Wounded Warrior and the Physical Disability Evaluation System

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Legal Assistance Policy Division

Army JAGC Initiatives

TJAG Sends
A Message from The Judge Advocates General

The JAG Corps sends its warmest regards and wishes to all our wounded Soldiers and Families. We are committed to ensuring that these fine men and women receive the highest level of care and support possible. The Army Legal Assistance Program (ALAP) is designed to provide legal assistance to all members of the Armed Forces, including wounded soldiers and their Families. Our goal is to help ensure that each soldier and Family receives the full benefit of their legal rights and entitlements.

- We provide free legal assistance to wounded soldiers and their Families.
- Our team of experienced attorneys and support staff work closely with wounded soldiers and their Families to understand their needs and provide the best possible legal advice and representation.
- We have developed a range of resources and programs specifically designed to meet the unique needs of wounded soldiers and their Families.
- Our Soldiers and Families can expect to receive personalized, confidential, and accessible legal assistance.

We take pride in our ability to provide the necessary support to our wounded soldiers and their Families. We are committed to ensuring that each soldier and Family receives the highest level of care and support possible. Thank you for your service, and we appreciate your efforts in all that you do.

Scott D. Black
Major General, USAJAG
The Judge Advocate General
Army Legal Assistance

APDES Overview

Soldier Reaches "Optimal" Medical Care ability to perform duties unclear → MOS Medical Retention Board

- Meets medical retention std → 3-member board (Physicians)
- Personal Appearance/Personal Representation

Non-concur: Medical Evaluation Board (medically based evaluation)

- Fails retention standards → Physical Evaluation Board (performance based evaluation)

- Personal Appearance/Personal Representation

Concur: Meets medical retention std

- 3-member board (Physicians)
- Medical Retention Board
- Determines whether any conditions fail retention stds
- Soldier can appeal MEB
- Soldier entitled to Legal Counsel

Determined to be Fit/

Unfit: U.S. Army Physical Disability Agency (Walter Reed)

Formal Board and/or Written Appeal

- Concur
- Appeal: APDAB / ABCMR / PDRB

Non-concur: Informal Board

- Appeal: APDAB / ABCMR / PDRB

Discharge

RETURN TO DUTY

The Army Physical Disability Evaluation System Legal Support

Legal Assistance Consultation available thru CLO

Legal Assistance consultation and/or referral to Soldier’s Counsel.

MEB Outreach Counsel at WTUs soon!

Counsel “assigned” at request for Formal PEB. Private Attys & NGO Reps allowed (no cost to US)

Surgery, PT, trial of duty, etc.

Rehab, Complain

Or

Physician issues P3 / P4

Meets Medical Retention Standards (MRS)

Yes

Re-class, 6 mos probation status, Reason MEB

No

MEB "Medical Evaluation" 3 MDS

Appeal within 72 hrs?

Informal PEB

PEBLO assembles record

PEB Record Review

"Fit" = RTD

"Unfit" >= VASRD %

Request Formal PEB within 10 days

PEB "Performance Evaluation" 3 Members – Only 1 MD

Informal PEB

Personal Appearance

Legal Counsel

Appeals

Transition to VA

Annual Rate:

MMRB

30 days

60 days

30,000 +/- 2,000 +/- requested

<1,000 held

15,000 +/-

40 days

MOS Medical Retention Board

60 days

30 days

15,000 +/-

2,000 +/-

10 days to appeal
Provision of Legal Services

- Legal counsel available in 2 stages
  - MEB Outreach Counsel for MEB Process
  - Soldiers’ Counsel for PEB Process

- MEB Outreach Counsel & paralegal assigned to each Warrior Transition Battalions and Brigades
  - Civilian hiring actions now underway and counsel should be in-place by December 2008

- MEB Counseling at the WTU Company will be coordinated between nearest MEB Outreach Counsel and servicing Office of Soldiers' Counsel

MOS/Medical Reclassification Board

- Neither the MEB nor the PEB is a MMRB!

- Only Soldiers with a permanent P3 or higher on their physical profile and who meet medical retention standards can be referred to the MMRB

- PEBs cannot reclassify a Soldier’s MOS or consider a SMOS

- Soldiers who are not retainable in their PMOS and are ineligible to reclassify through the MMRB are referred back into the APDES

- Soldier has right to consult legal counsel prior to MMRB but no legal representation at MMRB
Army Legal Assistance

MOS Medical Retention Board (MMRB)

- Governed by AR 600-60
- P3 / P4 Profile = Trigger
- Refer to MMRB, Unless SM Fails to Meet Retention Standards (Then Directly to MEB)
- Bypass MMRB (Straight to MEB / PEB) If: Inability to Wear Protective Mask, Protective Helmet, Fire Individual Weapon, Wear Load Carrying Eq., Take APFT
- Structure
  - Convening Authority = GCMCA
  - Five-Person Board
  - Spokesperson, but No Counsel
- MMRB Recommendations (4 Options)
  1) Retention (Fwd to Career Branch / OMPF)
  2) Probation (Further Treatment Beneficial)
  3) Reclassify (Fwd to HQDA)
  4) Refer to PDES

Medical Evaluation Board (MEB)

- Trigger: optimum medical care
- Informal “Board”
  - At least 2 physicians determine if SM meets Medical Retention Standards of AR 40-501
- PEBLOs
- Objecting to MEB findings
MEB Overview

• The MEB is an informal process before a board comprised of at least three physicians, who compile, assess, and evaluate a Soldier's medical history and current condition.

• The MEB Process begins when a Soldier's optimum medical care has been reached or when a Soldier's physician determines that, even with further treatment, a Soldier is unable to return to duty
  • P3 (Permanent 3) or higher PULHES Score on their Physical Profile

Purpose of an MEB

• The MEB’s purpose is to determine if a Soldier's medical condition(s) meets or does not meet Army Medical Retention Standards IAW AR 40-501, Chapter 3 – Findings listed on a DA Form 3947

• The MEB refers a Soldier to the Physical Evaluation Board (PEB) if at least one medical condition does not meet retention standards
MEB Election Period

- **Independent Physician Review**: NDAA 08 provides Soldiers, upon request, a physician who is independent of the MEB to review their MEB records and counsel them on the MEB findings and recommendations.

- Soldiers may disagree with the MEB’s findings and submit a rebuttal statement, which the Deputy Commander for Clinical Services (DCCS) must consider:
  - Seven day review/rebuttal period, extendable upon request.
  - Deadline begins upon the later of the completion of independent medical review or receipt of MEB findings.
  - MTF has 7 days to consider and respond.

Implications of MEB

- "Medically acceptable" conditions will generally not be found unfitting by the PEB:
  - i.e., conditions that meet retention standards.

- "Medically unacceptable" conditions may be rated by the PEB only they are unfitting:
  - i.e., condition(s) do not meet retention standards.

- A MEB cannot refer to an MMRB a Soldier who has a medically unacceptable condition:
  - consider MMRB before MEB is completed.
MEB Products:

- Permanent Physical Profile
- DA Form 3947, Report of MEB Proceedings
  - Narrative Summary (NARSUM)
  - Commander’s Letters on Performance

MEB vs. PEB

- MEB makes a medically-based determination
- PEB makes a performance-based analysis to determine if a medically unacceptable condition is fit or unfit
- MEB findings are not appealable to the PEB, as the PEB does not have the authority to change MEB findings
  - Soldiers should ensure MEB is correct before it goes forward to PEB
  - PEB may send case back to MEB for further evaluation
Physical Evaluation Board (PEB)

INFORMAL/FORMAL BOARD:
• 3 members – President, Medical Officer, Personnel Officer

PEB Process
• The PEB must answer four main questions
  – 1: Fit or unfit for each condition
  – 2: Compensability (service connection)
  – 3: Level of compensation
  – 4: Whether the Soldier’s condition is combat-related or was it incurred in the combat-zone?
• Burden of proof is by preponderance of evidence
• Exception for compensability: for which there must be “clear and unmistakable evidence” that condition is not service connected
Is this standard for all service connection issues or just EPTS?
fioreul, 10/24/2008
Factors Affecting Compensability:
- Line of Duty
- EPTS
- Caused by Soldier’s Misconduct
- Non-compliance with prescribed treatment
- Certain Conditions

Rating Disabilities:
- Veterans Administration Schedule for Rating Disabilities (VASRD)
- DoD and Service Regulations
- Interplay of Several Unfitting Conditions (PEB Math)
- Only unfitting conditions rated at PEB; VA rates all service connected disabilities
Physical Evaluation Board (PEB) vs. Veterans Affairs

Physical Evaluation Board
- Rates: ONLY conditions found to be unfitting
- Rating: Permanent (snapshot in time)
- Compensation: ONLY for loss of military career
- Compensation Amount: depends on basic pay and length of service

Veterans Affairs
- Rates: ANY impairment that is service-connected (even if NOT unfitting)
- Rating: can change (increase / decrease) if Veteran's condition improves or worsens
- Compensation: for loss of civilian employability
- Compensation Amount: based on rating percentage (w/o regard to rank/TIS)

Severance Pay
- 20% or <

Disability Retirement
- 30% or >

(2) x (Monthly Basic Pay) x (Years of Service)
Physical Evaluation Board (PEB)

TDRL/PDRL:
- Temporary vs. Permanent Disability Retirement
- 30% and stability of disability
- TDRL – maximum 5 years and re-evaluation at least every 18 months
- No guarantee to retirement

COAD/COAR

- Soldiers found unfit can request to continue on Active Duty (COAD) or in the Reserves (COAR) if:
  - COAD: Active duty with at least 15 or more years;
  - COAR: Reservists with at least 15 or more “good” years toward reserve retirement;
  - Combat injured Soldiers; or
  - Soldiers in a critical/shortage MOS.

- Note: HRC will consider all applications even if they do not meet above criteria.
Combat Related Criteria

• Tax Free Severance pay or disability retirement if injuries are direct result of:
  – Armed conflict;
  – Instrumentality of war;
  – Direct result of hazardous service; or
  – Under conditions simulating war

• Tax Free Severance pay if condition(s) were incurred in tax-free combat zone (NDAA 08)
  – CZ provision only applies to severance, not retirement
  – No VA offset/recoupment for CZ conditions

• Taxes withheld in all cases may be refunded upon receipt of VA rating – see PDA Info Sheet

Joint DoD/DVA DES Pilot

• Single comprehensive medical exam to include general & specialty exams performed to dual DoD and DVA specifications.
• MEB evaluates comprehensive exams to determine if condition(s) meets or does not meet Army retention standards
• Army PEB determines fit/unfit & military compensability
  – PEB does not consider DVA compensability
• DVA rates all service-connected conditions
• Army adopts DVA rating for all unfitting conditions
Joint DoD/DVA DES Pilot

Legend
- Similar to old process
- New process

Member is treated or being treated for a medically limiting injury or condition?

Yes
- War Injuries/Conditions
- Other
- Has member reached a point where it is unlikely they will meet medical retention standards?
- Based on:
  - Medical evidence/Occupational Medicine review
  - DoD Instruction Guidance
  - Military Department Regulations

No
- Continue Medical Treatment

Does the member meet medical retention standard?

Yes
- Return to duty

No
- Refer for Disability Evaluation/Transition Exam

Member receives VA General Medical Exam & comprehensive evaluation of both potentially unfitting conditions & other conditions claimed by member as having been incurred in or aggravated by military service.

Member’s Medical Evaluation Package Completed (complete narrative summary of all potentially unfitting conditions) + Other required documentation

Service Medical Experts perform final review, deliver final medical retention decision

No
- Return to duty

Yes
- Does member meet medical retention standards?

Results of VA Exam

All medical records and current diagnostic results forwarded for use by VA qualified provider.

Initiate Exam

MEB

Legend
- MEB
- PEB
- NARSUM
- LOD

VA Template

E-
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**Joint DoD/DVA DES Pilot**

1. **Is the member fit for duty?**
   - Yes (Fit)
     - Member may elect Formal PEB after unfitness determination
     - Necessitates Formal PEB Proceedings
     - VA Rating Panel: Receives case file from PEB & rates all qualified conditions
     - PEB applies VA rating to unfitness conditions.
   - No (Unfit)
     - Placed on Temporary Disability Retired List (TDRL)
     - Separated with lump sum disability severance

2. **What is the applied disability rating?**
   - < 20 years
     - Member’s years of active duty or equivalent service
     - No
     - Further Action
     - Certificate to the Board of Veterans Appeals (BVA)
     - Appeal Granted
     - Referral to BCMR for adjustment of the DoD disposition under 10 USC, chapter 61.
   - ≥ 20 years
     - Member may elect Formal PEB after unfitness determination
     - Necessitates Formal PEB Proceedings
     - VA Rating Panel: Receives case file from PEB & rates all qualified conditions
     - PEB applies VA rating to unfitness conditions.
     - What is the applied disability rating?
     - 0-20%
     - 30% or higher
       - Disability is stable
     - No
       - Placed on the Temporary Disability Retired List (TDL)
     - 20 years
     - No
     - Further Action
     - Statement of the Case issued
     - VA Form 9 Substantive Appeal Received?
       - Yes
         - Appeal Granted
         - Promulgate the Decision and Issue Payment to the Veteran
         - Refer to BCMR for adjustment of the DoD disposition under 10 USC, chapter 61.
       - No
         - No Further Action
         - No Further Action

**Post-Separation Actions by VA**

- VA Receives DD 214/Verification of Separation
- Promulgate the Decision and Issue Payment to the Veteran
- Appeal Process:
  - Notice of Disagreement Received Within 1 Year of Rating Decision?
    - Yes
      - Statement of the Case issued
      - VA Form 9 Substantive Appeal Received?
        - Yes
          - Appeal Granted
          - Promulgate the Decision and Issue Payment to the Veteran
          - Refer to BCMR for adjustment of the DoD disposition under 10 USC, chapter 61.
        - No
          - No Further Action
          - No Further Action
    - No
      - No Further Action
      - No Further Action

Note: Pre-discharge ratings used, concurrent process, decreases post-separation processing time for award processing by VA.

Legend
- Similar to old process
- New process
Army Legal Assistance

Soldiers Counsel

- Mission: support, advise and represent Soldiers throughout the Army Physical Disability Evaluation System. Maximize clients’ chances of success in attaining their goals of either being found fit for duty or maximizing their disability rating.
Army Legal Assistance

Office of Soldiers Counsel

- Walter Reed Army Medical Center
  (202) 782-5812 or (202) 782-1676
- Fort Sam Houston
  (210) 221-9392 or (210) 295-0432
- Fort Lewis
  (253) 968-4441/4442
  - Fort Carson
    (719) 526-5572
  - Tripler Army Medical Center
    (719) 526-5572

Community Based WTU, MTF & PEB Alignment

Legend

- MTF
- § CBWTU

PEB - Ft. Sam Houston, TX
- CBWTUs
  - California
  - Utah
  - 13 MTFs

PEB - Ft. Lewis, WA
- CBWTUs
  - Arkansas
  - Alabama
  - Florida
  - 10 MTFs

PEB - WRAMC
- CBWTUs
  - Virginia
  - Wisconsin
  - Massachusetts
  - 14 MTFs

PEB - Ft. Lewis, WA
- CBWTUs
  - California
  - Utah
  - 13 MTFs

Japan

Hawaii

Alaska

Germany
MEB Outreach Counsel

- Organic Legal Support at 19 WTUs (Bde/Bn)
  - MEB Outreach Counsel (1 per WTU)
  - Paralegal Support (1 per WTU)
- MEDCOM Assets on WTU TDAs
- MOA between TSG & TJAG
  - Duties
  - Support
  - Supervision

APDES Attorney Alignment (MTF, PEB, OSC and MEB Outreach)
### Army Legal Assistance

**MEB Outreach Counsel**
Co-located at 18 Brigade & Battalion Sized WTUs

- Walter Reed AMC
- Ft. Polk
- Tripler AMC
- Ft. Gordon
- Ft. Benning
- Ft. Stewart
- Ft. Riley
- Ft. Campbell
- Ft. Knox

- Ft. Drum
- Ft. Bragg
- Ft. Sam Houston
- Ft. Hood (2)
- Ft. Bliss
- Ft. Lewis
- Heidelberg
- Ft. Richardson

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**MEB Outreach Counsel & Soldiers Counsel**

- Information Soldier provides to MEB Outreach Counsel and Soldiers’ Counsel is confidential under the attorney-client privilege.

- MEB Outreach Counsel and Soldiers’ Counsel advise, counsel and represent Soldiers and -- **DO NOT** advise or represent commanders or members of the MEB/PEB
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**Soldier's Rights**

- **Upon initiation of MEB**
  - Right to consult with legal counsel (e.g., MEB Outreach Counsel, private attorney, other representative such as DAV)

- **During MEB**
  - Right to consult with legal counsel
  - Right to non-concur with MEB findings and to submit a written rebuttal
  - Right to independent medical review upon request

- **Soldier Rights during PEB**
  - Right to consult with legal counsel before requesting Formal Hearing
  - Right to personal appearance before PEB (may be by VTC – discuss with counsel)
  - Right to representation (appointed counsel, private counsel, DAV, *pro se*)
  - Right to testify (under oath, unsworn, or not at all)
  - Right to review and present evidence (Testimony, Documents & Witnesses)
  - Right to request female or minority membership on Formal Board
  - Right to recording of hearing
  - Right to appeal with assistance of counsel (in writing)

**Key Stages for Soldier to Consult Counsel**

- **Receipt of P3 Profile & Initiation of MEB**
  - MEB Outreach Counsel will provide general advice on process & rights
  - Counsel will render advice and assist Soldier in establishing goals
  - Counsel work with PEBLOs, Case Managers, the Triad, Ombudsmen, and health care professionals to advance Soldier’s interests
  - Assistance is non-adversarial

- **MEB Completed/Issued (DA Form 3947)**
  - Soldier has 7 calendar days to review and prepare rebuttal
    - **NEW (14 Oct 08 DTM, para. E3.P1.2.6.1.3)**
    - Counsel will advise on whether Soldier should request an independent medical review of MEB and assist with request
    - **NEW (14 Oct 08 DTM, para. E3.P1.2.6.1.1)**
  - Soldier & MEB Counsel will carefully review DA 3947, NARSUM, Profile, Cdr’s Memo, etc.
  - Counsel will provide case-specific advice and explain options
  - Counsel will assist with drafting MEB rebuttal when requested
Key Stages for Soldier to Consult Counsel

• **Informal PEB Decision (DA Form 199)**
  - Soldier has 10-days to review and make election for Formal hearing
  - When requested, MEB Counsel & Soldiers’ Counsel, working together, will review results with Soldier, explain legal basis of decision, & advise about rights
  - Counsel and Soldier will discuss potential benefits and/or risks of proceeding to a Formal PEB hearing
  - Counsel will advise Soldier of regarding whether to elect or waive Formal hearing and assist with election or waiver as Soldier decides

• **Formal PEB Hearing**
  - Soldier will have a minimum of 10 days advance notice of Formal hearing
    • **NEW (14 Oct 08 DTM, para. E8.4.2)**
  - Soldier & Soldiers’ Counsel review entire file and discuss options
  - Counsel will provide candid advice and help identify & obtain supporting evidence
  - Counsel will zealously advocate the case before the PEB

• **Appeals**
  - Counsel will evaluate and advise on possible theories and likelihood of success
  - Counsel will assist with gathering evidence and writing the Appeal
Governing Law, Regs & Policies

- **Title 10 U.S.C., Chapter 61** (Retirement or Separation for Physical Disability) (Secs. 1201–1222)
- **Department of Defense Directive 1332.18** (Separation or Retirement for Physical Disability, 11/4/96)
- **DOD Instruction 1332.38** (Separation or Retirement for Physical Disability, 11/4/96)
- **DOD Instruction 1332.39** (Application of the Veterans Administration Schedule for Rating Disabilities, 11/14/96) - RESCINDED
- **DTM (Directive Type Memoranda)**
  - 21 Nov 2007, Disability Evaluation System (DES) Pilot Program
  - 19 Dec 2007, Standards for Determining Unfitness Due to Medical Impairment (Deployability)

- **Army Regulation 40-501** (Standards of Medical Fitness, 9/10/08)
- **Army Regulation 40-400** (Patient Administration, 2/8/08)
- **Army Regulation 635-40** (Physical Evaluation for Retention, Retirement, or Separation, 2/8/06)
- **Army Regulation 600-60** (Physical Performance Evaluation System, 2/28/08)
- **Veterans Administration Schedule for Rating Disabilities (VASRD), 38 CFR Part 4**
Questions?

LTC Martha Foss
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Reaching Out to Wounded Soldiers

“We are here for Soldiers. That’s our job.”
- CSM Althea Dixon, Walter Reed Army Medical Center

The JAG Corps exists to serve commanders and Soldiers. No Soldier is more deserving of our best efforts than a Soldier wounded in combat. Recently, we have become more aware of the red tape and other problems facing wounded Soldiers and their Families. These difficulties prolong recovery and frustrate the heroes who have sacrificed so much for our Nation.

I encourage every JAG Corps member, military and civilian alike, to reach out to our wounded Soldiers and their Families in every way possible. If you see wounded Soldiers in the PX, thank them for their service and offer to help them schedule legal assistance appointments. I need your help to establish formal, aggressive outreach programs that touch every wounded Soldier in your community. Specifically, I expect SJAs – and just as importantly, legal assistance personnel, and our “tip of the spear” battalion paralegals and brigade judge advocates – to:

- Reevaluate your legal assistance programs and ensure that they are adequately focused on wounded Soldiers and their Families;
- Network with other staff sections and installation agencies to ensure all wounded Soldiers are fully aware of the legal assistance services available, and how to obtain them;
- Coordinate with hospital and medical clinic commanders to emphasize your readiness to assist Soldiers and help the facilities accomplish their challenging missions; and
- Ensure that wounded Soldiers in treatment facilities are personally offered assistance, and that, to the extent practicable, past Purple Heart recipients are also made aware of the available legal assistance services.

The other JAG Corps General Officers and I will ask about your outreach programs for wounded Soldiers during Article 6 inspections. I expect SJAs to track these efforts, and I have asked the Legal Assistance Policy Division to post tools and other relevant information for your use on JAGCNet’s Legal Assistance Forum.

Soldiers are making enormous contributions and sacrifices in the Global War on Terror. Wounded Soldiers, in particular, have demonstrated unquestionable courage in their service to our Nation. We help honor their sacrifice by proactively offering them our high quality legal services. I appreciate your efforts in all that you do.

SCOTT C. BLACK
Major General, USA
The Judge Advocate General