RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100699 SEPARATION DATE: 20020313

BOARD DATE: 20120503

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (95B10/Military Policeman), medically separated for chronic pain in the right shoulder and bilateral legs (“chronic pain right shoulder, status post arthroscopic surgery x3; and both legs, due to tibial stress fractures”). The CI began to experience right shoulder pain after playing pushball. He underwent two shoulder (SLAP) surgeries, injections, and physical therapy which did not resolve the condition. The CI also had bilateral leg pain and difficulty running and biking due to chronic stress fractures in both tibia (lower legs) that were documented by bone scan. 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 U3, L3 profile and underwent a Medical Evaluation Board (MEB). Chronic right shoulder instability, status post arthroscopic surgeries and chronic bilateral tibial stress fractures were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions appeared on the MEB’s submission. The PEB adjudicated the chronic right shoulder pain and bilateral tibial stress fractures conditions as a single unfitting pain condition, rated 20%; with specified application of the US Army Physical Disability Agency (USAPDA) pain policy. The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: “It is noted in my Medical Board Evaluation Board Narrative Summary that I experienced both chronic pain and instability in my right shoulder after two SLAP lesions repairs. I also suffer from pain in both legs which were noted as being from stress fractures in both tibias. I also had a P2 profile for acute folliculitis barbae. I also suffer from a non fungal rash on both feet that caused an immense stench and the skin to become pitted and coming off. I was also suffering from untreated hypertension as mentioned in both the narrative and DD Form 2807-1 as included in my PEB packet. It is also noted that I experience numbness in my right hand, as well as an inability to sleep more than three hours a night, which has continued to this day.”

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20010926** | | | **VA (2 Mo. After Separation) – All Effective 20020314** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Pain, R. Shoulder Post Arthro. Surgery x3,  Both Legs Due to Tibial Stress Fractures | 5099-5003 | 20% | Residuals R/Shoulder Dislocation, S/P Arthroscopy | 5201 | 20% | 20020508 |
| Bilateral Tibial Stress Fractures | 5299-5262 | 0% | 20020508 |
| ↓No Additional MEB/PEB Entries↓ | | | 0% x 0/Not Service-Connected x 0 | | | 20020508 |
| **Combined: 20%** | | | **Combined: 20%** | | | |

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 DVA 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 PEB 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.

Chronic pain right shoulder, status post arthroscopic surgery x3; and both legs, due to tibial stress fractures. The PEB rated the right shoulder and bilateral tibial stress fractures under the analogous 5099- 5003 (degenerative arthritis) code. This coding approach was countenanced by AR 635-40 (B.24 f.), and the USAPDA pain policy in effect at the time of the CI’s separation. However, 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 for the right shoulder condition and the bilateral tibial stress fractures as below:

Right Shoulder: The CI was right-handed and injured his right shoulder after playing pushball in October 1998. He was treated in the emergency room and underwent physical therapy. Orthopedics evaluation indicated shoulder pain and instability with recurrent subluxation. Magnetic resonance imaging (MRI) findings were consistent with impingement at the level of the acromial clavicular joint with no evidence of fracture. As a result he underwent his first shoulder surgery for a SLAP lesion repair in March 1999. He began to experience recurrent sublaxations following push-ups and sit-ups and underwent a second surgery in May 2001 for a SLAP three repair. His shoulder mobility showed little improvement following surgery and he experienced more pain due to instability which had a limiting impact of his physical activity. Medication included narcotics and profile restriction included no overhead work, modified sit-ups, push-ups own pace and number. There were two goniometric range-of-motion (ROM) evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation; as summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| R. Shoulder ROM | MEB ~7 Mo. Pre-Sep | VA C&P ~2 Mo. After-Sep |
| Flexion (0-180) | 80⁰ | 140⁰ |
| Abduction (0-180) | 90⁰ | 120⁰ |
| Comment | No atrophy; sensory normal; motor strength limited by his symptoms (pain) | Positive impingement sign; history recurrent dislocations |
| §4.71a Rating | 20% | 10%-20% (VA 20%) |

The PT and MEB exams both indicated limitation of abduction at or below the shoulder level (90⁰). Each exam documented inability to test strength or pain interfering with motor testing, but no muscle atrophy noted. History indicated post-surgical subluxations without indication of frank dislocations of the shoulder. The VA C&P exam after separation indicated a greater ROM to 30⁰ above shoulder level, but with a positive impingement sign and a history of recurrent dislocations. The VA temporary 100% rating for right shoulder surgery over 8 years after separation was noted, but was not considered relevant in the rating assessment at the time of separation.

The PEB and VA chose different coding options for the condition. The PEB coding was combined with the leg conditions and applied the pain policy as discussed above. The VA rating of 20% based on code 5201 arm limitation of motion at shoulder level was not a straight forward application of the ROMs from the C&P exam, but likely included the service record, recurrent subluxations/dislocations and positive impingement signs. Analogous coding to 5201 at 20% was supportable by the VA evidence. Alternate coding analogous to 5202, humerus, other impairment recurrent dislocation with infrequent episodes was considered. The VA exam was closer to the time of separation and further from the date of surgery, but was not as comprehensive as the service exams. There was recurrent subluxation of the humerus which may have approached dislocations of the humerus. There was no clinical and/or radiologic evidence that suggested ankylosis, loss of the humeral head, nonunion, malunion, fibrous union, deformity, nonunion or dislocation of the scapula. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 20% for the right shoulder condition coded as 5099-5201.

Bilateral Leg Pain Due to Tibial Stress Fractures: The CI had a long history of bilateral lower leg and left hip pain which led to numerous temporary profiles in 1998 thru April 2000. The record indicated worsening of the lower leg pain and a diagnosis of bilateral tibial stress fractures in March 2000 with spurring in the left hip. Repeat bone scan in February 2001 indicated chronic tibial stress fractures with resolution of hip pain. The CI complained of pain in both legs when running and bicycling and was restricted from field duties and physical training per the orthopedic NARSUM. Profile restrictions included “no ruck, no run, no jump, walk for APFT.” The commander’s statement addressed the chronic tibial stress fractures in addition to the right shoulder condition as interfering with the CI’s ability to perform the tasks within his MOS.

The military exams indicated tenderness of both anterior lower legs and slightly limited knee ROM of left 120⁰ and right 130⁰ (normal 140⁰) with no knee joint pathology. There was tenderness to the anterior tibial area bilaterally. The final diagnosis was chronic tibial stress fractures, bilateral and the examiner and MEB indicated the condition did not meet retention standards IAW AR 40-501. The Board adjudged that there was sufficient reasonable doubt that the bilateral chronic tibial stress fractures, when unbundled from the shoulder condition, were unfitting and ratable. The VA exam after separation indicated the CI had “minimal symptoms unless he stands for prolonged periods of time or runs.” Exam indicated only mild bilateral tenderness along the medial border of the distal third of the tibia. The VA diagnosis was “history of bilateral stress fractures, minimally symptomatic” and was adjudged as likely as not to be post-separation improvement. There were no documented episodes of incapacitating exacerbations, and no specific ankle or knee painful motion, although knee ROM was slightly limited bilaterally with the left more limited than the right. As discussed above, the PEB bundled the bilateral tibial condition with the shoulder under coding of 5099-5003. The VA coding was analogous to 5262, Tibia and fibula, impairment of at 0% as not meeting the “slight knee or ankle disability” 10% rating criteria. The Board considered the multiple profile restrictions, bilateral tenderness, pain with running or prolonged standing, repeated abnormal imaging by bone scan and the tenants of §4.40 (functional loss) of impacting the normal working movements of the body with normal excursion, strength, speed, coordination and endurance. Neither the left or right tibial condition alone clearly rose to the “slight knee or ankle disability” 10% rating level. However, in totality, the CI’s bilateral tibial condition was best coded under 5262-5022 (periostitis) which uses the criteria of VASRD code 5003 and meets the 10% rating level based on the totality of the record. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt) and §4.40 (functional loss), the Board recommends a disability rating of 10% for the bilateral tibial condition.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for folliculitis barbae, a non-fungal rash, hypertension, and sleep disorder. All of these conditions were reviewed by the action officer and considered by the Board. 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 disability rating.

Remaining Conditions. No other occupationally limiting conditions were noted in the NARSUM, identified by the CI on the MEB physical or found elsewhere 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 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 all conditions was operant in this case and the conditions were adjudicated independently of that policy by the Board. In the matter of the chronic right shoulder pain and bilateral tibial stress fractures condition, the Board unanimously recommends that it be rated for two separate unfitting conditions as follows: the right shoulder coded 5099-5201 and rated 20%; and, bilateral leg pain due to tibial stress fracture coded 5262-5022 and rated 10%; both IAW VASRD §4.71a. In the matter of the folliculitis barbae, rash, hypertension, and sleep disorder 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.

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** |
| Right Shoulder Pain and Instability | 5099-5201 | 20% |
| Bilateral Tibial Stress Fracture, Chronic | 5262-5022 | 10% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110824, 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 222025001

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for XXXXXXXXXXXXX, AR20120008879 (PD201100699)

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 XXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA