RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: NAVY

CASE NUMBER: PD1200019 SEPARATION DATE: 20050301

BOARD DATE: 20120919

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty GSM3/E-4 (Shipboard Engineering), medically separated for a right shoulder condition. He did not respond adequately to operative treatment and was unable to fulfill the physical demands within his rating, meet worldwide deployment standards or meet physical fitness standards. He was placed on limited duty (LIMDU) and underwent a Medical Evaluation Board (MEB). Recurrent right shoulder instability was forwarded to the Physical Evaluation Board (PEB) IAW SECNAVINST 1850.4E. No other conditions appeared on the MEB’s submission. The PEB adjudicated recurrent right shoulder instability, status post right arthroscopic bankart repair condition as unfitting, rated 10%, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). The PEB adjudicated two additional conditions; ganglion left wrist, surgically removed and adjustment disorder which were determined to be not unfitting and to be Category III and IV, respectively. Navy CAT III conditions are not separately unfitting and do not contribute to the unfitting condition and category IV are conditions, which do not constitute a physical disability. The CI made no appeals, and was medically separated with a 10% disability rating. The adjustment disorder is not a ratable condition IAW DoD and the VA regulations and will not be discussed further.

CI CONTENTION: “Based on VA documents I should be entitled to a medical retirement, My health issues are far more severe than what The NAVY rated me at prior to discharge, I am respectfully asking for a re-evaluation. I should have been entitled to tricare for my Daughter and myself, as well as a higher severance pay and a retirement pay so that it goes accordingly to my disability rating, I am a single Father, unemployed and disabled.”

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in the 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 ratings for unfitting conditions will be reviewed in all cases. The conditions ganglion cyst, as requested for consideration meet the criteria prescribed in DoDI 6040.44 for Board purview and are addressed below, in addition to a review of the ratings for the unfitting conditions. The remaining conditions, referenced in the CI’s attachment, rated by the VA at separation 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 Board for Correction of Naval Records.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20050119** | | | **VA (24 Mos. Post-Separation) – All Effective Date 20070305** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Recurrent Right Shoulder Instability , Post Right Arthroscopic Bankart Repair | 5099-5003 | 10% | Residuals of Right Shoulder Arthroscopic Bankart Repair | 5201-5014 | 10%\* | 20070514 |
| Residual Scar Of Bankart Procedure Of Right Shoulder | 7805 | 0% | 20070514 |
| Ganglion Left Wrist, Surgically Removed | CAT III | | Residuals of Left Wrist Ganglion Cyst Excision | 5215-5014 | 10% | 20070514 |
| Residual Scar from Left Wrist Ganglion Cyst Removal | 7805 | 0% | 20070514 |
| Adjustment Disorder CAT IV | | |  |  |  |  |
|  | | | Residuals of L1 Anterior Compression w/Disc Bulge | 5237 | 10% | 20070514 |
| ↓No Additional MEB/PEB Entries↓ | | | 0% x 1 / Not Service-Connected x 2 | | |  |
| **Combined: 10%** | | | **Combined: 30%** | | | |

\*20101001 VARD increased to 20% effective 20090914

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 Veteran Affairs (DVA), operating under a different set of laws (Title 38, United States Code). The Board evaluates VA evidence proximal to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of DES fitness decisions and rating determinations for disability 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.

Right Shoulder Condition. The CI is right hand dominant and had a dislocation injury of the right shoulder for which he underwent an arthroscopic Bankart repair, over 2 years after the injury, in November 2003. The postoperative and rehabilitation course was without complication however the CI continued to have symptoms of instability, persistent pain and paresthesia of his lateral right arm. His non-medical assessment (NMA) referenced his right shoulder condition only and documented he was not working in his rating and missed 10 hours per week of work to attend medical appointments. The NMA further documented his condition precluded from performing the duties of his rating at sea. 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 | MEB 2 Mo. Pre-Sep | VA C&P ~26 Mo. Post-Sep |
| Flexion (0-180⁰) | 180⁰ | 120⁰ |
| Abduction (0-180⁰) | 170⁰ | 120⁰ |
| Comments | Pain with overhead use, +apprehension, +sulcus | Painful motion, crepitus, +Deluca flexion to 90⁰ |
| §4.71a Rating | 10%\* | 10% |

\*Conceding §4.59 (painful motion)

At the MEB exam, the CI reported subtle anterior instability with some apprehension, which had much improved from preoperatively and some intermittent mild paresthesias over his lateral arm. He reported he was unable to do any pushups or lift anything greater than 10 pounds with his right upper extremity. The MEB physical exam demonstrated well healed surgical incisions, full ROM of his right shoulder, sulcus sign of 1 centimeter, grade I anterior translation, positive mild apprehension when he was abducted and externally rotated and his distal arm was neurovascularly intact. X-rays of the right shoulder were within normal limits. At the VA Compensation and Pension (C&P), well after separation, the CI reported daily pain, 7 of 10 on a pain scale, instability symptoms, and could not throw a ball, pull anything, or do any lifting overhead. Cold, wet and hot weather, swimming and baseball increased his pain to 10 of 10 and over the counter motrin and aspirin medications did not provide much relief. The C&P exam demonstrated crepitus and positive Deluca observations with forward flexion to 90 degrees, and abduction to 90 degrees.

The Board directs attention to its rating recommendation based on the above evidence. The ROM values reported by the VA examiner, 26 months after separation, are significantly worse than those reported by the MEB dated 2 months prior to separation. There is no record of recurrent injury or other development in explanation of the more marked impairment reflected by the VA measurements. It is also noted for the record that the Board recognizes the significant interval (26 months) between the date of separation and the VA evaluation. DoDI 6040.44, under which the Board operates, specifies a 12-month interval for special consideration to VA findings. This does not mean that the VA information was disregarded, as it was a valuable source for clinical information and opinions relevant to the Board’s evaluation. In matters germane to the severity and disability at the time of separation, however, the information in the MEB evaluation was assigned proportionately more probative value as a basis for the Board’s rating recommendations. The PEB and VA chose different coding options for the condition, but this did not bear on rating and both were consistent with §4.71a—Schedule of ratings–musculoskeletal system. The PEB’s chosen code 5003 (arthritis, degenerative) analogous to 5099, specifies that, in the presence of degenerative arthritis established by X-ray findings, when “the limitation of motion of the specific joint or joints involved is noncompensable under the appropriate diagnostic codes, a rating of 10 pct is for application for each such major joint or group of minor joints affected by limitation of motion, to be combined, not added under diagnostic code 5003. Limitation of motion must be objectively confirmed by findings such as swelling, muscle spasm, or satisfactory evidence of painful motion.” There was noncompensable ROM impairment of the right shoulder, and the Board agreed that there is adequate documentation of painful motion of the joint in the pre-separation data to merit application of a minimal compensable rating under this code. The Board agreed there was no evidence of incapacitating episodes to support a 20% rating under the 5003 code. The Board considered the VA choice of coding the right shoulder 5014 (Osteomalacia) analogous to 5201 (Arm, limitation of motion of) for a higher rating however agreed there was no evidence to support the 20% rating with ROM limitation at the shoulder level. While the evidence reflects symptoms and signs of instability there was no evidence of guarding of the movement only at the shoulder level to consider the 5202 code (Humerus, other impairment of) at the 20% rating. There was no further clinical or radiologic evidence of the joint that suggested nonunion of, or malunion of the clavicle or scapula. Hence, no alternative shoulder code is supported in justification of a rating higher than 10% for this joint. There was no evidence of ratable peripheral nerve impairment which would provide for additional or 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 right shoulder condition.

Contended PEB Conditions. The contended condition adjudicated as not unfitting by the PEB was ganglion cyst. The Board’s first charge with respect to these conditions is an assessment of the appropriateness of the PEB’s fitness adjudications. The Board’s threshold for countering fitness determinations is higher than the VASRD §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard. This condition was not profiled; not implicated in the commander’s statement; and, was not judged to fail retention standards. This condition was reviewed by the action officer and considered by the Board. There was no indication from the record that this condition significantly interfered with satisfactory duty performance. After due deliberation in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB fitness determination for the any of the contended conditions and, therefore, no additional disability ratings can be recommended.

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 contended ganglion cyst condition, the Board unanimously recommends no change from the PEB determinations as not unfitting. 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:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Recurrent Right Shoulder Instability , Post Right Arthroscopic Bankart Repair | 5099-5003 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120104, 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 15 Oct 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 that 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

- former USN, XXX-XX

- former USN, XXX-XX

Assistant General Counsel

(Manpower & Reserve Affairs)