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ODPMC Discharges: The military's new scheme to eliminate "problem" soldiers

BY KATHLEEN GILBERD

Counselors and attorneys have seen a significant increase in Other Designated Physical and Mental Conditions (ODPMC) discharges¹ over the last few years. These discharges are sometimes given to servicemembers with serious psychiatric or physical problems that have been mis- or under-diagnosed, and sometimes to members with no medical problems who are considered troublemakers or whistleblowers by their commands — in essence, problem soldiers of one kind or another.² Increasingly, ODPMC discharges based on a psychiatric diagnosis of adjustment disorder have become the administrative discharge of choice for members who should be medically retired for more serious illness, as well as members who simply have problems with difficult supervisors, harassers, or problem commands. (While adjustment disorder has been the most notable discharge category, there has also

been an increase in ODPMC discharges for other medical problems that are thought not to warrant medical discharge or retirement. This can happen, for example, when herniated discs are misdiagnosed as "lower back pain.")

Adjustment Disorder

Adjustment disorder is, by its nature, a transient condition not rising to the level of depression, anxiety disorder or the like. The Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (DSM-IV-TR) describes the disorder: "[t]he essential feature of an Adjustment Disorder is a psychological response to an identifiable stressor or stressors that results in the development of clinically significant emotional or behavioral symptoms ... The clinical significance of

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Overview of the new Integrated Disability Evaluation System

Understaffing and disregard from command undermine promise of speedier transition

BY KIT ANDERTON

Background

In 2007, to replace the legacy Disability Evaluation System, the DOD and VA instituted a pilot program to integrate its disability processes. The goal is to eliminate the slow and confusing elements of duplicate VA and military disability processes and to create a system that will support members with service-related disabilities to transition to civilian life. The pilot program started at three military bases, has gradually expanded and the current goal is to have it operative at all 141 major military medical facilities by January 1, 2013. This new system is called Integrated Disability Evaluation System (IDES).

The conditions that created congressional request for reform of the legacy Disability Evaluation System were:



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KAREN DETAMORE 1950 - 2012

MLTF steering committee member and secretary Karen Detamore of Philadelphia died unexpectedly on May 1. For story about Karen's remarkable life and many contributions to NLG and other groups, see page 3.



the reaction is indicated either by marked distress that is in excess of what would be expected given the nature of the stressor or by significant impairment in social or occupational (academic) functioning. In other words, a reaction to a stressor that might be considered normal or expectable can still qualify for a diagnosis of Adjustment Disorder if the reaction is sufficiently severe to cause significant impairment.”

Adjustment disorders must develop within three months of the stressor(s) and must abate within six months, unless the stressor(s) continue. Stressors may be, for example, serious business problems, marital problems or divorce, loss of a job, living in a crime-ridden area, or adjusting to a new and stressful job. They are considered among the less serious psychiatric disorders categorized under Axis I; because of this and their short duration, they are not considered unfitting conditions warranting medical discharge or retirement, and were not traditionally a basis for ODPMC discharges.

This began to change when the Navy added the disorder to its list of ODPMC categories several years ago. Some of the services followed suit, while others considered adjustment disorder one of the “other” unlisted conditions warranting ODPMC discharge. Most recently, in 2011, DoD expanded its very general list of conditions warranting ODPMC discharge to include a number of specific physical and psychiatric conditions, among them adjustment disorder.

Personality Disorder: The former ruse

Until a few years ago, personality disorder discharge was a favored administrative discharge for problem soldiers. This changed when veterans groups and the media revealed that large numbers of soldiers with Post-Traumatic

Stress Disorder (PTSD) were being denied medical retirement because of misdiagnoses of personality disorders. As a result, Congress mandated a new DoD policy requiring second opinions and service surgeon general review for combat troops who faced personality disorder discharges, designed specifically to look for undiagnosed PTSD or Traumatic Brain Injury (TBI).³ It was after this policy that advocates began to see a rise in adjustment disorder-based discharges, which until very recently did not require any review.

The shift from personality disorder to ODPMC for adjustment disorder has some advantages for servicemembers. Unlike personality disorder, adjustment disorder is not named as a separate reason for discharge, and should not appear on DD-214 discharge documents, barring command error. Instead, ODPMC or the service equivalent should be given as the narrative reason for discharge, making the separation less stigmatizing. Potential employers who learn about the underlying reason for discharge may understand that an adjustment disorder presents fewer work-related problems than the average personality disorder. And the Veterans Administration, which does not provide care or benefits for personality disorder, considers adjustment disorder a service-connected condition warranting treatment and compensation.

Servicemembers with serious medical problems or conditions should not be discharged for ODPMC/adjustment disorder if the other problems warrant referral to a medical evaluation board (MEB). MEBs and disability processing take precedence over administrative discharges when, as with ODPMC, an other than honorable discharge may not be given.⁴ But this is dependent on accurate military diagnoses. As was the case with personality disorders until that discharge became cumbersome, we

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are now seeing PTSD, major depression and other conditions (including, in one of this writer's cases, an apparent psychotic disorder) misdiagnosed as adjustment disorder.

The most recent revision to DoD's administrative discharge regulation, DoD Instruction 1332.14, has now added review provisions for any psychiatrically-based ODPMC discharge for servicemembers who have served in a combat area.⁵ As with personality disorders, combat veterans facing ODPMC discharge for psychiatric conditions are to be given a second evaluation by a peer of the first evaluator or a more highly credentialed mental health professional, and their cases are to be reviewed by the office of the service's surgeon general to ensure that the diagnosis is accurate and does not mask conditions such as PTSD or TBI. This provision has not yet made its way into most service discharge regulations, and commands may be unaware of the requirements.

Rights limited in ODPMC proceedings

Aside from this special review for combat vets, the rights available to those facing ODPMC discharges are limited. Like other administrative discharges in which an OTH may not be awarded, ODPMC is processed under the Notification Procedure.⁶ Unless they have served for six years, members are not entitled to an administrative discharge board hearing, but instead may submit a statement in opposition to the discharge. They are also entitled to

consult a JAG (JAGs give advice here, but seldom provide representation or assist in preparing statements), to civilian counsel at their own expense, to copies of the documents to be submitted to the separation authority and, in some cases, to review of the proposed discharge by the separation authority's Staff Judge Advocate.

Statements challenging a proposed discharge or character of discharge are often considered ineffective, so that many servicemembers and JAGs tend to consider discharge a foregone conclusion once the discharge process is initiated by the command. Few members seek help from civilian counselors or attorneys in preparing statements, and statements usually amount to a general plea for retention or for an honorable discharge, sometimes pointing to good performance and conduct, and sometimes accompanied by character letters. While no statistics are available, anecdotal experience suggests that such general statements make little difference in the outcome of discharge proceedings. Relatively few servicemembers point out legal errors in the discharge proceeding, or argue that they do not meet the criteria for discharge, and few include substantial documentation with the statement.

Challenging ODPMC discharges

But these discharges can be challenged, and attorneys and counselors can play an important role in presenting solid arguments for retention (usually with a request for referral

KAREN DETAMORE: LAWYER, ACTIVIST, FRIEND

It is with an extremely heavy heart that the Military Law Task Force announces the passing of Karen Detamore on May 1, 2012.

Karen worked from 1976-77 as a staff member for the National Lawyers Guild Military Law Project in Japan, providing legal assistance for individual servicemembers. She remained a member of the MLTF for the rest of her life. Most recently, Karen had rejoined the Steering Committee and was its secretary at the time of her passing.

Karen fought for the civil and legal rights of the downtrodden and underrepresented her entire life. As a legal worker and lawyer, Karen consistently led an inspiring and successful life, devoted in service to the oppressed.

For over 20 years from 1989 through mid-2009, Karen was Executive Director of Friends of Farmworkers, a statewide legal services organization in Pennsylvania providing legal representation and education to migrant and seasonal farmworkers. FOF has protected thousands of farm workers, defending them on issues related to their employment and their ability to organize. FOF has become an important and powerful legal advocacy group thanks in major part to Karen's vision, dedication, intelligence, and strategy. She was forced to step down from her position at FOF in 2009 because of health issues.

In 2006, the Pennsylvania Bar Association gave Karen its "Everyday Leader Award" and in 2009 the

Pennsylvania Legal Aid Network gave her its "Excellence Award."

Last year the Philadelphia Chapter of the National Lawyers Guild honored Karen for her years of service and went on to create the Karen Detamore Lifetime Achievement Award, to honor those whose lifetime of work parallels Karen's many accomplishments and the values she always fought for.

Karen will be sorely missed by all for whom she fought and worked, including all of us in the MLTF. She leaves behind her partner, MLTF member Harold Jordan, and two children.

- [Read NLG Philly obituary](#)
- [Read Philadelphia Inquirer obituary](#)



to a MEB) and/or honorable characterization. It is sometimes sufficient to present the command with evidence of more serious medical problems at the outset, pointing out that they take precedence over ODPMC discharge and must be referred to a MEB. Even if an adjustment disorder has been correctly diagnosed, an accompanying orthopedic problem, or a separate psychiatric diagnosis, may mean that the administrative discharge is improper.

When commands cannot be persuaded to drop (or not initiate) discharge proceedings, well-crafted statements raising medical and legal arguments can sometimes turn these cases around. Counselors and attorneys can write or assist in writing statements, using memoranda or letter briefs to point out factual and legal reasons to halt the discharge proceedings. (In cases where these are unsuccessful, the arguments and documentation provide an important paper trail for later discharge review.) While every case is different, there are some common issues to consider:

- **Misdiagnosis** – As noted above, adjustment disorder diagnoses are becoming increasingly popular among some military health care professionals and commands. Since this disorder can mask underlying PTSD, TBI or other disorders, an independent civilian psychiatric evaluation (or two) can be key, although in the long run it will be important to support a civilian diagnosis with the same or a similar diagnosis by a military psychiatrist or psychologist. In many cases, adjustment disorder is not the only psychiatric diagnosis in a member's medical record; prior diagnoses, including more serious ones, are sometimes ignored by the evaluating doctor in the rush to discharge for adjustment disorders. A careful review of medical records (including those records maintained separately by behavioral health or other military clinics, not always copied into the member's medical record) may show conflicting or co-existing diagnoses. Where PTSD, major depression, anxiety disorder or other serious conditions have been diagnosed, it is important to determine whether or not these are severe enough to warrant referral to a medical board. The statement can note the diagnoses, attach the appropriate records, and argue that the member's case should be referred for a medical evaluation board. (In cases where command and separation authority ignore conditions warranting MEBs, it is essential that the member mention all other medical conditions during the discharge physical examination. At that point, the examiner can refer the member for further evaluation or testing of the other conditions, and possible referral to a MEB.)

- **Conflicting diagnoses** – Where other diagnosed medical problems don't appear to rise to the level of medical discharge/retirement, the existence of conflicting diagnoses can still be used to undercut the adjustment disorder diagnosis. Counsel or counselor can point out that there is no

certainty about the diagnosis, that ODPMC discharge must be based on a specific and reliable diagnosis, and that further medical work-up is necessary before the member should be discharged for ODPMC.

- **Lack of evidence of effect on performance and conduct** – ODPMC discharge is not appropriate merely because a condition has been diagnosed. DoD policy and service regulations require that the condition interfere with performance of duty or conduct. The Army, for example, allows separation for ODPMC disorders "sufficiently severe that the Soldier's ability to effectively perform duties is significantly impaired."⁷ Similarly, Navy policy states that a discharge packet must include "specific documentation...from the medical officer that condition renders member incapable of completing member's OBLISERV."⁸ While the services vary in the conclusions which must be made by the psychiatrist or psychologist, all of them require objective evidence of poor performance or conduct, or behavior affecting the member's service. Commands and separation authorities sometimes overlook this because they wish to discharge the person. At other times, "potential" interference with duty will be used as a basis when the adjustment disorder is diagnosed as severe, and the psychiatrist or psychologist warns of potential harm to the member or others.

- **Lack of counseling and opportunity to overcome deficiencies** – The regulations require that members facing ODPMC discharge be counseled about performance deficiencies and offered an opportunity to overcome them. Counseling in this situation means preparation of a formal counseling entry identifying the problems, warning that administrative discharge may follow if the problems continue, and outlining steps the member may take to overcome the deficiencies. An opportunity to overcome deficiencies must, at a minimum, involve some period of time in which the member does not have performance problems, and in many cases should involve a rehabilitative transfer or rehabilitative move to another part of the current command. While rehabilitative transfer can be waived by the separation authority, counseling and an opportunity to overcome deficiencies cannot. In order to show that the counseling has been ineffective, there must then be some further problems of performance or conduct to which the command can point; some services require documentation of the further problems.

This can be difficult to do when there are no performance or conduct problems, and some commands have resorted to using a counseling entry which merely states the diagnosis, or the diagnosis and an explanation that the disorder is a condition which interferes with

performance and conduct. In some cases, commands prepare this entry mere days (or less) before notifying the member of discharge proceedings, so that the counseling statement is merely a formality. It is uncommon for a command to point to 'further' poor performance or conduct that violates the counseling statement.

Given this, counsel or counselor can argue that the requirements of counseling and rehabilitation have not been fulfilled, that no (or insufficient) deficiencies were identified in the counseling statement, that counseling was treated as a mere formality, that no suggestions for improvement were offered the member, and/or that no further deficiencies occurred which would warrant initiation of discharge proceedings.

▪ **Improper basis for the discharge** – ODPMC discharges are sometimes given in reprisal for complaints protected under the Military Whistleblower Protection Act,⁹ and particularly in reprisal for sexual assault or sexual harassment complaints. In these cases, the separation authority is unlikely to be aware of the underlying complaint and reprisal issue unless it is specifically raised in the member's statement and, if possible, supported by documentation of the complaint or the matter complained of. In these cases, separation authorities should follow the provisions of the Whistleblower Protection Act regulations and make an inquiry into the possibility of reprisal.

▪ **Defects in the discharge proceedings** – Many commands have trouble adhering to the regulations for administrative discharge, and it is valuable to compare the notice of discharge proceedings, statement of awareness/waiver of rights form, and command recommendation for discharge against the service and DoD regulations. Commands sometimes fail to give specific notice of the proposed reason for the discharge. For example, the notification may not state which of several medical conditions is the basis for ODPMC discharge, or the command may fail to forward all appropriate documentation (including the member's statement and its attachments) to the separation authority.

▪ **Need for second opinion and service Surgeon General review for combat veterans** – Again, where members are serving or have served in an imminent danger pay area, the adjustment disorder diagnosis must be confirmed by a peer or higher level mental health professional and reviewed by the service's Surgeon General, to look for PTSD or other "co-morbidity" conditions. Since this provision is fairly new, and hasn't been incorporated into all of the service regulations, the error may turn up in discharge proceedings.

In egregious cases, client and counsel or counselor may want to submit documentation from organizations concerned about servicemembers' rights. In cases involving sexual assault, an 'amicus' letter outlining legal and policy issues from the [Service Women's Action Network](#) (SWAN) might be helpful. With other violations of rights, the Military Law Task Force, the [GI Rights Network](#), or local counseling organizations might be asked to give written comments on the legal issues, which can be included in the statement.

Noting that the statement has been cc'd to a Member of Congress can also catch the command and separation authority's attention—and well-argued statements are more likely to result in pointed inquiries from the Congressman than letters simply asking for help because the discharge is unfair.

Conclusion

ODPMC discharges can be challenged successfully if there is enough time and effort put into the challenge. Achieving a discharge with the correct diagnosis and an honorable one as well can make all the difference to a servicemember. Successful challenges may also deter the current trend by commands to get rid of "troublemakers" with bogus ODPMC discharges.

Kathleen Gilberd is a legal worker in San Diego, California, and executive director of the Military Law Task Force.



Endnotes

1. [DoD Instruction 1332.14](#), Encl. 3, para 3.a.(8); Naval Military Personnel Manual (MILPERSMAN) 1910-120; [Army Regulation \(AR\) 635-200](#), part 5-17; [Marine Corps Separation and Retirement Manual \(MARCORSEPMAN\) 6203](#); [Air Force Instruction \(AFI\) 36-3208](#), part 5-11. Only the Army calls ODPMC by that name. The Navy uses 'physical and mental conditions,' the Marine Corps calls it 'conditions not a disability,' and the Air Force uses 'conditions that interfere with military service.'
2. The Service Women's Action Network (and this writer) have noted a trend towards adjustment disorder discharges in women who have reported sexual harassment or sexual assault. Since Post Traumatic Stress Disorder (PTSD) is a common result of sexual trauma, under-diagnosis seems a likely problem. At the same time, these complainants are frequently seen as trouble-makers by their commands, with the result that they may be referred for psychiatric evaluation on the basis of their 'non team-player' behavior.
3. DoD 1332.14, Encl. 3, para. 3.a.(8).(c).
4. See [DoD 1332.38](#), Encl. 3, para. 3.2.4.2 and .3.
5. DoD 1332.14, Encl. 3, para. 3.a.(8).(c).
6. DoD 1332.14, Encl. 5, para. 2.
7. AR 635-200, Para. 5-17.a.(9).
8. [MILPERSMAN 1910-120](#), Para 2.c.
9. 10 USC 1034; [DoD 7050.06](#).

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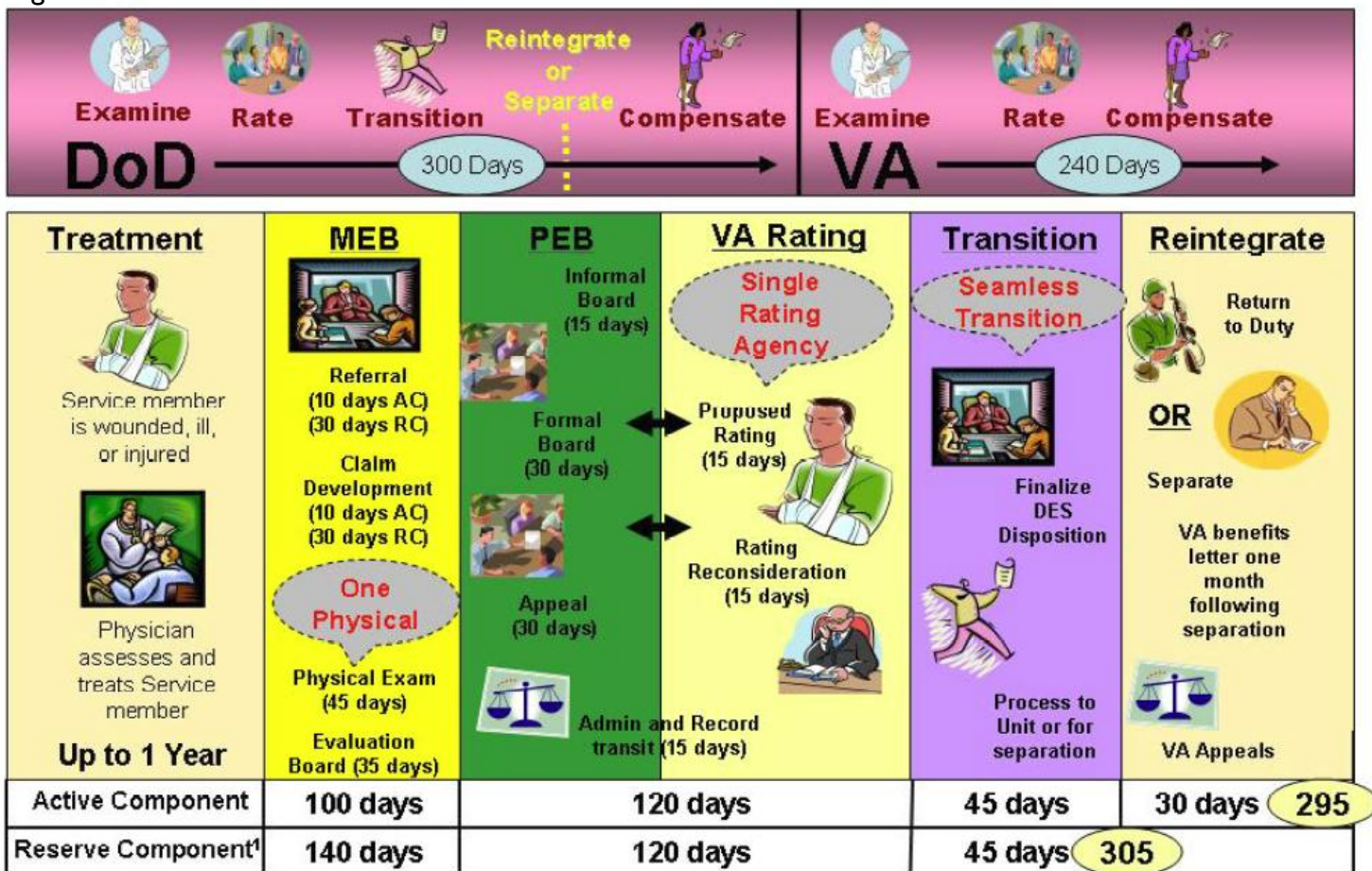
1. It was taking, on average, 540 days for a servicemember to receive medical testing, disability rating and discharge from the military, then to go through much the same process to get VA to exam, rate, certify and begin disability payments.
2. In the time between separation and delivery of VA benefits, servicemembers were without salary or benefits.
3. The military and the VA used different disability rating systems.
4. Even within the military and VA systems, the procedures and results appeared arbitrary and subject to differing local results.
5. There was little monitoring, evaluation or transparency within either the military or VA systems.
6. The servicemember had no guidance from either the service or the VA to assist him or her through the process.

7. Many deserving servicemembers gave up before receiving disability benefits.

The goals of IDES are to:

- Reduce the case-processing time – that is, the time from entry into the system to deliverance of VA benefits to the member – from the 540-day average of the legacy system to 295 days for active members and 305 days for reserve members.
- Have a single medical examination conducted by VA staff.
- Design these exams to be thorough and clearly summarized (Narrative Summary, or NARSUM) so that disagreements between the military and VA can be resolved quickly and so that VA can effectively rate the member's disability.
- Design a clearly charted timeline and process that the servicemember and family can understand and follow, with appeals at all steps.
- Provide the servicemember with a caseworker from the military, known as a Physical Evaluation Board

Figure 1: IDES Process Timeline



1. Reserve Component member entitlement to VA disability compensation begins upon release from active duty or separation.

Liaison Officer (PEBLO), and the VA, known as a Military Service Coordinator (MSC), and staff so as to provide one PEBLO and one MSC per 20 servicemembers to allow guidance of the individual through the system.

- Determine the servicemember’s fitness for duty within 100 days of entry into the process.
- Train commanders to respect servicemembers profiled within the system, to provide these members with work that will maintain their self-respect, and to assure that members make their appointments as required by IDES.
- Support servicemembers within IDES by keeping them in the service, providing them with salary and benefits until they are retired with a 30-day assurance of benefits from VA.
- To set up an electronic information system to allow coordination between each service and the VA and to allow servicemembers access to their IDES files.

distributed by the Undersecretary of Defense for Personnel and Readiness on Dec. 11, 2011. This 55-page document details every step of the IDES process as idealized by the results of the pilot program. Like all military procedures or regulations, it takes familiarity with acronyms and concentration to understand. I have tried to summarize the IDES process without hundreds of pages of detail.

Timelines:

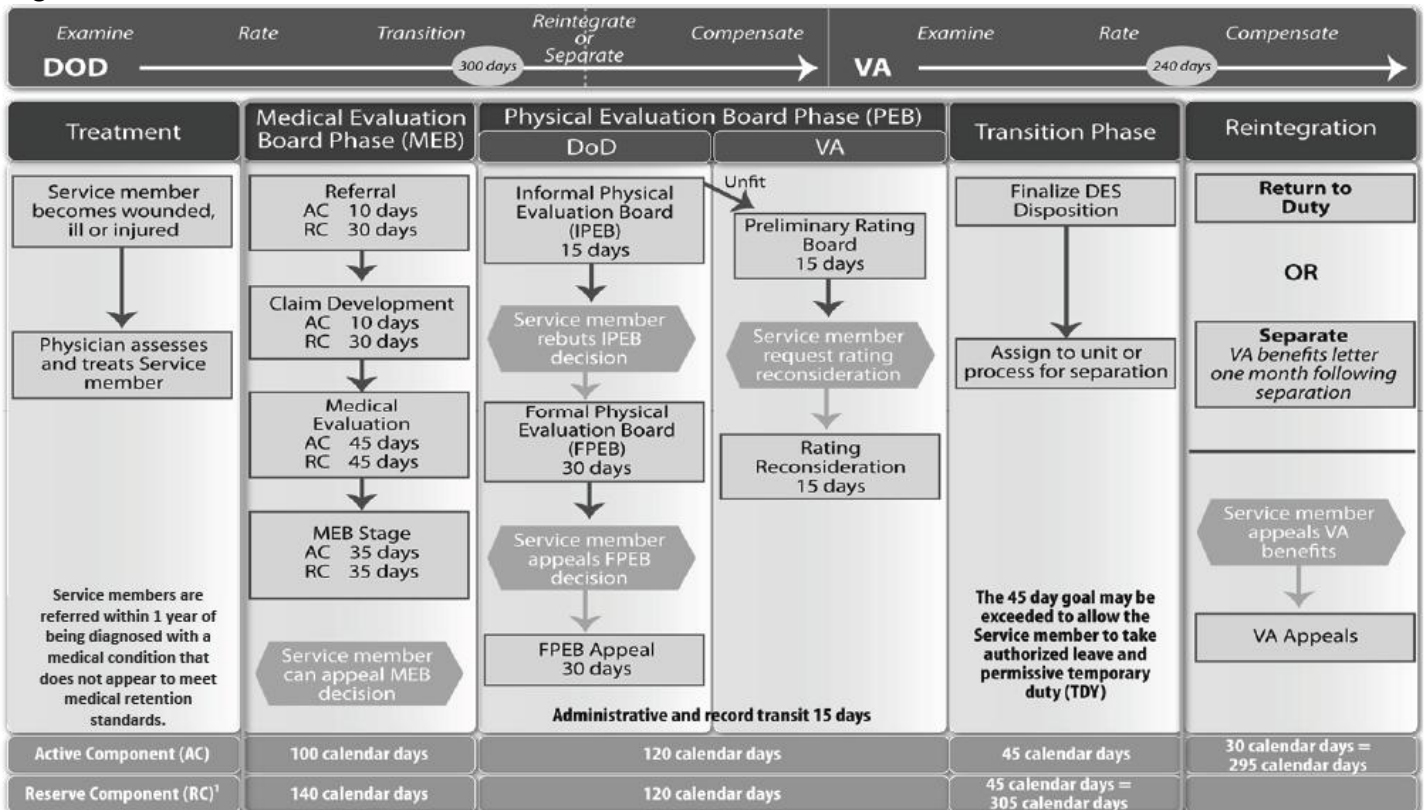
Figures 1 and 2 show the process from MEB referral to VA benefits letter at 295 days (305 days for Reserves). They also show, at the top, the legacy DES timeline at 540 days (300 days DOD and 240 days VA).

The two charts provide an overview of the process as well as some specifics (You can also call or e-mail the author for guidance with the details; contact info is at end of this article). Frustrations may arise in the process because medical treatment is often, if not always, taking place simultaneously with the separation/retirement process. The system is designed to avoid interaction between IDES and treatment personnel because every interaction slows down the process. As a counselor you will be tempted to find a way to interfere, because there will be service related symptoms that may not be noted in the NARSUM that will affect the member’s disability rating.

The IDES process

IDES moved from a small pilot to a system-wide program through DTM (Directive Type Memorandum) [11-015](#),

Figure 2: IDES Timeline



¹Reserve Component member entitlement to VA disability begins upon release from active duty or separation

Steps in the process

There are many intermediate steps that are not covered by the charts, with many personnel involved. Here is a two-page process summary, which refers to the steps and the personnel:

DTM 11-015 IDES PROCESS

1. **GENERAL.** The IDES is the joint DoD-VA process by which DoD determines whether wounded, ill, or injured servicemembers are fit for continued military service and by which DoD and VA determine appropriate benefits for servicemembers who are separated or retired for a service-connected disability. The IDES features a single set of disability medical examinations appropriate for fitness determination by the military departments and a single set of disability ratings provided by VA for appropriate use by both departments. Although the IDES includes medical examinations, IDES processes are administrative in nature and are independent of clinical care and treatment.
 - a. The IDES scope includes all medical examinations and all administrative activities associated with IDES case management from the point of referral by a military medical care provider to the point of return to duty or completion of VA's benefits decision letter, including the management of servicemembers who are temporarily retired for disability through the IDES.
 - b. Administrative requirements include, but are not limited to, creating a DES case file, educating the servicemember on the process, advising the servicemember of the results of the MEB and PEB and their options, rights, benefits, and entitlements; assisting the servicemember as the case progresses through the IDES process; and reevaluating servicemembers who were temporarily retired for disability through the IDES or who have an approved record correction requiring an examination. All IDES timelines in this DTM refer to calendar days.
2. **PROCESS STEPS.** This section describes the high-level IDES process:
 - a. In consultation with the servicemember's commander and on approval by the MEB convening authority, a military medical care provider refers a servicemember to the IDES and provides the referral to an MTF patient administrator.
 - b. The MTF patient administrator assigns a DoD PEBLO to the servicemember.
 - c. The PEBLO informs the servicemember of the IDES process, assembles the DES case file, enrolls the servicemember in the Veterans Tracking Application (VTA), and refers the servicemember to a VA MSC case manager.
 - d. The VA MSC informs the servicemember of the IDES process and requests that qualified medical examiners perform the medical examinations required to adjudicate the servicemember's disability claim.
 - e. Qualified medical examiners perform the medical examinations required to adjudicate the fitness-for-duty determination and rating determinations.
 - f. The MSC provides the completed medical examination results to the servicemember's PEBLO and the VA D-RAS of jurisdiction.
 - g. The PEBLO incorporates the medical examination results in the IDES case file and provides it to the MEB convening authority.
 - h. The MEB convening authority (MTF commander or senior physician(s) designated by the commander for this purpose) conducts an MEB and provides the results to the PEBLO, including the results of the MEB's response to the servicemember's rebuttal of the MEB findings.
 - i. The PEBLO provides a copy of the MEB findings, to include the completed VA medical examination results, to the servicemember and, if the MEB did not return the servicemember to duty, forwards their case to the PEB administrator.
 - j. The PEB administrator prepares and provides the servicemember's case to the informal PEB (IPEB).
 - k. The IPEB adjudicates the case and requests that the D-RAS provide proposed ratings for servicemember conditions that the IPEB determines to be unfit.
 - l. The D-RAS prepares and provides the servicemember's proposed disability ratings, and reconsideration of the proposed ratings (if the servicemember requested reconsideration) to the IPEB.
 - m. The IPEB provides its findings to the servicemember.
 - n. If the servicemember requests a formal PEB (FPEB), the FPEB convenes, adjudicates the case, and provides its findings to the servicemember.

- o. If the servicemember appeals the FPEB findings, the military department considers the appeal and returns to duty, separates, retires, or assists the servicemember to complete an inter-service transfer, if appropriate and approved.
- p. The military department concerned and VA provide servicemembers, separated or retired for disability through the IDES, with disability benefits and compensation at the earliest time allowed by law after separation.
- q. After separation, the military department periodically reexamines and re-adjudicates the cases of servicemembers who are temporarily retired for disability.

This is a thorough summary, but the devil is in the details (and, as referenced below, in the staffing levels).


Some problems with IDES

IDES has been operating for four-and-a-half years as a pilot program, and numerous problems have been revealed in GAO reports, Senate Hearing 111-913, investigative reports and soldier blogs. Here are some:

- When IDES was a small pilot program, operating on a few well-managed bases, it maintained a timeline of 295/305 days. As it expanded and there was a surge in cases, the average timeline has ballooned to more than 450 days. This is partly due to a backup of Iraq/Afghan disability cases and to the recognition of TBI/PTSD, but mostly due to serious understaffing.
- Coordination of cases is poor. The ratio of PEBLOs to servicemember has been reported at 130:1 and training of PEBLOs is slow. Soldier blogs indicate that PEBLO management is key to efficiency, yet there are many complaints about paperwork sitting on desks for weeks.
- The services and VA have been slow to coordinate

IT systems. A GAO report of February 2011 said they still didn't have a clear plan.

- According to Gen. Peter Chiarelli, the Army's vice chief of staff, commanders are not involved in the process and do not treat the IDES process as their responsibility. As a result, servicemembers miss IDES appointments, which should take priority over military responsibilities.
- VA staff have had problems finding housing and office space on military bases and hospitals.
- Service members transferred to military treatment facilities have trouble finding housing.
- There are many servicemember complaints of idleness and frustration, leading to difficulty with command. The GAO documented a 2.8% discharge rate for misconduct among service members going through IDES.
- There is complaint about incomplete and unclear exam summaries (NARSUMs), leading to conflict between military and VA staff and slower process.
- VA is severely lacking doctors and staff to carry out medical evaluations. They are hiring subcontractors, which adds to the coordination dilemma.

As counselors, we will only understand IDES by working through cases and communicating with each other. There are some counselors who think we should get soldiers out as quickly as possible and deal with VA benefits after discharge. I don't have an opinion yet on that. I suggest communicating through the helpingout listserv (maintained by the [GI Rights Network](#)) with the title "IDES. Again, I offer my limited but growing knowledge and hope we can have a constructive conversation at the GI Rights Conference in Fayetteville." 

Kit Anderton is a counselor with the Santa Cruz GI Rights Hotline. Contact him at kit@cruzio.com or 831-359-1914.

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Ninth Circuit to Vets: Tough Luck

Court Backs Out of Benefits Case On Separation-of-Powers Grounds

BY JEFF LAKE

An *en banc* panel (all the justices) of the Ninth Circuit in May reversed a 2011 decision of the court that care provided by the Veteran's Administration (VA) was so inadequate as to violate due process, ruling that federal courts lack jurisdiction to adjudicate such cases.

By disclaiming jurisdiction to hear cases involving delays or inadequate care by the VA, the panel, led by Judge Jay Bybee – of George W. Bush-era torture memo infamy – placed veterans in what a dissenter called a “Catch-22” situation because they are stuck petitioning the very entity that is delaying care, its system for hearing such claims leaving them nowhere to go.

The *en banc* decision reversed last year's holding by a three-judge Ninth Circuit panel in *Veterans for Common Sense v. Shinseki* that the care provided by the Veteran's Administration was so inadequate and its system for adju-

On Watch adds feature for easier reading in digital formats

With this issue, there will be some (literally) small but mighty additions to our layout that should make reading the PDF on computers and other digital devices a bit smoother. The changes will affect the jumps between pages when an article does not continue on the next contiguous page.

Previously, if a front page article continued on page 6, readers had to scroll down to that page, then move back up several pages when they finished the article, so they could pick up reading others.

Now, hyperlinked “buttons” will provide an instant transition between the divided sections of articles. A small RIGHT-facing arrow (➡) will appear at the break point, which, when clicked, will take you to the page where the article continues. At the end of the article, an UP arrow (⬆) will return you to the originating page. All front page articles will have a return button at their end.

We hope readers find this small feature useful and, as always, we invite feedback about anything in *On Watch*.

dicating service-related disability claims was so fraught with delays as to amount to a constitutional due process violation, as reported by Becca von Behren in the [September 2011 issue of On Watch](#).

The *en banc* court – to which the Obama Administration appealed promptly following the three-judge panel's decision – ruled 10-1 on May 7, 2012, that Congress had intended the VA to be “a non-adversarial system of veterans' benefits administration” and that the courts had no power to hear claims of systematic failure. Bybee concluded: “Such responsibilities are left to Congress and the Executive, and to those specific federal courts charged with reviewing their actions; that is the overriding message of the VJRA, and it is the one that we must respect here.” The attorney for Veterans for Common Sense told the Associated Press that he plans to appeal.

Judge Mary Schroeder, the lone dissenter, began her dissent with a quote from *Catch-22*, the novel by Joseph Heller, correctly pointing out that the majority's holding means that, “[w]ith respect to the claims of systemic delay is that veterans have no place to go to adjudicate such claims.” Now the only remedy is an individual mandamus action by a veteran, which Judge Schroeder points out “is rarely granted.” She concluded with where she began:

“The majority's holding thus reduces itself to a ‘Catch 22’: To challenge delays in the system, you must bring a systemic claim and not just an individual claim. But if you bring a systemic claim, it has to be treated as an individual claim and you must suffer the delays in the system. Get it?”

This case was filed in 2007 and a trial was held in 2008. As of this writing there is still no resolution and the vast majority of judges to hear the case have ruled against the veterans. As usual, the system is long on platitudes for veterans and shamefully inadequate in providing any real care or concern for them.

Jeff Lake is an attorney in San Jose, California. He is a member of the MLTF Steering Committee and an On Watch editor.

DON'T MISS IT!



75th Anniversary Convention

Pasadena Hilton

MLTF CLE seminar

Thursday, Oct. 11 • 8:30 to 12:30

DISCHARGE UPGRADING AND DISCHARGE REVIEW

an introductory program for attorneys, law students and counselors interested in assisting veterans with less than honorable discharges and related problems

Speakers:

Teresa Panepinto, Jim Klimaski,
Kathy Gilberd & Bridget Wilson

For more information contact
nlg.mltf@gmail.com

MLTF annual meeting

Thursday, Oct. 11 • 1:30 to 5:00

Other workshops and events to be announced. Check our website for updates/changes
nlgmltf.org

MLTF NEWS & NOTES

BAMLP training efforts - The Bay Area Military Law Panel continues to operate a successful training program for law students who want to do military counseling. The program is conducted in collaboration with American Friends Service Committee and GI Rights Network. In March BAMLP presented follow-up training for seven of the students trained Spring semester, including a Navy vet and IVAW member. As part of the program, in May the students were treated to an end-of-year pizza dinner to review and evaluate the program, as well as to build Guild connections.

BAMLP and AFSC/GIRN are working together to fund a part-time work-study law student during Summer, 2012. Our candidate is a veteran and we are waiting to hear whether the position will be funded.

Bay Area group activities - Recent BAMLP program topics included "What to Expect in Article 15 Proceedings." In April BAMLP was invited to attend the SF Film Festival screening of *Invisible War* about military sexual assault. BAMLP member Elizabeth Stinson was a consultant for the film and participated in a post-screening panel discussion. As part of our touch with Hollywood glamour, the group was invited to attend a post-screening party. The June program "Poking Holes in Military Psychiatric Testing" will be presented by BAMLP member Jim Cook, who has worked as a therapist for the military, including Wounded Warrior and Travis Air Base.

Rehabilitation in sentencing - MLTF has received a donation of 20 copies of *Military Law Review's Summer 2011 issue* with Major

Evan Seamone's article, "Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism." Copies are available to Task Force members for the cost of postage, from kathleengilberd@aol.com. Thanks to Major Seamone for the gift.

Congrats - Cheers to Task Force member Dorah Rosen, from the Santa Cruz GI Rights Network group, on her marriage to Geoff Shuey. We wish them all the best.

Thanks - MLTF recently received a donation from a servicemember who had used the website. He or she wrote: "[donation for] Use of *On Watch* and donation for extremely vital information – 4 tours, 17 yrs and getting fcked over, unbelievable."

New Manual for Courts-Martial - The 2012 edition of the *Manual for Courts-Martial* is now available online at army.mil/usapa/epubs/pdf/mcm.pdf. Unfortunately, a printed version of the Manual is not expected out until some time next year.

BAMLP/MLTF training materials - The Bay Area Military Law Panel and MLTF are distributing a new version of the BAMLP training materials, updated as of May, 2011, and now available on CD. Along with a number of MLTF memos are discharge checklists, sample letters and forms for use in military cases, and important regs. The CD is available for \$30, and the binder plus CD for \$85 plus shipping. For ordering information, contact nlg.mltf@gmail.com.

ABOUT THE MILITARY LAW TASK FORCE

The National Lawyers Guild's Military Law Task Force includes attorneys, legal workers, law students and "barracks lawyers" interested in draft, military and veterans issues. The Task Force publishes *ON WATCH* as well as a range of legal memoranda and other educational material; maintains a listserv for discussion among its members and a website for members, others in the legal community and the public; sponsors seminars and workshops on military law; and provides support for members on individual cases and projects.

The MLTF defends the rights of servicemembers in the United States and overseas. It supports dissent, anti-war efforts and resistance within the military, offering legal and political assistance to those who challenge oppressive military policies. Like its parent organization, the NLG, it is committed to the precept that human rights are more sacred than property rights.

The Task Force encourages comments, criticism, assistance, subscriptions and membership from Guild members and others interested in military, draft or veterans law. To join, or for more information, please check our website at www.nlgmltf.org or contact the Task Force at:

MLTF, 730 N. First Street, San Jose, CA. 95112 ▪ (619) 463-2369 ▪ nlg.mltf@gmail.com

 facebook.com/nlgmltf

 twitter.com/military_law



Military Law Task Force
730 North First Street
San Jose, CA 95112