RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxxx BRANCH OF SERVICE: Army

CASE NUMBER: PD1101127 SEPARATION DATE: 20060428

BOARD DATE: 20120705

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty CPL/E-4 (15P, Aviation Operations Specialist), medically separated for chronic right knee pain. His chronic right knee pain condition could not be adequately rehabilitated and was expected to progressively worsen over time until a full knee replacement would be necessary. The CI was unable 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). The MEB forwarded no other conditions for PEB adjudication. The PEB adjudicated the chronic right knee pain condition as unfitting, rated 10% with application of the US Army Physical Disability Agency (USAPDA) pain policy. The condition was determined to have existed prior to service (EPTS) but was permanently aggravated by service and no rating deduction was made. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: The CI attached a three page statement requesting consideration of multiple conditions including migraine headaches, gastroesophageal reflux disease and ruptured peptic stomach ulcers, anemia, bilateral knees, depression, and posttraumatic stress disorder.

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 right knee pain condition is the only condition that meets the criteria prescribed in DoDI 6040.44 for Board purview; and is addressed below. The other requested 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 (BCMR).

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service PEB – Dated 20060310** | **VA– All Effective Date 20060429** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Right Knee Pain | 5099-5003 | 10% | Status Post Meniscal Surgery, Right Knee with Residual Chronic Pain | 5260 | 10%\* | STR |
| ↓No Additional MEB/PEB Entries↓ | 0% X 2 / Not Service-Connected x 8 |
| **Combined: 10%** | **Combined: 10%\*\*** |

\*Temporary increase to 100% for surgery effective 20091201 and decreased to 10% effective 20100201. Also 5257 Instability of right knee added at 20% after first C&P exam and effective 20090504.

\*\*With additional conditions added over time, total combined rating 90% effective 20100226.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred condition continues to burden him. 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 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 6040.44; however, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation and is limited to conditions adjudicated by the PEB as either unfitting or not unfitting. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Chronic Right Knee Pain Condition. The CI injured his right knee as a teenager and had arthroscopic surgery, presumably for osteochondral defect of the right lateral femoral condyle. A magnetic resonance imaging (MRI) performed in October 2005 showed the post-operative changes of a defect on the right knee medial femoral condyle which most likely was the donor site for an osteochondral autograft transfer system (OATS) procedure sometime between 1997 and 1998; different dates are reported in the record. This initial surgery occurred before entry into service on 11 December 2000. At the entrance physical, the CI was asymptomatic and had a normal exam. The record does contain right knee X-rays performed on 17 December 2001 which had been ordered for knee, shin, and ankle pain that worsened with activity. The right knee X-rays showed what appeared to be an osteochondral fracture of the lateral femoral condyle and a small effusion. No outpatient visit notes dated prior to 20 September 2005 are available in the record for Board review and it is not clear how frequently the CI was seen for right knee pain. No profiles prior to 2005 are available in the record for review. There are records of outpatient visits for other conditions as early as July 2002. The outpatient note from September 2005 noted the CI had been symptom free until the past year and a half when he noticed increased pain with activities. Thus, it appears there was no significant right knee problem until early to mid-2004. In his letter to the Board, the CI reported injuring his right knee when he was running to an aircraft during a medevac mission under fire in 2004 in Afghanistan. This is consistent with the clinical history reported in the medical record in September 2005. There are multiple visits documented from September 2005 to April 2006 at a civilian orthopedic clinic as well as military aviation medicine and physical therapy clinics. The CI had arthroscopic surgery on 2 November 2005 which included mechanical chondroplasty of the right knee lateral femoral condyle. The anterior cruciate ligament and medial and lateral menisci were intact and appeared normal. The defect at site of the previous transplant harvest had a stable edge and was not debrided. A large loose osteochondral flap along the lateral femoral condyle was removed. Degenerative changes were visualized in the lateral compartment. On follow-up visits, the orthopedic surgeon noted the presence of degenerative changes with a poor prognosis and the need for permanent restrictions from weight bearing activities. He also noted the CI would eventually need a total knee replacement. The CI was also followed in physical therapy and saw military providers for a permanent profile and MEB. One steroid injection in the right knee was administered in January 2006 and two Synvisc injections were administered a week apart in early April 2006. The CI separated in late April 2006.

There are two MEB narrative summary (NARSUM) dictations in the record, one dated 22 December 2005 and one dated 15 February 2006, and both are signed by the same provider. The same provider signed the MEB physical that is dated 28 February 2006. The two NARSUMs have similar clinical histories and both state the CI had an OATS procedure in November 2005. However, as described above, no OATS procedure was done in that surgery. Neither NARSUM includes information about the injury in 2004. Neither NARSUM includes goniometric range-of-motion (ROM) measurements but both refer to the measurements obtained on 20051220 by physical therapy. These are recorded in the chart below. The December 2005 NARSUM reported the presence of some tenderness to palpation and crepitus with flexion and extension, but no obvious effusion and no instability. The February 2006 NARSUM reports a “marked decrease” in ROM with crepitus in both knees and positive anterior and posterior drawer tests. The MEB physical done in late February 2006 reports instability in three planes, positive McMurray’s, valgus stress, and positive drawer. It does not specify whether the drawer test was anterior, posterior, or both.

There were two goniometric 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 Knee ROM | MEB 2-4 Months Pre-Separation(20060215 and 28) *(PT ROM 20051222 p. 78)*  | VA C&P~33 Months Post-Separation(20090730) p.287 |
| Flexion (140⁰ Normal) | 65° (70⁰, 65⁰, 70⁰) | 91°; 80° (82°) with repeated motion |
| Extension (0⁰ Normal) | 0° (0⁰, 0⁰, 0⁰) | 0° |
| Comment | ROM limited due to pain, measured 20051220. Marked decrease in ROM of right knee with crepitus in both knees; positive anterior and posterior drawer; overall good muscle tone; good muscle tone. MEB physical 20060228: instability in three planes, positive McMurray, valgus stress, and positive drawer; normal neurologic exam. | Normal gait, was prescribed a knee brace; right knee: instability, weakness, tenderness, and guarding of movement; no edema or effusion; locking pain; after repeated motion additionally limited by pain, fatigue, weakness, lack of endurance, incoordination with pain having the major functional impact; medial and lateral meniscus test is abnormal with moderate degree of abnormality; normal motor, sensory, and reflex exams. Residuals of surgery are scars, pain, instability, osteoarthritis. Addendum states instability is moderate. |
| §4.71a Rating 5260 | 10% | 10% |
| §4.71a Rating 5257 | 20% | 20% |

On 8 March 2006, the PEB determined the CI was unfit for continued service for “chronic right knee pain following meniscal surgery times two” and with application of the USAPDA pain policy, rated the condition at 10% under code 5099-5003. While the condition had EPTS, it was permanently aggravated by service and rendered the CI unfit. While the CI did have two surgeries neither one was for meniscal repair, both were for osteochondral injuries.

No VA Compensation and Pension (C&P) examination was completed until 30 July 2009. An exam had been scheduled in June 2006, but he CI failed to report for this exam and the VA used his service treatment record (STR) to determine his initial rating. Although the VA noted the CI had a right knee condition EPTS, it was permanently aggravated by service and the pre-service percentage of disability was zero, so no rating deduction was necessary. The condition was rated as 5260 at 10% for pain-limited motion. However, after the first C&P examination was completed in July 2009, an additional rating of 20% was added for moderate instability of the right knee, coded under 5257. An addendum to the C&P examination specified the instability was moderate. This rating was effective the day of the CI’s claim for increased rating.

This case justifies separate ratings for instability and ROM impairment as established by VA policy in effect at the time of separation (general counsel opinion dated July 1, 1997 and Fast Letter 04-22 dated October 1, 2004). By internal policy and precedent, the Board adheres to this guidance. Degenerative changes were visualized at arthroscopy and the CI had limitations of his right knee ROM clearly documented. Instability was present in the right knee prior to separation as noted on the MEB NARSUM and MEB history and physical. Additionally, multiple visits for knee pain are documented in the VA treatment record, showing continuing care for right knee pain and instability. The CI underwent arthroscopy in January 2008 where the anterior cruciate ligament (ACL) was noted to be almost completely torn but was not repaired. There is no indication of worsening of the instability and no report of any incident which would have caused either worsening or improvement. Therefore the Board assumes this instability was present at the same degree of severity continuously from the time prior to separation (February 2006) to the time of the VA C&P exam in July 2009. If the VA had done an exam within one year of separation, the instability, more likely than not, would have been present and the rating would have been effective the day after separation. While the service medical examinations do not specify the severity of the instability, the presence of instability in three planes supports a determination of at least moderate instability.

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 right knee osteochondral injury with secondary degenerative changes condition based on pain limited motion and 20% for the right knee moderate instability 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. As discussed above, PEB reliance on the USAPDA pain policy was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the right knee osteochondral injury with secondary degenerative changes condition, the Board unanimously recommends a disability rating of 10%, coded 5260 IAW VASRD §4.71a. In the matter of the right knee moderate instability condition, the Board unanimously recommends a disability rating of 20%, coded 5257 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; 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** |
| Right Knee Osteochondral Injury with Secondary Degenerative Changes  | 5260 | 10% |
| Right Knee Moderate Instability | 5257 | 20% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111201, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 XXXXXXXXXXXXXXXXXXXXX

 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 XXXXXXXXX, AR20120012293 (PD201101127)

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 XXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA