

PART 3 - FORMAL PHYSICAL EVALUATION BOARD HEARINGS

4301 Purpose And Overview

a. No active duty or reserve member of the naval service found Unfit by the Informal PEB may be retired or separated for physical disability without the right to a Formal PEB hearing. Acceptance of the Informal PEB findings constitutes waiver of the right to a Formal PEB (10 U.S.C. 1214). As a matter of policy, although not required by statute, no member of the reserve component shall be separated for being Not Physically Qualified for continued naval service without a Formal PEB hearing unless he or she waives the right. TDRL members determined Fit shall be entitled to a Formal PEB hearing since removal from the TDRL represents a change in military status. The President, PEB shall provide such hearings when required.

b. Formal PEB hearings also may be conducted by the PEB as information gathering bodies for the development of cases when directed by the President, PEB or DIRNCPB under paragraph 4 of the basic instruction, see paragraphs 1004c (2), 4212b(2), or 4212b(4). The proceeding is non-adversarial and formal rules of evidence do not apply. Members of the board are charged with making findings concerning fitness and eligibility for disability benefits and must protect the interests of both the member and the government.

c. A Formal PEB hearing provides an opportunity for the member to present additional material to support his or her case. Once a hearing has convened, any preliminary findings of the Informal PEB are null and void and are of no precedential value to the Formal PEB or the member.

d. Service members requesting a Formal PEB should be encouraged to submit a rebuttal identifying the issues of disagreement with the Informal PEB's findings and recommendations.

4302 Functions Of Formal PEB

a. To conduct formal hearings pertaining to disability evaluation of members of the naval service as required by 10 U.S.C. 1214 and this instruction,

b. To evaluate on the basis of formal hearings attended by a member and/or counsel:

(1) physical fitness (or physical qualification in the case of an inactive-duty member of the Naval or Marine Corps Reserve) of a member for active duty; and

(2) if found Unfit to continue naval service, the entitlement of the member to benefits authorized by 10 U.S.C., Chapter 61;

c. To refer Formal PEB findings to the President, PEB for review, issuance and promulgation; and

d. To protect the privacy of individuals whose records are reviewed under SECNAVINST 5211.5D.

4303 Board Composition

a. A formal board normally shall be composed of three members, a Navy line officer, a Marine Corps officer, and a Medical Corps officer, all senior military officers selected on the basis of wide medical and/or military experience, proven performance and education. All Medical Corps officers assigned shall possess a wide cross-section of clinical experience.

b. Members of the Formal PEB shall be assigned by the DIRNCPB and report to the President, PEB.

c. The Presiding Officer for a formal board shall be a Navy line or Marine Corps officer in the grade of O-6 or above. While not mandatory, it is preferred that the Presiding Officer be of the same service as that of the member being considered.

d. The composition of boards shall be consistent and shall not be altered by reason of the grade, status or organization of a member under disability evaluation, except as specified in paragraphs 3108 and 4305, or by specific direction of the DIRNCPB.

4304 Reserve Membership

See paragraph 3110a.

4305 Alternate Members

a. In the absence of a principal member, an alternate member may sit on a board.

b. Alternate members must be in the grade of O-5 or above. An alternate line member may be of the same service as the Presiding Officer. However, one of the line officers on a board should be of the same service as the member being evaluated.

c. CHNAVPERS, CMC (M&RA), and CHBUMED shall designate in advance and provide alternate board members including funding for Navy and Marine Corps reservists, as requested by the President, PEB.

d. Changes in alternate member nominations shall be held to a minimum so as to retain as high a degree of expertise as practicable on the boards.

e. Alternates shall be carefully instructed in the provisions of this instruction by the Administrator. In addition, an alternate should observe at least one full hearing, including deliberations, before actually sitting as a board member. A prospective alternate may not discuss the case or vote while observing deliberations.

4306 Administrator

A board member at each Formal PEB site shall be assigned as Administrator. He or she shall be responsible for the leadership and management of day-to-day panel affairs.

4307 Counsel

Each Formal PEB shall be assigned the continuous services of no less than two judge advocates for a period of not less than 6 months. They shall act as counsel for members appearing before the boards. These counsel shall be provided from the staffs of appropriate Naval Legal Service Offices, or from such other sources as may be designated by the JAG. They shall be qualified under 10 U.S.C. 827b (Article 27(b), UCMJ). The principles attendant to the use of alternate members in paragraph 4305d, apply to military lawyers as well.

4308 Counsel For The Board

a. At the discretion of the Presiding Officer of a board, an attorney who is not involved in a particular case as counsel for the member may be assigned as counsel for the board.

b. A civilian employed by the government who is a member of the bar of a federal court or the highest court of a state may be appointed as counsel for a board.

4309 Duties Of Counsel For The Board

Counsel for the board shall:

a. ensure that the board has before it information to ascertain as accurately as possible:

- (1) the circumstances in which the physical impairment was incurred, and
- (2) the extent of the disability;

b. when requested by the Presiding Officer, present the evidence and represent the government during the hearing;

c. when requested by the Presiding Officer, question witnesses so as to impartially elicit all available evidence.

4310 Representation By Counsel

a. Military Counsel. In order to provide maximum pre-hearing preparation time, to minimize unnecessary travel and to avoid hearing delays, a military lawyer will be detailed as counsel for the member immediately subsequent to the receipt of a case by a Formal PEB. Members appearing before a Formal PEB hearing have the right to be represented by a designated military lawyer at no expense to the member. A military lawyer, other than those regularly assigned to the board, shall be provided upon request only if reasonably available and at no additional expense to the government.

b. Civilian Counsel. Members appearing before a Formal PEB have the right to be represented by counsel of their own choice provided by the member and at no expense to the government. This right includes the ability of the member to choose a non-lawyer to represent him or her.

c. Associate Counsel. When a member (or legal guardian or next-of-kin in incompetent cases) elects counsel of his or her choice, the military lawyer assigned shall act as associate counsel if requested to do so.

4311 Independence Of Military Counsel

Formal PEB members shall not limit or interfere with counsel's ability to fully represent their clients in any way. The scope of counsel's representation is a matter between the member and counsel only.

4312 Duties Of Counsel For The Member

a. The military lawyer assigned as counsel for a member shall represent the member being evaluated unless the member refuses counsel or elects other counsel of his or her choice. In the case of an incompetent, the military lawyer assigned shall act in that capacity in all cases except when a duly appointed guardian, spouse or next of kin obtains or requests other counsel.

b. A lawyer who acts as counsel for the member shall:

(1) confer with and fully advise the member of legal and other substantive considerations in his or her case;

(2) represent the member, presenting to the board information and arguments in support of the member's case and interests;

(3) arrange for the presence of desired witnesses and evidence in support of the member's case;

(4) interview witnesses prior to the hearing and question them during the hearing;

(5) counsel the member regarding Formal PEB findings and options open to the member, and recommend courses of action that are most favorable to the member which are consistent with the letter and intent of statutes, regulations and directives addressing disability evaluation and administration;

(6) advise the member of the procedural requirements involved in submitting a request for PLD, if the member has not already been denied this request by service headquarters;

(7) advise the member of the requirements of a PFR;

(8) prepare or assist in the preparation of a PFR at the request of the member;

(9) prepare or assist in the preparation of an appeal of the combat-related/taxability opinion of the PEB at the request of the member; and

(10) in the case of incompetents, fully inform the court-appointed guardian, or, if no guardian has been appointed by a court, the member's spouse or next of kin, of the legal and factual issues in the case and act following the wishes of the guardian, spouse or next of kin, as appropriate, if those wishes do not conflict with the proper exercise of the responsibilities of Counsel concerning the member's interests.

4313 Personal Appearance

A member shall have the right to appear personally at the Formal PEB, which may include video teleconferencing, unless such appearance proves impracticable because the member cannot travel (e.g., the member is incarcerated or incapacitated).

a. If the member's conduct or statements create a potential security risk to board members and/or other personnel, local security police shall be alerted and appropriate security precautions shall be taken.

b. Unless the Formal PEB hearing is directed by SECNAV, members of the Ready Reserve with nonduty-related impairments are responsible for their personal travel and other expenses.

4314 Waiver Of Personal Appearance

a. Actual Waiver. Members have the right to waive their personal appearance before a Formal PEB. In such cases, Counsel must represent the member during the hearing.

b. Constructive Waiver. After due notification of the time and place of a hearing, failure to appear before a Formal PEB on the part of the member, his or her counsel, and, in incompetent cases, the guardian, spouse or next of kin, shall be considered as a waiver by the member of his or her right to personally appear unless it is reasonably shown that the failure was through no fault of the party failing to appear. The hearing shall proceed "in absentia" and the Presiding Officer will include in the record a statement of the circumstances as well as evidence of notification.

4315 Late Appearances

Late appearances, while an "in absentia" hearing is in progress, shall be heard.

4316 Access To Records

Service members or, if incompetent, their legal representative, shall have the right of access to all records and information received by the PEB before, during, and after the formal hearing that may affect the findings of the PEB or appellate review authority.

4317 Scheduling Of Formal PEB Hearings

The Administrator of each Formal PEB shall establish the date and time of each hearing, subject to the following guidance:

a. Cases Involving Incompetent Members. If, after counseling by Counsel for the member, the guardian, spouse or next of kin, does not waive the right of the member to a hearing within 15 calendar days of counseling, schedule the case for a hearing.

b. Inadequate Information

(1) Hearings will not be scheduled unless all necessary records will be available and ready for review by the Formal PEB and the member, his or her counsel, guardian, spouse or next of kin for a reasonable period prior to the commencement of the hearing.

(2) Each board shall ensure that it has available the necessary information for competent decision.

c. Extensions

(1) An Administrator may authorize an extension of the above times upon presentation by the member or his or her counsel of substantial grounds for such extension. In such instances, the delay shall be the minimum reasonable on the basis of the grounds presented.

(2) Notwithstanding (1) above, except as specifically authorized by the President, PEB, conclude each requested hearing within 45 days following receipt of the case at the hearing site.

4318 Formal PEB Hearings - Presiding Officer

Presiding Officers shall preside over all sessions of a hearing and speak for the board in findings matters. The Presiding Officer is responsible for the accuracy and completeness of the records forwarded to the President, PEB.

4319 Formal PEB Hearings - Open Session And Conduct

a. Conduct hearings in open session unless, in the opinion of the Presiding Officer, such would be prejudicial to the objective of attaining a full and fair hearing, or unless the member requests a closed hearing. The adjudicatory function of board members is paramount. Members should avoid conduct, which is or could be construed to be investigatory or prosecutorial.

b. Conduct hearings with dignity and decorum and with the objective of eliciting all the facts bearing on a case. Encourage witnesses to contribute to this objective.

c. If the member's conduct or statements create a potential security risk to board members and/or other personnel, alert local security police and take appropriate security precautions.

4320 Formal PEB Hearings – Uniform

Active duty personnel and inactive-duty reservists shall appear in the site's uniform of the day for hearings unless specifically excused by the Presiding Officer from doing so.

4321 Formal PEB Hearings – Oaths

Each board member and Reporter shall act under oath or affirmation. Witnesses shall be sworn in by the Presiding Officer or by Counsel for the board if one is assigned.

4322 Formal PEB Hearings - Interlocutory Issues

Presiding Officers shall rule on all interlocutory questions except challenges. These rulings may be objected to by other board members, in which case, decide the matter by a majority vote of the members in closed session.

4323 Formal PEB Hearings - Challenges

a. Any Formal PEB member may be challenged by an individual undergoing physical disability evaluation at any time during the hearing for cause stated to the board. The Presiding Officer shall not receive a challenge to more than one member at a time. After disclosing grounds for a challenge, the challenging individual may examine the board member. This examination shall be recorded verbatim. Counsel for the board, if assigned, may cross-examine the member who has been challenged. After all questions have been put and answered, any other evidence bearing on the board member's fitness to serve shall be heard.

b. The burden of sustaining a challenge is on the individual who made the challenge. The challenged board member shall withdraw when the hearing is closed to vote upon the challenge. One vote of the remaining members is enough to sustain the challenge. The board shall decide the challenge according to the preponderance of the evidence. When a challenge is sustained, the Presiding Officer of the board or the remaining senior member will call alternate board members.

4324 Formal PEB Hearings - Recesses And Continuances

a. Presiding Officers may recess or adjourn a case where substantial reason is made apparent. However, a case may not be delayed for more than 30 days without the approval of the President, PEB.

b. Continuances of a hearing are not a matter of right; they are a matter of discretion. The decision to grant or deny a request for continuance shall be solely within the discretion of the President, PEB. Written request from the Administrator of the Formal PEB shall be submitted in writing documenting substantial reasons for the continuance and subsequent rescheduling of the case.

4325 Formal PEB Hearings - Procedural Guide

A procedural guide issued by the DIRNCPB shall be followed in all hearings.

4326 Formal PEB Hearings – Objections

Objections may be made to any action (other than a challenge) taken or proposed to be taken by a board, as well as to the admission of testimony. Objections, when made, are recorded as part of the proceedings. The Presiding Officer must note in the record the ruling on any objections that may be offered. The Presiding Officer rules upon objections.

However, if any other board member dissents from the Presiding Officer's ruling, the entire board rules upon the objection in closed session. The ruling is the decision of the majority of the board and is announced on the reopening of the hearing.

4327 Formal PEB Hearings - Admission Of Evidence And Testimony

a. Before taking testimony, the Presiding Officer shall, for the record, officially receive all papers pertaining to the case in open session. These papers may be inspected by the member and his or her counsel during the hearing.

b. The Formal PEB shall consider all documentary evidence transmitted to it by proper authority. A board, in addition, may require and examine records as may be in Department of the Navy files that relate to issues before the board. All evidence having probative value as to the determination of issues may be considered. In consideration of the weight and probative value to be accorded evidence, the members of a board are expected to utilize their background and experience, their common sense and their knowledge of human nature and behavior. In every case, the testimony of the member concerned shall be considered in connection with all the evidence adduced and given such weight, as the board may believe it merits. When the testimony presented at the hearing indicates that the member claims to have disabilities not disclosed by the official medical records or presents evidence sharply in conflict with official medical records, and the issue thus drawn is not one that can be readily resolved by the observation of the board, there shall be further development of the case by requesting further physical examination, special studies, or further investigation by appropriate agencies; and the hearing shall be adjourned until such development has been accomplished. Findings of a board shall be based upon evidence consistent with a reasonable probability of truth.

c. Members undergoing disability evaluation before a Formal PEB shall be permitted to introduce witnesses, depositions, documents, sworn (affidavits) or unsworn statements or other evidence in their behalf and to question all witnesses who testify at the hearing.

d. Members may make oral or written statements.

e. Members may elect not to offer evidence or testimony.

f. Members may not be required to sign any statement touching upon circumstances surrounding the origin, incurrence or aggravation of any disease or injury (10 U.S.C. 1219).

g. Members and witnesses introduced by them may be questioned by members of the board regarding evidence or testimony submitted by them.

h. Testimony of witnesses shall be taken under oath or affirmation unless otherwise requested by the member, his or her counsel, guardian, spouse, or next of kin.

i. Members have the right to remain silent. When the member exercises this right, the member may not selectively respond, but must remain silent throughout the hearing.

4328 Formal PEB Hearings – Witnesses

A board may obtain military witnesses whose presence is requested by the member or member's counsel, if witnesses are reasonably available and if, in the opinion of the board, their testimony is essential or contributes materially to the case. Article 49, UCMJ (10 U.S.C. 849), is used in determining reasonable availability of witnesses. The use of affidavits or depositions to obtain testimony of witnesses is encouraged. A board may obtain military witnesses considered necessary to complete its findings and to comply with the legal requirements of a full and fair hearing. To assure the attendance of a military witness, the Administrator of a board will request the proper commander make the necessary arrangements for the timely presence of the witness, provided the witness is reasonably available. If the commander considers that the witness is not reasonably available, he or she shall provide a statement giving the reasons therefore, and this statement shall be appended to the record.

4329 Formal PEB Hearings - Findings

- a. Findings shall be reached through a majority vote of the board members.
- b. In arriving at findings, a board shall comply with this instruction.
- c. Each finding made, which is concurred in by a majority of a board, shall constitute the PEB findings subsequent to legal review.
- d. Record votes of individual members in the board's records of proceedings and findings .
- e. Any dissenting member of a board shall submit a minority rationale concerning those particulars in which he or she does not agree with the action of the board. The rationale will become part of the record.
- f. Set forth findings in writing, in summary form, and attached to the record. The Presiding Officer shall sign them. Also, see paragraph 4342.

4330 Formal PEB Hearings - Basis Of Findings

a. Each board shall make findings with regard to the physical fitness for active duty (or physical qualification for active duty in the case of an inactive-duty member of the Naval or Marine Corps Reserve) on the basis of a formal personal hearing conducted in the presence of the member being evaluated, unless such appearance is waived or would be injurious to health, and/or his or her counsel .

b. In connection with each formal hearing, a board shall consider the following information when applicable:

- (1) physical evidence presented;

- testimony;
- (2) statements of the member, his or her counsel, and/or witness's
 - (3) medical board reports and associated documents, together with endorsements of convening authorities and statements of members referred for disability evaluation;
 - (4) line of duty/misconduct determinations;
 - (5) statements of service ;
 - (6) reports of periodic physical examination (TDRL);
 - (7) reports of special consultations;
 - (8) statements of non-medical information as to the observation by the reporting senior on performance of duty of the member being evaluated;
 - (9) fitness reports and performance evaluations supplied by the CHNAVPERS or the CMC (M&RA), as they apply to disability evaluation;
 - (10) NOEs; and
 - (11) any other pertinent matters prior to conclusion of the hearing.

4331 Formal PEB Hearings - Eligibility Determinations

Each board shall determine a member's statutory eligibility for benefits as required by 10 U.S.C., Chapter 61 and enclosure (3) to this instruction. Include eligibility determinations in the record but; they need not be published to the member in the findings . These determinations are, if Unfit to continue naval service:

- a. the disability (was)(was not) (incurred)(aggravated) while entitled to receive basic pay,
- b. the disability (is)(is not) the result of intentional misconduct or willful neglect, and whether such disability (was)(was not) incurred during a period of unauthorized absence;
- c. (select appropriate finding)
 - (1) the disability (is)(is not) the proximate result of active duty or inactive duty training (because of aggravation , when applicable), or
 - (2) the disability (was)(was not) incurred in line of duty in time of war or national emergency, or

- d. the disability (is)(may be) permanent; and
- e. the disability is ratable in accordance with the VASRD and this instruction.

4332 Formal PEB Hearings - Inadequate Information

If a board is unable to make findings because of inadequate information, the Presiding Officer shall take appropriate action to obtain the necessary information before proceeding further.

4333 Formal PEB Hearings – Deliberations

Upon completion of the presentation of a case, a board shall be closed for deliberation. Except as provided in paragraph 4305 (e), no person, other than the voting members, shall be present during closed sessions. The voting members then arrive at the PEB findings as prescribed in this Part.

4334 Format Of Findings

a. Cases Of Active Duty Members And Inactive-Duty Reservists Who Have Been Issued An NOE. The Formal PEB shall determine that the member is Fit to continue naval service or Unfit to continue naval service; and

(1) If the member is Fit to continue naval service, Formal PEB evaluation is complete; or

(2) If the member is Unfit to continue naval service :

(a) the disability (was)(was not) (incurred) (aggravated) while entitled to receive basic pay;

(b) the disability (is)(is not) the result of intentional misconduct or willful neglect, and whether such disability (was)(was not) incurred during a period of unauthorized absence;

(c) the disability (is)(is not) stabilized at the present degree of impairment;

(d) the disability is ratable at (percentage); and, if applicable,

(e) the disability (is)(is not) combat related as defined by section 104 of the Internal Revenue Code. See paragraphs 3501 - 3507.

b. Cases Of Inactive-Duty Reservists Not Eligible For Disability Benefits. When the member is an inactive-duty reservist who is not eligible for disability benefits, under 10 U.S.C., Chapter 61; i.e., under SECNAVINST 1770.3B and reference (b), the member has not been issued an NOE, or the member is not referred under the provisions of paragraph 3201b(3), the only findings to be made are:

(1) Physically Qualified for continued naval service in the Naval or Marine Corps Reserve, or

(2) Not Physically Qualified for continued naval service in the Naval or Marine Corps Reserve.

4335 Categorization Of Findings

See paragraph 4111.

4336 Notification To Member

a. Every member appearing before a Formal PEB will be advised that:

(1) the Formal PEB's findings are subject to an automatic review for administrative and legal sufficiency before issuance by the President, PEB. PEB findings can only be challenged by means of a PFR or by Petition to the BCNR filed in accordance with enclosure (5) to this instruction.

(2) the member will receive the final PEB findings and rationale from the President, PEB after review, and

(3) the member has 15 calendar days from the date of receipt of the final PEB findings and rationale to submit a PFR, if desired, before the case is finalized and CHNAVPERS or CMC (M&RA) is notified of the disposition by means of a Notification of Decision Letter.

b. The Formal PEB will not, either orally or in writing, notify the member or the member's counsel of the Formal PEB's findings prior to issuance of the findings by the PPEB.

4337 Permanent Limited Duty (PLD) Requests

See paragraph 4312b(6) and enclosure (6) to this instruction.

4338 Disagreement With Formal PEB Findings

If a member disagrees with the findings after the Formal Board stage of disability processing, he or she may submit a PFR to the DIRNCPB or after discharge from active duty submit a petition to the BCNR. See enclosure (5) of this instruction. It is recommended that a member consult with Counsel.

4339 Final PEB Findings

See paragraph 4105.

4340 Rationale

Since it is essential that the record clearly reflects facts sufficient to form the basis for the findings, prepare a rationale which states the basis for the findings reached.

4341 Transcripts

a. A verbatim transcript of a hearing shall be prepared and forwarded to the President, PEB only when:

- (1) a finding of misconduct is to be issued;
- (2) there is not a unanimous decision by the board;
- (3) the case is a Special Interest case; or,
- (4) a transcript is specifically requested by the President, PEB or DIRNCPB.

b. A verbatim transcript is defined to include any oral mechanical recording, such as a cassette recording, of the proceedings from the time the proceedings are convened to the time they are adjourned. A typewritten transcript of the oral mechanical recording will be made only upon the approval and direction of the President, PEB. A duplicate copy of the oral mechanical recording will be made available upon the request of the member or designated counsel. It is the responsibility of the requester to provide a receptor, such as a blank cassette. PEB has the discretion to waive the requirement that the requester provide a duplication receptor.

4342 Disposition Of Records

a. Forward to President, PEB all records considered by a formal board, the board's findings, rationale, transcript when required, and a proposed final PEB findings letter with proposed rationale as an enclosure thereto.

b. A verbatim record on magnetic tape shall be kept of all hearings. This tape shall be forwarded to the Director, Naval Council of Personnel Boards. The Director will retain these tapes for 1 year and shall then forward them to the Washington National Personnel Records Center for retention per reference (i).

4343 – 4399 Reserved