RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100849 SEPARATION DATE: 20060304

BOARD DATE: 20120607

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a National Guard SSG/E-6 (12B30/Combat Engineer), medically separated for chronic pain, right shoulder, status post (s/p) rotator cuff repair. He injured his right shoulder in a motor vehicle accident in November 2003 due to IED/landmine explosion while deployed to Iraq. He did not improve sufficiently with conservative and operative treatment (surgery) to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent U3 profile and underwent a Medical Evaluation Board (MEB). “Chronic right shoulder pain secondary to rotator cuff tear of the right status post repair” was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Four other conditions, as identified in the rating chart below, were forwarded on the MEB submission as medically acceptable conditions. The PEB adjudicated the right shoulder condition as unfitting, rated 10% with application of the US Army Physical Disability Agency (USAPDA) pain policy. The CI appealed to Formal PEB (FPEB) which affirmed the PEB findings. The USAPDA issued a revised PEB DA Form 18; and the CI was medically separated with a 10% disability rating.

CI CONTENTION: The CI states: “I was on active duty for the US Army thru the ARNG to serve in Iraq. When I came home from Iraq [sic] I was placed on medical hold for two years due to injuries incurred in combat. The MEB and PEB's [sic] resulted in disabilities of a combined 10% for a cervical spine injury and right shoulder injury which resulted from an IED explosion in Iraq. All of my disabilities were not taken into consideration [sic] My medical evaluation board proceedings consisted of the following disabilities: 719.41 Chronic [sic] right shoulder pain secondary to rotator cuff injury, 719.46 Chronic [sic] right knee pain, 724.2 [sic] Chronic [sic] low back pain, 780.57 Obstructive [sic] sleep apnea, 723.1 Neck [sic] pain. My physical evaluation board only listed my right shoulder as 10% disabling. I was told I had to take military severance pay or go back to my unit [sic] but if I went back to my unit [sic] the Army would not be held responsible for any additional injuries I incurred. While I could not understand this [sic] I felt it was in my best interest to take the severance pay and go home. I filed a claim for service connection for the disabilities incurred in service and received an award of VA compensation of 70% effective the date of discharge of 3/4/2006 from service by VA rating decision dated July 28, 2006. My original rating decision awarded service connection for: cervical spine injury @10%, right shoulder injury @10%, migraine headaches @0%, DJD of the right knee @10%, tinnitus @10%, [sic] obstructive sleep apnea @50%. I received a purple heart in service and was later on treated for PTSD and TBI, [sic] I have been granted service connection for the residual of post traumatic stress disorder rated at 70% alone by VA rating decision dated November 18, 2006 and given an effective date of discharge for all of my conditions. VA rating decision dated 3/4/2011 granted service-connection for my TBI. I presently have a combined 90% evaluation for VA compensation benefits.”

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 conditions of right shoulder, right knee, low back, and neck pain; and obstructive sleep apnea (OSA), as requested for consideration meet the criteria prescribed in DoDI 6040.44 for Board purview; and, are addressed below. The Board acknowledges the presence of PTSD as a currently rated condition by the VA, but notes that the scope of its recommendations does not extend to conditions which were not diagnosed or in evidence at the time of medical separation. This includes conditions which may have had early manifestations during active service, since such sub-clinical conditions cannot be correlated with a fitness determination requisite for a rating. It is noted that the USAPDA addressed the CI’s “claim for PTSD,” without any indication of a formal PTSD diagnosis in evidence. The Board acknowledges the CI’s assertions that there were potential irregularities in his disability processing. It is noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to the CI’s statements in the application regarding suspected service improprieties in the processing of his case or of service medical errors. The requested conditions of migraine headache, tinnitus, PTSD and TBI 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 the Correction of Military Records (BCMR).

RATING COMPARISON:

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| --- | --- |
| **Service Revised PEB – Dated 20060215** | **VA (3 & 6 Mos. Post Separation) – All Effective20060305** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Pain Right Shoulder… | 5099-5003 | 10% | Right Shoulder Residuals of Rotator Cuff Repair | 5201-5010 | 10% | 20060620 |
| Chronic Right Knee Pain | Not Unfitting | Right Knee. Degenerative … | 5260 | 10% | 20060620 |
| Chronic Low Back Pain | Not Unfitting | Chronic Low Back Strain | 5237 | 0% | 20060620 |
| Obstructive Sleep Apnea | Not Unfitting | Obstructive Sleep Apnea | 6847 | 50% | 20060620 |
| Neck Pain | Not Unfitting | Cervical Spondylosis, C5-6 with Discogenic Pain… | 5242 | 10% | 20060620 |
| Claims of PTSD | “does not exist…” | PTSD | 9411 | 70%\* | 20060916 |
| ↓No Additional MEB/PEB Entries↓ | Tinnitus | 6260 | 10% | 20060620 |
| Migraine Headaches | 8100 | 0%\* | 20060620 |
| 0% x 2/Not Service-Connected x 1 | 20060620 |
| **Combined: 10%** | **Combined: 90%\*** |

\* PTSD, 9411 awarded on VARD dated 20061118; HA, 8100 increased to 10% *on VARD dated 20070822* effective 20070620

ANALYSIS SUMMARY: The Board acknowledges the CI’s contention that suggests service ratings should have been conferred for other conditions documented proximate to separation and that there were irregularities in his Disability Evaluation System (DES) processing. The Board wishes to clarify that it is subject to the same laws for service disability entitlements as those under which the DES operates, and that any DES irregularities are outside the scope of the Board. 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 reevaluate said conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment vary over time.

Chronic Pain, Right Shoulder, S/P Rotator Cuff Repair Condition. 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.

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| --- | --- | --- |
| Right Shoulder ROM | MEB ~6 Mo. Pre-Sep | VA C&P ~3 Mo. Post-Sep |
| Flexion (0-180) | 145⁰ | 170⁰ |
| Abduction (0-180) | 130⁰ | 170⁰ |
| Comment: Surgery ~11 Mo. Pre Sep (April 2005) | Normal bulk and tone; no atrophy; no pain with palpation; strength 4/5 vs 5/5 other side; good grip; sensory and reflexes normal | No pain on palpation; no pain on ROM or manipulation; well muscled; no assistive devices; repetition with fatigue and weakness only; normal sensory/reflexes; good grip strength |
| §4.71a Rating | 10% | 10% |

Pre-surgical X-Rays demonstrated mild sclerosis and osteophytes; magnetic resonance imaging (MRI) indicated likely full-thickness tear of the supraspinatus tendon, and degenerative changes, with inferior bony spurring. The CI had surgical repair of the right rotator cuff in April 2005. At the MEB exam, the CI reported chronic shoulder pain which was aggravated by overhead work or exerting himself. The MEB physical exam noted decreased strength (4/5) and decreased ROM of the right shoulder as charted above.

At the VA Compensation and Pension (C&P) exam, performed 3 months after separation, the CI reported pain, inability to do overhead lifting, flares of pain, increase pain with repetitive motion, use of Motrin for relief, and popping sounds without instability. ROM limitations are charted above and the examiner stated “With five repetitive motions, the only functional impact he had was fatigue and weakness but no pain, lack of endurance or change of ROM with each ROM to include.” The diagnosis was “status post rotator cuff surgery to right shoulder, with residual fatigue and weakness.”

The Board directs attention to its rating recommendation based on the above evidence. Both the PEB and VA rated the shoulder at 10%. Although the PEB rating was IAW the pain policy, independent rating IAW VASR criteria also meet the 10% criteria. The PEB coding of 5099-5003 is acceptable, but the VA coding using 5201-5010 better indicated the traumatic origin of the shoulder injury while using the same 5003 rating criteria. Changing the codes would not change the rating and provides no benefit to the CI. 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’s 10% adjudication for the right shoulder condition.

Other Contended PEB Conditions. The contended conditions adjudicated as not unfitting by the PEB were chronic right knee pain; chronic low back pain (LBP); OSA and neck pain. 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.

Only the OSA condition was profiled (P2); the medical hold commander’s statement only mentioned profile limitations and unspecified medical conditions and stated “(the CI) has been able to perform duties assigned to him within limits of his profile. He has been receiving medical treatment since his arrival.” None of the contended conditions were judged to fail retention standards. All conditions were reviewed by the action officer and considered by the Board. The NARSUM indicated OSA with mild impairment as a diagnosis without further details. There was no in-service sleep study or prescription of a breathing assistance device such as continuous airway pressure (CPAP) machine. The CI’s request for a FPEB indicated he did not believe he had OSA, but that his sleeping issues were related to his presumed PTSD. OSA was hand-written into the permanent profile as P2 without added duty limitations or restrictions beyond those from the typed restrictions for the right shoulder (U3). The VA sleep study after separation confirmed OSA as a diagnosis and recommended a breathing device.

There were multiple VA record indications of sleep difficulties; with symptoms of insomnia and poor sleep being attributed to a mental health disorder verses the OSA condition. There is no evidence in this case that the CI had excessive daytime somnolence to the level of impacting duty performance. There were treatment notes that combined both shoulder and neck pain, without specific attribution of symptoms to either condition. Intermittent arm paresthesias were attributed to the neck condition, and hand strength/grip was unimpaired. The possibility that the neck condition was overshadowed by the CI’s unfitting shoulder condition was considered, but was unduly speculative. 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 chronic right knee pain; chronic LBP; OSA or neck pain contended 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. As discussed above, PEB reliance on the USAPDA pain policy for rating the right shoulder was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the right shoulder condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended chronic right knee pain; chronic LBP; OSA and neck pain 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:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Pain Right Shoulder… | 5099-5003 | 10% |
| **COMBINED** | **10%** |

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

 XXXXXXXXXXXX

 Director of Operations

 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 XXXXXXXXXXX, AR20120011908 (PD201100849)

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 XXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA