RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1200008 SEPARATION DATE: 20020420

BOARD DATE: 20121017

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSG/E-6 (54B/Chemical Operations) medically separated for right shoulder and right knee conditions. He dislocated his (dominant) right shoulder in 1994, and required surgical stabilization in 1998 for recurrent dislocations. Although he suffered no further dislocations, he continued to experience pain and subjective instability. The shoulder could not be adequately rehabilitated 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). Additionally the CI was evaluated by the MEB for chronic pain of the right knee. The right shoulder and right knee conditions were forwarded to the Physical Evaluation Board (PEB) as separate diagnoses: “right shoulder chronic instability, status post surgery” and “right knee chondromalacia.” The right shoulder condition was designated in the narrative summary (NARSUM) as medically unacceptable IAW AR 40-501. The addendum to the NARSUM for the knee condition did not address compatibility with retention standards; and, the MEB’s DA Form 3947 made no reference to medical acceptability for either condition. No other conditions were submitted by the MEB. The PEB adjudicated the right shoulder and right knee diagnoses as a single unfitting condition, coded analogously to 5003 (degenerative arthritis) and rated 10%, citing criteria of the US Army Physical Disability Agency (USAPDA) pain policy. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: The application states (redacted for brevity, with preservation of content relevant to the Board’s scope and recommendations): “I was medically discharged with 10% after a 2 year Medical Board while stationed in Germany. I filed with VA when I got out. VA immediately upgraded my disability to 30% which if I had received that at my time of discharge, I would have a retirement card and benefits. I have recently been diagnosed with Tinnitus and was discharged with a service connected hearing loss. ... [Details post separation course of complications, repeat surgery and related diagnoses relevant to the right shoulder condition.] My quality of life to include normal daily living functions and sleeping have been greatly impaired. ... I gave ten years of my life to the Army and was on the fast track until my injuries stopped me. I feel that I am warranted for medical retirement and I asking [*sic*] the board to please review my case.”

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in Department of Defense Instruction (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 rating for the unfitting right shoulder and knee disability is addressed below. The tinnitus and hearing loss conditions specified in the application were not identified and adjudicated by the PEB; e.g., they do not satisfy scope requirements. Those, and any other conditions or contention not requested in this application, remain eligible for future consideration by the Army Board for Correction of Military Records.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20020107** | | | **VA (~10 Mo. Post-Separation) – Effective 20020421** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Right Shoulder/Right Knee Pain | 5099-5003 | 10% | Right Shoulder Dislocation | 5299-5201 | 20% | 20021008 |
| RPS, Right Knee | 5257 | 10% | 20021008 |
| No Additional MEB/PEB Entries | | | Bilateral Hearing Loss | 6100 | 0% | 20021008 |
| **Combined: 10%** | | | **Combined: 30%** | | | |

ANALYSIS SUMMARY: IAW DoDI 6040.44, the Board’s authority is limited to making recommendations on correcting disability determinations. The Board’s role is thus confined to the review of medical records and all evidence at hand to assess the fairness of PEB rating determinations, compared to Veteran’s Affairs Schedule for Rating Disabilities (VASRD) VASRD standards, based on ratable severity at the time of separation; and, to review those fitness determinations within its scope (as elaborated above) based on MOS performance limitations in evidence at separation. The Board acknowledges the CI’s information regarding the significant impairment with which his service-connected condition continues to burden him; but, must emphasize that the Disability Evaluation System (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. Post-separation evidence is probative to the Board’s recommendations only to the extent that it reasonably reflects the disability at the time of separation.

The PEB combined right shoulder and right knee disabilities as a single unfitting condition, which was compliant with AR 635-40 in effect; although the Board must apply separate codes and ratings in its recommendations if compensable ratings for each condition are achieved IAW VASRD §4.71a. If the Board judges that separate ratings are warranted under the VASRD, however, each ‘unbundled’ condition must satisfy the requirement that it was independently unfitting to be eligible for disability rating; since, not uncommonly, this approach by the PEB reflects its judgment that the constellation of conditions was unfitting, not a judgment that each condition was independently unfitting. The Board’s analysis and recommendations regarding the separate fitness issue and potential separate rating for each condition entrained in the PEB’s combined rating approach is as follows.

Right Shoulder Condition. The shoulder was dislocated in 1994 during a tour in Korea, although a subsequent sports injury in 1998 was also noted by the PEB. The right shoulder was not profiled until 1998 after the CI underwent an open Bankart repair for recurrent anterior dislocations. Interval records between the surgery and MEB proceedings indicate continuing pain managed by physical therapy and conservative measures, but no repeat dislocations. Magnetic resonance imaging (MRI) revealed post-operative changes without further surgical pathology. The CI began to experience subjective instability with anterior shoulder maneuvers, and the MEB was initiated when it was clear that the persistent limitations and continuing profile restrictions were incompatible with MOS demands. The NARSUM noted that the shoulder was “essentially painful with any kind of activities, relieved only by rest.” The physical exam noted anterior apprehension, but forward flexion to 170 degree (normal 180 degree; minimal compensable 90 degree) with “notable pain at extremes of motion.” MEB outpatient notes noted ligamental stability to stress and no signs of impingement. The VA Compensation and Pension (C&P) exam (10 months post-separation) noted that the shoulder was “troublesome approximately 50% of the days”, and that the CI modified some work activities to preferential use of his left arm. The VA physical exam noted forward flexion and abduction to 110 degrees (limited by pain), with intact ligaments.

The Board directs attention to its rating recommendation based on the above evidence. All members agreed that the shoulder condition was well established as independently unfitting. The PEB’s DA Form 199 cited “good” range-of-motion (ROM) and stated that the joint was “rated for pain.” The VA’s 20% rating was under VASRD code 5201 for limitation of motion, citing the C&P ROM measurements stated above; although, 5201 requires limitation “at shoulder level” (i.e., 90 degrees) to support a 20% rating. Especially considering the near normal ROM recorded in the NARSUM (more probative to separation), all members agreed that a 20% rating under 5201 could not be supported. The Board considered analogous application of code 5202, which includes provision for rating instability, and would achieve a 30% rating for “frequent episodes and guarding of all arm movements” or 20% for “infrequent episodes, and guarding of movement only at shoulder level”. The code stipulates, however, that those ratings are for “recurrent dislocation”; and, members agreed that, even with analogous interpretation of 5201, it could not be applied for recurrent dislocations that had been surgically corrected without recurrence for several years preceding separation. There was no clinical and/or radiologic evidence that suggested ankylosis, loss of the humeral head, nonunion, malunion, fibrous union, deformity, nonunion or dislocation of the scapula that would have justified application of any other available joint code to achieve a rating higher than 10% for the shoulder impairment in this case. All members concurred that VASRD §4.59 (painful motion) was adequately supported to achieve the minimal compensable rating of 10%. 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 shoulder condition. The action officer recommended, and the Board concurred with, the code 5099-5024 (tenosynovitis) for its clinical compatibility.

Right Knee Condition. An addendum to the NARSUM for the right knee condition (dated approximately 3 months later) stated that the knee was injured “during a road-march between 1993-1994.” The PEB requested clarification since the only LOD (line of duty) authorization for the knee related to a motorcycle accident in 1996; which the PEB stated was not valid per regulations. Although an amendment to the NARSUM specifying the 1996 injury was directed, no such amendment is in evidence; and, the only LOD for the knee in evidence is related to the motorcycle accident. The earliest treatment note for the knee condition was in 1996 following the motorcycle injury. The condition was diagnosed as retropatellar pain syndrome (RPS); and chondromalacia (cartilage defect) was noted on X-ray. An entry from December 1999 (> 2 years prior to separation) requested a downgrade of the knee profile to P2, stating that the CI was “able to march and run at own pace.” There are no treatment notes in evidence after this entry, and the profile at separation was L1 with no mention of the knee condition. The commander’s statement did not mention the knee condition, and specified only “the profile limitations of limited use of right hand and the inability to carry or fire a rifle.” The NARSUM documented right knee flexion to 135 degrees (normal 140 degree; rating 0%) without notation of painful motion. All exams indicated that the knee was stable without other ratable findings. The post-separation C&P examination documented flexion to 140 degree without notation of painful motion. The joint was stable, although the VA examiner stated “His right patella is somewhat mobile.” The VA rating decision invoked the patellar finding in support of a 10% rating under code 5257 (knee subluxation and instability); which is clearly not clinically applicable to patellar mobility.

As previously elaborated, having de-coupled the right knee condition from a combined PEB adjudication, the Board must first consider whether it remained separately unfitting as required for disability rating. Based on the above evidence, the Board is left with a questionable basis for arguing that it was independently unfitting. The well established principle for fitness determinations is that they are performance-based. The Board could not find evidence in the commander’s statement or elsewhere in the file that documented any significant interference of the knee condition with performance of duties at the time of separation, nor were any physical findings documented by the MEB or VA examiners which would logically be associated with significant disability. The condition was not profiled at separation, and it is dubious that the MEB examiner considered it to fail retention standards. It should also be noted that there is no clear evidence in support of a compensable rating for the knee, even if were conceded as unfitting. After due deliberation, the members agreed that the preponderance of the evidence does not support a conclusion that the right knee condition, as an isolated impairment, would have rendered the CI incapable of performing within his MOS; and, accordingly cannot recommend a separate rating for it.

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 and likely on AR 635-40 for rating the shoulder and knee conditions was operant in this case, and they were adjudicated independently of that policy by the Board. In the matter of the right shoulder condition, the Board unanimously recommends a disability rating of 10%, coded 5099-5024, IAW VASRD §4.71a. In the matter of the right knee condition, the Board unanimously agrees that it cannot recommend a finding of unfit for additional disability rating. 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** |
| Surgical Residuals, Right Shoulder | 5099-5024 | 10% |
| Retropatellar Pain Syndrome, Right Knee | Not Unfitting | |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111226, 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 22202-3557

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for XXXXXXXXXXXXXXXXXXXX, AR20120019910 (PD201200008)

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 combined 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 XXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA