

# HOW TO WIN YOUR COAST GUARD PHYSICAL DISABILITY CASE

By

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## **Introduction**

In the course of representing Coast Guardsmen in the Physical Disability Evaluation System (“PDES”) over the past twenty-five years, I have found that there is a shortage of practical information describing simple, positive steps that members can take to achieve the best possible outcome in their cases.

This booklet is designed to help fill that information gap so that you will be able to work with your counsel and be a proactive, well-informed participant in this process.

At the end of each chapter, you will find a summary of the action steps needed at each stage to make sure that your case is fully and properly developed. Some steps may take a few minutes, while others will take you several days. Please do not skip a step, as each one has been carefully planned as part of an overall strategy that will put you in the driver’s seat throughout this process.

If you have any questions regarding the points made in this booklet, then please feel free to contact me at the address shown on the final page. Good luck and thank you for your service to our country!

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## CHAPTER ONE- OVERVIEW OF THE COAST GUARD PHYSICAL DISABILITY EVALUATION SYSTEM

Unlike the other armed services, the Coast Guard does not participate in the DOD/VA Integrated Disability Evaluation System (“IDES”) and prefers to rely upon a more personalized approach to the PDES process. If you properly prepare for it, you will find that this legacy<sup>1</sup> structure provides you with many more opportunities for effective interaction with decision makers than those afforded to your DOD peers in the IDES process.

In the Coast Guard PDES structure, your case will be processed in accordance with the procedures outlined in the Physical Disability Evaluation System Manual – COMDTINST 1850.2D (“PDES Manual”) as well as applicable provisions of Title 10, U.S. Code, Chapter 61 and Volume 38, Part C of the Code of Federal Regulations.

Since you are reading this book, it is likely that you are entering the PDES process and should now begin familiarizing yourself with these references. It would also be wise to begin reviewing the applicable provisions of the Medical Manual- COMDTINST M 6000.1E so that you will be familiar with current retention standards and provisions for waivers.

Then, you should next obtain a complete copy of your medical records from any and all civilian and military providers at the start of this process and then update it every 30-60 days.

Finally, if you choose to work with me, this is also the best time to provide me with a copy of your existing records so that I may assess your case at that point and discuss how to develop it as you proceed through the PDES process.

### **Summary of Action Steps for Chapter One**

1. Become familiar with the PSC-psd-de web site
2. Download copies of the PDES Manual, Medical Manual and 38 CFR Part C
3. Obtain a copy of your current Coast Guard medical record and review it to identify what pertinent records may be missing and need to be requested through the providers.
4. Obtain copies of records from outside providers- military and civilian
5. If working with me, please forward copies of any and all medical records as well as your personnel record, marks, award citations, counseling entries, disciplinary proceedings, etc. If in doubt, err on the side of providing more information, not less.

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<sup>1</sup> The term “legacy” refers to the traditional PDES system now being phased out by the Department of Defense as part of the Joint DOD/VA DES process. The Coast Guard, the NOAA Corps and the Public Health Service retain the legacy structure.

## CHAPTER TWO- REVIEWING YOUR MEDICAL RECORDS AND DEFINING YOUR IDEAL OUTCOME

Now that you have obtained a complete copy of your medical records- military and civilian- it is time to define your goals for the PDES process in light of the governing instructions and regulations.

However, I would first suggest that you also obtain a copy of the Merck Manual and the Merck Manual of Patient Symptoms- two medical treatises authored by Robert S. Porter that you may order online at Amazon.com. On the same site, you can also order a copy of Dorland's Medical Dictionary, 32<sup>nd</sup> edition.

The total cost for these items will be a little more than \$100, but this expense is worth it as these treatises will help you to better understand your medical records and effectively work with me to develop your case.

If your goal is to be found Fit, then we will need to review the current retention standards in the Medical Manual to determine whether any diagnoses contained within your medical record might arguably render you Unfit. If so, we will need to develop a convincing argument with real world examples showing how you can perform your duties despite these injuries or conditions.

If your goal is to be found Unfit, then we will need to identify each and every condition or injury that prevents you from performing the full range of duties that one could normally expect of a Coast Guardsmen in your pay grade and with your length of service.

Please do not listen to anyone who trots out the old trite phrase that "... the Coast Guard only boards you for one condition and you go to the VA for the rest". Such misinformation is not only inaccurate and irresponsible, but it is also contrary to the very guidance contained within the PDES Manual.

This sea story stems from the guidance that members are only to be processed for conditions that render them unfit to perform their duties- a wise policy that was intended to protect Coast Guardsmen from having their careers ended by injuries or medical conditions that may require treatment or monitoring but which do not affect the member's ability to perform his or her duties on a daily basis.

For example, it is normal for all of us with the passage of time and physical activity to develop minor arthritic conditions that may not allow us to be triathletes, but we can still hold our own on a daily basis.

In your case, please remember that there is no one better aware than you as to how your injuries or medical conditions affect you in the daily performance of your duties.

Take the time to review your records with me at the outset of your case so that we may decide how each recorded diagnosis either does or does not impact you in the workplace. This will help us to determine whether your goal is to be found fit or unfit in the PDES process.

Once you have recorded your initial thoughts on paper, it is time to discuss your observations with those closest to you- a spouse, significant other or a close friend. Many times, these persons will notice things that you have downplayed or accommodated but which really do affect you on a daily basis. Take the

time to discuss your case with them, as their insight may prove invaluable to us in obtaining the optimum outcome for you.

When you have determined that a condition adversely impacts your ability to perform your duties, write down examples that will assist both us and your provider in drafting your Medical Evaluation Board.

This is also a good time to review these observations with trusted coworkers, as these individuals may need to write nonmedical evidence letters corroborating how these conditions limit or do not limit you in the workplace. While we will talk more about nonmedical evidence letters in the chapters that follow, the ideal time to identify these persons is at the outset of your case.

At this point, you will also receive my assessment of your medical records and description of symptoms. We will then discuss your initial goals and whether it is possible to achieve them. If I do not believe that your intended goals are reasonable, then we will discuss why this is the case and determine what your realistic best case scenario should be in the PDES process. Once this is determined, then we will develop a plan to achieve your best case outcome.

By carefully following the action steps below, you will be well-prepared to effectively contribute to the drafting of your Medical Evaluation Board- the subject of the next chapter.

### **Summary of Action Steps for Chapter Two**

1. Order copies of the Merck Manual, the Merck Manual of Patient Symptoms and Dorland's Medical Dictionary from Amazon.com
2. Highlight all diagnoses and review medical treatises to determine which of the symptoms or limitations commonly associated with these conditions afflict you on a daily basis.
3. Write down examples of how each condition affects you in the workplace, i.e. a lower back injury that prevents you from accessing confined spaces, bending, lifting more than 10-15 pounds, etc.
4. Review your thoughts with a loved one or close friend to ensure that your list is complete and you have not downplayed or overstated your limitations due to each injury or condition.
5. Discuss these examples with trusted coworkers to obtain their feedback as well as to identify which of them might be good sources for nonmedical evidence letters that will better focus the drafters of your medical board and the command endorsement in your case.
6. Not to worry, we will work through these steps together as a team.

## CHAPTER THREE- DRAFTING NONMEDICAL EVIDENCE LETTERS THAT WILL ACHIEVE YOUR GOALS

Contrary to what you may think, the individuals reviewing your case may not always know from simply reviewing your medical records and a medical board narrative summary how an injury or medical condition affects or does not impact you in the performance of your duties.

Plainly, if you are afflicted with a terminal illness or an injury causing a loss of sight, mobility or other catastrophic injury, this will be self-evident and you can rest assured that every effort will be made by the persons reviewing your case to obtain the maximum disability rating for you.

Fortunately, for most of us, this will not be the case and it will be incumbent upon you to show how these conditions either do or do not affect you in the performance of your duties.

The best tool to demonstrate your point regarding each injury or condition will be nonmedical evidence letters from your coworkers and supervisors- be they fellow Coast Guardsmen, civilian employees or government contractors.

You see, it is the persons with whom you work on a daily basis who can describe functional limitations posed by your medical condition(s) and how these limitations adversely affect you in the performance of your duties if your goal is to be found Unfit.

If your goal is to be found Fit despite the diagnoses contained within the text of your medical board narrative summary, then these will be the individuals who can describe how well you perform your duties despite the presence of these injuries or conditions.

There is a standard formula that these letters must follow in order to be effective in influencing the drafter of your medical board narrative summary, the person writing your command endorsement and persons reviewing your case on the Informal Panel ("IPEB") and Formal Panel ("FPEB") levels:

1. The letter must clearly identify its author and describe his or her relationship to you in the workplace.
2. In doing so, its author must describe how long he or she has observed you in the performance of your duties- days, weeks, months or years- in order to provide the factual basis for his or her observations.
3. If your goal is to be found Fit, then the person writing the letter should describe how well you have been able to perform your duties despite the underlying medical diagnoses at issue in your board.
4. This will mean providing practical examples that illustrate their points; i.e. "... while I know that he has a back injury, he has always been able to perform the full range of physical activities assigned to everyone in this shop/section/branch".
5. Conversely, if you wish to be found Unfit, then the same individuals would provide practical examples of your limitations in the workplace or accommodations made for your various injuries or medical conditions.

6. These letters should conclude by providing contact information for the individuals should anyone wish to obtain additional information or clarify a point in the letter that they did not understand.

7. From personal experience, I find it best to have the individuals provide work and personal e-mail addresses as their contact information. This allows medical personnel and persons within the PDES structure to contact them and arrange a phone call, if needed, without disrupting the military workplace.

8. Note- it is better to have 3-4 good solid letters from persons who have observed you on a daily basis within the past twelve months than a dozen letters from persons who no longer work with you or who do not observe you in the workplace on a regular basis.

9. Letters from a spouse, significant other or family members who actually live with you and observe you on a daily basis outside of the workplace are also useful; however, letters from distant relatives who simply speak with you by phone or exchange e-mail are given little weight in this process.

10. Please forward all such letter to me for review so that I might determine whether they add or detract from your goals.

11. In reality, I tend to draft sample letters for individuals to edit after speaking with them and obtaining their input. They can then edit the letters as they see fit, thereby making this task easier for them in the first place.

In reviewing the key points of this chapter, remember that our goal is to develop nonmedical evidence letters from persons who observe you at work or at home on a daily basis and can attest to your limitations or lack of limitations due to your various medical conditions. Keep this in mind and these letters will form an important part of your case.

### **Summary of Action Steps for Chapter Three**

1. Identify potential nonmedical evidence witnesses and discuss with them how your various conditions affect or do not affect you in the workplace.

2. Based upon their input, work with me to draft sample letters for their review.

3. Provide the edited or final letters to me for review to determine whether it adds or detracts from the theory of the case. Simple rule of thumb- if a letter provides no practical examples to support its conclusions, then it is not worth submitting.

4. Discuss with me how these letters may be used effectively to influence the drafting of your medical board narrative summary and command endorsement, as well as at later stages in this process.

## CHAPTER FOUR- EFFECTIVELY INFLUENCING THE DRAFTER OF YOUR MEDICAL BOARD

Now that you have reviewed your medical records and determined your goals for your PDES case, it is time to discuss how to effectively influence the content of your Medical Evaluation Board (“MEB”).

First, an MEB is convened when someone in a position of responsibility – your Coast Guard health care provider or your commanding officer- has determined that you have an injury or illness that causes concern about whether you can perform the full range of duties that one would normally expect of a service member with your length of service and in your pay grade.

The purpose of an MEB is to provide you with a detailed examination which documents your medical history, provides the diagnoses of any potentially unfitting conditions, describe the etiology of any diagnosed impairments as well as the treatment history, functional limitations and prognosis for each condition.

Many of my clients initially misunderstand the role of the Coast Guard health provider drafting their MEB narratives and assume that he or she is making the determination regarding retention or whether the degree of impairment merits separation or retirement.

To the contrary, the role of your provider is limited to documenting the points made above and a recommendation to the IPEB and, if necessary, to the FPEB as to whether you meet retention standards.

With this in mind, it is not intended to be an adversarial process- although it may sometimes feel that way! Let me explain why in the paragraphs that follow.

Given the uncertainty of the job market in the present economy, it is understandable that many of us will downplay our injuries and only seek treatment for the conditions that cause us pain or frustration throughout the course of the workday.

After all, you may have traumatic degenerative arthritis in both knees but have not sought treatment for it on a frequent basis if your primary concern is a failed lower back surgery with bouts of sciatica.

However, when it comes time for your MEB to be drafted, you may feel frustrated if your provider does not appear to view the bilateral knee injury as unfitting since it has not been the focus of your treatment. Here is how we will deal with this turn of events:

1. This is when it will be critical for you to submit nonmedical evidence letters from loved ones and coworkers that we discussed in Chapter Three to be able to establish your credibility with respect to the knee injury.
2. It will also be helpful for you to provide the examiner with an overview of the history of each injury that you wish to be found unfitting, along with a discussion of the treatment provided and residual limitations that adversely affect you in the workplace.

3. Conversely, if you wish to be found fit, then you will give your provider the nonmedical evidence necessary to demonstrate that any conditions for which you are being placed into the PDES process do not affect your ability to perform your duties.

4. If your provider forwards a draft of the MEB for your review, we will review it in light of your goals and the evidence developed from taking the action steps listed in Chapters Two and Three.

5. I will teach you how to politely request that any additional diagnoses, symptoms or limitations that you wish included in the text of this narrative summary be added prior to submission to PSC-psd-de, making sure that you include the medical record entries and nonmedical evidence letters that support your request as enclosures to make it easier for you provider to grant this request.

6. Not to worry, if he or she declines to do so, then I will draft a written request for your review and signature regarding these issues so that it is clear to subsequent reviewers that we have been requesting such assistance from the outset of your case.

7. We will also be sure to review the MEB checklist as found on the PSC-psd-de web site to ensure that your board is complete, as many times incomplete boards are sent back after months in the queue for further development- if it is incomplete, then we will politely point out in writing the information that is missing from the document.

8. If your provider tells you that there is insufficient information to add additional referral diagnoses to your board because this would require further testing or referrals, then be sure that you specifically ask for these appointments to be put into the system.

9. My preference would be for us to document this request by e-mail so that it is plain from the outset that you view the condition(s) for which you are seeking additional treatment as potentially unfitting.

#### **Summary of Action Steps for Chapter Four**

1. We will have nonmedical evidence letters available to support your contentions with your provider.

2. We will draft an outline for your provider with respect for each condition at issue in your case showing its onset, treatment history and your functional limitations (if any).

3. We will review any draft narrative provided to you in order to ensure that it complies with the MEB checklist and is complete.

4. We will document your request for any additional testing or referrals necessary to address conditions that you wish included in the MEB.

5. If you suffer from any cognitive impairment or memory loss issues, it may prove helpful to have your spouse or significant other accompany you to your appointment with the provider drafting your MEB.

6. Please consult with me by phone or e-mail prior to any important medical appointments, so that we can develop your talking points and agenda in order to both making things easier on the provider and maximize the benefits received from these appointments.

## CHAPTER FIVE- CONVINCINGLY REBUTTING YOUR MEB NARRATIVE SUMMARY

When your MEB narrative summary is complete, your medical providers will contact you to forward a copy of this document for your review. While some junior staff members may tell you that you are not entitled to a copy of this document, this is categorically untrue. By the same token, you may also be told that you must review the document at the clinic and sign at that point accepting its recommendations. This is also totally incorrect.

In all cases, your first step in reviewing this document will be to sign indicating that you intend to submit a rebuttal to correct any errors or inconsistencies. By doing so, you will then be entitled to 15 working days to review the document with me and return it with your rebuttal.

Should we determine that the document is accurate in all details and the language contained in it will help you to meet your goals, then you will simply return within that time frame and sign indicating that you agree with the findings of the board- no harm, no foul.

After receiving the MEB narrative summary, you should return home to review it carefully in light of your medical records and nonmedical evidence. After you send me copies by fax or e-mail attachment, here is the three-step process that we will follow in reviewing this information:

1. On our first reading, we will check for any inaccuracies regarding your medical history, treatment, diagnoses and prognoses.
2. Next, we will review the document for any inaccuracies or omissions regarding your symptoms and functional limitations (or lack thereof).
3. On our third review, we will actually be noting any new diagnoses, findings, studies, etc. that have taken place since the drafting of your initial medical board.

After this third review, please take a break for a few hours and discuss this document with your spouse, significant other or a trusted friend to ensure that we have not missed any key points.

When reviewing this document, do not assume that any and all outside providers- military or civilian- have forwarded their complete treatment records to your Coast Guard clinic in a timely manner.

Your provider may actually be unaware of some new medical developments in your case. Part of your task at this stage will be to bring these matters to your provider's attention.

Not to worry, we will completing this process together. In this type of practice, distance does not matter- you would simply forward documents to your counsel by e-mail, fax and overnight delivery.

After reviewing these documents with my clients, I always draft the rebuttal for their review and signature to make sure that we use it to effectively advocate our theory of the case.

If you are unable to afford counsel, then your next task is to begin to draft the rebuttal by outlining the key points that were inaccurately described or omitted from this document. In each case, you must specifically reference medical record entries or nonmedical evidence that demonstrates the error(s). These documents should be properly marked and attached to your rebuttal as enclosures.

Most Coast Guard MEB narratives contain very little information about how these medical conditions either adversely impact or have no impact upon an individual's ability to perform his or her duties. It will be your job to fill in this information gap through the artful use of the nonmedical evidence letters that you previously gathered.

No matter what, if you are drafting your own rebuttal, always start this document with the following sentence:

"I am writing in response to ref (a)<sup>2</sup> to both thank the medical staff at my servicing clinic for their diligent efforts to treat my medical issues as well as to provide you with additional information to correct a few inaccuracies in this document- thus ensuring that you are provided with the additional evidence necessary to fairly adjudicate my case."

Then begin to methodically work your way through any necessary corrections, discuss how each condition does or does not affect you in the workplace and identify any additional conditions within your medical record that you believe should be referral diagnoses.

By referral diagnoses, I mean conditions that were not contained in the original MEB narrative but which also prevent you from performing your duties. If additional testing or appointments are necessary to further develop these conditions, please be sure to request that your provider put in these referrals as part of your rebuttal.

Always conclude your rebuttal by thanking both your care providers and subsequent reviewers on the IPEB and FPEB level for taking the time to read your rebuttal.

For those who would ask what they should do if their provider takes no action on their rebuttal, my response is straightforward- we had two audiences in mind when drafting your rebuttal, your provider and reviewers at PSC-psd-de.

Many times, a provider will deny the relief that you request in your rebuttal but personnel further up the chain will send the case back for further development on these very points.

From a tactical standpoint, you always want to raise every potentially unfitting condition up front. Otherwise, you may encounter some resistance to your effort to add additional conditions after you receive your initial findings from the IPEB. You see, at that point, the perception will be that you are simply raising new conditions because you did not like your initial results.

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<sup>2</sup> Ref (a) is always the MEB narrative summary

If you follow these steps with your initial MEB narrative summary and any subsequent addenda by specialty providers, then you will have taken the first step towards achieving your goals in the PDES system.

### **Summary of Action Steps for Chapter Five**

1. Never sign your MEB narrative summary indicating that you agree with the findings when you have not even had the chance to read it or discuss it with me as well as your spouse, significant other or trusted friend or parent.
2. Always sign your MEB narrative summary indicating that you intend to submit a rebuttal, as this will allow you 15 working days to review this document.
3. Please forward a copy to me for review as soon as possible.
4. Follow the three-step review process described above to analyze this document and begin to draft the key points to include in your rebuttal.
5. Make sure that every point that you raise is supported by an enclosure containing medical or nonmedical evidence supporting your contentions.
6. Do not make this document adversarial in nature, as it will lose its impact on subsequent reviewers at PSC-psd-de.

## CHAPTER SIX- ENSURING THAT YOUR COMMAND ENDORSEMENT ACTUALLY HELPS YOUR CASE

While it is no great secret that your command is required to write a forwarding endorsement to your medical board, most Commanding Officers and their designated action officers really have no clue as to what should be contained within the text of this document. That is where we come in to assist them and build an effective draft endorsement that actually helps to prove up our case upon review.

First, this endorsement should contain a description of the duties normally associated with your pay grade, rating (for enlisted personnel) and your current assignment. It should then discuss in detail your ability to perform the duties of your assigned billet, not simply some “ad-assigned” busywork job that you are performing while going through the medical board process.

This means that you command must actually be advised of the symptoms and limitations imposed upon you by your various medical conditions in order to effectively address these matters in the endorsement. For clients with multiple medical conditions, this endorsement should describe how each medical condition at issue in your board adversely impacts you in the performance of your duties.

If a condition is not cited in this endorsement as adversely impacting you in the performance of your duties, it should not surprise you if the Informal Panel (“IPEB”) determines that there is insufficient evidence to find is separately unfitting.

So, the burden will be upon us to supply your Commanding Officer with a proposed draft of this endorsement that expressly identifies each medical condition that impacts your ability to perform the duties of a Coast Guardsman of your pay grade and experience.

I find it useful to also provide your command with evidence of the amount of time that you spend away from your assigned duties due to medical appointments or flares of symptoms that result in you having to come into work late, leave early or take numerous breaks in the military workplace. Why?

Because many Commanding Officers erroneously consider you to be performing your assigned duties as long as you are not away at medical appointments. Wrong, categorically, biblically, tragically wrong. If such information is not expressly provided in the endorsement, how would you expect IPEB members to know about it?

In addition, some Commanding Officers mistakenly think that it is important to give the impression that you are working diligently in your assigned billet, even if that is not at all accurate. The perception in the field tends to be that “... Headquarters expects to hear that you are giving the Coast Guard its money’s worth”. Not true at all- the staff at PSC-psd-de does genuinely want a clear and accurate picture of what duty limitations, if any are imposed by your various medical conditions.

For those who ask how to deal with an uncooperative chain of command that does not wish to allow you to have input into the drafting of this vital document, the answer is very straightforward. We simply

forward the proposed endorsement with a cover letter or memorandum describing why this information is important in order for your case to be fairly assessed by the IPEB.

If they ignore this information, then it will be critical to prove that it was actually delivered to them. Why? So that we can use this document in conjunction with your nonmedical evidence letters to demonstrate that you have consistently represented each of these conditions as being separately unfitting.

**Summary of Action Steps for Chapter Six:**

1. Review a description of the physical activities required to perform the duties of your enlisted rate or as a warrant or commissioned officer within your assigned billet, in light of PDES Manual Chapter 3.1.
2. Next, review with your coworkers or supervisors how the symptoms of your medical conditions affect you in the military workplace and what accommodations have been made for your medical conditions.
3. Then, discuss these same issues with a spouse, significant other or a family member as to how your conditions affect you outside of the workplace in both social and recreational settings.
4. At this point, we will begin drafting an endorsement for your command to review that will include appropriate enclosures from your medical record, duty status reports, etc.
5. When this is done, we will draft a forwarding memorandum for your signature so that we have a track record of submitting this information to your command in a timely manner.

## CHAPTER SEVEN: PRESENTING AN EFFECTIVE CASE TO THE INFORMAL PHYSICAL EVALUATION BOARD

At this stage of the process, your case is sent to PSC-psd-de to check-in, review and subsequent referral to an Informal Physical Evaluation Board (“IPEB”). While most of the armed services have three persons sitting on the IPEB, the Coast Guard makes do with two board members- one medical officer and one line officer. In the Coast Guard, these personnel typically come from the staff at PSC-psd-de.

The IPEB reviews both medical and nonmedical evidence in your case and makes findings and recommendations regarding your fitness for duty, any potentially disabling conditions and whether you should be found fit, separated with disability severance pay or medically retired. This review is based solely upon documentary evidence and does not afford the member, medical providers or the chain of command with any opportunity to comment or be heard in person. This means that the burden is upon us to ensure that your record is complete.

What do I mean by that statement? Unfortunately, you have no idea how many times prospective clients come to me after receiving disappointing IPEB findings and wonder why the panel did not acknowledge a decline in their condition or additional unfitting conditions that have arisen since the time that their board package was submitted. Nine times out of ten, it is because they simply did not know. The burden is upon us to ensure that any and all new medical evidence germane to your case is submitted to the IPEB Coordinator at PSC-psd-de.

It is not sufficient to request that your unit’s servicing HSWL FO forward these records to PSC-psd-de. The volume of cases being processed through this very small and understaffed branch is quite extraordinary and many times updates to medical records are simply not made available to IPEB members. It is not unusual for me to request a copy of the IPEB case file after being retained by a client at this stage only to find that the medical record is 6 to 12 months out of date.

That is why it is my standard practice to review the records of existing clients whenever I am at the PSC on business. Since Coast Guard cases comprise a significant percentage of my caseload, I am typically able to do this on a monthly basis- thereby ensuring that your case file is up to date.

If you retain me after receiving your IPEB findings, then my first task will be to update your case file to support a petition for reconsideration to the IPEB prior to scheduling a formal hearing. More on this subject to follow later in this chapter.

When the IPEB members review your case, they may find you fit for duty or unfit for duty. If they find you unfit, then they will identify any service disqualifying conditions and assign a disability percentage rating to them in accordance with the criteria established by the Veterans Administration Schedule for Rating Disabilities (“VASRD”) - a rating schedule that you may find online in Part Four of Volume 38 of the Code of Federal Regulations. The best web site on which to find this rating schedule is [www.findlaw.com](http://www.findlaw.com). Not to worry, I will review any and all IPEB findings with you in accordance with the VASRD and suggest how we can improve upon their findings- that is what I do and I am very good at it.

If the IPEB members find you fit, it means that they found that the record indicates you are physically and mentally able to perform the duties of your office, grade, rank or rating (including specialized duty, if applicable). For our purposes, the definition of the term "office" is defined as the member's assigned duties in Chapter 2.A.36 of the PDES Manual. <sup>3</sup>

This is the very reason why I emphasized the need to effectively rebut medical board narrative summaries, provide input to command endorsements and to develop nonmedical evidence supporting your goals. The members of the IPEB do not have a crystal ball and do not observe you in the performance of your duties. It is up to us to provide them with a clear and convincing picture as to the impact of your medical conditions (or lack thereof) upon your ability to perform your assigned duties.

There are occasions when the IPEB sends back a case for further development because the evidence is not clear enough to make a determination regarding your fitness for duty. If this happens, you must notify me right away so that we can effectively develop any evidence needed to respond to their request for additional information in order to achieve your goals.

When this happens, the IPEB will direct your MEB physician to conduct a Disposition Medical Board ("DMB") with the appropriate specialist consultations and submission deadline. This is normally done by e-mail and is very informal. Rather than being upset at any additional delay should the IPEB order a DMB, we should welcome this as a chance to address their concerns and open the door to considering any new medical conditions as potentially unfitting.

If you are found fit and this is plainly not the case, then we will request a formal hearing as well as filing a petition for reconsideration. A petition for reconsideration is an informal appeal that provides new medical and nonmedical evidence to show why you are not fit to perform the duties of your rank, rating, pay grade or office. Not to worry, I draft such petitions for all of my clients. If it is granted, then we win. If not, then we move on to a formal hearing and continue to develop additional medical and nonmedical evidence as we proceed.

In order to understand the fit for duty concept, I suggest that you review and discuss with me the detailed explanations provided in Chapter 2.C.2.c. & Chapter 3.D.7 of the PDES Manual.

Why? Because formal hearing are granted for good cause shown when you are found fit and are not a matter of right. That is why it is critical that our petition for reconsideration be as persuasive as possible and comply with the criteria established by Chapter 4.A.14.b of the PDES Manual.

If you are found unfit, as discussed above, the IPEB will identify the unfitting conditions and assign disability ratings in accordance with the members' perception of your degree of impairment using the criteria established by the VASRD. Often times, the IPEB members do not recognize the severity of your injuries or medical condition. Not to worry, it will be our job to clarify this misunderstanding in a petition

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<sup>3</sup> See the definition of the term "office", as it is very narrowly defined as your present duties- not simply what you duties might be if you were fully fit or not in a limited duty status.

for reconsideration. The same holds true with respect to conditions that prevent you from performing your duties but which the IPEB members failed to recognize as being service disqualifying.

The key to this process is working with me to identify potentially unfitting conditions and developing the medical and nonmedical evidence needed to prove your contentions. In doing so, we must be guided by Chapter 2.C.2.a of the PDES Manual where it states that:

"[T]he sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service."

What does this mean? Simply put, you will only be assigned disability ratings for medical conditions that prevent you from performing your military duties. It will be up to us to demonstrate why each condition that we claim as service disqualifying prevents you from performing your assigned duties.

Now do you see why it was so critical to effectively rebut inaccurate medical board summaries, develop nonmedical evidence regarding the impact of your injuries and positively influence the drafting of your command endorsement?

You see, the severity of your medical condition(s) will determine whether you are separated with severance pay or whether you are medically retired. A disability rating of 0, 10 or 20 percent will result in a recommendation that you be separated with disability severance pay. If you are assigned a rating of 30 percent or greater, then you will be recommended for a medical retirement. If your condition is medically stable, then you will be recommended for a permanent disability retirement ("PDRL") If your condition is not medically stable, then you will be recommended for the Temporary Disability Retirement List ("TDRL") and be subject to periodic review for up to five years.

If it is determined that your medical condition(s) existed prior to service, then it will be up to us to disprove this point or show sufficient service aggravation to merit the assignment of disability ratings under the VASRD. Otherwise, the service will attempt to separate you without any benefits in accordance with the provisions outlined in Chapter 2.C.5 of the PDES Manual. Not to worry, I have fought this battle successfully before and can do so again in your case, should the need arise.

It is critical to notify me the moment that you receive a copy of your IPEB findings, so that we may make your election of options in a timely manner to avoid being deemed to have accepted the initial findings by waiver. Upon receipt of the IPEB findings, you will execute an Election of Counsel form identifying me as your attorney so that the staff at PSC-psd-de may send me a copy of the case file.

Once we receive the case file and determine what is missing from it, then we can discuss how to effectively overcome any adverse decision in your case. Of course, if we receive the optimum result early on, then we will accept and move on to your VA claim- yes, in case you were wondering, that is part of what I do for my Coast Guard clients.

If we wish to submit a request for reconsideration, that is expected to be done before rejecting the IPEB findings. If it cannot be done in a timely manner, then we will submit a rejection and a request for a formal hearing to prevent inadvertently waiving your rights. Not to worry, this is a dynamic process and many reconsideration requests are received and adjudicated after a member has rejected the initial IPEB findings.

**Summary of Action Steps for Chapter Seven:**

1. Ensure that my copy of your medical record is updated on a monthly basis while your case is pending review by the IPEB.
2. Forward updated nonmedical evidence to me upon receipt- this includes, but is not limited to, marks, duty status reports and award recommendations.
3. Advise me immediately upon receipt of IPEB findings or an e-mail message directing that a DMB be held in your case- providing me a copy of any such findings or messages by e-mail in pdf format.
4. Coordinate the development and submission of any petitions for reconsideration or election of rights with me.

## CHAPTER EIGHT: TRIAL LAWYER'S SECRETS TO PREPARING FOR FORMAL HEARINGS

Sometimes, it will be necessary for us to proceed on to a Formal Physical Evaluation Board ("FPEB") hearing in order to achieve the optimum result in your case. Contrary to what many of you may think, this is not a moment to be feared; rather, it should be welcomed as an opportunity for your story to be presented to three persons- one medical officer and two line officers- who have no agenda and have played no previous role in your case.

That being said, preparation is essential to obtain optimum results in such proceedings. In fact, your preparation will begin the moment that we decide to reject the findings of the IPEB. In reality, though, we have been consistently preparing for this moment since the very start of your medical board case.

The board members are selected from a standing list of personnel made available for such collateral duty from the staff members of Coast Guard Headquarters, the PSC and units in the surrounding area. Occasionally, members may be brought in from as far away as Hampton Roads. Most medical officers assigned to such duty have had experience sitting as a board member in FPEB proceedings in the past. However, many of the line members will have little or no training prior to being seated as board members.

That is the very reason why I always provide the panel with a formal case outline setting for our contentions and discussing why the evidence supports our goals. Each piece of supporting evidence is attached as an enclosure so that the members will not have to rummage through your medical records trying to find the pages to which I am referring in our submission. The goal is to make things so simple that literally a board member can be plucked from the line at the Starbucks in the mall adjacent to the PSC and be up to speed on your case in thirty minutes or less. And, news flash- sometimes that is actually what happens in these proceedings.

If you are a member of a recognized minority group, female or enlisted, you may request a minority member, female member or enlisted person to sit on your board. We will discuss the pros and cons of making such an election prior to the board, as I have some interesting anecdotes to relate regarding such decisions that should focus the issue rather well for you. And, as a Coast Guardsman, you should be so accustomed to reading between the lines that you know what the previous sentence really meant!

The Coast Guard is unique among all the armed and uniformed services in that a Recorder is assigned to present evidence in what is intended to be a non-adversarial role. However, despite what you may read about the role of the Recorder in Chapter 5.A.5.c of the PDES Manual, the Recorder is essentially tasked with presenting the Government's case in these proceedings.

Most of the time, this role will be assigned to a gifted junior officer or senior enlisted person assigned to the PSC staff who is being groomed for positions of increased responsibility. So, do not be lulled into a false sense of security by the fact that most Recorders are not lawyers- many of these young men and women are brighter than many attorneys who I have faced in federal court over the past two decades.

That is why we will prepare thoroughly and never underestimate either our opponent or the board members.

Our preparation begins by working together on developing our case outline to determine our goals for these proceedings- to be found fit or unfit; if unfit, then our goal has to be a medical retirement to ensure that you have continued Tricare coverage for you and your family no matter what.

If you wish to be found fit, then our case outline and presentation of evidence during the proceedings will focus on demonstrating how you are able to perform your assigned duties despite any medical conditions for which you are being treated. Such cases turn heavily on providing sufficient nonmedical evidence in the form of written statements, live testimony or speaker phone testimony from coworkers and supervisors extolling your virtues in the military workplace. Without such evidence, it will be an uphill battle. However, that is why we began identifying such witnesses several chapters ago, wasn't it?

If you wish to be found unfit, then we must describe how each and every condition for which we seek the assignment of a disability rating effectively prevents or hinders you in the performance of your duties. Then we must determine whether each condition is medically stable and merits placement on the PDRL or whether it more appropriate for the time being to seek placement on the TDRL. While I always try to build a case for placement on the PDRL at the outset, some conditions- such as PTSD- require that a member be placed on the TDRL and remain subject to future re-evaluation. Nevertheless, this is a matter for discussion as we build our case.

Nonmedical evidence is also critical in cases in which you wish to be found unfit, as there is no better way to demonstrate how each conditions compromises you in the performance of your duties than through the eyes of your coworkers and supervisors. If any of these individuals seem particularly strong or useful to us, then I will prepare them to testify either in person or via speaker phone. Not to worry, we can work around their schedule when calling them to testify via speakerphone.

The most important aspect of case preparation is preparing you to testify under oath in response to my questions as well as being available for questioning by board members and the Recorder. We will begin that preparation by telephone on several occasions prior to the hearing. Then, on the day before the hearing, we will spend between three to five hours practicing every question that I will ask you as well as any that the board members or the Recorder may ask you.

Essentially, I will put you through the whole hearing process three or four times that night, so that it will all seem second nature the next day. And, in developing my framework of questions, it will be my goal to cover every modality of care, treatment issues, prognoses, medications, surgeries, symptoms and the practical effect of your medical conditions on every aspect of your life. Many times, we will start this preparation during dinner in a crowded restaurant or whilst sightseeing at museums or along the National Mall as we visit the various memorials. Why such an unorthodox approach?

So that you will be accustomed to remaining on point despite distractions such as cars, tourists, vendors, music, fellow diners in restaurants, etc. Besides, if you are going to be put through the wringer over a three to five hour period, you may as well enjoy some tiramisu, a glass of a good wine, a decent meal

and a chance to see the sights of our nation's capital. While there will be no such distractions during your board, members will often be shuffling through records as you are speaking and we may have occasional interruptions due to psd-de staffers having to enter the proceedings to attend to administrative matters. No worries though- if you can stay on point whilst dining in Shirlington or Old Town Alexandria and walking the Mall, then you can handle anything that board members or the Recorder might toss our way.

For those who are curious, the only times that I do not call a client to testify under oath are when the injuries might be deemed to be due to misconduct and having this person testify might harm the case. Otherwise, expect to testify. But, realize that you will be exceptionally well-prepared and nothing will be left to chance.

After completing your testimony, you will be provided the chance to address the board to let them know if there is anything else that you would like them to know before adjudicating your case. This is what I refer to as "the \$64,000 question". We will develop your statement carefully the night before and you will practice it until it becomes second nature. This is the chance to make any points that have not been previously made as well as taking that one last opportunity to let the board get to know and like you.

I often have clients who say "Why do they have to like me? Isn't it about doing their jobs?" News flash- this is about emotions too. Board members are much more likely to grant relief to someone whom they view as credible and a "good Coastie" than to the local neighborhood dirt bag. Sorry, but that is just a harsh dose of reality. Besides, everyone knows that I do not take on dirt bags as clients anyway. Just trust my 20+ years of experience on this point- your final statement could be the tipping point in our case. We will use this opportunity very wisely to gain every additional advantage that we can in the process.

When both the Recorder and I as your counsel have rested our respective case and closing arguments have been heard, the board members will adjourn for deliberation. When they return, they will announce their findings and provide us with a signed CG-4808 and the accompanying amplifying statement explaining their decision. The amplifying statement is not required as part of this process, but it is the customary practice nowadays.

We will then have three working days to decide whether to submit a rebuttal to the findings of the board and, if we choose to do so, to submit it within fifteen working days from the date of the decision itself. I draft such rebuttals for my clients, along with assisting them in retrieving or developing any additional evidence needed in support of the rebuttal.

The most logical bases for rebutting the findings of the FPEB revolve around the concepts of new and material evidence or a mistake of law.

New and material evidence means evidence that could not have reasonably been obtained prior to the FPEB through the exercise of due diligence and which, had the board had access to this information, would have materially changed the outcome of the proceedings.

A mistake of law argument describes how the findings of the FPEB are against the weight of the evidence presented during the hearing and outlines how the evidence of record actually supports the findings that we seek vice any adverse decision from the board.

Such rebuttals are heard by the Physical Review Counsel (“PRC”) - a deceptive term, as in the Coast Guard setting this refers to a one-office review panel where the individual does not necessarily have to be a lawyer.

However, the reality of this stage of the process as plainly outlined in Chapter 6.B.2 and 6.B.3 of the PDES Manual is that the PRC will not normally modify the findings of the FPEB upon review unless they are clearly in error. Good luck with that one, my friend.

But, should the PRC substitute its own findings, then an appeal to Physical Disability Appeals Board is triggered. Truth be known, this rarely happens. In this system, the PRC is typically a “speed bump” in the process of appealing to the Coast Guard Board of Corrections (“CGBCMR”).

As for petitioning for relief to the CGBCMR, this is a lengthy, often two to three year process which will not delay the agency from implementing an adverse decision. That is why we must make every effort possible to prove up our case during the formal hearing. And, trust me, we will do so.

#### **Summary of Action Steps for Chapter Eight:**

1. Keep providing me with updates to your medical records as frequently as possible- but never less than once a month- as well as contacting me prior to any significant medical appointments so that we can review your goals, talking points and agenda for each appointment.
2. Ensure that you keep me informed regarding any changes in your duty status or the retirement or PCS of any of your providers or nonmedical evidence witnesses.
3. Make yourself available for phone preparation of testimony prior to traveling for your hearing.
4. Make certain that your travel arrangements allow for you to arrive at your hotel prior to 1600 on the day before your scheduled hearing date. If there are any issues whatsoever with your travel arrangements, please contact me as soon as possible for assistance.
5. Coordinate your hotel arrangements with me so that we can stay in the same or nearby hotels, drive to the hearing together, etc.- this will dramatically reduce your stress level as I know where I am going, where to park, etc.
6. Make sure that your family members know that you will be unavailable between 1800 and 2200 the night before your hearing so that we have sufficient real time preparation for the next day.
7. For God’s sake, make sure that your uniform is in order and that you bring extras of everything- belt, shoes, ribbon bars, etc. - as accidents sometimes happen.

## **CHAPTER NINE- FINALIZING CASES AND OTHER TASKS THAT WE WILL WORK THROUGH TOGETHER**

All completed IPEB, FPEB and PRC findings are subject to review for legal sufficiency by the Office of General Law at the PSC prior being finalized, as per the applicable requirements of the PDES Manual.<sup>4</sup> Next, there is a second level of legal review at COMDT (CG-0944). Once these reviews are completed, the findings will be forwarded to the Final Approving Authority at the PSC for signature. This process normally takes about ninety days from start to finish.

At that point, the applicable branch of the PSC- epm, opm or rpm- will release a retirement or separation date message to your command. You may expect your retirement or separation date to be within one to two months after the release of that message. Of course, if you have been found fit as per your wish, you are simply returned to duty at this point.

Once we receive word of FAA action on your case, we need to begin preparing your VA claim for submission prior to your retirement or separation. It is critical that the claim be submitted prior to separation or retirement in order to be processed through the Quick Start program. This program will take several months to complete and may seem slow and complex. However, if your claim is submitted after retirement or separation, then it will be processed under the traditional claims process- this will take between 18 to 24 months given the current VA backlog.

Since I assist all of my clients with VA claims unless they choose to proceed on their own due to established connections with local veterans' service officers in their jurisdiction, it is vital for you to inform me the moment that you receive FAA approval.

When preparing your DD-214, it is also critical that you ensure that you are credited with the appropriate length of service. If these are issues regarding prior service, please let me know at the outset as it is easier to correct such matters while your PDES case is pending than afterwards.

I also prefer that my clients contact the Pay and Personnel Center to learn who will be handling their retired pay account and ensure a smooth transition for pay purposes. Trust me on this one, it will be fifteen or twenty minutes well spent.

### **Summary of Action Steps for Chapter Nine**

1. Keep me apprised of any e-mails from psd-de regarding the status of your case and I will do the same in return.
2. Carefully review your DD-214 worksheet with your yeoman to ensure that it is correct.
3. Begin completing the VA forms that I send to you after your FPEB and start gathering marriage certificates, divorce decrees, birth certificates for children, etc.

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<sup>4</sup> See PDES Manual, Chapter 4.C, Chapter 5.D4.b and Chapter 6.C.2.b

## CONCLUSION

While I know that it may seem like I am asking you to put a great deal of effort into preparing your PDES case, the decision that you make during this process will affect you and your family for years to come. My role as an attorney is to become involved as early in the process as possible to be your counselor and advocate- thereby reducing your stress level, giving you increased confidence and a sense of security that you will not find elsewhere.

I do my job quite well as you will find from examining the anonymous peer review assessments and clients reviews on my web site at [www.gatelylawfirm.com](http://www.gatelylawfirm.com). However, this is a joint effort that requires every stakeholder in this process- you, your spouse or significant other and me- to work together as a team to achieve the optimum results in this process.

If this concept interests you, then feel free to contact me to discuss your case in detail, as well as sharing this document with anyone whom you feel might benefit from it. In closing, please accept my profound thanks for your service to our country.

All the best,

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