Note from the Field

A Practitioner's Note on Physical Evaluation Boards

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Introduction

The Army's disability system, in particular the Physical Evaluation Board (PEB), relies on a unique and complex body of law not readily understood[1] by members of the military to include many judge advocates.[2] This note is intended to help attorneys in the field who do not work directly with PEBs on a daily basis, but who may find themselves representing soldiers undergoing the process.[3] The first part offers practitioners a step-by-step explanation of the PEB process, highlighting its most important aspects.[4] The second part offers practitioners some useful suggestions to assist in case preparation. After reading this note and examining the applicable regulations, practitioners should have the tools necessary to guide clients through the PEB system.

Step One: Starting The PEB Process—The MEB

All PEBs begin with a Medical Evaluation Board (MEB).[5] A treating physician, commander or Military Occupational Specialty (MOS) Medical Retention Board (MMRB)[6] may refer a soldier to the MEB to determine if he meets retention standards.[7] If the MEB finds that the soldier meets retention

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1. The PEB process is not necessarily an intuitive one. For example, in the world of the PEB's 100% "Whole Person Concept," 30%+20 %+10%= 50%. How can that be? If a soldier is found to have three different unfit medical conditions rated at 30%, 20%, and 10% respectively, the aggregate of those conditions results in a 50% rating. This is so because the whole person is reduced proportionally by the first, and each subsequent rating, as illustrated in the following example:

> 1. The soldier starts as a 100% whole person. Applying the first percentage rating to this figure yields 30% with a new baseline figure of 70%. (100% x 30% = 30%)(100% - 30% = 70%).
> 2. The soldier is now only a 70% whole person. Applying the second percentage rating to this new baseline figure yields 14% with a new baseline figure of 56%. (70% x 20% = 14%)(70% - 14% = 56%).
> 3. The soldier is now only 56% whole. Again, applying the third percentage rating to this new baseline figure yields 5.6%. Since there are three ratings, no new baseline is needed. (56% x 10% = 5.6%).
> 4. All the percentages are added together, yielding 49.6%. (30% + 14% + 5.6%= 49.6%).
> 5. The resultant percentage is rounded to the nearest number divisible by 10, yielding 50%.

As stated earlier, 30%+20%+10%= 50%. Simple!

2. Currently the Army conducts PEBs at three locations, Fort Lewis, Fort Sam Houston, and Walter Reed Army Medical Center. Each location has at least one judge advocate assigned to represent soldiers before the PEB. In addition, the United States Army Physical Disability Agency (USAPDA) the higher headquarters for the three PEBs, has its own legal counsel.

3. In fiscal year 2000, USAPDA processed over 10,000 soldiers.

4. For more information on the Army's disability system to include the PEB process, see U.S. ARMY MEDICAL COMMAND, OTJAG, THE 1999 MEDICAL-LEGAL DESK-BOOK, Vol. I, 25-1 (Aug. 1999); Captain James R. Julian, *What You Absolutely, Positively Need to Know About the Physical Evaluation Board*, ARMY LAW., May 1996, at 31; Captain Eva M. Novak, *The Army Physical Disability System*, 112 MIL. L. REV. 273 (1986); Major Chuck R. Pardue, *Military Disability in a Nutshell*, 108 MIL. L. REV. 149 (1985); Dennis E. Brower & Lieutenant Colonel Arthur Reynolds, Service as Service Members' Counsel: Advocacy Before the Physical Evaluation Board (Apr. 1999) (unpublished information paper), *available at* http://www.jagcnet.army.mil/ (Databases/LegalAssistance) [hereinafter Service as Service Members' Counsel].

5. U.S. DEP'T OF ARMY, REG. 635-40, PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION, paras. 2-8, 2-9 (1 Sept. 1990) [hereinafter AR 635-40] .The medical standards applied in MEBs are covered by U.S. DEP'T OF ARMY, REG. 40-501, MEDICAL SERVICES: STANDARDS OF MEDICAL FITNESS (30 Aug. 1995) [hereinafter AR 40-501].

6. For a more complete discussion of the MMRB process, see Major Sheila E. McDonald, *The Military Occupational Specialty/Medical Retention Board: An Introduction and Practical Guide*, ARMY LAW., Jul. 1998, at 74.

7. The practitioner must understand that although the MEB and PEB address similar issues, they serve different functions. The PEB, which falls under U.S. Army Personnel Command (PERSCOM), makes a determination of *fitness* for duty and applies a disability rating if applicable. AR 635-40, *supra* note 5, paras. 4-17, 4-19. The MEB, which falls under U.S. Army Medical Command (MEDCOM), determines whether a soldier does or does not meet *retention* standards. *Id.* para. 4-10. The MEB, as opposed to the PEB, is a very informal process with minimal attorney-client involvement, if any. Although slight, the difference between the MEB and the PEB is very important and will be raised again later.

standards, the soldier is returned to his assignment.[8] However, if the MEB finds that the soldier does not meet retention standards, the soldier's file is forwarded to one of three PEBs for a fitness determination.[9]

Step Two: Informal Board vs. Formal Board

Once the PEB receives a soldier's file from the MEB, the board conducts an informal adjudication, which is a record review of the MEB proceedings and findings, as well as applicable personnel documents to include the soldier's medical records.[10] The soldier does not appear in person before the informal board.[11] After an informal decision is made, the soldier consults with his Physical Evaluation Board Liaison Officer (PEBLO) at the Medical Treatment Facility (MTF) for assistance in determining what action to take regarding the PEB's informal findings.[12] If the soldier concurs with the findings, the case is forwarded to the U.S. Army Physical Disability Agency (USAPDA) for final disposition.[13]

Non-Concurrence

If the soldier non-concurs with the informal findings, he may submit a rebuttal for reconsideration and elect a formal board.[14] This is normally the point where the judge advocate gets involved. When electing a formal board, the soldier may also: decide to appear or not appear; request an enlisted, female or minority representative on the board; and choose to be represented by the regularly appointed military counsel or counsel of choice at no expense to the government.[15] In addition, the soldier may contact the Disabled American Veterans and inquire about potential representation.[16]

De Novo *Review*

While it is the soldier's absolute right to request a formal board,[17] there are certain hazards associated with having a formal board. The formal board is not bound by decisions made during the informal board process, as it is a "de novo" proceeding.[18] Therefore, if the soldier elects a formal board, he may have his disability rating raised, lowered or maintained.[19] In addition, the formal board may find the soldier fit and return him to duty or recommend further tests at the MTF.[20]

Formal Hearing

The hearing begins with the president of the board reading a script addressing the soldier's rights and other administrative data.[21] At this time the soldier elects to give either sworn or

8. *Id.* para. 4-13.

9. *Id*.

10. *Id.* para. 4-20. The soldier's medically disabling condition(s) should be listed on the MEB Narrative Summary (NARSUM) or an official addendum. *Id*. para. 4-11. Any unlisted diagnosis may not be considered .*See id.* para. 4-18, app. D-8b. Therefore, if the soldier has a diagnosed condition not listed he should attempt to get a physician to write an addendum.

11. *Id.* para. 4-20.

12. The soldier has four election options: (1) Concurrence with the findings and recommendations and waiver of a formal hearing; (2) Nonconcurrence with the findings and recommendations; submission of a rebuttal explaining the soldier's reasons for nonconcurrence; and waiver of a formal hearing; (3) Demand for a formal hearing with or without personal appearance; and (4) Choice of counsel if a hearing is demanded. *Id.*

13. *Id.* para. 2-4 (e)-(f). Authority to act as final approving authority for all cases except those involving general officers and medical corps officers has been delegated to USAPDA from the Secretary of the Army. *Id.* para. 3-13. While not frequently exercised, USAPDA retains inherent supervisory authority to review and revise PEB findings, make informal determinations, or to refer the case to a formal board. *Id.* para. 4-22. The president of a PEB may reconsider an informal decision or direct a formal board *sua sponte* if the soldier's case has not been adjudicated by USAPDA. *Id.* para. 4-21r(2).

14. *Id.* para. 4-20. Due to personnel constraints, the same individuals generally adjudicate both the formal and informal boards.

15. *Id.* paras. 4-20c(d), 4-21h(1).

16. *Id.* para. 4-21h(1).

17. The request does not have to be granted if the soldier has been found fit for duty at the informal board. U.S. Dep't of Defense, Instr. 1332.38, Physical Disability Evaluation, para. E.3.P1.3.3.1.2 (14 Nov 1996) [hereinafter DODI 1332.38].

18. AR 635-40, *supra* note 5, para. 4-21r(2).

19. *Id.*

20. *Id.*

21. *Id*. para. 4-21. *See* Service as Service Members' Counsel, *supra* note 5, para. IVD5.

unsworn testimony.[22] Once the soldier is sworn, he or his counsel presents the case-in-chief,[23] which normally consists of a brief opening statement and direct examination of the soldier and any available witnesses.[24] Next, the board members may question the soldier or witnesses.[25] After the board members finish their questions, the soldier (or counsel) may offer a closing statement.[26] The hearing is then closed for deliberation.[27] When a majority of the board members reach an agreement, which typically requires twenty to thirty minutes of deliberation depending on the complexity of the case, both the soldier and the attorney return to the hearing room for the decision.[28] A full hearing ordinarily lasts only sixty to ninety minutes, necessitating a well-organized and succinct presentation of matters.

Appeal Rights

The soldier has ten days to concur or non-concur with the formal board decision.[29] If the soldier agrees with the findings of the formal board, the case is sent to USAPDA for final disposition.[30] If the soldier does not agree with the findings of the formal board and he submits the non-concurrence within the allotted time, the case will be reconsidered by the PEB without the presence of either the soldier or his attorney and is then forwarded to USAPDA for final disposition.[31] If a USAPDA review confirms the PEB's findings, the soldier's case is finalized.[32] If a USAPDA review modifies the PEB findings, the revised findings are forwarded to the soldier for his concurrence or non-concurrence.[33] If the soldier non-concurs with the modified findings or provides a statement of rebuttal[34] and the rebuttal does not result in a reversal of the USAPDA modification, the case will be forwarded to the U.S. Army Physical Disability Appeal Board for a final decision.[35] If the soldier remains dissatisfied, he may appeal to the Army Board for Correction of Military Records.[36] In addition, the soldier may bring suit in the Court of Federal Claims.[37]

Step Three: What Is The PEB Looking For?

The PEB, composed of a president, personnel management officer and medical member,[38] has two purposes: to decide whether or not the soldier is fit for duty and to determine disability compensation, if applicable.[39] However, the PEB cannot determine disability compensation until the soldier is first

22. AR 635-40, *supra* note 5, para. 4-21. For all practical purposes, only sworn testimony carries any weight.

23. *Id*. para. 4-21e(1)(c). Documentary evidence may be submitted at any time during the hearing. *Id.*

24. *Id.* On occasion, board members will interrupt counsel's presentation prior to completion to ask questions.

25. *Id.* para. 4-21e(1)(b).

26. *Id.* para. 4-21e(1)(d). Recommended practice is to have the soldier deliver the closing statement if he wants to be found fit for duty. However, the soldier must be capable of giving a closing and the practitioner should review any statement the soldier plans to offer the board.

27. *Id.* para. 4-21q.

28. The decision need not be unanimous. *See id.* para. 4-19m. If a board member disagrees with the majority, he may file a minority report—which is akin to a dissenting opinion and requires a review by USAPDA. *Id.* para. 4-22a(4).

29. *Id.* para. 4-21s(1).

30. *Id.* para. 4-24.

31. *Id.* paras. 4-21t, 4-22.

32. *Id.* para. 4-21t(4)(a).

33. *Id.* para. 4-21t(4)(b).

34. *Id.* para. 4-21t. The regulation states that a rebuttal must be based upon one or more of the following factors and must provide a rationale in support thereof: "(a) The decision of the PEB was based upon fraud, collusion, or mistake of law; (b) The soldier did not receive a full and fair hearing; (c) Substantial new evidence exists and is submitted which, by due diligence, could not have been presented before disposition of the case by the PEB." *Id.* para. 4-21t(1).

35. If the modification occurs during the informal findings, the soldier will be offered the opportunity to appear before the formal board and present his case pursuant to 10 U.S.C. § 1214 (2000).

36. *See* AR 635-40, *supra* note 5, para. 2-12.

37. The soldier can bring suit in the Court of Federal Claims after the formal board stage .Pomory v. United States, 39 Fed. Cl. 213 (1997) (citing The Tucker Act, 28 U.S.C. § 1491(a)(1) (2000); 10 U.S.C. § 1201 (2000)).

38. AR 635-40, *supra* note 5, para. 4-17b. Board membership may increase or decrease if one of the board members is challenged for cause or the solider elects minority, female or enlisted membership on the board. *Id.* para. 4-21b.

found unfit for duty.[40] The judge advocate should make the soldier aware of this fact and determine whether the client wants to be found fit or unfit prior to entering the boardroom. Equivocating between the two will cause both the soldier and the attorney to lose credibility. That is to say, the judge advocate should not request that the formal board find his client either "unfit with a 100% rating[41] or fit and returned to duty."[42]

The Standard

The standard the PEB applies in determining fitness is whether the soldier can reasonably perform the duties of his office, rank, grade, or rating.[43] The PEB is best described as a *performance evaluation board* as opposed to a *physical evaluation board* because the PEB will only find the soldier unfit for duty if he cannot reasonably perform his specific MOS due to a medical condition which fails medical retention standards.[44] While the inability to qualify with a weapon, take the Army Physical Fitness Test (APFT), perform basic soldier skills, or deploy worldwide may impact on the fitness determination, each category does not by itself make the soldier unfit for duty. For example, if the soldier is unable to take the APFT, he may still be found fit for duty if able to perform his MOS.[45] To determine whether the soldier is fit, the PEB compares the nature and severity of the soldier's medical condition to the requirements and duties he may reasonably be expected to perform in his primary MOS.[46] As a reference, the PEB uses *Army Regulation 611-1*[47] to determine what duties the soldier performs in his MOS and the physical requirements of those duties.[48] Therefore, while a certain medical condition may make an infantryman unfit, the same condition may not make a doctor unfit. As the soldier's advocate, you must also remember that this determination is based on the soldier's rank.[49] Consequently, a certain condition may make a lieutenant unfit, but not a colonel, due to the nature of the MOS.

Retention vs. Unfitness

To determine whether the soldier is unfit, the PEB will establish the medical condition(s) that ended the soldier's career. It is possible for a soldier to be found unfit based on only one medical condition, even though he fails to meet medical retention standards in many different areas.[50] As the soldier's advocate, you must remind the soldier that even if he has more than one diagnosed condition that fails medical retention standards, the PEB will only rate those conditions which fail medical retention standards and make him unfit for duty.[51] Remember the difference between the MEB and the PEB.[52] For the board to consider disability compensation, the soldier's condition must fail not only retention standards but make him unfit for duty as well.[53]

Step Four: Determining Disability Compensation

The second function of the PEB is to determine possible disability compensation.[54] If the soldier is found unfit, the PEB

39. *See id*. paras. 4-17a, 4-19a, 4-19i.

40. *See id*. paras. 4-19f, 4-19i.

41. Disability ratings range from 0% to 100%. In dealing with approximately 200 clients, the author has had only one receive a 100% rating.

42. This type of argument is illogical and may prove detrimental to the client's case.

43. AR 635-40, *supra* note 5, para. 4-19a(1).

44. *See* AR 40-501, *supra* note 5.

45. DODI 1332.38, *supra* note 17, paras. E3.P3.4.1.2, E3.P3.4.4.

46. *Id.*

47. U.S. Dep't of Army, Reg. 611-1, Military Occupational Classification and Structure (1 Jul. 1994).

48. The board members rely heavily on their own experience and knowledge of the Army to determine whether a soldier can function in a particular MOS.

49. AR 635-40, *supra* note 5, para. 4-19a(1).

50. *Id.* para. 3-1.

51. AR 635-40, *supra* note 5, para. 3-1c.

52. *See* note 7 *supra* and accompanying text.

53. AR 635-40, *supra* note 5, para. 4-19i.

54. *Id.*

will next determine whether the medical condition was caused or permanently aggravated by military service.[55] If the PEB finds that the soldier's military service neither caused nor permanently aggravated his condition, he will be separated without benefits. However, if the PEB reaches the opposite conclusion, it will assign a disability rating based on the diagnosed condition and its severity.[56]

Severance Pay

The soldier is entitled to severance pay if he receives a disability rating of less than 30%.[57] Severance pay is calculated by multiplying the soldier's most recent monthly base pay by two, then multiplying the resulting number by the total number of years on active duty up to twelve years (six months or more counts as a whole year).[58] Financially, there is no difference between a 0%, 10%, or 20% rating. Under limited circumstances, both severance and disability retirement pay may be non-taxable.[59]

TDRL vs. PDRL

If the soldier receives a disability rating of 30% or more, he will be placed on either the permanent or temporary disabled retired list (PDRL/TDRL).[60] Soldiers placed on the TDRL are temporarily retired, but must undergo periodic medical re-examinations to see if their condition changes or stabilizes.[61] After each re-examination the results are forwarded to the PEB for disposition.[62] If the PEB determines that the soldier's condition has improved sufficiently, the PEB can find the soldier fit for duty.[63] The soldier then has a statutory right to return to active duty.[64] If the PEB determines that the soldier's condition has improved but not to such an extent that the soldier is fit for duty, the soldier may be removed from the TDRL and offered severance pay.[65] In addition, the board may permanently retire the soldier or keep him on TDRL.[66] While on TDRL, the soldier receives at least 50% of his retirement base pay.[67] If the soldier is placed on TDRL with a rating above 50%, his pay will be based on the higher rating.[68]

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55. *Id.* para. 4-19f.

56. The PEB relies on a number of regulations and directives to determine the disability rating. *See* Department of Veterans Affairs, Schedule for Rating Disabilities, 38 C.F.R. §§ 4.1-.150 (2000); U.S. Dep't of Defense, Dir. 1332.18, Separation or Retirement for Physical Disability (4 Nov 1996); DODI 1332.38, *supra* note 17; U.S. Dep't of Defense, Instr. 1332.39, Application of the Veterans Administration Schedule for Rating Disabilities (14 Nov 1996); AR 635-40, *supra* note 5.

57. AR 635-40, *supra* note 5, app. B-15, A-2, C-12.

58. 10 U.S.C. § 1212(a) (2000).

59. A soldier may receive all or a portion of his disability or retirement pay tax free if:

> (1) he was a member of the Armed Forces, National Oceanic and Atmospheric Administration or U.S. Public Health Service or was under binding written agreement to become such a member on 24 September 1975; (2) the injury is a direct result of armed conflict or directly caused by an instrumentality of war, during a period of war; or (3) on application to the VA the soldier is entitled to receive compensation.

26 U.S.C. § 104(a)(4) (2000).

60. AR 635-40, *supra* note 5, ch.7. Most soldiers are placed on TDRL as opposed to PDRL unless the unfitting medical condition involves an amputation or the soldier has over twenty years of military service. Under limited circumstances, a soldier with twenty years of service may be placed on TDRL with a rating below 30%. *Id.* para. 3-9.

61. *Id.* para. 7-4. The maximum allowable time on TDRL is five years. *Id.* para. 7-9d.

62. *Id.* para. 7-19.

63. *Id.* para. 7-11a(3).

64. 10 U.S.C. §§ 1211(a), 1210(f)(1)(B) (2000) (giving the soldier the option of returning to duty).

65. AR 635-40, *supra* note 5, para. 7-11(2). At this stage, the soldier can opt for another formal board. *Id.* para. 7-21.

66. *Id.* para. 7-11a(1).

67. 10 U.S.C. §§ 1402, 1406, 1407. *See also* AR 635-40, *supra* note 5, apps. C-10, C-12.

68. A soldier's maximum disability retirement pay, like regular retirement pay, is capped at 75% of his monthly base pay. Consequently, even if the soldier receives a 100% rating he will not receive more than 75% of his monthly base pay. 10 U.S.C. § 1401.

Case Preparation

As the soldier's advocate you must provide him advice and guidance to ensure that he makes an informed decision. Depending on caseload,[69] judge advocates may need to rely on the soldier to take an active role in case preparation, such as getting statements from witnesses, gathering important documents, and following up on medical consultations.

While nothing replaces a personal in-depth consultation, focused instructions, if provided to the soldier early enough in the process, may lead to a more favorable rating before the formal board.[70] While the soldier's testimony alone may change the outcome, it is generally insufficient .The following checklists are offered to assist judge advocates in providing guidance to their clients and developing their cases.

Checklist To Obtain Higher Disability Rating

(1) Additional medical evidence demonstrating that his condition is more severe than originally diagnosed or described in his NARSUM. The soldier should attempt to have this new evidence drafted in an addendum to his MEB.

(2) Documentation of hospital or emergency room visits, sick call slips, and physical therapy records incurred after the MEB was dictated.

(3) Copies of all medical treatment records (civilian and military) to include VA disability award letter(s), if applicable.

Checklist for Seeking Fit for Duty Determination

(1) Letters of recommendation from commanders and supervisors indicating that he performs in his MOS and participates in unit Physical Training, Common Tasks Test, field exercises and deployments.

(2) An Army Physical Fitness Test (APFT) card or a copy showing that he has recently passed the APFT.

(3) His latest Non Commissioned Officer Evaluation Report/Officer Evaluation Report, if applicable.

Checklist for Attorneys Appearing Before the Formal Board

Finally, the judge advocate representing a soldier before a PEB should run through the following questions to ensure they are adequately prepared to present the soldier's case:

1. Am I familiar with applicable regulations and the Veterans Administration Schedule for Rating Disabilities (VASRD)? Do I know which VASRD codes are applicable? Have I checked Appendix B of AR 635-40, DODIs, and USAPDA Policy Memorandums to see if there are modifications? Do I understand how the soldier's symptoms and test results should be rated? Does the soldier understand this? Am I prepared to address the issue of fitness, even if the informal board found the soldier unfit? Do I understand the soldier's MOS? What tasks can the soldier not accomplish in his MOS? Are supporting documents available?

2. If the soldier is on TDRL, have I looked at previous TDRL packets? Do I understand how the soldier's condition has or has not changed since being placed on TDRL? Have I advised the soldier to obtain copies of all medical records from VA and civilian doctors?

3. If I have doubts about the value of a formal board, have I given the soldier the benefit of my opinion and advised him of the option to waive the hearing?

4. Are the soldier's claims realistic and provable, in light of all the available evidence?

5. Have I advised the soldier that the formal board is "de novo"?

6. Have I adequately prepared the soldier and witnesses for direct and cross-examination? Can I deal effectively with "questionable" matters?

7. Am I sure that the soldier does not have any last minute questions?

8. Are my questions for the soldier simple to follow? Does the soldier understand the questions that he will be requested to answer during the hearing? Am I prepared to summarize the expected answers into a short narrative if the soldier is unable to provide adequate responses?

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69. Based on the author's experience, the soldiers' legal counsel assigned to Walter Reed Army Medical Center normally presents two cases daily before the PEB, depending on additional duties.

70. Keeping in mind that the soldier's best opportunity to change the decision made at the informal board rests with producing new evidence, with medical evidence normally proving the most persuasive. *See supra* note 5 and accompanying text.

9. Do I fully understand what the soldier wants from the hearing?

10. Does the soldier understand that the PEB cannot address issues such as lack of treatment or mistreatment by medical personnel, reclassification to another MOS, or changing a finalized line of duty determination?

11. Do I know how the soldier's injury or disease affects his ability to perform? Regardless of medical records, do I know what the soldier is feeling? Is the discrepancy between the soldier's complaints and records so great that I should request that his case be returned to the MTF?

12. Does the soldier have the basic information regarding uniform, reporting, and the procedures to be followed in the hearing room?

13. Does the soldier understand that the formal board findings are subject to review by USAPDA?

14. Does the soldier have any additional appointments, treatments or surgeries scheduled which will change his level of disability? Can the board be delayed by the board president or recalled by the MTF?

15. Did I discuss available VA options with the soldier?

Helpful Hints

The PEBs place a great deal of weight on credibility. The soldier should answer questions honestly and consistently. The board will compare the soldier's testimony to medical or personnel records. As the soldier's advocate, you must remember that many soldiers never interact with high-ranking members of the Army and thus may be nervous during the formal board. In addition, the decisions rendered by the formal board hold long-term consequences. Going through a brief question and answer session before the actual formal board helps prepare the soldier so that he will be more at ease during the hearing. These sessions should stress the need for honest responses before the board and should not be used to coach the soldier or craft his responses. The following are some typical questions posed by board members during proceedings:

What do you want the board to do for you? This question may mean that the particular board member is not sure what he is going to do.

How much work or school have you missed because of your medical condition?

When was the last time you saw a doctor or went to the emergency room?

What medication did you take today? What did you take yesterday?

When did you obtain your last prescription? The board is looking to see how much medication the soldier takes. If the soldier states "I take three pills a day" and the prescription has not been refilled in months, he places his credibility in question and demonstrates that his condition is not severe.[71]

Is the pain constant? Rate the pain on a scale of one to ten. Pain is very rarely constant. There are usually times that are better or worse. Therefore, the soldier could state that he "always has pain, but activities such as running, lifting, or bending make it worse."

What are you doing to improve your condition, such as physical therapy or rehabilitation? This normally applies to orthopaedic injuries. The board wants to see a concerted effort at rehabilitation. The soldier should be able to describe specific activities. If the soldier cannot describe them then it shows the board that the soldier may not actually be doing the stretches or exercises.

What are you going to do when you leave the Army? The board will want to see if the soldier's post-Army plans are inconsistent with the injuries or pain he claims to have.

Have you ever injured your back, knee, leg before? This relates to credibility.

What kind of car do you drive? This usually arises in orthopaedic cases. The board is looking to see if the soldier drives a standard or automatic.

Do you shop at the mall? The board wants to know if the soldier can stand and walk for long periods. If the soldier does shop, have him tell the board how long he can stand, how far he can walk, and how often he needs to rest while shopping.

Do you participate in household chores? Who does the grocery shopping? The board wants to know how the condition affects the soldier outside of the workplace. Be aware,

71. Remember that military hospital visits, prescriptions, dates of examinations, and other medical information may be checked electronically.

the board may ask a soldier suffering from a cold injury such as frost bite whether he goes into the frozen foods section of the grocery store.

Are you married and do you have children? Does your medical condition limit your interactions with your family?

Describe a typical workday by the hour?

Is your driver's license restricted? If the soldier's condition is severe, the Army or state may restrict or revoke driving privileges.
Do you get along with superiors? Do you enjoy the Army? The board may be looking for ulterior motive. The board does not like to hear that superiors are out to get the soldier.When did you become unfit?

What is your VA rating? If the soldier has a rating, use it to compare the severity. This normally only applies to those soldiers already on TDRL or in the Reserves.

Conclusion

This note provides a basic road map on how to represent soldiers during the PEB process. It is intended as a guide to give the attorney in the field a better understanding of one portion of the Army's Physical Disability System. It is offered as a starting point, to be used along with all of the governing statutes and regulations, so that judge advocates can provide the best possible representation to soldiers faced with this complex process.