RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100905 SEPARATION DATE: 20030703

BOARD DATE: 20120816

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an SPC/E-4 (71L10/Administrative Specialist), medically separated for left foot and ankle pain and low back pain (LBP). The foot and ankle condition began in January 2002 as a consequence of trauma. The LBP condition, which did not result from injury, began in May 2001. Neither condition was associated with a surgical indication. She did not respond adequately to conservative treatment. Although she was able to meet the requirements of her Military Occupational Specialty (MOS) and satisfy her physical fitness standards, she was unable to complete her soldiering requirements. She was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded LBP and left ankle pain to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions were forwarded on the MEB submission. The PEB adjudicated the chronic left foot and ankle pain condition and mechanical LBP condition as unfitting, rated 10% and 0% respectively, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “The rating should be changed because range of motion of the lumbar spine has been decreased by pain and muscle spasms. Pain Management Specialist has recommended physical therapy 3 times a week due to Discogenic Versus Facet Joint Mediated. Neurology Specialist diagnosis of L5 Radiculopathy on the basis of Electromyography test is another reason the rating should be changed. Issues with nerve roots if not resolved with therapy or pain management would require that I have surgery in the near future. Since my last rating I have developed arthritis. Both ankles/feet continue to swell due to compensating more on the right leg/foot to avoid pressure on the injured left foot. These issues also continued to affect my lower back and causes a direct corralation with the issues of my legs. Due to possible right posterior tibial chronic thrombophlebitis Vascular Specialist recommended that I wear leg stockings. The podiatrist recommended custom orthotics and air-cast brace to support foot/ankle, which puts limitation on the type of shoes I can wear. The Podiatrist impression are that I'm suffering from chronic chondromalacia at fibular talar surface from injury. X-rays taken show joint spacing narrowing at the area of compliant. Podiatrist also note a significant talor beaking and some mid-tarsal arthritis at the talonavicular cuneiform joints. Constant use of tens unit for lower back pain, and different pain medication in attempt to ease chronic pain in back/foot/leg. Consistently having to be seen by various doctors, which cause me to have to take time off from work hindering my reliability. The pain from the various injuries makes sitting, standing, and walking for long periods of time difficult.” The CI continues with: “This rating should be change to medically retired because with 12 months of getting out of service VA change my rating to a higher percentage, which would indicate that the initial rating was not correct. Partial tear of the peroneus brevis, claimed as status post fractured left ankle rated as 10%. Residuals of umbilical hernia rated at 10% and Lumbar strain, chronic rated at 20%.” [*sic*]

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 unfitting left foot and ankle pain and LBP conditions meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. The requested right leg and foot, thrombophlebitis, radiculopathy and residuals of umbilical hernia conditions 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.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20030429** | | | **VA (3 Mos. Post-Separation) – All Effective Date 20030704** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Left Foot and Ankle Pain | 5399-5311 | 10% | Left Peroneus Brevis Tear | 5311 | 20%\* | 20030926 |
| Left Fifth Metatarsal Fracture | 5283 | 10% | 20030926 |
| Mechanical Low Back Pain | 5299-5295 | 0% | Lumbar Strain | 5237-5295 | 20% | 20030926 |
| ↓No Additional MEB/PEB Entries↓ | | | Umbilical Hernia Residuals | 7339-7804 | 10%\* | 20030926 |
| Not Service-Connected x 1 | | | 20030926 |
| **Combined: 10%** | | | **Combined: 50%\*** | | | |

\*Original VARD coded left peroneus brevis 5311 rated 0% and umbilical 7339 at 0% (combined 30%); retroactively changed to above based on BVA 20070830 decision and VARD 20040520.

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. The Board also acknowledges the sentiment expressed in the CI’s application regarding the significant impairment and worsening severity with which her service-incurred condition continues to burden her. It is a fact; however, that the DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions resulting in medical separation. This role and authority is granted by Congress to the DVA.

Left Foot and Ankle Pain Condition. The narrative summary (NARSUM) notes that the CI twisted her left ankle in January 2002, causing a fracture of the base of the 5th metatarsal bone. Due to persistent pain, a magnetic resonance imaging (MRI) study was performed on 15 April 2002. A tear of the anterior aspect of the peroneus brevis tendon was identified, but there was no longer evidence of fifth metatarsal abnormality. Prolonged treatment with an immobilizing boot, orthotics and physical therapy did not sufficiently improve her pain. She was unable to run, bend, or lift heavy objects due to persistent ankle pain and LBP, but she enjoyed going to the gym. Weight bearing activity caused the ankle to hurt.

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.

|  |  |  |  |
| --- | --- | --- | --- |
| Left Ankle ROM | MEB ~4 Mo. Pre-Sep | NARSUM ~3 Mo. Pre-Sep | VA C&P ~3 Mo. Post-Sep |
| Dorsiflexion (0-20⁰) | 10⁰ | 10⁰ (-10⁰)\* | “Full” (pain at 10⁰) |
| Plantar Flexion (0-45⁰) | 30⁰ | 30⁰ | 40⁰ (pain at 20⁰) |
| Comment | Painful inversion |  | Normal gait; painful motion |
| §4.71a Rating | 10% | 10%\*\* | 10% |

\*“-10⁰” assumed to mean 10⁰ of dorsiflexion

\*\*Conceding painful motion

An orthopedic evaluator, 12 months prior to separation, noted mild discomfort with resistance on left ankle supination and inversion. The previous MRI finding was identified as a “probable partial tear.” A repeat MRI performed on 29 August 2002 was normal. A follow-up in the orthopedic clinic, 9 months prior to separation, noted full ROM of the ankle, no swelling, no instability and no pain with compression of the forefoot or ankle. An orthopedic clinic evaluation, 7 months prior to separation, stated that the left foot pain had resolved, but a primary clinic note 2 months later stated the pain was ongoing. A pain clinic evaluation performed 4 months prior to separation observed that the CI could squat, rise, heel-walk and toe walk without difficulty. The MEB examiner noted pain during inversion of the left ankle and mild symptomatic pes planus, 4 months prior to separation. The NARSUM exam, performed 3 months prior to separation, was silent regarding gait, ankle or foot swelling, tenderness or painful motion. An orthopedic examiner, 2 months prior to separation, observed a normal gait. At the VA Compensation and Pension (C&P) exam, performed 3 months after separation, the CI reported that overuse or cold weather caused ankle and foot pain and swelling. Prolonged walking or running was difficult. She could perform all aspects of daily living, although taking out the trash and pushing a lawnmower were difficult. It was noted that she could stand for 15 minutes and walk for 20 minutes. Examination revealed a normal gait. Pes planus (flat feet) was present bilaterally. There was no edema, painful motion or tenderness of her foot. The left ankle appeared normal. Pain during ankle motion was present. A VA physical therapy note, 11 months after separation, noted normal plantar flexion and dorsiflexion ROM, and pain with inversion. Some limitation of inversion and eversion was reported.

The Board directs attention to its rating recommendation based on the above evidence. The PEB rated the condition 10% using an analogous muscle injury code (5311, group XI). Despite the fact that the metatarsal fracture was completely healed, the VA assigned a 10% rating under code 5283 (Tarsal or metatarsal malunion). The VA then combined this with an initial rating of 0% under the 5311 code which was increased to 10% after a record review. The Board of Veterans Appeals, on 19 October 2007, then increased the rating under the 5311 code to 20%, with the rationale that her complete disability picture more closely approximated “moderately severe” under 5311. First, the Board debated if assigning separate ratings under two different codes, one for metatarsal fracture and one for peroneus brevis injury, is defensible. It was agreed that since these injuries are co-located and that symptoms and signs of one are indistinguishable from the other, separate codes are not justified. Under the 5283 and 5311 codes, a moderate injury warrants a 10% rating while a moderately severe injury supports a 20% rating. The Board further considered that the objective evidence consisting of normal gait, heel walking and toe walking without difficulty, no ankle or foot swelling or tenderness, some limited ankle motion and some pain with ankle motion was best depicted by the “moderate” descriptor. Board members also agreed that no route to a higher rating existed using the other foot code (5284, foot injuries, other), or ankle code (5271, ankle, limited motion). 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 and ankle pain condition.

Low Back Pain Condition. The 2003 VASRD coding and rating standards for the spine, which were in effect at the time of permanent separation, were changed from the previous spine criteria of 23 September 2002 and to the current §4.71a rating standards on 26 September 2003, following the CI’s permanent disability disposition. The older ratings were based on a judgment as to whether the disability was mild, moderate or severe. The current standards are grounded in ROM measurements. IAW DoDI 6040.44, this Board must consider the appropriate rating for the CI’s back condition at separation based on the VASRD standards in effect at the time of separation. An orthopedic examination, performed 7 months prior to separation, noted no spine tenderness and absence of muscle spasm. An orthopedic note, 5 months prior to separation, reported the pain occurred daily and was worsened after a vigorous workout. Examination revealed lower lumbar tenderness but no spasm. A pain clinic evaluation, performed 4 months prior to separation, documented absence of muscle spasm, normal spine curvature and normal flexion, extension and rotation. Tenderness of the sacroiliac joints, iliac crests and sacral areas was present. The MEB examiner stated that LBP inhibited her ability to run, bend, or sit or stand for a prolonged time. The examination, 4 months prior to separation, noted tenderness of the upper lumbar vertebrae, forward flexion of 60⁰, and right and left lateral flexion of 30⁰. The NARSUM examination, 3 months prior to separation, documented mild lordosis, forward flexion of 90⁰ and right and left lateral flexion of 35⁰. Sacroiliac joints and iliac crests were tender. Lumbar X-rays and MRI were normal. An orthopedic examiner, 2 months prior to separation, stated the CI had experienced moderate improvement through the pain clinic and displayed a normal gait. ROM in evidence is provided in the following table:

|  |  |  |  |
| --- | --- | --- | --- |
| Thoracolumbar ROM | MEB ~4 Mo. Pre-Sep | NARSUM ~4 Mo. Pre-Sep | VA C&P ~3 Mo. Post-Sep |
| Flexion (90⁰ Normal) | 60⁰\* | 90⁰ | 75⁰ |
| Ext (0-30) | -- | -- | 30⁰ |
| R Lat Flex (0-30) | 30⁰ | 30⁰ (35⁰) | 30⁰ (35⁰) pain at 30⁰ |
| L Lat Flex 0-30) | 30⁰ | 30⁰ (35⁰) | 30⁰ (35⁰) pain at 30⁰ |
| R Rotation (0-30) | -- | -- | 30⁰ (35⁰) pain at 35⁰ |
| L Rotation (0-30) | -- | -- | 30⁰ (35⁰) pain at 35⁰ |
| Combined (240⁰) | -- | -- | 225⁰ |
| Comment | + Tenderness | Mild lordosis | + Tenderness, spasm, painful motion |
| §4.71a Rating | 10% or 20% | 10% (PEB 0%) | 10% (VA 20%) |

\*Unclear if this represents segmental (lumbar-only) or thoracolumbar spine measurement

The VA examiner, on 26 September 2003, reported the back condition was a “constant situation,” without radiation of pain. Her condition impaired bending, twisting or lifting. She was again noted to “handle most aspects of daily living without any problem.” Examination showed normal posture and gait. Spine appearance was normal. Movement did not cause radiation of pain, but she did have “muscle spasm and tenderness today.” Straight leg raise (SLR) was positive bilaterally. The examiner considered the right and left lateral flexion measurements (noted in table above) to represent “restricted ROM.” Lower extremity motor, sensory and deep tendon reflex exams were normal. Lumbar x-rays were normal.

The Board must correlate the above clinical data with the 2003 rating schedule which, for convenience, is excerpted below:

**5292** Spine, limitation of motion of, lumbar:

Severe ………………………………………………………..……….…………......... 40

Moderate …………………………………….……………….…….…………...……. 20

Slight ………………………………………………………..………………………..…….10

**5294** Sacro-iliac injury and weakness:

**5295** Lumbosacral strain:

Severe; with listing of whole' spine to opposite side, positive

Goldthwaite's sign, marked limitation of forward bending in

standing position, loss of lateral motion with osteo-arthritic

changes, or narrowing or irregularity of joint space, or some

of the above with abnormal mobility on forced motion ………….. 40

With muscle spasm on extreme forward bending,

loss of lateral spine motion, unilateral, in standing' position ….. 20

With characteristic pain on motion …………………………….....…….…. 10

With slight subjective symptoms only ……………………...….……...……. 0

The PEB and VA both used the 5295 code (analogously by the PEB); the VA in a later rating decision modified the code to reflect newer VASRD coding options, but the rating was unaffected. The PEB’s 0% rating was based on an assessment that the condition was characterized by “slight subjective symptoms only.” The VA’s 20% rating was assigned for “muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral, in standing position.” The Board debated the rating by the PEB using the older VASRD rules in effect at the time. Although not specifically noted in the MEB or NARSUM physical examination, “characteristic pain on motion” supporting a 10% rating is reasonably conceded given the CI’s history and symptoms of lifestyle limiting pain at the time of separation. The Board agreed that elements of the 40% rating were not present on any of the cited examinations, but debated if any of the documented examinations met the requirements for the 20% level under the 5292 code. Board members further noted that no symptoms of radiculopathy were present. All Board members agreed that the condition more nearly approximated the criteria for the 10% 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 LBP condition.

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 ankle condition and IAW VASRD §4.73, the Board unanimously recommends no change in the PEB adjudication. In the matter of the LBP condition, the Board unanimously recommends a disability rating of 10%, coded 5299-5295 IAW VASRD §4.71a. 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, effective as of the date of her prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Left Foot and Ankle Pain | 5399-5311 | 10% |
| Mechanical Low Back Pain | 5299-5295 | 10% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111013, 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 XXXXXXXXXXXXXXXXXXXXX, AR20120015476 (PD201100905)

1. 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 to modify the individual’s disability rating to 20% without recharacterization of the individual’s separation. This decision is final.

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.

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 XXXXXXXXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA