RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1100655 DATE OF PLACEMENT ON TDRL: 20040701

BOARD DATE: 20120808 Date of Permanent SEPARATION: 20061101

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty PVT/E-1 (9900, Basic Marine), medically separated for subtalar dislocation. 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 injured in basic training and underwent a Medical Evaluation Board (MEB). Subtalar dislocation was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. No other conditions appeared on the MEB submission. The PEB adjudicated the subtalar dislocation condition as unfitting and recommended placement on the Temporary Disability Retired List (TDRL) at a 30% disability rating. The CI was reevaluated in July of 2006 and permanent separation recommended by the second PEB on 9 August 2006 at a 20% disability rating. The CI made no appeals, and was medically separated with a 20% combined disability rating with probable application of the Veterans Administration Schedule for Rating Disabilities (VASRD).

CI CONTENTION: “I was originally rated at 30% placing me on the TDRL. After my first check up, 18 months later, my rating was reduced to 20% removing me from retired status. My injury is extremely rare and is going to get worse with time and possibly may require surgery. There is an extreme amount of force necessary to dislocate the joint I injured, which causes cartiledge damage. 18 months rehabilitation was not enough to decide my case.” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in DoDI 6040.44, Enclosure 3, paragraph 5.e.(2) 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 ratings for unfitting conditions will be reviewed in all cases. 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 Board for Correction of Naval Records.

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RATING COMPARISON:

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| --- | --- | --- | --- | --- | --- | --- | --- |
| **Final Service PEB – Dated 20060809** | | | | **VA\* – All Effective Date 20040701** | | | |
| **Condition** | **Code** | **Rating** | | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20040701** |  | **TDRL** | **Sep.** |
| Subtalar Dislocation | 5284 | 30% | 20% | S/P reduction, Subtalar Dislocation R/Ankle | 5010-5271 | 10% | 20040524 |
| ↓No Additional MEB/PEB Entries↓ | | | | L/Hip Capsulitis | 5299-5255 | 10% | 20040524 |
| 0% x 0/Not Service Connected x 0 | | | 20040923 |
| Combined: 20% | | | | Combined: 20% | | | |

ANALYSIS SUMMARY: The Disability Evaluation System (DES) is responsible for maintaining a fit and vital fighting force. 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 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 nor for conditions determined to be service-connected by the Department of Veterans’ Affairs (DVA), but not determined to be unfitting by the PEB. However the DVA, operating under a different set of laws (Title 38, United States Code), is empowered to compensate all 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’s role is confined to the review of medical records and all evidence at hand to assess the fairness of PEB rating determinations, compared to VASRD standards, based on severity at the time of separation. 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 recognizes that PEBs across the services sometimes apply an overly generous initial rating in order to meet the DoD requirement of 30% disability for placement on TDRL. This is in the member’s best interest at the time and does not mean that a final lower rating is unfair, even if perceived as incongruent with subjective severity from one rating to the next. Thus the sole basis for the Board’s permanent disability recommendation is the optimal VASRD rating for disability at the time the CI is permanently separated at exit from TDRL.

Subtalar Dislocation Condition, Right Ankle. There was one goniometric range-of-motion (ROM) evaluation proximate to TDRL entry in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation. There were no goniometric ROM evaluations proximate to TDRL exit although there is a VA examination in 2010, over three years after TDRL exit.

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| --- | --- | --- | --- | --- |
| Goniometric ROM  Bilat Ankles  Degrees | VA C&P ~ 1 Mo. Pre-TDRL Placement | | VA C&P ~38 Mo. After-Permanent Separation | |
| Left | Right | Left | Right |
| Dorsiflexion (0-20) | 15 | 0 | 20 | 20 |
| Plantar Flexion (0-45) | 56 | 56 | 50 | 50 |
| Comments | Normal uninjured ankle. | Swelling and tenderness. | Normal uninjured ankle. | Some pain with motion. |
| §4.71a Rating | N/A | 10% | N/A | 10% |

The CI was on day 12 in basic training when he fell from a climbing rope onto his right foot, dislocating his sub-talar joint (ankle). He was managed conservatively with closed reduction, casting and non-weight bearing. Due to the anticipated several months of rehabilitation, it was determined that he would not be fit to return to training in a timely fashion and he was referred for MEB. The MEB examination was on 9 April 2004, 3 months prior to TDRL entry and approximately one month after the initial injury. He was noted to still have moderate foot and ankle edema, significant tenderness to palpation along the subtalar joint and mid foot. Both dorsi and plantar flexion were weak; this was thought to be secondary to pain. Some reduction in sensation was noted globally about the right foot. Imaging showed good alignment of the reduction. He was still in acute treatment and in an immobilizer with a cam walker. He was expected to be non-weight bearing for another two weeks followed by several months of rehabilitation. The PEB, 14 May 2004, recommended that he be placed on TDRL during convalescence and rehabilitation. The initial VA Compensation and Pension (C&P) exam was on 24 May 2004, 5 weeks before TDRL entry. He had been out of the cam walker for three days and was using an elastic support. Sensory loss was again noted globally along with diminished ROM. Motor strength was also reduced and edema was persistent. Early arthritic changes were noted on X-ray. The VA granted a 10% rating for the right ankle condition based on this C&P examination. The Board first considered the TDRL entry rating. It is noted that both MEB and C&P examinations discussed above were conducted in the acute recovery period and do not reflect permanent impairment. The PEB coded the ankle condition as 5284, other foot injuries, and that the VA coded it 5010-5271, respectively traumatic arthritis and limited ROM. The PEB rated at 30% and the VA at 10%. The Board notes that the 30% rating awarded by the PEB is the highest available under the code 5284 and that for a higher rating of 40%, the disability would need to be equivalent to complete loss of function of the foot. The disability did not rise to this level of severity. As discussed previously, the initial rating adjudicated by the PEB was the result of the PEB’s intent to place the CI on TDRL for purpose of stabilization and rehabilitation prior to a final fitness and disability determination (IAW DoDI 1322.38). 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 ankle condition for TDRL entry. The Board next considered the permanent rating of disability. The TDRL examination was on 20 July 2006, two years after placement on TDRL and 3 months prior to TDRL exit. The TDRL examiner noted that the CI had little limitation in physical activities although there was soreness in the foot afterwards. The CI was able to surf, mountain bike and snowboard. On exam, dorsiflexion was decreased bilaterally. No comment was made if this was symmetric. Subtalar motion was noted to be abnormal on the right. Degenerative joint disease was noted on imaging. The VA did not perform another C&P exam until over three years after TDRL exit. The Board notes that this is well outside of the 12-month window typically used for adjudication. Nonetheless, as there was only the single exam proximate to TDRL exit, it serves to validate the PEB exam. The CI stated that he had more pain than previously and was now restricting his activities; he no longer ran or snowboarded. He was able to hike several miles, but did have pain afterwards. He used no assistive devices. On exam, his gait was normal and could walk on his toes and heels “with ease.” ROM was normal without ligamentous laxity or pain other than when plantar flexed and inverted. Motor strength was normal. A benign bony prominence was noted. DeLuca criteria were negative. No incapacitation was noted. The VA continued the 10% disability rating and retained the coding initially assigned. The PEB determined a 20% rating for a moderately severe foot injury (5284, foot injury, other). Board members agreed that the disability reflected in the TDRL evaluation was slight to mild as the CI participated in sports activities, but did experience pain. Members concluded the condition more nearly approximated the 10% rating adjudicated by the VA; however, the Board may not recommend a rating lower than that adjudicated by the PEB. 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 ankle condition for TDRL exit and permanent 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. In the matter of the right ankle, the Board recommends no change in the PEB adjudication at TDRL entry or exit. There were no other conditions within the Board’s scope of review for consideration.

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** | |
| **TDRL** | **PERMANENT** |
| Subtalar Dislocation | 5284 | 30% | 20% |
| **COMBINED** | **30%** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110803, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans Affairs Treatment Record

President

Physical Disability Board of Review

MEMORANDUM FOR DIRECTOR, SECRETARY OF THE NAVY COUNCIL

OF REVIEW BOARDS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATIONS

Ref: (a) DoDI 6040.44

(b) CORB ltr dtd 19 Sep 12

In accordance with reference (a), I have reviewed the cases forwarded by reference (b), and, for the reasons provided in their forwarding memorandum, approve the recommendations of the PDBR that the following individual’s records not be corrected to reflect a change in either characterization of separation or in the disability rating previously assigned by the Department of the Navy’s Physical Evaluation Board:

- XXXX former USMC

- XXXX former USMC

- XXXX former USMC

- XXXX former USN

Assistant General Counsel

(Manpower & Reserve Affairs)