RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100825 SEPARATION DATE: 20080915

BOARD DATE: 20120731

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (13B20/Field Artillery Cannoneer), medically separated for left knee pain. The condition began in 2005 and was not a consequence of injury. It could not be adequately rehabilitated to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded osteochondritis dessicans to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Sleep apnea corrected with uvuloplasty and pre-hypertension, identified in the rating chart below, were also identified and forwarded by the MEB as non-disqualifying. The PEB adjudicated the left knee pain condition as unfitting, rated 10% with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). 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: “Not all of my medical conditions were addressed during MEB proceedings. I was diagnosed with obstructive sleep apnea by my doctor and was awaiting an appointment for a sleep study to confirm the diagnosis. The sleep study was scheduled but not performed until I had already started terminal leave. I was treated and diagnosed with PTSD following my deployments in 2006 and 2007.” CI also submits his “VA award letter showing that I was service connected disabled at 60% immediately following my discharge from the military. This VA claim was filed prior to my discharge from the military and held at the Winston-Salem Regional Office until my official release from active duty.”

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 obstructive sleep apnea (OSA) condition requested for consideration and the unfitting left knee condition meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. The requested posttraumatic stress disorder (PTSD) condition is 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 (ABCMR).

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20080602** | | | **VA (7 Mos. Post-Separation) – All Effective Date 20080916** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Left Knee Pain | 5003 | 10% | Left Knee Osteochondritis | 5099-5010 | 10% | 20090420 |
| Sleep Apnea | Not Unfitting | | Obstructive Sleep Apnea | 6847 | 50% | 20090420 |
| Pre-Hypertension | Not Unfitting | | Hypertension | 7101 | NSC | 20090420 |
| ↓No Additional MEB/PEB Entries↓ | | | Bilateral Tinnitus | 6260 | 10% | 20081210 |
| 0% X 4 / Not Service-Connected x 3 | | | 20090420 |
| **Combined: 10%** | | | **Combined: 60%\*** | | | |

\*VARD dated 23 July 2010 added PTSD, rated 30% effective 26 January 2010; combined increased to 70%.

ANALYSIS SUMMARY: The Board acknowledges the CI's contention suggesting that ratings should have been conferred for other conditions documented at the time of separation, some of which were evaluated and determined not to be individually unfitting for continued service. 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 is responsible for maintaining a fit and vital fighting force. 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. However the Department of Veterans’ Affairs (DVA), operating under a different set of laws (Title 38, United States Code), 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. The Board is empowered to evaluate the fairness of fitness determinations, and to make recommendations for rating of conditions which it concludes would have independently prevented the performance of required duties (at the time of separation). The Board’s threshold for countering DES 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.

Left Knee Pain Condition. The narrative summary (NARSUM) notes that the knee pain condition, which started in August 2005 while deployed, was worsened with prolonged walking or standing, and could occur at rest. Surgical intervention was considered, but because of the uncertain likelihood of improvement, it was not pursued. Medications and knee injections were not helpful. 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.

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| --- | --- | --- | --- |
| Left Knee ROM | Ortho/MEB ~ 5 Mo. Pre-Sep | PT ~ 5 Mo. Pre-Sep | VA C&P ~ 7 Mo. After Sep |
| Flexion (140⁰ normal) | 130⁰ | 110⁰ | 118⁰ |
| Extension (0⁰ normal) | 0⁰ | -2⁰\* | 0⁰ |
| Comment | Small effusion, no instability; painful motion | Limited motion due to pain; no additional loss with repetition | Painful motion; flexion limited by pain |
| §4.71a Rating | 10% | 10% | 10% |

\*A minus (-) sign indicates hyperextension

The MEB orthopedic examiner, on 14 April 2008, indicated there was no specific injury to the knee. Initial symptoms included buckling and giving way, associated with pain and swelling. The persistent pain was localized to the anterior medial joint line and in the patellofemoral area. The orthopedic physical exam revealed a 1/5 effusion and intact ligaments. There was questionable physical exam evidence of a medial meniscal tear. The most recent magnetic resonance imaging (MRI) performed on 15 December 2007 showed an osteochondral lesion of the medial femoral condyle that was improving, and central and lateral patellar chondromalacia. There was also a questionable tear of the posterior horn of the medial meniscus. The MEB physical exam, performed on 21 April 2008, 5 months prior to separation, noted the presence of patellar grinding and patellar tenderness, but no knee swelling. Pain was present under the patella during knee extension. The VA Compensation and Pension (C&P) examiner, 7 months after separation, reported that medications were not helpful and that the CI was currently receiving no treatment. He did not use an assistive device. Activity caused flare-ups, and he was prevented from doing strenuous work, climbing, lifting or walking. However, the condition did not interfere with activities of daily living. Examination revealed a normal gait, and the left knee appeared normal. Flexion was limited by pain, and pain was also present during full extension. There were no examination findings of instability, and the McMurray test (assessing for meniscal tear) was negative.

The Board directs attention to its rating recommendation based on the above evidence. The PEB and VA chose different coding options for the condition, but this did not bear on rating. There is no evidence that DoD or service specific regulations or policies were applied. The ratings by the PEB and VA were consistent with VASRD §4.71a standards for rating a painful joint with non-compensable limitation of motion. Because of the presence of a possible meniscal tear, the Board considered rating under the 5259 code, which also includes painful motion; however, no more than a 10% rating was possible using this pathway. 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 knee pain condition.

Contended PEB Conditions. The contended condition adjudicated as not unfitting by the PEB was OSA. The Board’s first charge with respect to this condition is an assessment of the appropriateness of the PEB’s fitness adjudication. 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. In 2004 the CI had surgery to remove large tonsils thought to be contributing to sleeping problems. In February 2008 he presented with symptoms suggestive of sleep apnea, and per the VA examiner was subsequently diagnosed with this condition. The examiner stated that his symptoms were “considerably helped” with CPAP. Routinely OSA is not considered unfitting solely on the basis of field and operational impediments to the use of CPAP. There is no evidence in this case that OSA was associated with any unfitting impairments not corrected by CPAP. The condition was not profiled, was not implicated in the commander’s statement and was not judged to fail retention standards. The condition 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. The PEB’s fitness adjudication was therefore expected and reasonable. 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 obstructive sleep apnea 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. The Board did not surmise from the record or PEB ruling in this case that any prerogatives outside the VASRD were exercised. In the matter of the left knee pain condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended OSA 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, therefore, recommends that there be no recharacterization of the CI’s disability and separation determination, as follows:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Left Knee Pain | 5003 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110909, 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 / ), 2900 Crystal Drive, Suite 300, Arlington, VA 22202

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation for XXXXXXXXXXXXXXXXXXXX, AR20120014280 ()

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 and hereby deny the individual’s application.

This decision is final. The individual concerned, counsel (if any), and any Members of Congress who have shown interest in this application have been notified of this decision by mail.

BY ORDER OF THE SECRETARY OF THE ARMY:

Encl XXXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA