RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100716 SEPARATION DATE: 20040505

BOARD DATE: 20120809

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active drilling National Guard MSGT/E-8 (63Z50/Maintenance Management Supervisor), medically separated for bilateral knee osteoarthritis. The right knee condition resulted from an injury in 2002 and required multiple arthroscopic surgeries. The left knee condition was not a result of injury and was not associated with a surgical indication. He did not respond adequately to operative and rehabilitative treatment and was unable to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent L4/H3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded bilateral osteoarthritis of knees, right much greater than left, and right patellar chondromalacia to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Two other conditions, identified in the rating chart below, were also identified and forwarded by the MEB. The PEB adjudicated the bilateral knee osteoarthritis condition as unfitting, rated 10% with likely application of the US Army Physical Disability Agency (USAPDA) pain policy. The remaining conditions were determined to be not unfitting. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “I am now rated at 30% by the Veterans Administration for service connected disabilities. I have service connected Asbestosis and was just recently tested for home use of oxygen. I score a 92 and would have been declared unemployable if I had scored 88 or less. My condition is degenerative and my breathing is expected to get worse. My MOS was 63Z and I worked on brakes and clutches during my military service. Because of my medical discharge I also lost my full time job as a Military Technician. My condition has continued to deteriorate to the point where I am no longer able to work as a mechanic, which I have trained for since the age of 17. I have had three surgeries on my right knee and have been told that I must have a total knee replacement at the age of 55. After my third knee surgery on my right knee I experienced DVT which I have been told will probably recur on subsequent surgeries. I am currently 53. I sustained my injury while attending Warrant Officer Candidate School at Fort Rucker, Alabama. I was given severance pay and I have been repaying the severance pay every month since my discharge in May 2004. l am not expected to make full repayment until 2018. In addition, the high blood pressure that was listed as under control has gotten worse. I was getting migraine headaches which led to a CT scan that revealed that I had a stroke. The migraine headaches were determined to be caused by my sleep apnea. I now sleep with a CPAP and my headaches have been reduced.”

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. The high blood pressure condition, as requested for consideration, meets the criteria prescribed in DoDI 6040.44 for Board purview, and is addressed below, in addition to a review of the ratings for the unfitting knee conditions. The asbestosis, deep vein thrombosis (DVT), migraine headache and sleep apnea conditions 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:

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| --- | --- |
| **Service PEB – Dated 20040308** | **VA (4 Mos. Post-Separation) – All Effective Date 20040508** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Bilateral Knee Osteoarthritis | 5003 | 10% | Right Knee Post-Traumatic Arthritis | 5010 | 20% | 20040923 |
| Left Knee Degenerative Arthritis | 5010 | 0% | 20040923 |
| Hypertension | Not Unfitting | NO VA ENTRY |  |
| Hearing Loss | Not Unfitting | NO VA ENTRY |  |
| ↓No Additional MEB/PEB Entries↓ | 0% X 0 / Not Service-Connected x 0 | 20040923 |
| **Combined: 10%** | **Combined: 20%** |

\* VARD dated 20110222 added Asbestosis coded 6833 rated @ 10% effective 20090513; combined raised to 30%.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred condition continues to burden him. The Board wishes to clarify that it is subject to the same laws for disability entitlements as those under which the 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 proximal to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of DES fitness decisions and rating determinations for disability at the time of separation. The Board further acknowledges the CI’s contention for ratings for other conditions documented at the time of separation, and notes that its recommendations in that regard must comply with the same governance. 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 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.

Bilateral Knee Osteoarthritis Condition. The PEB combined right knee and left knee osteoarthritis as the single unfitting and solely rated condition, coded 5003. Although this approach complies with the USAPDA pain policy and AR 635.40 (B.24 f.), the Board must apply separate codes and ratings in its recommendations, if compensable ratings for each condition 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. 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. Thus the Board may exercise the prerogative of separate fitness recommendations in this circumstance, with the caveat that its recommendations may not produce a lower combined rating than that of the PEB. The narrative summary (NARSUM) reports a history of a right knee injury in April 2002 that led to the need for arthroscopic repair of a meniscal tear in August 2002. Two additional arthroscopies were performed due to re-injury over the next 6 months. However, the CI continued to have pain in the right knee on a daily basis, and was told that knee replacement surgery would have to be considered in the future. Although he was able to perform activities of daily living, he was unable to run or walk more than a quarter mile. Standing longer than a 1/2 hour or driving longer than an hour exacerbated his pain. He had also experienced locking of his right leg when swimming. He occasionally awakened at night with his right knee locked. Although the NARSUM noted “arthritis in the left knee as well,” specific left knee symptoms were not detailed. 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.

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| Knee ROM | MEB/PT ~3 Mo. Pre-Sep | VA C&P ~5 Mo. Post-Sep |
| Left | Right | Left | Right |
| Flexion (140⁰ Norm) | 130⁰, 131⁰, 130⁰ | 120⁰, 121⁰, 123⁰ | 140⁰ | 140⁰ |
| Extension (0⁰ Norm) | -2⁰, -2⁰, -2⁰ | -17⁰,-18⁰, -17⁰\* | 0⁰ | -3⁰ |
| Comment | Crepitus | Motion limited by pain | Intermittent pain by history | “Lurching” to right increased on repetition (*see text*) |
| §4.71a Rating | 10% | 20% | 0% | 20% (VA 20%) |

 \*The PEB received clarification that a minus value refers to limitation of extension.

An outpatient exam performed on 14 October 2003, 7 months prior to separation, documented right knee flexion of 120⁰ and extension limited by 10⁰. The MEB examiner stated the CI suffered from pain in both knees since April 2002, and that the right knee was worse than the left. The examination performed on 17 November 2003, 3 months prior to separation, showed tenderness of the right knee and bilateral crepitus. The NARSUM physical exam performed on 15 January 2004, 4 months prior to separation, noted no effusion or joint line tenderness of the right knee. There was no muscular atrophy and strength was normal. The examination was silent regarding the left knee. X-rays showed bilateral arthritic changes. The MEB physical therapist annotated that the left knee condition was “significant only for pain.” Post-operative orthopedic clinic notes on 26 February 2003 and 11 April 2003, a year prior to separation, indicated that knee locking and pain could be due to patellar chondromalacia. At the VA Compensation and Pension (C&P) exam, performed 5 months after separation, the CI reported pain in the left knee on an intermittent basis without loss of motion, and confirmed that left knee surgery was never performed. The right knee would develop swelling after prolonged standing or walking, and would sometimes catch or lock. He was not using crutches or a cane. Examination revealed a gait with “a lurch to the right.” The right knee was unable to extend completely during ambulation. There was no effusion, tenderness or signs of instability of either knee. The CI was observed to walk 30 yards doing ten repetitions as fast as he could and during the last four repetitions, he lost between 1/2 to a second in time, and there was a slight increase in the “lurching.” The VA rated this exam as a left knee 0% rating due to lack of evidence of painful or limited motion, and right knee 20% with consideration of DeLuca (additional pain and fatigability/coordination on repetition).

The Board directs attention to its rating recommendation based on the above evidence. The PEB cited the physical exam as being non-contributory to their 10% rating, reflecting likely application of the USAPDA pain policy. The VA rated each knee separately under the 5010 code (post-traumatic arthritis). The Board further considered that there appeared to be some post-separation improvement as the ROM exam showed pain-limited flexion and extension of each knee, while the VA exam showed increased ROMs with minimal pain-limited extension of the right knee and normal (pain-free) ROM of the left knee. Board members agreed that the service exam was closer to the date of separation, provided greater detail and internal consistency, and was therefore assigned higher probative value for rating at separation. Regarding the right knee osteoarthritis, there was a preponderance of evidence that it was unfitting. This service exam indicated the CI had a limitation of extension of the right knee of at least 15⁰, which supports a 20% rating under the 5261 code. The Board also considered rating the right knee under the 5258 code (dislocated semilunar cartilage); however, meniscal coding includes painful motion so dual coding with 5261 was not supported, and alternate meniscal coding would not rate higher than 20% and was less well supported by the record. 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 knee osteoarthritis condition, coded 5010-5261.

Next, the Board turned its attention to the left knee. As previously elaborated, the Board must first consider whether left knee osteoarthritis remains separately unfitting, having de-coupled it from a combined PEB adjudication. In analyzing the intrinsic impairment for appropriately coding and rating the left knee condition, the Board is left with a questionable basis for arguing that left knee arthritis was indeed independently unfitting. There was little information about the left knee in the clinical record, and neither the NARSUM nor the C&P examiners provided much detail about it. It is clear that the pain was intermittent and much less problematic than the right knee. Although there was X-ray evidence of left knee arthritis, examiners were silent about any objective evidence of left knee pain. The VA examiner did report the absence of tenderness, while the MEB examiner annotated bilateral crepitus, but did not mention if there was associated pain. The MEB physical therapist however did report pain, and ROM measurements documented slightly diminished flexion. The VA assigned a 0% rating based on normal ROM and lack of evidence of painful motion at the C&P exam. After due deliberation, the Board majority agreed that evidence does not support a conclusion that left knee arthritis, as an isolated condition, would have rendered the CI incapable of continued service within his MOS and accordingly cannot recommend a separate rating for it.

Contended PEB Conditions. The contended condition adjudicated as not unfitting by the PEB was hypertension. The Board’s first charge with respect to this condition is an assessment of the appropriateness of the PEB’s fitness adjudications. The Board’s threshold for countering 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. This condition was not profiled, implicated in the commander’s statement or judged to fail retention standards. It was reviewed by the action officer and considered by the Board. There was no indication from the record that this condition 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 contended hypertension condition and therefore no additional disability ratings 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 bilateral knee arthritis was likely operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the bilateral knee osteoarthritis condition, the Board unanimously recommends that it be adjudicated for two separate conditions. In the matter of the right knee osteoarthritis condition, the Board unanimously recommends a disability rating of 20%, coded 5010-5261. In the matter of the left knee osteoarthritis condition, the Board by a vote of 2:1 agrees that it cannot recommend a finding of unfit for additional disability rating. The single voter for dissent (who recommended an unfit determination and 10% rating coded 5099-5003) submitted the addended minority opinion. In the matter of the contended hypertension condition, 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, effective as of the date of his prior medical separation:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Right Knee Osteoarthritis | 5010-5261 | 20% |
| Left Knee Osteoarthritis | Not Unfitting |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110830, 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

MINORITY OPINION: The action officer recommends that the left knee osteoarthritis be confirmed as unfitting, following unbundling, awarded a 10% rating and combined with the right knee 20% rating (combined 30% with BLF).

As detailed above, the PEB combined right knee osteoarthritis and left knee osteoarthritis as the single unfitting condition, coded 5003 and rated at 10% IAW the USAPDA pain policy and AR 635.40 (B.24 f.). The Board unanimously agreed that absent the Army-specific policy and IAW VASRD-only rating, the right knee condition was separately rated at 20%.

When unbundling a PEB-adjudicated multi-joint (bilateral knees) condition, the default Board position is that all joints included in the PEB rating adjudication are unfit, unless the preponderance of the evidence indicates that there was no reasonable basis for the PEB to include the joint as unfitting. To recommend that the PEB’s adjudication should be unbundled, yet maintain the left knee was not unfit requires a preponderance of evidence.

Given the evidence of record, it was very reasonable for the PEB to consider the left knee as unfitting in combination with the more severe right knee. The PEB disability description went to the effort of detailing the trauma/non-trauma history of each knee: “bilateral knee osteoarthritis, with the medical record supporting an injury to the right knee but no injury to the left. Physical exam is non-contributory to the rating. Radiographs support the diagnosis.” The profile listed bilateral knees as limiting duty, the MEB listed bilateral knees as not meeting standards, and the dynamics of walking and standing require both knees with a limitation on one side requiring additional compensation from the opposite paired knee.

The right knee condition was clearly emphasized in the record as more severe than the left knee and was afforded more detailed exams and had a longer profile restriction history. However, the Board majority applied an evidentiary standard to the fit/unfit determination that would require the left knee condition to be “separately unfitting.” IAW DoDI 1332.38, medical conditions can be unfitting due to combined effect and do not need to be unfitting “as an isolated condition.” The record supports that the PEB fairly judged that the constellation of left and right knee conditions was unfitting, and there was not a preponderance of the evidence to indicate that the PEB did not intend for the left knee to be considered unfitting. Reasonable doubt, although applied to rating-level determinations, is not sufficient to consider an unbundled condition as “not unfitting.”

Once established as unfitting, the left knee 10% rating is clearly supported. Pain-limited motion, crepitus and radiographic evidence of osteoarthritis were documented on service exam and records. Under the 5003 code and IAW §4.71a this constellation of findings from the higher probative value exam justifies a 10% rating.

RECOMMENDATION: The action officer strongly 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 Knee Osteoarthritis | 5010-5261 | 20% |
| Left Knee Osteoarthritis | 5099-5003 | 10% |
| **COMBINED (w/ BLF)** | **30%** |

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 XXXXXXXXXXXXXXXXXXXXXX, AR20120015365 (PD201100716)

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 XXXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA