RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100737 SEPARATION DATE: 20040109

BOARD DATE: 20120918

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (67U20/CH-47 Helicopter Repairman) medically separated for a right knee condition. He did not respond adequately to operative and post-rehabilitated treatment and was unable to fulfill the physical demands within his Military Occupational Specialty (MOS), meet worldwide deployment standards or meet physical fitness standards. He was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Recurrent anterior cruciate ligament rupture of the right knee was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. The PEB adjudicated the right knee condition as unfitting rated 20% with application of the Department of Defense Instruction (DoDI) 1332.39. The condition was determined to have existed prior to service (EPTS) but was permanently aggravated by service and no rating deduction was made. The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: “TBI, Bilateral Right-Left Knee, Laminectomy-Discectomy L5, PTSD”

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 other requested conditions; traumatic brain injury (TBI), left knee, post traumatic stress disorder (PTSD) and laminectomy-discectomy L5 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 Correction of Military Records.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20031003** | | | **VA (4 Mos. Post-Separation) – All Effective Date 20040110** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Right ACL Laxity with 2+ Lachman's Test, S/P ACL Reconstruction | 5257 | 20% | Anterior Cruciate Ligament S/P Reconstruction, Right Knee | 5259-5257 | 10% | 20040329 |
| Degenerative Joint Disease, Right Knee | 5010-5261 | 10%\* | 20050618 |
| ↓No Additional MEB/PEB Entries↓ | | | PTSD also claimed as Insomnia and Depression | 9411 | 10% | 20040329 |
| Degenerative Joint Disease, Left Knee | 5260 | 10%\*\* | 20040329 |
| DJD, Right Wrist | 5215 | 10%\*\* | 20040329 STR |
| Degenerative Disc Disease of Thoracolumbar Spine | 5243 | 20%\*\*\* | 20070706 |
| 0% X 1 / Not Service-Connected x 5 | | |  |
| **Combined: 20%** | | | **Combined: 20%\*\*\*\*** | | | |

\*VARD 20050907 added DJD right knee effective 20040110. \*\*VARD 20070418 added DJD left knee and DJD right wrist effective 20040110. \*\*\*VARD 20080808 changed DDD thoracolumbar spine effective date 20040110.

\*\*\*\*Combined increased to 60% effective 20040110.

ANALYSIS SUMMARY: The Board acknowledges the CI's contention suggesting that his ratings should have been conferred for other conditions documented at the time of separation and for conditions not diagnosed while in the Army (but later determined to be service-connected by the VA). While the Disability Evaluation System (DES) considers all of the member's medical conditions, compensation can only be offered for those medical conditions that cut short a member’s career, and then only to the degree of severity present at the time of final disposition. The Department of Veterans’ Affairs (DVA), however, 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 his degree of impairment vary over time.

Right Knee Condition. Prior to entry into the military, the CI had a right knee injury that required an arthroscopy repair of a torn posterior horn lateral meniscus and the arthroscopy documented a partial tear of the anterior cruciate ligament (ACL) which was not repaired. He enlisted with a medical waiver. He had a re-injury to the right knee while in service in 2001 which an magnetic resonance imaging (MRI) revealed pathology of the femoral condyle and the tibial plateau, a post surgical change versus complete tear of the posterior horn of the lateral meniscus, and a partial tear versus strain of the anterior cruciate ligament (ACL) tear. No surgical intervention occurred prior to his deployment to Afghanistan. While deployed he was involved in a hard landing helicopter mishap in 2002 which resulted in a re-injury of his right knee. He was medically evacuated to the States and was seen by orthopedics. He was diagnosed with a complete rupture of the ACL and underwent operative reconstruction in May 2002. He did not have any postoperative or rehabilitative complications but continued to have pain, swelling, popping and symptoms of “giving out” and “it goes backwards in the brace,” 3 months post-operatively. A repeat MRI, 6 month’s post-operatively, revealed s/p ACL repair, with slight laxity of the graft, but intact fibers, degenerative changes of the patellofemoral joint, with an osteochondral defect, possibly unstable, of the posterior patellar surface, osteochondral defect of the lateral tibial plateau, oblique tear of the posterior horn of the medial meniscus and complete disruption of the posterior horn of the lateral meniscus. Orthopedics agreed there were some degree of ligament laxity noted and the CI was offered another surgery but declined. A service treatment record (STR) entry in September 2003 documented pain that was 6-7 of 10 intensity and 10 of 10 at the worst. His pain was aggravated with walking, standing, and sitting. The profile limitations included no running, marching climbing or wearing a ruck, lift up to 15 pounds, swim or walk in pool at own pace and distance, and APFT for swim, push-ups and sit-ups. 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.

|  |  |  |  |
| --- | --- | --- | --- |
| Right Knee ROM | Physical Therapy ~6 Mos. Pre-Sep | MEB ~3 Mos. Pre-Sep | VA C&P ~2 Mos. Post-Sep |
| Flexion (140⁰ Normal) | 135⁰ | No ROM | 140⁰ |
| Extension (0⁰ Normal) | #⁰ | No ROM | 0⁰ |
| Comment | Positive instability one plane, atrophy, mild effusion, wearing brace | Positive instability in three planes, unstable knee | Positive Instability one plane, Painful motion; no swelling  wearing brace |
| §4.71a Rating 5257 | 20% | 30% | 20% |
| §4.71a Rating5260\* | 10% |  | 10% |

\*Conceding §4.59 painful motion

At the MEB exam, the CI reported pain, swelling and symptoms of meniscal and ligament disease with popping and giving way, respectively. The MEB physical exam documented the wearing of a brace with signs of persistent ACL laxity in three planes (with a 2+ Lachman, 1 to 2+ anterior drawer sign and a 1 to 2+ pivot shift). X-rays at that time revealed the femoral interference screw appeared to be backing out. The examiner opined at this time he had an essentially unstable knee. At the VA Compensation and Pension (C&P) exam, performed after separation, the CI reported a painful knee, worse when standing, and repetitive motion and after stopping prolong activity. He worked as a helicopter repairman. The VA (C&P) exam documented the wearing of a brace, tenderness along both the medial and lateral joint line and some ligamentous laxity on the anterior drawer sign. X-ray revealed previous orthopedic reconstructive changes of the ACL and PCL otherwise, views of the right knee, was within normal limits.

The Board directs attention to its rating recommendations based on the above evidence which includes consideration of functional loss lAW VASRD §4.10, §4.40, §4.45 and §4.59. The MEB did not document ROM evidence; but, there was a ROM measurement within 12 months of separation on which to base a rating grounded in VASRD §4.71a. Although it was not compliant with VASRD §4.46 (accurate measurement) it was similar in ratable data to the VA exam. The Board notes while the MEB exam was not VASRD §4.46 compliant when coupled with the PT exam the MEB exam demonstrates a more thorough instability evaluation than the VA and it is completed by the treating orthopedist. Therefore the Board assigns the MEB coupled with the ROM PT exam more probative value. The PEB and initial VA rating decision rated this case under code 5257 for knee instability; which confers 10% for ‘slight’ instability, 20% for ‘moderate’, and 30% for ‘severe’. The VASRD is not specific with delineating the criteria which satisfies the descriptors of ‘slight,’ moderate or severe thus allowing the evaluator some latitude in applying these ratings. The PEB’s 20% rating was for moderate knee instability and the VA rated 10% for slight instability. The action officer (AO) opines the instability evidence exceeds the slight descriptor, meets the moderate descriptor and further Board discussion settled on considering the 30% higher rating for severe. The MEB and VA exam both documented use of a brace and the VA rating decision post separation, 1-1/2 years later cited use of a “solid knee brace all of the time.” The natural history of ACL pathology, which can be treated nonoperatively, can result in performing low functional demands and allow individuals to participate in sports that do not place high demands on the knee and not require permanent bracing. The AO opines the CI’s use of the brace likely prevents recurrent subluxation, however was likely used for support and comfort. Furthermore, there is no evidence of an absolute provider requirement for the brace. Finally, the CI is working as a helicopter repairman supporting the return to a low functional performance occupation post-separation. The Board deliberated the application of dual ratings, based on separate ratings for instability and limitation of motion (or painful motion) as established by VA policy in effect at the time of separation (General Counsel Opinion of 01 July 1997 and Fast Letter 04-22 of 01 October 2004). By internal policy and precedent, the Board adheres to this guidance. Members thus deliberated if a second compensable code could be justified under this sanction. All Board members agree all exams reflect painful motion, and degenerative changes of the right knee. One and a half years later the VA additionally rated 10% for Degenerative Joint Disease (DJD) of the right knee based on degenerative changes on X-ray and for compensable loss of extension limitation, 5261 code, analogous to 5010 code (traumatic arthritis). The Board agreed no compensable rating is supported under code 5260 (limitation of flexion) with either exam at the time of separation; although, application of VASRD §4.59 (painful motion) could be considered in order to achieve the minimal compensable rating of 10% and also agreed with a 10% rating under code 5010. Furthermore, in lieu of the instability of the knee, there is additional knee pathology with meniscal and bony disorders to support the evidence of functional pain impairment and therefore the evidence does support dual coding. 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 moderate instability condition and 10% for the right knee degenerative changes, subsuming osteochondral and meniscal pathology, based on painful motion.

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. The Board did not surmise from the record or PEB ruling in this case that any prerogatives outside the VASRD were exercised. As discussed above, PEB reliance on DoDI 1332.39 for rating right knee condition was operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the right knee condition, the Board unanimously recommends a dual coding disability rating for a combined rating of 30%, IAW VASRD §4.71a.

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 Anterior Cruciate Ligament Laxity With 2+ Lachman's Test, Status Post Anterior Cruciate Ligament Reconstruction | | 5257 | 20% |
| Degenerative joint disease, Right knee | | 5010-5003 | 10% |
| **COMBINED** | | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111003, 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 / Mr. Brower), 2900 Crystal Drive, Suite 300, Arlington, VA 22202

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for XXXXXXXXXXXXXXXXXXXXXXXX, AR20120018088 (PD201100737)

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 the 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 XXXXXXXXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA