

RECORD OF PROCEEDINGS  
PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXX  
CASE NUMBER: PD1200354  
BOARD DATE: 20130129

BRANCH OF SERVICE: ARMY  
SEPARATION DATE: 20061225

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**SUMMARY OF CASE:** Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Soldier, SSG/E-6(89D/Explosive Ordnance Disposal Specialist), medically separated for left knee pain. The left knee pain could not be adequately rehabilitated nor did it improve adequately with treatment to meet the physical requirements of his Military Occupational Specialty (MOS). He was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded chronic left knee pain and left chondromalacia patella as medically unacceptable IAW AR 40-501. Posttraumatic stress disorder (PTSD), identified in the rating chart below, was also identified and forwarded by the MEB as meeting retention standards. The Informal Physical Evaluation Board (IPEB) adjudicated the left knee pain and some chondral softening as unfitting, rated 0%, with application of the Veterans Affairs Schedule for Rating Disabilities (VASRD) and likely application of the US Army Physical Disability Agency (USAPDA) pain policy. The IPEB adjudicated the PTSD as meeting medical retention standards. The CI appealed to the Formal PEB (FPEB) but withdrew his appeal and was medically separated with a 0% disability rating.

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**CI CONTENTION:** The CI states: "(1) I should have been rated at more than 0% for my left knee condition. The decision did not, as a matter of law, comport with the medical and factual issues related to my knee disability. (2) I should have been medically retired and placed on the TDRL with a rating of 50% for Post-Traumatic Stress Disorder, Panic Disorder with Agoraphobia and Social Phobia. I was first diagnosed with depression after my first deployment to Afghanistan in 2002-03 and continued to receive both therapy and medication for this, as well as for PTSD and Panic Disorder with Agoraphobia and Social Phobia, until my final discharge on 12/25/06. It was legal error not to make this a part of my MEB/PEB process and I firmly believe this was done intentionally. In that regard, whatever legal advice I had, or should have had, utterly failed to consider this gross error in my proceedings and I was, therefore, denied legal representation in violation of my rights pursuant to military regulations and the Due Process Clause of the Fifth Amendment of the U.S. Constitution. Pursuant to the settlement agreement in Sabo v. United States, I am entitled to this rating, despite the fact that PTSD and Panic Disorder with Agoraphobia and Social Phobia were not a part of my MEB/PEB proceedings. Shortly after my discharge, I was rated at 30% for PTSD by the Department of Veterans Affairs that was made retroactive to the day after my discharge, and was just re-rated at 50%. The fact that my discharge physical noted depression, and not PTSD and Panic Disorder with Agoraphobia and Social Phobia, was medically inexcusable and further violated my rights. In regard to my left knee, it is factually and medically impossible to contend that my knee warranted a 0% rating when this condition prohibited me from virtually all activity requiring use of the left leg and knee, made it impossible for me to carry a combat load, run, do most exercises and resulted in a permanent profile. This condition prohibited me from maintaining my 89D MOS as an Explosive Ordnance Disposal Supervisor, or from returning to my other MOS, 11B. The decision not to rate me, at least, at 10% for my left knee is insupportable, as a matter of law, and the medical conclusion that the medical problems that are well-documented did not warrant, at least, a 10% rating, was wrong."

**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. The PTSD condition, 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 rating for the unfitting left knee pain condition. The depression, panic disorder with agoraphobia, and social phobia conditions 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 Army Board for Correction of Military Records.

**RATING COMPARISON:**

Service PEB – Dated 20060908			VA – All Effective Date 20061226			
Condition	Code	Rating	Condition	Code	Rating	Exam
Left Knee Pain	5099-5003	0%	Left Knee Condition	5299-5260	NSC	None
PTSD	Meets Medical Retention Standards		PTSD	9411	30%	PEB Proceedings
↓No Additional MEB/PEB Entries↓			0% X 0 / Not Service-Connected x 3			None
<b>Combined: 0%</b>			<b>Combined: 30%</b>			

**ANALYSIS SUMMARY:** The Board acknowledges the CI’s assertions that an intentional, legal, and medically inexcusable error was made in omitting his complete psychiatric condition from the MEB/PEB process, thereby violating his rights, and that it was legally insupportable to rate his knee condition at less than 10%. 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 service 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. The Board further acknowledges the CI’s contention that suggests ratings should have been conferred for other conditions documented at the time of separation. 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. While the DES considers all of the member's medical conditions, compensation can only be offered for those medical conditions that cut short a 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 the degree of impairment vary over time.

**Left Knee Pain Condition.** The narrative summary (NARSUM) notes the CI sustained a left knee injury in 2004. He continued to experience pain despite activity modification and physical therapy. A magnetic resonance imaging (MRI) study in May 2005 documented all knee ligaments to be intact and no definite evidence of a meniscal tear. A subsequent arthroscopic evaluation in October 2005 revealed minimal patellofemoral chondromalacia and chondral softening predominantly at the medial tibial plateau, but no discrete cartilaginous lesion was

present. Furthermore, examination under anesthesia showed that all knee ligaments were intact. He continued to experience pain post-operatively. An outpatient examination on 7 February 2006 noted full range-of-motion (ROM), a moderately tender medial joint line, normal cruciate ligament stability and a negative McMurray test. The NARSUM examination on 28 April 2006 (8 months prior to separation) revealed left quadriceps atrophy, a lack of approximately 3 degrees of full extension, and flexion “well beyond 90 degrees.” There was also pain with patella compression, tenderness to palpation of the left medial side of the patella, an antalgic gait, and an inability to swing to full extension prior to heel strike. 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 Knee ROM (in degrees)	MEB/PT ~8 Mo. Pre-Sep	VA Treatment Record ~2 Mo. Post-Sep*
Flexion (140 Normal)	135	130
Extension (0 Normal)	-1	0
Comment	+Tenderness, quad atrophy	+Painful motion, tenderness; quad atrophy
§4.71a Rating	10%	10%

\*Actual examination not in evidence, see below

At the MEB exam on 9 May 2006 (7 months prior to separation), the CI reported pain with walking greater than 20 minutes, prolonged standing and sitting, and carrying heavy loads. The MEB examination noted left knee tenderness at the medial joint line and a positive McMurrays. During an outpatient primary care clinic visit on 7 September 2006, the CI was observed to have a normal gait. A follow-up visit on 5 December 2006 also recorded a normal gait, but pain in the left knee was noted to occur with hopping. A VA Compensation and Pension rating decision on 5 June 2007 cited an orthopedic evaluation performed on 1 February 2007 (2 months after separation) which was not in evidence. The exam reportedly demonstrated 1.5 cm left of quadriceps atrophy as compared to the right and ROM as reflected in the table. There was also documented pain with patellar pressure. The rating decision cited a second examination performed on 19 April 2007 (4 months after separation), also not in evidence. This examiner reportedly documented that the CI experienced constant dull aching pain with intermittent sharp pain in the left knee relieved by 800 mg of ibuprofen. Swelling, redness, locking and buckling occurred 5-6 times per month and lasted for a couple of hours. The condition did not have any effect on activities of daily living or employment. The physical examination was significant for an obvious limp and inability to walk on the toes or heels. There was no swelling, redness or crepitus. ROM was 0-90 degrees with pain.

The Board directs attention to its rating recommendation based on the above evidence. The PEB assigned a 0% rating under an analogous 5003 code (degenerative arthritis) with likely application of the USAPDA pain policy. The VA did not service-connect the left knee. Non-compensable loss of ROM and chronic knee pain were consistent throughout the CI’s service and VA treatment records. The non-compensable loss of ROM, chronic knee pain, and the arthroscopic findings of minimal chondromalacia and chondral softening are consistent with a 10% rating IAW VASRD §4.71a. A 10% rating was also justified on the basis of Painful motion (§4.59) and Functional loss (§4.40). The Board considered alternate pathways to a higher rating. Under the 5257 code (knee, other impairment of) a higher rating is justified if moderate or severe ligamentous instability is present. However, Board members agreed that the confirmation of ligament integrity by MRI and the documentation of ligament stability by examination under anesthesia evidence do not support an instability rating. The Board also

considered a higher rating under the 5258 code (dislocated semi-lunar cartilage). Although one examiner noted a positive McMurray test, which might indicate meniscal pathology, the absence of dislocated semi-lunar cartilage was strongly suggested by MRI, and proven by direct arthroscopic visualization. Therefore, the only rating available under the 5258 code (20%) was not justified. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (Resolution of reasonable doubt), the Board recommends a disability rating of 10% for the chronic left knee pain condition, coded 5260-5014.

Contended PEB Condition. The contended condition adjudicated as not unfitting by the PEB was PTSD. Symptoms of PTSD first became apparent in December 2003. After return from a deployment in 2004, the first available mental health note (23 March 2005) stated he was “doing well” on medications. In preparation for the PEB, a formal psychiatric evaluation was performed on 2 June 2006. The examiner noted the current symptoms, documented a normal mental status exam and agreed with the diagnosis of PTSD. The examiner stated that “(The CI) feels that his active duty performance has not been impacted.” The examiner assigned a Global Assessment of Functioning of 65 (connoting mild symptoms or impairment), and affirmed that the CI was receiving appropriate treatment, was able to fulfill MOS obligations and met the psychiatric medical standards for retention IAW AR 40-501. On this basis, the PEB adjudicated the PTSD condition as not unfitting. Outpatient notes leading up to the time of separation document a relative stability of symptoms prior to separation, and the need for follow up medication management. A note on 7 September 2007 stated: “...when he is on the job he doesn’t have a problem,” and also referred to the need for less frequent counseling due to fewer symptoms. The Board’s first charge with respect to this condition 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 (Resolution of reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard. The PTSD condition was not profiled; it was not implicated in the commander’s statement; and, it was not judged to fail retention standards. All evidence of record was reviewed by the action officer and considered by the Board. There was no indication from the record that the PTSD 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 contended PTSD condition; and, therefore, no additional disability ratings can be recommended.

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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 for rating left knee pain was operant in this case, and the condition was adjudicated independently of that policy by the Board. In the matter of the left knee pain condition, the Board unanimously recommends a disability rating of 10%, coded 5260-5014, IAW VASRD §4.71a and §4.59. In the matter of the contended PTSD condition, the Board unanimously recommends no change from the PEB determination as not unfitting. There were no other conditions within the Board’s scope of review for consideration.

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RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows, effective as of the date of his prior medical separation:

UNFITTING CONDITION	VASRD CODE	RATING
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Left Knee Pain	5260-5014	10%
	<b>COMBINED</b>	<b>10%</b>

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120226, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

XXXXXXXXXXXXXXXXXXXX, DAF  
Director  
Physical Disability Board of Review

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency  
(TAPD-ZB / XXXXXXXXX), 2900 Crystal Drive, Suite 300, Arlington, VA 22202-3557

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation  
for XXXXXXXXXXXXXXXXXXXX, AR20130002239 (PD201200354)

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 10% 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

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Deputy Assistant Secretary  
(Army Review Boards)