RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100891 SEPARATION DATE: 20090627

BOARD DATE: 20120727

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (92W10/Water Treatment Specialist), medically separated for chronic left foot and left knee pain. The CI had onset of left foot pain in 2006 that recurred during recovery from left knee surgery in late 2007. The left foot pain was treated to include surgery (instep fasciotomy release) when conservative therapies (orthotics, injections, shock wave treatments, physical therapy, etc.) were not effective. The traumatic left knee injury was treated with arthroscopic surgery to correct medial meniscal tear and fat pad excision. The left foot and left knee could not be adequately rehabilitated and the CI did not improve adequately with treatment 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). Plantar fascia release and chronic left knee pain s/p arthroscopy conditions were identified and forwarded by the MEB as not meeting retention standards. Chronic low back pain (LBP), turbinoplasty and left ear PE tube placement and tinnitus conditions, identified in the rating chart below, were identified and forwarded by the MEB as meeting retention standards. The PEB adjudicated the left foot and left knee conditions as unfitting, rated 10% and 10%, respectively, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: “I was told that my back wasn't hurt long enough to get retirement. When my x-rays show that I have problems with my L-5 and other discs. I just want a fair and honest opinion. I had almost eleven years in, I didn't want to get out, they pushed for me to get out. And I felt like I didn't get a fair shake on the deal. I even had to have another surgery on my left foot at the VA Hospital.”

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 chronic low back pain condition requested for consideration and the unfitting left foot, and left knee conditions meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. 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:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20090320** | | | **VA (~1 Mo. Post-Separation) – All Effective Date 20090628** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Left Foot Pain Status Post Plantar Fascia Release | 5299-5284 | 10% | Left Foot Status Post Fasciotomy Release | 5276 | 10%\* | 20101202 |
| Chronic Left Knee Pain Status Post Arthroscopy To Correct Medial Meniscal-Tear and Fat Pad Excision | 5099-5003 | 10% | Left Knee Status Post Arthroscopic Debridement | 5259 | 10% | 20090601 |
| Chronic Low Back Pain | Not unfitting | | Low Back Strain | 5237 | 10% | 20090601 |
| Turbinoplasty and Left Ear PE Tube Placement | Not unfitting | | Nasal Turbinoplasty | 6502 | 0% | 20090514 |
| Eustachian Tube Dysfunction | 6201 | 0% | 20090514 |
| Tinnitus | Not unfitting | | Tinnitus | 6260 | 10% | 20090514 |
| ↓No Additional MEB/PEB Entries↓ | | | Residual Right Lower Quadrant Status Post Appendectomy | 7804 | 10% | 20090601 |
| GERD | 7399-7346 | 10%\* | 20101202 |
| 0% X 6 / Not Service-Connected x 14 | | | 20090514 |
| **Combined: 20%** | | | **Combined: 50%\*** | | | |

\*Left foot, 5276 and GERD, 7346 each initially rated 0% (combined 30%), then later increased to 10% each with effective date 20090628 (combined 50%).

ANALYSIS SUMMARY: The Board acknowledges the CI’s contention that suggests ratings should have been conferred for other conditions documented at the time of separation. 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. 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 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 utilizes DVA evidence proximal to separation in arriving at its recommendations; and, DoDI 6040.44 defines a 12-month interval for special consideration to post-separation evidence. The Board’s authority as defined in DoDI 6044.40, however, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Left Foot Condition. The PEB condition was described as chronic left foot pain status post plantar fascia release. At the MEB exam, the CI reported left foot and heel pain with walking and prolonged standing. He was using orthotics and could not accomplish the alternate fitness testing walk of 2.5 miles. The MEB physical exam noted a mildly antalgic gait favoring the left heel. Motor and sensory exams were normal and the CI was able to heel walk, toe walk and perform single leg calf raises without difficulty. There was tenderness to palpation along the medial tibiae bilaterally.

At the pre-separation VA Compensation and Pension (C&P) exam, the CI reported pain every other day with prolonged walking. He used gel inserts and had no instability of the foot. Limitations were no running and no standing or walking greater than 30 minutes. Exam indicated tenderness to palpation of the plantar surface with normal foot alignment. Sensory and motor exams were normal. The VA rated this exam at 0%. VA treatment records indicated left foot surgery in May 2010, 11 months after separation, with treatment notes indicating possible nerve entrapment causing pain. A C&P exam was performed in December 2010, which met the 10% rating criteria and a 10% rating was awarded retroactive to the date of separation, based on the CI’s appeal.

The Board directs attention to its rating recommendation based on the above evidence. The PEB and the VA chose different coding for the left foot condition, but arrived at the same 10% rating. The PEB coded analogous to 5284, foot injuries, other and rated 10% (moderate); the VA coded as 5276 for flatfoot, acquired (moderate; following surgery after separation) and rated 10%. 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 foot condition.

Left Knee Condition. The PEB condition was described as chronic left knee pain status post arthroscopy to correct medial meniscal-tear and fat pad excision. 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.

|  |  |  |
| --- | --- | --- |
| Left Knee ROM | MEB ~5 Mos. Pre-Sep | VA C&P ~1 Mo. Pre-Sep |
| Flexion (140⁰ Normal) | 110⁰, 114⁰,110⁰ | 140⁰ |
| Extension (0⁰ Normal) | 3⁰, 3⁰, 3⁰ | 0⁰ |
| Comment | Tender over medial knee; pain with patellar grind; no instability | Normal gait; painful motion, tender; painful McMurray |
| §4.71a Rating | 10% | 10% |

At the MEB exam, the CI reported recurrent left knee locking and pain with flares. He denied recurrent buckling of the knee. The MEB physical exam noted pain-limited ROM as charted above, with tenderness, patellar grind, and no indications of instability.

At the VA C&P exam, the CI reported constant sharp knee pain and limitations of activities including “cannot stand greater than 15 minutes” or running or squatting. The exam indicated full ROM with pain, tenderness and a painful McMurray test without mention of click or instability.

The Board directs attention to its rating recommendation based on the above evidence. There was no evidence of incapacitating episodes. The PEB and the VA chose different coding for the knee condition, but arrived at the same 10% rating. The PEB coded analogous to degenerative arthritis and rated 10%; the VA coded 5259 for cartilage, semilunar, removal of, symptomatic, and rated 10%. The VA coding would be ideal, since the CI did not have any radiographic evidence of degenerative arthritis; however, the PEB analogous coding is also correct and provides the same rating outcome. Although the narrative summary (NARSUM) indicated “occasional locking,” there was no mention of locking at the VA exam and the record did not support dislocations or frequent episodes of “locking,” pain, and effusion into the joint. There is no route to rating higher than 10% under any applicable code and no coexistent pathology which would merit additional rating for the right knee condition under a separate code. Thus, the PEB choice of VASRD code provided the highest achievable rating IAW VASRD §4.71a. 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 condition.

Contended PEB Conditions. The contended condition adjudicated as not unfitting by the PEB was chronic LBP. 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. The back condition was specified in the commander’s statement (in addition to the left foot and left knee conditions) as interfering with performance of duty with an inability to stand more than 10 minutes. The CI’s L3 profile did not mention the back, but restrictions for the left foot and left knee may have provided shelter for or compounded and disability attributable to the back condition. The NASRUM and MEB indicated the back condition met retention standards. The back condition was reviewed by the action officer and considered by the Board.

The MEB, performed 5 months prior to separation, indicated non-traumatic, non-radiating back pain beginning in 2008. Two months of physical therapy provided little pain relief and he was being managed with muscle relaxers and non-steroidal anti-inflammatory drugs and self care. Imaging showed mild kyphosis of the thoracic spine, with no significant degenerative or disc disease. There was partial sacralization of L5. Exam indicated painful forward flexion to 90⁰ (normal 90⁰) with pain-limited combined thoracolumbar ROM of 215⁰ (normal 240⁰). There was mild bilateral paraspinal muscle spasm with mild tenderness to palpation. There was mildly antalgic gait favoring the left heel. Straight leg raising was negative and there were no non-physiologic findings. There were approximately 12 treatment notes for the back condition from June 2008 to separation; four notes indicated paraspinal muscle spasm, and 2 indicated abnormal gait or abnormal spinal contour with the spasm.

At the VA C&P exam, the CI reported constant lumbar pain with “no associated features or symptoms.” He stated he could not walk greater than 30 minutes and had difficulty with bending activities and could not run. Exam documented full, but painful ROM with back tenderness without muscle spasm. Gait and sensory/motor exams were normal. Radiographs (CAT scan) accomplished 29 months after separation indicated a mild to moderate disc protrusion at L4-L5 indenting the thecal sac, but not encroaching on the nerve roots.

The Board directs attention to its fitness and rating recommendation based on the above evidence. The VA exam indicated some improvement of the CI’s back condition. Although it is possible that the back condition in combination with the left knee and left foot condition could have risen to the level of being unfitting; the duration of the LBP, underlying back pathology and weight of the evidence was not sufficient to indicate a preponderance of the evidence that it should have been determined to be unfitting at the time of separation. 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 contended LBP 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 foot and left knee conditions and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudications. In the matter of the contended back 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** |
| Chronic Left Foot Pain Status Post Plantar Fascia Release | 5299-5284 | 10% |
| Chronic Left Knee Pain Status Post Arthroscopy To Correct Medial Meniscal-Tear And Fat Pad Excision | 5099-5003 | 10% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110926, 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 XXXXXXXXXXXXXXXXXXXXXXXXXXX, AR20120014287 (PD201100891)

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 XXXXXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA