curve | 5290 | 10% | 20020307 |
| Recurrent Bilateral Tinnitus | 6260 | 10% | 20020701 |
| 0% x 2/Not Service Connected x 1 | | | 20020307 |
| **Combined: 10%** | | | **Combined: 40%\*** | | | |

\*Increased to 50% effective 20101125 when PTSD 9411 added at 10%.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred condition continues to burden him. The Board wishes to clarify that it is subject to the same laws for service disability entitlements as those under which the Disability Evaluation System (DES) operates. 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. That role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA), operating under a different set of laws (Title 38, United States Code). The Board evaluates DVA evidence proximal to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of DES fitness decisions and rating determinations for disability at the time of separation. The Board also acknowledges the CI’s contention for service ratings for other conditions documented at the time of separation, and notes that its recommendations in that regard must also comply with the same governance. 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 DVA, however, 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 PEB combined chronic back pain and right knee pain as a single unfitting condition, coded analogously to 5003 and rated 10%. The PEB may have relied on AR 635.40 (B.24 f.) and/or the USAPDA pain policy in its rating decision. 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. 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 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 unfitting. 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.

Back Pain Condition. The CI injured his back in a motor vehicle accident on 13 June 2001. Radiographs were normal. He was treated with medications and physical therapy but failed to improve. A bone scan on 21 December 2001 was normal with no evidence of back pathology, but the CI continued to have daily lower back pain that interfered with duties. He was assigned a permanent L3 profile on 11 January 2002 for low back pain with Waddell’s signs, with restrictions to include run at own pace and distance, no airborne operations, an alternate PT test and no lifting over 10 pounds. At the 22 March 2002 MEB narrative summary (NARSUM) evaluation, four months prior to separation, the CI complained of a constant, pinching pain in his paraspinal muscles with pain radiating into the legs and feet. While he had two episodes of decreased bladder control shortly after the accident, those resolved and he denied any other neurologic symptoms. The MEB quoted an examination of the back dated 11 January 2002 which documented decreased forward flexion, pain with lying supine but no pain when standing straight, and inability to squat more than one quarter of the way down but no pain on sitting or rising. Neurologic examination was normal. The examiner stated that “multiple examiners have noted Waddell’s signs.” Range-of-motion (ROM), measured by physical therapy on 21 November 2001, was restricted as per the chart below. The PEB of 9 April 2002 found the CI unfit at 0%, rated for pain in accordance with the USAPDA pain policy, noting that “ROM of the lumbar spine are within acceptable parameters.” A civilian physician evaluated the CI on 6 June 2002, found mild tenderness in the lower back, and diagnosed lumbar strain. After the CI appealed the 0% rating, a Formal PEB convened 17 June 2002 increased the rating to 10%.

At the 7 March 2002 VA Compensation and Pension (C&P) examination, four months prior to separation, the CI complained of constant lower back pain with pins and needles pain into his legs and feet and intermittent foot numbness. The CI also complained of thoracic back pain that radiated to his lower back and was exacerbated by bending or stretching. On examination there were bilateral thoracic and lumbar muscle spasms. There was tenderness over the lumbar spine. Straight leg raise tests were positive at 70 degrees bilaterally. Sensation, strength and reflexes were normal. Motion was limited as per the chart below. Radiographs noted slight narrowing of the posterior L4-5 disc space, slight retrolethesis of L3 on L4 and mild dextroscoliosis of the lower thoracic spine. The examiner diagnosed thoracic strain and lumbosacral spine strain with radiculopathy and degenerative disc disease. The Veterans’ Administration Rating Decision (VARD) assigned a 20% disability evaluation for lumbar spine degenerative disc disease with radiculopathy, VA Code 5295-5293, due to “recurring attacks of moderate intervertebral disc syndrome.” Two goniometric ROM evaluations were in evidence and are summarized below.

|  |  |  |
| --- | --- | --- |
| Goniometric ROM - Thoracolumbar | PT ~ 8 Mo. Pre-Sep  20011121 | VA C&P ~ 4 Mo. Pre-Sep  20020307 |
| Flex (0-90) | 60⁰ | 85⁰ |
| Ext (0-30) | 18° | 30⁰ |
| R Lat Flex (0-30) | 12° | 30⁰ |
| L Lat Flex 0-30) | 11° | 30⁰ |
| R Rotation (0-30) | 28° | 30⁰ |
| L Rotation (0-30) | 21° | 30⁰ |
| COMBINED (240) | 150⁰ | 235⁰ |
| Comment | 3/5 Waddell’s; normal neurologic exam; pain radiates to legs and feet; pain constant | Antalgic gait; additionally limited by pain and lack of endurance; spasm and scoliosis and retrolethesis |
| §4.71a Rating (2002) 5295 | 10% for pain on motion | 10% for pain on motion |
| §4.71a Rating (2002) 5293 | 10% mild or 20% moderate | 10% mild or 20% moderate |
| §4.71a Rating (2002)5292 | 10% mild or 20% moderate | 10% for slight |

The Board first considered whether the back pain condition, having been de-coupled from the combined PEB adjudication, remained independently unfitting as established above. All members agreed that back pain, as an isolated condition, would have rendered the CI incapable of continued service within his MOS; and, accordingly merits a separate service rating.

The 1 July 2002 Veterans’ Administration Schedule for Rating Disabilities (VASRD) coding and rating standards for the spine, which were in effect at the time of separation, were modified on 23 September 2002 to add incapacitating episodes (5293 Intervertebral disc syndrome), and then changed to the current §4.71a rating standards on 26 September 2003. The 1 July 2002 standards for rating based on 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. When older cases have goniometric measurements in evidence, the Board reconciles (to the extent possible) its opinion regarding degree of severity for the older spine codes and ratings with the objective thresholds specified in the current VASRD §4.71a general rating formula for the spine. This promotes uniformity of its recommendations for different cases from the same period and more conformity across dates of separation, without sacrificing compliance with the DoDI 6040.44 requirement for rating IAW the VASRD in effect at the time of separation. For the reader’s convenience, the 1 July 2002 rating codes under discussion in this case are excerpted below.

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

Severe .................................................................. 40

Moderate .............................................................. 20

Slight ..................................................................... 10

**5293** Intervertebral disc syndrome:

Pronounced; with persistent symptoms compatible with sciatic neuropathy with characteristic pain and demonstrable muscle spasm, absent ankle jerk, or other neurological findings appropriate to site of diseased disc, little intermittent

relief ...................................................................... 60

Severe; recurring attacks, with intermittent relief 40

Moderate; recurring attacks ................................. 20

Mild ....................................................................... 10

Postoperative, cured ............................................. 0

**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 carefully reviewed all evidentiary information available. The Board noted that the thoracolumbar flexion measured by the MEB fit the current VASRD criteria for a 20% (moderate) rating based on forward flexion but 10% (slight) based on combined motion, while the C&P exam fit a 10% (slight) rating based on forward flexion and combined motion. The Board questioned the probative value of the measurements included in the MEB examination given that they were obtained four months prior to the MEB NARSUM, and that a significant number of Waddell’s signs were documented. The C&P examination thus has more probative value due to its proximity to separation. The Board noted therefore that three of the four measurements just discussed would fit a slight limitation of motion under the 1 July 2002 VASRD Code 5292 (limitation of motion, lumbar spine). The Board determined that the CI’s limitation of lumbar motion was best described as slight, commensurate with a 10% rating under code 5292. The Board also noted that the CI did have characteristic pain on motion consistent with a 10% rating under Code 5295 (lumbosacral strain), but there was no evidence of unilateral loss of lateral spine motion that is required to reach a 20% rating under 5295. However, the Board agreed with the VA decision that the CI had symptoms consistent with intervertebral disc syndrome (Code 5293) with recurring exacerbations that would justify a 20% rating under the 5293 code. After due deliberation, the Board agreed that the preponderance of the evidence with regard to the functional impairment of the low back pain condition favors its recommendation as an unfitting condition for separation rating. The low back pain condition is appropriately coded 5293 (intervertebral disc syndrome) and meets the VASRD §4.71a criteria for 20% rating.

The Board then considered the matter of lumbar radiculopathy. On examination, motor strength testing had shown no objective evidence of muscle weakness. The CI’s radiculopathy symptoms were sensory only. Board precedent is that a functional impairment tied to fitness is required to support a recommendation for addition of a peripheral nerve rating at separation. The sensory component in this case has no functional implications and did not interfere with satisfactory performance of military duties. As no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment.

Right Knee Pain Condition. The CI injured his right knee during a parachute jump in May 2000 but did not seek medical care at that time. A month later he was diagnosed with bursitis and a medical collateral ligament strain, and treated with physical therapy and bracing. Because the CI did not improve an MRI was obtained in August 2001, which showed joint swelling but no other pathology. An evaluation by orthopedics at that time found no operative pathology and recommended continuing physical therapy. He was assigned a permanent L3 profile on 11 July 2002 with restrictions that included run at own pace, no flutter kicks, no airborne operations and alternative physical fitness test, and he was referred to the MEB. At the 22 March 2002 MEB NARSUM evaluation, four months prior to separation, the CI complained of daily right knee pain that prevented prolonged standing. The MEB quoted an examination of the right knee dated 11 January 2002 which showed “a normal right knee with no effusion, no crepitus, no tenderness to palpation, negative McMurray’s and no Lachman.” On 22 April 2002 the CI was seen by a civilian physician who noted some swelling and tenderness in the right knee but no evidence of ligamentous injury. On 21 May 2002 the CI was evaluated by a civilian orthopedist that noticed crepitus on range on motion and diagnosed probable patellofemoral chondromalacia. He was evaluated by another civilian orthopedist on 3 June 2002 who noted some loss of extension but full flexion, no patellofemoral crepitus, and no joint line tenderness or evidence of ligamentous laxity.

