RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1100667 SEPARATION DATE: 20070205

BOARD DATE: 20120320

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a National Guard SGT/E-5 (63B, Light-Wheeled Vehicle Mechanic), medically separated for chronic bilateral knee condition*.* After bilateral arthroscopic repair for meniscal disease of his knees he failed to respond adequately to physical therapy to fully 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). Chronic bilateral knee pain was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Five other conditions, as identified in the rating chart below, were forwarded on the MEB submission as medically acceptable conditions. The PEB adjudicated the chronic bilateral knee pain condition as unfitting, rated 10%, with application of the US Army Physical Disability Agency (USAPDA) pain policy. The CI appealed to the Formal PEB (FPEB), and then, following USAPDA review, was medically separated with a 10% disability rating.

CI CONTENTION: The CI refers to 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 20061208** | **VA (2 Mo. After Separation) – All Effective 20070206** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Bilateral Knee Pain | 5099-5003 | 10% | Residuals Right Knee Surgery | 5299-5260 | 10% | 20070425 |
| Residuals Left Knee Surgery | 5299-5260 | 10% | 20070425 |
| Left Shoulder Impingement | Not Unfitting | Left Shoulder Condition | 5299-5201 | NSC | 20070425 |
| Plantar Fasciitis | Not Unfitting | Bilateral Pes Planus | 5010-5276 | 0% | 20070425 |
| Intermittent Low Back Pain | Not Unfitting | Lumbar Spine Degenerative… | 5242 | 0% | 20070425 |
| Mild Liver Enzyme Elevations | Not Unfitting | Inflamed Liver | 7399-7312 | 0% | 20070425 |
| Psoriasis | Not Unfitting | No VA Entry | 20070425 |
| ↓No Additional MEB/PEB Entries↓ | Residuals Left Femur | 5255 | 10% | 20070425 |
| Residuals Right Femur | 5255 | 10% | 20070425 |
| Tinnitus | 6260 | 10% | 20070425 |
| Left Hip Scar | 7804 | 10% | 20070425 |
| Right Hip & Thigh Scars | 7804 | 10% | 20070425 |
| Right Ankle Strain | 5099-5024 | 10% | 20070425 |
| Left Ankle Strain | 5099-5024 | 10% | 20070425 |
| C-Spine Discogenic Disease | 5242 | 10% | 20070425 |
| 0% x 5 / Not Service Connected x 4 | 20070425 |
| **Combined: 10%** | **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 Disability Evaluation System (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.

Bilateral Knee Condition. The PEB rated left knee pain and right knee pain under the single analogous 5003 (degenerative arthritis) code. This coding approach is countenanced by AR 635-40 (B.24 f.), but IAW DoDI 6040.44 the Board must apply only VASRD guidance to its recommendation. The Board must therefore apply separate codes and ratings in its recommendations if compensable ratings for each joint are achieved IAW VASRD §4.71a. If the Board judges that two or more separate ratings are warranted in such cases; however, it must satisfy the requirement that each “unbundled” condition was unfitting in and of itself. Since §4.71a criteria are met for separate joint ratings in this case, the Board is pursuing separate rating and fitness evaluations as follows.

Right and Left Knee Condition. The CI sustained extensive lower extremity injuries, including bilateral femur fractures, in a tactical vehicle accident in Iraq in February 2005. The femur fractures were repaired surgically and healed well. During the rehabilitation period evaluation of knee pain revealed a complex tear of the posterior horn of the medial meniscus of the right knee and a small tear of the mid portion of the lateral meniscus of the left knee. Arthroscopic surgery with partial meniscectomy was performed on both knees. After eight months of rehabilitation the CI was judged to be unable to fully resume the duties of his MOS and MEB proceedings were initiated. The permanent profile limitations included no aerobic physical training test and no functional activities that required the CI to run, bend, or dig and deemed him non-deployable. The commander’s statement documented the CI was not working in his MOS but was able to work a normal duty day. There were three goniometric range-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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| --- | --- | --- | --- |
| L/R Knee ROM | PT – 7 Mo. Pre Sep | MEB – 4 Mo. Pre Sep | VA C&P –2 Mo. Post Sep |
| Left | Right | Left | Right | Left | Right |
| Flexion (0-140⁰ normal) | 116⁰ | 112⁰ | 124⁰ | 112⁰\* | 115⁰ | 110⁰ |
| Extension (0⁰ normal) | 0⁰ | 0⁰ | 0⁰ | 0⁰ | 0⁰ | 0⁰ |
| Comments |  | No instability | Normal gait, No instability |
| §4.71a Rating\* | 10%\* | 10%\* | 10%\* | 10%\* | 10%\* | 10%\* |

 \* Conceding §4.59 (painful motion)

At the time of the MEB the CI reported symptoms of pain “70% of the time,” swelling and increased pain of the knees with activity, and “give way” of his right knee. The MEB examiner noted a normal gait. There was no effusion or instability of either knee. Right knee ROM was limited by pain. The examiner opined that the right knee give way was likely due to weakness since there was no evidence of instability. An earlier physical therapy evaluation documented nearly identical ROMs of the knees without comment on other ratable parameters. Other physical therapy notes documented painful motion. A VA Compensation and Pension (C&P) exam two months after separation documented a normal gait. ROM measurements were again nearly identical to the prior to separation MEB measurements. The examiner further noted that there was “no objective evidence of painful motion, edema, effusion, instability, weakness, tenderness, redness, heat, abnormal movement, guarding of movement” and “no evidence of fatigue; weakness; lack of endurance; or in coordination with repetitive use.” Imaging studies demonstrated damaged menisci as noted above.

The Board first considered if each knee, having been de-coupled from the combined PEB adjudication, remained independently unfitting as established above. All members agreed that either knee, as an isolated condition, would have rendered the CI incapable of continued service within his MOS, and accordingly merits a separate service rating. There was no evidence in the clinical record, the profile, or the commander’s statement to distinguish one knee from the other in terms of duty impairment. The PEB and VA chose different coding options for the condition, but this did not bear on rating. The PEB’s DA Form 199 reflected application of the USAPDA pain policy for rating, and its 10% determination was not consistent with §4.71a standards. The PEB’s chosen code 5003 specifies that, in the presence of degenerative arthritis established by x-ray findings, when “the limitation of motion of the specific joint or joints involved is non-compensable under the appropriate diagnostic codes, a rating of 10 pct is for application for each such major joint or group of minor joints affected by limitation of motion, to be combined, not added under diagnostic code 5003. Limitation of motion must be objectively confirmed by findings such as swelling, muscle spasm, or satisfactory evidence of painful motion.” There was noncompensable ROM impairment of each knee, and the Board agreed that there was adequate documentation of degenerative changes and painful motion of each joint in the pre-separation data to merit application of a minimal compensable rating under this code. The Board also considered code 5259 (cartilage, semilunar, removal of, symptomatic) applicable to the underlying pathology, which likewise results in a 10% rating for each knee. The Board considered the VA choice of coding each knee analogous to 5260, loss of motion in flexion. Based on prior to separation data this coding approach would also yield a minimal compensable rating with application of §4.59 (painful motion). Finally, the Board considered code 5258 criteria based on the symptoms of the right knee giving way and effusions of both knees, but there was no objective clinical evidence to support these symptoms. There was no VASRD compliant coding or rating approach that would yield higher than a minimal compensable rating for either knee. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends that the bilateral knee condition be rated for two separate unfitting conditions as follows: right knee coded 5259 for clinical specificity subsuming painful motion, degenerative changes and non-compsenable loss of flexion rated 10% and left knee coded 5259 for clinical specificity, degenerative changes and noncompsenable loss of flexion rated 10%.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were psoriasis, left shoulder impingement, plantar fasciitis, intermittent lower back pain, and mild elevations of liver enzymes. None of these conditions were significantly clinically or occupationally active during the MEB period; and none were profiled, implicated in the commander’s statement or noted as failing retention standards. All were reviewed by the action officer and considered by the Board. There was no indication from the record that any of these conditions significantly interfered with satisfactory duty performance. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for any of the stated conditions.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for right and left ankle strain, cervical spine discogenic disease, right and left femur fracture, scars, fractured right wrist, and bilateral pes planus with left bunion. These conditions were reviewed by the action officer and considered by the Board. The Board noted the right and left femur fractures were fully healed. There was no evidence for concluding that any of the conditions interfered with duty performance to a degree that could be argued as unfitting. The Board determined therefore that none of the stated conditions were subject to service disability rating. The CI’s application also asserts that compensable ratings should be considered for tinnitus and psychiatric posttraumatic stress disorder (PTSD). These conditions do not appear in the DES file and 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 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).

Remaining Conditions. No other conditions were noted in the NARSUM, identified by the CI on the MEB physical or found elsewhere in the DES file. As noted above, 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 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 bilateral knee pain 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 it be rated for two separate unfitting conditions as follows: left knee coded 5259 and rated 10%; and, right knee coded 5259 and rated 10%; both IAW VASRD §4.71a. In the matter of the psoriasis, left shoulder impingement, plantar fasciitis, intermittent lower back pain, and mild elevations of liver enzymes conditions, the Board unanimously recommends no change from the PEB adjudications as not unfitting. In the matter of the right and left ankle strain, cervical spine discogenic disease, right and left femur fracture, scars, fractured right wrist, and bilateral pes planus with left bunion 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. The Board unanimously agrees that there were no other conditions eligible for Board consideration, including tinnitus and PTSD which could be recommended as additionally unfitting for rating at separation.

RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows, effective as of the date of his prior medical separation:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Right Knee Pain | 5259 | 10% |
| Left Knee Pain | 5259 | 10% |
| **COMBINED (Incorporating BLF)** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110819, 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

1. 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 to modify the individual’s disability rating to 20% without recharacterization of the individual’s separation. This decision is final.

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.

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

 Deputy Assistant Secretary

 (Army Review Boards)