RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1100609 SEPARATION DATE: 20070315

BOARD DATE: 20120227

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (11B/Infantryman), medically separated for chronic pain, right knee*.*  The CI injured his right knee in June 2005 while on a 12 mile road march. MRI revealed a medial meniscus tear. He underwent arthroscopic surgery (partial meniscectomy and chondral picking) in January 2006. Post-operative treatment included medications, physical therapy, and Synvisc injections. 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/H2 profile and underwent a Medical Evaluation Board (MEB). Right knee pain was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Three other conditions, as identified in the rating chart below, were forwarded on the MEB submission as medically acceptable conditions. Other conditions included in the Disability Evaluation System (DES) file are discussed below. The PEB adjudicated the chronic right knee pain condition as unfitting, rated 10% with specified application of the US Army Physical Disability Agency (USAPDA) pain policy. The CI appealed for a Formal PEB (FPEB) which upheld the PEB findings. He also appealed to USAPDA and to his Congressional representative; on both occasions the USAPDA reaffirmed the FPEB adjudication. He was then medically separated with a 10% disability rating.

CI CONTENTION: “The board only evaluated my right knee. I also have TBI, PTSD, Impairment of Clavicle, Tinnitus, Migraine headaches, Impaired hearing and Paralysis of the seventh cranial nerve from being blown up in Iraq. I had a mortar explode about 10’ from me and was not evaluated for this the board told me to take my issues to the VA.” He additionally lists his VA conditions and ratings as per the rating chart below. A contention for their inclusion in the separation rating is therefore implied.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service FPEB – Dated 20070105** | | | **VA (~2 Mos. After Separation) – All Effective 20070316** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Pain, R Knee | 5099-5003 | 10% | R Knee Strain | 5260 | 10% | 20070525 |
| Facial Neuralgia | Not Unfitting | | Neuropathy, R Side of Face | 8299-8207 | 10% | 20070514 |
| Migraine Headaches | Not Unfitting | | Migraine Headaches | 8100 | 0% | 20070511 |
| Mild S/N Hearing Loss, R Ear | Not Unfitting | | Hearing Loss R Ear | 6100 | 0% | 20070605 |
| ↓No Additional MEB/PEB Entries↓ | | | R Shoulder Sprain | 5203 | 10% | 20070525 |
| Tinnitus | 6260 | 10% | 20070605 |
| 0% x 2 / Not Service Connected x 5 | | | 20070525 |
| **Combined: 10%** | | | **Combined: 30%\*** | | | |

\* Added TBI 8045 at 40% and PTSD 9411 at 30% effective 20081105 (combined 70%)

ANALYSIS SUMMARY: The Board acknowledges the CI’s contention that suggests service 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 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. 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 makes note that some of the CI’s contended conditions (traumatic brain injury (TBI), posttraumatic stress disporder (PTSD), tinnitus, impairment of clavicle/right shoulder sprain) 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. Contended conditions which are not eligible for Board recommendations on this basis remain eligible for submission to the Army Board for Corrections of Military Records (ABCMR).

Right Knee Condition. There were three post-operative right knee examinations, including goniometric range-of-motion (ROM) evaluations, with documentation of additional ratable criteria, in evidence which the Board weighed in arriving at its rating recommendation. These exams are summarized in the chart below.

|  |  |  |  |
| --- | --- | --- | --- |
| Goniometric ROM –  R Knee | PT ~ 13 Mo. Pre-Sep  (*20060201*) | MEB ~ 5 Mo. Pre-Sep  (*20061019*) | VA C&P ~ 2 Mo. Post-Sep  (*20070525*) |
| Flexion (140⁰ normal) | 90⁰ | 135⁰ | 90⁰ |
| Extension (0⁰ normal) | 0⁰ | 0⁰ | 0⁰ |
| Comment | 3.5 weeks post-operative, TTP, 1+ effusion, warm, R quad atrophy (no measurements), neuro normal | TTP, no effusion, ligament exam stable, neuro normal; DD 2808 (*20061002*) FROM, TTP, pain w/ flexion, popping w/ ROM, no edema | Mild pain with flexion, no tenderness, normal gait, no laxity or instability, no additional loss with repetition |
| §4.71a Rating\* | 10% | 10% | 10% |

A physical therapy note, 13 months prior to separation (three and a half weeks post-surgery), reported limited flexion, tenderness, “1+” effusion, knee warmth, and right quadriceps atrophy (without measurement). The NARSUM, five months prior to separation, documented mild ROM limitation, tenderness to palpation, and well healed arthroscopic portal scars. Ligament laxity tests were negative, including Lachman’s, pivot shift, anterior/posterior drawer, and varus/valgus stress. The MEB physical exam, documented on DD Form 2808 and dated earlier that month, noted full ROM, pain and popping with flexion, tenderness to palpation, absence of edema, and a normal neurological evaluation. As indicated above, pre-operative radiological studies showed medial meniscal pathology, and the CI had meniscal surgery in January 2006 (14 months prior to separation).

The VA Compensation and Pension (C&P) exam, two months after separation, reported greater limitation of flexion with mild pain over the patella with flexion. The remainder of the exam was normal, with no tenderness, no laxity/instability, and no additional loss with repetition. Knee radiographs were normal.

The Board considered alternative rating options and the possibility of dual coding for the right knee condition. All exams proximate to separation noted an absence of objective ligament laxity or mechanical instability, so coding under 5257, for recurrent subluxation or lateral instability, was not warranted. Locking, popping, swelling, and subjective instability of the right knee was noted on the MEB history (DD Form 2807-1), five months prior to separation. One post-operative instance of effusion was noted in a physical therapy note 13 months prior to separation (three and a half weeks after surgery); this was likely residual from surgery, given its proximity. Effusions or locking were not observed in either of the exams proximate to separation, so coding under 5258, which requires “frequent episodes of “locking,” pain, and effusion into the joint,” was not appropriate. The CI had documented meniscal pathology, and underwent an arthroscopic partial medial meniscectomy 14 months prior to separation, so the 5259 post-menisectomy code would be a rational coding option. Nevertheless, the PEB’s analogous 5003, degenerative arthritis, is acceptable, and does not result in a less favorable rating. The Board determined that, without a minimum compensable limitation under another code (beyond §4.59 or §4.40), there were insufficient symptoms to support dual rating of the right knee. Thus there is no route to higher than a 10% rating under any other applicable codes and no criterion for dual coding of the joint impairment. Although there is no compensable ROM deficiency proximate to separation, there is sufficient evidence of painful motion (§4.59) and/or pain with use (§4.40) to justify a minimal compensable rating under §4.71a. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s rating decision for the right knee condition.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were facial (seventh cranial) neuralgia (VA 10%), migraine headaches (VA 0%), and mild sensorneural hearing loss (VA 0%). The CI addressed the neuralgia and hearing loss conditions in his rebuttal to the PEB, stating he could not wear his hearing aid, helmet, or chemical protective gear due to his facial pain, and that his hearing loss caused him difficulty with communication. The comander’s statement also noted the CI could not wear his issued protective gear (it also noted the CI could not lift greater than 20 lbs, although this restriction was not documented elsewhere in the DES file), but did not mention hearing loss. The permanent profile stated the CI was able to wear all chemical protective equipment, it did not restrict him from wearing a helmet, and it mandated an annual hearing test (H2 designation). The FPEB responded to the CI’s rebuttal, stating:

Soldier's claim that he has not been properly evaluated by neurology and audiology is not substantiated by the medical evidence provided with the Medical Board. He was evaluated on 18 April 2006 by neurology and his condition was found to be medically acceptable. Soldier was evaluated by audiology on 14 April 2006 which noted his problems with tolerating his hearing aids, but found his condition to be medically acceptable. The PEB notes that a neurologist was a member of the Soldier's MEB. Soldier's claim that daily narcotics were required to control his knee pain is not substantiated by his medication profile.

The USAPDA responded to the CI’s rebuttal, stating the case was properly adjudicated by the FPEB. The USAPDA responded similarly to a Congressional inquiry, noting “…only the right knee pain significantly interfered with his abilities to accomplish his assigned duties.”

The Board’s threshold for countering DES fitness determinations is higher than the VASRD §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard. The established DES (and Board applicable) principle for fitness determinations is that they are performance-based. Clearly, there was conflicting opinion in the record, as to whether the CI’s facial neuralgia and/or hearing loss interfered with his duty performance. The service treatment record (STR) indicates the CI experienced neuropathic pain on the right side of his face, and this may be consistent with an inability to wear a helmet, chemical protective mask, or ear muffs; although this was not a profile restriction. During both service and VA exams, the CI indicated he could not tolerate wearing ear phones for an air conduction audiogram. Both exams indicated speech discrimination was good in both ears, and the VA exam indicated good bone condution hearing. The VA general exam, two months after separation, indicated the CI was wearing a hearing device in the right ear, and indicated a loss of sharp from dull discrimination over the right side of the face; there was no indication of hyperesthesia or pain in the ear canal or right face.

There was insufficient evidence from the record that either the hearing loss or the migraine headaches significantly interfered with satisfactory duty performance. Service audiologic evaluations revealed good word recognitions scores, and by the time of the VA audiologic exam two months after separation, the CI had apparently been fitted with a hearing aid that he could tolerate (“…has worn hearing aid … since 2005”). The VA examiner found normal bone conduction hearing in the right ear, and the Maryland CNC speech discrimination score was 92 in that ear. There was no evidence the CI’s migraine headaches significantly interfered with duty performance. All of thes conditions were reviewed by the action officer and considered by the Board. There was insufficient evidence from the record that any of these conditions significantly interfered with satisfactory duty performance. All evidence considered, there is not a preponderance of evidence in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the facial neuralgia, right ear hearing loss or migraine headaches conditions.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for impairment of the clavicle (VA 10% for right shoulder sprain), TBI (VA 40% from 5 November 2008), PTSD (VA 30% from 5 November 2008), and tinnitus (VA 10%). None of these, conditions were 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 of these conditions be added as unfitting conditions for separation rating.

Remaining Conditions. Other conditions identified in the DES file were blurred vision, fractured ribs, right leg stress fracture, occasional dizziness, and insomnia (secondary to pain). Several additional non-acute conditions or medical complaints were also documented. None of these conditions were occupationally significant 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. No other conditions were service-connected with a compensable rating by the VA within twelve months of separation or contended by the CI. 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. As discussed above, PEB reliance on the USAPDA pain policy for rating the right knee condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the right knee condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the facial neuralgia, right ear hearing loss and migraine headaches conditions, the Board unanimously recommends no change from the PEB adjudications as not unfitting. In the matter of 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** |
| Chronic Right Knee Pain | 5099-5003 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110729, 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

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

Deputy Assistant Secretary

(Army Review Boards)