RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100641 SEPARATION DATE: 20071205

BOARD DATE: 20120516

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, Infantry) medically separated for bilateral knee and chest wall conditions. All conditions were secondary to multiple shrapnel injuries incurred from a rocket propelled grenade in 2006 while deployed to Afghanistan; and, which resulted in medical evacuation and multiple surgical interventions. The CI suffered persistent pain in both knees associated with retained shrapnel; and, persistent chest wall pain complicating tube thoracostomies. The knee and chest wall conditions could not be adequately rehabilitated 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). Left knee, right knee, and chest wall conditions were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Additionally posttraumatic stress disorder (PTSD) was evaluated by the MEB, but forwarded as a medically acceptable condition. The PEB adjudicated the knee submissions as a single unfitting condition, rated 0%, citing criteria of the US Army Physical Disability Agency (USAPDA) pain policy; and, the chest wall condition as unfitting, rated 0%, citing criteria of the Veterans Administration Schedule for Rating Disabilities (VASRD). The PTSD condition was determined to be not unfitting. The CI made no appeals, and was medically separated with a 0% combined disability rating.

CI CONTENTION: “Request review lAW DoDI 6040.44. Ratings do not reflect conditions at the time of separation and seem contradictory to narratives provided by Doctors. Ratings do not reflect long term issues for wounds received in combat. PTSD not evaluated for rating at time of separation.” The application additionally refers to current VA ratings, to include 30% for PTSD (effective 20100701) and an additional 10% rating referable to his right knee (effective 20100408). Attached and reviewed were separate letters from treating clinical psychologists dated 20080211 and 20110810.

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in DoDI 6040.44 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 PTSD condition, as requested for consideration, and the unfitting knee and chest conditions meet the criteria prescribed in DoDI 6040.44 for Board purview; and are accordingly addressed below. The remaining conditions rated by the VA at separation, and listed on the DA Form 294 application, 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 Army Board for the Correction of Military Records (BCMR).

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20070820** | | | **VA (1 Wk. Post-Separation) – All Effective Date 20071206** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Bilateral Knee Pain | 5099-5003 | 0% | Right Knee Condition | 5257 | 0% | 20071212 |
| Left Knee Condition | 5257 | 0% | 20071212 |
| Scar, Left Knee | 7802 | 0% | 20071212 |
| Scar, Right Knee | 7802 | 0% | 20071212 |
| Group XXI Muscle And Nerve Injury | 5321 | 0% | Residual Rib Fracture | 5299-5297 | 0% | 20071212 |
| Residual Scar, Chest | 7802 | 0% | 20071212 |
| Post-Traumatic Stress Disorder | Not Unfitting | | Post-Traumatic Stress Disorder | 9411 | 10%\* | 20071126 |
| No Additional MEB/PEB Entries | | | Lumbar Spine Condition | 5237 | 10% | 20071212 |
| Right Ankle Condition | 5271 | 10% | 20071212 |
| Left Ankle Condition | 5271 | 10% | 20071212 |
| Tinnitus | 6260 | 10% | 20071212 |
| 0% X 3 / Not Service-Connected x 2 | | | 20071212 |
| **Combined: 0%** | | | **Combined: 40%** | | | |

\* Increased to 50% effective 20071206 based on letter from clinical psychologist dated 20080211.

ANALYSIS SUMMARY: The Board notes the current VA ratings listed by the CI for his service connected conditions and his request for a rating for PTSD; and, wishes to clarify that it is subject to the same laws for service disability entitlements as those under which the Military Disability Evaluation System (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 DVA evidence proximate to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of rating determinations for disability at the time of separation. While the DES considers all of the service member's medical conditions, compensation can only be offered for those medical conditions that cut short the member’s service 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.

Knee Condition(s). Both knees suffered multiple shrapnel penetrations and minor bony injury. Both required open debridement, irrigation and delayed primary closure. There was no evidence of significant ligamental or meniscal damage in either knee, but there were indications of some soft tissue and muscle damage. The MEB radiographic report for the left knee stated, “soft tissue defect in the lateral tibial region on the left with underlying shrapnel fragments. No fracture.” That for the right knee stated, “soft tissue defect in the medial tibial region with underlying shrapnel fragments and fracture of the medial tibial metaphysis.” The right leg also suffered an associated ankle fracture (lateral malleolus), albeit not subject to Board rating consideration. The VA examinations also described modest scar depressions. Outpatient notes and the narrative summary (NARSUM) both document persistent pain in each knee prompted by routine activities. The NARSUM noted “continued pain in the areas of his bilateral blast wounds, difficulties with prolonged standing, walking, running or load bearing activities.” The VA Compensation and Pension (C&P) examination, performed a week after separation, documented “daily 8-9/10 bilateral mechanical knee pain symptoms.” Conversely, the physical examinations were fairly benign. The NARSUM noted stable joints with no signs of cartilage impingement, and tenderness on the left but not the right. The MEB range-of-motion (ROM) evaluation deferred to physical therapy measurements. The latter reported 130⁰ flexion (normal 140⁰) on the right and 135⁰ on the left. It was annotated “ROM limitations secondary to pain.” The VA examiner reported totally normal examinations, with no instability or tenderness; no painful motion (including with repetition, i.e., negative DeLuca findings); and, bilateral flexions of 140⁰.

The Board directs attention to its rating recommendation(s) based on the above evidence; and, must first consider if separate ratings for each joint is indicated. The PEB combined the bilateral knee conditions as a single unfitting condition, coded analogously to 5003 and rated 0%, relying on the USAPDA pain policy for not applying separately compensable VASRD codes. The Board must apply separate codes and ratings in its recommendations if compensable ratings for each condition are achieved IAW VASRD §4.71a. Board members ultimately agreed that, whether or not compensable, the pathology and disability for each joint was separate. Although subject to the same mechanism of injury, there was no link to a common disease process such as degenerative arthritis (for which 5003 is intended to rate) or a soft-tissue inflammatory condition affecting the knees. Thus it was determined that each knee was subject to separate coding IAW VASRD §4.71a, regardless of the attendant ratings. Having determined that separate ratings are warranted; however, the Board must also satisfy the requirement that each “unbundled” condition was unfitting in and of itself. Not uncommonly, this approach by the PEB reflects its judgment that the constellation of conditions was unfitting and that there was no need for separate fitness adjudications, not a judgment that each condition was independently unfitting. The Board therefore exercises the prerogative of separate fitness recommendations in this circumstance. Although the commander’s statement alluded only to “physical limitations,” the L3 profile was for “bilateral knee shrapnel wounds;” and, the MEB determined that each knee separately failed retention standards. There was also outpatient care directed at each individual knee. After deliberation, all members agreed that (more likely than not) each of the knee conditions, in isolation, would have rendered the CI incapable of continued service within his MOS and accordingly merits a separate disability rating.

The Board then directed its attention to its separate rating recommendations for each knee. It was readily agreed that the ratable parameters in evidence were functionally identical, and that the ratings should therefore be the same. Deliberations settled on non-compensable ratings as conferred by the PEB and the VA vs. a minimal compensable rating (10%) for each joint. There was no compensable ROM limitation under any of the knee joint codes. There was no mechanical instability, locking or frequent effusions which would allow a rating higher than 10% under an alternate joint code. The Board considered; however, a recommendation for minimal compensable ratings as sanctioned by VASRD §4.59 (painful motion) or §4.40 (functional loss). Although the VA C&P examination clearly excluded painful motion (hence the VA’s 0% determinations), the MEB’s ROM exam distinctly verified that the minimally impaired flexions were nevertheless limited by pain. Furthermore §4.40 specifies that “a part which becomes painful on use must be regarded as seriously disabled;” and, both the NARSUM and corroborating outpatient entries confirmed that this was the case. The action officer opines that the nature of the pathology, with retained foreign bodies in each joint, is also consistent with an expectation that both painful motion and pain with use would be present; and, collateral evidence of record suggests that the CI was inclined to be stoic. After due deliberation in consideration of the preponderance of the evidence for its separate fitness determinations, and mindful of VASRD §4.3 (reasonable doubt) for its rating recommendations, the Board recommends separate disability ratings of 10% for each injured knee. The action officer recommended, and the Board concurred with, application of the analogous code 5099-5010 (arthritis, due to trauma) for both joints in alignment with the clinical pathology.

Chest Wall Condition. The CI sustained a left hemopneumothorax from shrapnel penetration which necessitated multiple chest tube insertions during the clinical course. He also suffered non-displaced rib fractures and was noted to harbor retained fragments in the left lung base by MEB x-ray. The persistent left chest wall pain, however, was thought likely to be a result of intercostal nerve injury from the chest tubes. He suffered no measurable pulmonary compromise, and had no respiratory symptoms. The NARSUM documented “continued pain especially with deep inspiration, as well as, pain chronically on the left side of his chest;” and, an addendum documented, “He states he is unable to perform a deep enough inspiration during repeated and long duration activities to ruck or run.” The VA C&P examination, after separation stated “he has been having pain when he takes a deep breath, yawns, or sneezes, which resolved on its own.” The VA examiner attributed the pain to the rib fractures. The VA rating decision referenced the healed rib fractures and quoted the above statement as rationale for its 0% rating (under an analogous code for rib resections). Although seemingly interpreted as such by the rater, it is unlikely that the VA examiner meant to state that all of the chest pain had resolved by the time of his exam. The examiner more likely intended to convey only that the pain associated with the stated activities had resolved. Indeed subsequent VA evidence confirms that the chronic chest wall pain was still present well after separation.

The Board directs attention to its rating recommendation based on the above evidence. The PEB coded the condition under the muscle disability code 5321 (Group XXI, muscles of respiration) characterizing the chest wall pain as “intermittent, worsened with deep inspiration.” This was taken from an addendum which quoted the CI’s complaint to his primary care physician some months before the NARSUM description was composed. In considering the appropriate code for rating, the Board agreed that the PEB choice was the closest analogous fit in the VASRD. Although the action officer agrees with the MEB opinion that the pain was most likely neurogenic, there are no available peripheral nerve codes in §4.124a for thoracic nerves. VA’s rib code is not clinically applicable, nor are any available orthopedic codes in §4.71a. The 5321 muscle code is in common use for analogous rating of pleuritic and chest wall conditions. The PEB’s 0% rating under 5321 assesses the muscle disability as “slight.” Code 5321 assigns a 10% rating for “moderate” muscle disability, and 20% for “moderately severe” and “severe” disabilities. The downside of rating under VASRD §4.56 (evaluation of muscle disabilities) is that the cardinal signs and other features of muscle injury do not readily transfer to cases such as this, when muscle coding is applied analogously “moderate” disability, and the objective physical findings in this case are also similar to those described for the “moderate” rating. The ratable cardinal signs; however, are “loss of power, weakness, lowered threshold of fatigue, fatigue-pain, impairment of coordination and uncertainty of movement.” Such features are readily apparent for extremity and proximal trunk muscles, but are more subtle (if not inapplicable) for intercostal muscles. Since the limitations elaborated above seem to have placed a limit on exertional activities, this would extrapolate to some of the cardinal signs just enumerated. The members thus deliberated whether the rated disability was best aligned with ‘slight’ (0% in agreement with the PEB) or “moderate” (10%) muscle impairment. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board concluded that the evidence was more closely aligned with the 10% criteria.

Contended PTSD Condition. The Board’s first charge with respect to this condition is an assessment of the appropriateness of the PEB’s fitness adjudication. The Board’s threshold for countering service 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 CI self-referred to behavioral health in September 2006 and received an axis I diagnosis of PTSD. He participated in outpatient therapy and was prescribed two psychoactive medications at the time of separation. The core opinion in the psychiatric addendum to the NARSUM is excerpted below.

He is demonstrating mild/moderate PTSD-like symptoms at this time, and reports that if he was “physically well enough” he would deploy again, and “manage his symptoms to be with his buddies downrange.” … At present, there are no duty limitations due to his psychiatric condition.

The VA C&P examiner likewise described mild symptoms and assigned a Global Assessment of Functioning (GAF) score of 70, connoting minimal if any occupational or social impairment. Although subsequent supporting letters from his providers opined that the CI was minimizing his symptoms, and that the psychiatric severity was underestimated; it is the manifest severity that must be factored as a determinant of fitness at the time of separation. The condition was judged to meet retention standards; it was not profiled; and, the commander implicated only physical limitations as impeding performance. The condition was reviewed by the action officer and considered by the Board. There was no indication from the record that it significantly interfered with satisfactory duty performance. After due deliberation in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB fitness determination for the PTSD condition; and, therefore, no additional service disability rating can be recommended.

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 bilateral knee condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the bilateral knee condition, the Board unanimously recommends that each joint be separately adjudicated as an unfitting right knee condition and an unfitting left knee condition; each coded 5099-5010 and each rated 10%, IAW VASRD §4.71a. In the matter of the chest wall condition, the Board unanimously recommends a disability rating of 10%, coded 5399-5321 IAW VASRD §4.73. In the matter of the contended PTSD, the Board unanimously recommends no change from the PEB determination as not unfitting. There were no other conditions within the Board’s scope of review for consideration.

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.

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| **UNFITTING CONDITION** | | **VASRD CODE** | **RATING** |
| Residuals, Shrapnel Injuries to Right Knee | | 5099-5010 | 10% |
| Residuals, Shrapnel Injuries to Left Knee | | 5099-5010 | 10% |
| Chest Wall Muscle And Nerve Injury | | 5399-5321 | 10% |
| **COMBINED (w/ BLF)** | | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110811, 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 XXXXXXXXXXXXX, AR20120009656 (PD201100641)

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 XXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA