RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxxxxxxxx BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1200003 SEPARATION DATE: 20020228

BOARD DATE: 20120629

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5(0311, Rifleman), medically separated for a chronic bilateral shoulder condition. The CI initially injured his shoulders while lifting weights during platoon leader school in February 2000. 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 placed on limited duty (LIMDU) and referred for a Medical Evaluation Board (MEB). The MEB forwarded chronic bilateral SLAP lesion to the Physical Evaluation Board (PEB) as medically unacceptable. The PEB adjudicated the right and left shoulder SLAP lesions as unfitting, rated 10% each, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: “Person stated regarding this application had two shoulder surgeries (one Left and one Right) prior to discharge from the Marine Corps (UNC North Carolina) as a result of the service connected injury. Person stated above has had an additional 7 shoulder surgeries by the Salt Lake City, Veterans Hospital. Surgeries total 5 on the left and 4 on the right. Shoulders were not fully functional and had limited range of motion upon discharge.” The CI states in block 12: “I was initially discharged from the Marines on February 28, 2002 as a result of a SERVICE CONNECTED injury. After being discharged because of an injury to both shoulders that is service connected, I have had an additional 7 surgeries. TEMPORARY 100% was awarded for the recovery times of surgery then went back to the current disability rating after the shoulders had healed. These dates that TEMPORARY 100% were awarded are; right shoulder- Nov 09, 2005, Oct. 02, 2006, Oct. 06, 2008. For the Left shoulder dates are as follows; May 16, 2005, Nov. 05, 2007, Apr. 06, 2009, and Dec. 21, 2009. Two surgeries were conducted prior to being discharged by the University of NC, Chappel Hill Orthopedic Clinic. Dates of surgeries after being discharged were all performed at the Salt lake City Veterans Hospital located at 500 Foothill Blvd., SLC, UT 84148-0001 (801) 584-1224. As a result of these surgeries and limited range of motion in both shoulders, my life style changed drastically. I have had to continue to seek treatment at the University of Utah Health Care-Stansbury Park Clinic, due to the long wait of getting seen at the VA hospital. This takes time and money. While these surgeries were performed and I was re cooperating, I had to takes approximately a month off work each surgery.” [*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. 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 Board for Correction of Naval Records (BCNR).

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20011204** | | | **VA (2 Mos. Pre-Separation) – All Effective Date 20020301** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Bilateral SLAP Lesion | 5299-5003 | 10% | S/P L Shoulder Injury | 5299-5203 | 10%\* | 20011213 |
| 10% | S/P R Shoulder Injury | 5299-5203 | 10%\* | 20011213 |
| ↓No Additional MEB/PEB Entries↓ | | | 0% X 1 / Not Service-Connected x 0 | | | 20011213 |
| **Combined: 20%** | | | **Combined: 20%\*** | | | |

\*Rating decision 20080319 increased right shoulder to 20% effective 20070619 (combined 30%); left shoulder 20% effective 20080201 (combined 40%); (both based on new exams)

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-aggravated condition continues to burden him. 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 Department of Veterans’ Affairs (DVA). The 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.

Bilateral Shoulder Condition. The narrative summary (NARSUM) notes that the CI developed pain in both shoulders as a result of heavy lifting in February 2000. While the presence of a right shoulder SLAP lesion (a tear in the joint lip, or labrum) was firmly established, at the time of the MEB the precise pathology of the left shoulder condition was not clear. Between the time of the MEB and the PEB, surgical exploration discovered a left shoulder rotator cuff tear, versus a SLAP lesion. The PEB; however, maintained the bilateral SLAP lesion terminology, but did appropriately rate each shoulder separately and incorporated the bilateral factor. The Board acknowledges the multiple shoulder surgeries and worsening after separation, which is clearly documented in the VA records; however, none of the more remote VA exams were indicative of the CI’s condition at the time of separation for rating consideration.

Right Shoulder SLAP Lesion. The CI was right hand dominate. Although the injury reportedly occurred in February 2000, the CI did not present for evaluation until 3 months later. Physical therapy did not result in improvement and a magnetic resonance imaging (MRI) revealed a tear of the superior aspect of the labrum. Surgical treatment for the condition was performed on 12 October 2000. The CI did well post-operatively, but 5 months later he re-injured the shoulder while opening a car door. The operating surgeon subsequently advised a change in MOS if the CI remained on active duty. The CI complained of ongoing pain, especially with overhead movements. No clinical entries documented complaints of instability, subluxation or dislocation. There were two 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 | PT ~11 Mo. Pre-Sep | VA C&P ~2 Mo. Pre-Sep |
| Flexion (0-180⁰) | 160⁰ | 140⁰ |
| Abduction (0-180⁰) | 160⁰ | 130⁰ |
| Comments | Painful motion | Painful motion |
| §4.71a Rating | 10% | 10% |

A PT note on 25 June 2001, 8 months prior to separation, reported pain at end of external rotation, but full motion of flexion and abduction. At the MEB exam (undated - approximately 29 August 2001), the CI reported continued pain. The MEB physical exam noted “upper extremity ROM is only 60% in all planes bilaterally with pain at greater than 60 degrees of flexion and abduction” [60% is approximately 100⁰ flexion/abduction]. At the VA Compensation and Pension (C&P) exam, 2 months prior to separation, the CI reported limitation of rotary movement and problems with overhead mobility, which interfered with his ability to lift even light weights or to participate in sports. Examination revealed ROM, particularly abduction and external rotation, to be painful. Clicking was noted with abduction and external rotation. There was no mention of loose movement, dislocation, mal-union or deformity. X-rays were remarkable only for appropriately positioned operative hardware. 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,” and both the PT and VA examinations demonstrated motion well above this level. Because the MEB exam was undated and unclear in its language (“upper extremity ROM is only 60%”), the Board assigned it lower probative value. The PEB’s 10% rating under an analogous 5003 code was supported by §4.40 (pain with use) or §4.59 (painful motion). There was no evidence of loose movement or dislocation supporting a rating higher than the 10% assigned by the VA under the analogous 5203 code (impairment of clavicle or scapula). The Board also considered the 5202 code (other impairment of humerus), but there was no evidence of mal-union or deformity to support the minimum 20% rating under that code. Similarly, under the 5304 code (group IV muscle function) “moderately severe” impairment justifying a 20% rating was not present. 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 right shoulder condition.

Left Shoulder Rotator Cuff Condition. Although the left shoulder injury reportedly occurred in February 2000 (at the time of the right shoulder injury), it did not become a focus of clinical attention until over a year later. An MRI performed on 12 June 2001, for evaluation of pain, showed subacromial narrowing and supraspinatus tendinosis. Due to continued pain despite PT, diagnostic arthroscopy was performed on 6 September 2001, during the MEB process, which revealed subacromial impingement and partial thickness supraspinatus tear. These issues were addressed surgically. There were no documented complaints of instability, subluxation or dislocation. 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.

|  |  |  |
| --- | --- | --- |
| Left Shoulder ROM | PT ~4 Mo. Pre-Sep | VA C&P ~2 Mo. Pre-Sep |
| Flexion (0-180⁰) | 125⁰ | 140⁰ |
| Abduction (0-180⁰) | 120⁰ | 120⁰ |
| Comments | Minimal tenderness | Painful motion |
| §4.71a Rating | 10% | 10% |

A PT note dated 28 September 2001, 3 weeks after surgery, reported some anterior shoulder soreness. A follow-up approximately a month later noted minimal shoulder tenderness. The MEB exam, as noted above, reported painful motion beginning at 60 degrees of flexion and abduction, but ROM limits were not clearly defined. The VA exam reported complaints and physical findings similar to those of the right shoulder. X-rays were normal.

The Board directs attention to its rating recommendation based on the above evidence. As discussed for the right shoulder, the 10% rating assigned by the PEB and the VA for the left shoulder was appropriate in the setting of painful, but non-compensable, limitation of motion. Likewise, the Board agrees there is no pathway available that leads to a higher rating. 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 shoulder 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 right shoulder condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the left shoulder condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. There were no other conditions within the Board’s scope of review for consideration.

RECOMMENDATION: The Board, therefore, recommends that there be no recharacterization of the CI’s disability and separation determination, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **UNFITTING CONDITION** | | | **VASRD CODE** | **RATING** |
| Chronic Bilateral SLAP Lesion (Shoulders) | | Right | 5299-5003 | 10% |
| Left | 5299-5003 | 10% |
| **COMBINED (Incorporating BLF)** | | | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120109, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

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 10 Jul 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 individuals’ 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:

XXX XX, former USMC

XXX XX, former USMC

XXX XX, former USMC

XXX XX, former USMC

XXX XX, former USN

XXX XX, former USN

XXXXXXX

Assistant General Counsel

(Manpower & Reserve Affairs)