Statement to the Recovering Warrior Task Force
05 December 2012

Later this morning you will receive a brief from the Physical Disability Board of Review (PDBR). My number one concern is that the PDBR is acting as a unilateral Temporary Disability Retirement List (TDRL) adjudication body. The PDBR's authority is to review initial PEB separation decisions. Neither the law (10 USC 1554a) nor DoD instructions (DoDI 6040.44) give the PDBR any authority to conduct TDRL reviews.

A proper TDRL review is complex and it protects the rights of the wounded warrior. It requires a new medical evaluation board (MEB) that covers all current medical conditions with full clinical data. The wounded warrior has a right to appeal this MEB and provide additional information to the Medical and Physical Evaluation Boards. TDRL adjudication includes an informal PEB and a formal PEB option. It also provides multiple levels of appeal. All of these procedures and protections evaporate when the PDBR steps in and conducts a TDRL review in a vacuum and without the required information.

A great example of this problem involved SFC Michael Rindorf whom I wrote about in my DES Outrage #1. In short, the PDBR found that SFC Rindorf should have found unfit for PTSD, rated at 50% and placed on the TDRL. However, the PDBR then exceeded its authority by artificially determining SFC Rindorf's TDRL review outcome. The PDBR decided his TDRL outcome would have been a PTSD rating of 10%, removal from the TDRL and loss of DoD disability retirement benefits. The PDBR made these findings despite the fact SFC Rindorf's VA ratings for his PTSD have never been less than 30% and were currently at 70%. SFC Rindorf was left holding the bag, stripped of all the requirements and rights due to him by a proper and complete TDRL evaluation.

Bottom line: If the PDBR decides a PEB should have placed a wounded warrior on the TDRL, the individual should then undergo a proper and complete TDRL evaluation by their Service. Not to do so cheats wounded warriors out of proper disability benefits.

I relayed other PDBR concerns to the Task Force. If you have not done so already, please review these issues prior to this morning's presentation by the Physical Disability Board of Review.

Michael A. Parker
LTC, USA (Retired)
Wounded Warrior Advocate
ma.parker@yahoo.com

10 USC § 1554A - REVIEW OF SEPARATION WITH DISABILITY RATING OF 20 PERCENT DISABLED OR LESS

(a) In General.—

(1) The Secretary of Defense shall establish within the Office of the Secretary of Defense a board of review to review the disability determinations of covered individuals by Physical Evaluation Boards. The board shall be known as the "Physical Disability Board of Review".

(2) The Physical Disability Board of Review shall consist of not less than three members appointed by the Secretary.

(b) Covered Individuals.— For purposes of this section, covered individuals are members and former members of the armed forces who, during the period beginning on September 11, 2001, and ending on December 31, 2009—

(1)are separated from the armed forces due to unfitness for duty due to a medical condition with a disability rating of 20 percent disabled or less; and

(2)are found to be not eligible for retirement.

(c) Review.—

(1) Upon the request of a covered individual, or a surviving spouse, next of kin, or legal representative of a covered individual, the Physical Disability Board of Review shall review the findings and decisions of the Physical Evaluation Board with respect to such covered individual. Subject to paragraph (3), upon its own motion, the Physical Disability Board of Review may review the findings and decisions of the Physical Evaluation Board with respect to a covered individual.

(2) The review by the Physical Disability Board of Review under paragraph (1) shall be based on the records of the armed force concerned and such other evidence as may be presented to the Physical Disability Board of Review. A witness may present evidence to the Board by affidavit or by any other means considered acceptable by the Secretary of Defense.

(3) If the Physical Disability Board of Review proposes to review, upon its own motion, the findings and decisions of the Physical Evaluation Board with respect to a covered individual, the Physical Disability Board of Review shall notify the covered individual, or a surviving spouse, next of kin, or legal representative of the covered individual, of the proposed review and obtain the consent of the covered individual or a surviving spouse, next of kin, or legal representative of the covered individual before proceeding with the review.

(4) With respect to any review by the Physical Disability Board of Review of the findings and decisions of the Physical Evaluation Board with respect to a covered individual, whether initiated at the request of the covered individual or a surviving spouse, next of kin, or legal representative of the covered individual or initiated by the Physical Disability Board of Review, the Physical Disability Board of Review shall notify the covered individual or a surviving spouse, next of kin, or legal representative of the covered individual that, as a result of the request or consent, the covered individual or a surviving spouse, next of kin,

or legal representative of the covered individual may not seek relief from the Board for Correction of Military Records operated by the Secretary concerned.

(d) Authorized Recommendations.— The Physical Disability Board of Review may, as a result of its findings under a review under subsection (c), recommend to the Secretary concerned the following (as applicable) with respect to a covered individual:

(1) No recharacterization of the separation of such individual or modification of the disability rating previously assigned such individual.

(2) The recharacterization of the separation of such individual to retirement for disability.

(3) The modification of the disability rating previously assigned such individual by the Physical Evaluation Board concerned, which modified disability rating may not be a reduction of the disability rating previously assigned such individual by that Physical Evaluation Board.

(4) The issuance of a new disability rating for such individual.

(e) Correction of Military Records.—

(1) The Secretary concerned may correct the military records of a covered individual in accordance with a recommendation made by the Physical Disability Board of Review under subsection (d). Any such correction may be made effective as of the effective date of the action taken on the report of the Physical Evaluation Board to which such recommendation relates.

(2) In the case of a member previously separated pursuant to the findings and decision of a Physical Evaluation Board together with a lump-sum or other payment of back pay and allowances at separation, the amount of pay or other monetary benefits to which such member would be entitled based on the member's military record as corrected shall be reduced to take into account receipt of such lump-sum or other payment in such manner as the Secretary of Defense considers appropriate.

(3) If the Physical Disability Board of Review makes a recommendation not to correct the military records of a covered individual, the action taken on the report of the Physical Evaluation Board to which such recommendation relates shall be treated as final as of the date of such action.

(f) Regulations.—

(1) This section shall be carried out in accordance with regulations prescribed by the Secretary of Defense.

(2) The regulations under paragraph (1) shall specify reasonable deadlines for the performance of reviews required by this section.

(3) The regulations under paragraph (1) shall specify the effect of a determination or pending determination of a Physical Evaluation Board on considerations by boards for correction of military records under section 1552 of this title.

(a) In General.—

(1)The Secretary of Defense shall establish within the Office of the Secretary of Defense a board of review to review the disability determinations of covered individuals by Physical Evaluation Boards. The board shall be known as the "Physical Disability Board of Review".
(2)The Physical Disability Board of Review shall consist of not less than three members appointed by the Secretary.
(b) Covered Individuals.— For purposes of this section, covered individuals are members and former members of the armed forces who, during the period beginning on September 11, 2001, and ending on December 31, 2009—
(1)are separated from the armed forces due to unfitness for duty due to a medical condition with a disability rating of 20 percent disabled or less; and
(2)are found to be not eligible for retirement.
(c) Review.—
(1)Upon the request of a covered individual, or a surviving spouse, next of kin, or legal representative of a covered individual, the Physical Disability Board of Review shall review the findings and decisions of the Physical Evaluation Board with respect to such covered individual. Subject to paragraph (3), upon its own motion, the Physical Disability Board of Review may review the findings and decisions of the Physical Evaluation Board with respect to a covered individual.
(2)The review by the Physical Disability Board of Review under paragraph (1) shall be based on the records of the armed force concerned and such other evidence as may be presented to the Physical Disability Board of Review. A witness may present evidence to the Board by affidavit or by any other means considered acceptable by the Secretary of Defense.
(3)If the Physical Disability Board of Review proposes to review, upon its own motion, the findings and decisions of the Physical Evaluation Board with respect to a covered individual, the Physical Disability Board of Review shall notify the covered individual, or a surviving spouse, next of kin, or legal representative of the covered individual, of the proposed review and obtain the consent of the covered individual or a surviving spouse, next of kin, or legal representative of the covered individual before proceeding with the review.
(4)With respect to any review by the Physical Disability Board of Review of the findings and decisions of the Physical Evaluation Board with respect to a covered individual, whether initiated at the request of the covered individual or a surviving spouse, next of kin, or legal representative of the covered individual or initiated by the Physical Disability Board of Review, the Physical Disability Board of Review shall notify the covered individual or a surviving spouse, next of kin, or legal representative of the covered individual that, as a result of the request or consent, the covered individual or a surviving spouse, next of kin, or legal representative of the covered individual may not seek relief from the Board for Correction of Military Records operated by the Secretary concerned.
(d) Authorized Recommendations.— The Physical Disability Board of Review may, as a result of its findings under a review under subsection (c), recommend to the Secretary concerned the following (as applicable) with respect to a covered individual:

(1)No recharacterization of the separation of such individual or modification of the disability rating previously assigned such individual.
(2)The recharacterization of the separation of such individual to retirement for disability.
(3)The modification of the disability rating previously assigned such individual by the Physical Evaluation Board concerned, which modified disability rating may not be a reduction of the disability rating previously assigned such individual by that Physical Evaluation Board.
(4)The issuance of a new disability rating for such individual.

(e) Correction of Military Records.—

(1)The Secretary concerned may correct the military records of a covered individual in accordance with a recommendation made by the Physical Disability Board of Review under subsection (d). Any such correction may be made effective as of the effective date of the action taken on the report of the Physical Evaluation Board to which such recommendation relates.
(2)In the case of a member previously separated pursuant to the findings and decision of a Physical Evaluation Board together with a lump-sum or other payment of back pay and allowances at separation, the amount of pay or other monetary benefits to which such member would be entitled based on the member's military record as corrected shall be reduced to take into account receipt of such lump-sum or other payment in such manner as the Secretary of Defense considers appropriate.
(3)If the Physical Disability Board of Review makes a recommendation not to correct the military records of a covered individual, the action taken on the report of the Physical Evaluation Board to which such recommendation relates shall be treated as final as of the date of such action.

(f) Regulations.—

(1)This section shall be carried out in accordance with regulations prescribed by the Secretary of Defense.
(2)The regulations under paragraph (1) shall specify reasonable deadlines for the performance of reviews required by this section.
(3)The regulations under paragraph (1) shall specify the effect of a determination or pending determination of a Physical Evaluation Board on considerations by boards for correction of military records under section 1552 of this title.

Three years ago over the President's Day weekend, The Washington Post and the Army Times released explosive articles about wounded warrior care. A central theme in the initial and subsequent press coverage dealt with DoD and Service practices and policies that denied or curtailed disability benefits to wounded warriors. Many hearings and commissions were held that resulted in Congress passing measures to reform the Defense Disability Evaluation System (DES). While there has been some progress in the past three years to improve the DES, DoD and the Services still have in place numerous techniques and tactics to deny or limit DoD disability benefits to wounded warriors.

I have often stated that DoD and the Services bend over backwards to do the least possible for wounded warriors in terms of disability compensation. I also have stated that there are only two things DoD and the Services will do when it come to the DES: What they want to do and what Congress makes them do. I understand these statements can be construed as inflammatory and pejorative but I stand by them in full. They are based on my extensive experience helping wounded warriors as they process through the DES.

To ensure that the key players involved in DES reform have visibility to continuing DES concerns, I am starting a weekly email that will expose and discuss these concerns. For my inaugural DES Outrage of the Week, I will be discussing issues of the Physical Disability Board of Review (PDBR). The PDBR's past and current actions will back up my statements above. It will focus on the PDBR experience of Army SFC Michael Rindorf, a OIF veteran with multiple service connected medical conditions, most notably, severe PTSD. In short, the Army screwed him out of disability benefits and the PDBR bent over backwards to followed suit.

In 2006, SFC Rindorf went through a Medical Evaluation Board (MEB) and a Physical Evaluation Board (PEB). His MEB deemed that he had several service connected medical conditions. However, his MEB declared that only three of these conditions failed to meet retention standards; a heart condition requiring a pacemaker, PTSD and a mood disorder. The PEB declared that only the heart condition was unfitting resulting in a DoD disability rating of 10%. The PEB stated his PTSD was not separately unfitting despite the MEB psychiatric position that the PTSD created "significant military impairment". Based on a 10% DoD disability rating, SFC Rindorf was denied disability retirement and separated with a one-time severance payment. He then applied for benefits from the VA which resulted in a VA rating of 30% for his PTSD effective the date of his discharge from the Army. His PTSD rating from the VA is currently 70%. His severance pay from the Army was offset by his VA disability compensation eliminating the career compensation for his 15 years of military service.

After the initial wounded warrior press coverage, Congress quickly recognized the shenanigans that DoD and the Services were using to deny disability benefits. As a result, the 2008 National Defense Authorization Act (NDAA) included a multitude of DES reform measures. One of these measures included language that reinforced the long standing law requiring PEBs to rate unfitting conditions in strict compliance with the Veterans Administration's Schedule for Rating Disabilities (VASRD). Another reform measure was the creation of the PDBR, a DOD level board to review DES cases that resulted in DoD disability ratings of less than 30%, the level required to qualify for disability retirement. Congress limited the eligibility window for the PDBR to those separated between 9-11-2001 and 12-31-2009. These two reform measure, and DoD disingenuous application of these measures, directly impacted SFC Rindorf's situation.

Congress gave DoD authority to establish the operating polices for the PDBR. DoD seized on this opportunity and implemented PDBR policies that would severely limit the PDBR's ability to grant relief as well as to reduce the amount of the relief granted. DoD established a policy that stated if the PDBR decided to recommend disability retirement, the retirement would not be retroactive to the date of discharge. Rather, the retirement effective date would be the date of the PDBR recommendation. Exposure of this policy to the press and veterans service community resulted in a quick change in the policy that made PDBR retirement recommendations effective the date of discharge.

Other initial PDBR policies also demonstrated DoD's propensity for enacting and continuing DES policies that do the least possible for wounded warriors. First, DoD stated that the PDBR could only review conditions that the PEB deemed unfitting. Second, DoD stated that if a service member was separated before the enactment of the 2008 NDAA (28 January 2008), the PDBR could still rate the conditions per non VASRD criteria. Fortunately, DoD changed these policies after press exposure and Congressional pressure. The DoD policy change dictated that the PDBR would review all conditions and rate conditions they deemed unfitting in strict compliance with the VASRD. Without these policy changes, the PDBR would have limited SFC Rindorf's appeal to just his heart condition and, even if the PEB had found his PTSD unfitting, the PDBR would have continued using low-balling, non VASRD PTSD rating criteria. Unfortunately, as you will read further down, his PDBR found a new disingenuous, and potentially illegal, tactic to deny SFC Rindorf's disability retirement.

To better understand how the PDBR pulled off this stunt requires an understanding of the DoD PTSD rating problem. PTSD is one of many conditions DoD and the Services low-balled by using non VASRD rating criteria and policies. The VASRD has a provision (4.129) that states if PTSD is severe enough to warrant removal from military service, then the initial rating must be at least 50% for the first six months. The provision requires further evaluation after six months to adjust the rating. This provision aligns perfectly with DoD's Temporary Disability Retirement List (TDRL) process. The

TDRL is used specifically for unfitting conditions that are not stable for final rating determinations. Instead, DoD and the Services adopted policies that allowed them to ignore the VASRD minimum 50% PTSD rating policy. This led to thousands of service members receiving artificially low ratings and non retirement separations for PTSD. SFC Rindorf was one of these service members.

The impact of DoD PTSD rating policies became evident in a study conducted by the congressionally chartered Veteran's Disability Benefits Commission (VDBC). This 2007 study identified 849 cases where service members received ratings for PTSD by DoD PEBs and who were then subsequently rated by the VA for PTSD. The VDBC study identified 849 such PTSD cases rated less than 30% by DoD. Of these 849 PTSD cases, 749 were immediately rated at 30% or more by the VA for PTSD. (The remaining 100 cases rated less than 30% by the VA indicates that many VA raters are not aware of the VASRD's minimum 50% initial rating requirement for PTSD). Additionally, the study indentified 182 cases rated by DoD of 30% or more. Of these 182 PTSD cases, only seven received lower ratings by the VA. However, an astonishing 141 of these cases received higher ratings by the VA. The VDBC study clearly demonstrated that the fix was in to avoid and lower DoD disability benefits for PTSD.

Even after the enactment of the 2008 NDAA provision that reinforced the requirement for DoD to rate unfitting conditions per the VASRD, the Army adopted yet another policy to ignore the VASRD's initial minimum 50% rating provision for PTSD. DoD was seriously considering propagating the Army's new PTSD rating policy DoD wide. Press coverage, Congressional pressure and a DoD legal review forced DoD to reconsider. Finally, in October of 2008, DoD established policy that enforced the use of the VASRD's 50% minimum rating for PTSD.

In December 2008, the National Veterans Legal Services Program (NVLSP) filed suit to force DoD to fix past PTSD cases that PEBs improperly rated. Recently, DoD reached a agreement and identified over 4,300 such cases going back to December 2002. Those who elect to take part in the settlement will receive a initial 50% DoD PTSD TDRL disability rating for the first six months of separation. DoD will then expedite a review of these cases, presumably by the PDBR, to determine the DoD rating status for the period of time following the initial 50% minimum rating. While this settlement is good news, the tactic the PDBR used to deny SFC Rindorf's disability retirement for his PTSD does not bode well for the thousands of other victim's of DoD's errant PTSD rating policies.

I need to point out that, by law, DoD has the authority to nominate disability cases for review by the PDBR. They could have easily identified past improperly rated PTSD cases, and notified the service members for the option of having the PDBR review their

case. Instead, it required a lawsuit to force DoD to identify the service members affected by erroneous PTSD ratings. Even at that, DoD is only going to review the cases of service members that opt into the lawsuit. These members will first have to be located and notified by the NVLSP with a deadline for opting in of July of 2010. This will certainly narrow the number of PTSD cases fixed by DoD. Further, due to statute of limitations, the NVLSP suit only covers PTSD cases back to December 2002. However, the PDBR can review cases going back to 9-11-2001. DoD's unwillingness to proactively notify all service members affected by erroneous PTSD ratings further illuminates my position that DoD bends over backwards to do the least possible for wounded warriors. DoD prefers to let sleeping dogs lay and leave these wounded warrior's disability ratings broken. DoD's lack of action certainly contributes to the increase in the suicide rate and homelessness of service members affected by PTSD.

SFC Rindorf filed with the PDBR to review his case on multiple issues to include his PEB's determination that his PTSD was not unfitting. The PDBR, following their revised policies, found his PTSD to be unfitting and correctly applied the minimum 50% initial rating as required by the VASRD. Unfortunately, the PDBR's decision process then went rogue and stated that after this six month's initial 50% rating period ended, SFC Rindorf's rating should revert to a 10% rating. The PDBR recommendation puts SFC Rindorf on the TDRL for the first six months after he left service but then separates him again without disability retirement. The PDBR's recommendation to give SFC Rindorf only six months of retirement via the TDRL and then separate him is flawed on two major fronts.

First, the PDBR lowered SFC Rindorf's PTSD rating to 10% despite the fact his VA rating for PTSD has never been lower than 30% and is currently at 70%. His 70% VA rating went into effect less than three years after separation. It is clear DoD is continuing to assign disability ratings significantly lower than that of the VA despite the fact the law requires that they both rate per the VASRD.

Second, the PDBR, by unilaterally deciding the outcome of SFC Rindorf's TDRL review, has denied his right to a full and fair hearing that he is due under law. 10 USC 1214 states, *"No member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it."* A full and fair hearing allows the member to present his case in person with the aid of counsel, submit, review and rebut evidence and to call and question witnesses. When a service member is on the TDRL, his case undergoes a new MEB and PEB at least every 18 months for up to five years. The purpose of the review is to determine the current rating for the unfitting conditions and to determine if the condition is stable for rating purposes. If the service member disagrees with the outcome of the TDRL PEB decision, he or she can demand a formal hearing.

The PDBR's decision to determine the outcome of a TDRL review decision, in lieu of a full MEB and PEB, is preposterous. A PDBR is a record review, not an in person hearing. DoD policy prohibits the PDBR from granting hearings. Further, PDBR law and DoD policy dictate that the outcome of the PDBR process cannot be further reviewed by the Service Board for the Correction of Military Records (BCMR). In effect, the PDBR is making binding and non challengeable TDRL review decisions without the benefit of a refreshed MEB and PEB that specifically focus on the current status and stability of the condition. Again, the PDBR process denies the service member his legal right to a full and fair hearing to challenge a TDRL review decision that leads to separation due to physical disability. What the PDBR should do in cases like SFC Rindorf's is to grant the initial TDRL rating and return the case to the Service DES element to conduct a full and proper TDRL review to include a MEB,PEB and a formal hearing if demanded by the service member.

It is worth discussing how the PDBR was able to recommend the discharge of SFC Rindorf (without disability retirement) despite the lack of stability his current PTSD rating, which again is currently rated at 70% by the VA. The problem centers on a flaw in disability law that DoD exploited to, once again, do the least possible for the wounded warrior. In essence, disability law only requires placement and retention on the TDRL if the condition is unstable and rated at 30% or more. If the rating ever drops below 30%, the law state the Service ***may*** discharge the individual without disability retirement regardless of how unstable the condition is or its future rating. DoD and the Services, by policy and action, have changed the "**may"** portion of this law to **"*will"***. To take away wounded warrior's disability retirement, DoD merely has to claim the rating dropped below 30%, regardless of the conflicting evidence such as a VA rating for the condition.

In December 2005, I brought the TDRL ratings stability issue to the attention of Mr. Michael Higgins, a professional staff member of the House Armed Services Committee. Throughout 2006, Mr. Higgins shepherded legislation through the House of Representative's version of the 2007 NDAA that required rating stability before removal from the TDRL. Unfortunately, the Senate version of the 2007 NDAA did not contain a similar provision and the measure was dropped in conference. The 2007 NDAA did require DoD to conduct a report on the TDRL issue but I am not sure if the report was ever done or released to the public. I am sure that DoD never took action, such as a legislative proposal, to remedy the problem.

It appears the measure to fix the TDRL stability issue lost steam after the revelations of wounded warrior care in the media in 2007. There were many recommendations made by committees investigating these concerns that, if adopted, would have made the TDRL stability issue moot. For instance, the Dole Shalala commission recommended all service members who are found unfit due to a service connected condition be retired regardless of the disability rating; much in the same way that civil

servants are treated when they are forced out due to disability. This Dole/Shalala recommendation, if adopted, would have eliminated this and many of the other tactics DoD uses to deny disability retirement. Unfortunately, this and many other necessary reform measures have yet to get serious traction in Congress.

In conclusion, the PDBR tactic used on SFC Rindorf is but one of many continuing DES practices that bend over backwards to do the least possible for our wounded warriors. DoD has proven over and over again that only specific Congressional action will fix the remaining issues. In next week's *DES outrage of the Week,* I will focus on how the Army DES is avoiding compensating migraine headaches; a condition that is quite common among the tens of thousands of service members affected by PTSD and traumatic brain injuries.

Michael A. Parker
LTC, USA (Retired)
Wounded Warrior Advocate
ma.parker@yahoo.com

Department of Defense

INSTRUCTION

NUMBER 6040.44
June 27, 2008
Incorporating Change 1, 6/2/2009

USD(P&R)

SUBJECT: Lead DoD Component for the Physical Disability Board of Review (PDBR)

References: See Enclosure 1

1. PURPOSE. This Instruction:

a. Establishes policy, assigns responsibilities, and provides instructions for PDBR operation and management under the authority of DoD Directive (DoDD) 5124.02 (Reference (a)).

b. Establishes the PDBR within the Office of the Secretary of Defense, as required by section 1554a of title 10, United States Code (Reference (b)).

c. Designates the Department of the Air Force as the Lead DoD Component for the establishment, operation, and management of the PDBR for the Department of Defense (hereafter referred to as the "Lead Component").

d. Conforms to Reference (b).

2. APPLICABILITY. This Instruction applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the "DoD Components").

3. DEFINITIONS. Terms used in this Instruction are defined in the Glossary.

4. POLICY. It is DoD policy that:

a. The purpose of the PDBR shall be to reassess the accuracy and fairness of the combined disability ratings assigned Service members who were discharged as unfit for continued military service by the Military Departments with a combined disability rating of 20 percent or less and

were not found to be eligible for retirement. To that end, the PDBR shall review the combined disability ratings assigned individuals covered by this Instruction upon the individuals' request or upon its own motion and, where appropriate, recommend that the Military Departments correct discrepancies and errors in such ratings. *The PDBR shall review appeals by eligible individuals as provided for in Reference (b) pertaining to conditions identified but not determined to be unfitting by the Physical Evaluation Board (PEB) of the Military Department concerned.*

b. The PDBR shall operate in a spirit of transparency and accountability, and shall impartially readjudicate cases upon which review is requested or undertaken on its own motion. The PDBR has no greater obligation to our wounded, ill, and injured Service members and former Service members than to offer fair and equitable recommendations pertaining to the assignment of disability ratings.

c. The PDBR shall be managed and operated under uniform guidelines established in this Instruction, and the Lead Component shall be reimbursed by the respective Military Department of the applying Service member.

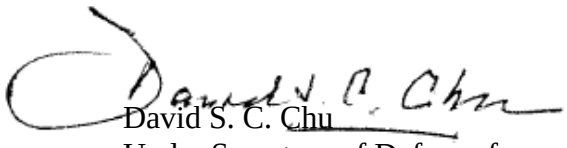
d. Scheduling of cases subject to review by the PDBR shall be based upon an intentional methodology that gives equitable consideration to requests originating from covered Service members regardless of status, component affiliation, or source of disability.

5. RESPONSIBILITIES. See Enclosure 2.

6. PROCEDURES. See Enclosure 3.

7. RELEASABILITY. UNLIMITED. This Instruction is approved for public release. Copies may be obtained through the Internet from the DoD Issuances Web Site at http://www.dtic.mil/whs/directives.

8. EFFECTIVE DATE. This Instruction is effective immediately.



David S. C. Chu
Under Secretary of Defense for
Personnel and Readiness

Enclosures
1. References
2. Responsibilities
3. Procedures

Glossary

TABLE OF CONTENTS

ENCLOSURE 1

REFERENCES

(a) DoD Directive 5124.02, "Under Secretary of Defense for Personnel and Readiness (USD(P&R))," June 23, 2008
(b) Section 1554a and chapter 61 of title 10, United States Code
(c) DoD 7000.14-R, "DoD Financial Management Regulation," Volume 11A, Chapter 1
(d) DoD Instruction 4000.19, "Interservice and Intragovernmental Support," August 9, 1995
(e) DoD Directive 5015.2, "DoD Records Management Program," March 6, 2000
(f) DoD Instruction 5100.73, "Major DoD Headquarters Activities," December 1, 2007
(g) DoD Instruction 8910.01, "Information Collection and Reporting," March 6, 2007
(h) DoD Directive 1332.18, "Separation or Retirement for Physical Disability," November 4, 1996
(i) DoD Instruction 1332.38, "Physical Disability Evaluation," November 14, 1996
(j) USD(P&R) Memorandum, "Policy Guidance for the Disability Evaluation System and Establishment of Recurring Directive-Type Memoranda," May 3, 2007
(k) DoD Directive 5400.11, "DoD Privacy Program," May 8, 2007
(l) DoD 5400.11-R "Department of Defense Privacy Program," May 14, 2007
(m) DoD Instruction 1332.39, "Application of the Veterans Administration Schedule for Rating Disabilities," November 14, 1996
(n) Part 4 of title 38, Code of Federal Regulations, "Schedule for Rating Disabilities," July 1, 2007

ENCLOSURE 2

RESPONSIBILITIES

1. UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS (USD(P&R)). The USD(P&R) shall:

a. Provide policy, guidance, and oversight to ensure the timely implementation of this Instruction, pursuant to the authority delegated in Reference (a).

b. Approve and appoint a Director for the PDBR (hereafter referred to as "the PDBR President"). The PDBR President shall be an O-6 line officer or an equivalent-grade Government civilian employee nominated by the Lead Component and shall possess high professional qualifications and demonstrated knowledge of the disability evaluation system.

2. ASSISTANT SECRETARY OF DEFENSE FOR HEALTH AFFAIRS (ASD(HA)). The ASD(HA), under the authority, direction, and control of the USD(P&R), shall detail specialty medical members to the PDBR, as requested by the PDBR President, to provide medical advisory opinions and recommendations.

3. DEPUTY UNDER SECRETARY OF DEFENSE FOR MILITARY PERSONNEL POLICY (DUSD(MPP)). The DUSD(MPP), under the authority, direction, and control of the USD(P&R), shall issue policy updates as necessary for the effective operation and management of the PDBR.

4. UNDER SECRETARY OF DEFENSE (COMPTROLLER)/CHIEF FINANCIAL OFFICER (USD(C)/CFO). The USD(C)/CFO shall include financial requirements for implementation of this Instruction in the budgets of the Lead DoD Component for the PDBR.

5. SECRETARIES OF THE MILITARY DEPARTMENTS. The Secretaries of the Military Departments shall:

a. Comply with procedures and processes established by the Lead Component to meet the information requirements prescribed in paragraph 6.i. of this enclosure and paragraph 5.a. of Enclosure 3.

b. Inform, assist, and cooperate with current and former Service members in forwarding requests to the PDBR. The Military Departments shall compile the records and information required by the PDBR or requested by the individuals covered by section 2 of Enclosure 3, including any applicable Department of Veterans Affairs (DVA) ratings.

c. Obtain written acknowledgment of individuals covered by section 2 of Enclosure 3 that, as a result of the request for review by the PDBR, the covered individual or a surviving spouse, next of kin, or legal representative may not seek relief from the Board for Correction of Military Records (BCMR) operated by the Secretary concerned, and that the recommendation of the PDBR, once accepted by the respective Military Department, is final.

d. Provide reimbursement and funding to the Lead Component for review of cases of covered members of their respective Departments, according to the procedures prescribed by Volume 11A, Chapter 1 of the DoD Financial Management Regulation and DoD Instruction (DoDI) 4000.19 (References (c) and (d), respectively).

e. Provide representatives to the PDBR as required and requested by the Lead Component, subject to the procedures in Enclosure 3.

f. Adhere to standards and processes in Enclosure 3 and those subsequently published under the authority of the Lead Component.

g. Correct the military records of individuals covered by section 2 of Enclosure 3 in accordance with a recommendation made by the PDBR, as outlined in section 6 of Enclosure 3, if the recommendation is accepted by the Secretary concerned.

(1) Any such correction may be made effective as of the effective date of the action taken on the report of the Military Department PEB to which such recommendation relates.

(2) The Secretary concerned may delegate this decision authority no lower than: for the Army and Air Force, to the Directors of the Review Board Agencies; for the Navy, to the Assistant Secretary of Navy (Manpower and Reserve Affairs) who may further delegate it to the Associate Counsel.

6. SECRETARY OF THE AIR FORCE. The Secretary of the Air Force, in addition to the responsibilities outlined in section 5 of this enclosure and as the Lead Component for the establishment, operation, and management of the PDBR for the Department of Defense, shall:

a. Act as the single point of contact for the Department of Defense to establish the operational relationships, capabilities, and system integration necessary for effective and efficient operation of the PDBR.

b. Organize the PDBR, with representation from each of the Military Departments, and comply with section 1554a of Reference (b).

c. Operate the PDBR under the policy direction of the DUSD(MPP), in accordance with DoDD 5015.2, DoDI 5100.73, and DoDI 8910.01 (References (e), (f), and (g), respectively).

d. Nominate the PDBR President for approval and appointment by the USD(P&R). The nominee shall meet the qualifications of paragraph 1.b of this enclosure.

e. Program, obtain, and provide necessary administrative, operational, and financial resources to establish and support the operation of the PDBR.

f. Delineate roles, responsibilities, and authorities among the organizations and elements that participate in or support the PDBR, including but not limited to DoD Components and the DVA.

g. Establish the operational and administrative relationships necessary to operate, publicize, and receive applications for the PDBR, and establish the standard format for packaged records that shall be forwarded to the PDBR for review.

h. Publish operating procedures that comply with DoDD 1332.18, DoDI 1332.38, and USD(P&R) memorandum (References (h), (i), and (j), respectively) and implement the procedures at Enclosure 3.

i. Determine the information required for review of cases by the PDBR. Such information may include, but is not limited to:

(1) The complete record of medical and non-medical material and evidence contained in the Service member's PEB records that served as the basis for the original determination of unfitness and disability rating(s) assigned;

(2) Rating determinations by the DVA, as applicable to the case under review; and

(3) New or newly discovered evidence not previously included in official records.

j. Determine procedures for the collection, storage, and release of information required by the PDBR (see Enclosure 3).

(1) The procedures will be established in collaboration with the Services and the DVA, and will be in accordance with Reference (e).

(2) The Lead Component shall ensure the release of personally identifiable information is in accordance with the requirements of DoDD 5400.11 and DoD 5400.11-R (References (k) and (l), respectively).

k. Semi-annually assess the operations and results of the PDBR, including a review of resources, and provide a report to USD(P&R).

ENCLOSURE 3

PROCEDURES

1. GENERAL. The PDBR is designed to reassess the accuracy and fairness of the combined disability ratings assigned Service members who were discharged as unfit for continued military service by the Military Departments with a combined disability rating of 20 percent or less and were not found to be eligible for retirement, and to recommend corrections where discrepancies and errors in such ratings exist. The PDBR, in accordance with section 3 of this enclosure, shall review the combined disability ratings of individuals covered by section 2 of this enclosure. ~~The PDBR does not review the Military Departments' determinations of fitness for continued military service; the PDBR only reviews the combined disability ratings assigned to the specifically military unfitting conditions acted upon by the Military Department PEBs.~~ *As part of its review, the PDBR may, at the request of an eligible member as provided for in Reference (b), review conditions identified but not determined to be unfitting by the PEB of the Military Department concerned.*

2. COVERED INDIVIDUALS. Any Service member may have his or her case reviewed by the PDBR if that individual (hereafter referred to as a "covered individual"):

a. Was separated from the Armed Forces during the period beginning on September 11, 2001, and ending on December 31, 2009, due to unfitness for continued military service resulting from a physical disability under chapter 61 of Reference (b); and

b. Received from DoD a combined disability rating of 20 percent or less; and

c. Was not found to be eligible for retirement.

3. MOTION TO REVIEW

a. Cases may be considered and presented to the PDBR upon the written request of a Service member meeting the qualifications of section 2 of this enclosure, or by their surviving spouse, next of kin, or legal representative. The PDBR may, upon its own motion, review the findings and decisions of the PEB with respect to a covered individual.

b. If the PDBR proposes to review, upon its own motion, the findings and decisions of the PEB, the PDBR shall notify the covered individual or a surviving spouse, next of kin, or legal representative of the covered individual of the proposed review and obtain the consent of the covered individual or a surviving spouse, next of kin, or legal representative of the covered individual before proceeding with the review.

4. ORGANIZATION AND RESPONSIBILITIES. The PDBR shall:

a. Be composed of career military or senior civilian members in the grade equivalent of O-5 or O-6, appointed by the Secretary of the Military Department that they represent.

(1) The PDBR will consist of at least one member from each of the Military Departments.

(2) Additional PDBR members will be appointed, as required and upon request of the Lead Component as necessary, by the Secretaries of the Military Departments.

(3) When in session and considering the case of a covered individual, the PDBR will be composed of three voting members. No voting member of the PDBR may have a personal interest in, or have been a member of another board that ever considered, the case under review. When the covered individual is a member of the Reserve Component, one voting member of the PDBR shall be from the Reserve Component. Additionally, a non-voting military medical officer, a non-voting legal advisor, and/or a DVA advisor familiar with the application of the Veterans Administration Schedule for Rating Disabilities (VASRD) may be invited to provide advice to the PDBR.

b. Notify the covered individual, after receipt of either the review request or the consent to review described in section 3 of this enclosure, of the commencement of the PDBR's review of the case, and advise the covered individual of the final and non-appealable nature of the review, as described in paragraph 5.c. of Enclosure 2.

c. Review the PEB record of findings and the combined disability rating decisions regarding the specifically military unfitting medical conditions with respect to the covered individual. The review shall be based on the records of the Military Department concerned and such other evidence as may be presented to the PDBR, in accordance with the information requirements prescribed in paragraph 6.i. of Enclosure 2 and paragraph 5.a. of this enclosure.

d. Use the VASRD in arriving at its recommendations, along with all applicable statutes, and any directives in effect at the time of the contested separation (to the extent they do not conflict with the VASRD in effect at the time of the contested separation).

e. Make one of the following recommendations to the Secretary concerned for each case reviewed with respect to a covered individual:

(1) Do not re-characterize the separation of such covered individual or modify the combined disability rating previously assigned such covered individual.

(2) Re-characterize the separation of such covered individual to retirement for disability.

(3) Modify the combined disability rating previously assigned such covered individual by the Military Department PEB. This modified combined disability rating may not be a reduction of the disability rating previously assigned such covered individual by that PEB.

(4) Issue a new combined disability rating for such covered individual. No reduction of the previously issued combined disability rating will result as a product of this review.

(5) If upon review of the PDBR, the PDBR determines that a previous "fit" determination by the PEB of the Military Department concerned should be changed to "unfit," the PDBR shall make the recommendation and assign a rating to that condition which will be combined with the other disability rating(s).

5. ADMINISTRATION. The following minimum actions are required to operate the PDBR:

a. The Military Departments shall obtain records and other information required for review of cases by the PDBR.

(1) Evidence to be reviewed by the PDBR will be primarily documentary in nature.

(2) All new or newly discovered records or other relevant evidence gathered and considered by the PDBR will be made a part of the Service member's PEB records and maintained in accordance with regulations pertaining to that system of records.

(3) A witness may present evidence to the Board by affidavit or by any other means considered acceptable by the Lead Component.

(4) If the Service member indicates that a DVA disability award has been made, the applicant shall be requested to provide a copy of the DVA determination letter and sign a release form authorizing the PDBR access to the information. The Military Departments will obtain DVA rating determinations issued on behalf of the former Service member. Once obtained, the PDBR should compare any DVA disability rating for the specifically military unfitting condition(s) with the PEB combined disability rating and consider any variance in its deliberations and any impact on the final PEB combined disability rating, particularly if the DVA rating was awarded within 12 months of the Service member's separation.

b. The Military Departments shall provide the Lead Component with the medical records and non-medical documents that were reviewed and considered by the Military Department PEBs in making their final disability rating determinations; documents detailing the final decisions of the Military Department PEBs; and any documents or decisions subsequently issued on appeal(s), as requested by the Lead Component for case review.

c. The Military Department concerned shall afford a covered individual who petitions the PDBR not less than 2 weeks from notice of pending review to provide documentary evidence outside DoD possession.

d. For each case referred to the PDBR, the PDBR shall review the complete case record that served as the basis for the final Military Department PEB rating determination and, to the extent feasible, collect all the information necessary for competent review and recommendation. The PDBR President may also obtain the advice and assistance of specialized medical authorities for

cases involving those respective medical disabilities, if needed. Any assistance provided by the medical authorities will be documented in the covered individual's case.

e. The PDBR shall conduct reviews of the disability rating(s) of the covered individual in accordance with the VASRD in effect at the time of separation.

(1) If the case was adjudicated by the final Military Department PEB and the covered individual was separated from military service prior to January 28, 2008, the PDBR shall also review the disability rating(s) of the covered individual, in accordance with ~~the DoD application of~~ the VASRD ~~under DoDI 1332.39 (Reference (m)) and applicable Service regulations, if any,~~ in effect at the time of separation for the covered individual. *Provisions of DoD or Military Department regulations or guidelines relied upon by the PEB will not be considered by the PDBR to the extent they were inconsistent with the VASRD in effect at the time of the adjudication.* If the covered individual was separated from military service on or after January 28, 2008, the PDBR shall use the VASRD without application of Reference (m), along with any applicable interpretation of the VASRD by the United States Court of Appeals for Veterans Claims.

(2) ~~Only the medical condition(s) determined to be specifically unfitting for continued military service, as previously determined by the Military Department PEB,~~ *The following* will be subject to review by the PDBR~~.~~*:*

(a) Medical conditions determined to be specifically unfitting for continued military service, as previously determined by the Military Department PEB.

(b) Those instances when the covered individual requests the PDBR to review conditions identified but not determined to be unfitting by the PEB of the Military Department concerned.

f. The PDBR shall establish a recommendation based on a vote of a simple majority of the board members.

g. The PDBR shall render recommendations, in a written report signed by the President and forwarded to the Secretary concerned, to either affirm or change the rating of the Military Department PEB being reviewed, in accordance with paragraph 4.e. of this enclosure. If the PDBR recommends a change to the covered individual's separation characterization or disability rating, these letters should also contain a brief explanation of the rationale for such recommendation.

h. The timeline goals for the review, adjudication, and notification processes are as follows:

(1) The PDBR shall schedule 80 percent of documentary reviews within 45 days of obtaining the necessary records.

(2) The PDBR shall adjudicate and issue an appropriate recommendation report for 80 percent of cases within 60 days of the review.

(3) The Secretary concerned shall accept or reject recommendations of the PDBR within 45 days of receipt from the PDBR of such recommendations.

(4) The Secretary concerned shall provide covered individuals notification of the Military Department's decisions on the recommendation within 10 days of such decisions.

i. The Lead Component shall maintain statistical review data by Military Department and affiliation (Active Component or Reserve Component) of cases reviewed. A key component of this statistical review shall include an accounting of PDBR recommendations that were rejected by the Secretary concerned.

6. CORRECTION OF MILITARY RECORDS

a. The Secretary concerned may correct the military records of a covered individual in accordance with a recommendation made by the PDBR under paragraph 4.e. of this enclosure. Any such correction may be made effective as of the effective date of the action taken on the report of the Military Department PEB to which such recommendation relates.

b. The Secretary concerned shall ensure that, in the case of a Service member previously separated pursuant to the findings and decision of a Military Department PEB together with a lump sum or other payment of back pay and allowances at separation, the amount of pay or other monetary benefits to which the covered individual would be entitled, based on the member's military record as corrected, shall be reduced to take into account receipt of such lump sum or other payment.

c. The Secretary concerned shall ensure that, if the PDBR makes a recommendation not to correct the military records of a covered individual, the action taken on the report of the Military Department PEB to which such recommendation relates shall be treated and recorded as final as of the date of such action.

d. The Secretary concerned shall accept or reject, in whole or in part, the recommendation of the PDBR and shall notify the covered individual of such decision.

(1) If the recommendation is accepted, the Secretary concerned shall notify the covered individual of the effect (medical retirement or separation with severance pay) and effective date of the recommendation.

(2) In those cases where a record change is warranted resulting from an increase of a rating and/or retirement, the Secretary concerned will notify the DVA of the change.

GLOSSARY

PART I. ABBREVIATIONS AND ACRONYMS

BCMR	Board for Correction of Military Records
CFR	Code of Federal Regulations
DES	Disability Evaluation System
DVA	Department of Veterans Affairs
FMR	DoD Financial Management Regulation
PDBR	Physical Disability Board of Review
PEB	Physical Evaluation Board
VASRD	Veterans Administration Schedule for Rating Disabilities

PART II. DEFINITIONS

For the purposes of this Instruction, these terms are defined as follows:

combined disability ratings. Assignment of disability ratings are based on the VASRD as implemented by References (i) and (m). An individual with more than one unfitting condition receives a disability percentage rating for each condition, which are then combined using the "whole person concept" into a combined disability rating, as described in paragraph 4.25 of part 4, title 38, Code of Federal Regulations (Reference (n)). A rating of 30 percent in line-of-duty cases for unfitting conditions is required for medical retirement in accordance with chapter 61 of Reference (b).

PEB. The PEB, subject to Military Department Secretary discretion, is the Military Department board that determines the fitness of Service members with medical impairments and, if a member is determined unfit for duty, recommends their entitlement to benefits under chapter 61 of Reference (b).

physical disability. The inability of a Service member or former Service member to meet personal, social, or occupational requirements or demands because of a medical impairment; the reduction in, or loss of a Service member's or former Service member's actual or presumed ability to engage in gainful employment or normal activity that is the result of a medical impairment. The term "physical disability" includes mental disease, but not such conditions as

behavioral disorders, adjustment disorders, personality disorders, and primary mental deficiencies. A medical impairment or physical defect standing alone does not constitute a physical disability. To constitute a physical disability, the medical impairment or physical defect must be of such a nature and degree of severity as to interfere with the Service member's or former Service member's ability to adequately perform his or her duties.

VASRD. The rating schedule in Reference (n) is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service. The percentage ratings represent, as far as can practicably be determined, the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations. Generally, the degrees of disability specified are considered adequate to compensate for considerable loss of working time from exacerbations or illnesses proportionate to the severity of the several grades of disability. For the application of this schedule, accurate and fully descriptive medical examinations are required, with emphasis upon the limitation of activity imposed by the disabling condition.

To: The Recovering Warrior Task Force (RWTF)

From: Michael A. Parker, Wounded Warrior Advocate

Subject: Physical Disability Board of Review (PDBR) Issue, Service Secretary Denial of PDBR Recommendations

Date: 27 November 2012

A PDBR issue that the RWTF needs awareness of is the rejection of PDBR recommendations by the Service Secretary. Attached is a PDBR case that illuminates this problem.

The wounded warrior in question was placed on TDRL in 2004 by the Navy PEB. In 2006 the Navy PEB conducted a TDRL review on the case a found the individual should be rated at 10% disabled, removed from the TDRL with termination of disability retirement status. The PDBR recommended an upgrade of the wounded warrior's status from disability severance to permanent disability retirement with a 30% rating. The Secretary of the Navy rejected the PDBR recommendation and maintained a disability severance status for the wounded warrior.

The PDBR findings of this case is four pages long and details the rationale for their recommendation to upgrade the wounded warrior to permanent disability retirement status with a 30% rating for PTSD. The PDBR notes that the VA twice rated the wounded warrior's PTSD at 30% disabling. The VA based their second PTSD rating on the same TDRL exam that led to a 10% rating by the Navy PEB.

The Secretary of the Navy (page 5 of the enclosed document) simply stated they reject the findings of the PDBR. The Secretary of the Navy provided no rationale for their rejection. By law, a wounded warrior cannot further appeal a PDBR determination in Service or DoD channels. Their only recourse at that point is federal court which has a six year statute of limitations from the date of separation to file in court.

When the Secretary of the Navy refuses to provide rationale for their decision, it impairs the courts ability to provide judicial review of the case*. It also violates 10 USC 1222a which requires review authorities to provide rationale for their decisions: 10 USC 1222a states:

> ***(a) Response to Applications and Appeals.—*** *The Secretary of each military department shall ensure, in the case of any member of the armed forces appearing before a physical evaluation board under that Secretary's supervision, that documents announcing a decision of the board in the case convey the*

findings and conclusions of the board in an orderly and itemized fashion with specific attention to each issue presented by the member in regard to that member's case. The requirement under the preceding sentence applies to a case both during initial consideration and upon subsequent consideration due to appeal by the member or other circumstance.

The Secretary of Navy made no attempt whatsoever to justify the decision let alone address the issues raised by the member in his appeal. This defeats the whole purpose of the PDBR which is to ensure disability evaluations adhere to all applicable disability laws, regulations and policies. Please note the PDBR reports the Navy rejects PDBR recommendation at a rate 700% higher than the other Services.

This practice needs to stop and past instances of these types of cases need to be reviewed to ensure the secretarial level rejection of the PDBR recommendations are properly based in law and regulation and that they properly explained to the wounded warrior the basis for their decision.

Enclosure
PDBR Case PD1000957

Michael A. Parker
LTC, USA (Retired)
Wounded Warrior Advocate
ma.parker@yahoo.com

* (Rominger V. US, United States Court of Federal Claims, case No. 05-742C). The court decision stated the Army BCMR decision lacked sufficient explanation for judicial review. They key passage from that decision stated:

*Although courts afford great deference to the decisions of boards for the correction of military records, that deference is not absolute. Correction boards are obligated to "examine relevant data and **articulate a satisfactory explanation for their decisions."** See Van Cleave, 66 Fed. Cl. at 136 (citing Yagjian v. Marsh, 571 F. Supp. 698, 701 (D.N.H. 1983)). In this connection, "correction boards are required to make rational connections between the facts found and the choices made." Id. Where a correction board fails to support its decision with a reasoned explanation of an important issue, a remand is appropriate. Id. Tested by these standards, a remand is necessary in this case. Here, the ABCMR dismissed Mr. Rominger's objections in three short paragraphs without any real analysis. After reiterating the undisputed factual evidence, the ABCMR did not provide any explanation for why the Army should not reconsider its disability rating based on the higher disability rating provided to Mr. Rominger by the VA for precisely the same diagnosis. Although the VA and Army have different standards for determining whether a service member is "disabled" or unfit for military service, "once a soldier is determined to be physically unfit for further military service, percentage ratings are applied to the unfitting conditions from the VASRD." Army Reg. 635-40, App. B-3(a). "Congress has established the VASRD as the standard under which percentage rating decisions are to be made for disabled military personnel." Id., App. B-1(a).*

RECORD OF PROCEEDINGS
PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXX
CASE NUMBER: PD1000957
BOARD DATE: 20111110

BRANCH OF SERVICE: MARINE CORPS
ENTRY TO TDRL: 20040815
EXIT FROM TDRL: 20060501

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a Reserve CPL/E-4, (0311, Rifleman) medically separated for posttraumatic stress disorder (PTSD). He was diagnosed with PTSD consequent to an Iraq deployment from February to May 2003. Criterion A combat stressors were documented and the Diagnostic and Statistical Manual of Mental Disorders (DSM IV) criteria for an Axis I diagnosis of PTSD were met. He did not respond adequately to treatment and was unable to drill with his unit or perform within his military occupational specialty. The CI subsequently underwent a Medical Evaluation Board (MEB). PTSD was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. No other conditions appeared on the DES packet. The PEB adjudicated the PTSD as unfitting. The CI was placed on the Temporary Disability Retired List (TDRL), effective 15 August 2004 with a 30% disability rating. On re-evaluation in February 2006, the CI was believed to be sufficiently stable for final adjudication. The PTSD condition rating was finalized at 10%, with likely application of the SECNAVINST 1850.4E and DoDI 1332.39. The CI made no appeals and was finalized from TDRL with a 10% disability rating.

CI CONTENTION: "I was assigned less than 50% disability rating by the military for my unfitting PTSD upon discharge from active duty. In accordance with the class action notice, assign the highest final disability rating applicable consistent with 38 CFR 4.129 and DoD policy, to the extent such increase will not adversely affect my total compensation, including but not limited to compensation pursuant 10 CRSC."

RATING COMPARISON:

Final Service IPEB – Dated 20060322				**VA – All Effective Date 20030714**			
Condition	**Code**	**Rating**		**Condition**	**Code**	**Rating**	**Exam**
On TDRL – 20040815		**TDRL**	**Sep.**				
PTSD	9411	30%	10%	PTSD	9411	30%	20031208
						30%	20060209*
↓No Additional MEB/PEB Entries↓				0% x 0/Not Service Connected x 0			20031121
Combined: 10%				**Combined: 30%**			

*VARD 20060426 based on the Service TDRL re-evaluation exam20060209

ANALYSIS SUMMARY:

Posttraumatic Stress Disorder. The PEB rating, as described above, was derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act (NDAA) 2008 mandate for DoD adherence to Veterans' Administration Schedule for Rating Disabilities (VASRD) §4.129. IAW DoDI 6040.44 and DoD guidance (which applies current VASRD 4.129 to all Board cases), the Board is obligated to recommend a minimum 50% PTSD rating for the TDRL period. The Board must then determine the most appropriate final rating IAW VASRD §4.130 criteria. Since the service was in compliance with the §4.129 TDRL requirement, the Board need not apply a constructive TDRL interval in this case. A minimum TDRL rating of 50% remains applicable IAW DoD direction, and as held by Federal court in the *Sabo v. United States* class action settlement. The most proximate source of comprehensive evidence on which to base the permanent rating recommendation in this case is the MEB TDRL re-evaluation exam which took place 18 months after entry into and 3 months prior to exit from TDRL. There was no relevant VA outpatient or civilian provider evidence during or following the TDRL period.

The CI received his initial diagnosis and treatment for PTSD at the VA, prior to the MEB period. At the VA compensation and pension (C&P) exam (nine months pre-TDRL), the CI noted improvement in many of his PTSD symptoms after starting treatment with anti-depressant medication. He endorsed ongoing problems with anger, difficulty concentrating and marital difficulties. The CI was working full time for his father-in-law, repairing electric motors, but he had not been able to finish college course work due to problems with concentration. On mental status exam (MSE), the examiner commented that the CI appeared sad, withdrawn and expressionless, with a depressed mood and constricted affect. When questioned about his war experiences, he became anxious, tearful and avoidant. There was no suicidal or homicidal intent, and there were no hallucinations or paranoid ideation. The examiner noted the CI's "persistent symptoms of increased arousal manifested by hypervigilance, startle response, irritability, outbursts of anger, and reduced concentration," and concluded that "the disturbance has caused distress and impairment in his social functioning and his marriage relationship…" The Axis I diagnoses were PTSD (acute onset, moderate severity with partial remission on medication) and major depressive disorder (MDD - single episode, moderate in remission). The global assessment of functioning (GAF) for PTSD was assigned at 70, in the range of mild symptoms. The GAF for MDD was 75, in the range of slight impairment. The VA assigned a rating of 30% on the basis of this exam.

In March 2004, the CI required treatment for significant suicidal ideation due to symptoms of PTSD. At that time, the CI presented with nightmares, irritability, heightened startle response, intrusive thoughts and suicidal ideation secondary to traumatic combat exposure. One month later, at the MEB exam, the CI reported that treatment with Zoloft had decreased the intensity of his symptoms and he denied suicidal ideation. On MSE, his mood was euthymic and his affect was full range, non-labile and appropriate. There was no homicidal ideation and no evidence of psychotic symptoms or formal thought disorder. The examiner concluded that the CI had marked military impairment and moderate social and industrial impairment. The Axis I diagnosis was PTSD and the GAF was assigned at 65 – 75, in the range of slight to mild impairment. The PEB considered the VA C&P exam findings, as well as the VA rating of 30%, and assigned a TDRL rating of 30%.

The service re-evaluation exam took place approximately 18 months after placement on the TDRL and 3 months prior to exit from TDRL. At that time, the CI had stopped his medications due to side effects and he had stopped attending counseling because it made him feel worse. He reported that he was performing well in his work as a truck driver and noted mild improvement in the frequency of his symptoms since leaving the military. He continued to have marital problems, nightmares, intrusive thoughts, chronic irritability, increased startle response, poor concentration, and depressed mood with anhedonia. The examiner also noted

that the CI continued to experience significant anxiety and somatic reactions when faced with reminders of Iraq. On MSE, the CI became tearful, anxious and began sweating when questioned about his PTSD experiences. The examiner documented that "[CI] continued to demonstrate significant difficulty with PTSD," and added that "although the frequency of these re-experience symptoms had reduced, the intensity of his psychological and physiological reactions to these reminders remained intense." The examiner additionally addressed the CI's avoidance of PTSD counseling, commenting:

> "It was evident during the evaluation that his symptoms quickly rekindle with minimal exposure to thoughts or conversation about his past experience. These symptoms are difficult for [CI] and he avoids psychotherapeutic treatment as a result. This avoidance of treatment is common for many people with PTSD and reflects the severity of the condition and not a volitional non-compliance with treatment."

The CI's prognosis for complete resolution of symptoms was poor and his impairment for civilian social and industrial adaptability was definite. The Axis I diagnosis was PTSD, not in remission, and the GAF was assessed at 60 (TDRL entry GAF=65-75), in the range of moderate symptoms. The PEB noted that the CI was working full-time and had not been hospitalized or on medication. They additionally cited "borderline non-compliance" based on the CI's failure to take medication or attend counseling, and rated PTSD at 10%, with likely application of the SECNAVINST 1850.4E. The VA performed another review and rating determination of the CI's condition based upon the service TDRL re-evaluation, and continued the PTSD rating at 30%.

The Board directs its attention to its rating recommendations based on the evidence just described. All members agreed that the §4.130 criteria for a rating higher than 50% were not met at the time of entry into TDRL, and therefore the minimum 50% TDRL rating (as explained above) is applicable. The VA assigned a 30% rating for the PTSD condition based on §4.130 criteria without relying on the provisions of §4.129, as the CI had not been separated from service for PTSD by the time of the VA rating determination. As regards the permanent rating recommendation at exit from TDRL, all members agreed that the §4.130 threshold for a 70% rating was not approached and that the criteria for a 10% rating were well-exceeded. The deliberation settled on arguments for a 30% versus a 50% permanent rating recommendation. The "definite impairment for civilian social and industrial adaptability" documented at the narrative summary (NARSUM) TDRL re-evaluation best fits the criteria for the 30% description (occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks). In discussion for the 50% rating, the Board considered the CI's marital discord and the presence of severe symptoms which provoked avoidance of treatment. The Board also acknowledged that although he was "doing well" at his employment as a truck driver, the CI had not resumed his college course work and had continued difficulty with concentration and had a worsened GAF and overall assessment of impairment for social and industrial adaptability. After due deliberation, considering the totality of the evidence and with deference to VASRD §4.3 (reasonable doubt), the Board recommends 30% as the fair and equitable permanent rating for PTSD in this case.

Remaining Conditions. Several relatively minor medical conditions were identified in the NARSUM and MEB physical. These were reviewed by the action officer and considered by the Board. It was determined that none could be argued as unfitting and subject to separation rating. The Board therefore has no reasonable basis for recommending any additional unfitting conditions for separation rating.

BOARD FINDINGS: IAW DoDI 6040.44, provisions of DoD or Military Department regulations or guidelines relied upon by the PEB will not be considered by the Board to the extent they were inconsistent with the VASRD in effect at the time of the adjudication. As discussed above, PEB reliance on SECNAVINST 1850.4E and DoDI 1332.39 for rating PTSD was operant in this case and

the condition was adjudicated independently of that instruction by the Board. In the matter of the PTSD condition, the Board unanimously recommends a 30% permanent rating at exit from TDRL IAW VASRD §4.130. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as additionally unfitting for rating at separation.

RECOMMENDATION: The Board recommends that the CI's prior determination be modified as to reflect permanent 30% disability retirement as indicated below.

UNFITTING CONDITION	VASRD CODE	PERMANENT RATING
Posttraumatic Stress Disorder	9411	30%
	COMBINED	**30%**

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100808, w/atchs.
Exhibit B. Service Treatment Record.
Exhibit C. Department of Veterans' Affairs Treatment Record.

President,
Physical Disability Board of Review

MEMORANDUM FOR DIRECTOR, SECRETARY OF THE NAVY COUNCIL OF REVIEW BOARDS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION
ICO XXXXXXX, FORMER USMC, XXX XX XXXX

Ref: (a) DoDI 6040.44
(b) PDBR ltr dtd 23 Nov 11

I have reviewed subject case pursuant to reference (a) and non-concur with the recommendation of the Physical Disability Board of Review as set forth in reference (b). Therefore, Mr. XXXX's records will not be corrected to reflect a change in either his characterization of separation or in the disability rating previously assigned by the Department of the Navy's Physical Evaluation Board.

Principal Deputy
Assistant Secretary of the Navy
(Manpower & Reserve Affairs)

To: The Recovering Warrior Task Force (RWTF)

From: Michael A. Parker, Wounded Warrior Advocate

Subject: Improper PDBR Ratings of Category II Conditions

Date: 27 November 2012

The PDBR, like the Navy PEB, is improperly rating conditions the Navy PEB designates as Category II conditions. Enclosed is a PDBR case that involves several category II conditions that were not properly rated by the initial Navy PEB or the PDBR.

Paragraph 4111 of SECNAVINST 18504.E defines condition categories as follows:

> *4111 Categorization Of Findings*
> *All PEB findings should be arranged into four categories for members found Unfit to continue naval service:*
> *a. Category I: All Unfitting Conditions*
> *b. Category II: Those Conditions That Are Contributing to the Unfitting Condition.*
> *c. Category III: Those Conditions That Are Not Separately Unfitting, And Do Not Contribute To The Unfitting Condition.*
> *d. Category IV: Conditions, Which Do Not Constitute A Physical Disability.*
> ***Note: Only Category I and Category II conditions will be rated by the PEB.***

Please note that category II conditions are conditions that contribute to the unfitting condition and that *"category I and II conditions will be rated by the PEB".*

10 USC 1216 states:

> ***(b) Consideration of All Medical Conditions.—*** *In making a determination of the rating of disability of a member of the armed forces for purposes of this chapter, the Secretary concerned shall take into account all medical conditions, whether individually or collectively, that render the member unfit to perform the duties of the member's office, grade, rank, or rating.*

This section of 10 USC 1216 was placed into law via the 2008 NDAA. It requires all conditions that contribute to unfitness to be rated per the VASRD.

The 14 October 2008 DoD DTM, which implements the wounded warrior provisions in the 2008 NDAA, states the following:

> *E7.1.2. The Department of Veterans Affairs Schedule for Rating Disabilities* ***(VASRD) shall be used in making ratings determinations for each of the medical conditions determined to be unfitting independently or due to combined effect, to include in combination with an independently unfitting***

condition. *If more than 1 military unfitting condition exists, the VASRD will be used to determine a combined disability rating for each unfitting condition. For purposes of establishing a rating, the VASRD will be used in relation to the Service member's physical disability at the time of the evaluation. If use of convalescent ratings and/or other interim ratings (i.e prestabilization ratings) applies, the Service member may be placed on the Temporary Disability Retired List (TDRL) for reevaluation purposes.*

In short, category II conditions are required to be rated per the rating criteria of the VASRD.

In the enclosed case, the wounded warrior was exposed to several IED and RPG explosions. His Navy PEB found him unfit and separated him with a 10% disability rating. His VA rating is 80% effective from the date of separation. The wounded warrior in this case had several category II conditions identified by the Navy PEB. They include: cognitive disorder, multiple grade two and three concussions, personality change due to a medic, post-traumatic headache, PTSD and major depressive disorder. Below is the rating comparison from the wounded warriors PDBR case:

RATING COMPARISON:

Service IPEB – Dated 20080414		
Condition	**Code**	**Rating**
Post-Concussive Syndrome	8045-9304	10%
Cognitive Disorder	Cat II	
Multiple Grade Two and Three Concussions	Cat II	
Personality Change Due to a Medical Condition	Cat II	
Post-Traumatic Headache	Cat II	
PTSD	Cat II	
MDD	Cat II	
Alcohol Dependence	Cat IV	
↓No Additional MEB/PEB Entries↓		
Combined: 10%		

VA (1/6 Mo. After Separation) – All Effective Date 20080716			
Condition	**Code**	**Rating**	**Exam**
Post-Concussive Syndrome	8045	NSC	20090225
Migraine	8199-8100	50%*	20090225
PTSD	9411	30%**	20080809
No VA entry			
Tinnitus	6260	10%	20090225
Mild Low Back Strain	5237	10%	20080809
Right Knee PFS	5299-5260	10%	20080809
Left Knee PFS	5299-5260	10%	20080809
0% x 1/Not Service Connected x 2			20080809
Combined: 80%			

*Initially deferred, rated 50% on 20090325, retroactive to separation;

** Rating increased from 30% to 50% on 20090325, retroactive to separation.

Note the Navy PEB only rated the individual for post concussive syndrome at 10% and failed to rate the six category II conditions as required by SECNAVINST 1850.4e, 10 USC 1216 and 14 October 2008 DoD DTM. Note the VA rated the headaches and PTSD both at 50% disabling effective the date of separation.

This is an all too common occurrence in the Navy PEB. I have advocated for multiple cases recently that had category II conditions identified but not rated by the Navy PEB. I have made multiple inquiries to the Navy PEB on the issue but they have refused to respond.

The PDBR erred when it failed to properly assess and rate the category II conditions. For example, the PDBR findings state:

> *In the matter of personality change condition, the Board unanimously recommends no change from the PEB adjudications as, Category II, contributing to but not separately unfitting.*

The PDBR, like the Navy PEB, is in error when it states a condition must be separately unfitting to be rated by the PEB. The SECNAVINST 1850.4e clearly shows that category II conditions are to be rated and 10 USC 1216/the 14 October 2008 DoD DTM clearly state that conditions that contribute to unfitness are to be rated IAW with the VASRD.

It should also be noted that the PDBR placed the wounded warrior on the TDRL based on a 50% PTSD rating determination. This is proper but it was improper for the PDBR to conduct a TDRL review of the case as they have no authority in law or regulation to conduct TDRL reviews. This wounded warrior, separated in July of 2008, is well within the five year TDRL window. He should have been referred back to the Navy for a proper and complete TDRL evaluation. The PDBR TDRL evaluation issue is covered in deeper depth in my 05 December 2012 statement to the RWTF.

Enclosure
PDBR Case PD1100184

Michael A. Parker
LTC, USA (Retired)
Wounded Warrior Advocate
ma.parker@yahoo.com

RECORD OF PROCEEDINGS
PHYSICAL DISABILITY BOARD OF REVIEW

NAME:
CASE NUMBER: PD1100184
BOARD DATE: 20120130

BRANCH OF SERVICE: MARINE CORPS
SEPARATION DATE: 20080715

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty member, Cpl/E-4 (0311, Rifleman), medically separated for post-concussive syndrome. He did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards and underwent MEB. Posttraumatic stress disorder (PTSD), post-concussive syndrome and major depressive disorder (MDD), single episode, were forwarded to the Informal Physical Evaluation Board (IPEB) IAW SECNAVINST 1850.4E on the NAVMED 6100_1. An MEB addendum, submitted on behalf of the request of the CI dated 3 April 2008, added migraine associated dizziness, dizziness, vertigo, migraine headaches, hearing loss and tinnitus. Other conditions included in the Disability Evaluation System (DES) packet will be discussed below. The IPEB adjudicated the post-concussive syndrome as unfitting, rated 10%, with likely application of SECNAVINST 1850.4E and DoDI 1332.39 (E2.A1.5). The IPEB determined that PTSD, in partial remission; cognitive disorder, NOS; multiple grade II and III concussions; major depression; standard assessment of concussion score 24 out of 30; multiple IED exposures; personality change due to a medical condition; and, post-traumatic headache were Category II conditions, related to the unfitting diagnosis, but not separately unfitting. Alcohol dependence, in sustained partial remission, was determined to be a Category IV condition, one which does not constitute a physical disability. The CI made no appeals and was medically separated with a 10% disability rating.

CI CONTENTION: "Due to the changes in the NDAA 2008, I am respectfully requesting a review of my medical records. I was diagnosed with sever (sic) Post Traumatic Stress Disorder (PTSD) from my combat experiences in Iraq. During my medical board, I was not looked at for PTSD and several other medical conditions". He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

Service IPEB – Dated 20080414			VA (1/6 Mo. After Separation) – All Effective Date 20080716			
Condition	**Code**	**Rating**	**Condition**	**Code**	**Rating**	**Exam**
Post-Concussive Syndrome	8045-9304	10%	Post-Concussive Syndrome	8045	NSC	20090225
Cognitive Disorder	Cat II					
Multiple Grade Two and Three Concussions	Cat II					
Personality Change Due to a Medical Condition	Cat II					
Post-Traumatic Headache	Cat II		Migraine	8199-8100	50%*	20090225
PTSD	Cat II		PTSD	9411	30%**	20080809
MDD	Cat II					
Alcohol Dependence	Cat IV		No VA entry			
↓No Additional MEB/PEB Entries↓			Tinnitus	6260	10%	20090225
			Mild Low Back Strain	5237	10%	20080809
			Right Knee PFS	5299-5260	10%	20080809
			Left Knee PFS	5299-5260	10%	20080809
			0% x 1/Not Service Connected x 2			20080809
Combined: 10%			**Combined: 80%**			

*Initially deferred, rated 50% on 20090325, retroactive to separation;

** Rating increased from 30% to 50% on 20090325, retroactive to separation.

ANALYSIS SUMMARY: The DES is responsible for maintaining a fit and vital fighting force. While the DES considers all of the Service member's medical conditions, compensation can only be offered for those medical conditions that cut short a career, and then only to the degree of severity present at the time of final disposition. The Board acknowledges the sentiments expressed or implied in the CI's application, i.e., that there should be additional disability assigned for his PTSD condition and for the significant impairment from his service-incurred musculoskeletal conditions which have worsened over time. It is a fact, however, that the DES has neither the role nor the authority to compensate Service members for anticipated future severity or potential complications of conditions incurred in service or resulting in medical separation. The Board's authority resides in evaluating the fairness of DES fitness decisions and rating determinations for disability at the time of separation and, for PTSD, at six months after separation. Moreover, the Board notes that the mere presence of a diagnosis is not sufficient to render the condition unfitting. While the DES considers all of the medical conditions, compensation can only be offered for those medical conditions that cut short a career, and then only to the degree of severity present at the time of final disposition. However, the Department of Veterans' Affairs (DVA), operating under a different set of laws (Title 38, United States Code), is empowered to periodically re-evaluate Veterans for the purpose of adjusting the disability rating should the degree of impairment vary over time. It is noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to the CI's statements in the application regarding medical care or suspected DES improprieties in the processing of his case. However, the Board notes that, contrary to the contention, the IPEB did specifically consider and adjudicate the PTSD condition.

Post Concussive Syndrome Condition with Posttraumatic Stress Disorder and Major Depressive Disorder. The PEB determined that post-concussive disorder was the primary unfitting condition and that PTSD, major depressive disorder, and cognitive disorder were category 2 conditions, conditions that are contributing to the unfitting condition (post-concussive syndrome), but not separately ratable. The conditions are discussed together due to the

intertwined and overlapping nature of symptoms. The Board's challenge was the overall approach to adjudicating this case. After careful consideration of the facts of the case the Board concluded that PTSD was the predominant unfitting condition and that the overlapping symptoms from post-concussive syndrome were appropriately subsumed in the rating for PTSD.

The CI was deployed to Iraq from 4 September 2005 until 29 March 2006. While in theater, he was reportedly exposed to several IED explosions. Medical care for one IED was present in the service treatment record. The CI was medically evaluated on 09 March 2006 when the vehicle he was driving was exposed to an IED blast. The record entry records he bounced his head off the steering wheel incurring a two to three inch "scratch" on the right forehead. He complained of a frontal headache and slight hearing loss of the right ear. He denied loss of consciousness, blurred vision, amnesia, nausea or vomiting. The neurologic examination was normal and he scored 30 on a Folstein mini mental status examination (30 is a perfect score, 25 and above is considered normal). The CI was return to duty with concussion precautions. On a post deployment health assessment dated 4 October 2006, he documented that he was dazed, confused or "seeing stars", but indicated that there was no amnesia or loss of consciousness (LOC). He was first seen in the concussion clinic on 2 May 2007, over a year after the last IED exposure and over a year prior to separation. The CI reported numerous IED and RPG exposures but the incident for which medical care is documented was the primary significant event. He denied LOC with the event but stated he was disoriented for several minutes afterwards. He stated that the initial headaches after the IED blast had essentially resolved while he was on extended emergency family leave (several months), but following return to duty he experienced recurrent headache with putting on his military helmet. At that time, he noted that he had severe headaches 7/10 pain scale with nausea and dizziness when wearing a helmet or even a baseball cap. He also had sleep problems, feeling fatigued, tinnitus of the right ear, twitching of the left arm and hand, decrease cognition, slow thinking, short term memory (STM) loss, increase frustration, irritability, numerous stress symptoms and difficulties driving. The examiner noted "his symptoms had mainly resolved while he was on an eight month emergency leave and he was getting plenty of rest and sleep."

The examiner also noted prior high risk activities to include boxing and skydiving. Subsequent treatment records recorded he suffered stars in seven of his fights but no knock-outs. His standardized assessment of concussion score was 25/30 consistent with his complaints. Thus began a thorough evaluation for postconcussive syndrome. This evaluation included vestibular, neuropsychology, neurology and psychiatry evaluations. While this evaluation was being completed the CI was placed on limited duty (LIMDU) restricting him from carrying a weapon, physical training to tolerance, no PFT, no field work and no shift work for six months with the following diagnoses: mild traumatic brain injury (TBI), PTSD, and major depressive disorder (MDD). Vestibular testing was normal and the examiner opined the dizziness was likely related to migraines. Three neuropsychological assessments were completed prior to separation collectively documented mild memory and processing deficits with an exam consistent with moderate major depression and PTSD. Global Assessment of Functioning (GAF) scores assigned during these evaluations were 60 and 65. At the time of initial neuropsychological testing, 25 July 2007, the neuropsychologist concluded "While the CI's history of concussion cannot be ruled out as a possible contributor to his thinking difficulties, his prominent mood and PTSD concerns are the likely etiology for his memory and processing speed difficulties at this time." Four months prior to separation and despite intervening psychiatric treatment the neuropsychologist commented "Due to significant psychiatric issues, difficult to determine if his problems on the cognitive evaluation are due to the history of blast or psychiatric issues." Testing at that time, 13 March 2008, documented mildly impaired ability to learn and remember new information with mildly slowed processing speed. Earlier the neuropsychologist thought problems were primarily of attention and recommended ADHD medication. The Neurology assessment documented a normal exam, a normal brain MRI and assessed the CI

with postconcussive syndrome, post-traumatic headaches, IED exposures, PTSD and major depression.

During this extensive postconcussive evaluation on 25 June 2007 the CI was emergently cared for an overdose after ingesting eight Vicodin pills combined with a large amount of beer and vodka. The CI attempted to manipulate his way out of substance abuse treatment, but reluctantly entered inpatient Substance Abuse Rehabilitation Program (SARP) in November 2007. The CI reported he "had experienced fifty hangovers and fifty alcohol related black-outs" since January 2007. He "rationalized and justified his drinking a method for controlling his anxiety and insomnia". His first use of alcohol was at age 15 with a historical pattern of binge drinking two times per month from age 16-20. He successfully completed inpatient alcohol treatment and complied with follow-up in the outpatient setting during the MEB process. At the conclusion of his inpatient treatment the multiple clinical exams indicated the CI exhibited most of the symptoms of PTSD but also had troubling paranoid and narcissistic traits. Examiners commented: "However, it is unclear if his personality disturbance existed prior to entry or may reflect a personality change secondary to brain injury." He was thought to remain at increased risk of relapse due to environmental concerns and the other psychiatric issues. He was assigned a GAF of 71 with a diagnosis of cognitive disorder not otherwise specified (NOS), PTSD, delayed in partial remission, and alcohol dependence, in sustained partial remission. The examiner opined the CI remained vulnerable to acute exacerbations of anxiety and agitation and appeared to be at a significant risk for relapse into alcohol dependence especially as he transitions out of the military and recommended continued psychological and psychiatric care through the VA.

The Board directs its attention to its rating recommendations based on the evidence just described. The IPEB adjudicated postconcussive syndrome as unfitting and rated it 10% IAW VARSD 8045-9304. The PEB determined the cognitive disorder; PTSD and MDD were contributing to this condition but not separately unfitting. The VA found postconcussive syndrome as not service connected citing no residuals after rating PTSD (claimed as depression) subsuming the overlapping symptoms of cognitive disorder and insomnia in the rating for PTSD and awarded separate ratings for migraines (subsuming dizziness), and tinnitus. The VA assigned a 30% rating for the PTSD condition based on §4.130 criteria without relying on the provisions of §4.129. The VA rater's rationale for a 30% rating was well elucidated in the rating decision. The rating for PTSD was increased to 50% based on a decreasing GAF score of 45-50 at the six month interval with residual memory issues related to PTSD and insomnia not mild TBI. The VA also cited there was not enough evidence to determine if the personality disorder existed prior to service or was a direct result of the blast injury therefore did not rate. Finally, the VA cited the CI declined to undergo further neuropsychiatric testing and that his recent VA TBI assessment revealed a history of exposure to improvised explosives without traumatic brain injury.

As noted above, the Board considered whether TBI or PTSD was the predominant unfitting condition and whether there was evidence the two diagnoses were separately unfitting and ratable conditions. There was a LIMDU prohibiting weapons use, three neuropsychological assessments concluding PTSD and MDD were significantly contributing to his cognitive disorder, SARP documenting alcohol dependence in remission with PTSD and the NMA's statement noting thirty hours of work missed but otherwise work exceptional. The record available for review supports a single IED injury resulting in a return to duty status. Furthermore there was neither LOC nor amnesia with this injury. This event could be at most a Grade I concussion although not formally diagnosed. Typically individuals recover and are returned to duty or contact sports within a week of a Grade I concussion. The Board considered the abatement of his symptoms while on emergency leave and the resurgence of symptoms when returning to duty which is more suggestive of a psychiatric condition than post-concussive condition. The Board concluded that PTSD, not postconcussive syndrome was the predominant unfitting

condition and that the most accurate way to capture the CI's overall unfitting disability for rating was to rate his PTSD subsuming overlapping cognitive symptoms (IAW TL 07-05; "Symptoms of cognitive impairment and mental disorders such as depression and PTSD often overlap. In such cases, a single evaluation taking into account both conditions may be the most appropriate way to evaluate them"). Post-traumatic headache is discussed separately below.

The first charge before the Board was to determine if this case was a result of a "highly stressful event" (as per §4.129). IAW DoDI 6040.44 and DoD guidance (which applies current VASRD 4.129 to all Board cases), the Board is obligated to recommend a minimum 50% PTSD rating for a retroactive six-month period on the Temporary Disability Retired List (TDRL). The Board must then determine the most appropriate fit with VASRD 4.130 criteria at six months for its permanent rating recommendation. The service treatment evidence did show the CI suffering an IED blast injury, and an injury or death of his fellow Marine in this same incident which was related in later service treatment records. The CI received the combat action ribbon. Therefore the Board determined this case did meet the criteria for a "highly stressful event". All members agreed that the §4.130 criteria for a rating higher than 50% were not met at the time of separation from active duty, and therefore the minimum 50% TDRL rating (as explained above) is applicable.

The most proximate source of comprehensive evidence on which to base the permanent rating recommendation in this case were VA psychiatric outpatient notes encompassing the targeted six-month interval and a VA TBI compensation and pension examination 25 February 2009, seven months after separation. An early December 2008 behavioral health note documented noncompliance with all his medications. A January 2009 speech pathology assessment noted difficulty with memory likely related to PTSD and insomnia with a normal speech evaluation. The speech pathologist opined that the memory problems were more likely due to PTSD and insomnia than to mild TBI. The CI scored in the average range on memory testing administered by the speech pathologist. In February 2009, a behavioral health addendum documented the patient likely has Axis II pathology, declined to undergo neuropsychiatric testing and did not comply with sending results of previous psychiatric testing. The VA TBI compensation exam in February 2009 documented the CI did not have symptoms of sleep disturbance, dizziness, vertigo, weakness or paralysis, fatigue, mobility issues, stagger or fall, attention, concentration nor decision making abilities. The CI was still having mild day to day short term memory issues. The examiner documented no overt psychiatric manifestations with his exam. In March 2009, eight months after separation he related symptoms of obsessive compulsive rituals, losing track of time, impulsivity with mood and money, nightmares, and difficulty with memory. He denied depression and had been happy since being the owner of a new puppy which he felt was therapeutic. He reinitiated driving in September 2008, started living with his girlfriend since December 2008 and was attending college as a full-time student pursuing pre-med course work. He was also working as a bouncer at a local college bar. His mental status exam (MSE) showed a blunted affect, but was otherwise normal. His GAF score was 50, connoting moderate impairment. The examiner noted the CI was smiling, and commented the CI appeared much more relaxed and was not on heightened alert as per prior visits.

As regards to the permanent rating recommendation, all members agreed that the §4.130 threshold for a 70% rating was not approached. A 50% rating IAW §4.130 would rely on an inference that the acuity of reported symptoms could reasonably be expected to result in impaired occupational reliability and productivity, without objective confirmation this was not the case. The deliberation settled on arguments for a 30% versus a 10% permanent rating recommendation. The argument for a 10% permanent rating can be sustained by the §4.130 description for that rating, i.e., "occupational and social impairment due to mild or transient symptoms which decrease work efficiency… only during periods of significant stress; or symptoms controlled by continuous medication." The VA C&P evidenced no decreased work efficiency and no social impairment, without reference to periods of stress. Although symptoms

were not fully controlled, the CI was noncompliant with medications, and this latter stipulation is preceded by "or" not "and." The Board noted the GAF's at the six month interval connoted moderate impairment yet the symptoms and social improvements supported the 10% argument. The Board noted that prior to entering the military, the CI was working as a bouncer (and reported that he drank all the time), and after separation at the six month interval, he not only was working as a bouncer, he was attending college, had a significant relationship with his girlfriend, and maintained sobriety from alcohol. The Board also noted the reports describing the CI's clinical history were not supported by the primary service medical documentation and revealed conflicting symptom reporting. The Board is left to consider, therefore, that the CI's accounts of his symptoms and their severity, which constitute most of the psychiatric evidence, are subject to probative value compromise. In such cases, the Board leans more heavily on the well-grounded evidence such as actual performance and functioning, objective elements of the mental status examination and symptoms which are consistently reported and compatible with clinical expectations. In so doing however, the Board remains cognizant of VASRD §4.3 (reasonable doubt) and favorably concedes matters which it cannot opine to a "more likely than not" standard. All of the evidence, bolstering and reducing support for the higher rating, was debated. The majority of the Board failed, on balance, to find adequate reasonable doubt favoring the CI in support of a recommendation for the higher rating. After due deliberation, considering the totality of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a permanent PTSD disability rating of 10% in this case.

Other PEB Conditions: The other conditions forwarded by the MEB and adjudicated as category 2 conditions by the PEB were cognitive disorder, post-traumatic headache, multiple grade two and three concussion, and personality change due to medical condition. Alcohol dependence in sustained partial remission was a category 4 condition, a condition which does not constitute a physical disability. Cognitive disorder, sleep disturbances, and personality change were subsumed under the §4.130 PTSD rating. After the CI's blast injury he noted residual chronic headaches occurring daily 2/10 pain scale, then about one time per day he has a migraine-like headache which Maxalt immediately resolves. He noted nausea and vomiting with the wearing of a helmet and post exercise. He was seen by neurology, noted to have a normal exam and radiographs and diagnosed with migraines and recommended treatment. In follow-up the CI had improvement in headache frequency and lessening of severity, requiring abortive therapy two times per week. It is clear from the record that headaches prevented the wear of a helmet and thus, he could not meet MOS requirements. Therefore the Board concluded that the headaches were separately unfitting. Although the VASRD offers no specific definition for "prostrating," in practice, the common dictionary definition is applied when rating headaches under the diagnostic code 8100 migraine headaches. The clear English definition of prostrating is "utter physical exhaustion or helplessness," and does not indicate that seeking medical attention is required. There is no evidence that his headaches were prostrating in the record prior to separation. The VA rating was based on the 25 February 2009 C&P exam, over seven months after separation, which documented historical multiple episodes of exercised induced fainting and headaches lasting several hours, three days a week. The fainting spells were documented as occurring while in Marine Special Forces training which he abandoned, yet was not symptomatic enough to deem him unfit and he subsequently deployed. Furthermore these fainting spells were not objectively documented prior to separation or in the VA C&P two weeks after separation. The Board considered that while the CI did not have prostrating attacks prior to separation if he did not wear his helmet (or sometimes service cover); he was prevented from participating in military duties. After due consideration, the Board determined that the headache condition be rated at 0% and coded 8199-8100, analogous to migraine headaches at separation and permanently. The personality change due to a medical condition was adjudicated by the IPEB as a not unfitting Category II condition. The MEB psychiatric addendum dated 22 May 2007, over one year prior to separation, noted paranoid and narcissistic traits. It was unclear if these were pre-existing, secondary to brain injury, or PTSD. Regardless, his commander did not indicate that his work performance was impaired and any personality

change related to mild TBI and PTSD is considered in the rating for PTSD. The history of concussion and cognitive disorder, are discussed above under TBI and PTSD and any related impairments are subsumed under the rating for PTSD. In the matter of personality change condition, the Board unanimously recommends no change from the PEB adjudications as, Category II, contributing to but not separately unfitting. Alcohol abuse is not a separately ratable condition.

Remaining conditions. Other conditions identified in the DES include blurred vision, right hand pain, bilateral knee pain, and low back pain. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically significant during the MEB period, none were the basis for limited duty and none were implicated in the NMA. These conditions were reviewed by the action officer and considered by the Board. It was determined that none could be argued as unfitting and subject to separation rating. Tinnitus was rated by the VA within twelve months of separation. This was in the DES file but there was no documentation in the record that it impaired duty. The Board, therefore, has no reasonable basis for recommending any additional unfitting conditions for separation rating.

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. In the matter of the PTSD, the Board by a vote of 2:1 recommends that the CI's prior separation be modified to reflect that the CI was placed on the TDRL at 50% for a period of six months (PTSD at 50% IAW §4.129 and DoD direction) and then permanently separated with severance pay by reason of physical disability with a final 10% rating as indicated below. The single voter for dissent (who recommended TDRL at 50% for a period of six months (PTSD at 50% [IAW §4.129 and DoD direction] and then permanent 30% disability and retirement) submitted the addended minority opinion. In the matter of the posttraumatic headache condition, the Board unanimously recommends that it be added as an additionally unfitting condition for separation rating; coded 8199-8100 analogous to migraine and rated 0% IAW VASRD §4.124a. In the matter of the blurred vision, right hand pain, bilateral knee pain, and low back pain, tinnitus or any other condition eligible for Board consideration, the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation.

RECOMMENDATION: The Board recommends that the CI's prior determination be modified as follows; TDRL at 50% for 6 months following CI's prior medical separation (PTSD at minimum of 50% IAW §4.129 and DoD direction) and then a permanent separation with a 10% disability rating as indicated below.

UNFITTING CONDITION	VASRD CODE	TDRL RATING	PERMANENT RATING
PTSD	9411	50%	10%
Migraine Headaches	8199-8100	0%	0%
	COMBINED	**50%**	**10%**

The following documentary evidence was considered:

Exhibit A. DD Form 294 dated 200110308, w/atchs
Exhibit B. Service Treatment Record
Exhibit C. Department of Veterans' Affairs Treatment Record

President
Physical Disability Board of Review

MINORITY OPINION:

The minority voter concludes a 30% permanent rating for PTSD at the end of the six month constructive TDRL period is appropriate in this case based on the evidence of the record and application of VASRD §4.3 (reasonable doubt) and §4.7 (higher of two evaluations). The post separation examinations document CI report of continued symptoms of PTSD including sleep disturbance, hypervigilance, irritability, and mood swings. Although going to college and working in the same occupation he had prior to entering military service, the VA neurology encounter 14 January 2009 documents CI report of difficulties with school due to memory and concentration problems. The comments and Global Assessment of Functioning ratings by the examining psychiatrists also indicate their assessment of moderate impairment that more nearly approximates the 30% rating. VA treatment records up to a year after separation do not reflect improvement. The minority voter acknowledges that there was scant direct evidence regarding occupational functioning at the time of permanent rating requiring an assessment based on symptom report. When speculation is required, reasonable doubt should weigh heavily in Board deliberations. The minority voter concludes that considering the evidence and mindful of VASRD §4.3 (reasonable doubt), a permanent disability rating of 30% for PTSD in this case is appropriate, fair and equitable.

MEMORANDUM FOR DEPUTY COMMANDANT, MANPOWER & RESERVE AFFAIRS
COMMANDER, NAVY PERSONNEL COMMAND

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATIONS

Ref: (a) DoDI 6040.44
(b) PDBR ltr dtd 22 Feb 12 ICO
(c) PDBR ltr dtd 28 Feb 12 ICO
(d) PDBR ltr dtd 24 Feb 12 ICO

1. Pursuant to reference (a) I approve the recommendations of the PDBR set forth in references (b) through (d).

2. The official records of the following individuals are to be corrected to reflect the stated disposition:

a. XXXXXX, former USN, : Placement on the Temporary Disability Retired List (TDRL) with a 50 percent disability rating for the period 26 October 2006 through 25 April 2007 followed by disability separation with a final rating of 10 percent effective 26 April 2007.

b. XXXXX, former USMC: Placement on Permanent Disability Retired List with a 30 percent disability rating effective 30 June 2008.

c. XXXXXX, former USMC: Placement on the TDRL with a 50 percent disability rating for the period 15 July 2008 through 14 January 2009, followed by disability separation with a final rating of 10 percent effective 15 January 2009.

3. Please ensure all necessary actions are taken, including the recoupment of disability severance pay if warranted to implement these decisions, and notification to the service members once those actions are completed.

Assistant General Counsel
(Manpower & Reserve Affairs)

Disability Evaluation System (DES) Issues Brief

Presented to
Representative David Loebsack of Iowa
Member, House Armed Services Committee
(Personnel Subcommittee)

Presented by
Michael A. Parker
Wounded Warrior Advocate
LTC, USA (Retired)
ma.parker@yahoo.com
703-424-3422
November 15th, 2012

Goal : To increase Congressional awareness of issues that are preventing wounded warriors from receiving proper disability benefits. Gain Congressional support to ensure wounded warriors get proper disability benefits

- Topics to discuss:
  - Military Services not following law in respect to presumption of sound condition and presumption of service aggravation (Section 727 of the 2009 NDAA)
  - Wounded warriors still evaluated under Legacy DES vice Integrated DES
  - HR 6574 - The Servicemember Mental Health Review Act
  - Guard/Reserve DES problems
  - Concurrent Receipt Issues for Disability Retirees

Presumptions of Sound Condition and Service Aggravation

- 2009 NDDA (Section 727) placed DoD on same presumption standards as the VA (38 USC 1111).
  - Standard states that unless a condition is noted on entry physical, a member is presumed to have entered active duty in sound condition. This presumption can only be overcome with clear and unmistakable evidence (undebatable) to the contrary.
  - Even if a condition in fact Existed Prior To Service (EPTS), the condition is presumed aggravated by service. Clear and unmistakable evidence is required to overcome the presumption of service aggravation.

- Prior to this law, DoD presumption standards only required a preponderance of evidence to overcome presumptions of sound condition and aggravation. Hereditary/genetic conditions presumed to have Existed Prior to Service (EPTS).

- DoD captured the presumption standards in its 14 October 2008 DTM. However, DoD is not properly monitoring or enforcing the standard.

Cases of PEBs Failing to Properly Apply Presumption Standards (PO2 Daniel Kinberg)

- Navy reservist (Field Corpsman) placed on active duty in 2009 for a combat tour in Afghanistan.
- Upon return from Afghanistan, diagnosed with Ankylosing Spondylitis (AS) and severe PTSD by both Navy doctors and VA. Undergoes DES processing.
- MEB and VA both service connect AS and PTSD. VA rates PTSD at 100% disabling and AS at 20% disabling*.
- Navy PEB finds both PTSD and AS unfitting but EPTS w/o aggravation. Orders him separated from Service without DoD disability benefits. Navy PEB does not provide clear and unmistakable evidence to overcome presumptions of soundness and aggravation.
- LTC (R) Parker challenges Navy EPTS determination. Navy conducts "quality review". PEB determines there is not clear and unmistakable evidence to overcome presumptions. However, new PEB decisions states PTSD (rated 100% disabling by the VA) is no longer considered unfitting. PO2 Kinberg ordered separated at 20% disabled with disability severance rather than disability retirement.

* *PO2 Kinberg's AS not properly rated by VA. VA fails to properly apply VASRD DC 5009-5002 rating criteria. Rating for his AS should be in 40-60% range. Currently appealing VA AS ratings.*

Cases of PEBs failing to Properly Apply Presumption Standards (PO2 Daniel Kinberg, Continued)

- LTC (R) Parker challenges new Navy PEB determination that PTSD is not unfitting as the Navy PEB failed to follow proper fitness determination standards and procedures as outlined in DoDI 1332.38.
- Navy PEB reverses course and deems PTSD unfitting.
- PO2 Kinberg goes from separate without DoD disability benefits, to separate with disability severance to full DoD disability retirement based on a 100% disability rating.
- Navy PEB failed to follow well established disability processing procedures. Tried to separate PO2 Kinberg as cheaply as possible.
- Took outside advocacy to force the Navy PEB to properly follow well established disability laws and procedures and award PO2 Kinberg proper DoD disability benefits.
- NBC article covered PO2 Kinberg situation. See comments posted to article for deeper details not covered in article.
    - *http://usnews.nbcnews.com/_news/2012/08/22/13339784-red-tape-entangles-injured-service-members-who-can-no-longer-deploy#comments*

Cases of PEBs Failing to Properly Apply Presumption Standards (SGT Lynn Jarvis)

- Member of Ohio National Guard since July 2003.
- Activated and deployed to Iraq, JUL 2005 – DEC 2006. While in Iraq, manned burn pits and exposed to burn pit containments.
- Upon completion of tour in Iraq, returns to National Guard status.
- 2009 Diagnosed with malignant brain tumor (terminal).
- Oncologist declares tumor began 3-5 years prior to diagnosis (DEC 2004 - DEC 2006 timeframe).
- Ohio National Guard Line of Duty Report , Medical Evaluation Board and Veterans Administration declare condition is service connected and tied to burn pit exposure. VA rates condition 100% disabling.
- Army PEB declares the condition is EPTS w/o aggravation. Finds member should be separated without DoD disability benefits.

Cases of PEBs failing to Properly Apply Presumption Standards (SGT Lynn Jarvis, continued)

- LOD sent to Army HRC for resolution.
- PEB failed to adjudicate case as if favorable LOD is correct as required by AR 40-501 and by USAPDA policy.
- Favorable LOD cites 2010 VA training letter for adjudicating burn pit cases.
- PEB failed to properly apply DoDI 1332.38 E3.P4.3. Applicable Statute for Reserve Component Members:

  A Reserve component member shall be adjudicated under the statutory provisions applicable to his or her duty status at the time of onset or aggravation of the condition for which the member is determined unfit. This means a Ready Reserve member not on extended active duty at the time of his or her referral into the DES, but who is determined unfit for a disability incurred or aggravated while the member was on a call to active duty of more than 30 days, comes under the provisions of 10 U.S.C. 1201 - 10 U.S.C. 1203 and not 10 U.S.C. 1204 – 1206 (reference (b)). In such a situation, "in line of duty while entitled to basic pay" rather than "proximate result" is the applicable statutory requirement for entitlement to disability compensation.

What Congress Needs to Do on DoD Presumptions Issue

- Congress request a GAO investigation into EPTS issue. Is DoD properly applying presumptions of soundness and aggravation as required by law?
- Require DoD to report all disability cases where VA service connects a condition but a DoD PEB does not.
- Develop a review board to review all EPTS cases since October 2008 where DoD failed to provided clear and unmistakable evidence to overcome presumptions of service connection and/or aggravation.
- Improve Guard/Reserve member protections for presumption of service connection and service aggravation. Tie it to VA service connection determinations. If VA service connects condition, then DoD needs to service connect the condition or provide clear and unmistakable evidence to the contrary.
- Apply clear and unmistakable evidence standards to Line of Duty (LOD) determinations. Currently, LODs are declaring injuries/diseases EPTS w/o aggravation without any rationale to support the claim. (Big issue for Guard and Reserve Members).

Wounded Warriors Still Evaluated Under Legacy DES Vice Integrated DES (IDES)

- DoD states the IDES is fully implemented throughout DoD as of October 2011. IDES designed to ensure proper disability evaluation and ratings and to expedite VA compensation.
- However, DoD wrote policy that states Services do not have to use IDES for new entrants, cadets/midshipmen or TDRL cases.
- Per this DoD policy, Services can evaluate under the legacy DES which does not provide same level of protection and delays receipt of VA benefits.
- Legacy cases are rated by the PEB. PEB ratings have historically failed to correctly apply disability laws and regulations resulting in low balled disability ratings.
- VA IDES ratings have a much more robust appeal process available to the wounded warrior. Legacy DES ratings do not have this protection.
- DoD policy appears to be driven by need to manage IDES timeline which has come under greater scrutiny by Congress.

Case Example of Wounded Warrior Denied IDES Evaluation (A1C John Trew)

- Enters active duty Air Force in March 2011.
- Injures hips six weeks into training – Fell through steps in mock training village.
- Treated for muscle strain with Motrin. 4 weeks later X-Ray detects bone issue.
- Bone scan confirms bilateral avascular necrosis of the femoral head (grade III and IV).
- Bilateral hip replacement required (Aug 2011 and April 2012).
- AF currently evaluating A1C Trew under Legacy DES process. VA claim will not get started until after separation from Air Force.

Case Example of Wounded Warrior Denied IDES Evaluation (A1C John Trew, Continued)

- PEB rating should be initially 100% based on hip replacement within 1 year.
- VA rating should be 100% based on hip replacement within 1 year.
- DoD disability retirement around $1,300 a month (75% of basic pay).
- VA compensation $2,756 a month for 100% rating.
- Based on current backlog, he will not get VA compensation until around 1 year post separation.
- Could have received VA disability compensation immediately upon separation if evaluated under IDES.
- Making these wounded warriors undergo legacy DES process delays proper receipt of disability benefits at the time they need it most – transition back to the civilian world.
- Delays their use of GI Bill, VA VOC rehab and other VA programs due to lack of VA rating decision.
- While these wounded warriors should be focusing on their transition to the civilian world, they have to instead fight and wait for VA benefits.

What Congress Needs to Do on Legacy DES Vice IDES Problem

- Congress needs to pass legislation to ensure all wounded warriors are evaluated under the IDES to ensure timely and proper disability benefits from both DoD and VA.

- Congress needs to focus their IDES concerns on the quality of the evaluations instead of the timeliness of the evaluations.
  - Congressional focus on IDES timeliness is having widespread negative impacts on the quality of the evaluations and this has lifetime impacts on the wounded warriors and their family.

HR 6574 - The Servicemember Mental Health Review Act

SEC. 2. FINDINGS.

(1) Since September 11, 2001, approximately 30,000 veterans have been separated from the Armed Forces on the basis of a personality disorder or adjustment disorder.

(2) Nearly all veterans who are separated on the basis of a personality or adjustment disorder are prohibited from accessing service-connected disability compensation, disability severance pay, and disability retirement pay.

(3) Many veterans who are separated on the basis of a personality or adjustment disorder are unable to find employment because of the 'personality disorder' or 'adjustment disorder' label on their Certificate of Release or Discharge from Active Duty.

(4) The Government Accountability Office has found that the regulatory compliance of the Department of Defense in separating members of the Armed Forces on the basis of a personality or adjustment disorder was as low as 40 percent between 2001 and 2007.

(5) The establishment of a Mental Health Discharge Board of Review to review the separation of veterans who are separated on the basis of a personality or adjustment disorder is warranted to ensure that any veteran wrongly separated on such basis will have the ability to access disability benefits and employment opportunities available to veterans.

HR 6574 - The Servicemember Mental Health Review Act

- Bill is much needed to correct injustices of the past.
- PTSD often called Personality Disorder or Adjustment disorder to avoid paying DoD disability benefits.
- Congress restricts personality disorder discharges but does not address adjustment disorder discharges.
  - *Result: Personality disorder discharges declined significantly, adjustment disorder discharges shot through the roof.*
- Recent IDES problem had VA diagnoses PTSD only to have Army change diagnosis to a non compensable mental health condition.
- DoD orders a review on DES mental health cases – Status unknown. Review does not include personality /adjustment disorder cases not referred to the MEB.
- Currently seeing trend where PTSD is not called unfitting by PEB despite being rated 50-70% disabling by VA.

HR 6574 - The Servicemember Mental Health Review Act

- Bill needs to be expanded to cover:
  - Fit but unsuitable cases: PEB states a condition is not unfitting but then Service discharges member for being unsuitable for retention or reenlistment.
    - Recent laws passed by Congress to prevent this practice have been thwarted by Services.
  - EPTS cases: Cases where a condition was deemed EPTS w/o aggravation to ensure proper adjudication in compliance with disability laws and regulations.

Guard/Reserve DES Problems

- LODs arbitrarily deeming conditions EPTS
- Reservist not maintained on active duty to complete DES evaluation (required by law and policy).
  - Negatively affects PTSD ratings, EPTS protections, access to important services at WTU's.
- Reserve and Guard members not properly referred for disability evaluation.

Concurrent Receipt Issues for Disability Retirees

- Concurrent Receipt of Disability Benefits (CRDP)
  - Current Law (10 USC 1414) requires disability retirees to have 20 years of service be eligible for CRDP. Length of Service (LOS) retirees do not have this requirement.
  - TERA - Over 50,000 LOS retirees with less than 20 years service can get CRDP with a VA rating of 50%+.

- Combat Related Special Compensation (CRSC)
  - CRSC Glitch – DoD CRSC calculation method shorts Disability Retirees out of due CRSC payments.
    - See DES Outrage # 8 - Congress has a NDAA amendment to fix the problem but it has yet to be included.

To: The Recovering Warrior Task Force (RWTF)

From: Michael A. Parker, Wounded Warrior Advocate

Subject: Feedback and Comments on the PDBR brief to the RWTF

Date: 28 November 2012

Below are my comments, questions and concerns from the PDBR's brief to the RWTF due to be presented at the 5 December 2012 RWTF meeting.

Slide 8:

2,350 of 5,087 PDBR applications have been adjudicate by the PDBR. 855 cases (36%) of those 2,350 cases resulted in an upgrade to disability retirement.

However, 501 PTSD cases submitted to the PDBR were administratively closed by the PDBR because they were settled under the Sabo class action lawsuit. Sabo lawsuit cases all received disability retirement (at least temporarily on the TDRL).

Thus, a total of 1,356 cases submitted to the PDBR resulted in upgrades to retirement (855 upgrades by PDBR action and 855 upgraded by Sabo settlement action).

Thus 47% of the 2,851 cases handled by the PDBR and Sabo class action settlement resulted in an upgrade to disability retirement.

The 36% retirement upgrade number used by the PDBR dilutes the overall problem of erroneous, low-balled PEB disability ratings that were not compliant with VASRD rating criteria.

Slide 8:

The PDBR brief states/infers they had 1,105 PDBR eligible cases that were part of the Sabo (PTSD) cases action lawsuit. 501 of those cases were administratively closed by the PDBR without action. 265 of those cases were adjudicated by the PDBR prior to the final Sabo settlement arrangement. That accounts for 766 of the 1,105 PDBR eligible cases. What is the status of the remaining 339 cases?

Slide 8:

PDBR states 36% of the cases resulted in an upgrade to disability retirement. It does not state if they were upgraded to permanent disability retirement or temporary disability retirement and then downgraded to disability separation by the PDBR

conducting TDRL reviews. (See my public forum statement to the RWTF on this issue). How many PDBR cases resulted in permanent disability retirement? How many PDBR cases resulted in placement on the TDRL only to have the PDBR conduct a TDRL review and separate the member for the TDRL with disability separation?

Slide 8:

PDBR states: "789: Total traditional cases administratively". What does this mean?

Slide 8:

PDBR statistic shows Navy/USMC have the lowest rate (30%) of cases being upgraded by the PDBR to disability retirement. This can falsely lead one to conclude the Navy PEB decisions were more often correct than the Army or Air Force. However, the Navy/USMC used the "fit but unsuitable scheme" to remove disabled members from the ranks without paying them disability benefits. This scheme had the PEB finding the individual fit for duty only to have the Navy/USMC discharge the individual or deny them reenlistment based on the condition the PEB deemed not to be unfitting. Congress has since passed legislation banning this practice. Fit but unsuitable cases are ineligible for PDBR review as the member never received a PEB disability rating percentage.

Slide 9:

PDBR statistics show the Navy is at least seven times more likely to reject a PDBR decision than the other Services. Why is the Navy rejecting such a higher proportion of PDBR recommendations?

Two marines I advocated for filed for PDBR review resulting in a PDBR decision to upgrade them to permanent disability retirement. These PDBR recommendations were rejected by the Secretary of the Navy. The Secretary of the Navy rejection letters stated the member would be given TDRL status for six months and then separated at 10% disabled for PTSD. What these letters failed to mention was the fact the PDBR had actually recommended TDRL for six months followed by permanent disability retirement. I had to request from the Navy CORB documents that made the recommendation to the Secretary of the Navy to reject the PDBR findings.

Unbelievably the reason for the rejection centered on Navy specific non VASRD rating criteria that Congress banned from further use. The driving factor for the PDBR was the fact Services were rating disabilities with non VASRD rating criteria. The PDBR originally tried to use non VASRD criteria to be used on cases resulting in separation prior to January 2008. Congress put a halt to that yet the Navy was using the banned rating criteria as a basis to reject PDBR recommendations.

Fortunately the two marines involved filed to be included in the Sabo class action lawsuit. The results of the Sabo lawsuit settlement granted them permanent disability retirement as they had been separated for unfitting PTSD and had never been rated less than 30% by the VA for PTSD.

I have enclosed DES Outrage 15 that provides deeper details on these two marines' cases.

Slide 12:

PDBR states that the first mailing notification to wounded warriors eligible for PDBR review resulted in *an "8% application rate to the PDBR (similar to overall application rate prior to mailing)".*

Another way of looking at this statistic is that the PDBR mailing doubled the application rate for PDBR review.

Enclosure
DES Outrage 15

Michael A. Parker
LTC, USA (Retired)
Wounded Warrior Advocate
ma.parker@yahoo.com

DES Outrage # 15, The Navy Continues to Use the Same Old Tricks to Deny Disability Benefits to Wounded Warriors.

I haven't written a *DES Outrage* in a while but that doesn't mean I have run out of issues to write about. Rather, I have been quite busy assisting wounded warriors trying to gain their legally due DoD disability benefits. Much of the assistance I have given in the last six months was in support of marines who were systematically cheated out of their disability benefits by the Navy DES system. I now have the time to relay the problems and concerns I encountered supporting these marines.

As background, the 2007 Walter Reed press coverage revealed numerous deceitful tactics DoD and the Services used to cheat wounded warriors out of their DoD disability benefits. Some of these key tactics were:

- Use of non Veterans Administration Schedule for Rating Disabilities (VASRD) rating criteria to low-ball DoD disability ratings.

- Failing to cover all medical conditions in the Medical Evaluation Board (MEB) as required by DoDI 1332.38.

- Finding members fit for duty and then administratively separating them without DoD disability benefits for the same condition for which they were found "fit" for continued service.

- Calling PTSD personality or adjustment disorder to avoid paying disability compensation.

- Physical Evaluation Boards (PEB) arbitrarily cherry picking which disabilities to deem unfitting thus keeping the overall DoD disability ratings below the 30% disability retirement level.

- Avoiding transparency to keep wounded warriors in the dark on disability decisions. Wounded warriors can't appeal what they don't know.

The cases of three marines I have recently assisted clearly show that the Navy, despite all the DoD and Congressional fixes to issues listed above, continue these practices to the detriment of wounded warriors and their families. In my next *DES Outrage*, I will cover the case of Sergeant Roy Sanchez, USMC. I covered aspects of Sergeant Sanchez's case in *DES Outrage # 14,* which can be found here:

http://www.pebforum.com/content/des-outrage-14-navy-peb-ignores-law-does-its-own-thing-deny-disability-benefits-60/

Sergeant Sanchez recently received his findings from his formal PEB petition for relief to the Navy Council of Review Boards (CORB). These results are shocking evidence of the corruption that still runs rampant in the Navy Disability Evaluation

System (DES). Sergeant Sanchez is now vulnerable to being administratively separated due to the service impacts of his so called "fitting" medical conditions.

Note to the U.S. Senate: Section 571 of the Senate's Version of the 2011 National Defense Authorization Act (S. 3454) addresses the "fit but unsuitable problem". Unfortunately, if it is passed as written, it will not put an end to the Navy's "fit but unsuitable" practice discussed in *DES Outrage # 3*, found here: http://www.pebforum.com/content/des-outrage-week-3-dod-uses-fit-but-unsuitable-practice-deny-disability-benefits-33/

At best, Section 571 only closes the deployability loop hole. Unfortunately, deployability is only one of numerous methods the Navy uses to administratively discharge members due to the impacts of their supposedly "fitting" medical conditions. The Navy is way ahead of the Senate's provision and they will continue the "fit but unsuitable" practice despite the intent of Section 571. I will provide further details in my next *DES Outrage*.

This *DES Outrage* covers the cases of two marines with PTSD and how the Navy continues to cheat them out their disability benefits. It is one of my longer *DES Outrages* because I need to walk through numerous problems and concerns. Both marines were found unfit due to PTSD and medically separated with less than a 30% military disability rating. Again, a 30% rating is the minimum level required for DoD disability retirement. The original Navy PEB findings low-balled these marines' disability ratings by using non VASRD rating criteria and by failing to apply VASRD provision 4.129 which states:

> *§4.129 Mental disorders due to traumatic stress.*
>
> *When a mental disorder that develops in service as a result of a highly stressful event is* **severe enough to bring about the veteran's release from active military service,** *the rating agency shall assign an evaluation of not less than 50 percent and schedule* **an examination** *within the six month period* **following the veteran's discharge** *to determine whether a change in evaluation is warranted. (Authority: 38 U.S.C. 1155) (Emphasis added)*

In response to the problem of tens of thousands of wounded warriors being cheated out of their disability benefits, Congress established the Physical Disability Board of Review (PDBR) under 10 USC 1544a. The PDBR reviews disability cases that resulted in ratings of less than 30% to determine if they should have received higher DoD ratings. Initially DoD tried to mute the effect of the PDBR by stating the PDBR could continue to use non VASRD rating criteria and that the PDBR only had to review conditions deemed unfitting by the Physical Evaluation Board (PEB). Congress was outraged when they found out about DoD's continuing shenanigans to cheat wounded warriors. Two articles that covered these issues and Congress's response can be found here:

http://www.military.com/features/0,15240,185783,00.html

http://www.military.com/features/0,15240,190478,00.html (Second Half of Article)

In response to the Congressional outrage, DoD modified its PDBR procedures to ban non VASRD rating criteria and to allow the PDBR to review conditions not found unfitting by the PEB. Problem fixed? Not so fast.

In 2007, LCPL Raymond Vito was diagnosed with PTSD, found unfit, rated a mere 10% by his Navy PEB and medically separated. Upon discharge, he was immediately diagnosed with PTSD by the VA and rated 30%, a rating that continues to this date. (The VA should have assigned an initial 50% rating under the provisions of VASRD 4.129) LCPL Vito was an ideal case for PDBR review as he was immediately rated at 30% by the VA for the same condition the Navy PEB deemed unfitting but rated at only 10%.

When LCPL Vito received his notification from the Navy on the results of his PDBR review he was shocked. The decision was to retroactively place him on the Temporary Retirement Disability List (TDRL) at 50% for the first 6 months after his discharge per the provisions of VASRD 4.129. After the first six months, however, the decision was to return his rating to 10%, remove him from the TDRL and to separate him without disability retirement benefits.

How could the PDBR recommend a 10% rating in light of the fact the VA had rated him at 30% for PTSD from the day he left service? The truth is they didn't. The PDBR recommended to the Navy that LCPL Vito be permanently retired for PTSD with a 30% disability rating. It turns out that the Navy, based on a recommendation by the Navy Council of Review Boards (CORB), ignored the PDBR's recommendation and changed the final disability rating to 10% and separation without disability retirement. Worse, the Navy never informed LCPL Vito that the PDBR recommendation was different than the Navy decision nor did the Navy provide LCPL Vito with the PDBR and Navy rationales for their respective decisions. Instead, LCPL Vito received a generic letter from the Navy stating the results of the PDBR process was that he would receive a 50% rating for six months followed by a 10% rating and separation without disability retirement.

When I finally got my hands on the PDBR and Navy rationale documents from LCPL Vito's case, it became obvious the Navy based their 10% rating not on VASRD criteria, but on their own non VASRD criteria from the Navy's 2002 DES instruction (SECNAVINST 1850.4e). It was the fact DoD and the Services were using non VASRD rating criteria to low-ball disability ratings that created the need for PDBR reviews in the first place. Again, DoD initially tried to continue using non VASRD rating criteria but Congress put a stop to it. Now it turns out that the Navy is rejecting PDBR decisions because they are not in keeping with the Navy's non VASRD rating criteria. Unbelievable! We are back at square one! And worse, the Navy is doing this covertly without informing the wounded warrior of what is going on.

Here is a breakdown of the details:

The VASRD 30% rating criteria for PTSD is as follows:

> *"Occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events) ….30%."*

Based on the criteria above, both the VA and the PDBR rated LCPL Vito at 30% disabled due to PTSD. In fact, the PDBR rationale stated LCPL Vito's MEB NARSUM supported a 50% PTSD rating and that his post separation assessment met some of the criteria for a 50% PTSD rating.

The 29 July 2010 Navy CORB letter to the Assistant Secretary of the Navy for Manpower and Reserve Affairs offered the first clue that demonstrate the Navy is continuing to use non VASRD criteria to justify low-balled ratings. In paragraph 3, the letter states:

> *"……however, the [CORB] Medical Officer non-concurred with the recommendation Mr. Vito be placed on the Permanent Disability Retirement List with a 30 percent rating. It is his opinion that a 10 percent final rating for PTSD is warranted based on the evidence which does not substantiate sufficient occupational impairment to warrant a 30 percent rating under the Veterans Administrations Schedule for Rating Disabilities Code 9411."*

So what substantiates sufficient occupational impairment in the eyes of the Navy and why does it differ from the definition used by the PDBR and the VA? The answer is that the Navy is using non VASRD criteria from their 2002 SECNAVINST 1850.4e. In the CORB Medical Officer's 29 July 2010 opinion, he list reference (b) as SECNAVINST 1850,4e. Then, the CORB Medical Office states:

> *"…the "permanent" disability rating thereafter turns on the interpretation of the following sentence from the 25 July 2007 EAST ORANGE VA PTSD EVALUATION: He is working as a garbage truck driver. He is generally able to do the job and does not report any problems at work"*

The CORB Medical Officer took one sentence from the VA evaluation, in isolation, to justify his "opinion". Further, the VA exam was a mere two months after LCPL Vito's separation from service and he had just started his new job. Again, the VA should have assigned an initial rating of 50% IAW VASRD 4.129 and schedule a follow up exam within six months to determine whether a change in evaluation was warranted. The CORB Medical Officer's opinion leverages off a process error made by the VA in enforcing VASRD 4.129.

However, the fatal error in the CORB Medical Officer's opinion is in paragraph 5 where he states:

> *Conclusion: NON-CONCUR with PDBR's recommended permanent disability rating of 30% (vice 10%) –cf., **§9011k.(1) (b), reference (b),** …."* (Emphasis added).

Paragraph 9011k. (1) (b) of SECNAVINST 1850.4e states:

> *(b) Vocational functional impairment. Since the 30% rating in the VASRD requires "…intermittent periods of inability to perform occupational tasks," the following definition of vocational functional impairment is provided: Symptoms of a psychiatric condition causing a period or periods of "inability to perform occupational tasks" **should be of such severity as to result in a pattern of job loss, demotion, disqualification from obtaining employment, or inability to engage in or maintain reasonable employment.** "Reasonable employment" is determined, in part, by considering the service member's premorbid vocational adjustment, education, and accomplishments. (Emphasis added)*

The VASRD does not require job loss, demotion, disqualification from obtaining employment, or inability to engage in or maintain reasonable employment to qualify for a 30% PTSD rating. It does require such factors for higher PTSD ratings, such as the 100% PTSD rating requirement for 'total occupational impairment, but not the 30% rating.

The overall paragraph 9011 in SECNAVINST 1850.4e is titled, "*Instructions for Specific VASRD Codes".* The reason Congress established the PDBR was because VA ratings for conditions were drastically different than the military rating despite the fact that all ratings were required to be done in accordance with VASRD criteria. Title 10 has always required the use of the VASRD to rate conditions deemed unfitting by the military. Numerous federal court opinions and even a 1994 DoD General Counsel opinion have reinforced the VASRD rating requirement. However, over the years, DoD and the Services created their own rating criteria to replace or modify VASRD criteria. The effect was low-balled military disability ratings which all too often dropped the rating below 30%, the level needed to qualify for disability retirement. Congress took action in the 2008 NDAA and made it clear that VASRD was the rating criteria that Services must use to rate unfitting conditions. And, as discussed earlier, Congress had to reign in DoD to ensure the PDBR did not use non VASRD rating criteria.

As a result of Congressional action, DoD rescinded its non VASRD criteria document, DoDI 1332.39, and released a directive type memorandum stating the VASRD would be the sole rating criteria for rating disabilities. (Like SECNAVINST 1850.4e, DoDI 1332.39 also modified the VASRD criteria for PTSD.) We now find out that the Navy apparently never got the memo and they continue to use Non VASRD

criteria to rate unfitting conditions. The Navy is continuing to low-ball disability ratings using the same non VASRD criteria that drove the need for the PDBR in the first place. Disabled sailors and marines are caught in a do-loop designed to deny legally due disability benefits!

Even if the non VASRD criteria were allowed, it would have to be consistent among the military services. Paragraph 3.7 of DoDD 1332.18 states:

> *The **standards** for **determining** unfitness because of physical disability or medical disqualification and the **compensability of unfitting disabilities shall be uniform among the Services** and between components within an individual Service. (Emphasis added)*

The fact that the Navy continues to rate conditions with Navy specific, non VASRD rating criteria would explain why the Navy rejects PDBR decisions at a rate six times higher than that of the Army according to PDBR data released earlier this year. (The same data indicates the Air Force accepts 100% of the PDBR recommendations.)

LCPL Erica Kelly's case is similar to that of LCPL Vito's. As documented in her PDBR review findings, the critical events of LCPL Kelly's PTSD diagnosis and ratings are as follows:

> *"On 20050201[LCPL Kelly] was examined by a Navy Psychiatrist (Dr. S)."*
>
> *"He [Dr. S.] said she was physically fit for full duty, but unsuitable for ongoing military service in the Marine Corps"*
>
> *"He [Dr. S.] diagnosed Adjustment Disorder with Mixed Disturbances of Emotion and Conduct & Personality Disorder – not otherwise specified." She had no medically boardable conditions, and he recommended Administrative Separation."*
>
> *"The following month (March 2005), Medical Evaluation Board (MEB) action was initiated. Psychiatric Narrative Summary (NARSUM) was done by Dr. F. [LCPL Kelly] was suffering from insomnia, recurrent thoughts and nightmares related to the mortar incident. [LCPL Kelly] complained she was unable to enjoy fireworks. She reported difficulty completing tasks, and being easily distracted. Dr F. determined that Global Assessment of Functioning (GAF) score was 55 and diagnosis was PTSD. He made no mention of her other two Psychiatric Disorders."*
>
> *"The MEB referred [LCPL Kelly] to the Physical Evaluation Board (PEB)."*
>
> *" The PEB considered the evidence from both Psychiatric evaluations* [Dr. S and Dr. F.]. *They determined that none of her conditions were separately*

*unfitting. However, the Overall Effect of her three psychiatric diagnosis made her unfit for military service. She was separated at 0%."**

"Three (3) months following separation, she went to the VA and was rated at 50% for PTSD." [The effective date of the VA rating is 10012005, the day after LCPL Kelly was separated from service]

* It is important to note that the Navy PEB had an internal policy stating that if a condition contributed to unfitness, but was not independently unfitting, the rating could be no greater than 0%, regardless of the VASRD criteria. DoD issued a directive in October 2008 stating all conditions that contribute to unfitness are to be rated in strict compliance with the VARSD. During the August 2010 PEB's formal board hearing for Sergeant Sanchez (the topic of my next *DES Outrage*), the PEB presiding officer stated the Navy would still only rate such conditions at a maximum of 0%. Two months later the PEB corrected their position and stating they were required to follow the requirements of the 14 October 2008 DoD directive. This raises concerns than many other Navy cases may exist that involve improperly rated "overall effect" conditions.

The PDBR made the following recommendation in reference to LCPL Kelly's PTSD:

"*In the matter of the Mental Disorder (coded 9411-9440)* [PTSD-Chronic Adjustment Disorder], *the board unanimously recommends an initial Temporary Disability Retired list (TDRL) rating of 50%, in retroactive compliance with VASRD paragraph 4.129, as directed by DoD. The Board unanimously recommends a permanent rating of 30% at six months following separation IAW VASRD 4.130."*

Just like in LCPL Vito's case, the CORB sent LCPL Kelly a letter stating that the results of her PDBR process was to grant a 50% rating and placement on the TDRL for six months followed by a 10% rating and separation without disability retirement. Nowhere in the CORB's letter did they mention the fact that the PDBR had actually recommended a 30% permanent retirement rating for PTSD or the fact it was the Navy that rejected the PDBR recommendation and replaced it with a 10% separation level rating. So much for transparency in the DES.

In fact, a passage from a letter by the CORB to the Assistant Secretary of the Navy for Manpower and Reserve Affairs was identical to that of LCPL Vito's. Only the name was changed. Both letters were dated 29 July 2010. The passage states:

"……however, the [CORB] Medical Officer non-concurred with the recommendation Ms. Kelly be placed on the Permanent Disability Retirement List with a 30 percent rating. It is his opinion that a 10 percent final rating for PTSD is warranted based on the evidence which does not substantiate sufficient occupational impairment to warrant a 30 percent rating under the Veterans Administrations Schedule for Rating Disabilities Code 9411."

However, in LCPL Kelly's case, the CORB letter continues the passage as follows:

> "*The [CORB] medical officer also stated Ms. Kelly's post-discharge difficulties are primarily due to conditions (Personality disorder ATTENTION DEFICIT DISORDER) not compensable under Chapter 61."*

The CORB medical officer focuses on Dr. S's diagnosis of personality and adjustment disorder and ignores the medical evidence from the MEB NARSUM and VA that diagnose the condition as PTSD. LCPL Kelly states that a senior non commissioned officer in her chain of command paid a visit to Dr. S. and stated nothing was wrong with her and demanded that the doctor deem her deployable, and if not, recommend administrative separation. Sure enough, Dr. S.'s findings were that LCPL Kelly had no medically boardable conditions but should be administratively separated. Neither the MEB psychiatrist nor the multiple VA psychiatrists concur with Dr. S.'s positions. Rather they unanimously stated LCPL Kelly suffers from the effects of PTSD.

The only entities that have pushed the non PTSD mental diagnosis have been the Navy PEB and the Navy CORB. Both these entities have long established track records of cheating wounded warriors out of proper disability benefits. In fact, in the 2008 NDAA, Congress clarified the requirement to rate unfitting conditions in strict compliance with the VASRD. Soon after the 2008 NDAA was signed into law, The Navy CORB released a policy (2008-02) stating they did not have to follow VASRD provision 4.129. The Navy CORB policy unbelievably stated that VASRD 4.129, *"is not applicable to an active duty population".* Incredible! The day a service member is separated from the military due to PTSD, the condition is still severe enough to warrant their removal from service and, thus, VASRD 4.129 applies. This was just another attempt by the Navy to low-ball disability ratings to avoid paying disability benefits. It took nine months for DoD put out policy that mandating that the Services apply VASRD 4.129 as required by law.

The military's abuse of substituting a non compensable personality disorder diagnosis for a compensable PTSD diagnosis has been extensively covered by the press over the last three years. It is clear this is exactly what happened to LCPL Kelly. A recent Congressional hearing on the use of a personality disorder diagnosis in lieu of a PTSD diagnosis can be found here.

> http://veterans.house.gov/hearings/hearing.aspx?newsid=622
>
> (You can view the video of the hearing by clicking on the multimedia link on this page)

It is well worth watching the hearing to see just how little DoD has actually done to fix the problem despite their 2007 commitment to do so. The Navy CORB has made LCPL Kelly one of the latest victims of the practice of using a personality/adjustment disorder diagnoses in lieu of PTSD.

In addition, the PDBR refused to consider LCPL Kelly's asthma in her review. LCPL Kelly's service connected asthma is well documented in her military and VA records. Her asthma was diagnosed shortly after she returned from Iraq. The VA rated this condition at 30% which, when combined with her PTSD rating, gave her an overall 70% VA disability rating. The asthma condition was in fact listed in her DES physical. The PDBR rationale stated that because the asthma was not included in her DES package, it was outside the scope of PDBR review. First, per DoDI 1332.38, all medical conditions are required to be covered in MEBs with full clinical data. Second, PEBs are required to return MEBs that are not complete. Again, the asthma was documented in LCPL Kelly's service medical records, listed on her DES physical and was covered in detail by the VA. The PDBR had plenty of information to determine if LCPL Kelly's asthma contributed to her military unfitness and how to rate the condition. Rather than address the condition, the PDBR elected to perpetuate the MEB/PEB error of not properly covering her asthma condition and, instead, stated LCPL Kelly needs to address the issue in a separate action with the Board for the Correction of Naval Records. This is not taking care of wounded warriors.

It should also be pointed out that the Navy CORB letters to the Assistant Secretary of the Navy for Manpower and Reserve Affairs pointed out the years of service of both LCPL Vito and LCPL Kelly. The number of years of service is not a factor in DES compensability for conditions that incurred while on active duty. For the Navy CORB to highlight the years of service in their letter leads me to conclude they are indeed using years of service as a criteria for determining who deserves DoD disability retirement. Numerous times in my advocacy, wounded warriors have reported to me they were told they did not have enough years in to qualify for disability retirement. Absent pure Existing Prior to Service (EPTS) conditions, years of service has no bearing on disability retirement eligibility. It appears, however, within the broken DES culture, years of service is a hidden, albeit illegal, factor of consideration.

It is clear to me that despite Congressional and DoD intent, the military Services, and in particular the Navy, will continue to do whatever they want, laws and policies be damned, to avoid paying DoD disability benefits. Congress can change laws and DoD can change policies but without proper, consistent and deep monitoring and enforcement, they are merely whistling in the wind. No enforcement and accountability equals abandoned wounded warriors, plain and simple. We are better than that.

Michael A. Parker
LTC, USA (Retired)
Wounded Warrior Advocate