RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100502 SEPARATION DATE: 20040901

BOARD DATE: 20120613

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (11B1P, Infantryman), medically separated for gunshot wound (GSW) to the right thigh. The CI had a GSW to his right thigh in Afghanistan in August 2003. He underwent debridement with a “large amount of tissue loss” and was then medevac’d to CONUS. He had skin grafting of the thigh with good healing. He continued to have pain, tenderness, numbness and a contracture of his quadriceps muscle decreasing knee motion. Despite physical therapy and ongoing treatments, the CI could not be adequately rehabilitated to meet the physical requirements of his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). The MEB forwarded no other conditions for PEB adjudication. The PEB adjudicated the GSW to the right thigh condition as unfitting, rated 0%, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 0% disability rating.

CI CONTENTION: “DVA rating decision 10/19/2004 found the MEB unfit condition (right thigh gsw) to meet the 30% criteria rate. This determination was based on service treatment records reviewed by the MEB and examination conducted by Dr. K. on 08/05/2004. DVA rating decision 10/27/2009 upheld a 30% rating for the exit wound residuals and granted an additional 10% for the right thigh entrance wound.”

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 (right thigh GSW exit and entrance wounds) will be reviewed in all cases. 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 Army Board for the Correction of Military Records (BCMR).

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20040506** | | | **VA (1Mos. Pre -Separation) – All Effective Date 20040902** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| GSW Combat-Related, R. Thigh | 5261 | 0% | Residuals, GSW, R. Thigh | 5314 | 30%\* | 20040805 |
| ↓No Additional MEB/PEB Entries↓ | | | Residuals, GSW, R. Chest | 5321 | 10% | 20040805 |
| PTSD | 9411 | 50% | 20040805 |
| Tinnitus | 6260 | 10% | 20040805 |
| 0% X 3 / Not Service-Connected x 2 | | | 20040805 |
| **Combined: 0%** | | | **Combined: 70%\*** | | | |

\* Added right thigh entry wound, code 7804 at 10% effective 20091014 (combined 80%)

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-aggravated condition continues to burden him. 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 Veterans’ Affairs (DVA). The DVA, operating under a different set of laws (Title 38, United States Code), 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 Board utilizes DVA evidence proximal 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 fitness determinations and rating decisions for disability at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Gunshot Wound Right Thigh. The CI had a thru and thru GSW to his right thigh with additional GSW injuries remote from the thigh (right abdomen/chest) that are not relevant to this adjudication. Initial treatment by a forward surgical team included debridement with a 10x15 cm soft tissue defect over the quadriceps muscle (anterior medial thigh; inferior to superior). There was no fracture. Upon return to CONUS, there was a “large soft tissue defect over the anterior portion of his thigh” and the CI underwent additional surgical debridement and homograft followed by a split thickness skin graft (from the opposite thigh).

At the MEB exam, the CI reported inability to perform his MOS, unable to do PT, and continued thigh pain, tenderness and some numbness to the thigh. The MEB examiner indicated a “large amount of tissue loss” with good healing of the skin graft. There was likely injury of the lateral cutaneous branch of the femoral nerve, and ongoing physical therapy with “a small contracture of his knee secondary to the scarring of his quad.” The MEB physical exam noted numbness and paresthesias throughout the distribution of the lateral cutaneous branch of his femoral nerve. “He does have a 5° flexion contracture of the knee. He lacks 5⁰ of full extension. He flexes to about 120⁰.” The knee was stable on exam. Present status indicated profile for severe pain in the anterior portion of the thigh. Diagnosis was “S/P gunshot wound to his right thigh and injury to the lateral cutaneous branch of his femoral nerve with a 5⁰ flexion contracture of his knee.”

At the VA Compensation and Pension (C&P) exam, a month prior to separation, the CI reported a history similar to the NARSUM as above. Exam documented entry wound on the low medial thigh of 1.5x1.5 cm and the upper thigh graft that was well taken and measured 4x6 inches. The right hip lacked 5⁰ of full extension and the right knee exam was normal with normal ROM. There was no neurologic or motor deficit in evidence. The VA rated this exam as 5314 at 30%. Five years remote from separation, additional VA exam and rating continued the 30% muscle rating for the right thigh (some indication of lessened thigh-related symptoms) and added an additional 10% rating for painful entry wound scar.

The Board directs attention to its rating recommendation based on the above evidence. The VA separate rating for painful entry scar was not clearly related to functional impairment at the time of separation and could not be considered to have reached the level of unfitting for additional service disability compensation. The service and VA coding and ratings for the thigh GSW condition were very disparate, even though were based on similar exam findings. The VA rating narrative was predominately based on the service exam, records and narrative summary (NARSUM). The crucial difference in rating was the selection of disability codes; the military coded the CI’s thigh GSW based on a knee ROM disability code of 5261 for non-compensable decreased knee extension; however, the VA rated the CI under disability code 5314 for muscle injury.

The Board considered that there was no specific knee joint pathology, that the GSW injury was to the thigh and thigh pain and muscle contracture were the etiology of duty restrictions and the CI’s inability to function in his MOS. Coding of this disability was determined to be appropriately under VASRD §4.56—Evaluation of muscle disabilities, rather than under §4.71a—schedule of ratings–musculoskeletal system. The muscle involved was under code 5314 group XIV which includes the anterior thigh group and involves both extension of the knee and impacts extension of the hip.

The Board considered the tenants of VASRD §4.55, principles of combined ratings for muscle injuries and §4.56, Evaluation of muscle disabilities. The deliberations focused between moderately severe (30% - VA rated) and the moderate (10%) level of disability ratings. Given the CI’s right thigh muscle injury, pain with muscle contracture limiting joint motion, through and through GSW with entry and exit wounds, multiple surgical debridement, substantial tissue loss and required skin grafting, and in consideration of §4.7, higher of two evaluations, the Board adjudged the CI’s injury and disability picture was closest to the moderately severe muscle criteria. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 30% for the right thigh GSW 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. In the matter of the right thigh GSW condition, the Board unanimously recommends a disability rating of 30%, coded 5314 IAW VASRD §4.56. In the matter of the contended right thigh entry wound (scar) condition; the Board unanimously recommends it be found as not unfitting. There were no other conditions within the Board’s scope of review for consideration.

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** |
| Gunshot Wound (combat-related) Right Thigh | 5314 | 30% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110713, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

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Director of Operations

Physical Disability Board of Review

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency

(TAPD-ZB / ), 2900 Crystal Drive, Suite 300, Arlington, VA 22202

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for XXXXXXXXXXXXXXX, AR20120011851 (PD201100502)

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 XXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA