RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxxxxxxxxxxxx BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1100546 SEPARATION DATE: 20030228

BOARD DATE: 20120621

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (2844, Systems Repair Specialist), medically separated for left shoulder condition. He did not respond adequately to operative and rehabilitative treatment and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was placed on limited duty and underwent a Medical Evaluation Board (MEB). Status post left shoulder reconstruction for anterior instability was forwarded to the Physical Evaluation Board (PEB) IAW SECNAVINST 1850.4E. No other conditions appeared on the MEB’s submission. The PEB adjudicated the left shoulder condition as unfitting, rated 10% with application of SECNAVINST 1850.4E and with the Veterans Administration Schedule for Rating Disabilities (VARSD). The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: “Low back injury 1999 in Japan - mis diagnosed and only got worse; Severity of right elbow fracture not taken into full account; Right shoulder instability injured 1997 and 2002 got worse after separation”.

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 other requested conditions are 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 PEB – Dated 20021219** | | | **VA ( ~1 Mo. Pre Separation) – All Effective Date 20030301** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| S/P Left Shoulder Reconstruction Anterior Instability | 5299-5003 | 10% | Residuals, Post Operative Left Shoulder | 5299-5203 | 10% | 20030115 |
| ↓No Additional MEB/PEB Entries↓ | | | Residuals, S/P Fracture Right Radial Head | 5299-5213 | 10% | 20030115 |
| 0% x 1 | | | 20030115 |
| **Combined: 10%** | | | **Combined: 20%** | | | |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that there should be additional disability assigned for conditions which will predictably worsen over time. 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 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 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. The Board also acknowledges the CI's contention suggesting that ratings should have been conferred for conditions not diagnosed while in the service (but later determined to be service-connected by the DVA). 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 all 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.

S/P Left Shoulder Reconstruction Anterior Instability. The CI first his injured non-dominant left shoulder while playing football in 1995 and this was treated conservatively for either a rotator cuff tendinitis versus a posterior dislocation. Per the narrative summary (NARSUM), the CI reinjured his shoulder with recurrent dislocations in 2001 and he failed conservative physical therapy. The injury, dislocations, and physical therapy treatment notes were not in evidence to review. In July 2001 he opted for definitive surgical care and had a very slow post-operative rehabilitation which required an extension of his LIMDU. He continued to have constant pain and had limitations of lifting over 20 pounds, overhead reaching, performing field duties, completing physical training and was referred to an MEB. The non-medical assessment (NMA) corroborated these limitations, in addition documented the CI was working in his MOS, missing 20 hours per week and while he had shown improved potential as a non-commissioned officer (NCO) he displayed an indifference towards a future in the Marine Corps. There were two goniometric range-of-motion (ROM) evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation; as summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Goniometric ROM – L/R Shoulder | MEB ~ 5 Mo. Pre-Sep | VA C&P ~ 1 Mo. Pre-Sep |
| Flexion (0-180) | 160⁰ | 180⁰ |
| Abduction (0-180) | 165⁰ | 180⁰ |
| Comment |  | Painful motion of abduction |
| §4.71a Rating | 10% | 10%\* |

\*4.59 painful motion

At the MEB exam, the CI reported constant pain, worsened with crossing his arms, overhead reaching, wearing a backpack, sleeping on the left side and difficulty with doing field operations. The MEB physical exam demonstrated diminished deltoid strength (4+ out of 5) with the remainder of the muscle exam being normal, negative instability signs, a well healed surgical scar, and normal sensation. At the VA Compensation and Pension (C&P) exam, a month prior to separation, the CI reported pain with pull-ups and pushups, overhead lifting, driving a car for prolong periods of time. He took Naprosyn and Percocet for pain relief. The C&P physical exam demonstrated painful ROM with abduction and adduction, motor strength was not documented and otherwise the exam was similar to the MEB exam. X-rays revealed probable post-operative changes of the left shoulder, otherwise normal findings.

The Board directs attention to its rating recommendation based on the above evidence. The Board notes that both the MEB and VA exams were complete, well documented, and similar in terms of ratable data; and, therefore assigns them equal probative value. The PEB and VA chose different coding options for the condition, but this did not bear on rating. The PEB assigned a rating of 10% coded analogous 5299-5003 for noncompensable limitation of motion of the shoulder joint with the application of the SECNAVINST 1850.4E and was also consistent IAW VASRD 4.71a—schedule of ratings–musculoskeletal system. The VA assigned a rating of 10% coded analogous 5299-5203 (clavicle or scapula, impairment of) also consistent with VASRD §4.71a. The Board agreed there was no evidence of incapacitating episodes to support a 20% rating under the 5003 code. There was no further clinical or radiologic evidence of the joint that suggested non-union of, or malunion of the clavicle or scapula. The recurrent dislocation of the humerus was resolved with the surgery without residual clinical laxity or instability signs. Hence, no alternative shoulder code is supported in justification of a rating higher than 10% for this joint. There was no evidence of ratable peripheral nerve impairment which would provide for additional or higher rating. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board concluded that there was insufficient cause to recommend a change in the PEB adjudication for the left shoulder 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 left shoulder 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** |
| S/P Left Shoulder Reconstruction Anterior Instability | 5299-5003 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110728, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

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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 10 Jul 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, former USMC

XXX XX, former USMC

XXX XX, former USMC

XXX XX, former USMC

XXX XX, former USN

XXX XX, former USN

XXXXXXX

Assistant General Counsel

(Manpower & Reserve Affairs)