RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100870 SEPARATION DATE: 20060608

BOARD DATE: 20120907

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a National Guard member, SPC/E-4 (11B, Infantry), medically separated for a right hip condition. He developed right hip pain during a 2004 deployment to Iraq, which worsened and was not ascribed to a specific etiology. It did not respond to conservative management, and could not 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/L2 profile and referred for a Medical Evaluation Board (MEB). (The Members did surmise that it was likely that the L2 and U3 classifications were erroneously transposed on the profile (i.e., intended as L3/U2); although, that must remain speculative.) The right hip condition was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Two other conditions (right ankle, left shoulder) were addressed by the MEB, and forwarded as meeting retention standards. The PEB adjudicated the right hip condition as unfitting, rated 10%, referencing the US Army Physical Disability Agency (USAPDA) pain policy. The ankle and shoulder conditions were not specifically adjudicated per the PEB’s DA Form 199; but, the Board judged that this was likely an erroneous omission and should be assumed to constitute a *de facto* determination that neither condition was considered to be unfitting. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “PTSD was not rated, was diagnosed with PTSD [post-traumatic stress disorder] and Doctors … Iisted me as having Adjustment Disorder, PTSD diagnosis was overlooked due to me not wanting to get out of Army for having PTSD nor wanting to talk about it. Hip pain was not fully researched nor tested to see what is causing the pain nor did they look at why I had the injury. Back injury was not mentioned either. … I was diagnosed in IRQ [Iraq] with PTSD, leg length problem, back injury, TBI [traumatic brain injury], shoulder injury, hearing loss, exposure to unknown and known chemicals and hazardous materials …” The application was additionally accompanied by a written statement from the CI, which was reviewed by the Board and considered in its recommendations. This stated that he “Was told if I spoke about PTSD I would be kicked out.” It elaborated that he did not relate his symptoms to physicians for this reason, and instead sought counseling from the chaplain; and, further asserts that he was unjustly denied “promised” promotions to E-5 and E-6. The CI specifically requests “promotion to E-6 w/ 6 years & retired by you.”

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 condition(s) “identified but not determined to be unfitting by the PEB”. The rating for the unfitting right hip condition is addressed below. The Board also judged that, since the shoulder condition was specifically implicated in the CI’s statement and was identified as not unfitting by the PEB, it also falls within the DoDI 6040.44 defined purview; and, is accordingly addressed below. The right ankle condition, identified as not unfitting by the PEB, was not requested; and, thus not within purview. The contended PTSD, leg length problem, back injury, TBI, hearing loss, and any medical conditions resulting from toxic exposure were not identified by the PEB; and thus, are not eligible for Board consideration. The latter conditions and the PEB adjudicated right ankle condition, or any other conditions or contention 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 20060518** | **VA (2 Mos. Post-Separation) – Effective 20060609** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Right Hip Pain | 5099-5003 | 10% | Trochanteric Tendonitis, R Hip | 5252-5024 | 10% | 20060811 |
| Chronic Right Ankle Pain | Not Unfitting | R Ankle Strain w/ Instability | 5271 | 10% | 20060811 |
| Left Shoulder Pain | Not Unfitting | Tendonitis, L Shoulder | 5024-5201 | 0% | 20060811 |
| No Additional MEB/PEB Entries | PTSD | 9411 | 50% | 20060816 |
| Lumbar Disc w/ Radiculopathy | 5242 | 40% | 20060811 |
| 0% X 2 Additional / Not Service Connected x 7 | 20060731 |
| **Combined: 10%** | **Combined: 80%** |

ANALYSIS SUMMARY: The Board acknowledges the CI’s contention for ratings for his left shoulder condition which was adjudicated as not unfitting by the PEB, and notes that its recommendations in that regard must comply with governance for the Disability Evaluation System (DES). 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 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 Department of Veteran Affairs (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. The Board also acknowledges the CI’s contention that he was unjustly deprived of promotions. It is noted for the record that the Board has neither the jurisdiction nor authority to scrutinize, render opinions, or offer remedy in reference to decisions of this nature. That jurisdiction and authority resides with the ABCMR.

Right Hip Condition. There is a paucity of outpatient evidence for the diagnosis and treatment of the CI’s persistent hip pain. There are no imaging reports, physical therapy (PT) notes, and no directed orthopedic consultation yielding a specific diagnosis. An x-ray by the VA performed 2 months after separation was normal. The narrative summary (NARSUM), however, stated:

[CI name] developed right hip pain in January of 2004 during his first deployment secondary to high optempo [operational tempo] while in Iraq. No overt MOI [mechanism of injury]. He feels that his condition is worsening. He has been to Orthopaedics and he has had a full workup. He has been cleared by Ortho for his Medical Evaluation Board, as there have been no objective findings. He is undergoing physical therapy and anti-inflammatories, etc.

In light of these statements, it is unknown if there is missing evidence from the outpatient file, but members agreed that the necessary probative evidence is available for a proper rating assessment applicable to the date of separation. The NARSUM physical exam reported a normal gait, painful motion at the hip, and normal thigh/leg strength testing. The PT evaluation for range-of-motion (ROM) measurement (4 months pre-separation) documented, “Gait is normal, able to ascend/descend stairs in reciprocal manner and without external support.” At the VA Compensation and Pension (C&P) exam (performed 2 months after separation) the CI reported that the hip had been injured in an explosion in Iraq in 2004. He reported pain “90% of the time”, worsened with lying on the right side, “all walking”, and stair climbing; and, stated that he was unable to return to his previous occupation (underwater welding) due to hip pain. At the VA general C&P exam (which included the hip), the examiner recorded “The patient walks with a cane and has a slight limp involving his right leg.” At the C&P exam for the feet on the same date, the examiner recorded “The veteran's gait is slightly limping, this is minimal. He has a splint on his right ankle.” The VA physical examination of the hip noted joint tenderness, painful motion, and normal strength testing. The goniometric ROM measurements from the MEB and post-separation VA C&P evaluations are summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Left Hip ROM | MEB ~4 Mo. Pre-Sep | VA C&P ~2 Mo. Post-Sep |
| Flexion (125⁰ Normal) | 120⁰ | 90⁰ |
| Extension (20⁰) | 15⁰ | 20⁰ |
| External Rotation (45⁰) | 30⁰ | 40⁰ |
| Abduction (45⁰) | 20⁰ | 15⁰ |
| Adduction (45⁰) | 25⁰ | 25⁰ |
| §4.71a Rating | 10% | 10% |

The Board directs attention to its rating recommendation based on the above evidence. Although the PEB’s 10% rating adhered to the USAPDA pain policy, it was consistent with VASRD §4.71a standards for the evidence under consideration. None of the codes for limitation of motion at the hip (5251, 5252, 5253) achieved a compensable rating from either the MEB’s or the VA’s ROM evidence. Application of VASRD §4.59 (painful motion), however, was supported by both evaluations to achieve the minimum compensable rating (10%) for each of these codes. None of the other hip/thigh joint codes (5250, 5254, 5255) were applicable to this case. 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 of the right hip condition.

Contended Left Shoulder Condition. The NARSUM noted a complaint of left shoulder pain without elaboration of history or diagnosis, and identified it as a condition meeting retention standards. As with the hip condition, there is a paucity of outpatient information from the Service file; and likewise it is possible that there are missing outpatient records from the file. Members once again deliberated if this possibility posed an issue with fair assessment; and, agreed that the evidence at hand was sufficiently probative, i.e., any presumed missing evidence would not materially affect the Board’s ultimate recommendation. There are notes from 2004 that the CI injured his left shoulder from a fall in Iraq; and, the condition was added to the final permanent profile as a U3. Members did surmise that it was likely that the L2 and U3 classifications were erroneously transposed on the profile (i.e., intended as L3/U2); although, that must remain speculative. The commander’s statement did not elaborate the CI’s conditions or specific physical limitations. There are no ROM evaluations in evidence from the Service. At the 2 month post-separation VA C&P evaluation, the CI reported pain prohibiting tasks “requiring the elevation of the arms overhead.” The VA examiner cited a magnetic resonance imaging report in the CI’s possession (source study not in evidence) which read “Mild increased signal within the supraspinatus tendon, suggestive of mild tendinosis.” The VA ROM evaluation documented abduction of 125⁰ and forward flexion of 120⁰ (normal 180⁰ for each; minimal compensable 90⁰ for each). Painful motion was not adequately supported by the VA exam for application of §4.59 to achieve a compensable rating.

The Board’s main charge with respect to this condition is an assessment of the fairness of the PEB’s (*de facto*) determination that it was 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 established DES (and Board applicable) principle for fitness determinations is that they are performance based. Although service treatment record evidence is scant, there is no MOS specific functional impairment which the Board can cite in support of a conclusion that the left shoulder condition in isolation would have rendered the CI incapable of continued service; especially in the face of the MEB physician’s judgment that it was medically acceptable. It must be further noted that, even if conceded as unfitting, a compensable rating is not supported by the evidence. 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 left shoulder condition; thus no additional disability rating 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 hip was operant in this case and it was adjudicated independently of that policy by the Board. In the matter of the right hip condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended left shoulder 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:

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

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.

 XXXXXXXXXXXXXXXX

 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 XXXXXXXXXXXXXXXXXXXXXX, AR20120017700 (PD201100870)

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 XXXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA