RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1101077 SEPARATION DATE: 20070726

BOARD DATE: 20120809

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (92G20/Food Service Specialist), medically separated for a chronic right shoulder condition. An injury in 2002 led to ongoing pain and instability that required three surgeries. He did not respond adequately to operative and rehabilitative treatment and was unable to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent U3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded chronic right shoulder pain and instability to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Three other conditions, identified in the rating chart below, were also identified and forwarded by the MEB. The PEB adjudicated the chronic right shoulder pain and instability condition as unfitting, rated 10% with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). The remaining conditions were determined to be not unfitting. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “I was never given the option of a medical retirement. I was told by a former VA rep at a much later date that I should have been medical retired. It wasn’t explained that I had that option under my circumstances. So I don’t think that I was given a fair chance.”

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 hypertension, erectile dysfunction (ED), and obstructive sleep apnea (OSA) conditions as requested for consideration meet the criteria prescribed in DoDI 6040.44 for Board purview, and are addressed below, in addition to a review of the ratings for the unfitting chronic right shoulder condition. 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 20070514** | | | **VA (1 Mo. Pre-Separation) – All Effective Date 20070727** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Right Shoulder Pain and Instability | 5299-5203 | 10% | Right Shoulder Derangement | 5202 | 30%\* | 20070611 |
| Hypertension | Not Unfitting | | Hypertension | 7101 | 20% | 20070611 |
| Erectile Dysfunction | Not Unfitting | | Erectile Dysfunction | 7599-7522 | 0% | 20070611 |
| Sleep Apnea | Not Unfitting | | Sleep Apnea with Bronchitis | 6602-6847 | 50% | 20070611 |
| No Additional MEB/PEB Entries | | | Tinnitus | 6260 | 10% | 20070611 |
| 0% X 6 / Not Service-Connected x 5 | | | 20070611 |
| **Combined: 10%** | | | **Combined: 80%\*** | | | |

\*20080528 rating decision increased right shoulder from 20% (code 5201) to 30% (code 5202), combined from 70% to 80%; based on exam 20080125; effective 20070727

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 Service 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 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 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.

Right Shoulder Condition. The narrative summary (NARSUM) notes the right hand dominant CI sustained a shoulder dislocation while lifting a heavy item in October 2002. Persistent pain and recurrent dislocations led to arthroscopy in January 2004, at which time subacromial decompression and rotator cuff tendon debridement were performed. The CI continued to experience pain and mild instability symptoms requiring a second arthroscopic surgery in September 2004 (thermocapsular shrinkage, labral debridement, distal clavicle resection), and ultimately a third surgery (open shoulder ligament reconstruction) in August 2006, which resulted in no further dislocations but did not prevent episodes of subluxation or persistent pain. 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.

|  |  |  |  |
| --- | --- | --- | --- |
| Right Shoulder ROM | MEB / PT ~3 Mo. Pre-Sep | VA C&P ~1 Mo. Pre-Sep | VA C&P ~6 Mo. After Sep |
| Flexion (0-180⁰) | 92⁰, 91⁰, 92⁰ | 90⁰ | 90⁰ |
| Abduction (0-180⁰) | 90⁰, 88⁰, 90⁰ | 90⁰ | 95⁰ |
| Comments | Painful motion; tenderness, popping; “anticipated subluxing” | Painful motion | Painful motion; dislocated during exam; reached 80⁰ on 3rd movement |
| §4.71a Rating | 20% (PEB 10%) | 20% (VA 20% initial) | 20%\* (VA 30%) |

\*Conceding “shoulder level” limitation of abduction

At an orthopedic follow-up on 14 December 2006, months after surgery, 7 months prior to separation, the CI reported increased pain and a sensation of subluxation three to four times per week. Examination revealed shoulder tenderness but no significant laxity. The orthopedist’s assessment was that symptoms were due to inflammation as there was no appreciable instability. A final orthopedic follow-up evaluation on 20 February 2007, 6 months after surgery, 5 months prior to separation, reported that shoulder pain had recently worsened. Symptoms of instability were not mentioned. Examination revealed crepitus in the subacromial region and diffuse shoulder tenderness, but no appreciable sulcus sign (an indicator of multidirectional instability). The MEB physical exam on 17 April 2007, 3 months prior to separation, noted anterior shoulder tenderness, pain with all movements, and limitation of ROM due to pain and anticipated subluxation. Shoulder strength was 4/5 and there was no muscle atrophy. The shoulder did not dislocate during the exam. During rotation of the shoulder, “popping” was noticed. The NARSUM examiner on 19 April 2007 reported the same examination findings as the MEB examiner. At the VA Compensation and Pension (C&P) exam a month prior to separation, the CI reported constant pain, stiffness with repetitive motion and weakness with overhead activities, but denied giving way or dislocation. Physical activities caused pain; rest and medication could alleviate the pain. The shoulder condition did not cause incapacitation. The functional impairment was difficulty lifting due to pain. He was able to accomplish activities of daily living, including gardening and pushing a lawn mower. Examination revealed no swelling, weakness, tenderness, subluxation or guarding of movement. At a second C&P exam on 25 January 2008, 6 months after separation, the CI complained of a constant “large amount” of pain that worsened with use. The shoulder was reported to “slide out of place” by holding a briefcase or putting gasoline in his car. The frequency of any dislocations was not specified. He avoided overhead activities, but the condition did not affect his occupation as a restaurant manager. During the examination, the shoulder was noted to dislocate anteriorly during abduction, after which the CI demonstrated guarding of movements.

The Board directs attention to its rating recommendation based on the above evidence. The VASRD §4.71a threshold for compensable ROM impairment is “shoulder level” (i.e. 90⁰ abduction), and both the PT and first VA examinations demonstrated this degree of limitation of motion. The initial VA decision assigned a 20% rating under the 5201 code (arm, limitation of motion). Based on new examination findings of a dislocatable shoulder with guarding of movements at the second VA exam performed 6 months after separation, the VA increased the rating to 30% under the 5202 code (humerus, other impairment of: recurrent dislocation of at scapulohumeral joint, with frequent episodes and guarding of all arm movements). The PEB’s 10% rating under an analogous 5203 code (impairment of clavicle or scapula) was based on the distal clavicle demonstrating no loose movement. Under this code, impairment with dislocation or with nonunion and loose movement is required for a 20% rating. While the Board agreed that this was not present, members also agreed there was clear support for 20%, but not higher, under the 5201 code. Debate focused on whether evidence supported a rating higher than 20% via alternate pathways. While the VA exam performed 6 months after separation demonstrated a shoulder dislocation, “frequent episodes and guarding of all movements” required for the 30% rating under code 5202, was not specified. Pre-separation orthopedic exams, the MEB and NARSUM exams and VA examination prior to separation (the latter three being more proximal to separation than the second VA exam) demonstrated no evidence of dislocation or guarding of all arm movements, or malunion with marked deformity, required for the 30% rating under the 5202 code. Similarly, under the 5304 code (group IV muscle function) “severe” impairment justifying a 30% rating was not present. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board majority recommends a disability rating of 20% for the right shoulder condition, coded 5202-5201.

Contended PEB Conditions. The contended conditions adjudicated as not unfitting by the PEB were hypertension, ED, and OSA. 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. None of these conditions were implicated in the commander’s statement or judged to fail retention standards. The OSA condition was temporarily profiled (P3) in 2005 to restrict deployment where high temperatures were unavoidable or electricity for CPAP was not available. The other two conditions were never profiled. Routinely, OSA is not considered unfitting solely on the basis of field and operational impediments to the use of CPAP. There is no evidence in this case that OSA was associated with any unfitting impairments not corrected by CPAP. All three conditions 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. In the matter of the chronic right should pain and instability condition, the Board, by a vote of 2:1, recommends a disability rating of 20%, coded 5202-5201 IAW VASRD §4.71a. The single voter for dissent (who recommended adopting the VA rating, 5202 at 30%) did not elect to submit a minority opinion. In the matter of the contended hypertension, ED and OSA 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, effective as of the date of his prior medical separation:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Right Shoulder Pain and Instability | 5202-5201 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111110, 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 XXXXXXXXXXXXXXXXXXXXXXXX, AR20120015487 (PD201101077)

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 XXXXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA