RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100558 SEPARATION DATE: 20050428

BOARD DATE: 20120427

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SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Specialist/E-4 (13B1O/Cannon Crewmember), medically separated for comminuted fracture, left first digit rated as moderate. He initially presented in September 2004 with a comminuted fracture of his left first digit when a 50 caliber machine gun fell on the great toe of his left foot*.* Despite several months of physical therapy his pain persisted and he was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. In March 2005, podiatry services placed him on a permanent L3 profile and recommended a Medical Evaluation Board (MEB). His commander recommended he be retained and filed a memorandum to the MEB requesting a MOS Medical Retention Board (MMRB), however, his case was not considered by the MMRB. The MEB forwarded left first digital comminuted fracture with degenerative joint disease involving both proximal and metatarsal phalangeal points 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 comminuted fracture, left first digit rated as moderate condition as unfitting, rated 10%; with application of the US Army Physical Disability Agency (USAPDA) pain policy, DoDI 1332.39 and Veterans Administration Schedule for Rating Disabilities (VASRD), respectively. The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: “I dropped a .50 caliber machine gun on my left great toe while cleaning weapons in the arms room. My left great toe was shattered in multiple places and (I) was sent to the ER for treatment. I was placed in a full cast from toes to bottom of knee (sic), which I believed it was unnecessary. After several weeks in a cast and "walking boot" my ankle was very fragile. My balance was off and my gait changed. My gait changed since I had to compensate because I could not put pressure on my left toe. After walking with a different gait a tendon on my left ankle was attenuated and it would snap back and forward. I was discharged from the US ARMY without any further treatment. The PEB recommended a 10% rating and the VA denied that claim at first. After 2 years from separation I had to have surgery on my left ankle for that same reason. It was difficult for me to play sports, exercise and find employment which required activities I could not perform. The VA changed the rating to 10% for my ankle and 10% for Allergic Rhinitis/sinusitis in December 12 of 2007 when the signs and symptom where (sic) the same back at the time of separation. I believe that my claim was NOT rated correctly and would like for the PDBR to review the paperwork as evidence and make changes to the rating if something was done incorrectly. Thank you.” He also lists his VA claims and award letters as attachments in support of his application.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service PEB – Dated 20050330** | **VA (2 Weeks Prior To Separation) – All Effective Date 20050429** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Comminuted Fracture, Left First Digit rated as Moderate | 5284 | 10% | Status Post Closed Fracture Left Great Toe with Bilateral Hallux Valgus | 5284 | 0%\* | 20050415 |
| ↓No Additional MEB/PEB Entries↓ | 0% x 2 others/Not Service-Connected x 2 | 20050415 |
| **Combined: 10%** | **Combined: 0%\*\*** |

\*Never increased.

\*\*Increased to 10% 20060807 when Allergic Rhinitis increased from 0% to 10%. Increased to 20% 20070426 when Left Ankle Instability added. Temporary increase to 100% 20070808 for left ankle surgery and reverted back to 20% 20071001. Increased to 40% 20100813 when PTSD added.

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 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 also acknowledges the CI’s contention that suggests ratings should have been conferred for other conditions documented at the time of separation. The Board wishes to clarify that it is subject to the same laws for 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. However the Department of Veterans’ Affairs (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. 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.

Comminuted Fracture, Left First Digit Rated as Moderate Condition. The CI suffered a closed comminuted fracture of the left lateral distal phalanx of the left great toe and subungual hematoma in September 2004 when a machine gun fell on his left foot. He was treated with a non-weightbearing short leg cast. In October 2004 he progressed to a CAM boot and after an additional 3 weeks progressed to normal footwear. An X-ray on October 14, 2004 showed a healing fracture. In November 2004, his symptoms had decreased but pain remained 6/10. Mild pain with palpation and range-of-motion (ROM) of the left great toe was noted, as was motor strength of 5/5, normal sensation, and full ROM of both ankles. Continued healing of the fracture was shown on X-ray in December 2004. Also in December 2004, the CI was noted to have increased pain with running, prolonged standing and walking and deceased pain with rest and removing his shoe. By January his pain was noted to be mild but increased with running, jumping, and prolonged standing. His pain remained 6/10. In March 2005 his pain had continued at 6/10 and he remained unable to walk, stand for prolonged periods, or run without significant pain and an MEB was initiated. Decreased ROM of the left great toe was noted at this examination.

The MEB narrative summary (NARSUM) examination, completed approximately 6 weeks prior to separation, noted pain with palpation and ROM of the left first metatarsal phalangeal joint. Muscle strength was 5/5 bilaterally and sensation as intact. Extension of left first metatarsal phalangeal joint was less than that on the right. His present status noted the CI could not perform the functions of his MOS due to his chronic left first digit and foot pain. He remained unable to run or tolerate prolonged standing or walking. His AMA pain rating was slight intensity and occasional frequency. The commander’s letter noted he was an excellent soldier but was unable to perform the duties required for his MOS and the commander recommended MOS Medical Review Board (MMRB) for reclassification. A VA C&P examination was completed two weeks prior to separation and it noted a similar history. Examination noted normal gait and no use of assistive devices such as crutches, braces, or canes. Bilateral hallux valgus was noted but no obvious limitation of function for standing or walking was noted and there was no obvious use of corrective shoes wear. There were no findings of painful motion, edema, abnormal circulation, weakness, atrophy, or tenderness in the feet and toes. Neurologic exam was normal. X-rays documented bilateral mild hallux valgus.

Both the PEB and VA coded the condition as 5284 foot injuries, other, but the PEB rated the condition 10% and the VA rated the condition 0%. Although the PEB utilized the USAPDA pain policy for rating, its 10% determination was consistent with §4.71a standards. The VA C&P did not document painful motion and the VA rated the condition at 0% secondary to the absence of moderate symptoms.

Painful motion along with intolerance to running as well as prolonged standing and walking was noted on the MEB NARSUM but not the VA C&P examination. There is a disparity between these examinations, with implications regarding the Board's rating recommendation. The Board deliberated the probative value of these evaluations and carefully reviewed the record for corroborating evidence in the 12-month period prior to separation. The service treatment record documents findings consistent with the MEB NARSUM examination on every outpatient visit after the date of the initial injury. The Board therefore concludes that these findings were present at the time of separation and they should be considered moderate. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s rating decision for the comminuted fracture, Left First Digit condition.

Left Ankle Condition. The Board acknowledges the CI’s assertion that his left ankle condition is related to his unfitting comminuted fracture, left first digit condition and therefore should be subject to additional disability rating. However, the Board must note that a causality linkage of this contended condition with the unfitting primary condition, even if conceded, is not a basis in itself for separation disability rating. A concomitant condition of this nature must itself be independently unfitting at the time of separation to merit additional rating.

The MEB NARSUM examination documented normal bilateral ankle ROM with muscle strength 5/5 in all groups bilaterally and normal sensation. There is no mention of painful motion of either ankle. The MEB physical performed on March 15, 2005 and documented on a DD Form 2808 did note decreased ROM and strength of the left ankle. The VA C&P examination did not specifically mention an ankle examination but a normal gait was noted. In fact, there is no report of abnormal gait in the record prior to July 2007, more than 2 years after separation. A VA C&P podiatry exam of July 16, 2007, more than 2 years after separation, did document abnormal gait and the CI had ankle surgery in August 2007 for instability. The VA determined his ankle instability was related to his left great toe fracture and therefore service-connected the ankle instability effective April 26, 2007, 2 years after separation from service. It was initially rated 10%, then increased to 100% for the surgery effective August 8, 2007, and then decreased back to 10% effective October 1, 2007, coded 5299-5271. There is no evidence that ankle instability or decreased or painful ankle ROM was present at the time of separation from service to a degree that would have prevented the CI from performing the duties required of his MOS. This condition did not carry an attached profile and was not implicated in the commander’s statement. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of a left ankle condition as an unfitting condition for separation rating.

Allergic Rhinitis/Sinusitis. This condition was reviewed by the action officer and considered by the Board. It was not significantly clinically or occupationally active during the MEB period, did not carry an attached profile, and was not implicated in the commander’s statement. There was no evidence for concluding that this condition interfered with duty performance to a degree that could be argued as unfitting. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of this condition as an unfitting condition for separation rating.

Remaining Conditions. Other conditions identified in the DES file were mild hearing loss, low back pain, pterygium, arthralgias of bilateral knees, bilateral wrist pain, and trouble sleeping. None of these conditions were significantly clinical 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 separation rating. The Board therefore has no reasonable basis for recommending any additional unfitting conditions for separation rating.

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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 comminuted fracture, left first digit rated as moderate was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the comminuted fracture, left first digit condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the left ankle and allergic rhinitis/sinusitis conditions, the Board unanimously agrees that it cannot recommend any finding of unfit for additional rating at separation. In the matter of the mild hearing loss, LBP, pterygium, arthralgias of bilateral knees, bilateral wrist pain, and trouble sleeping conditions or any other medical conditions eligible for Board consideration; the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation.

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

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Comminuted Fracture, Left First Digit, rated as Moderate | 5284 | 10% |
| **COMBINED** | **10%** |

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

 XXXXXXXXXXXX

 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 XXXXXXXXXXXX, AR20120008439 (PD201100558)

I have reviewed the enclosed Department of Defense Physical Disability Board of Review (DoD PDBR) recommendation and record of proceedings pertaining to the subject individual. Under the authority of Title 10, United States Code, section 1554a, I accept the Board’s recommendation and hereby deny the individual’s application.

This decision is final. The individual concerned, counsel (if any), and any Members of Congress who have shown interest in this application have been notified of this decision by mail.

 BY ORDER OF THE SECRETARY OF THE ARMY:

Encl XXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA