RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100584 SEPARATION DATE: 20041202

BOARD DATE: 20120229

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (91W/Health Care Specialist), medically separated for a right lower leg/ankle condition (chronic pain, due to delayed union, stress fracture right fibula). The CI was running and felt a pop above his right ankle which was a fracture felt to be a completion of a stress fracture. He did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Right distant fibula delay union 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 pain due to delay union stress fracture right fibula condition as unfitting, rated 10%, with specified application of the USAPDA pain policy. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “It should be changed because the level of disability of my fractured right distal fibula is so painful that I cannot stand over 10 minutes. Also, I cannot run or jog anymore and most of the time the pain is so bad with the weather especially when is raining or snowing that I have to wear a brace. I have to wear special orthotics everyday due to fact that this injury changed my walking mechanics to a point that affects my back as well. My right distal fibula injury is a permanent disability of which I have never recovered. On the other hand, even though I was not found unfit because of my dried eye syndrome, lower back condition, bilateral tinnitus, migraines and headaches conjunctivitis (dry eyes), sexual dysfunction and Tinea Pedis; these condition should be evaluated in accordance with Department of Defense INSTRUCTION NUMBER 6040.44, which states: “The PDBR shall review appeals by eligible individuals as provided for in Reference (b) pertaining to conditions indentified but not determined to be unfitting by the Physical Evaluation Board (PEB) of the Military Department concerned”. As a result, I am respectfully requesting from this honorable Board to evaluate those conditions for the purpose of combined rating. Retaking the issue of my right distal fibula injury, as I said, I have to wear especial orthotics and braces that were provided by the Department of Veterans Affairs due to that injury. Therefore, giving the level of disability of my right distal fibula injury I think that the rating of 40% would be fair and just.”

RATING COMPARISON:

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| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20040816** | | | **VA (1 Mo. After Separation & Later\*) – All Effective 20041203** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Pain, Right Due to Delay Union Stress Fracture Right Fibula | 5099-5003 | 10% | Residual of Fx of Rt Distal Fibula w/ Stress Syndrome to Include Rt Ankle Pain | 5262 | 10% | 20050114 |
| ↓No Additional MEB/PEB Entries↓ | | | DJD of the Right Knee | 5010 | 10%\* | 20050114 |
| GERD | 7307-7346 | 30%\* | **20060522** |
| Major Depressive Disorder | 9434 | 30%\* | **20091020** |
| Lumbar Strain | 5237 | 10%\* | **20100415** |
| Keratoconjunctivitis Scicca | 6018 | 10%\* | 20050114 |
| 0% x 1/Not Service Connected x 18 | | | 20050114 |
| **Combined: 10%** | | | **Combined: 70%\*** | | | |

\* VA initial rating was for the right leg coded 5262 at 10% (combined 10%) with other conditions added by later rating determinations, all effective 20041203 (combined 70%) as charted above; added Migraines 8100 at 30% effective 20061004 (combined 80%); increased OSA 6847 to 30% effective 20070309 then OSA at 50% and added tinnitus 6260 at 10% effective 20100411 (combined 90%)

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 VA 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.

The Board also makes note that some of the CI’s contended conditions are derived from VA evaluations performed after separation, diagnosing conditions which were not addressed by the PEB. By policy and precedent the Board has limited its jurisdiction for recommending unadjudicated conditions as unfitting and subject to additional separation rating to those conditions which are evidenced in the core DES file. The core DES file consists of the MEB referral document (DA Form 3947), the PEB adjudication document (DA Form 199), the narrative summary (NARSUM) (including any addendums or referenced examinations), the MEB physical exam, the commander’s statement, the physical profile(s), and any written appeals or internal DES correspondence.

Right Fibula Stress Fracture Delayed Union and Pain (Right Lower Leg/Ankle) Condition. There were two goniometric ranges-of-motion (ROM) evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation.

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| Right Ankle ROM | MEB ~ 8 Mo. Pre-Sep | VA C&P ~ 1Mo. After-Sep |
| Dorsiflexion (0-20) | 10⁰ | 5⁰ |
| Plantar Flexion (0-45) | 40⁰ | 45⁰ |
| Comment | No gross motor or sensory deficit; Peroneal strength 5/5 as well as tibialis anterior and gastrocnemius – soleus muscle groups; no external rotation or squeeze test; no gross motion at the fracture site; x-ray ‘non-healed’ fibula fracture\* see text | Pain on the right, eversion 10 degrees bilaterally; inversion 20 degrees bilaterally; no obvious swelling redness or inflammation; increase in pain, but no decrease in ROM with repetitive testing; no fatigue, weakness or lack of endurance related to ankle ROM; x-ray well-healed fracture site |
| §4.71a Rating | 10% | 10% |

Radiographs at the MEB timeframe (eight months pre-separation) demonstrated consistent distal fibula fracture findings of callus formation (2 cm) at the fracture site with correlating increased uptake on bone scans and questionable bridging. The NARSUM indicated the CI was able to walk without pain, but was unable to run without pain, and the CI was on as needed (but, used daily) narcotic pain medication. The VA exam, one month after separation indicated continued pain and tenderness; however, radiograph at that time indicated findings were: “There is a well-healed fracture involving the distal right fibula. The fracture site is well healed. The ankles are otherwise normal. The joint spaces are well maintained.” Impression was: “HEALED FRACTURE INVOLVING THE RIGHT DISTAL FIBULA, OTHERWISE NORMAL VIEWS OF THE ANKLES.”

The Board considered the VA exam had the highest probative value for rating as it was six months closer to the date of separation. The PEB coding of 5099-5003 was analogous to ankle arthritis and although the pain policy was applied, rating the lower leg and ankle under VASRD only criteria would also result in a 10% rating of either exam charted above. The VA coding under 5262, “(tibia and) fibula, impairment of,” at 10% for “with slight (knee or) ankle disability.” The Board considered alternate coding of 5271 for limited ankle motion, but the evidence did not support greater than a moderate (10%) ankle impairment. The Board also considered if the entirety of the record including the degree of the CI’s pain, use of braces and orthotics, and pain medication supported a higher rating analogously to 5262 for moderate (20%) or marked (30%) impairment due to the CI’s fibula condition. Although ideal coding would be 5299-5262 at 10%, the 5099-5003 coding was considered acceptable and carried the same rating level of 10%. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s 10% rating decision for the right fibula/ankle condition.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for lower back condition (VA 10%), bilateral tinnitus (VA 10%), migraines and headaches (VA 30%), conjunctivitis (dry eyes) (VA 10%), sexual dysfunction (VA 0%) and tinea pedis (VA 0%). The conjunctivitis condition was mentioned in the DES file. There was no significant visual acuity impairment (corrected to normal vision) and the condition was not profiled or noted in the commander’s statement. Conjunctivitis (dry eyes/Keratoconjunctivitis scicca) was reviewed by the action officer and considered by the Board. There was no evidence for concluding that any eye condition interfered with duty performance to a degree that could be argued as unfitting. None of the remaining conditions were noted in the DES file. Sexual dysfunction is not a condition constituting a physical disability IAW DoDI 1332.39. The lower back, bilateral tinnitus, migraines and headaches, sexual dysfunction and tinea pedis conditions 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 determined therefore that none of the stated conditions were subject to service disability rating.

Other non PEB conditions: There were several conditions that were recognized by the VA as service-connected with rating effective within 12 months of separation, including right knee DJD (VA 10%), depression (VA 30%), and GERD (VA 30%) that were not mentioned 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 determined therefore that none of the stated conditions were subject to service disability rating.

Remaining conditions: There were several non acute conditions or medical complaints documented in the DES file including foot trouble and a positive screening skin test (+PPD) for tuberculosis, without signs or symptoms of tuberculosis. The foot trouble, as related to the right lower leg condition was considered above. 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 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. As discussed above, PEB reliance on the USAPDA pain policy for rating the right lower leg condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of right lower leg and ankle condition and IAW VASRD §4.71a, the Board unanimously recommends no recharacterization of the PEB 10% rating. In the matter of the conjunctivitis condition 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** |
| Right Fibula Stress Fracture Delayed Union and Pain | 5099-5003 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110802, 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

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 XXXXXXXXXXXXXXXX, AR20120004764 (PD201100584)

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 XXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA