

## **PART 4 - ELIGIBILITY FOR DISABILITY BENEFITS AND RELATED POLICIES**

### **3401 Conditions Not Constituting Physical Disability**

Only those conditions that constitute physical disabilities may be considered by the PEB. Enclosure (8) to this instruction lists conditions not constituting physical disability.

### **3402 Non-Military Medical Records**

A member may be processed for discharge, but the PEB may not award disability benefits for an injury or disease treated by a non-military medical doctor or other health care provider, or facility, unless the member signs a release to allow the medical board or PEB to obtain all records relating to that treatment.

a. When a case is being processed by the PEB in which the member has refused to release all medical records, the PEB shall determine whether the member is Fit or Unfit. If the member is found Fit, see paragraph 3701. If the member is found Unfit, rate only those conditions not related to the non-military medical treatment, if any. Do not assign rating or disability benefits to conditions for which the member has refused to release non-military medical records.

b. Prior to the PEB issuance of a Notification of Decision in such a case, the President, PEB, must be satisfied that the member has been counseled that the refusal to release non-military medical records will result in the prohibition of disability rating and compensation for the injury (ies) or disease treated by the non-military medical facility.

### **3403 Disciplinary Or Misconduct Administrative Action**

a. The disability statutes do not preclude disciplinary separation. Such separations as described herein normally supersede disability separation or retirement. Whenever a member is being processed through the PEB and, subsequently the member is processed for an administrative involuntary separation for misconduct, disciplinary proceedings which could result in a punitive discharge, or an unsuspended punitive discharge is pending, or is pending separation under provisions that authorize a characterization of service of Under Other Than Honorable conditions (UOTH), disability evaluation shall be suspended and monitored by the PEB. The MEB Convening Authority should forward to the PEB either a copy of the Statement of Awareness/Letter of Notification, the court-martial charges, or the Court Martial Order, as appropriate. The PEB case will remain in suspense pending the outcome of the nondisability proceedings. If the action taken does not include punitive or administrative discharge for misconduct, the PEB will continue to process the case. If the action includes either a punitive or administrative discharge for misconduct, file the medical board report in the member's terminated health record.

b. Do not submit a case to the PEB for a member who is currently being processed for misconduct which could result in a punitive discharge as the result of a captain's mast or courts-martial or for a member who is pending an administrative discharge due to

misconduct. Once all misconduct proceedings are complete, and if still necessary, submit the member's medical board package to the PEB for consideration.

c. Notwithstanding paragraph (a) and (b) above, disability evaluation in an individual case may proceed if directed by the DIRNCPB or ASN (M&RA). In such a case, ultimate disposition shall be decided by the ASN (M&RA).

d. Non-misconduct/Non-UOTH administrative separations do not supersede or preclude disability separation. Consequently, final closure must occur on all disability processing/appeals prior to finalization of Non-misconduct/Non-UOTH administrative separation by field commanders/service headquarters.

#### **3404 Deserters**

When a member who is being evaluated within the DES is administratively declared a deserter, end the evaluation. Take no further action until appropriate disciplinary or administrative action has been completed, the member has been reexamined, and a current medical board prepared.

#### **3405 Statutory Determinations To Be Made**

a. The existence of a physical defect or condition that is ratable under the VASRD does not of itself provide justification for, or entitlement to, separation or retirement from military service because of physical disability .

b. Once unfitness has been determined, the PEB shall determine if the member is statutorily eligible to receive disability benefits before rating an individual. There must be findings that the disability is: (a) of a permanent nature or such a degree to preclude return to military duty within a reasonable period of time, and (b) not the result of intentional misconduct or willful neglect and was not incurred during a period of unauthorized absence. To warrant retirement, the length of service and degree of disability requirements prescribed in clause (3) of 10 U.S.C. 1201, must be satisfied. To warrant separation, the degree of disability requirements prescribed in clause (4) of 10 U.S.C. 1203 must be satisfied, and the member must have less than 20 years of qualifying service under the criteria of 10 U.S.C. 1208.

#### **3406 Ineligibility for Disability Benefits**

A member is not eligible to receive benefits under 10 U.S.C., Chapter 61 for an unfitting physical disability if:

a. the disease or injury was incurred while not entitled to receive basic pay (i.e., Existed Prior to Service and is not service aggravated),

b. the disease or injury was incurred Not In Line Of Duty,

c. the disease or injury was incurred during a period of unauthorized absence,

d. the disease or injury resulted from Intentional Misconduct or Willful Neglect,

e. disease or injury was incurred as a result of unreasonable refusal of medical, dental, or surgical treatment,

f. the member has not been granted a Notice Of Eligibility (applies to inactive-duty reservists only), and the PEB determines that the service member does not have a prior service illness/injury (see 3201b(3)), or

g. the member refuses to release medical records (see paragraph 3402).

**3407 Not Entitled To Receive Basic Pay**

a. A determination of Unfit while on active duty is not sufficient to entitle a member to disability retirement or severance pay. There also must be a determination that unfitness is due to a disability, which was incurred or aggravated while entitled to receive basic pay.

b. The fact that a member was accepted physically for active duty is not conclusive that the disability was incurred after such acceptance. It is one piece of evidence to be considered with all the medical evidence. In addition to, and in conjunction with, all other pertinent medical evidence, due consideration and weight must be given to accepted medical principles, authenticated by medical authorities, in arriving at a final determination. It is not proper to exclude such accepted medical principles in making the determination, even in cases where there is no other evidence that the disability existed prior to entrance upon active duty.

c. Guidance concerning EPTS and service aggravation is contained in the Rating Policies section of this enclosure.

d. Examples of Individuals Not Entitled To Basic Pay:

- (1) Naval Academy Midshipmen.
- (2) NROTC Midshipmen not under ACDUTRA orders.
- (3) Medical School Programs (except during clinical clerkships).
- (4) Individuals on Excess Leave.
- (5) Individuals on Appellate Leave.
- (6) Nursing Programs.
- (7) Engineering Programs.

**3408 Inactive-Duty Reservist without A Notice of Eligibility**

An inactive-duty reservist is normally not eligible to receive disability benefits unless he or she has been granted an NOE under SECNAVINST 1770.3B, (reference (g)). See paragraph 3201 b (3) for the exception to this policy.

**3409 Prior Service Impairments**

Any medical condition incurred or aggravated during one period of service or authorized training in any of the Armed Forces that recurs or is aggravated during later service or authorized training, regardless of the time between, normally should be considered incurred or aggravated in the line of duty, provided the condition or subsequent aggravation was not the result of the member's misconduct or willful negligence.

**3410 Line of Duty**

Disease or injury incurred by naval personnel while in active service (see paragraph 2007) will be considered to have been incurred "in the line of duty."

a. Injuries incurred under the following circumstances will not be considered to have been incurred "in the line of duty."

(1) as the result of the member's own misconduct,

(2) while avoiding duty by deserting the service,

(3) during a period of unauthorized absence,

(4) while confined under sentence of a courts-martial which included an unremitted dishonorable discharge,

(5) while confined under sentence of a civil court following conviction for an offense which is defined as a felony by the law of the jurisdiction where convicted, or

(6) while on appellate leave.

b. Presumption of "In the Line of Duty." Any disease or injury discovered after a member enters active military service, with the exception of congenital and hereditary (genetically transmitted from parent to offspring) conditions, is presumed to have been incurred "in the line of duty." Clear and convincing evidence is required to overcome this presumption. This presumption does not apply in the case of chronic disease identified soon after entry on military duty nor does it apply when the signs or symptoms of a communicable disease appear within less than the medically recognized minimum incubation period after entry on active service.

c. Intentional Misconduct or Willful Neglect. Misconduct is wrongful conduct. However, simple or ordinary negligence or carelessness, standing alone, does not constitute misconduct. To support an opinion of misconduct, it must be established by clear and convincing evidence that the injury or disease either was intentionally incurred or the

proximate result of such gross negligence as to demonstrate a reckless disregard of the consequences. If a resulting injury or disease is such that it could have been reasonably foreseen from the course of conduct, it is said to be a "proximate result." The fact that the conduct violates a law, regulation, or order, -- or the fact that the conduct is engaged in while the individual is intoxicated -- does not, of itself, constitute a basis for a determination of misconduct. Such circumstances should, however, be considered along with all other facts and circumstances by the PEB in determining whether the conduct of the individual was grossly negligent, and whether the incurrence of injury or disease was reasonably foreseeable as a probable result of such conduct. Willful neglect is defined in paragraph 2087.

d. **Presumption of Not Misconduct.** It is presumed that disease or injury suffered by a member of the naval service is not the result of misconduct. Clear and convincing evidence is required to overcome this presumption. The criminal evidentiary standard of beyond a reasonable doubt does not apply.

e. **Applicability of Misconduct Determination**

(1) An injury which was incurred as the result of misconduct may later become service aggravated.

(2) A misconduct determination disqualifies a member from disability benefits only for the particular disability to which it applies.

f. **Examples of Misconduct and Not Misconduct Situations.** An intentional self-inflicted injury, other than suicide attempt discussed in paragraph 3414e, is deemed to be incurred as the result of the member's own misconduct, unless lack of mental responsibility is otherwise shown.

(1) If an individual intentionally wounds himself or herself with a firearm, the injury is due to his or her own misconduct .

(2) If an individual handles a firearm in a grossly negligent manner and thereby wounds himself or herself, that injury is due to his or her own misconduct because a wound is a reasonably foreseeable result of the grossly negligent handling of firearms; e.g., Russian Roulette.

(3) If, on the other hand , an individual was standing on a sidewalk and, while handling a firearm in a grossly negligent manner, was struck by an automobile which had gone out of control, the injuries are not due to his or her own misconduct because they would not have been reasonably foreseeable or the proximate result of the wrongful conduct in which the individual was engaged. In this example, the injuries are the result of an independent intervening cause.

g. **Misconduct /Line of Duty Determinations**

(1) Under the laws and regulations governing the Navy DES, members entitled to basic pay who incur or aggravate medical conditions which make them Unfit to perform their military duties are eligible to receive disability retirement or separation benefits. Members are not entitled to these benefits, however, if the physical disability resulted from the member's own intentional misconduct or willful neglect or was incurred while the member was in an unauthorized absence status.

(2) Chapter II of JAGINST 5800.7C (hereinafter the JAGMAN) (reference (h)), outlines policies and procedures for making line of duty/misconduct (LOD/M) determinations. JAGMAN section 0221 details circumstances that require such determinations. JAGMAN sections 0230 and 0231 prescribe that commands record LOD/M determinations in the member's health or dental record. When a command investigation or written preliminary inquiry has been prepared per JAGMAN, chapter II, commands will provide a copy of the inquiry, or investigation with General Court-Martial Convening Authority (GCMCA) endorsement, to the Medical Evaluation Board (MEB) convening authority for inclusion in the official records of the case which are forwarded with the MEB report for PEB consideration.

(3) Normally, the PEB will accept as binding the command LOD/M determination approved by the GCMA.

(a) The command determination will be subject to further review if either the PEB Legal Advisor, Informal PEB, Formal PEB, or PPEB, finds the LOD/M determination to be contrary to the evidence contained in a JAGMAN investigation, contrary to additional evidence obtained during the PEB review and hearing process, or predicated upon an investigation that may be deficient. In these cases, the PEB Legal Advisor, Informal PEB or Formal PEB will submit a written request to the PPEB for DIRNCPB review and decision. The PPEB will forward his/her recommendation along with a written legal analysis of the LOD/M determination from the PEB Legal Advisor to the DIRNCPB. If the Informal PEB initiates review of a LOD/M determination, the documentary review may be completed pending DIRNCPB decision. If the Formal PEB initiates a review of a decision made by DIRNCPB at the Informal PEB level, the formal hearing may be completed pending DIRNCPB's final decision. However, the Informal PEB or Formal PEB will not sign or promulgate a Preliminary Findings or Findings letter until the DIRNCPB has completed review of the case and issued a LOD/M determination. In the case of the Formal PEB, the member will be advised that an initial or revised LOD/M determination is being sought from the DIRNCPB. Upon receipt of the DIRNCPB's determination, the Informal or Formal PEB's will sign the Preliminary Findings Letter or Findings Letter, as appropriate, consistent with the DIRNCPB's determination. The case will then be forwarded to the PPEB for review and issuance of findings.

(b) Upon receipt of a request to review a LOD/M determination, DIRNCPB shall secure a written analysis of the LOD/M determination from the NCPB legal advisor before reviewing the analyses and recommendations from the President, PEB and the PEB legal advisor. DIRNCPB shall make a final LOD/M decision and return the

case to the President, PEB who shall issue a Findings Letter consistent with DIRNCPB's decision.

(4) Under chapter 18 of the reference (f) (MANMED), the convening authority of the MEB has the responsibility to review all MEB reports for completeness. Before referring a case for PEB review, the MEB convening authority shall review case records to ensure they contain required LOD/M determinations from the responsible field commander. The MEB convening authority shall process a case that fails to contain a required LOD/M determination according to the following principles:

(a) If the date of the injury giving rise to the requirement for an LOD/M determination was more than 2 years prior to the date of the MEB, the MEB convening authority shall continue to process the member's case, including forwarding the case to the PEB, without further effort to obtain the LOD/M determination or information normally required for making the determination. Consistent with the JAGMAN reference (h), the MEB will presume a finding of "in the line of duty and not due to the member's own misconduct" in processing such cases.

(b) If the date of the injury giving rise to the requirement for an LOD/M determination is less than 2 years from the date of the MEB, the MEB convening authority will contact the responsible field commander and request that steps be taken to properly investigate the facts surrounding the injury and to document and record appropriate findings. The MEB convening authority only shall forward the MEB report to the PEB for processing if:

1. MEB convening authority obtains a copy of the LOD/M investigation and includes it as part of the MEB report;

2. MEB convening authority obtains a copy of the health/dental record entry recording the LOD/M determination, and includes it as part of the MEB report package; or

3. MEB convening authority obtains a statement from the cognizant GCMCA stating that an LOD/M determination was not required (JAGMAN section 0221) or was not able to be obtained (i.e., that diligent efforts to complete the investigation were not productive due to witness unavailability).

(5) If the PEB receives a MEB report from a MEB convening authority that fails to contain a required LOD/M determination, processing of the MEB report will be governed by the following principles:

(a) If the date of the injury giving rise to the requirement for an LOD/M determination was more than 2 years prior to the date of the MEB reporting the medical evaluation of the associated injury/disease, the PEB will continue to process the member's case without further effort to obtain the LOD/M determination or information normally required for making the determination. Consistent with the JAGMAN and this

instruction, the PEB will presume the injury or disease was incurred or aggravated "in the line of duty and not due to the member's own misconduct " in these cases.

(b) If the date of the injury giving rise to the requirement for an LOD/M determination is less than 2 years from the date of the MEB reporting the medical evaluation of the associated injury/disease, the PEB will forward the case to the PEB legal advisor. Upon review of the case, if it is the legal advisor's opinion that an LOD/M determination was not necessary, the PEB shall process the case presuming an LOD/M determination favorable to the member. If it is the legal advisor's opinion that the relevant facts and directives require an LOD/M determination, and President, PEB concurs, the PEB will return the MEB report to the MEB convening authority for action as noted in subparagraph (4) above. (If the President, PEB does not concur with the recommendation of the PEB legal advisor, the provisions of paragraph 4103 (a) and (b) apply.) The PEB will advise the medical board report convening authority that prior to the PEB's acceptance of the medical board report for consideration, one of the following actions must be completed:

1. Obtain (or complete) a copy of the LOD/M investigation and include it as part of the MEB report;

2. Obtain (or complete) a copy of the health/dental record entry recording the LOD/M determination and include it as part of the MEB report; or

3. Obtain a statement from the cognizant GCMCA stating that an LOD/M determination was not required (JAGMAN section 0221) or was not able to be obtained. (In this case processing shall be made presuming the injury or disease was incurred or aggravated in the line of duty and not due to the member's own misconduct.)

(6) In the event that the member has incurred or aggravated an injury or disease while in an unauthorized absence status, JAGMAN sections 0223c(2) and 0230d require that the member's command complete an LOD/M investigation. JAGMAN section 0223 establishes separate standards regarding injury or disease incurred during a period of unauthorized absence: one standard is for JAGMAN investigations purposes, and the second standard is for the purposes of physical disability payments (severance/retirement) under chapter 61 of Title 10, U.S.C. Procedures set forth in the latter standard govern PEB processing of cases involving LOD/M determinations, as outlined in paragraph 3410a.

h. Passenger Misconduct. In accordance with paragraph 3410d, injuries sustained by a passenger will be presumed not to have occurred as a result of his/her own misconduct. However, subject to the criteria set forth in paragraph 3412a(3), this presumption may be overcome where clear and convincing evidence establishes that the passenger knew or should have known that the driver was incapable of operating a motor vehicle safely due to the intemperate use of alcohol or illegal use of a drug.



### **3411 Unauthorized Absence**

When a disability is incurred at any time during a period of unauthorized absence, regardless of whether the absence interfered with the member's military duties, the member is excluded from receiving disability benefits (10 U.S.C. 1207). Legally excusable mental or physical conditions may provide a bona fide defense to a charge of unauthorized absence and may be an issue addressed in the context of disability evaluation.

### **3412 Substance Abuse-Related Disabilities**

#### a. Injury Incurred as Proximate Result of Voluntary Intoxication

(1) Subject to the discussion in paragraph 3410, an injury incurred as the proximate result of prior and specific voluntary intoxication may be incurred as the result of misconduct. However, a finding of misconduct may only be made when:

(a) it clearly can be shown that the member's physical or mental faculties were impaired;

(b) the extent of impairment clearly can be determined; and

(c) it is clear that such impairment was the proximate cause of injury.

(2) In the case of an operator of a motor vehicle, the presence in the blood stream of a BAC of 0.1 grams percent or higher, standing alone, is sufficient to establish items a (1) (a) and a (1) (b) above. The fact that the operator was intoxicated does not, however, establish a (1) (c) above. Rather, other independent evidence such as a police report or written statement must be presented to establish that the member's injuries were a direct result of intoxication.

(3) While the gross negligence of an intoxicated driver, which is the proximate cause of injury, may support a finding of misconduct with regard to the driver, injury sustained by a passenger is normally not considered the result of misconduct. Injury to a passenger is normally the result of the driver's gross negligence and not the passenger's. Accordingly, in the case of passengers in motor vehicles, this paragraph is not applicable unless:

(a) the passenger exercises control over the operation of the vehicle,

(b) the negligence of the driver, by operation of law, can be "imputed" to another person or entity, or

(c) the evidence establishes a failure as a passenger to exercise due care for one's own safety.

#### b. Alcohol and Drug-Induced Disease

(1) General. Inability to perform duty resulting from disease, which is

directly attributable to a specific, prior, proximate, and related intemperate use of alcoholic liquor, or illicit and habit-forming drugs, shall be categorized as the result of misconduct . Habituation may or may not be associated with a specific inability to perform duty that is directly due to the specific and proximate use of alcohol or drugs. Controlled substances are listed in 21 C.F.R. 1308.

(2) Alcohol-induced disease. An alcohol-induced disease is the result of misconduct , if:

(a) according to recognized medical knowledge, it is the direct and foreseeable result of the intemperate use of alcohol; and

(b) the service member had been referred to a treatment and rehabilitation program for alcoholism at a time when the disease was preventable or treatable.

(3) Drug-induced disease

(a) If a disease, such as hepatitis, cannot be directly attributed to a specific, prior, proximate, and related intemperate use of a drug, it must be considered not due to misconduct .

(b) An individual will not be held responsible for his or her acts or their consequences if they result from mental disease. It must be determined therefore whether the drug use was a consequence of mental illness or the drug use was voluntary and brought on the mental illness. If a result of voluntary use or abuse, the findings may be misconduct and not compensable depending on the other circumstances involved; if a consequence of mental illness, no misconduct is involved. However, a determination that drug use was a consequence of mental illness would, by the same rationale, tend to establish the existence of mental illness prior to service in those cases where the member admits intemperate use of drugs prior to service. Brief experimentation with marijuana would not, in itself, meet this criterion.

### **3413 Unreasonable Refusal Of Medical, Dental, Or Surgical Treatment**

a. If a member unreasonably refuses to submit to medical, dental, or surgical treatment, any Unfitting disability that proximately results from such refusal is incurred as a result of the member's willful neglect. However, unreasonable refusal under this section only may equate to willful neglect when the member most likely would be Fit had he or she submitted to or complied (see paragraph 3802(c) failure to comply with prescribed treatment) with the treatment regimen. Additionally, a member who refuses medical treatment on a bona fide religious basis is eligible for disability benefits; refusal shall not be considered willful neglect.

b. The PEB must determine whether refusal of treatment was or was not, in fact, reasonable regardless of any opinion expressed in a medical board report. The medical board report also shall contain the following:

(1) written comments by the member regarding the member's refusal;

(2) written comments by the physician explaining why the refusal is unreasonable, supported by specific medical references. If the PEB finds that the refusal of treatment was unreasonable, the member shall, unless a MEDICAL BOARD CERTIFICATE RELATIVE TO COUNSELING ON REFUSAL OF SURGERY AND/OR TREATMENT (NAVMED 6100/4) already is contained in the record, be notified before a finding of willful neglect may be made, and advised that continued refusal will result in a finding of willful neglect and loss of disability benefits.

### **3414 Mental Competency And Responsibility**

a. Presumption of Mental Competence. All persons are presumed to be mentally competent and thus responsible for their acts. Clear and convincing evidence is required to overcome this presumption.

b. Mental Responsibility Considerations. A member may not be held responsible for his or her acts and their foreseeable consequences if, at the time of commission of such acts, as a result of severe mental disease or defect, he or she was unable to appreciate the nature and quality or the wrongfulness of the acts. A member's conditions not amounting to a lack of mental responsibility as defined above does not preclude holding a member responsible for his or her acts and their foreseeable consequences. As used in this paragraph, the terms "mental disease" and "defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct. Thus, an injury which was the proximate result of acts performed while the member was mentally impaired as a result of voluntary ingestion of an hallucinogenic drug would be deemed to have been incurred as a result of the member's own misconduct since certain properties of such drugs are notorious and their use is prohibited by Article 1151, U.S. Navy Regulations.

#### c. Determining Mental Incompetence

(1) Where mental competency is an issue, disbursement of a member's pay and allowances to a trustee properly designated under chapter XIV, JAGMAN, can only be made after a determination of mental incapacity to manage financial affairs by a board of medical officers convened and constituted in accordance with reference (f) (MANMED), chapter 18 and 37 U.S.C. 602. Such a board must consist of three members, at least one of whom must be a psychiatrist. Additionally, the members of such a board must be physicians of the Navy, Army, Air Force, or physicians employed by one of these Services, the Department of Health and Human Services, or the VA.

(2) In the case where a member who is on the TDRL elected to receive compensation from the VA in lieu of all retired pay from the Department of the Navy, a determination of mental incompetence by a psychiatrist other than a medical officer or physician employed by one of the Services, Departments, or agencies may be accepted subject to the approval of the DFAS.

(3) Where the member's attending physician determines that the member is mentally unable to acknowledge; i.e., accept or decline, the findings of the PEB, and is not expected to live more than 72 hours, the member's guardian appointed by a court, or, if no one has been appointed, the primary next of kin, may act on his or her behalf. The member's attending physician shall annotate this determination, and the reasons therefore, in the member's medical record. Should the member survive, however, and require active duty or retired pay, then his/her mental incompetence must be determined in accordance with paragraph 3414c (1).

d. Restoration of Mental Competency. Once a determination of mental incompetence has been properly made, a finding of restoration of competency or capability to manage financial affairs may be accomplished by a minimum of one medical officer, who shall be a psychiatrist. See JAGMAN, Chapter XIV.

e Suicide Attempts. In view of the strong human instinct for self-preservation, a bona fide suicide attempt, as distinguished from other acts of intentional self-injury, shall be considered to create a strong inference of lack of mental responsibility.

**3415 - 3499 Reserved**