RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxxxxxxxxxxx BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1100753 SEPARATION DATE: 20080830

BOARD DATE: 20120621

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty 1LT/0-2E (3404, Financial Management Officer), medically separated for a left ankle condition. The CI initially injured his ankle in 1999, while stepping on a curb and heard a popping sound. He did not respond adequately to conservative or operative treatment in 2004 and 2006 and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was placed on limited duty (LIMDU) and underwent a Medical Evaluation Board (MEB). Sixteen conditions, as identified in the rating chart below, were forwarded to the Physical Evaluation Board (PEB). The PEB adjudicated all sixteen conditions and found him fit for duty. The CI requested a reconsideration board via a Congressional specifically of the PEB’s fit determination. The reconsideration PEB (RPEB) adjudicated osteochondral lesion of the left talus status post failed microfracture and OBI plugs as unfitting, rated 10%; three other left ankle conditions as Category II, (contributing to the unfit); and the remaining twelve conditions rated Category III*,* (not separately unfitting and do not contribute to the unfitting condition); and with application of SECNAVINST 1850.4E. The CI made no further appeals and was medically separated with a 10% disability rating.

CI CONTENTION: The CI states: “I respectfully request to have my case reviewed through the PEB process. I do not believe the disability rating of 10% that I received from the PEB process accurately reflects the injuries that I sustained on active duty that made me unfit for service. Specifically, I believe that more injuries should have been considered for the unfit rarings and that the unfit ratings should have been higher due to the extent of my injuries. To this day I continue to struggle with limited activity and pain to these injuries. These injuries dwill continue the rest of my life and have only become more delilitationg with time. The VA rated my injuries at 60%, which more accurately reflects the severity of the injuries that I received on active duty.” He elaborates no specific contentions regarding 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. The fifteen remaining conditions rated as Category II and Category III requested for consideration meet the criteria prescribed in DoDI 6040.44 for Board purview; and, are addressed below, in addition to a review of the ratings for the unfitting conditions. The remaining conditions rated by the Department of Veterans’ Affairs (DVA) at separation and listed on the DD Form 294 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 Board for Correction of Naval Records (BCNR).

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service RPEB – Dated 20080429** | | | **VA (5 Mo. Pre Separation) – All Effective Date 20080831** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Osteochondral Lesion Of The Left Talus Status Post Failed Microfracture And OBI Plug | 5099-5003 | 10% | Postoperative Left Ankle Osteochondritis Dissecans  Corresponding VA Entry | 5271 | 10%\* | 20080318 |
| Left Tibiotalar Osteoarthriosis | Related CAT 2 | |
| Ankle Arthritis | Related CAT 2 | |
| Chronic Left Ankle Pain | Related CAT 2 | | Scar, Left Ankle | 7804 | 10% | 20080318 |
| Right Fifth Pip Joint Osteoarthrosis Secondary To Chondral Lesion From A Dislocation | Not Unfitting | | Status Post Contusion Right Little Finger | 5230 | 0% | 20080318 |
| Closed Dislocation Of Right Fifth Pip Joint | Not Unfitting | |
| Early Arthrosis Left Knee | Not Unfitting | | Patellofemoral Syndrome, Left Knee | 5260-5024 | 10% | 20080318 |
| Possible Chondromalacia Of Left Knee | Not Unfitting | |
| Left Knee Pain | Not Unfitting | |
| Left Knee Medial Femoral Condyle Bruise | Not Unfitting | |
| Bilateral Hallux Limitus/Rigidus To His Feet | Not Unfitting | | Hallux Ridigus, Right Foot With Sessamoiditis | 5281 | 0% | 20080318 |
| Hallux Ridigus, Left Foot With Sessamoiditis | 5281 | 0% | 20080318 |
| Sesamoiditis Bilateral Great toe | Not Unfitting | |
| Right Rotator Cuff Supraspinatus And Infraspinatus Partial Thickness Tears | Not Unfitting | | Right Shoulder Strain | 5201-5019 | 10% | 20080318 |
| Right Acromioclavicular Joint Osteoarthrosis | Not Unfitting | |
| Right Superior Labral Anterior Posterior Tear Of Shoulder | Not Unfitting | |
| Right Shoulder Slap Tear With Bicipital Biceps Tendon Tendinopathy | Not Unfitting | |
| ↓No Additional MEB/PEB Entries↓ | | | Cervical Spine Strain | 5237 | 10% | 20080318 |
| Lumbar Spine Strain | 5237 | 10% | 20080318 |
| Plantar Fasciitis, Bilateral Feet, With Pes Plantus And Left Achilles Tendonitis | 5299-5276 | 10% | 20080318 |
| Tinnitus | 6260 | 10% | 20080317 |
| 0% x 5/Not Service-Connected x 1 | | |  |
| **Combined: 10%** | | | **Combined: 60%** | | | |

\* VA rating based on exam most proximate to date of permanent separation.

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 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 also acknowledges the CI's contention suggesting that ratings should have been conferred for other conditions documented at the time of separation and for conditions not diagnosed while in the service (but later determined to be service-connected by the DVA). 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 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.

Left Ankle Condition. The CI initially injured his ankle in 1999, while stepping on a curb with recurrent ankle pain. He did not respond to conservative treatment and a magnetic resonance imaging (MRI) demonstrated an osteochondral Defect (OCD) lesion of the talus. Ankle arthroscopy with microfracture of the talus was performed in July 2004 with some success allowing the CI to return to full duty 6 months later in January 2005. However, pain persisted especially after activity and a repeat MRI demonstrated a large OCD involving superior and medial aspect of the talar dome. Several treatment scenarios were discussed and the CI opted for an open ankle procedure in April 2007 for definitive care of the talar dome defect. Left ankle pain persisted after post-operative management as well as trials of Hyalgan injections and custom fitted orthotics and he was thus referred to a MEB. The May and November 2007 LIMDU referenced only the left osteochondral lesion of the talus with the following limitations noted: no running, jumping, squatting, marching, humping, unit physical training, physical fitness testing (PFT), sports, martial arts, field duty, rifle range, work parties, standing watch, or formations and no deployments. The non-medical assessment (NMA) documented the CI was working in his rating, unable to stand or walk for a length of time or distance, lead his Marines in physical training, wear protective equipment; was not worldwide assignable and missed work related to his ankle treatments on average 5-10 hours per week. She further noted he performed extremely well in his limited capacity. 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; as summarized in the chart below.

|  |  |  |  |
| --- | --- | --- | --- |
| Goniometric ROM –  L Ankle | PT ~ 11 Mo. Pre-Sep | PT ~ 4 Mo. Pre-Sep | VA C&P  ~ 5 Mo. prior-Sep |
| Left Dorsiflexion (0-20) | 10⁰ | 9⁰ | 18⁰ |
| Left Plantar Flexion (0-45) | 45⁰actual measured 50⁰ | 27⁰ | 30⁰ |
| Comment | Mild antalgic gait |  | Limp, Painful motion |
| §4.71a Rating | 10% | 10% | 10% |

At the MEB exam, the CI reported daily constant ankle pain 2-4 out of 10 at rest and 3-6 out of 10 with activity such as short distance walking, walking on uneven surfaces or standing greater than fifteen minutes, pain starts in the morning and gradually worsened throughout the day with radiating pain to left calf and foot, pain caused the ankle to lock up, and numbness and tingling of the foot from prior surgeries. The CI reported he was unable to participate in events with his family as a result of his ankle pain and the pain also adversely affected his military career. He was reluctant to walk from office to office to speak with other marines and therefore required an e-mail making him less effective as an officer, was unable to participate in physical training events, hold formations, wear protective body equipment, wear combat boots or participate in annual and ceremonies in unit functions. The MEB physical exam demonstrated well-healed surgical incisions, mild swelling, pain with passive and active range of motion, decreased range of motion, tenderness to palpation over the medial aspect of the tibia as well as the anterior talofibular ligament, negative instability signs, and was distally neurovascularly intact. X-rays revealed normal stress views of the ankle and a positive osteochondral lesion of the talus medially and an anterior distal tibial lucency. At the VA Compensation and Pension (C&P) exam performed prior to separation, the CI reported weakness, stiffness, swelling, gives way, lack of endurance, locking, fatigability, tingling, loose feeling, constant pain 3 to 6 of 10, worse with physical activity to include walking and climbing stairs but could function with medication. The C&P physical exam demonstrated a 5.5 cm long level scar with tenderness and disfigurement of the medial side of the left ankle, tenderness on palpation, no edema, effusion, weakness, heat, guarding of movement or subluxation. Gait was described as a limp on his left leg without the use of orthopedic aids. X-rays taken at the VA examination revealed an old healed fracture of the medial malleolus with orthopedic repair.

The Board directs attention to its rating recommendation based on the above evidence. The Board notes that the VA exam was complete, well documented, and similar in terms of ratable data of the MEB and the PT ROM exams; except for the mild loss of dorsiflexion ROM compared to the moderate loss of the PT ROM’s. The Board carefully considered the whole record IAW VASRD §4.2 (interpretation of examination reports) in order to develop a consistent picture of the CI’s ankle condition and agreed in this case the exams and service treatment record (STR) reflected moderate loss of dorsiflexion therefore agreed to assign the VA exam more probative value but agreed to rate moderate dorsiflexion. The PEB and VA chose different coding options for the condition, but this did not bear on rating. The PEB chose to rate osteochondral lesion of the left talus status post procedures and rate the remaining ankle maladies; chronic left ankle pain, ankle arthritis left tibiotalar osteoarthriosis as category II contributing to the unfitting condition. The PEB’s adjudication reflected application of the SECNAVINST 1850.4E for rating, but its 10% determination coded analogous to the 5003 code (arthritis, degenerative) was consistent with §4.71a standards. The VA chose to code postoperative left ankle osteochondritis dissecans 5271 rated 10% for moderate painful limited motion. The Board agreed pain, likely caused by the pathology of the talus and subsequent surgical procedures to correct the talar defect, was the predominant disability and the evidence reflected moderate painful limitation of motion with mild to moderate symptoms. The Board looked for higher ratings using the 5271, the 5283 (tarsal, or metatarsal bones, malunion of, or nonunion of) or the 5284 code (foot injuries, other) but there was no evidence of marked limitation of motion or ankylosis of the ankle to justify a higher rating under these codes. Finally, Board precedent is that a functional impairment tied to fitness is required to support a recommendation for addition of a peripheral nerve or a scar rating at separation which was not evident in this case. 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 left ankle condition and that there was insufficient cause to recommend a change in the PEB fitness determination for the chronic left ankle pain, ankle arthritis left tibiotalar osteoarthriosis condition as the Board agreed they were directly related to the unfitting condition and were considered with the left ankle condition.

Contended PEB Conditions. The conditions adjudicated as not unfitting by the PEB were pathologies of the right fifth finger, the left knee, the right and left great toe and the right shoulder. The Board’s first charge with respect to these conditions 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. None of these conditions were profiled and none were judged to fail retention standards. The fifth finger and the right shoulder were implicated in the NMA’s statement. The right fifth finger was evaluated as an addendum for the PEB. The orthopedic surgeon opined the finger had post-traumatic arthritis secondary to a remote dislocation injury but did not interfere with the CI’s ADLs and recommended conservative management. The CI had right shoulder injury while participating in unit PT in November 2001 where he sustained a shoulder dislocation. He was treated non-operatively with physical therapy and was released to full duty after receiving six treatments. The STR does not reflect evidence of right shoulder treatment until March of 2007 when he had a flair-up of pain. He was evaluated by orthopedics, had normal plain X-rays, and an abnormal MRI which revealed rotator cuff injuries, acromioclavicular joint arthritis and a capsular injury and the orthopedic surgeon, in a letter to the PEB president, opined the right shoulder injury impacted the use of the right arm and would eventually need operative intervention. The LIMDU’s in evidence did not specifically identify the right shoulder nor were there specific limitations identified for the right shoulder. 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. 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 any of the contended PEB conditions 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. 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 SECNAVINST 1850.4E for rating left ankle condition was operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the left ankle condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended chronic left ankle pain, ankle arthritis left tibiotalar osteoarthriosis and the pathologies of the right fifth finger, the left knee, the right and left great toe and the right shoulder conditions, the Board unanimously recommends no change from the PEB determinations as not unfitting. 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:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Osteochondral Lesion Of The Left Talus | 5099-5003 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110905, 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 13 Jul 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 individuals’ 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:

- former USN

- former USN

- former USMC

- former USMC

- former USN

- former USMC

Assistant General Counsel

(Manpower & Reserve Affairs)