RECORD OF PROCEEDINGS
PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXX
CASE NUMBER: PD1200912
BOARD DATE: 20121218

BRANCH OF SERVICE: ARMY
TDRL SEPARATION DATE: 20021211

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (96B2P/Intelligence Analyst), medically separated for a history of osteomyelitis left distal tibia and fibula. The CI first began experiencing left lower extremity and ankle pain when involved in a motorcycle accident. At this time, he was diagnosed with a closed left distal fibular and tibial fracture. The osteomyelitis left distal tibia and fibula condition could not be adequately rehabilitated for the CI to meet the physical requirements of his Military Occupational Specialty (MOS) or to satisfy physical fitness standards. He was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded left ankle degenerative joint disease (DJD), posttraumatic condition and left distal fibular and medial malleolar fracture status post (s/p) open reduction, internal fixation (ORIF) with resulting chronic pain and postoperative osteomyelitis (in remission) conditions for Physical Evaluation Board (PEB) adjudication. The PEB adjudicated the osteomyelitis left distal tibia and fibula condition and the posttraumatic joint disease left ankle, as unfitting, rated 20% and 10% respectively and the CI was placed on the Temporary Disability Retired List (TDRL). The CI was re-evaluated on 29 July 2002 and was given a 20% disability rating by the PEB and was removed from the TDRL. The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: "Condition is progressively worse. Chronic persistant (sic) pain and swelling. Sharp acute pain periodically. Request to be placed on full permanent retirement. Depression result of PTSD Service Connected—demand this be corrected/reflected in record."

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 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, i.e. depression and PTSD, remain eligible for future consideration by the Army Board for Correction of Military Records.

TDRL RATING COMPARISON:

Service IPEB – Dated 20021015			
Condition	**Code**	**Rating**	
On TDRL – 20000404		**TDRL**	**Sep.**
History of Osteomyelitis	5000	20%	20%
Post Traumatic Joint Disease Left Ankle	5010	10%	N/A
↓No Additional MEB/PEB Entries↓			
Combined: 20%			

VA – All Effective Date 20000519			
Condition	**Code**	**Rating**	**Exam**
Fracture left Distal Tibia and Fibula	5010-5271	20%	20000519
Scars, Left Lower Extremity	7804	10%	20000519
Not Service Connected x 2			20000519
Combined: 30%*			

*Major Depression, 9434, @50% added effective 20090824 (combined 60%)

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI's application regarding the significant impairment with which his service-incurred conditions continue to burden him. 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. The DES has neither the role nor the authority to compensate 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 evaluates DVA evidence proximate to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of fitness decisions and rating determinations for disability at the time of separation. DoDI 6040.44 specifies a 12-month interval for special consideration to DVA findings. While the DES considers all of the service member's medical conditions, compensation can only be offered for those medical conditions that cut short the member's career; and the Board's assessment of fitness determinations is premised on the MOS-specific functional limitations in evidence at the time of separation. 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.

History of Osteomyelitis Left Distal Tibia and Fibula Condition. The CI was involved in a motorcycle accident 29 September 1996 when he incurred a closed left distal fibular and tibial fracture. He underwent ORIF of the distal fibular and medial malleolar fracture. Three months post-operatively he continued to have pain and, while there was no obvious infection, he underwent pin removal. A month later in February 1997 in follow-up he was noted to have medial wound full thickness skin loss and serous drainage; X-rays showed only osteopenia without changes of osteomyelitis. Eight months after the initial event in June 1997, according to the orthopedist, his wound was "all but healed" with normal ankle range-of-motion (ROM) without swelling. A year later, in September 1998, he presented with pain for 8 months without known acute injury. Physical examination revealed edema and erythema with reported normal ROM. He was diagnosed with ankle abscess and treated with incision and drainage and oral antibiotics. In February 1999 he was seen by Orthopedics for chronic sinus drainage on the medial malleolar incision and pain for 18 months and was diagnosed with osteomyelitis based on his clinical condition of a chronically open wound and increased uptake on bone scan. On 13 April 1999, he underwent hardware removal and debridement of the left distal fibula and the draining medial malleolar site. After 6 weeks of IV antibiotics, in May 1999, he underwent another irrigation and debridement with delayed primary closure of the wound. In follow up in June his wound had "not completely closed." In September 1999, Orthopedics noted that the member continued to have recurrent pain and swelling of his lower leg and he was referred to physical therapy (PT) for rehabilitation. When he was unable to improve his ROM without subjective complaints of pain and swelling, the CI was referred to the MEB.

The goniometric ROM evaluations in evidence which the Board weighed in arriving at its rating recommendation, with documentation of additional ratable criteria, are summarized in the chart below.

Ankle ROM	MEB ~1 Mos. Pre-TDRL* (20000301)		VA C&P ~1 Mo. Post TDRL Entry (20000519)	MEB ~3 Mos. Pre-TDRL Exit* (20020729)	
	Left	Right	Left	Left*	Right
Dorsiflexion (0-20°)	-5	5	5°	-5	5
Plantar Flexion (0-45°)	30	30	25°	35°	30
Inversion (25-30)	5	20	0	15	20
Eversion (5-10)	0	0	5	0	5
Comments for Left only	Tender to palpation over medial malleolus & distal fibula. Constant pain with motion, esp with wt bearing dorsiflexion; MRI: arthritic changes at left ankle and bony defects in L distal tibia		"5 degrees of dorsiflexion" All motions cause discomfort. No swelling, erythema, drainage. Obvious bony defect at medial distal fibula. Tender along mid aspect of longitudinal scar	Reports 'severe pain with ambulation'; strength 4+/5; no instability; no effusion; mild antalgic gait from internal rot'n deformity so walks on lateral column of foot (see text)	
§4.71a Ratings (see text)	20% (PEB 20% + 10%)		20% (VA 20%)	20% (PEB 20%)	

* Ortho MEB for TDRL entry stated ROM 0-25°; PT ROMs charted from same day
* PEB cover sheet listed ROMs at TDRL exit were charted. TDRL exit NARSUM stated 0-15°

The pre-TDRL entry MEB/PT exam and the VA Compensation and Pension (C&P) exam proximate to TDRL entry are summarized above. At the MEB exam at the conclusion of TDRL after 2 years, 3 months prior to separation, the CI reported severe pain with attempts at running and walking. The MEB physical exam noted no instability, and no effusion. The CI had a mildly antalgic gait from internal rotational deformity and he was noted to walk on the lateral column of his foot. He had decreased ROM of the left ankle as noted, with continued marked limited ROM of 0-15 degrees per Orthopedic MEB exam [PEB -5-35 degrees]. There was not a C&P exam proximate to the conclusion of TDRL.

> Note (2): The 20 percent rating on the basis of activity within the past 5 years is not assignable following the initial infection of active osteomyelitis with no subsequent reactivation. The prerequisite for this historical rating is an established recurrent osteomyelitis. To qualify for the 10 percent rating, 2 or more episodes following the initial infection are required. This 20 percent rating or the 10 percent rating, when applicable, will be assigned once only to cover disability at all sites of previously active infection with a future ending date in the case of the 20 percent rating.

Based on the above evidence, the Board directed its attention to its rating recommendation for the left ankle and lower leg condition. It first considered the MEB's coding choice of 5000, Osteomyelitis for TDRL entry. As per VASRD §4.43, osteomyelitis is considered a continuously disabling process. At DOS the CI had a recent documented history of a discharging sinus within the prior 5 years, and his unfitting condition was rated 20% by the PEB; according to the PEB proceedings, he was "placed on TDRL due to short time since clearing of osteomyelitis." Code 5000, Note (2) states "The 20 percent rating on the basis of activity within the past 5 years is not assignable following the initial infection of active osteomyelitis with no subsequent reactivation." The Board considered that the TDRL-entry may reasonably be considered as the "initial infection" time frame. A 30% rating would require definite involucrum (layer of new bone growth outside existing bone) or sequestrum (a piece of dead bone that has become separated during the process of necrosis from normal bone), neither of which was present. According to DC 5000 Note (1): partial ratings of 30 percent or less are to be combined with ratings for ankylosis, limited motion, nonunion or malunion, shortening, etc. It is reasonable to assume that the PEB was hopeful that a trial of a TDRL time period for observation of recurrence and recovery was warranted and applied application of coding osteomyelitis code 5000 at 20% and 5010 at 10% to reach the 30% rating required to pursue that approach. The PEB TDRL entry coding and rating for the ankle and osteomyelitis conditions was considered reasonable and IAW VASRD guidelines by the Board.

The Board then directed its attention to the TDRL exit rating. At TDRL exit, the provisions of code 5000 Note (2) for rating 20% were not met, as the CI did not have "established recurrent osteomyelitis." The IPEB removed DC 5010 at TDRL completion in 2002 without specifically rating the ankle pain or limited motion, but noted the ROMS and indicated "left ankle cannot be separately rated because of pyramiding." According to DC 5000 Note (1): 10 percent rating and the other partial ratings of 30 percent or less are to be combined with ratings for ankylosis, limited motion, nonunion or malunion, shortening, etc… If the osteomyelitis diagnosis 5000 were to stand, the CI's limited ROM would be combined with (not subsumed under) the rating for osteomyelitis.

The Board considered the CI's entire left lower extremity disability for rating and considered the degenerative arthritis confirmed by X-ray, gait abnormality which was not present at TDRL entry, the limited ROMs, and the internal rotation deformity with walking on the lateral column of the foot and determined that this did not approach the disability picture for rating equivalent to loss of the foot (40%). The Board deliberated at length between rating under code 5262 (tibia and fibula impairment) for ankle disability of moderate (20%) or marked (30%), or coding under 5271 (ankle limitation of motion) as marked (20%). The Board agreed that the 5262 code was most representative of the CI's injury, i.e. fracture, infection and dysmorphic healing of the tibia and fibula compared with mere ankle limitation of motion as per code 5271. The Board discussed the orthopedic examiner's description of 'mildly' antalgic gait and its meaning with the description of walking in the context of the disability rating.

The Board then considered the left lower extremity scars which were coded 7804 by C&P exam. By precedent, the Board does not recommend separation rating for scars unless their presence imposes a direct limitation on fitness. In order to be considered unfitting, scars must contribute to a decrease in functionality. In review of each physical examination both prior to TDRL entry and after TDRL entry there was no evidence to support the scar's interference with ROM and thus the scars are not considered unfitting.

After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board majority recommends a TDRL exit rating of 20% for the left ankle condition due to moderate ankle disability, coded 5010-5262.

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 history of osteomyelitis left distal tibia and fibula condition, the Board unanimously recommends no change in the PEB adjudication for entry into TDRL. On exit from TDRL, the Board by a 2:1 vote recommends an unfitting ankle disability coded 5010-5261 rated 20% IAW VASRD §4.71a. The single voter for dissent (who recommended a permanent ankle disability rating of 30%) submitted the appended minority opinion. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as additionally unfitting for rating at separation.

RECOMMENDATION: The Board recommends that the CI's prior determination be modified as follows, effective as of the date of his prior medical separation:

UNFITTING CONDITION	VASRD CODE	RATING	
		TDRL	PERMANENT
Osteomyelitis	5000	20%	-
Post traumatic joint disease left ankle	5010-5262	10%	20%
	COMBINED	**30%**	**20%**

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120615, w/atchs
Exhibit B. Service Treatment Record
Exhibit C. Department of Veterans' Affairs Treatment Record

XXXXXXXXXXXXXX, DAF
President
Physical Disability Board of Review

MINORITY OPINION. The AO physician strongly recommends a permanent rating of 30% coded 5010-5262 (Tibia and fibula, impairment) for marked ankle disability.

The Board was in agreement on TDRL-entry rating, that the PEB TDRL-exit rating using code 5000 was not IAW VASRD guidelines, and that rating at exit under code 5010-5262 was correct. The critical difference was in the disability rating-level of the MEB exam at TDRL-exit for permanent separation rating.

The CI had fractures of his tibia and fibula (lower leg bones at the ankle) with surgeries, bone infections (osteomyelitis), and degenerative changes in the ankle. Although the osteomyelitis did not have multiple recurrences, the lower leg/ankle disability increased during the TDRL period to the point where the CI limped, and had a markedly abnormal foot placement while walking. The orthopedic specialist examiner stated "He walks on the lateral column of his foot with an internal rotation deformity and a mildly antalgic gait. He has metatarsus primus varus on exam." Slight weakness and 2-3+ tenderness were also documented with an ROM of dorsiflexion to 0 degrees and plantar flexion to 15 degrees.

The CI's disability picture is clearly much more severe than only the marked limitation of motion of the ankle (5271 at 20%). Walking on the lateral column of the foot with limited ankle ROM with an inability to lift the foot above a neutral position and ankle weakness clearly supported a marked (30%) versus moderate (20%) ankle disability.

Given consideration of VASRD §4.3 (reasonable doubt), 4.7 (higher of two evaluations), §4.40 (functional loss), §4.45 (the joints) and IAW §4.71a, the CI's permanent separation rating should be at 30% coded 5010-5262.

The AO strongly 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	
		TDRL	PERMANENT
Osteomyelitis	5000	20%	
Post traumatic joint disease left ankle	5010	10%	
	5010-5262		30%
	COMBINED	**30%**	**30%**

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency
(TAPD-ZB / XXXXXXX), 2900 Crystal Drive, Suite 300, Arlington, VA 22202-3557

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation for XXXXXXXXXXXXX, AR20130000617 (PD201200912)

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 description without modification of the assigned rating or 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

XXXXXXXXXXXX
Deputy Assistant Secretary
(Army Review Boards)

CF:
( ) DoD PDBR
( ) DVA