

INFORMATION PAPER

MCJA
8 June 2015

SUBJECT: Impact of Misconduct during Army Physical Disability Evaluation System Process

1. **PURPOSE:** To provide guidance on the process of separating Soldiers for misconduct who are undergoing the Army Physical Disability Evaluation System (APDES).
2. **BLUF:** An administrative or UCMJ - based action initiated against a Soldier who is undergoing a Medical Evaluation Board (MEB) or Physical Evaluation Board (PEB) may impact the Soldier's eligibility for continued APDES processing. Discontinuing the disability process and proceeding with separation under administrative regulations or the UCMJ should be done only when warranted by the facts and in compliance with the law.
3. **NOTICE OF MEDICAL CONDITION:** Per AR 40-501, 3-3(d) Physicians who identify Soldiers with medical conditions listed in this chapter should initiate an MEB at the time of identification. The command is now on notice that a medical condition exists that may result in the Soldier entering APDES processing. Commanders must understand that although the formal MEB processing doesn't start until the referral (second signature on DA Form 3349, Physical Profile) a condition has been identified by a medical professional that requires additional command attention and consideration. The second-signature on the DA Form 3349, for Soldiers that are issued a permanent profile with a designator of 3 or 4-value in any of the PULHES factors for a duty related condition which do not meet retention standards, constitutes Medical Retention Determination Point (MRDP) and the start of the MEB process (MOD 1 to HQDA EXORD 185-11: Reduction of Non-Deployables).
4. **CIRCUMVENTION OF THE ARMY PHYSICAL DISABILITY EVALUATION SYSTEM (APDES) PROCESS:** Intentional circumvention of the APDES process is never acceptable. Commanders must be willing to withstand the scrutiny of the Congress, Inspector General or higher command for their decision to separate soldiers in lieu of allowing the Soldier to complete the APDES process. The commander's decision should be based on the sound legal advice provided by the Staff Judge Advocate and the decision to administratively separate or to refer a Soldier under the UCMJ should not to be made lightly.
5. **CROSSROADS:** Attention must be given to situations where a commander is at the crossroads of electing the medical evaluation process route or the administrative/punitive route. Although regulations may allow for the route your

MCJA

SUBJECT: Impact of Misconduct during Army Physical Disability Evaluation System Process

commander seeks to follow, legal advice should take into consideration Congressional and regulatory intent, as well as any additional factors, to include the potential scrutiny and criticism that may result. Therefore, when a commander elects to administratively separate a Soldier in APDES the decision must be made with all relevant information available as to the Soldiers medical status.

6. PUNITIVE ACTION: Soldiers who are in an AWOL status, in military confinement, or under investigation for or facing charges that could result in dismissal or punitive discharge are not eligible for referral or processing in the APDES, unless: (1) the investigation ends without charges; (2) the charges are dismissed; or (3) the charges are referred for trial to a court-martial that cannot adjudge a punitive discharge. (AR 635-40, para 4-1)

7. ADMINISTRATIVE ACTION:

a. APDES processing takes priority for all administrative separation actions, unless the separation action authorizes separation Under Other Than Honorable (OTH) conditions. (AR 635-200, para 1-33a; AR 635-40, para 4-3)

b. Dual Processing: If the Chapter authorizes an OTH, the MEB and administrative separation action will both continue but final action will not be taken. If the MEB determines that a medical condition fails retention standards per AR 40-501, Chapter 3, the completed MEB and Chapter action will be provided to the General Court-Martial Convening Authority (GCMCA), who will determine whether processing under the APDES will continue. (AR 635-200, para 1-33b) AR 40-400, para 7-1 requires Physicians who identify Soldiers with medical conditions not meeting fitness standards for retention will initiate a DA Form 3349 referring them to the Physical Disability Evaluation System (PDES). If the Soldier does not meet retention standards, an MEB is mandatory and will be initiated by the physical evaluation board liaison officer (PEBLO).

c. There are two bases for the GCMCA to elect APDES processing:

(1) Pursuant to AR 635-200, para 1-33, except in separation actions under chapter 10, disposition through medical channels takes precedence over administrative separation processing when the medical treatment facility (MTF) commander or attending medical officer determines that a Soldier being processed for administrative separation under chapters 7 (see sec IV), or 14, does not meet the medical fitness standards for retention (see AR 40-501, chap 3), he/she will refer the Soldier to a Medical Evaluation Board (MEB) in accordance with AR 40-400. The administrative

MCJA

SUBJECT: Impact of Misconduct during Army Physical Disability Evaluation System Process

separation proceedings will continue, but final action by the separation authority will not be taken, pending the results of MEB.

(2) AR 635-40, para 4-3, an enlisted Soldier may not be referred for, or continue, physical disability processing when action has been started under any regulatory provision which authorizes a characterization of service of under other than honorable conditions except when the commander exercising general court-martial jurisdiction over the Soldier decides to abate the administrative separation. This authority may not be delegated. A copy of the decision, signed by the general court-martial convening authority (GCMCA), must be forwarded with the disability case file to the PEB. A case file may be referred in this way if the GCMCA finds the disability is the cause, or a substantial contributing cause, of the misconduct that might result in a discharge under other than honorable conditions or other circumstances warrant disability processing instead of alternate administrative separation.

d. If a personality disorder is the basis for the separation, special rules apply.

(1) VCSA Sends - Admin Separation of Soldiers for Personality Disorder or Other Designated Physical or Mental Conditions (2011) [hereafter VCSA Sends 2011 Message] states a Soldier will not be processed for administrative separation under AR 635-200, Chapter 5-13, if PTSD, TBI and/or other comorbid mental illness are significant factors to a diagnosis of personality disorder, but will be evaluated under physical disability system in IAW AR 635-40.

(2) OTSG/MEDCOM Policy Memo 14-049- states the following cases require higher level review and endorsement by OTSG prior to Soldiers being processed for administrative separation:

a. All administrative separations of Soldiers for Personality Disorder under Chapters 5-13 or 5-17 that meet the following criterion: The Soldier is currently deployed, or has ever been deployed, to an imminent danger pay area.

b. All administrative separations of Soldiers for Other Designated Physical or Mental Conditions under Chapter 5-17 that meet the following criterion: The Soldier is currently deployed, or has ever been deployed, to an imminent danger pay area.

e. If civilian criminal court action is pending and the Soldier is present for duty, disability processing continues. (AR 635-40, para 4-1b)

MCJA

SUBJECT: Impact of Misconduct during Army Physical Disability Evaluation System Process

f. Officers who are facing elimination for misconduct with an OTH but not under charges should be dual processed. If the officer is found unfit, the Secretary of the Army determines the disposition. (AR 635-40, para 4-4)

8. After MEB/PEB Processing:

Even after a Soldier has completed the MEB/PEB processing and is waiting on retirement orders or is on transitional leave, he can still be separated from the Army for serious misconduct. However, commands have no authority to delay disability processing/separation for Article 15s or Summary Court-Martial so long as they complete the action before the Soldier's final separation / retirement date from Active Duty. For serious offenses that could result in separation under OTH, the disability separation action can be stopped and reviewed by the GCMCA. The authority of the GCMCA to determine whether the administrative separation action will proceed or be abated for completion of disability evaluation will not be delegated.

9. PRACTICAL EXAMPLES: Is the Soldier eligible for the duty related Medical Evaluation Board and Physical Evaluation Board Process?

a. An enlisted Soldier is pending separation under AR 635-200, Chapter 13 (unsatisfactory duty performance).

YES. The lowest characterization authorized for a chapter 13 is "general". Only those Chapters which allow for an under other than honorable discharge (UOTH) make the Soldier ineligible.

b. Enlisted Soldier is pending separation for misconduct (AR 635-200, Chapter 14) with a general characterization of service.

NO. The fact that a chapter 14 allows an UOTH makes the Soldier ineligible for the PEB until the GCMCA suspends the separation action. **The MEB is still completed.** If the GCMCA suspends, and the PEB finds the Soldier "fit" then the misconduct separation action proceeds.

c. Soldier assaults his First Sergeant.

NO. Soldier would be under investigation for an offense that could result in a bad conduct discharge. Per AR 635-40, para 4-1, he is ineligible for the MEB and the PEB. The disability processing will resume if the investigation ends without charges, the charges are dismissed, and the charges are referred to a summary court-martial or

MCJA

SUBJECT: Impact of Misconduct during Army Physical Disability Evaluation System Process

Article 15. Discontinuing the disability process and proceeding with courts-martial when similar types of offenses have routinely been dealt with via Article 15 could be viewed as an attempt by command to circumvent the APDES process. Another example is a onetime drug use that would normally be processed as an Administrative Separation Action under AR 635-200, para 14-12c. Caution should be given to insure that Soldiers requiring APDES processing and those not requiring APDES processing are treated the same given similar violations of the UCMJ.

d. An enlisted Soldier completed the MEB/PEB process and was issued disability retirement orders. While awaiting the retirement date, he commits an action that results in his command initiating Chapter 14 action. Because his disability case was completed and approved for the Secretary of the Army, the disposition takes precedence over the Chapter 14.

NO. The Soldier is still on active duty and subject to misconduct (Chapter 14) separation while awaiting disability disposition. Otherwise, discipline would be undermined.

10. SUMMARY: Below is a summary of separation actions and their affect on PEB processing.

a. If the command is seeking to separate a soldier under AR 635-200:

(1) Ch 5-13 or 5-17, Personality Disorder: Follow VCSA Sends 2011 message and OTSG/MEDCOM Policy Memo 14-049.

(2) Ch 5-17, Other Designated Physical or Mental Conditions: Follow VCSA Sends 2011 message and OTSG/MEDCOM Policy Memo 14-049.

(3) Ch 6, Dependency or Hardship: MEB and PEB process continue uninterrupted and take precedence over administrative separation actions.

(4) Ch 7 Fraudulent Enlistment: MEB case is processed to completion however GCMCA approval is needed for PEB processing.

(5) Ch 9, Alcohol Drug rehab/failure: MEB and PEB process continue uninterrupted and take precedence over administrative separation actions.

(6) Ch 10, Discharge in Lieu of Trial by Court-Martial: MEB and PEB process both stopped.

MCJA

SUBJECT: Impact of Misconduct during Army Physical Disability Evaluation System Process

(7) Ch 11, Entry Level Performance and Conduct: MEB and PEB process continue uninterrupted and take precedence over administrative separation actions.

(8) Ch 12, Retirement for Length of Service: MEB and PEB process continue uninterrupted and take precedence over administrative separation actions.

(9) Ch13, Unsatisfactory Performance: MEB and PEB process continue uninterrupted and take precedence over administrative separation actions.

(10) Ch 14 Misconduct: MEB case is processed to completion however GCMCA approval is needed for PEB processing.

(11) Ch 18, Failure to Meet Weight Control Standards: MEB and PEB process continue uninterrupted and take precedence over administrative separation actions.

(12) Separation Under for UCMJ, Civilian Criminal Confinement, AWOL: If the Soldier is:

(a) Under criminal charges that could result in dismissal, dishonorable or bad conduct discharge: Both MEB and PEB process stop.

(b) Currently in Civilian Confinement: Both MEB and PEB process stop.

(c) AWOL: Both MEB and PEB process stop.

COL F. Dean Raab
MEDCOM SJA