RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1200296 SEPARATION DATE: 20090109

BOARD DATE: 20120906

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (11B, Infantry), medically separated for left knee condition after incurring a significant injury while deployed to Iraq in 2006. He did not respond adequately to non-operative, conservative treatment to perform within his Military Occupational Specialty (MOS), meet worldwide deployment standards or meet physical fitness standards. He was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Four other conditions, as identified in the rating chart below, were also identified and forwarded by the MEB. The Physical Evaluation Board (PEB) adjudicated the left knee condition as unfitting, rated 20% with application of the Veterans’ Affairs Schedule for Rating Disabilities (VASRD). The remaining conditions were determined to be not unfitting. The CI made no appeals, and was medically separated with a 20% service disability rating.

CI CONTENTION: “During my military service, I was injured in the Iraqi Campaign. After a long transition to the Warrior Transition Unit (WTU) at Ft Campbell, KY, I was quickly medically discharged and given a 20% rating. The Non-Commissioned Officers that were directly in my chain of command used an incredibly efficient force to have me discharged as quickly as possible. This resulted in my discharge for only one of my many ailments. After going to the Veterans Administration, I started seeing doctors regularly and many other ailments were discovered that were all directly related to my military service. I feel that if the WTU and the doctors that were seeing me during my medical discharged had taken the time and actually looked at me, I would have been rated higher in my military separation”.

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in DoDI 6040.44 (4.a) is limited to those conditions which were determined by the PEB to be specifically unfitting for continued military service; and, when requested by the CI, those condition(s) “identified but not determined to be unfitting by the PEB.” In addition to a review of the service ratings for the unfitting conditions, chronic PTSD, sensorineural hearing loss with tinnitus, and sleep apnea conditions as requested for consideration meet the criteria prescribed in DoDI 6040.44 for Board purview; and, are addressed below. 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:

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| --- | --- |
| **Service PEB – Dated 20080919** | **VA (12 Mos. Pre-Separation) – All Effective Date 20090108** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Left Knee Pain | 5299-5257 | 20% | Status Post (S/P) Left Knee Patellar Dislocation w/Disruption of Medial Patellar Retinaculum w/Limitation of Flexion | 5299-5260 | 10% | 20080104 |
| S/P Left Knee Patellar Dislocation w/Disruption of Extension | 5299-5261 | 10% | 20080104 |
| Chronic PTSD | Not Unfitting | PTSD | 9411 | 30%\*\* | 20081213 |
| Sensorineural Hearing Loss with Tinnitus | Not Unfitting | Tinnitus | 6260 | 10% | 20080104 |
| Right Ear Hearing Loss | 6100 | 0% | 20080104 |
| Left Ear Hearing Loss | 6100 | NSC | 20080104 |
| Sleep Apnea | Not Unfitting | Sleep Apnea | 6847 | 50%\* | STR |
| Alcohol Dependence | Not a Ratable Condition | NO VA ENTRY | 20080104 |
| ↓No Additional MEB/PEB Entries↓ | 0% X 1 / Not Service-Connected x 2 |  |
| **Combined: 20%** | **Combined: 50% then 80% then 90%** |

\*Sleep apnea was deferred, and then denied, then service connected and rated 50% by VARD dated 2009223 which increased combined rating from 50% to 80%

\*\* PTSD was increased to 70% by VARD dated 20110207 which increased combined rating from 80% to 90%

ANALYSIS SUMMARY: The Board acknowledges the CI’s assertions that he was quickly medically discharged without consideration of his many ailments. It is noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to asserted service improprieties in the disposition of a case. The Board’s role is confined to the review of medical records and all evidence at hand to assess the fairness of the 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. The Board further acknowledges the CI’s contention for ratings for other conditions documented at the time of separation, and notes that its recommendations is subject to the same laws for disability entitlements as those under which the Disability Evaluation System (DES) operates. While the DES considers all of the service member's medical conditions, compensation can only be offered for those medical conditions that cut short a service member’s career, and then only to the degree of severity present at the time of final disposition. However the Department of Veteran Affairs (DVA), operating under a different set of laws (Title 38, United States Code), is empowered to compensate all service-connected conditions and to periodically reevaluate said conditions for the purpose of adjusting the veteran’s disability rating should his degree of impairment vary over time.

Left Knee Condition. The CI injured his left knee when he twisted it attempting to traverse a ravine in the dark. He was medevac’d from Balad to Landstuhl Regional Medical Center and finally back to the States. Several magnetic resonance imaging (MRI) evaluations revealed a left patella (knee cap) dislocation, avulsion fractures of the medial patella, contusions of the lateral tibia and proximal fibula (lower leg bones), a large joint effusion and full thickness tear of the medial collateral ligament (MCL) consistent with a grade 3 injury. Orthopedics opted to manage nonoperatively and treated with bracing, physical therapy and pain management. The CI engaged in over a year of physical therapy with improvement of his knee with no further episodes of patellar dislocation and improved stability of the MCL. However, he continued to have pain with performing basic soldiering tasks and the duties of his MOS and was referred to a MEB. His profile limitations included; unable to run, ruck, march, carry a fighting load, construct a fighting position or do 3-5 second rushes, wear his individual body armor, do sit-ups, and could not complete the Army Physical Fitness Test. 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.

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| Knee ROM | VA C&P ~12 Mo. Pre-Sep | MEB ~8 Mo. Pre-Sep |
|  | Left | Left |
| Flexion (140⁰ Normal) | 140⁰ | 135⁰ |
| Extension (0⁰ Normal) | 0⁰ | 10⁰ |
| Comment | Muscle Strength 5/5 | Muscle atrophy, Painful motion, No swelling is present |
| §4.71a Rating | 10%\* | 10% |

At the MEB exam, the CI reported a constant dull ache in his left knee, 2 of 10 pain intensity at rest and increased to a sharp pain, 7-8 of 10, with walking fast, prolonged standing and climbing stairs. The pain improved with rest and medications yet at the time of the MEB he was not taking prescription or over-the-counter pain relievers. The MEB physical exam of the left knee documented tenderness of the patella, painful flexion and extension; however, there was no weakness or laxity noted, no tenderness on ambulation and he had normal neuromuscular findings. At the VA C&P exam performed, prior to separation, the CI reported no additional historical information. The VA (C&P) physical exam documented a normal gait, no pain, weakness, fatigue, palpable swelling, tenderness, and joint effusion or Deluca observations. X-rays revealed medial patellar fragments and overlying soft tissue swelling consistent with trauma and fracture.

The Board directs attention to its rating recommendations based on the above evidence which includes consideration of functional loss lAW VASRD §4.10, §4.40, §4.45 and §4.59. The MEB examination was considered more probative due to its proximity to the date of separation. The PEB rated this case under code 5257 for knee instability; which confers 10% for ‘slight’ instability, 20% for ‘moderate’, and 30% for ‘severe’. The PEB’s 20% rating was generous in the absence of patella subluxation and lateral instability and the Board further agreed the evidence did not support 30% since the ‘severe’ rating implies recurrent subluxation or routine requirement for a rigid brace. The Board agreed however while the acute clinical pathology supports the use of code 5257, it was pain that was contributing to the functional impairment of the knee and therefore the Board agreed to consider the 5257 code as an analogous code. The VA relied on the MEB ROM exam for its rating recommendation and cited “that when a Veteran meets the requirements for a 0 percent or higher evaluation under diagnostic code 5260 (limitation of flexion) and under diagnostic code 5261 (limitation of extension), an evaluation under each diagnostic code may be assigned and assigned 10% for 5260 for painful flexion and 10% for 5261 compensable loss of extension for a combined disability rating of 20%.” The Board deliberated the application of dual ratings, based on separate ratings for instability and limitation of motion. This was sanctioned by VA Training Letter TL 04-22; and, by precedent and legal opinion, may be applied by the Board. Members thus deliberated if a second compensable code could be justified under this sanction. The Board agreed no compensable rating is supported under code 5260 (limitation of flexion); although, application of VASRD §4.59 (painful motion) could be considered in order to achieve the minimal compensable rating of 10% and also agreed with the 10% rating under 5261 (limitation of extension) for compensable extension loss and this rating approach is consistent with the combined 20% VA recommendation. There is no evidence of continued dislocation of the patella or instability of the knee by history or exam and therefore the evidence does not support dual coding nor use of 5257 as the primary diagnostic code. The Board also considered code 5262 (Tibia and fibula, impairment of) as the X-ray evidence suggested malunion of the patella and agreed the pain impairment supported the 20% rating of moderate and did not support the 30% rating of marked. Since alternative VASRD codes of either 5262 or 5261 with 5260 confer no rating benefit, no change is recommended. 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 knee condition.

Contended PEB Conditions. The contended conditions adjudicated as unfitting by the PEB were chronic PTSD, sensorineural hearing loss with tinnitus and sleep apnea. 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 service 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. None of these conditions were profiled; none were implicated in the commander’s statement; and, none were judged to fail retention standards. All were reviewed by the action officer and considered by the Board. There was no indication from the record that any of these conditions 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 left knee condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended chronic PTSD, sensorineural hearing loss with tinnitus and sleep apnea conditions, 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** |
| Chronic Left Knee Pain | 5299-5257 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120322, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 XXXXXXXXXXXXXXXXXXXXXX

 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

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation for XXXXXXXXXXXXXXXXXX, AR20120016884 (PD201200296)

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 and hereby deny the individual’s application.

This decision is final. The individual concerned, counsel (if any), and any Members of Congress who have shown interest in this application have been notified of this decision by mail.

 BY ORDER OF THE SECRETARY OF THE ARMY:

Encl XXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA