RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Marine corps

CASE NUMBER: PD1100815 . SEPARATION DATE: 20061215

BOARD DATE: 20120329

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty CPL/E-4 (2621, Signals Collection Operator), medically separated for bilateral lower leg condition. He did not respond adequately to conservative and surgical treatment and was unable to fulfill the physical demands of his MOS or meet physical fitness standards. He was placed on limited duty (LIMDU) and underwent a Medical Evaluation Board (MEB). Bilateral leg medial tibial stress syndrome and status post right leg soleus fascial release with medial tibial periostectomy were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. No other conditions appeared on the MEB’s submission. Other conditions included in the Disability Evaluation System (DES) packet will be discussed below. The PEB adjudicated the medial tibial stress syndrome condition as unfitting, rated 0%; additionally the status post right leg soleus fascial release and medial tibial periostectomy condition was determined to be category II. The CI requested reconsideration and was then medically separated with a 0% disability rating.

CI CONTENTION: “I originally received a ratings letter of 20% or greater service connected disability rating. But, when my payments began last October 2010 they sent a letter stating only 10% and my payments reflect that amount rather than the 20%. I was medically discharged for injuries to both legs. A Surgery was performed to correct the injury to my right leg, but was unsuccessful. As such, the physician did not want to perform the surgery on my left leg and deemed me medically unfit to continue duty. His medical findings were for both legs stating the problem. As a result of these injuries I cannot run any distance without pain afterwards. Once I discovered this error, I contacted at several different numbers listed on both letters inquiring of an explanation of the conflicting ratings. It was an exercise in great frustration as the VA kept redirecting me to another number and so on, when finally a VA representative told me that they did not know why the two letters were conflicting and that it normally does not happen. I was unable to get any answers and so when I was browsing the VA website, I saw your the PDBR investigation, contacted wounded warriors and they sent me the forms to send to you. It is my understanding that the PDBR will review these findings and determine if I was rated incorrectly and any other benefits which should have been offered and made available to me at the time of separation as well as the conflict of these two different ratings I have received an I am actually receiving.”

RATING COMPARISON:

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| --- | --- |
| **Service Recon PEB – Dated 20061016** | **VA (2 Mo. Post-Separation) – All Effective Date 20061216** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Medial Tibial Stress Syndrome, Bilateral Legs | 5022-5003 | 0% | Right and Left Medial Tibial Stress Syndrome | 5299-5262 | Not Rated\* |
| S/P Right Leg Soleus Fascial Release and Medial Tibial Periostectomy | Category II | Status Post Fasciotomy Right Calf w/ Residual Hypoesthesia | 8799-8724 | 10% | 20061113 |
| ↓No Additional MEB/PEB Entries↓ | 0% x 1/Not Service Connected x 0 | 20061113 |
| **Combined: 0%** | **Combined: 10%** |

\* VARD 20061030 coded the conditions 5299-5262 @ 10% for each leg for vocational rehabilitation purposes only.

ANALYSIS SUMMARY: The Board acknowledges the CI’s assertions that the Department of Veterans’ Affairs(DVA) sent two conflicting rating letters. It is a fact; however, that the Board and the VA are two separate entities, each acting under a different set of laws. The Board has neither the role nor the authority to correct any DVA improprieties or errors. The Board’s authority as defined in DoDI 6044.40 resides in evaluating the fairness of the DES fitness determinations and rating decisions for disability at the time of separation. The 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 Lower Leg Condition. In August 2004, the CI first noticed the insidious onset of bilateral leg discomfort during boot camp while running, jumping or performing any impact activities. He was diagnosed with bilateral shin splints and treated conservatively with activity restriction and physical therapy, and his condition improved. He had a resurgence of bilateral leg pain in 2005 and after a year of conservative therapy and positive tibial stress related changes demonstrated on a bone scan and MRI, he elected for surgical repair. A soleus fascial release and medial tibial periostectomy was performed on his right leg and, if successful, the orthopedic surgeon planned a similar procedure for the left leg. The CI noted marked improvement and was able to run for a time, but after a long run, 5 months after surgery, his pain returned. The CI underwent the MEB process and his LIMDU documented medial stress syndrome, bilateral legs, with limitations to include light duty and activity modification. The non-medical assessment (NMA) noted the CI could not do the run portion of physical fitness training or testing, participate in field activities and was not worldwide qualified. The CI was separated without surgery having been performed on the left leg.

At the MEB exam, 4 months prior to separation, the CI reported baseline pain of 2 to 3 on a scale of 10 with sharp, significant pain of 6 to 7 on a scale of 10 when performing impact activities. The MEB exam demonstrated a very slightly antalgic gait on the right, surgical scar on the posteriormedial aspect of the right leg, and tenderness to palpation of both the right and left leg. The neurovascular exam was normal. The diagnosis was medial tibial stress syndrome, bilateral legs, and status post right leg soleus fascial release and medial tibial periostectomy. At the VA Compensation and Pension (C&P) exam 1 month prior to separation, the CI reported daily intermittent pain radiating down his shins to his ankles with physical activity, rated eight on a scale of 10. Pain was relieved with narcotic non steroidals and rest in the past, yet he was not taking medications or wearing a brace at the time of this exam. He was not able to run, do heavy lifting, or perform any high-impact activities. The exam demonstrated a normal gait, an asymptomatic, normal, linear scar of the right calf, normal muscular exam of the lower legs and no evidence of nonunion or malunion.

The Board directs its attention to its rating recommendations for the bilateral leg condition and debated several options for coding and rating. The PEB combined the bilateral leg condition as a single unfitting condition coded analogous to 5003 rated 0% (degenerative arthritis). The VA rated status post fasciotomy right calf with residual hypoesthesia at 10% with a neuralgia code, 8799-8724, citing intermittent pain twice a day and also subsuming a non painful residual scar. There was no loss of range-of-motion (ROM), no documented painful motion, and no evidentiary findings in support of a compensable rating under any of the specific knee joint codes. The Board deliberated three recommendations which are all compliant with VASRD §4.71a: 1) a bilateral rating of 10%, coded 5022-5003 (periostitis); 2) separate 10% ratings for each leg, coded analogous to 5262 (tibia and fibula, impairment of) for shin splints with tenuous application of §4.40 (“a part which becomes painful on use must be regarded as seriously disabled”); and, 3) separate non-compensable ratings under 5099-5003 without application of §4.40. The Board considered the residual slightly antalgic gait on the right which supports a 10% rating under the 5262 code, x-ray evidence of stress related changes of both tibias which supports the 5003 code (with x-ray evidence of involvement 2 or more major joints), and finally the 5022 code for periostitis which when used analogous with the 5003 code would capture both the antalgic gait and x-ray evidence and merit a 10% rating. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the majority of the Board concluded that the first option (a bilateral rating of 10% coded 5022-5003) constituted the best supported recommendation.

On a separate note, for the purpose of vocational rehabilitation only, the VA determined that the CI’s left medial tibial stress syndrome and right medial tibial stress syndrome were each separately service-connected at 10% using code 5299-5260 (limitation of flexion) and sent CI a letter from the VA vocational rehabilitation and employment officer stating that he had a “rating” of “20% or higher.” This is likely the cause of the CI’s confusion regarding his VA rating decision.

Other PEB Conditions. The other condition forwarded by the MEB was status post right leg soleus fascial release and medial tibial periostectomy. This condition was adjudicated as a category II related condition, one that contributes to the unfitting condition but is not subject to additional separation rating. It was reviewed by the action officer and considered by the Board. This procedure improved the CI’s underlying condition based on the CI’s history and the exams evidenced in the record. There was sensory loss to light touch of the medial aspect of the right calf likely due to the procedure. However, there was no evidence of ratable peripheral motor nerve impairment or documentation of incapacitating episodes which would provide for additional or higher rating. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for this stated condition.

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. 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, the PEB’s use of SECNAVINST 1850.4E for rating medial tibial stress syndrome, bilateral legs was operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the medial tibial stress syndrome, bilateral legs, the Board by a vote of 2:1 recommends a combined rating of 10%, coded 5022-5003 IAW VASRD §4.71a. The single voter for dissent (who recommended adopting the PEB rating 5022-5003 at 0%) did not elect to submit a minority opinion. In the matter of the status post right leg soleus fascial release and medial tibial periostectomy condition, the Board unanimously recommends no change from the PEB adjudication that this was a category II related condition that contributed to the unfitting condition but was not separately compensable. The Board unanimously agrees that there were no other conditions eligible for Board consideration 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** |
| Medial Tibial Stress Syndrome, Bilateral Legs | 5022-5003 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110801, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans Affairs Treatment Record

 President

 Physical Disability Board of Review

MEMORANDUM FOR DEPUTY COMMANDANT, MANPOWER & RESERVE AFFAIRS

 COMMANDER, NAVY PERSONNEL COMMAND

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATIONS

Ref: (a) DoDI 6040.44

 (b) PDBR ltr dtd 26 Mar 12 ICO

 (c) PDBR ltr dtd 4 Apr 12 ICO

 (d) PDBR ltr dtd 27 Mar 12 ICO

 (e) PDBR ltr dtd 4 Apr 12 ICO

1. Pursuant to reference (a) I approve the recommendations of the PDBR set forth in references (b) through (e).

2. The official records of the following individuals are to be corrected to reflect the stated disposition:

 a. Placement on the Permanent Disability Retired List with a 30 percent disability rating effective 31 August 2004.

 b. Disability separation with entitlement to disability severance pay with a rating of 20 percent (increased from zero percent) effective 31 October 2004.

 c. Placement on the Permanent Disability Retired List with a 30 percent disability rating effective 2 February 2002.

 d. Disability separation with entitlement to disability severance pay with a rating of 10 percent (increased from zero percent) effective 15 December 2006.

3. Please ensure all necessary actions are taken to implement these decisions, including the recoupment of disability severance pay if warranted, and notification to the subject members once those actions are completed.

 Assistant General Counsel

 (Manpower & Reserve Affairs)