

# Chapter Nineteen

## Disability Separation and Retirement

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Imagine a nightmare in which you, a new recruit, are called into your commander's office and told that you are being ordered to a combat zone to fight an unfamiliar enemy. Your commander can't disclose the rules of engagement but does tell you that you are deploying by yourself and after you are halfway to your destination you will get further information and some help from someone who knows more about the enemy than you do. Eventually, if things aren't going well, you will get some help from someone with expert knowledge. You hope that "if things aren't going well," there will be enough time to turn things around. But for now, you wonder, "What do I need to do to win this battle?" Your commander asks, "Any questions? Good, dismissed!"

This nightmare is similar to the situation that many servicemembers who are injured or become ill on active duty face if they are referred to the military Physical Disability Evaluation System (PDES). The stakes are very high for those found unfit for continued service. In a worst-case scenario they may be separated without any benefits. If, however, they are eligible for military disability retirement, they will receive lifetime retirement pay and health insurance for themselves and their eligible dependents. The most important thing to know about the PDES is that *by being actively involved in your case you can influence the outcome*. You cannot change the facts of your case but you can ensure the information that helps your case is included in your file and you can maximize

the chances of your arguments succeeding by following the guidance found in this chapter.

### ***Outcomes and Ratings***

Before this chapter discusses the PDES in detail, it is important to understand the possible outcomes from the PDES. There are five basic outcomes. They include a fit-for-duty determination, an unfit finding with severance without benefits, an unfit finding with severance pay, an unfit finding with permanent retirement and an unfit finding with temporary disability retirement. In addition to these outcomes, there are also administrative determinations that affect other benefits and taxes.

**Fit for Duty**—This finding basically means that you can reasonably perform the duties of your grade and career field. A fit-for-duty determination means that you will be returned to regularly assigned duties and will be expected to perform those duties within the limits of your physical profile, if you have one. For reasons discussed later in this chapter, it is best to reach 20 years of service before being medically retired. While it is not always possible to reach 20 years, it is important to keep this in mind if you are reasonably close to being retirement-eligible. If you want to be found fit, it is important to demonstrate that you are able to successfully perform your duties. You can submit statements from supervisors, evaluation reports, awards and anything else that tends to show that you are not limited significantly in the performance of your duties.

**Unfit findings generally**—For all unfit findings, Department of Defense (DoD) Instruction 1332.18 requires that the Physical Evaluation Board (PEB) determine that the servicemember is unable “to perform the duties of the member's office, grade, rank or rating because of disease or injury.” This determination requires a finding of two things. First, the servicemember has at least one condition that is disqualifying for retention. This is first addressed at the Medical Evaluation Board (MEB), but must later be confirmed by the PEB. Second, that this same condition prevents reasonable performance of the duties expected of someone of his or her grade and career field. Either one is not enough; an unfit finding requires both of the above. Also, note that each condition must by itself be the cause of the unfitness. If you have three conditions, but only two of them affect your duty performance, you can be compensated only for those two conditions.

**Unfit and separation without benefits**—In order to be eligible for compensation, a condition must have been incurred while the servicemember was entitled to basic pay and not as a result of intentional misconduct or willful negligence. If a condition existed prior to service (EPTS) and was not service-aggravated, or was incurred while absent without leave (AWOL) or was the result of misconduct or willful negligence, the military will not compensate you for your disability. The result is that you are separated without payment of any kind. The law presumes that conditions that arise while a servicemember is in-service are incurred while the servicemember is entitled to basic pay. In order to overcome this presumption there must be evidence showing that it is *more likely than not* that the condition existed prior to service. Even if condition EPTS, the law presumes that military service aggravated the condition and that it is compensable. To overcome the presumption, there must be evidence that more likely than not the condition is a natural progression of the condition that EPTS. Usually this evidence is in the form of a generally accepted medical principle that can be found in textbooks, scholarly articles or medical journals.

**Unfit and separation with severance pay**—This finding requires that one or more of your conditions are “unfitting” (making you unfit for service) and rated according to the Veterans Affairs Schedule for Rating Disabilities (VASRD) at 0%, 10%, or 20%. A sometimes confusing point is that 0% is a compensable rating. All ratings 20% or below are compensated with severance pay. Severance pay is calculated by multiplying two times years of service performed (with six months or more counted as a whole year) up to a maximum of 19 years multiplied by base retired pay. A recent change in the law credits all servicemembers with a minimum of three years and those with injuries incurred in the line of duty in a combat zone with a minimum of six years of service for the purposes of calculating severance pay. A Retired base pay for those who entered the military after September 7, 1980 is the average of the highest 36 months of basic pay.

**Unfit and placement on Permanent Disability Retirement List (PDRL).** If you are a servicemember with less than 20 years of service, you must be unfit due to stable conditions rated at 30% or more to be permanently retired. If you have more than 20 years of service, the military will grant retirement if you have a condition that is unfitting and compensable (i.e., rated at least 0%). If these conditions are met, you will be medically retired. If you have less than 20 years of service when permanently retired, your retired pay is calculated by multiplying the retired base pay times the percentage awarded. For servicemembers with more than 20 years of service, actual retirement pay

is either the retired base pay multiplied by the percentage awarded for disability or 2.5 multiplied by years of service multiplied by retired base pay, whichever is higher. Nevertheless, not more than 75% of retired base pay can be awarded under any calculation. In addition to retired pay, medical retirees get the same benefits as length-of-service retirees. This includes Tricare health insurance coverage for the retiree and eligible dependents, access to PX/BX and commissary and issuance of a retiree identification card.

**Unfit with placement on Temporary Disability Retirement List (TDRL)**—If the PEB finds you unfit due to disabilities that are rated at 30% or higher, but the disabilities are unstable, you will be placed on the TDRL. DoD Instruction 1332.18 defines “unstable conditions” as those conditions that are likely to change over the next five years enough to warrant a change in rating. In practice, many unstable conditions are found by PEBs to be stable. TDRL status is limited to a maximum of five years. Servicemembers on the TDRL have the same retiree benefits as length-of-service retirees. However, TDRL retired pay is calculated under different rules. The minimum payment while on TDRL is 50% of retired base pay. If the servicemember is rated at higher than 50%, he or she gets the benefit of the higher rating. The maximum on TDRL is also 75% of retired base pay. While on TDRL, the servicemember is periodically re-examined to determine if his or her condition has stabilized. If so, he or she will be referred to the PEB, which can find the servicemember fit for duty, unfit with severance pay, unfit and permanently retired, or continued on TDRL with no change in rating. While on TDRL, the percentage of disability rating may not be changed. Since a servicemember on TDRL is technically retired, no time accrues for purposes of time in service or regular length of service retirement.

**Other Administrative findings**—Title 5, United States Code, section 3501, gives hiring preference for Civil Service positions to those injured as a result of armed conflict or an instrumentality of war. The Tax Reform Act of 1976 makes compensation from combat-related injuries tax-free. The PEB can make these administrative findings in any case where a servicemember receives compensation. *The important thing to recognize is that regular military retirement pay is normally taxable. (VA disability compensation if not taxable.) With findings by the PEB that your injuries are combat-related, your pay becomes tax-free. If you believe that the informal PEB has not correctly addressed this issue, you can submit evidence, such as sworn statements, award citations, and in some cases even your own testimony. You would submit*

*this evidence through your Physical Evaluation Board Liaison Officer or at the formal PEB hearing.*

The DoD and the VA use the “whole person concept” in rating multiple disabilities. The idea is that a “whole person” who is uninjured is 100% able to perform. When you rate two or more conditions, you must first put them in order from highest to lowest. The next step is to subtract the highest number from 100%. The next condition is then applied to this remaining percentage before being combined with the first rating. For example, a servicemember with two conditions, one rated at 40% and one rated at 20%, would be rated at 50%. This is arrived at by subtracting 40% from 100% leaving 60% remaining. The condition rated at 20% is then multiplied by the remaining 60%, which yields 12%. The next step is to combine the 40% and 12% to come up with 52%. The last step is to round the number to the closest number divisible by 10, which in this example would be 50%.

### **Physical Disability Evaluation System (PDES)**

Title 10 United States Code, Sections 1201 through 1221 contain the body of federal law that authorizes the services to separate or retire members and to award or deny benefits. Each service administers the PDES using different regulations. However, the services all use similar procedures to process disability cases. The common steps are medical evaluation, physical disability evaluation, servicemember counseling, and final approval by personnel authorities.

### **Medical Evaluation Board**

#### **Overview**

The services administer the medical evaluation portion of the PDES by having a Medical Evaluation Board (MEB) evaluate the Servicemember’s medical status and duty limitations. The use of the term “Board” in MEB is a misnomer, as there is no opportunity for the servicemember to appear and the members of the MEB simply review the documentation in the case and then make their findings. The MEBs are typically made up of two or more medical doctors. The purpose of the MEB is to determine if you have a medical condition which requires further processing through the PDES and to document your

condition. While the Physical Evaluation Board (PEB) can gather and consider new evidence, the MEB is the crucial first step in assembling the evidence that will be considered later if your case is referred to the PEB. It is important that the MEB's report is accurate if the PEB is to have the best information to make the right decision in your case.

Who can refer a case to the MEB? For Air Force, Navy, and Marine Corps cases, the decision to initiate an MEB is made by a medical officer. In the Army and the Coast Guard, MEBs can be initiated by commanders or medical officers. In most cases, the route to an MEB begins after you seek medical care for an injury or illness. If your condition does not improve or gets worse and you have limitations on your duty performance that are likely to last more than a year, you will be referred to an MEB. Once the process is initiated, the MEB will determine if you have a disqualifying condition and if so, its impact on duty performance.

What is a condition that is disqualifying for retention? Department of Defense Instruction 1332.38, Enclosure 4, lists the conditions that are cause for referral to an MEB. The list is not all-inclusive and the services have supplemented this list in their own regulations. Other medical conditions are cause for referral if they significantly affect the performance of the duties expected of someone in your grade and career field.

What is the outcome of an MEB? The MEB recommends whether you can return to duty (with or without limitations) or need to be referred to a PEB. The MEB process results in the issuance of two documents. The first is the findings and recommendations. The services use different forms to document the MEB's findings and recommendations, but they all use a form which contains the recommended disposition. This form states the conclusion of the MEB. The other document produced is the Narrative Summary (NARSUM). The NARSUM is a report that lists the servicemember's medical history, current diagnosis, prognosis, and impact on duty performance, and whether the conditions are disqualifying for retention, among other things. DODI 1332.38, Enclosure 4, Attachment 1, lists the requirements for a complete NARSUM.

### *Common Issues*

The single most important thing you can do at the MEB phase of the process is to decide what outcome you want and then act accordingly. Your actions will vary greatly if you want to eventually return to duty as contrasted to if you believe your condition makes further military service impossible. If the goal is to return to duty, you want to make sure the MEB has information tending to

show that your duty performance is not significantly limited by your conditions. If the MEB does not already have them, submit copies of your most recent evaluation report, awards, or letters from supervisors—if they tend to show that you are performing your duties well. If you believe that your condition makes further service out of the question, it is important that the MEB considers all conditions you have that interfere with your duty performance. It is not unusual for a servicemember to be referred to an MEB for one condition and to have other disqualifying conditions not considered. This can happen for many reasons, including loss of relevant medical records, misdiagnosed or undiagnosed conditions, feeling shame about certain conditions, or medication which may mask certain conditions. If you are aware of a condition that is not documented, it is important to discuss it fully with your physician so the proper diagnosis and evaluation can take place and your records can be updated to reflect the diagnosis.

Sometimes servicemembers are unsure about what outcome they want or is likely from the PDES. It is certainly better if you are consistent in your position throughout the PDES. At the MEB, you may think that you will be unable to continue to serve. But later some of your conditions may be found not to be disqualifying, and you may want to qualify for duty. So to have argued at the MEB that you are unfit may undermine your ability to argue later that you are fit.

Early in the process it can be hard for you to evaluate your case without help from someone with experience. Talking with an attorney or veterans service officer (VSO), also known as a “service representative” or “service rep” can help you in coming to a better understanding of the likely outcome based on the facts of your case. (You can find a VSO by contacting a veterans organization, such as the American Legion, the Veterans of Foreign Wars, or the Disabled American Veterans.) Remember that if you are asked if you want to remain in the military, saying “Yes,” will not hurt your case. If the facts later show that due to your condition you are unable to remain on duty, your desire to continue to serve will not hurt your case. However, if you state, “No,” when asked about your desire to continue to serve and your condition is borderline, this can sometimes be viewed as your wanting to get out of your obligations or as a desire just to get benefits.

Another common issue at the MEB stage of the process is failure to disagree with the findings of the MEB. Each service provides an opportunity to disagree with the findings. If you agree that the MEB findings accurately describe your condition, it is difficult to later argue that you have other,

“unfitting” conditions. For this reason it is a good idea to thoroughly review the MEB’s findings. If you disagree with them, you should submit a statement explaining what errors should be corrected. This could state your belief that you have additional conditions, that the extent of your conditions is not fully described, or that you believe additional testing is needed to identify other conditions. Also, you should correct any administrative errors in the MEB’s findings, including dates of service, units of assignment and awards that are incorrect. By ensuring that the MEBs findings are as complete as possible, you will have provided the necessary information for the Informal PEB, which is the board that issues a preliminary rating, to rate you correctly.

### *Counseling*

DoD Instruction 1332.18, paragraph 3.13. states that “servicemembers referred for physical disability evaluation shall be afforded, at appropriate stages of processing, comprehensive counseling on the significance of the actions proposed and the related rights, entitlements, and benefits.” Throughout the process, this counseling is provided by the Physical Evaluation Board Liaison Officer (PEBLO). Most PEBLOs are professionals who perform their jobs well. Early in the process, the PEBLO is oftentimes the first and only source of information for servicemembers.

What you should realize is that PEBLOs do not have a duty to advance your interests. The PEBLO works for the military service. His or her job is to provide you information, track your case for administrative completeness, and to be a conduit of information between you, your MEB and physicians, and the PEB. In these functions there is no issue and PEBLO can be very helpful. However, recognize that PEBLOs do not have a duty to act in your best interests in your case in the same way that your attorney does. Similarly, information that you provide the PEBLO is not confidential, as it is with your attorney. The PEBLO can and often does communicate with the PEB and shares information. Because of this you should be pay careful attention to what you say to your PEBLO. Finally, PEBLOs are not supposed to provide advice about the correctness of a rating. If you need advice, it is advisable that you discuss your concerns with a qualified attorney.

### ***Physical Evaluation Board***

The Physical Evaluation Board is actually composed of two separate boards. The PEB (both formal and informal) is generally composed of three members. The president of the board is usually a senior commissioned officer in the grade of O-6. The remaining members are usually an additional line officer and a medical member physician. If the PEB is considering the case of a reservist, at least one voting member will also be a reservist. In the Army, the practice is that the same members will sit on the informal and formal boards. The Air Force and the Navy use different board members at the informal and formal PEBs.

If the MEB refers your case to the Physical Evaluation Board, the first step is the informal PEB's record review of your case and issuance of findings and recommendations. If you accept the findings, then your case will be forwarded through personnel channels for approval. If you disagree with the informal PEB's recommendations, you can demand a formal hearing where you will have an opportunity to appear, present evidence and witnesses, ask questions, and testify if desired.

The informal PEB receives your packet from the MEB, reviews it for completeness and makes an initial decision in your case. You have no right to personal appearance at the informal PEB and the board decides the case based solely on the records in the case packet. This should serve to underscore the importance of evidence to support your case. The only way the informal PEB knows about your case is from what they read in your case file. While informal PEBs can and sometimes do return cases to Military Treatment Facilities (MTF) for further testing and evaluation, it is much better if evidence of your condition is already in your file when they get it.

The best thing you can do to improve your chances of success at the informal PEB is to thoroughly understand the criteria that the PEB will use to decide your case and to try to provide it with the information it needs to justify a proper rating. To do so, you should do two things. First, try to gather evidence of how each condition you have limits your duty performance. Commanders' letters, statements from supervisors and physical profiles are good examples. You should also look up your conditions in the Veterans Affairs Schedule for Rating Disabilities (VASRD) and see what the criteria are for rating each unfitting condition. If there is a test that is required by the ratings criteria that has not been performed, consider asking your treating physician or primary care manager to arrange the test. If there are some other criteria, think

of ways to document them so as to provide the PEB with evidence that justifies a proper rating.

After the informal PEB makes its findings, you will be given an opportunity to agree or disagree with the findings and recommendations. If you accept the informal PEB's findings, your case will be forwarded to your service's approval authority. If you disagree with the findings, you can demand a formal hearing. You also have the opportunity to submit a statement explaining the basis for your disagreement. It is a good idea to submit a rebuttal, especially if you have additional evidence to support your position. The reason for this is that if you submit additional information or evidence, sometimes the informal PEB will reconsider its findings and issue revised findings.

The formal PEB is the servicemember's opportunity to have a full and fair hearing before separation for physical disability as required by the law. If you demand a formal hearing, you will have the option to be represented by assigned military counsel at no cost to you, or you may elect to be represented by a civilian attorney of your choosing (or an experienced veterans services officer—if one is available). While your personal appearance is not necessarily required, it is definitely to your benefit to appear. Similarly, you cannot be forced to testify or answer questions, but it is highly recommended that you do. That is because oftentimes you have the information that the formal PEB needs in order to grant a higher rating. Without your testimony, oftentimes the PEB will defer to its earlier judgment. If you have concerns about testifying, you should discuss them with your attorney or VSO.

The formal PEB procedures vary between the services, but generally begin with the servicemember reporting to the board. Then there is a brief discussion of administrative matters and the servicemember's attorney may give a brief opening statement that covers what the evidence will show and what the servicemember desires that the PEB find. After that, there is a presentation of evidence and testimony. Once the attorney has asked questions, the board members may also ask questions of the witness. After all the witnesses and evidence has been discussed, there is an opportunity for the servicemember to make a statement and the attorney to make a closing statement. The board will then close to decide the case in private.

When you appear at a formal PEB you should be respectful and courteous to the board members. Remember that they are your audience and you need their recommendation to get the result you want. You want to make a good impression on them. Wear a clean uniform and only wear awards and badges properly awarded and documented in your service record. Address the board

members as “sir,” or “ma’am,” as appropriate or by their military title. It is important for you to be consistent in your testimony and to project credibility. It is better to say that you do not know the answer to a question than to guess or to say what you think the board wants to hear. The members of the PEB hear many cases each week, so they are familiar with many of the common issues facing disabled servicemembers. By providing them with credible testimony, you can help them to properly rate the severity of your conditions. You should be prepared to discuss the history of your condition(s), the demands of your military job, how your condition affects your military job, your treatment and medications, and your current duty and functional limitations.

The PEB commonly asks servicemembers about their plans if separated from the military. You should be prepared to discuss this. A good answer will be consistent with your functional limitations due to your disability. For example, if you have a back condition and you have testified that this causes you to be unable to perform many of your military duties, telling the PEB that you plan to work in construction may undercut your credibility and send the signal that you just want to leave the service or get higher benefits. While you want to answer truthfully, be aware that sometimes concrete plans such as acceptance at a college or a job that starts in the near future can also send the same message. It may be better to state that you would like to attend school or work in a particular field in the future and leave it at that.

If at all possible, do not appear at the formal PEB with assistive devices such as canes, crutches, or braces without having them noted in your medical records. If you need these items, be sure to talk about them with your physician before the formal hearing and get their use prescribed and documented. This is not to discourage their use if you need them. It is only to ensure that if the board questions you about your use of a device (which it likely will if it is not in your records), you can show that it is part of your treatment. Otherwise, it can appear that you are trying to make your condition appear worse than it is. If you need these items, normally your physician will approve their use.

The appearance at the formal PEB can be stressful for anyone. There is a lot riding on the outcome and sometimes the stress and frustration of the process can make you want to lash out. Sometimes servicemembers feel like the board members are responsible for their predicament or represent a system that is denying them benefits. While this is understandable, remember to remain respectful and do not direct your anger toward the board. You will be given an opportunity to make a statement and if you choose to, you may men-

tion your frustration with the system, but generally it is best to just thank the board for listening to your case.

If the PEB does not give you the result you hoped for, it is important to remain respectful. The PEB will rule on your rebuttal, which you would submit later, so antagonizing them will not help your case. If they have made legal or factual errors or rated you lower than you think you deserve, you and your attorney can still appeal. Later administrative or judicial appeals may be where errors at the formal board are corrected but you want to maximize the chance that the board will reconsider their findings later. Keeping your military bearing will help.

