RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: army

CASE NUMBER: PD1100465 SEPARATION DATE: 20020523

BOARD DATE: 20120227

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E4 (63W, Wheeled Vehicle Repair) medically separated for bilateral shoulder pain. He underwent right shoulder repair for instability with good results prior to enlistment; but, re-injured the shoulder on active duty. He underwent two additional surgeries on the right shoulder, but remained symptomatic. Concurrently, he developed similar symptoms of instability of the left shoulder, and underwent two surgeries to restore left shoulder stability. Although the surgical results were satisfactory, the orthopedic surgeon judged that the CI’s shoulder conditions would not hold up to the rigors of his current Military Occupational Specialty (MOS). A MOS Medical Retention Board (MMRB) further determined that the CI was not to be a candidate for reclassification into any available MOS. He was issued a U3 permanent profile and underwent a Medical Evaluation Board (MEB). Bilateral shoulder pain and bilateral shoulder instability were forwarded to the Physical Evaluation Board (PEB) as separate medically unacceptable conditions IAW AR 40-501. Two other conditions, as identified in the rating chart below, were forwarded by the MEB as medically acceptable conditions. The PEB adjudicated “left shoulder pain” as unfitting, rated 0%, with application of the Veterans Administration Schedule for Rating Disabilities (VASRD); and adjudicated “right shoulder pain” as unfitting, but designated as EPTS (existed prior to service) and therefore not ratable. The CI made no appeals, and was medically separated with a 0% disability rating.

CI CONTENTION: “I am currently rated at 70% Service Connected Disabled from the VA. 30% for residuals gallbladder, 30% for Migraine Headaches, 20% for my Left Shoulder and 20% for my Right Shoulder. Given that I have all these ratings the Army rated me at 0% which basically meant that I merely no longer met the standards in AR 40-501. I believe that given my VA rating the Army should have rated me at a minimum of 30%.”

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20020222** | | | **VA (2 Mo. After Separation) – All Effective 20020524** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Left Shoulder Pain | 5099-5003 | 0% | Residuals, Left Shoulder | 5201 | 0%\* | 20020719 |
| Right Shoulder Pain | EPTS | ---% | Residuals, Right Shoulder | 5201 | 20% | 20020719 |
| Migraines | Not Unfitting | | Migraines | 8100 | 30% | 20020719 |
| Insomnia | Not Unfitting | | VA Entry | | | 20020719 |
| No Additional MEB/PEB Entries | | | No Additional VA Entries | | | 20020719 |
| **Combined: 0%** | | | **Combined: 40%** | | | |

\*Left Shoulder Condition increased from 0% to 20%, effective 20090831.

ANALYSIS SUMMARY: The Board notes the current Department of Veterans’ Affairs (DVA) ratings listed by the CI for all of his service-connected conditions, but must emphasize that its recommendations are premised on the severity and presence of medical conditions at the time of separation. The Board 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 DVA, operating under a different set of laws (Title 38, United States Code). The Board evaluates VA 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 further 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 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.

Bilateral Shoulder Condition. Prior to the CI’s entry onto active duty his civilian orthopedic surgeon reported the CI “underwent an anterior shoulder reconstruction by me on February 27, 1995. He has had an excellent functional result and has regained full range-of-motion (ROM) and strength. He currently has no disability in regard to his shoulder.” Radiographs of the right shoulder showed evidence of suture anchors, but were otherwise normal. Intra-operatively, he was noted to have chondromalacia and degenerative joint disease with associated synovitis of the right shoulder. Radiographs of the left shoulder were normal. An orthopedic specialty opinion advising the MMRB stated that, “Continued heavy lifting and stressing of his shoulders … would not be conducive to the continued success of the shoulder surgery.” At the time of the MEB the CI reported aching in both shoulders, easy arm fatigability, inability to perform protracted overhead activities, inability to tolerate load bearing military equipment, and difficulty tolerating the parade rest position. He denied any dislocations since his last surgery. The commander’s statement corroborated these, and other, MOS-specific limitations. There were two goniometric ROM evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Shoulder ROM | MEB ~7 Mo. Pre-Sep | | VA C&P ~2 Mo. Post-Sep | |
| Left | Right | Left | Right |
| Flexion 0-180⁰ | 180⁰ | 180⁰ | 100⁰ | 95⁰ |
| Abduction 0-180⁰ | 180⁰ | 180⁰ | 95⁰ | 90⁰ |
| Comments | Painless ROM; no instability. | | No instability noted. | |
| §4.71a Rating | 10%\* | 10%\* | 10%\* | 20% |

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

The MEB examiner noted a “painless full fluid arc of motion bilaterally;” although, some limitation of internal rotation (left worse than right) was documented. Tests for subluxation, instability and impingement were negative. The motor exam was normal in both upper extremities for all muscle groups; sensation and reflexes were intact. Numerous orthopedic clinic notes over the previous several months had recorded similar exam findings. At the post-separation VA Compensation & Pension (C&P) examination the CI reported no interval history of additional trauma, injury or surgery. He reported having pain in his shoulders at his civilian job when lifting or carrying pipe or working overhead. On examination the ROM was noted to be significantly restricted compared to the service exam, with no comment on painful motion. Conversely, the examiner stated that the CI “can put his arms behind his head,” suggesting a significantly greater ROM than reflected by the recorded measurements. There was tenderness over the acromioclavicular joints and the supraspinatus and infraspinatus muscles. There was normal and symmetrical muscle bulk in the upper extremities; but, motor strength was reported as 3/5 or worse (movement against gravity, but not against added resistance), in conflict with active ROM and negative resistance findings already recorded by the examiner. Additionally, the action officer opines that there is no identified peripheral nerve insult or other neurologic pathology associated with the case which would provide an etiology for objective loss of motor strength to the degree reported in this exam.

It is obvious that there is a clear disparity between these examinations, with very significant implications regarding the Board's rating recommendation. The Board thus carefully reviewed the service file for corroborating evidence in the 12-month period prior to separation. In assigning probative value to these conflicting examinations, the Board notes that: (1) the MEB measurements are consistent with corroborating evidence; (2) the MEB measurements are consistent with the other collateral physical findings; (3) the MEB measurements are consistent with the diagnostic and clinical pathology in evidence; (4) there is not a reasonable accounting for progressively impaired ROM in the fairly short interval between the MEB and VA examinations; (5) the VA exam showed considerable internal inconsistency; and, (6) VA rating evaluations based on ROM rely on subjective pain thresholds which are patently associated with financial incentive, thus inherently subject to some loss of objectivity. Therefore, based on all evidence and associated conclusions just elaborated, the Board is assigning preponderant probative value to the MEB evaluation.

The Board first considered the unfitting left shoulder condition. The PEB and VA chose different coding options for the condition. The PEB coded analogously to 5003 (degenerative arthritis); and, the DA Form 199 cited full range of motion and the absence of radiographic evidence of degenerative changes in support of a 0% rating determination, which remains consistent with §4.71a standards. The VA’s coding choice of 5201 (limitation of motion) would also achieve a 0% rating based on the MEB data. The Board deliberated whether the provisions of VASRD §4.40 (functional loss) would apply in this case, providing a pathway to a minimal compensable rating. The relevant language of §4.40 is, “disability of the musculoskeletal system is primarily the inability, due to damage or infection in parts of the system, to perform the normal working movements of the body with normal excursion, strength, speed, coordination and endurance … a part which becomes painful on use must be regarded as seriously disabled.” The Board notes in that regard the functional limitations which were referenced in the commander’s statement, in the orthopedic specialty opinion, and in the MEB examination as elaborated above. The CI was incapable of performing the duties of his MOS; had significant difficulties with lifting, carrying, and overhead work; and, experienced rapid joint fatigue and functional degradation with various repetitive or protracted activities. The Board concluded that this evidence provided ample reasonable doubt favoring application of §4.40 to achieve the minimal compensable rating for the left shoulder, based on the MEB findings alone. There was no clinical and/or radiologic evidence that suggested ankylosis, loss of the humeral head, nonunion, malunion, fibrous union, deformity, nonunion or dislocation of the scapula, or recurrent dislocations of the humerus that would have justified any alternate shoulder code with higher rating potential. After due deliberation, considering all of the evidence, the Board recommends a separation rating of 10% for the left shoulder condition. The action officer recommends the code 5099-5024 (tenosynovitis) for its clinical fit with the pathology in evidence.

The Board next turned its attention to the unfitting right shoulder condition. The Board’s main charge regarding this condition is an assessment of fairness 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 Board accepts at face value the opinion of the CI’s civilian orthopedic surgeon (as quoted above and confirmed by a military physician) that the right shoulder repair was successful, and that there was no significant residual disability at the time of entry onto active duty. The re-injury which occurred with duty-related activities was a proximate cause of recurrent shoulder instability necessitating further surgical interventions. It would logically follow that, although the condition existed prior to service, the significant disability identified at separation resulted from service-aggravation. The action officer opines that, especially in consideration of the physical rigors of MOS, the disability at separation could not be attributed solely to natural progression of the pre-service pathology. After deliberation, Board members agreed that there was not enough strength in the PEB’s position to overcome sound arguments favoring a conclusion that the right shoulder condition was permanently aggravated by service duties. The Board, therefore, recommends that it be rated as an additionally unfitting condition.

The Board then directed its attention to its rating recommendation for the right shoulder condition. Since the ratable data for the right shoulder was essentially identical to that for the left shoulder, as elaborated above, the Board applied the same reasoning and rationales to arrive at the same coding and rating recommendation. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 10% for each shoulder condition coded 5099-5024.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were migraine headaches and insomnia. The CI had a long history of headaches exacerbated by stress and anger, and the condition was thoroughly evaluated. The neurologist who submitted an addendum to the narrative summary (NARSUM) reported that the current medication regimen had resulted in a “decrease in headache frequency and severity … and allow[s] him to continue working for the most part;” and, opined that the CI’s migraine headaches showed “reasonable control on current regimen.” There was no evidence in the STR documenting any prostrating episodes associated with the headache condition. Insomnia is referenced in the NARSUM as a condition being treated by the same neurologist, but does not appear in the neurology addendum to the NARSUM or elsewhere in the DES file or STR. Neither of these conditions were profiled, implicated in the commander’s statement 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 duty performance. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change in the PEB fitness adjudication for the headache or insomnia conditions.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for gallbladder residuals. The CI developed an acute attack of cholecystitis one week prior to separation, resulting in cholecystectomy without complications or sequelae. The condition was not appealed in service; and, therefore a MEB retention classification, commander’s opinion, profile restrictions, and PEB fitness adjudication are not relevant to the Board’s recommendation. This condition was, however, reviewed by the action officer and considered by the Board. There was no evidence for concluding that it interfered with duty performance to a degree that could be argued as unfitting. The Board determined therefore that the gallbladder (surgical residuals) condition was not subject to service disability rating.

Remaining Conditions. Other conditions identified in the DES file were exercise induced asthma, finger numbness, an orbit and cheekbone fracture, fused fingers, and allergies to bees and codeine. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were significantly clinically or occupationally 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 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 left shoulder condition, the Board unanimously recommends a rating of 10% coded 5099-5024 IAW VASRD §4.71a. In the matter of the right shoulder condition, the Board unanimously recommends that it be added as an additionally ratable condition; coded 5099-5024 and rated 10% IAW VASRD §4.71a. In the matter of the migraine headache and insomnia conditions, the Board unanimously recommends no change from the PEB adjudications as not unfitting. In the matter of the contended gallbladder (surgical residuals) condition, the Board unanimously agrees that it cannot recommend a finding 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, effective as of the date of his prior medical separation:

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| --- | --- | --- | --- |
| **UNFITTING CONDITION** | | **VASRD CODE** | **RATING** |
| Surgical Residuals, Left Shoulder | | 5099-5024 | 10% |
| Surgical Residuals, Right Shoulder | | 5099-5024 | 10% |
| **COMBINED (Incorporating BLF)** | | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110617, 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 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

Deputy Assistant Secretary

(Army Review Boards)