

SILENT PARTNER

Q&A - Military Disability Retired Pay

*Introduction: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers, published by the Military Committee of the American Bar Association's Family Law Section and the North Carolina State Bar's military committee. Please send any comments, corrections and suggestions to the address at the end of this Silent Partner. There are many **SILENT PARTNER** infoletters on military pension division, and other aspects of military divorce. Just go to www.americanbar.org > Family Law Section > Military Committee (the website of the above ABA committee) or www.nclamp.gov > For Lawyers (the website of the military committee, N.C. State Bar).*

Q. How can I find out if Army Sergeant John Doe is a disability retiree, that is, he's receiving military disability retired pay?

You'll need to get a copy of his discharge papers, also known as his DD Form 214. At the bottom left you will find information indicating that the regulation authorizing separation due to disability (see #26 in the DD Form 214 below) and the narrative reason for separation (see #28).

19.a. MAILING ADDRESS AFTER SEPARATION (Include Zip Code)		19.b. NEAREST RELATIVE (Name and address - include Zip Code)	
20. MEMBER REQUESTS COPY 6 BE SENT TO: CA <input type="checkbox"/> DIR OF VET. AFFAIRS <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		22. OFFICIAL AUTHORIZED TO SIGN (Typed name, grade, title and signature)	
21. SIGNATURE OF MEMBER BEING SEPARATED		POSITION	
SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)			
23. TYPE OF SEPARATION DISCHARGE		24. CHARACTER OF SERVICE (Include upgrades) HONORABLE	
25. SEPARATION AUTHORITY AR 635-40, PARA 4-24B(3)		26. SEPARATION CODE JFL	27. REENTRY CODE NA
28. NARRATIVE REASON FOR SEPARATION DISABILITY, SEVERANCE PAY		30. MEMBER REQUESTS COPY 4 Initials	
29. DATES OF TIME LOST DURING THIS PERIOD NONE			

DD Form 214-AUTOMATED. NOV 88 Previous editions are obsolete. MFMFRF - .

You can also determine whether John has a disability retirement from his "Retirement Orders," issued to him upon his separation from the armed forces.

Q. Where are the rules found for military disability retired pay and the armed forces?

Military disability retired pay (MDRP) is found at Chapter 61 of Title 10, U.S. Code. The rules are described more extensively in the Department of Defense Financial Management Regulation, DoD 7000.14-R, at Volume 7b, "Military Pay Policies and Procedures - Retired Pay." Known as the DoDFMR, the Regulation is at <https://comptroller.defense.gov/fmr/>. Chapter 1 of Volume 7b contains a full explanation of military retired pay in general. Military disability retired pay is a subset of military retired pay.

Q. What about the rules for division of military retired pay at divorce?

The federal rules for division of uniformed services retired pay are set out in the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408. Detailed rules are found at Chapter 29, Volume 7b of the DoDFMR.

Q. What is military disability retired pay?

MDRP is retired pay which is available for those servicemembers (SMs) who are sufficiently disabled that they cannot perform their assigned duties. If a disabled SM has enough creditable service (at least 20 years), he or she may be placed on the "disability retired list" and start to draw disability retired pay.

Q. Is MDRP excluded from division by the court as marital or community property?

When Congress originally enacted USFSPA, it excluded from "disposable retired pay" the retired pay of a SM who retired for disability under Chapter 61 of Title 10, U.S. Code. See *Bullis v. Bullis*, 22 Va. App. 24, 33, 467 S.E.2d 830, 835 (1996).

This was changed in 1986. Now the *disposable retired pay* for a SM who is entitled to MDRP is equal to total monthly retired pay less the amount of retired pay under Chapter 61, computed using the percentage of the SM's disability when he or she was retired. The amended USFSPA thus excludes that portion of MDRP that equals the money equivalent of the retiree's disability percentage rating at the time of retirement.

Q. Is that the same thing as John Doe's "VA rating?"

No - the military disability rating measures his fitness to perform his military duties. The VA rating (based on service-connected disabilities) measures his degree to hold down a job and earn a living. John could have a 40% military disability rating and a 100% VA rating, since they measure different disabilities.

Q. How does one determine the amount of John Doe's military disability retired pay?

There are three steps to this process. For the purposes of this example, assume that SM John Doe has an active duty base pay of \$3,000 per month, 20 years of creditable service, and a disability rating of forty percent (40%).

- 1) The first step is to calculate John's retired pay by multiplying his retired pay base (also known as his "High-3 pay) times his disability rating. This is done by multiplying \$3,000 by 40%, which yields \$1,200. This is John's "Disability Percentage Retired Pay Amount." It's also known as Method A.

- 2) The next step is to calculate John's retired pay based on his years of service, which we will assume for this example to be 2.5% times his "High-3" pay. In this case, it comes about \$1,500. That's the "Years of Service Retired Pay Amount," or Method B.
- 3) The SM gets to decide which of these two amounts he will receive, under 10 U.S.C. § 1401(a).

Q. What is the impact of this on Jane Doe, the former spouse?

USFSPA makes divisible only the amount of pay that is the difference between the two above amounts, that is, the difference between John Doe's gross retired pay and his disability pay based solely on the disability rating. In this example, the difference is \$1,500 minus \$1,200, or only \$300 as divisible military retired pay. Thus, although Mrs. John Doe might be entitled to half of \$1,500 in marital property division in a non-disability case, or \$750 per month as her spousal share of the military pension, the receipt of MDRP by John means that the retired pay center would pay her only half of \$300, or \$150 per month.

Q. I've got the opposite situation. I'm representing Jane Doe, the spouse, and John's lawyer tell me that he has a 60% military disability rating, so he's getting retired pay that is based on his percentage of disability. How do I explain that to Jane Doe, my client? Walk me through the process.

You'd explain that -

- 1) John was retired from the Army for military disability, not for longevity.
- 2) That means he was let go, mustered out, and/or discharged as "unfit to serve" in the armed forces. It was an involuntary separation.
- 3) A SM can have a rating of anywhere between 30% and 100% and get a military retirement based on disability; disabilities of less than 30% are handled through the payment of a lump sum, when the SM has less than 20 years of creditable service.
- 4) When the SM has been determined to be of questionable fitness, he is placed on the Temporary Disability Retired List (TDRL) for further review and examination. This usually means a Medical Evaluation Board (MEB) is convened to determine his medical condition as it relates to continued service. Then a Physical Evaluation Board is convened (a board of three officers) to determine whether to retain or separate the SM. If the SM has a rating of 30% or more, he will be placed on the Permanent Disability Retirement List (PDRL) if his condition is found to be stabilized and he is determined to be unfit for service.

- 5) In this case, John was retired with a rating from the military of 60%, as established by the PEB.
- 6) He was given an estimate from his PEBLO, or Physical Evaluation Board Liaison Officer, showing how his retired pay would be calculated (see example at end of this infoletter).
- 7) Then he got a letter from the Army Physical Disability Agency which stated the amount of retired pay he would receive based on his *years of service* and upon his *percentage of disability*. The SM's pension is based on the higher of retired pay based on *years of service*, and retired pay based on *percentage of disability*.
- 8) And finally he received a letter from DFAS, the Defense Finance and Accounting Service, showing how it calculated his retired pay based on both of these methods (see example at end of this infoletter).
- 9) When disability retired pay is based upon the *percentage of disability*, it is not divisible.
- 10) That latter - military disability retired pay based on *percentage of disability* - is what Mr. Doe is receiving.
- 11) Since the retired pay of Mr. Doe is based on the percentage of his disability, not on his years of service, his retired pay is exempt from division.

Q. Can John get VA disability compensation? Is that divisible?

Yes, John can get monthly tax-free payments of disability compensation from the Department of Veterans Affairs, or VA. They are not divisible as property, however; the USFSPA exempts VA payments from division.

Q. Isn't there anything else of his retired pay which can be divided? What about this reference to CRDP found on his Retiree Account Statement?

There is no residual amount of retired pay to which Mr. Doe is entitled. He gets MDRP. That is all he gets for retired pay. He does not get any additional deferred compensation. The annotation of "CRDP" in the RAS refers to Concurrent Retirement and Disability Pay, which is the return of waived military retired pay which was impacted by the election to receive disability compensation from the Department of Veterans Affairs. When a retiree has a VA rating of 50% or more, he may be eligible under 10 U.S.C. § 1414 for the restoration of the retired pay which was waived pursuant to 39 U.S.C. §§ 5304-5305.

Q. Where do I find the rules on CRDP, and what's a short "take-away"?

The CRDP rules are found at Chapter 64, Volume 7b, DoDFMR. They state the following –

- 1) CRDP is available to eligible military retirees (not just longevity retirees). Section 6401, Ch. 64, Vol. 7b, DoDFMR.
- 2) A qualified retiree is one who is entitled to both retired pay and VA disability compensation for a service-connected disability. Para. 640201, Ch.64, Vol. 7b, DoDFMR.
- 3) Under Chapter 1, Vol. 7b of the DoDFMR, military disability retirement and longevity retirement are both called *retired pay*; they both have the same, single label, although they spring from different sources.
- 4) Those who have over 20 years of qualifying service and have been retired for physical disability are eligible for CRDP, since the rule states that those with less than 20 years do not qualify. Para. 640203, Ch. 64, Vol. 7b, DoDFMR. This is confirmed in a later paragraph, “Special Rule for Disability Retirement,” which sets out the procedure and limits in certain CRDP cases involving disability retirees.

Q. So can the other side argue that my client is getting a *new benefit* which can be divided as property in divorce?

The upshot of all of this for John Doe is as follows: The other side may think that he may be receiving a new form of military retired pay, CRDP. They may argue that this is in addition to MDRP. They probably believe that this can be divided with John Doe’s ex-wife.

In reality the CRDP which Jane thinks John is getting *in addition to MDRP* is, in fact, the MDRP itself. Here’s the process:

- 1) Nothing in the law (Chapter 61 of Title 10) bars eligible disability retirees from getting CRDP. And no such limitation for disability retirees exists in the CRDP statute, 10 U.S.C. § 1414.
- 2) Those getting MDRP have been able all along to apply for and receive VA disability compensation. These two disability payments are measured by different criteria. *Military disability retired pay* measures one’s limitations on ability to serve in the armed forces, while *VA disability compensation* measures one’s limitations in “outside employment,” that is, a job in the civilian world.
- 3) Prior to the onset of CRDP, military disability retirees were subject to the same “VA offset” or waiver that longevity retirees would face. For each dollar of VA disability compensation, one had to waive a dollar of retired pay. 38 U.S.C. §§ 5304-5305. CRDP restores that waived retired pay for the SM.

- 4) It is probable that retirees receiving military disability pay would make their choice as to VA payments on the same basis as longevity retirees, that is, whether they could get an equivalent amount of *non-taxable payments* from VA by waiving taxable retired pay.
- 5) Most of the time, military disability retired pay is taxable income. The only exception is when the MDRP is for a combat-related condition or injury, that is, one which -
 - Resulted directly from armed conflict,
 - Took place while the SM was engaged in extra-hazardous service,
 - Took place under conditions simulating combat, including training exercises, or
 - Was caused by an instrumentality of war (e.g., a mortar, a tank, a fighter jet).
- 6) Since retirees whose disability retirement is based on such combat service get tax-free MDRP, they would have had no incentive to elect VA disability compensation for tax savings.
- 7) The rest of disability retirees, however, are receiving taxable MDRP and have the same incentive as longevity retirees to seek VA disability compensation (e.g., equal money with no taxes attached).
- 8) CRDP is automatic and if the SM has a VA disability rated at 50% or higher, he will receive ALL of his MDRP (not more than the amount based on length of service) and all of the VA disability compensation.

Q. Can John get Combat-Related Special Compensation? Is that divisible?

If John has served for at least 20 years, he can apply for CRSC and - if qualified - he can receive this monthly tax-free payment from the retired pay center. 10 U.S.C. § 1413a. It is not, however, divisible as property. For a detailed explanation of CRSC and CRDP, see the Silent Partner infoletter, *Military Pension Division: The “Evil Twins” - CRDP and CRSC*.

Q. What about the Survivor Benefit Plan?

The former spouse, Jane Doe, is still eligible for former-spouse SBP coverage if she meets the qualifications, that is -

- 1) She is awarded the former-spouse SBP in a court order;
- 2) There is an election made by John Doe for former-spouse SBP within one year of the divorce, or Jane makes a *deemed election* for SBP within one year of the SBP award;
- 3) The papers are registered with the retired pay center within the above deadlines; and
- 4) Jane doesn't remarry before age 55 (which would suspend her receipt of SBP).

Q. Is any of this subject to consideration in support proceedings?

Yes - everything is subject to garnishment that was discussed above... military retired pay (longevity), MDRP, VA disability compensation and CRSC. CRDP is, of course, part of retired pay (since it's the restoration of waived retired pay) and is thus subject to garnishment. Most states consider all of these items as part of "income" in determining child support or spousal support.

Q. What records are needed to understand MDRP and, if necessary, to give opinions and conclusions about the receipt of MDRP and its divisibility, whether in oral testimony or in a written report?

Here is a checklist for what is needed:

✓	Record	✓	Record
	Orders placing SM on TDRL (Temporary Disability Retired List)		Final Leave and Earnings Statement (in active-duty case)
	Physical Evaluation Board Record		Letter from DFAS to SM at/before receipt of retired pay as to how it was calculated
	Orders placing SM on PDRL (Permanent Disability Retired List)		Retiree Account Statement
	PEBLO Estimated Disability Compensation Worksheet		Findings and rating letter from U.S. Dept. of Veterans Affairs
	DD Form 214 ("discharge papers")		Other correspondence from govt. re disability
	Letter from physical disability agency		

(Rev. 5/12/21)

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This **SILENT PARTNER** was prepared by Raleigh, NC attorney Mark E. Sullivan, a retired Army Reserve JAG colonel. For revisions, comments or corrections, contact him at 919-832-8507, or at mark.sullivan@ncfamilylaw.com.

PEBLO ESTIMATED DISABILITY COMPENSATION WORKSHEET

For use of this form, see AR 635-40; the proponent agency is DCS, G-1.

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: 5 USC 301 and 10 USC, chapters 61 and 71.
PRINCIPAL PURPOSE: To provide an estimate of disability compensation.
ROUTINE USES: To provide information on how disability compensation is computed and the requirements for compensation to be exempted from federal taxation.
DISCLOSURE: Disclosure is voluntary; however, failure to provide information will adversely affect accuracy of estimate.

SECTION I. APPLICABILITY

This form is to be completed for Soldiers entitled to Army disability compensation.

SECTION II. INSTRUCTIONS

PEBLOS will complete this form during counseling of the Soldier (or the authorized individual acting in the Soldier's behalf) on the PEB's findings. The PEBLO will cover with the Soldier the notes on the back of this form. This form is provided to the Soldier for his/her records and does not need to be retained in the record copies of PEB evaluation.

SECTION III. ESTIMATED COMPENSATION

(Superscripts correspond to numbered notes of explanation on the next page of this form.)

1. <u>CPT ██████████ O-3</u> <i>(Name and Grade) ¹</i>	2. <u>Years 12 Months 5</u> <i>(Years of Service (YOS)) ²</i>
3. <u>\$5,921.10</u> <i>(Monthly Basic Pay) ³</i>	4. <u>\$5,921.10</u> <i>(Estimated Retired Pay Base) ⁴</i>
5. <u>40</u> % <i>(Disability Percentage) ⁵</i>	6. <u>PDR</u> <i>(Disposition)</i>

7. Estimated retired Pay (PDR or TDRL): Retired pay is the higher of formula "a" or "b"

a. Years-of-service computation

$$2.5\% \times \text{Yrs } 12 \text{ Mths } 5 \times \$ \frac{5,921.10}{(\text{YOS})^2} = \$ \frac{1,838.00}{(\text{retired pay base})} = \$ \frac{1,838.00}{(\text{retired pay})}$$

b. Disability rating percentage computation

$$\frac{40}{(\text{percentage limited to a max } 70\%)^6} \times \$ \frac{5,921.10}{(\text{retired pay base})} = \$ \frac{2,368.44}{(\text{retired pay})}$$
(for TDRL, percentage no less than 50%)⁶

c. Non taxable disability retired pay: See note 7.

8. Estimated disability severance pay

a. Formula

$$2 \times \frac{\text{basic pay for applicable grade}^1}{(\text{YOS: At least 3 or 6 to a limit of 19})^2} = \$ \text{severance pay}$$

b. Exclusion from Federal Gross Income: See note 7.

c. Exclusion from VA recoupment: See note 8.

9. REMARKS

understand that this is an estimation of my disability retirement pay. I understand that I will have to schedule an appointment with AG retirement/transition and DFAS for computation of service.

██████████ _____ Date

MDRP-DFAS Ltr

RETIRE PAY DEPARTMENT PAGE 1
Defense Finance and Accounting Service - Cleveland Center

NAME: ██████████
SSN: ***-**-██████

DATE PREPARED
13 NOV 2017

SUMMARY OF RETIRED PAY ACCOUNT
Date of Retirement: 29 OCT 2017

Gross Pay -

Retired Pay Rating: MSG Percentage of Disability: 90%

Service for Basic Pay: 20 Years, 02 Months, 09 Days

Since you entered the Military after 7 September 1980, your retired pay is computed using your monthly base pay instead of your last active duty basic pay (10 USC 1407). The monthly base pay (designated below as Active Duty Base Pay) is the average of the 36 highest monthly basic pay rates you received on active duty or if you were on active duty for less than 36 months, it is the average monthly basic pay you received while serving.

Service for Percent: 20 Years, 02 Months, 09 Days

In accordance with 10 USC 1401, you are entitled to receive retired pay computed using your Percentage of Disability (Method A) or, using your Years of Active Service (Method B), as follows:

	Method A	Method B
Active Duty Base Pay	4,405.30	4,405.30
Percentage of Disability	90%	
Percent Multiple	75.00%	50.43%
(Maximum Percent Multiple is 75%)		
Method A Calculation(4,405.30 x 0.7500)	3,303.00	
Method B Calculation(4,405.30 x 0.5043)		2,221.00
Cost of Living Adjustment	.00	.00
Gross Monthly Retired Pay	3,303.00	2,221.00

*Method A is most beneficial

The maximum percentage factor is 75 percent under any of the pay computation formulas regardless of the number of years of active service you may have or the percentage of disability assigned you.

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