At the 7 March 2002 VA C&P examination, four months prior to separation, the CI complained of recurrent right knee swelling about every two weeks, with pain on stair climbing, squatting, kneeling and prolonged walking or standing. The examiner noted a slightly antalgic gait favoring the right, mild lateral swelling and tenderness, with a positive patellar grind, slight drawer sign, slight McMurray’s test, slight recurrent subluxation and slight joint effusion. ROM was as per the chart below. X-rays were normal. The examiner diagnosed right knee patellofemoral syndrome. The VARD assigned a 10% disability for right knee patellofemoral pain syndrome due to painful motion, VA Code 5099-5019 (analogous to bursitis). Two goniometric ROM evaluations were in evidence and are summarized below.

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| --- | --- | --- |
| Goniometric ROM –  Right Knee | VA C&P ~ 4 Mo. Pre-Sep | CIV Ortho ~ 1 Mo. Pre-Sep |
| Flexion (140⁰ normal) | 130⁰ | 135⁰ |
| Extension (0⁰ normal) | 0⁰ | 5⁰ |
| Comment | Painful Motion; Uses a Brace | Painful Motion |
| §4.71a Rating | 10% for Painful Motion | 10% for Painful Motion |

The Board carefully reviewed all evidentiary information available. The Board first considered if the right knee pain condition, having been de-coupled from the combined PEB adjudication, remained independently unfitting as discussed above. All members agreed that the right knee pain, as an isolated condition, would have rendered the CI incapable of continued service within his MOS; and, accordingly merits a separate service rating. The Board noted that the MEB examination failed to document ROM in the right knee but the range of motion documented at the VA C&P examination, two weeks prior to the MEB, failed to reach compensable levels for the VASRD codes specific to leg extension and flexion (5261 and 5260 respectively). However, IAW VASRD §4.40 and §4.59, a 10% rating is warranted when there is satisfactory evidence of functional limitation due to painful motion of a major joint. The Board noted that crepitus and swelling were evident on some examinations but not on others. The Board concluded that the loss of motion, coupled with the intermittent patellar crepitus and right knee swelling, was sufficient to satisfy the intent of §4.59, painful motion, in the right knee as “the intent of the schedule is to recognize painful motion with joint or periarticular pathology as productive of disability.” No examination in evidence documented mechanical instability or locking. There was no evidence, either on examination or MRI, of an unstable meniscal tear. Thus, there is no route to a rating higher than 10%, or criteria for additional separate ratings (such as for instability, per Fast Letter 04-22 of 1 October 2004), for the right knee. After due deliberation, the Board recommends a separation rating of 10% for right knee pain, VA code 5099-5003.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for cervical spine strain and bilateral tinnitus. Neither condition was not mentioned in the DES file, to include the MEB history and physical and the MEB NARSUM. 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, therefore, has no reasonable basis for recommending any additional unfitting conditions for separation rating.

Remaining Conditions. Other conditions identified in the DES file were headaches and difficulty sleeping. 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. Additionally right shoulder strain, thoracic spine strain, and right ear hearing loss and several other non-acute conditions were noted in the VA rating decision proximal to separation, but were not documented in the DES file. Posttraumatic stress disorder (PTSD) was diagnosed and service connected by the VA in 2010, approximately eight years after separation. However, this diagnosis was not mentioned in the DES. 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, 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 knee and back pain conditions was operant in this case and the conditions were adjudicated independently of that policy by the Board.

In the matter of the chronic back pain and right knee pain condition, the Board unanimously recommends rating two separately unfitting conditions as follows: chronic back pain and right knee pain. In the matter of the chronic back pain condition, the Board (by a vote of 2:1) recommends a service disability rating of 20%, coded 5293 (intervertebral disc syndrome) IAW VASRD §4.71a. The single voter for dissent (who recommended adopting the VA rating 5292 at 10%) did not elect to submit a minority opinion. In the matter of the right knee pain condition the Board unanimously recommends a service disability rating of 10%, coded 5099-5003 IAW VASRD §4.71a. In the matter of the headaches and difficulty sleeping 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.

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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** |
| Chronic Back Pain | 5293 | 20% |
| Right Knee Pain | 5099-5003 | 10% |
| **COMBINED** | **30%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110619, 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. Under the authority of Title 10, United States Code, section 1554(a), I approve the enclosed recommendation of the Department of Defense Physical Disability Board of Review (DoD PDBR) pertaining to the individual named in the subject line above to recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 30% effective the date of the individual’s original medical separation for disability with severance pay.

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:

a. Providing a correction to the individual’s separation document showing that the individual was separated by reason of permanent disability retirement effective the date of the original medical separation for disability with severance pay.

b. Providing orders showing that the individual was retired with permanent disability effective the date of the original medical separation for disability with severance pay.

c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, and payment of permanent retired pay at 30% effective the date of the original medical separation for disability with severance pay.

d. Affording the individual the opportunity to elect Survivor Benefit Plan (SBP) and medical TRICARE retiree options.

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)