RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxxxxxxx BRANCH OF SERVICE: Army

CASE NUMBER: PD1200532 SEPARATION DATE: 20040107

BOARD DATE: 20121024

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E4 (11B, Infantry) medically separated for a right shoulder condition. In 2001 he was noted with instability of his (dominant) right shoulder during an evaluation after dislocating the opposite shoulder. He continued to experience posterior dislocations of the right shoulder, which was ultimately diagnosed as a partial tendon tear. Surgery was not recommended, and the joint could not be adequately rehabilitated to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was consequently issued a permanent U3 profile and referred for a Medical Evaluation Board (MEB). Right shoulder instability was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions were submitted by the MEB. The PEB (superseded by administrative correction of the applied code, but not the rating) adjudicated the right shoulder condition as unfitting, rated 0%, citing criteria of the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 0% disability rating.

CI CONTENTION: The application states “At first I was listed at a 60% then I was lowered without the VA Hearing all issues pertaining to service member.” He does not elaborate further or specify a request for Board consideration of any additional conditions.

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 condition is addressed below; and, no additional conditions are within the DoDI 6040.44 defined purview of the Board. 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 20031027** | **VA (42 Mo. Post-Separation) – Effective 20070131\*** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Right Shoulder Instability | 5299-5202 | 0% | Bursal Tear ... (Right Shoulder) | 5201 | 30% | 20070713 |
| No Additional MEB/PEB Entries | Tendinosis ... (Left Shoulder) | 5201 | 20% | 20070713 |
| **Combined: 0%** | **Combined: 50%** |

\* CI did not apply to VA until 20070131 (3 years post-separation).

ANALYSIS SUMMARY: The Board notes that the CI expresses a grievance with post-separation VA rating decisions, and clarifies that it has no jurisdiction over the Department of Veterans’ Affairs (DVA). The Board further notes the significant interval (>3 years) between the date of separation and the DVA evaluation. DoDI 6040.44 specifies a 12-month interval for special consideration to DVA findings. This does not mean that the DVA information was disregarded; but, in matters germane to the disability rating, the only evidence probative to the Board’s recommendation is that which can be reasonably extrapolated to the date of separation.

Right Shoulder Condition. After the initial 2001 diagnosis of right shoulder instability the CI experienced persistent pain and was followed in physical therapy (PT). There is an entry in the service treatment record (STR) documenting a spontaneously reduced dislocation of the right shoulder “with lifting” in October 2001. There are entries that the CI dislocated the shoulder again during a 2001-2002 deployment to Kosovo (managed by PT in theater). No profiles are in the STR other than the permanent U3 profile for the right shoulder from October 2002. Other entries in the STR note recurrent posterior dislocations (self reduced) of the right shoulder; but, none specify frequency or cite any other incidents, and there are no STR entries addressing a concurrent dislocation. There are two STR entries which elaborate the degree of shoulder excursion precipitating guarding: a 2001 note (2+ years prior to separation) which specified worsened pain with “raising arms above head,” and, a contemporary note which documented apprehension at 95 degrees abduction. An arthrogram of the right shoulder performed in August 2002 revealed a partial tear of the infraspinatus tendon at the capsular margin, bursitis, and acromioclavicular joint arthropathy. Initially there was discussion regarding surgical repair, but the final orthopedic opinion was that surgery was not indicated.

The narrative summary (NARSUM) documented “daily problems” with the right shoulder, and stated that, “He is able to posteriorly dislocate the right shoulder and pop it back in.” It further stated, “He has to be very careful of what type of movements he is making with his right arm. He is not able to do any overhead lifting or reaching.” There were further proscriptions of lifting over 30 pounds, push-ups, and load bearing. The physical exam noted crepitus, but normal strength and normal range-of-motion (ROM). Measured ROMs by PT were 180 degrees (normal) for both anterior flexion and abduction with “pain at end range.” Other than a follow-up note after the 2001 injury noted above which documented abduction of 90 degrees, outpatient notes suggest grossly normal ROM. The commander’s statement provided no details for specific limitations, other than the profile proscriptions. At the significantly delayed VA Compensation and Pension (C&P) exam, the CI had still not undergone surgical repair. The examiner stated that “pain varies from a 9 /10,” with a complaint of “weakness with the right shoulder as compared to the left with repetitive activity,” and, “The patient states that his shoulder on occasion during sleeping ‘pops out’ and this is very painful.” It was further stated, “During flare-up raising right shoulder above shoulder level is painful.” The VA physical exam noted tenderness, but no scapular winging or deformity. Recorded ROM measurements were forward flexion 180 degrees and abduction 100 degrees (onset of pain at 30 degrees with repetitive motion). Specific ROM comments relative to rating were, “Patient reports right shoulder popping out at approximately 100 degrees of any shoulder movement. With movement 5/10 pain report at shoulder level ... [and] ... 5/10 after use of a 10 pound weight.”

The Board directs attention to its rating recommendation based on the above evidence. The initial PEB rating and the VA rating were under the code 5201 (limitation of motion). Limitation below shoulder level (90 degrees) is required for the minimal compensable rating (20%). The VA rater invoked the DeLuca 30 degree abduction to achieve the 25 – 45 degree range for a 30% (major) rating under 5201. No compensable rating under code 5201 is supported by the (dominantly probative) evidence, although painful motion is evidenced to support a 10% rating under analogous 5003 coding. All members agreed, however, that the most favorable code was the administratively corrected 5202 code which was the basis for the definitive rating. Code 5202 allows rating for “recurrent dislocation of at scapulohumeral joint"; and, it is apparent that instability was the unfitting disability in this case. Members did not agree with the non-compensable rating under 5202; since, IAW VASRD §4.7 (higher of two evaluations), a compensable rating was achievable via §4.59 (painful motion) under an alternate code. 5202 offers two (major) ratings for recurrent dislocations: 30% for “frequent episodes and guarding of all arm movements”; and, 20% for “infrequent episodes, and guarding of movement only at shoulder level”. The Board must therefore assess two elements relying on the available evidence: frequency of dislocations, and the degree of shoulder excursion limited by guarding (above or below shoulder level). Regarding frequency, the STR and NARSUM do not provide precise elaboration; although, the evidence that is available suggests sporadic dislocations only. The VA evidence clearly elaborates “occasional” nocturnal dislocations; but, it is probative only to the extent that it is judged that the condition was stable over time. Regarding limitation of joint excursion by guarding, some of the earlier STR evidence clearly indicates that limitations were above shoulder level. The NARSUM comment regarding limitations with overhead excursions and the PT ROM evaluation noting painful motion only at full excursion also suggest that guarding occurred above shoulder level. The VA evidence clearly documents guarding and instability only above shoulder level; although, once again, that evidence must be probatively weighed. There is, however, a close similarity between the VA evidence well after separation and the STR evidence well before separation; suggesting, that the disability was stable over time. Clearly the 20% rating under 5201 is defensible; but, members agreed that the higher 30% rating was not supported by the preponderance of the evidence. No evidence from the STR or VA files was found which could be cited to support a conclusion that recurrent dislocations were frequent, or that motion was guarded at or below shoulder level. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 20% for the right shoulder condition under code 5201.

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, the Board unanimously recommends a disability rating of 20%, coded 5202, IAW VASRD §4.71a. 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** |
| Right Shoulder Instability | 5202 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120602, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans Affairs Treatment Record.

 XXXXXXXXXXXXXX

 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 XXXXXXXXXXXXXXXXXX, AR20120020021 (PD201200532)

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 XXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA