RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100822 SEPARATION DATE: 20061105

BOARD DATE: 20120718

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E4 (11B, Infantry) medically separated for cervical spine and left knee conditions. Both conditions were a result of a 2003 blast injury in Iraq. The neck injury (blunt trauma) was diagnosed as degenerative disc disease (DDD), and the knee suffered shrapnel injuries requiring surgical debridement. Neither condition could be adequately rehabilitated to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was consequently issued a permanent U3/L3 profile and referred for a Medical Evaluation Board (MEB). The cervical spine and left knee conditions were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Also addressed by the MEB and forwarded on the DA Form 3947 was “low back pain,” judged to meet retention standards. The PEB adjudicated the cervical spine and left knee conditions as unfitting, rated 10% and 0% respectively, each citing criteria of the US Army Physical Disability Agency (USAPDA) pain policy. The back condition was not addressed on the PEB’s DA Form 199. The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: “Injuries received in Iraq on 4/5/03 have been deemed worse then [*sic*] at the time of separation.” He elaborates no specific contentions, but lists additional conditions currently rated by the VA (lumbar degenerative disc disease, hearing loss with tinnitus, post-traumatic stress disorder, and cervical/lumbar radiculopathies). On the VA rating decision proximate to separation, the lumbar spine condition was not service-connected; but, was rated 10% effective 20070721. None of the other listed conditions were identified by the VA for rating within the 12 month period following separation.

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 the unfitting cervical spine and left knee conditions are addressed below. The CI’s application implies a request for consideration of rating all of his listed Department of Veterans’ Affairs (DVA) conditions, which would include the lumbar spine condition addressed by the MEB. Although the PEB did not include an entry that this medically acceptable condition was determined to be not unfitting, that was most likely an administrative oversight. Members agreed that the lumbar spine condition should be conceded as requested by the CI, and as compliant with the DoDI 6040.44 defined purview of the Board; it is addressed below. The remaining DVA rated conditions listed on the application, or any other conditions or contention outside the Board’s defined scope of review, remain eligible for future consideration by the Army Board for Correction of Military Records (ABCMR).

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service PEB – Dated 20060914** | **VA (3 Mo. Pre-Separation) – All Effective Date 20061105** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Cervical Disk Degeneration  | 5237 | 10% | Cervical DDD | 5243 | 10% | 20060803 |
| L Knee S/P Shrapnel Injury | 5099-5003 | 0% | L Knee, DJD | 5010-5260 | 10% | 20060803 |
| Low Back Pain | Not Unfitting\*  | Low Back Pain | 5237 | NSC | 20060803 |
| No Additional MEB/PEB Entries | Scar, L Knee | 7804 | 10% | 20060803 |
| Scar, LLE | 7804 | 10% | 20060803 |
| Not Service-Connected x 3 Additional | 20060803 |
| **Combined: 10%** | **Combined: 30%** |

\*Presumptively, as above.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the worsening impairment with which his service-incurred conditions continue 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 proximate to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of fitness decisions and rating determinations for disability at the time of separation. DoDI 6040.44 specifies a 12-month interval for special consideration to DVA findings. The Board further acknowledges the implied contention for rating of the lumbar spine condition determined to be not unfitting by the PEB; 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 the member’s service career; and the Board’s assessment of fitness determinations is premised on the MOS-specific functional limitations in evidence at the time of separation. 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.

Cervical Spine Condition. In April 2003 the CI was blown out of his vehicle when it struck a mine; landing on his head and neck. His neck pain was mild and ignored initially, but progressively worsened; specifically with the Kevlar and flak requirements of a second deployment to Iraq in September 2003. On redeployment, the neck pain was associated with bilateral (predominantly right) radicular pain. Magnetic resonance imaging (MRI) revealed bi-level DDD at C5-7, with right foraminal narrowing at C6/7. Electrodiagnostic studies were negative, and neurologic exams remained normal; surgery was not recommended. The narrative summary (NARSUM) documented pain rated 6/10, exacerbated by lifting and throwing. The physical exam noted “decreased range-of-motion (ROM) in all directions secondary to pain.” It further noted right paraspinal tenderness. At the VA Compensation and Pension (C&P) examination, performed 3 months prior to separation and same day as NARSUM exam, the neck pain was rated 8/10 (exacerbated by “exercise” and “changes in weather”). No physical findings for the spine, other than the cited ROM measurements, were recorded. Normal neurologic findings were documented by both examiners. Formal ROM measurements were performed for the MEB by physical therapy on the day preceding the MEB and VA examinations. Since the identical 36 measurements were recorded in the VA Compensation and Pension (C&P) evaluation, it is assumed that this is the only formal ROM evaluation in evidence for the Board’s rating recommendation. This recorded active flexion of 25⁰ (limited by pain) and combined active ROM of 190⁰.

The Board directs attention to its rating recommendation based on the above evidence. The PEB’s 10% rating was supported by the USAPDA pain policy, but was not consistent with VASRD §4.71a rating criteria for the ROMs under consideration. The VA rating decision (VARD) which conferred a 10% rating cited the passive ROM values for flexion (average 35⁰) from the same exam. More likely than not, this was an error on the rater’s part; since, active ROM is the accepted VA standard for disability rating; as, it is (by firm precedence) for the Board. IAW with the VASRD §4.71a general rating formula for the spine, the active flexion of 25⁰ yields a 20% rating. 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 cervical spine condition. The action officer recommended, and the Board concurred with, the code 5242 (degenerative arthritis of the spine) for its clinical compatibility.

Left Knee Condition. The CI suffered multiple shrapnel injuries to his knee consequent to the 2003 blast injury referenced above. He underwent surgical debridement and attempted rehabilitation in theater, but required medical evacuation. He failed a course of continued physical therapy and conservative management after redeployment. An MRI in 2004 did not comment on any retained shrapnel, but noted degenerative changes and possible injury to the meniscus (cartilage). Ligaments and other internal structures were intact. No arthroscopy or surgery was performed. The last outpatient clinical entry directed to the knee was 17 months prior to separation; all later entries were directed toward the neck. This recorded “deep retropatellar knee pain with hills, running, and prolonged sitting. Patient has functional locking, mild effusions, and functional instability.” The NARSUM reported pain “worsened by knee bending, running, and other impact exercises.” The totality of the NARSUM knee examination was “tenderness to palpation over his old wound sites. Full ROM of his knee. Associated crepitus.” The VA C&P prior to separation, documented pain and swelling aggravated by “prolonged standing, walking, changes in weather.” The physical exam recorded “medial tenderness over shrapnel scar. Pain with squatting.” ROM measurements were normal (flexion 140⁰, extension 0⁰). The joint was stable to stress in all planes, and there were no signs of cartilage impingement.

The Board directs attention to its rating recommendation based on the above evidence. The PEB’s 0% rating was supported by the USAPDA pain policy, and there was no ratable ROM impairment. The VA conferred a 10% rating under the analogous 5260 (limitation of flexion) code, although the VARD acknowledged normal ROM and absence of painful motion. The Board deliberated if a compensable rating could be justified, given that: the 5003 “two or more major joints” criterion for a 10% rating was not applicable; that ROM was normal; and, that §4.59 (painful motion) cannot be cited from the exams in evidence. Consideration was given to the applicability of VASRD §4.40 (functional loss) to achieve the minimum compensable rating; but, it was noted that the knee had been clinically silent for 1 1/2 years preceding separation; and, indeed, a case could be had that the knee condition was no longer unfitting by the time of the final PEB. The fitness call must, of course, be conceded to the PEB and the CI; but, member consensus was that reasonable criteria for application of §4.40 were not supported by the evidence. Although the nature of the injury and the persistent pain and limitations in evidence are not inconsequential, no route to a compensable rating under any available VASRD code can be achieved by the evidence before the board. The Board must cite reasonable supporting evidence linked to specific rating criteria in its recommendations; and, thus members concluded that there was insufficient cause to recommend a change in the PEB adjudication of the left knee condition.

Lumbar Spine Condition. The NARSUM reported an onset of low back pain in 2006, but the VA C&P and earlier service notes date it to a fall in 2003. It was not significantly clinically active until the MEB period. Normal ROM, normal physical findings, normal x-rays and lack of service treatment for the condition were cited by the VA in its initial decision that the condition was not service-connected. It was not profiled, was not specified in the commander’s statement, and was not judged to fail retention standards. The Board’s main charge with respect to this condition is an assessment of its fitness implications using performance based criteria. It was reviewed by the action officer and considered by the Board. There was no indication from the record that it 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 the lumbar spine condition as unfitting and eligible for disability 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 the cervical spine and left knee conditions was operant in this case and the conditions were adjudicated independently of that policy by the Board. In the matter of the cervical spine condition, the Board unanimously recommends a disability rating of 20%, coded 5242 IAW VASRD §4.71a. In the matter of the left knee condition and IAW VASRD §4.71a, the Board by a vote of 2:1 recommends no change in the PEB adjudication. The single voter for dissent (who recommended a 10% rating for the left knee under code 5010) submitted the addended minority opinion. In the matter of the lumbar spine condition, the Board unanimously agrees that it cannot recommend a finding of unfit for additional disability rating. 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** |
| Degenerative Disc Disease, Cervical Spine | 5242 | 20% |
| Residuals of Shrapnel Injury, Left Knee | 5099-5003 | 0% |
| Chronic Low Back Pain | Not Unfitting |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110919, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans Affairs Treatment Record

 XXXXXXXXXXXXXXXXXXXXXXXX

 President

 Physical Disability Board of Review

MINORITY OPINION:

My position is that a compensable rating for the left knee in this case is supported IAW VASRD §4.40. §4.40 states “a part which becomes painful on use must be regarded as seriously disabled;” and, the VA examiner, prior to separation, documented that knee pain was provoked by walking and prolonged standing. That observation, plus reasonable doubt, was adequately persuasive in support of my vote for a right knee rating of 10% under code 5010 with application of §4.40. Furthermore, from the DoDI 6040.44 perspective that this Board must render “fair and equitable” recommendations; a multiple shrapnel injury to a joint resulting in residual disability to the extent that the member was no longer fit for continued service (not withstanding controversy to that effect), is logically incongruent with a 0% disability rating.

I respectfully submit that the Secretary considers the following minority recommendation:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Degenerative Disc Disease, Cervical Spine | 5242 | 20% |
| Residuals of Shrapnel Injury, Left Knee | 5010 | 10% |
| Chronic Low Back Pain | Not Unfitting |
| **COMBINED** | **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 XXXXXXXXXXXXXXXXXXXXXXXXXXX, AR20120016394 (PD201100822)

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 XXXXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA