RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAme: XXXXXXXXX BRANCH OF SERVICE: army

CASE NUMBER: PD1100513 DATE OF PLACEMENT ON TDRL: 20040309

BOARD DATE: 20120411 Date of Permanent SEPARATION: 20060223

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a National Guard SSG/E-6 (88M/Motor Transport Operator), medically separated for pain and limited motion of the left knee. The CI’s original injury was on 15 November 1971 while playing intramural Army basketball in Germany. The CI did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. The CI was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Moderate to severe osteoarthritis of the left knee condition was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions appeared on the MEB’s submission. Other conditions included in the Disability Evaluation System (DES) packet will be discussed below. The PEB adjudicated the chronic left knee pain and instability condition as unfitting, rated 30% with application of the US Army Physical Disability Agency (USAPDA) pain policy. The CI was placed on Temporary Disability Retired List (TDRL) with ratings as reflected in the chart below. Upon TDRL re-evaluation the PEB recommended discharge with severance pay rated at 10%. The CI made no appeals, and elected placement on the Reserve Retired List with entitlement to retired pay at age 60 in lieu of disability severance pay.

CI CONTENTION: “I was rated at 30% by the PEB. On follow up visit at Ft. Campbell, KY The doctor said see you in a year. The PED (PEB) in Ft. Lewis, Wash., rated me at 10%, then discharged. The VA had me at a total of 40% at that time.” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

TDRL RATING CHART:

|  |  |
| --- | --- |
| **Final Service PEB – Dated 20051213** | **VA\* – All Effective Date 20040309** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20040309** |  | **TDRL** | **Permanent** |
| Chronic Left Knee Pain and Instability | 5257 | 30% |  | Degenerative Arthritis of Left Knee | 7805-5010 | 30%\* | 20040604 |
| Pain and Limited Motion of Left Knee | 5003 |  | 10% |
| ↓No Additional MEB/PEB Entries↓ | Degenerative Arthritis of Right Shoulder | 5003 | 10% | 20040604 |
| 0% x 1/Not Service-Connected x 2 |
| Combined: 10% | Combined: 40% |

\*Originally rated at 10% but increased to 30% with same effective date after de novo review 20050429.

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ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that the gravity of his condition merits consideration for a higher separation rating. The Board wishes to clarify that it is subject to the same laws for service disability entitlements as those under which the DES operates. 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. In TDRL cases, the Board must also adhere to the DES standard that only those conditions which were present and unfitting at the time of temporary retirement may be considered for compensation and rating at the time of permanent separation or retirement. The VA ratings which the Board considers in that regard are those rendered most proximate to separation. The Board utilizes Department of Veterans’ Affairs (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 6040.44, 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. However 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 reevaluate said conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment vary over time.

Left Knee Condition. There were three range-of-motion (ROM) evaluations in evidence, and one evaluation without goniometric ROM’s with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation.

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| Goniometric ROM –Left Knee | MEB ~ 5 Mo. Pre-TDRL entry (20031105) | Ortho clinic~ 3 Mo. Pre-TDRL entry(20031217) | VA C&P ~ 3 Mo. Post TDRL entry and 20 months prior to final separation(20040604) | Orthopedics ~ 7 Mo. Post-TDRL entry and 15 months prior to final separation(20041028) |
| Flexion (140⁰ normal) | No goniometrics | 125° with pain at 125° | 125⁰ | 130° passive |
| Extension (0⁰ normal) | No goniometrics | +5° with pain at +5° | 0⁰ | 0⁰ passive |
| Comment | Positive anterior drawer test; mild antalgic gait; pre-patellar tenderness; medial joint line tenderness; mild to moderate crepitus  | Findings from this exam were stated in the PEB disability description section of the DA 199. Diagnoses: left knee ACL tear and osteoarthritis.  Drawer test +2; Lachman’s +3 with soft end point; + pivot shift at +1; guarding with pivot; no varus or valgus laxity; medial joint line tender to palpation; X-rays show positive osteophytes and medial joint space is significantly narrowed. | Pain/discomfort with movement; no increase in pain or limitation of ROM after repeated movements ; instability not addressed  | Diagnoses: moderate to severe osteoarthritis medial compartment with mild to moderate arthritis patellofemoral compartment and ACL insufficiency.Medial/lateral /infra patellar/medial joint line tenderness to palpation (TTP); crepitus retro patellar area; Lachman’s 1+; FRD test +1 laxity (pivot shift-ACL); Modified Steinman’s test crepitus/pain along medial aspect knee (medial meniscus or arthritis) |
| §4.71a Rating |  |  | VA rated 30% based on these two exams |
| 5257 | 30% if severe, 20% if moderate | 30% if severe, 20% if moderate | 30% if severe, 20% if moderate | 30% if severe, 20% if moderate |
| 5260  |  | 10% | 10% | 10% |
| 5261 |  | 10% |  |  |

The CI has a long well-documented history of left knee pain in the service treatment record (STR) dating back to 1971. The CI initially injured his left knee in 1964 but did not have difficulty until he injured his left knee in November 1971 with symptoms of popping with pain, tenderness on extension and was diagnosed with left knee strain. The CI was noted to have a partially torn anterior cruciate ligament (ACL) and a small area of chondromalacia of the patella. A left knee arthrotomy was performed in November 1971. The CI was evaluated by orthopedics in 1974 and found to have medial tenderness, crepitus and chondromalacia. The CI was again seen by orthopedics in March 1997 and noted to have significant deterioration of the left knee medial compartment and cruciate ligament. The examiner recommended against any type of running as this would cause further deterioration and destruction. In August 2002, the CI was seen by orthopedics for left knee swelling; aching; clicking and grinding; pain with twisting motions, running stepping and walking; requiring the use of a knee brace due to give away; and pain along the medial and retropatellar region. The examination findings noted laxity and crepitus with pain along the medial joint line. X-rays at this time revealed moderate to severe osteoarthritis. The diagnoses were moderate to severe osteoarthritis, medial compartment; mild to moderate osteoarthritis, patellofemoral compartment; chondrosis, patella, left knee; and ACL insufficiency, left knee. Progress notes as early as 2002 note the eventual need for a total knee replacement but the plan to avoid this as long as possible. In February 2003 the CI was granted a P2 profile with restrictions of no running. The CI was deployed and was medevaced from theater to Landstuhl for severe left knee pain and instability in 2003. A left knee x-ray done in August 2003 demonstrated significant compartment degenerative arthritis changes most marked in the medial compartment. The CI was referred to physical therapy (PT) for aggressive treatment however he continued with significant knee pain. The CI was granted a permanent P3 profile in October 2003. The MEB History and Physical performed on 6 October 2003 (6 months prior to TDRL entry) noted 2/5 strength of the left knee with full ROM and inability to squat. The examiner noted left knee degenerative joint disease with ACL laxity as disqualifying defects.

The MEB examination 5 months prior to TDRL entry indicated left knee pain with prolonged standing, marching, jumping, crawling or stooping activities. The examination findings were positive anterior drawer test; mild antalgic gait; pre-patellar tenderness; medial joint line tenderness and mild to moderate crepitus. No ROM, motor, or strength assessment was noted. At this time the CI was unable to wear load bearing equipment, run, perform jumping activities, or perform any sort of exercises or duties that involving stooping, crawling, or climbing. An orthopedic evaluation was completed 2 months after the MEB narrative summary (NARSUM) examination and it noted pain-limited flexion, pain-limited extension, and severe instability. The commander’s statement noted the functional impairment of the inability to wear a backpack and participate in marching and the failure of his APFT run event due to his left knee condition. The VA Compensation & Pension (C&P) examination, 2 months after TDRL entry, indicated pain and discomfort on movement and limited knee flexion. No assessments of instability or motor strength were included. A civilian orthopedic evaluation, 7 months after TDRL entry, noted left knee give away necessitating a knee brace; clicking and grinding sensations; pain with twisting motions; morning stiffness; pain with steps, running and walking along with occasional swelling. On physical examination, there were findings of medial, lateral and infrapatellar medial joint line TTP; crepitus retropatellar area; Lachman’s 1+; F.R.D. test +1 laxity; modified Steinman’s test and crepitus with pain along the medial aspect of the knee. Although this examination was completed 15 months prior to separation from the TDRL, it is the latest evaluation present in the record for Board review.

The initial PEB in January 2004 determined the CI was unfit due to chronic left knee pain and instability. Their decision noted no surgical procedure was recommended and applied a disability rating of 30% for severe instability using VASRD 5257 knee, other impairment of, recurrent subluxation or lateral instability. The PEB also determined that the CI’s condition had not stabilized to the point where a permanent degree of severity could be determined and the CI was placed on the TDRL.

The VA coded the degenerative arthritis of left knee condition as 7805 scar, other analogous to 5010 arthritis, due to trauma substantiated by x-ray findings and initially rated 10% for pain-limited motion due to degenerative arthritis based on the VA C&P examination in June 2004 and a review of the STR. The VA based their rating on arthritis, due to trauma substantiated by X-ray findings. As noted above, this VA C&P examination did not assess the stability of the left knee. A de novo review of all the evidence was completed by the VA and is documented in a report dated 29 April 2005, approximately 10 months prior to the CI’s final separation from the TDRL. It is clear from the report that this review examined all of the examinations noted in the ROM chart above. Based on this review the VA determined the CI’s left knee should be rated at 30% effective 20040309, the date of entry onto the TDRL. The VASRD code was changed to 7805-5257 to indicate the knee instability. However, the condition remained degenerative arthritis of left knee with residual post operative scar. It is not clear why the VA did not apply separate ratings for instability and pain-limited motion. However, it does appear that the VA may have considered both when assigning the disability rating. A 20% rating for instability and a 10% rating for pain-limited motion combine to an overall 30%.

The CI had a remote history of a partial tear of the left ACL in 1971. He had surgery and debridement performed but the ACL was not repaired. In general, if a knee is not completely unstable and the person is not required to regularly perform activities that require an ACL, surgical repair of the ACL is not performed. The CI left active duty in 1972 and then served in the National Guard continuously until he was mobilized and deployed to Iraq in 2003. During his deployment his left knee condition worsened to the point where he had to be medevaced back to CONUS. He then had moderate to severe arthritis of his left knee as well as severe instability and was no longer fit for military service. While he was able to perform activities of daily living, most other activities were significantly limited by his left knee condition. The PEB in 2004 noted both pain and instability but only rated the instability. However separate ratings for instability and ROM impairment are allowed as established by VA policy that was in effect at the time of separation (general counsel opinion of 1 July 1997 and fast letter 04-22 of 1 October 2004). By internal policy and precedent, the Board adheres to this guidance. Therefore, separate ratings for limitations of flexion 5260, limitations of extension 5261 and instability 5257 can and should be applied if all are present in the knee. The PEB determined the CI was unfit for pain and instability. The examinations prior to entrance onto the TDRL show instability and pain-limited flexion, and therefore separate ratings should be applied for both at the time of entry onto the TDRL. The instability as documented on the orthopedic examination in December 2003 was recognized by the PEB as severe and a 30% rating was applied. The pain-limited flexion did not meet the criteria for the minimal compensable level and therefore should be rated at 10%, the minimal compensable level. Pain-limited extension was present on the orthopedic clinic examination 3 months prior to TDRL entry but was not present on the VA C&P examination performed 3 months after TDRL entry. Both examinations are complete and have equal probative value. After discussion, the Board determined that, more likely than not, there was no pain-limited extension of the knee at the time of TDRL entry.

The second PEB in December 2005 coded the pain and limited motion of left knee condition as 5003 arthritis, degenerative (hypertrophic or osteoarthritis) rated at 10% for painful motion. It is not clear if this PEB utilized the civilian orthopedic examination from October 2004 in making its determination for final separation or some other examination that is not present in the record. This orthopedic examination clearly shows continued knee instability due to ACL insufficiency. However, the PEB determined the knee was “described as stable” and rated only for pain and limited motion of the left knee. It changed the VASRD code to 5003 to reflect this.

The examination most proximate to the date of permanent separation from the TDRL in February 2006 is the civilian orthopedic examination done 15 months prior in October 2004. It is not clear why a TDRL evaluation was not completed at a date more proximate to separation. The Board therefore places more probative value on this examination in its determination of the final separation rating. The diagnoses of moderate to severe osteoarthritis of the medial compartment, mild to moderate arthritis of the patellofemoral compartment, and ACL insufficiency are noted. This examination only contains passive ROM evaluations but pain-limited flexion is clearly documented. Pain-limited extension of the knee as measured with active ROM may also have been present but there is no direct evidence to support this and to assume it was present would be mere speculation. Despite the PEB’s determination that the left knee was stable, this examination documents continued instability, albeit possibly to a lesser degree than the examination of December 2003. The VA reviewed both of these examinations as well as its own C&P examination and determined an overall 30% rating.

The Board discussed at length whether the instability at separation from the TDRL should be rated at 30% for severe, 20% for moderate, or 10% for mild. The Board noted that no definitive treatment or surgery was provided during the TDRL period and it is not medically feasible for the ACL insufficiency to have repaired itself during this time period. While the examination prior to TDRL entry appears to document a more severe level of instability than the examination of October 2004, the examinations were performed by different examiners and this could explain the seemingly different levels of instability. More likely than not, the level of instability was similar on these examinations and the level of instability is best described as moderate. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a final separation rating of 20% for the instability and 10% for pain-limited flexion.

Other Conditions. Other conditions identified in the DES file were left shoulder injury/surgery, hypertension and sinusitis. None of these conditions were significantly clinically or occupationally active during the initial 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 degenerative arthritis of right knee, degenerative arthritis of the right shoulder, and pneumonia were noted by the VA proximal to separation, but were not documented in the DES file. 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. In the matter of the left knee instability condition, the Board unanimously recommends a 20% permanent rating coded as 5257 IAW VASRD §4.71a; general counsel opinion of 1 July 1997; and fast letter 04-22 of 1 October 2004. In the matter of the left knee pain-limited flexion condition, the Board unanimously recommends a 10% permanent rating coded as 5260 IAW VASRD §4.71a; general counsel opinion of 1 July 1997; and fast letter 04-22 of 1 October 2004. In the matter of left shoulder injury/surgery, hypertension, sinusitis, the Board unanimously agrees that it cannot recommend any finding 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** |
| **PERMANENT** |
| Left Knee ACL Tear and Instability | 5257 | 20% |
| Pain-limited Flexion of the Left Knee | 5260 | 10% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110719, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans Affairs Treatment Record

 XXXXXXXXXX

 President

 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 XXXXXXXXXXX, AR20120007686 (PD201100513)

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 Reserve retirement.

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 Reserve retirement.

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

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

 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 XXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA