RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXX branch of service: Army

CASE NUMBER: PD1200036 SEPARATION DATE: 20070514

BOARD DATE: 20121004

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (44B/Welder), medically separated for bilateral bunion pain status post surgical correction of the left and of the right foot (joint at base of big toe). Despite surgery, medication, crutches and a cam walker, the CI failed to meet the physical requirements of her Military Occupational Specialty (MOS) or satisfy physical fitness standards. The CI was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded Bilateral Bunion Pain Status Post(S/P) Surgical Correction, Left Greater than Right condition on DA Form 3947 to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Adjustment disorder condition, identified in the rating chart below, was also identified and forwarded by the MEB as medically acceptable. The PEB adjudicated the Bilateral Bunion Pain S/P Surgical Correction condition as unfitting, rated 0%, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 0% disability rating.

CI CONTENTION: “Military denied me a rating because they felt my feet issues were genetic. However, no one in my family has ever had feet problems. I never had a problem until midway in my career. The appropriate measures were not taken to prevent the problem. Those “doctors” at the TMCs ignored my complaints well before I had even reached my third or fourth year on active duty. They used moleskin and Motrin as remedies. I am stuck with these ailments daily and I also had a surgery after I was discharged. I did not have a problem with my feet until after years on active duty. Also, I was denies rating for anxiety/depression issue. This issue began on active duty and continues to date. I am on medication and had my first run in with the law less than a year after discharge due to anxiety.”

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 condition anxiety disorder as requested for consideration meets the criteria prescribed in DoDI 6040.44 for Board purview; and is addressed below, in addition to a review of the Service ratings for the unfitting conditions. 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 Army Board for Correction of Military Records.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service IPEB – Dated 20070330**  | **VA (1 Mo. Post-Separation) – All Effective Date 20070515** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Bilateral Bunion Pain s/p surgical correction | 5280 | 0% | R Foot Hallux Valgus, S/P Bunionectomy and Residual Scar | 5280 | 10% | 20070515 |
| L Foot Hallux Valgus, S/P Bunionectomy | 5280 | 10% | 20070515 |
| Left Foot, Surgical Scar …  | 7804 | 10% | 20070515 |
| Adjustment Disorder w/Anxiety and Depressed Mood | Not Unfitting | Adjustment Disorder w/Anxiety and Depressed Mood | 9440 | 0%\* | 20070516 |
| ↓No Additional MEB/PEB Entries↓ | Post Concussive HA’s | 8304-8045 | 10%\* | 20070515 |
| 0% x 2/Not Service Connected x 3 | 20070515 |
| **Combined: 0%** | **Combined: 40%** |

\*Adjustment Disorder increased to 30% and Post Concussive Headaches increased to 30% effective 20090107 (combined 70%)

ANALYSIS SUMMARY: The Board acknowledges the CI’s assertions that she received inappropriate medical care for her bilateral foot condition and that she was denied a rating for her anxiety. It is noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to the CI’s statements in the application regarding suspected improprieties in the processing of his case. The Board’s role is confined to the review of medical records and all evidence at hand to assess the fairness of PEB rating determinations, compared to VASRD standards, based on severity at the time of separation. It must also judge the fairness of PEB fitness adjudications based on the fitness consequences of conditions as they existed at the time of separation.

Bilateral Bunion Pain s/p Surgical Correction Condition. There were three foot exams in evidence including one evaluation with goniometric range-of-motion (ROM) evaluations, along with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation; as summarized in the chart below.

|  |  |  |  |
| --- | --- | --- | --- |
| Great Toe (Right/Left) ROM | MEB ~ 4 Mos. Pre-Sep | VA C&P ~1 day Post-Sep | VA C&P ~ 5 Mos. Post-Sep |
| Right | Left | Right | Left | Right | Left |
| Flexion 0⁰-50⁰ | See Comment | 0⁰-40⁰\*  | 0⁰-30⁰ with discomfort | No ROM’s |
| Extension0⁰-50⁰ | 0⁰-60⁰\* | 0⁰-30⁰ with discomfort |
| Comment: X-ray post op changes from surgery without complication; L foot surgery 11 Mo. Pre-Sep | Left foot pain; Increased sensation lateral 1st metatarsal and medial 2nd metatarsal head; good pedal pulses; “ROM metatarsophalangeal (MTP)joints all > 65⁰; < 5⁰ plantar flexion”; muscle strength wnl | \*Mild discomfort; No tenderness along scar;  | Tenderness along 4cm scar; pain with walking affecting the MTP joint  | Non tender | Tenderness along 4 cm scar |
| §4.71a Rating | 10% | 10% | 10% | 10% | 10% |

The CI had a well documented history of chronic bilateral foot pain in the service treatment record (STR). A right modified Austin bunionectomy (removal of part of the metatarsal head) and fifth metatarsal (MTP) exostectomy was performed in June 2005. A post-operative X-ray noted that there was improved alignment at the first MTP joint. There were persistent complaints of joint pain in the MTP joint of the great toe right foot and great toe stiffness. In June 2006, the CI underwent a left modified Austin bunionectomy and second metatarsal osteotomy. A post operative X-ray was normal with hardware in place.

The commanders’ statements in December 2006 and January 2007 noted that due to the bilateral bunion deformity the CI was unable to move with a fighting load at least two miles and had an inability to construct a fighting position in a combat environment. The CI was seen by Physical Therapy (PT) in January 2007 for continued unresolved left foot pain. The therapist noted a slouched posture when standing, guarded gait, mild swelling of the first MTP joint, full ROM with mild pain first and second MTP joint, hypersensitive light touch on dorsum of the left foot, tenderness to palpation along the incision along the dorsum and plantar aspect of the left foot, 4/5 strength due to pain with the first and second MTP and interphalangeal joints. The examiner diagnosed left foot pain with mild plantar fasciitis.

The MEB examination performed 4 months prior to separation, noted that the CI had bilateral bunion pain s/p surgical correction with pain greater on the left foot than the right foot. The examiner also noted that the CI could not wear combat boots, walk greater than a mile or stand greater than fifteen minutes. The examiner noted well healed scars on both feet. An X-ray performed in May 2007 indicated a slight deformity of the distal fifth metatarsal on the right side; with findings including “there is evidence of previous bunion surgery bilaterally with resections of the medial margins of the distal ends of both first metatarsals and also probable osteotomies of the same bones.”

The initial VA Compensation & Pension (C&P) examination, performed one day post-separation, indicated residual pain greater on the left foot than the right foot; tenderness along the 4 cm scar on the left foot (non-tender scar on right foot); mild discomfort on the right foot; and both feet requiring moist heat, massage and non steroidal anti inflammatory drugs (NSAIDS). A repeat X-ray of both feet demonstrated post-operative changes and a post traumatic slight deformity of the distal fifth metatarsal on the right side. The second VA C&P exam, 5 months post-separation documented more pain with the left foot than the right foot, with pain along the scar on the left foot dorsum and at the MTP joint with limited ROM of the MTP joint and pain along the instep of the arch and pain with prolonged standing and walking more than 30 minutes.

The PEB combined the right foot bunion pain condition and left foot bunion pain condition as a single unfitting condition, coded analogously to 5280 and rated 0%. The PEB specified that “treatment has not involved resection of the metatarsal head and is not equivalent to amputation of the great toe,” and may have relied on AR 635.40 (B.24 f.). The Board’s initial charge in this case was therefore directed at determining if the PEB’s approach of combining conditions under a single rating was justified in lieu of separate ratings. 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 two or more separate ratings are warranted in such cases, however, it must satisfy the requirement that each ‘unbundled’ condition was unfitting in and of itself. Not uncommonly this approach by the PEB reflected its judgment that the constellation of conditions was unfitting, and there was no need for separate fitness adjudications or implied adjudication that each condition was separately unfitting. Thus the Board must maintain the prerogative of separate fitness recommendations in this circumstance, with the caveat that its recommendations may not produce a lower combined rating than that of the PEB.

The Board first considered if left and right bunion pain s/p surgical correction conditions, having been de-coupled from the combined bilateral PEB adjudication, each remained independently unfitting as established above. Almost all exams evaluated the bilateral feet for the bilateral bunion pain s/p surgical correction conditions together and the functional limitations and disability of the feet could not be separated or apportioned between the left and right foot. All members agreed that each foot, as an isolated condition, would have rendered the CI incapable of continued service within her MOS; and, accordingly each foot merits a separate rating.

Throughout the podiatry notes, the narrative summary (NARSUM) and the C&P examinations, there is ample documentation of pain, tenderness in both feet not responsive to treatment including shoe inserts, medications and surgery. The Board agreed that there was sufficient evidence to support the unbundling of the feet based on the necessity for surgery and constant post operative pain in each foot.

By precedent, the Board does not recommend disability ratings for scars unless their presence imposes a direct limitation on fitness. The evidence indicated a tender scar on the left foot only. The Board considered that the NARSUM-stated inability to wear boots and “profile for shoe of comfort” was not specifically linked to either the left foot tender scar or the bunion area pain. The footwear and profile was not restricted to the left foot. Although the left foot tender scar may have overlapped symptoms and contributed to the footwear restriction, the Board adjudged that there was not sufficient evidence in the record to consider the tender left foot scar additionally unfitting and compensable.

After due deliberation, considering all evidence and mindful of VASRD §4.3 (reasonable doubt), in the matter of the bilateral bunion pain s/p surgical correction condition, the Board unanimously recommends that each foot be separately adjudicated as follows: an unfitting Right Foot Bunion Pain (Hallux Valgus), S/P Bunionectomy and Residual Scar condition coded 5280 and rated 10%, and an unfitting Left Foot Bunion Pain (Hallux Valgus), S/P Bunionectomy condition, coded 5280 and rated 10%, both IAW VASRD §4.71a., with no other unfitting foot conditions.

Contended PEB Conditions. The contended condition adjudicated as not unfitting by the PEB was adjustment disorder w/anxiety and depressed mood. IAW DoDI 1332.38, enclosure 5, adjustment disorder is a condition or circumstance not constituting a physical disability and is not ratable. Both the PEB and the VA used substantially the same Axis I mental health diagnosis. 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 adjustment disorder condition and, therefore, no additional disability rating 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. As discussed above, PEB reliance on AR 635.40 (B.24 f.) for rating the bilateral foot condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the bilateral bunion pain, surgical correction condition, the Board unanimously recommends that each foot be separately adjudicated as follows: an unfitting right foot bunion pain (hallux valgus), S/P bunionectomy coded 5280 and rated 10% and an unfitting left foot bunion pain (hallux valgus), S/P bunionectomy condition, coded 5280 and rated 10%, both IAW VASRD §4.71a., with no additional unfitting foot conditions. In the matter of the contended adjustment disorder w/anxiety and depressed mood 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 recommends that the CI’s prior determination be modified as follows, effective as of the date of her prior medical separation:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Left Foot Bunion Pain, S/P Bunionectomy | 5280 | 10% |
| Right Foot Bunion Pain, S/P Bunionectomy | 5280 | 10% |
| **COMBINED (w/ BLF)** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111231, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 XXXXXXXXXXXXXXXXX

 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 XXXXXXXXXXXXXXXXXXXXXX, AR20120019100 (PD201200036)

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 rating to 20% without 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 XXXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA