RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1100548 SEPARATION DATE: 20050627

BOARD DATE: 20120322

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (91W, Medical Assistant) medically separated for right foot and lumbar spine conditions. The CI injured his ankle while running during basic training in 1999. He was subsequently diagnosed with tarsal tunnel syndrome and underwent surgery in 2002. He fared well post-operatively, but reinjured his ankle later that year and the pain recurred. The CI deployed to Iraq in 2003, and there injured his low back while litter bearing. He was subsequently diagnosed with non-surgical lumbar disc disease, which was unresponsive to conservative modalities. Due to both the ankle and spine conditions, he was unable to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). Right foot pain and lower back pain were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable conditions IAW AR 40-501. No other conditions were submitted by the MEB. Other conditions evidenced in the Disability Evaluation System (DES) are addressed below. The PEB adjudicated the right ankle and lumbar conditions as unfitting; each rated 10%, and each citing criteria of the US Army Physical Disability Agency (USAPDA) pain policy. The CI made no appeals, and was medically separated with a 20% combined disability rating.

CI CONTENTION:“I feel like the issues for PTSD, Right Ankle Tarsal Tunnel Release (February 2002), Lower Lumbar Spine L4-L5 S1 was under rated after discharged from the Army I had a Spinal Fusion to my Lower Back with no relief.”

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20050418** | | | **VA (11 Mo. Post-Separation) – All Effective 20050628** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Right Foot Pain | 5099-5003 | 10% | Right Ankle Tarsal Tunnel Release | 8721 | 10% | 20060522 |
| Chronic Low Back Pain | 5299-5237 | 10% | Traumatic Arthritis, LS Spine | 5242 | 20% | 20060522 |
| ↓No Additional MEB/PEB Entries↓ | | | PTSD | 9411 | 30% | 20051101 |
| Tinnitus | 6260 | 10% | 20060522 |
| Not Service Connected x 2 | | | 20060522 |
| **Combined: 20%** | | | **Combined: 60%** | | | |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred condition continues to burden him. The Board wishes to clarify that it is subject to the same laws for service disability entitlements as those under which the 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 Department of Veterans’ Affairs (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.

Right Foot/Ankle Condition. After the initial injury in 1999, magnetic resonance imaging (MRI) was normal; but, the CI experienced persistent pain and was followed by podiatry. He was ultimately diagnosed with posterior tibial tendonitis and tarsal tunnel syndrome; initially treated with steroid injections. He finally underwent tarsal tunnel release surgery in February 2002. This was met with favorable results until the CI reinjured his ankle in the field and the resultant pain did not respond to repeat steroid injections or other measures. There no records addressing any ankle or foot issues associated with the subsequent 2003 deployment to Iraq. An electromyelogram (EMG) from October 2003 (after redeployment) showed no evidence of posterior tibial neuropathy, but pain and tenderness was noted over the surgical scar. There were four 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.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Right Ankle ROM | Ortho  7 Mo. Pre-Sep | MEB Physical  6 Mo. Pre-Sep | MEB/PT  3 Mo. Pre-Sep | VA C&P  11 Mo. Post-Sep |
| Dorsiflexion (0-20⁰) | 25⁰ | “Normal” | 5⁰ | 15⁰ |
| Plantar Flexion (0-45⁰) | 50⁰ | “Normal” | 20⁰ | 45⁰ |
| §4.71a Rating | 10%\* | 10%\* | 20%\*\* | 10%\* |

\* Conceding §4.59 as below. \*\* For ‘marked’ limitation of motion under 5271.

At the MEB exam, the CI reported frequent slight pain along the medial side of his right foot; exacerbated by wearing boots, running and walking. It was noted that no further surgical interventions were indicated for the condition. The narrative summary (NARSUM) referenced the MEB physical exam, and the CI was also referred to physical therapy (PT) for ROM measurements. Both of these ROM exams, along with a concurrent one from an orthopedic consultant, are charted above. At the VA Compensation and Pension (C&P) exam (significantly remote from separation), the CI reported constant pain with intermittent swelling. The surgical scar was tender to palpation. Pain was also noted with motion. A normal gait was documented by all examiners, including on the unrelated spine exams.

The Board directs attention to its rating recommendation based on the above evidence. It is clear that the PT exam is significantly disparate from the physician examinations. The PT exam listed a single measurement for each plane and did not specify whether the ROM was limited by pain or recorded at the onset of pain. The latter would be more consistent with the markedly lower measurements, since there is no ready clinical explanation for them. For probative value assignment, the members agreed that the MEB physical and MEB orthopedic examinations most reliably reflected disability at separation; given the discordance of the PT exam and temporal distance of the VA exam from separation. There are three coding approaches to the pathology in evidence, although no combinations for separate ratings would comply with the VA Schedule for Rating Disabilities (VASRD) §4.14 (avoidance of pyramiding). These three approaches are: analogous to 5003 (degenerative arthritis) as per the PEB; coding the peripheral neuropathy, i.e., 8721 (neuralgia, common peroneal) as per the VA; or under 5271 (ankle, limitation of motion). The analogous 5003 option yields a 10% rating if §4.59 (painful motion) is conceded. The peripheral nerve code could not be rated any higher than 10% for “mild” impairment since there was only sensory (pain) involvement. The 5271 code could be invoked for a 20% rating if the dubious PT measurements were conceded, but the more probative ROM exams would only support a 10% rating via §4.59. The PEB’s DA Form 199 reflected application of the USAPDA pain policy for rating, but its 10% determination was consistent with §4.71a standards. 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 right foot/ankle condition.

Lumbar Spine Condition. The CI’s back pain, precipitated by a litter lifting injury in Iraq, persisted after redeployment. The pain radiated to both buttocks; and, was treated with PT, activity modification, and medications. An MRI in December 2004 revealed desiccation of the L5-S1 disc with moderate central disc bulge, but no neural impingent. EMGs of both lower extremities were normal. A neurosurgical consultant did not recommend surgery and the CI failed further attempts at rehabilitation, which included epidural steroid injections. There were two goniometric 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.

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM | MEB/PT ~3 Mo. Pre-Sep | VA C&P ~11 Mo. Post-Sep |
| Flexion (90⁰ Normal) | 45⁰ | 55⁰ |
| Combined (240⁰) | 180⁰ | 195⁰ |
| §4.71a Rating | 20% | 20% |

At the MEB exam, the CI reported frequent moderate pain that required frequent breaks from work to stretch and stand. He was unable to sit for long periods, run, march, carry more than 20 pounds, or carry a rucksack. The only lumbar ROM measurements evidenced in the service treatment record (STR) were those recorded at the same PT evaluation which was of compromised probative value, as discussed for the foot condition. The PEB sent a memorandum of discontinuance to the MEB, stating “soldier’s thoracolumbar ROM is quite restricted. He has no spinal lesion which would limit motion to that extent. Is any of the limitation due to pain?” The MEB physician replied with a memorandum which stated, “with respect to [CI’s] restricted ROM, he is in pain on a daily basis and much of this restriction can be attributed to this.” No repeat ROM evaluation was performed, or requested by the PEB. There were numerous outpatient notes in the STR addressing the back condition, but none commented on ROM grossly or otherwise. A normal gait and absence of spasm were documented on several entries; a few noted “some pain” on flexion; and several PT notes contained the automated entry “patient appeared uncomfortable.” A brief neurosurgical addendum stated, “he has pain with extension, pain on rotation but minimally, and he has a negative straight leg raising with a normal motor and sensory examination. At the (delayed) VA C&P exam, the CI continued to report radiating back pain. He was employed as a carpenter but it was stated that he was unable to do anything more than drive a vehicle around a shipyard. The ROMs charted above were noted to be pain limited, and there was no DeLuca degradation with repetition.

The Board directs attention to its rating recommendation based on the above evidence. The Board notes that both ROM evaluations in evidence result in a rating of 20% since, on each, flexion falls within the range of 35-60 degrees specified for that rating. The MEB PT evaluation does not comply adequately with VASRD §4.46 (accurate measurement), does not comport clinically with the known pathology or other clinical entries, and the VA evaluation is significantly remote from separation and vulnerable to secondary gain influence. There is, however, no contemporary service evidence which is irreconcilable with the PT ROMs and no competing ROM evaluation which would approach §4.46 standards. The PEB’s 10% rating was clearly derived from the USAPDA pain policy and was not compatible with VASRD §4.71a standards applied to the ROMs under consideration. Both the PEB’s 5237 (lumbosacral strain) and VA’s 5242 (degenerative arthritis of the spine) coding choices were reasonable clinical fits and neutral to rating. There was no evidence of ratable peripheral nerve impairment or documentation of incapacitating episodes in this case which would provide for additional or higher rating. After due deliberation, in consideration of all the evidence, the Board agreed that VASRD §4.3 (reasonable doubt) should prevail over the probative value concerns raised by this case and, accordingly, recommends a separation rating of 20% for the lumbar spine condition. The action officer recommends the 5242 code for its clinical fit with the diagnosis by imaging.

Contended Posttraumatic Stress Disorder (PTSD). The CI’s application asserts that a compensable rating should be considered for PTSD. The CI first sought mental health evaluation after his PEB adjudication, but before separation (note dated 21 April 2004). The examiner noted that the CI was upset over his military disability rating and quoted the CI as stating, “I have a friend who got next to 30% due to his posttraumatic stress.” The examiner listed PTSD as one of the Axis I diagnoses, and noted that the CI had entered group therapy on base. Psychiatric medication was started, and there is only a single follow-up note in evidence prior to separation. At that time (four weeks prior to separation), the CI was stable with mood disturbance as the only finding on mental status exam. His anti-depressant was switched due to side effect. No psychiatric profile was initiated, and the commander’s statement documented good performance within the parameters of the profiled physical limitations. This condition was reviewed by the action officer and considered by the Board. There was no evidence for concluding that this condition interfered with duty performance to a degree that could be argued as unfitting. The Board determined therefore that the PTSD condition was not subject to service disability rating.

Remaining Conditions. Other conditions identified in the DES file were mild scoliosis and headaches. 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 service disability rating. Additionally, tinnitus and several other non-acute conditions were noted in the after separation VA rating decision, 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 service disability 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. As discussed above, PEB reliance on the USAPDA pain policy for rating the right foot and lumbar conditions was operant in this case and the conditions were adjudicated independently of that policy by the Board. In the matter of the right foot condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the lumbar spine condition, the Board unanimously recommends a rating of 20%, coded 5242 IAW VASRD §4.71a. In the matter of the contended PTSD, the Board unanimously agrees that it cannot recommend a finding of unfit for additional service disability rating. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as unfitting for additional service disability rating.

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:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Right Ankle Pain | 5099-5003 | 10% |
| Degenerative Disc Disease, Lumbosacral Spine | 5242 | 20% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110724, 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. 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

Deputy Assistant Secretary

(Army Review Boards)