RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100867 SEPARATION DATE: 20070817

BOARD DATE: 20120810

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSG/E-6 (88L, Watercraft Engineer) medically separated for lumbar spine, left shoulder, and right knee conditions. He had a 3 year history of back pain which was diagnosed as non-surgical disc disease. The left shoulder condition was chronic and related to an acromioclavicular (AC) joint injury. He also had a history of chronic right knee pain which was diagnosed as patellofemoral syndrome (PFS). None of the conditions 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 following six conditions were separately forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501: two separate diagnoses related to the lumbar spine condition (sciatica, degenerative disc disease (DDD) at L3/4); two separate diagnoses related to the left shoulder condition (rotator cuff tear, acromioclavicular joint disruption); right knee osteoarthritis; and, “chronic pain syndrome.” Five other conditions (as identified in the rating chart below) were addressed by the MEB, and forwarded as meeting retention standards. The PEB (appropriately consolidating the double diagnoses for the same conditions) combined the submitted conditions under two ratings: “lumbosacral strain” and “chronic pain of the left shoulder and right knee.” These were rated 10% and 0% respectively, referencing the US Army Physical Disability Agency (USAPDA) pain policy for each. The remaining conditions were determined to be not unfitting. The CI made no appeals, and was medically separated with a combined 10% disability rating.

CI CONTENTION: “Not all conditions were evaluated sufficiently or accurately prior to being rendered unfit.” He does not elaborate further or specify a request for Board consideration of specific conditions.

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in Department of Defense Instruction (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 conditions “identified but not determined to be unfitting by the PEB.” The ratings for unfitting conditions are reviewed in all cases, and are addressed below. Although the contention does not specify which conditions the CI believes were not adequately evaluated by the service, the members judged that it was reasonably within the purview of the Board to assess the appropriateness of the PEB’s fitness determination for each of the remaining conditions. 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 20070725** | **VA (7 Mo. Post-Separation) – All Effective 20070818** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Lumbosacral Strain | 5237 | 10% | Low Back Strain | 5237 | 10% | 20080314 |
| Chronic Pain, Left Shoulder and Right Knee (Subsuming Chronic Pain Syndrome) | 5099-5003 | 0% | AC Sprain, L Shoulder | 5099-5019 | 10% | 20080314 |
| PFS, R Knee | 5099-5024 | NSC | 20080314 |
| Chronic Pain Syndrome | 5099-5003 | NSC | 20080314 |
| Torn Iris | Not Unfitting | Slight Iris Tear, R Eye | 6099-6003 | NSC | 20080314 |
| Cataracts | Not Unfitting | Bilateral Cataracts | 6028 | NSC | 20080314 |
| Tinea Pedis | Not Unfitting | No VA Entry | 20080314 |
| Pilonidal Sinus | Not Unfitting | No VA Entry | 20080314 |
| Depression | Not Unfitting | Depression | 9434 | NSC | 20080320 |
| No Additional MEB/PEB Entries | NSC (Not Service-Connected) x 12 Additional | 20080314 |
| **Combined: 10%** | **Combined: 20%** |

ANALYSIS SUMMARY:

Lumbar Spine Condition. The CI had a history of back pain dating to 2005 without specific injury. It was associated with right sciatic radiation; and, magnetic resonance imaging (MRI) demonstrated multi-level degenerative disc disease with a disc bulge at L5/S1. He underwent a course of conservative management which included epidural steroid injections, but failed to improve. There were no neurologic deficits by examination, and the neurosurgical consultant opined that he was not a surgical candidate. The narrative summary (NARSUM) noted recalcitrant low back pain with sciatic radicular pain (without complaint of extremity weakness or paresthesias). The physical exam noted a normal gait and contour, tenderness without spasm, and normal neurological findings. The Department of Veterans’ Affairs (DVA) Compensation and Pension (C&P) exam, performed 7 months after separation, noted constant back pain rated 5/10, but no radicular pain was present. A history of incapacitating episodes was reported to the VA examiner, but not corroborated in the service record. All physical and neurologic findings were recorded as normal. 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.

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM | MEB PT ~2 Mo. Pre-Sep | VA C&P ~7 Mo. Post-Sep |
| Flexion (90⁰ Normal) | 35⁰ | 80⁰ |
| Combined (240⁰) | 190⁰ | 230⁰ |
| Comments | Painful motion. | Painful motion. |
| §4.71a Rating | 20% | 10% |

Given the marked disparity in the ROM measurements charted above, the service file was carefully reviewed for corroborative evidence. A goniometric evaluation from 15 months prior to separation (therefore marginally probative) recorded a severely limited flexion of 5⁰, although pain was only rated at 3/10. An undated evaluation in the file, performed by the CI’s primary care physician and titled “medical evaluation board summary” contained the entry, “flexion and extension as well as retroflexion is limited to about 30⁰.” There are no further probative entries, and the definitive NARSUM did not comment on ROM. The PEB’s DA Form 199 cited a flexion of 51⁰; but, this was the passive ROM recorded by physical therapy (PT), which is charted above as active (ratable) ROM.

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 the VASRD §4.71a criteria for the ROMs under consideration. Even the passive 51⁰ flexion is within the §4.71a range for a 20% rating. The corroborative evidence elaborated above suggests that ROM was significantly limited during the period encompassing the date of separation, and provides more support for the MEB ROMs than for the VA evidence. The fact that radicular symptoms had resolved by the time of the VA evaluation suggests a course of significant improvement over the 7 month interval of civilian life, although the Board of course must base its recommendation on the likely severity at separation. 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 lumbar spine condition. The action officer recommended, and the Board concurred with, the code 5242 (degenerative arthritis of the spine) for its clinical compatibility.

Combined Joint Conditions. The PEB combined the left shoulder and right knee pain as a single unfitting condition, coded analogously to 5003 and rated 0%; relying on the USAPDA pain policy and possibly AR 635-40 for not applying separately rated VASRD codes. IAW VASRD §4.71a, the Board must apply separate codes and ratings in its recommendations if compensable ratings for each condition are achieved. When the Board judges that two or more separate ratings are possibly warranted in such cases, however, it must satisfy the requirement that each “unbundled” condition was unfitting in and of itself. Not uncommonly this combined rating approach by the PEB reflects its judgment that the constellation of conditions was unfitting, and that there was no need for separate fitness adjudications; not a judgment that each condition was independently unfitting. Thus the Board must exercise the prerogative of separate fitness recommendations in this circumstance. The Board’s analysis and recommendations regarding the separate fitness issue and potential separate rating for each condition entrained in the PEB’s combined rating approach are presented below. The “chronic pain syndrome” as submitted by the MEB is neither a distinct diagnosis nor a ratable condition.

Left Shoulder Condition. The CI suffered an AC separation in the 1998 time period, and had a history of persistent pain over the following years. This was managed with joint injections and other conservative measures. The NARSUM relates a history of a prior Mumford procedure (clavicular head resection), but there is no such documentation elsewhere in the record. The NARSUM provided diagnoses of degenerative AC joint disease and rotator cuff tendinitis. The diagnosis of “rotator cuff tear” appearing on the MEB’s DA Form 3947 was not present on the MRI obtained during the MEB. Degenerative changes were present on x-ray. The NARSUM noted chronic left shoulder pain exacerbated by overhead work, lifting, and push-ups. The VA C&P evaluation noted 10/10 pain exacerbated by “physical activity.” The MEB and VA examiners documented similar physical findings. These included AC joint tenderness, positive signs for impingement, and pain at extremes of motion. The VA measured ROMs were normal, and the MEB PT measurements were nearly so.

The Board directs attention to its recommendations based on the above evidence. All members agreed that the left shoulder condition was separately unfitting given the documented physical limitations, U3 profile and judgment that it failed retention standards. Regarding its rating recommendation, the Board notes that there is no compensable ROM limitation in evidence. Both the PEB and VA coding options default to analogous rating under 5003 (degenerative arthritis). There was no clinical and/or radiologic evidence that suggested ankylosis, loss of the humeral head, nonunion, malunion, fibrous union, deformity, nonunion or dislocation of the scapula, or recurrent dislocations of the humerus that would support a more favorable rating under the any of the §4.71a joint codes. Despite the absence of any significant ROM limitations; however, members agreed that either VASRD §4.59 (painful motion) or §4.40 (functional loss) was supported for achieving the minimum compensable rating of 10% (as invoked for the VA rating).

After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 10% for the left shoulder condition. The action officer recommended, and the Board concurred with, the code 5099-5010 (traumatic arthritis) for its clinical compatibility.

Right Knee Condition. The NARSUM documented “a history of recurring right knee pain of insidious onset which developed in 2000, exacerbated by running and marching.” Other than the NARSUM (and undated MEB document referenced in the lumbar spine discussion), the only documentation of evaluation or treatment of a right knee complaint in the service records was a single encounter in 2001. This was diagnosed as ligamental strain (no history of injury reported), and treated with ibuprofen and temporary activity restrictions. No follow-up is on record. No service X-ray of the knee could be located, although the VA’s X-ray taken after separation was normal. The condition appeared on the permanent profile issued 3 months prior to separation, but was not profiled prior to that. The commander’s statement referred only to the CI’s “medical condition,” and listed the physical requirements of his MOS which included kneeling. The NARSUM physical examination is excerpted below.

“Examination of the right knee revealed full active range of motion. There was no effusion There was no pain on patellar compression or distraction. The medial plica patellar test was negative. There was no ligament laxity to valgus or varus stress at 0 and 30⁰. The Lachman's, anterior and posterior drawer's tests were negative and the sag sign was negative.”

To the VA C&P examiner, the CI reported 10/10 pain which “occurs three times per day and each time lasts for 1 hour.” The VA physical examination stated only, “on the right there is tenderness and parapatellar pain with duck walk. There is no edema, effusion, weakness, redness, heat, guarding of movement and subluxation.” There was no instability with stress maneuvers or signs of cartilage impingement. The MEB physical therapist recorded 120⁰ flexion (normal 140⁰; minimal compensable 45⁰) and normal extension (0⁰); specifically stating “No pain noted in today’s exam.” The VA examiner recorded 140⁰ flexion, 0⁰ extension, and no painful motion. The VA could not service-connect the condition for lack of service documentation of treatment.

The Board directs attention to its recommendation based on the above evidence. As previously elaborated, the Board must first consider whether right knee condition remains separately unfitting, having de-coupled it from a combined PEB adjudication. In analyzing the intrinsic impairment associated with the condition, the Board is left with a questionable basis for arguing that the right knee condition was indeed independently unfitting. The well established principle for fitness determinations is that they are performance-based. Despite the fact that the condition was included on the profile (at the conclusion of MEB proceedings), there were no restrictions which were not in place for the back condition. The Board could not find evidence in the commander’s statement or elsewhere in the a service file that documented any interference of the right knee condition with performance of duties, nor were any physical findings documented by the MEB and VA examiners which would logically be associated with significant disability. Indeed, there were no §4.71a criteria in evidence which would easily support a compensable rating; even if the condition were conceded as unfitting. After due deliberation, the Board agreed that evidence does not support a conclusion that the right knee condition, in isolation, would have rendered the CI incapable of continued service within his MOS; and, accordingly cannot recommend a separate rating for it.

Remaining Contended Conditions. The Board wishes to clarify for the CI that it is subject to the same laws for disability entitlements as those under which the Disability Evaluation System (DES) operates. 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 then only to the degree of severity present at the time of final disposition. However 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. The Board’s main charge with respect to the remaining contended conditions identified by the PEB is therefore an assessment of the fairness of the determination that they were not unfitting. 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. The conditions falling into this category are torn iris, cataracts, tinea pedis, pilonidal sinus, and depression.

None of these conditions were profiled; none were implicated in the commander’s statement; and, none were judged to fail retention standards. 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 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 (and possibly AR 635-40) for rating all conditions was operant in this case and the conditions were adjudicated independently of that policy by the Board. In the matter of the lumbar spine condition, the Board unanimously recommends a disability rating of 20%, coded 5242 IAW VASRD §4.71a. In the matter of the service-combined left shoulder/right knee/chronic pain syndrome condition, the Board unanimously recommends that it be rated as follows: a left shoulder condition coded 5099-5010 and rated 10%; and, a right knee condition determined to be not unfitting and thereby not subject to disability rating. In the matter of the torn iris, cataracts, tinea pedis, pilonidal sinus, and depression 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 recommends that the CI’s prior determination be modified as follows; and, that the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective as of the date of his prior medical separation.

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Degenerative Disc Disease, Lumbar Spine | 5242 | 20% |
| Acromioclavicular Arthritis and Tendonitis, Left Shoulder | 5099-5010 | 10% |
| Left Knee Strain | Not Unfitting |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111005, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans Affairs Treatment Record

 XXXXXXXXXXXXXXXXXXXXXX

 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, AR20120015649 (PD201100867)

1. Under the authority of Title 10, United States Code, section 1554(a), I approve the enclosed recommendation of the Department of Defense Physical Disability Board of Review (DoD PDBR) pertaining to the individual named in the subject line above to recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 30% effective the date of the individual’s original medical separation for disability with severance pay.

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.

 a. Providing a correction to the individual’s separation document showing that the individual was separated by reason of permanent disability retirement effective the date of the original medical separation for disability with severance pay.

 b. Providing orders showing that the individual was retired with permanent disability effective the date of the original medical separation for disability with severance pay.

 c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, and payment of permanent retired pay at 30% effective the date of the original medical separation for disability with severance pay.

 d. Affording the individual the opportunity to elect Survivor Benefit Plan (SBP) and medical TRICARE retiree options.

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 XXXXXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA