RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1100492 SEPARATION DATE: 20021130

BOARD DATE: 20120522

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty LCpl/E-3 (1171 / Basic Hygiene Equipment Operator), medically separated for bilateral lower leg condition. She did not respond adequately to non operative, conservative treatment and was unable to perform within her Military Occupational Specialty (MOS) or meet physical fitness standards. She was placed on limited duty and underwent a Medical Evaluation Board (MEB). History of right tibial stress fracture and left tibial stress related changes were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. No other conditions appeared on the MEB’s submission. The PEB adjudicated the right tibial stress fracture with persistent pain and left tibial stress related changes with persistent shin pain conditions as unfitting, rated 10%, and 0% respectively with application of SECNAVINST 1850AE. The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: The CI states: “Conditions with legs have worsened and lead to back problems.” She elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

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 back condition is 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 Board for Correction of Naval Records (BCNR).

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20020920** | | | **VA (2 Mos. After Separation) – All Effective Date 20021201** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Right tibial stress fracture with persistent shin pain | 5003-5262 | 10%\* | Residuals, periostitis right lower leg | 5022 | 0% | 20021022 |
| Left tibial stress related changes with persistent shin pain | 5022-5003 | 0%\* | Residuals, periostitis left lower leg | 5022 | 0% | 20021022 |
| ↓No Additional MEB/PEB Entries↓ | | | Benign Fibroma left femur | 5099-5015 | 0% | 20021022 |
| Vertigo | 6299-6204 | 0% | 20021022 |
| Not Service Connected x 6 | | | 20021022 |
| **Combined: 10%** | | | **Combined: 0%** | | | |

\*Bilateral Factor applied

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which her service-connected conditions continue to burden her. It is a fact, however, that the Disability Evaluation System (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. This role and authority is granted by Congress to the Department of Veteran Affairs (DVA). 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 re-evaluate said conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment vary over time. The Board utilizes DVA evidence proximate to separation in arriving at its recommendations; and, DoDI 6040.44 defines a 12-month interval for special consideration to post-separation evidence. The Board’s authority as defined in DoDI 6044.40, however, resides in evaluating the fairness of DES rating determinations for the disability existing at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability at the time of separation.

Bilateral Lower Leg Condition. Over the two years of her military service, the CI underwent evaluations and treatment for left then right lower extremity pain. Serial imaging revealed bilateral stress related changes of both tibias. She was seen by orthopedics and diagnosed with left then right stress fractures which were managed with activity modification and physical therapy. A bone scan in September 2001 revealed stress related changes of the left tibia and a focal stress fracture in the right tibia. She had bilateral leg pain with running, lifting, climbing and descending stairs, and prolong walking which led to her MEB. At the MEB exam, completed approximately 4 months prior to separation, the CI reported that the injury occurred as a result of persistent running. The MEB physical exam demonstrated tenderness along the medial border of the midshaft of both tibias right greater than left, no swelling, soft muscle compartments of the right and left legs with full range of motion of the hip and knees with bilateral pes planus. She also had excellent bilateral symmetrical subtalar and tibiotalar motion. Repeat X-rays that day were negative for stress fractures or periosteal changes. At the VA Compensation and Pension (C&P) exam performed a month prior to separation, the CI reported similar symptoms as the MEB exam. The C&P physical exam demonstrated normal extremities, no edema or varicose veins, and gait and stance were normal, including heel and toe walking. She was able to perform repetitive squatting, as well as alternate leg hopping without difficulty. The neurological and musculoskeletal exams were normal. The tibia of both legs also demonstrated no bony deformities or overlying skin changes or muscle atrophy, but there was modest discomfort with palpation in this region. Bilateral tibia and fibula X-rays were normal.

The Board directs its attention to its rating recommendations for right and left lower leg condition and debated several options for coding and rating. The PEB chose to rate the right lower extremity 10% coded analogous to the 5262 code (Tibia and fibula, impairment of) and chose to rate the left lower extremity 0% analogous to the 5003 (Arthritis, Degenerative) with 5022 (Periostitis) with reliance on SECNAVINST 1850.4E. The separate 0% rating conferred by the VA coded 5022 granted service-connection for an exam that did not show any limitation of function or objective pain associated with the periostitis which was consistent with recovering from the clinical process. With no loss of ROM, normal gait, no documented painful motion, and no evidentiary findings in support of a compensable rating under any of the specific knee joint codes; the Board deliberated three recommendations which are all compliant with VASRD §4.71a: 1) A bilateral rating of 10%, coded 5022-5003 (periostitis); 2) Separate 10% ratings, coded with preferred analogous VASRD code 5262 (tibia and fibula, impairment of) for the rating of shin splints conceding §4.40 (“a part which becomes painful on use must be regarded as seriously disabled”); 3) Separate non-compensable ratings under 5022-5003 without the fairly tenuous application of §4.40. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board concluded that the first option (a bilateral 5022-5003 rating of 10%) best captured the disability picture at the time of separation. This recommendation, while coded differently, is consistent with the PEB’s final rating adjudication and did not result in a higher rating. Therefore the Board concluded there was insufficient cause to recommend a change in the PEB adjudication for the right and left lower leg condition.

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 tibial stress fracture with persistent shin pain and left tibial stress related changes with persistent shin pain condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. There were no other conditions within the Board’s scope of review for consideration.

RECOMMENDATION: The Board, therefore, recommends that there be no recharacterization of the CI’s disability and separation determination, as follows:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Right Tibial Stress Fracture with Persistent Shin Pain | 5003-5262 | 10%\* |
| Left Tibial Stress Related Changes with Persistent Shin Pain | 5022-5003 | 0%\* |
| **COMBINED (w/BLF)** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110707, 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 29 May 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 individuals’ 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:

- XXX XX XXXX former USMC

- XXX XX XXXX former USMC

- former USN, XXX-XX-XXXX

- XXX XX XXXX former USMC

- former USN, XXX-XX-XXXX

Assistant General Counsel

(Manpower & Reserve Affairs)