RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxxxx. BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1101136 SEPARATION DATE: 20030131

BOARD DATE: 20120423

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty CPL/E-4 (3521/Motor Transport Automotive Technician), medically separated for chronic right ankle pain and instability. The CI had recurrent rolling inversion injuries of his right ankle, was placed on limited duty, and had extensive non-surgical treatments. He did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He underwent a Medical Evaluation Board (MEB) with chronic right ankle pain and instability, as the single condition forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. The PEB adjudicated the chronic right ankle pain and instability condition as unfitting, rated 10% with application of the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: “There should be an increase in disability rating from the military. I believe that all of my injuries were not considered when my Medical Board was initially reviewed. Upon discharge from the military, the VA gave a rating of 20% which over time has been increased to 40%. When I was discharged, I only received 10% for my right ankle. The VA gave me 10% for right ankle, 10% for Tinnitus in ears and both knees where rated at 0% but have been upgraded to 10% each. I also am having lower back spasms and wrist problems or Carpal tunnel syndrome which I injured while on active duty and have been denied by the VA but appealing that decision. If there are any questions that I can answer to help with this process please feel free to contact at numbers or e-mail listed in section 9 (b-d).”

RATING COMPARISON:

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| --- | --- |
| **Service PEB – Dated 20021106** | **VA (1 Mo. After Separation) – All Effective Date 20030201** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Right Ankle Pain and Instability | 5299-5003 | 10% | Residuals, Right Ankle Ligament Strain | 5299-5271 | 10% | 20030107 |
| ↓No Additional MEB/PEB Entries↓ | Tinnitus | 6260 | 10% | 20030103 |
| R. Knee PFS | 5099-5019 | 0%\* | 20030107 |
| L Knee PFS | 5099-5019 | 0%\* | 20030107 |
| Not Service-Connected x 4 | 20030107 |
| **Combined: 10%** | **Combined: 20%\*** |

\* Both knee ratings changed to 5019-5260 at 10% each, effective 20090114 (combined 40%)

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 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. 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. That role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA), operating under a different set of laws (Title 38, United States Code). 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 further acknowledges the CI’s contention for service ratings for other conditions documented at the time of separation, and notes that its recommendations in that regard must comply with the same governance. 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. The 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.

Right Ankle Condition. 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.

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| Goniometric ROM –R Ankle | MEB ~ 5 Mo. Pre-Sep | Ortho ~ 5 Mo. Pre-Sep | VA C&P ~ 3 Wks. Pre-Sep |
| Right Dorsiflexion (0-20) | 10⁰ | 15⁰ | 20⁰ |
| Right Plantar Flexion (0-45) | 45⁰ | 30⁰ | 45⁰ |
| Comment | Moderately tender; Drawer signs normal and bilaterally symmetric | Tender to palpation; no laxity | Tender along medial ant ligament; no laxity; gait normal |
| §4.71a Rating | 10% | 10% | 0%-10% (VA 10%) |

All exams documented tenderness with no significant laxity on testing. The service exams demonstrated slight to moderate decreased ankle ROM. The VA exam prior to separation indicated normal ROM. Radiographs proximate to separation were normal, including an MRI indicating no internal derangement. There were no indications of motor or sensory loss or a nerve condition such as regional sympathetic dystrophy. Gait was normal on all three exams.

The Board carefully examined all evidentiary information available. The Army PEB and the VA used different coding options for the right ankle condition, but both assigned the same rating percentage, and neither was predominate. Even though right ankle ROM was not decreased at the VA exam and there was no mention of painful motion or DeLuca criteria, the CI had tenderness and a history of multiple inversion injuries supporting a 10% rating for conceding §4.59, painful motion or IAW VASRD §4.40 (functional loss). For a higher rating under code 5271 (ankle, limited motion), there would need to be a marked limitation of motion. There was not sufficient evidence in the treatment record to support a marked degree of ankle limitation of motion. After due deliberation, all evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s coding or 10% rating decision for the right ankle condition.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for tinnitus (VA 10%), knees, lower back spasm and wrist problem (or CTS). Tinnitus was not documented in the core DES file. The Board does not have the authority under DoDI 6040.44 to render fitness or rating recommendations for any conditions not considered by the DES. All other noted conditions were mentioned in the DES file and were reviewed by the action officer and considered by the Board. Bilateral knee pain, with report of discomfort using stairs and “giving away at times and popping” was noted. Exam indicated full ROM with crepitus and no instability. The lower back pain was an acute lumbar strain without radicular symptoms, and wrist pain was noted as a diagnosis without ongoing treatment. Only the ankle condition was mentioned in the limited duty (LIMDU) or the non-medical assessment (NMA) as interfering with duty. There was no evidence for concluding that the knees, back or wrists conditions interfered with duty performance to a degree that could be argued as unfitting. The Board determined therefore that none of the stated conditions were subject to service disability rating.

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 right ankle condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended bilateral knees, lower back spasm and wrist conditions, the Board unanimously agrees that it cannot recommend a finding of unfit for additional service disability rating. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as unfitting for additional service disability rating.

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 Right Ankle Pain and Instability | 5299-5003 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111217, 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

MEMORANDUM FOR DIRECTOR, SECRETARY OF THE NAVY COUNCIL OF REVIEW

 BOARDS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATIONS

Ref: (a) DoDI 6040.44

 (b) CORB ltr dtd 2 May 12

 In accordance with reference (a), I have reviewed the cases forwarded by reference (b), and, for the reasons provided in their forwarding memorandum, approve the recommendations of the PDBR the following individual’s records not be corrected to reflect a change in either characterization of separation or in the disability rating previously assigned by the Department of the Navy’s Physical Evaluation Board:

- XXXXXXXXXXXXXX former USMC

- XXXXXXXXXXXXXX former USMC

- XXXXXXXXXXXXXX, former USN,

- XXXXXXXXXXXXXX, former USN,

- XXXXXXXXXXXXXX former USMC

- XXXXXXXXXXXXXX former USN,

 XXXXXXXXXXXXXXX

 Assistant General Counsel

 (Manpower & Reserve Affairs)