After the formal PEB has made its decision you will have to decide whether you want to accept its findings or disagree. If you accept, the case will be forwarded directly to the intermediate authority, which is each service's agency with oversight of the physical disability evaluation process, for review and approval of findings. You should be aware that acceptance of the findings may bar later review because you may have "waived" your rights. If you disagree, you will have an opportunity to submit additional statements or other evidence that will accompany your case when it is reviewed by the service secretary's designated approval authority. Appeals to fit findings (when you disagree that you are fit to perform your duties) are accepted as a discretionary policy, but there is no statutory right to appeal. You have a right to a copy of the PEB's proceedings if you request them in writing. You should request a copy, as this will help you and your attorney in any later appeals.

Generally, there are three types of submissions. The first and most effective at the administrative level is additional objective evidence. This may be in the form of medical tests, medication profiles, or statements from the chain of command or supervisors that were previously unavailable. This is the best evidence because it shows new facts and may sway the reviewers to conclude that your case was not correctly decided. The next type of submission that is effective is a legal argument identifying errors made in the processing of your case or by the PEB in deciding your case. Oftentimes this type of submission will carry more weight in later administrative or judicial appeals than in the PDES, but it is still advisable to identify legal errors early in the process. Common legal errors include not following service regulations in deciding a case, failure to properly explain the board's rationale and failure of the PEB to cite to medical treatises when they make a finding based on "accepted medical principles"

The final type of submission is the servicemember's disagreement with the findings or the law. Since this is usually a statement of opinion, it tends not to

be very helpful in changing the decision. However, it is a servicemember's right to submit this type of personal statement and it can help in identifying systemic issues that may later be changed. If at all possible, try to focus your energy on gathering the first type of new evidence and then get assistance in drafting a good legal argument. Lastly, if the first two are not that strong and especially if you simply disagree with the policies under which your case was judged, then consider telling the service how you feel about the handling of your case. It may make you feel better and could possibly affect future policies.

### *Review and Final Action*

PEBs make findings and recommendations in physical disability evaluation cases. They do not make the final decision. After the PEB issues its findings and recommendations, there is a further review by their higher headquarters, which is the agency within each service with oversight of the PEB (for the Army it is the Army Physical Disability Agency; for Navy and Marine Corps cases, it is the Navy Council of Review Boards; for the Air Force it is the Air Force Personnel Council). This review encompasses both factual and legal sufficiency of the PEB's findings. Up until final action in the case, you can submit additional matters. The higher headquarters can make changes to the PEB's findings, but if the change results in a lower award, you must be given an opportunity to submit additional matters. Once approved by the PEB's higher headquarters, the case is forwarded for approval. At this point, it is extremely rare that a change of decision would be made by the service. The last step in the Physical Disability Evaluation System is approval by the Service Secretary's designee.

### *Post-PDES Options*

Each service has a Board for Correction for Military Records (BCMR). The BCMRs were created by Congress to correct errors or injustices in servicemembers' records. The servicemember bears the burden of showing that there is an error or injustice in his or her records. The BCMR has a three-year filing period after the alleged error or injustice occurs but it often waives this requirement if there is an error and it is in the interest of justice to correct it. In PDES cases, the three-year time limit runs from the date of discharge and not from the date of the PEB's decision. Be aware that as the highest administra-

tive review boards in each service, the BCMRs are *often, but not always*, the last step before filing a suit.

### ***Challenging a PEB Rating in Federal Court***

Normally it is best to go to the BCMR, so long as you have no time issues with meeting the federal Court of Claims statute of limitations discussed below. The BCMR has a mandated goal of issuing decisions in 10 months or less and must act on a case within 18 months. Currently, the majority of cases are being decided within eight to ten months.

Another option in some cases is to file suit in federal court. There are many complex issues in these cases involving choosing the correct court and when to file suit. For this reason, you should consult an attorney to discuss these issues before filing any suit. For appeals of PEB rating decisions, the proper court is usually the federal U.S. Court of Federal Claims. Nevertheless, in some cases you may want to file in a federal district court; this should be your lawyer's call.

In most cases you will want to go to the U.S. Court of Federal Claims. The burden is on you to show that the decision in your case was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." This is a technical legal standard that you should discuss with a qualified attorney if you have questions. There is a six-year statute of limitations for filing cases in the U.S. Court of Federal Claims. Unlike the BCMR time filing requirement which may be extended, the U.S. Court of Federal Claims statute of limitation is a strict requirement. If you have questions, ask an attorney familiar with cases such as yours.

For a discussion of handling PDES cases before the BCMRs, please see Chapter 16, "Correction of Military Records and Related Issues."

### ***Relationship Between DOD and VA Benefits***

Title 38 USC, Sections 5304 and 5305, prohibits veterans from receiving compensation from both the DoD and the VA for disability compensation. As a result, for most veterans, any award from the DoD will have to be deducted from VA compensation they would otherwise receive before the veteran receives any money from the VA. The veteran has the choice of electing which payment he or she will waive. In most cases, since VA compensation is non-taxable, the veteran will elect to waive the DoD compensation. What this

means in many cases is that the main benefit of getting to a 30% rating from the DoD is the lifetime medical coverage for the servicemember and his or her eligible dependents. Note that the waiver of DoD compensation will not affect the receipt by the servicemember of medical benefits, including for eligible dependents. However, in some cases, depending on the facts, getting a higher disability rating from the military does result in more money for the servicemember. Also, for those servicemembers who have more than twenty years of creditable service when retired medically, there is a phased-in elimination of the offset under a law that allows for Concurrent Retirement and Disability Pay (CRDP), sometimes called “concurrent receipts.” In order to qualify, you must be eligible for a normal retirement (for reservists, this means in receipt of a “20 year letter” and to have reached age 60) and have a VA rating of at least 50% for service-connected disabilities. Under a similar law, those retirees with twenty years or more of service, who have conditions rated by the VA at 10% or higher that were the result of combat, simulated combat, hazardous duty, or instrumentalities of war, will be eligible for restoration of their offset pay. With Combat Related Special Compensation (CRSC), sometimes called “special combat pay,” there is no phase-in and the money paid may be retroactive. Veterans who are eligible for both benefits may elect which one to receive.

Finally, for those cases decided after January 28, 2008, if the servicemember’s injuries were incurred in the line of duty in a combat zone or were incurred during performance of duty in combat-related operations, as designated by the Secretary of Defense, there is no offset of VA or DoD compensation for the injuries.

You must understand some of the differences in DoD and VA compensation before you are able to determine if appealing a DoD rating will increase your benefits. First, the DoD rating is applied to the servicemember’s base retired pay. This means that the higher the grade and years in service the servicemember has, the more a rating percentage will earn him or her. Compare this to the VA rating which assigns compensation based on a set schedule, with some additional compensation based on the number of dependents. To illustrate how this works, if two servicemembers with the same dependents, one an E-4 with only three years of service and the other an O-5 with 14 years of service, are assigned the same rating by the DoD, the O-5 will get a much higher amount of compensation than the E-4. Now assume the same two servicemembers are awarded the same rating by the VA. Given that they have the same number and type of eligible dependents, they will receive the same compensation from the VA. The rationale for this is that the DoD system is

designed to compensate for a career cut short, while the VA system is designed to compensate for loss of function and impact on civilian earnings. In order to know how the two systems will interact to determine the best outcome for the veteran, it is necessary to calculate the outcomes under various scenarios. In many cases, the calculations will have to be based on assumptions, as most servicemembers (with the exception, perhaps, of those on TDRL [Temporary Disability Retirement List, as mentioned early in this chapter]) will not have a VA rating until after the PDES process is completed. Below are some examples of possible outcomes, calculated using pay rates and VA schedules for 2007. Note that these calculations do not consider various other VA compensation programs which may significantly increase the VA benefits and were done using the concurrent retirement and disability pay calculations program. A similar calculation under CRSC combat special pay may yield different results.

### *DoD Retirement with Less than 20 Years of Service*

An O-5 with over 18, but less than 20, years of service and base pay of \$6968.10 is retired with a disability rating of 30%. He or she (we will go with “he” here because most servicemembers and vets are male) will get \$2090.43 in military retirement. Later the VA awards him a 70% rating, which gets him \$1303, because he is married with one child. Since he is not eligible for regular length-of-service retirement, he loses out on CRDP. He gets only \$2090.43. If he is successful in appealing his military rating and gets 50%, he now is eligible for \$3484.05. Appealing the military decision in his case earned him an extra \$1393.62.

An E-5 with nine years of service and base pay of \$2454.90 is retired by the DoD with a disability rating of 30%. He will get \$736.47 in military retirement. He then is rated by the VA at 70%, which gets him \$1303 because he is married with one child. Since he is not eligible for regular length-of-service retirement, he loses out on CRDP. Unless he can up his rating from the military to 60%, he gains nothing. This veteran would be better served by trying to increase his VA compensation to 80%, which would garner him \$1511.

### *DOD Retiree, More than 20 Years of Service, Rated at 50% or Higher by Military and CRDP-Eligible.*

In January 2007, an E-7 with 20 years and one day of service is permanently retired at 50%. He draws military retirement pay of \$1822.50 (\$3644.10 x .50). Had he been regularly retired, he would have drawn the same amount. He is rated 90% disabled by the VA. He is married with one child and thus is entitled

to \$1699 in VA compensation. Take the \$1699 and subtract his CRDP computation rate of \$500 and you get \$1199. Multiply that by the 2007 restoration rate (the phase-in is complete in 2014) of 49.6% and you get \$594.70. That amount plus the CRDP table rate of \$500 equals \$1094.70. Next, subtract the difference between the military retirement rate and the regular length-of-service retirement pay calculation. That figure is \$0. (We need to account for the difference between regular retirement and military physical disability retirement under Title 10 USC, Sec. 1414 (b).) He should receive a total amount of \$2917.20 monthly in 2007 (his military retired pay plus CRDP equals \$2917.20). At the full phase in 2014, he would be entitled to \$3021.50 (\$1822.50 + \$1199).

The same servicemember submits an appeal to his service's Board for Correction of Military Records, which rules in December 2007 that he will be rated at 70% by the military. He is now entitled to \$2550.87 in monthly military retired pay. This means the difference between his Chapter 61 retirement and length of service retirement has now grown to \$728.37 (\$2550.87 - \$1822.50). His VA entitlement does not change; it remains at \$1094.70. Add \$2550.87 and \$1094.70 and you get \$3645.57. Subtract \$728.37 (the difference between length of service and Chapter 61 retirement) and you end up with the same amount, \$2917.20. For this servicemember, there is no financial advantage to appealing under these facts.

As mentioned earlier, there are other VA compensation programs which may result in increased compensation from the VA schedule calculations in the previous examples. In order to make an informed decision, you must calculate the relationship between disability compensation from the military and disability compensation from the VA. Sometimes this can be difficult because you will have to make some informed guesses about what you may be rated at by the Department of Defense (DoD) and the VA.

## **Conclusion**

Revisit the nightmare scenario from the beginning of this chapter. This time, your commander tells you exactly where you are going, what you will be doing there, what the rules of engagement are, and that you will have time to prepare for your mission. With that information, you feel confident that you will be able to accomplish the mission. I hope that this chapter has provided much of the same information to those of you going through the military PDES. The

main lessons you should draw from this chapter are that you should decide early what your goals are and should work to provide evidence supporting your goals. Each case is unique, so you should not rely on this chapter alone. Many times your individual conditions will affect how you should present your case. There is no substitute for getting good legal advice when navigating the PDES. What you should do is use the information as a starting point and then discuss with an attorney. The earlier you do this, the better. If you follow this advice you will maximize your chances for success. The system may seem daunting at times, but remember that you can have a great impact on the outcome. In closing, I hope each and every servicemember going through the disability evaluation system gets the best possible outcome and that this chapter helps you to that end.

## **References**

### **Statutes**

Title 10 USC, Sections 1201-1221  
Title 10 USC, Sections 1553-1559  
Title 38 USC, Sections 5304 and 5305

### **DoD Instructions**

DoDI 1332.18  
DoDI 1332.38  
DoDI 1332.39

### **MEB Regulations**

Army AR 40-400, Patient Administration, Chapter 7  
Navy/USMC Manual of the Medical Department, Chapter 18  
Air Force AFI 41-210, Chapter 10  
Coast Guard COMDTINST M1850.2D

### **PEB Regulations**

Army AR 635-40  
Navy/USMC SECNAVINST 1850.4E  
Air Force AFI 36-3212  
Coast Guard COMDTINST M1850.2D

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