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AHRC-DOE

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MEMORANDUM FOR Presidents, U.S. Army Physical Evaluation Boards

SUBJECT: Medical Principles: Presumption of Soundness and Permanent Service Aggravation;
Placement on TDRL

Part I: Presumption of Soundness and Permanent Service Aggravation

DoDI 1332.38 provides that each Soldier on active duty orders for more than 30 days is presumed to have been in sound physical and mental condition upon entering active duty except for medical defects and physical disabilities noted and recorded at the time of entrance.

13 MAR 2008 DTM provides that each condition determined to be EPTS (including hereditary and/or genetic diseases) is presumed to have been aggravated.

The PEB can overcome the presumption of soundness and the presumption of permanent service aggravation (only) with clear and unmistakable evidence based upon well-established medical principles.

The following explains what constitutes well-established medical principles and how the PEB considers these well-established medical principles to overcome these presumptions.¹

DoDI 1332.38, E2.1.1 defines **accepted medical principles** as *fundamental deductions, consistent with medical facts that are so reasonable and logical as to create a virtual certainty that they are correct.* Even though neither the DTM nor DoDI 1332.38 defines what constitutes a “well-established medical principle,” it is reasonable to conclude that both terms have the same meaning.

Published medical information similar to the type of information a health care professional may rely upon when rendering a diagnosis, prognosis, or treatment plan often includes one or more “well-established medical principles.”

When such medical principles are sufficiently specific to the unique aspects of the Soldier’s diagnosis and presentation, it may constitute “clear and unmistakable” evidence to overcome the presumption of soundness and/or the presumption of permanent service aggravation.

The following is a more detailed explanation of each of the above three steps.

First, the PEB must have an initial understanding of the general nature of the Soldier’s condition regarding: causation (or etiology); symptoms; and disease progression (to include consideration of disease manifestations) over time, i.e., **well-established medical principles**. This initial understanding will come from reading standard texts and/or reputable online resources.

¹ USAPDA draws support for this approach based on consideration of 38 C.F.R. Part 3. See enclosed references.

Reliable internet sources for appropriate information may come from “.gov” or “.edu” sites. The National Institutes of Health website is an example of such a website. See: <http://www.nih.gov/index.html>. Commercial websites may also have valuable information. It is also acceptable to reference articles from websites which include scientific journals, well-known encyclopedias, and archival sites that include referenced official publications.

Whatever the source of the PEB’s findings of EPTS, no service aggravation, the PEB must cite to its source. If citing to an online source, include the link in the DA Form 199. If citing to a text, the 199 must include the name of the text (and page). To the extent feasible, whether with reference to the online source or the traditional source, consider quoting or paraphrasing the relevant language the PEB relied on to support its finding.

The second step in the PEB’s analysis of whether a Soldier’s condition is EPTS and/or permanently service aggravated involves the PEB reviewing the Soldier’s history, record of manifestations, and clinical course.

Third, the PEB considers the weight of the evidence. Is the evidence so strong that it constitutes **clear and unmistakable evidence** that the disability existed before the Soldier’s entrance on active duty and that it was not permanently aggravated by the military? When the evidence is not clear and unmistakable, the PEB will award a disability rating for the (unfitting) condition.

The PEB must document all findings of EPTS, not service aggravated, IAW 10 USC § 1222, by citing to all information upon which the PEB based its determination.

When such well-established medical principles are specifically relevant to the unique presentation of a Soldier, the PEB will determine whether the evidence that the condition existed prior to the Soldier’s entrance on active duty is such that it is “clear and unmistakable”. In this situation, the PEB must then determine whether the evidence with respect to aggravation while on active duty (due to the military vs. due to natural progression) is such that the PEB may consider it not permanently service aggravated.

“The PEB must consider all relevant, credible evidence not statutorily required to be excluded.” 3 AUG 1989 DAJA-AL Opinion. This means the PEB may consider voluntary verbal statements (including verbal statements documented in writing) the Soldier provides to the MEB or to the PEB. However, the PEB *will not* base its finding using any written statement by the Soldier, relating to the origin or incurrence of any disease or injury which the Soldier was required to sign. 10 USC § 1219.

The PEB cannot rely on mere conclusory statements from the MEB regarding the issue of EPTS. The MEB should ascertain whether the Soldier’s condition existed prior to military service and/or was permanently service aggravated by military service using this same method, i.e., using and citing well-established medical principles as applied to the Soldier’s specific presentation. When the MEB does not perform this detailed level of analysis, the PEB may supplement the record.

Part II: Placement on the TDRL

There are two types of PDES cases. The first type is the “legacy” case. In this type of case, the PEB assigns the disability rating. The second type of PDES cases is the “DES Pilot case” or other cases where the VA assigns the disability rating. Pending finalization of the TDRL Policy for DES Pilot cases and other cases where the VA assigns the disability rating, it appears the standard for placement on the TDRL (for these cases) will be that “a disability shall be considered unstable when there is clear and convincing evidence based on accepted medical principles that the VASRD rating percentage is likely to change within the next five years.”

Even though DoDI 1332.38 indicates the standard for placement on TDRL is “preponderance of the evidence,” as a matter of PDA policy, the standard for both types of cases will be “clear and convincing” as set forth in the draft policy.

In either type of case, the required analysis for determining whether a Soldier is to be placed, or retained, on the TDRL is as follows:

1. The MEB examiner is asked to assess the Soldier’s prognosis as follows:

The MEB should assess the prognosis of each of the Soldier’s conditions. The assessment should be based on what is known and what is not about each condition (e.g., long term response to treatment, disease progression (to include development of additional secondary conditions), etc.) The MEB should consider whether or not the Soldier’s presentation is typical or atypical. The MEB should then discuss whether (and how) the Soldier’s symptoms and/or physical findings are likely to occur within the next five years. If it appears the Soldier’s condition will be stable, the MEB should so state. The MEB should provide a foundation for its conclusions. This may include citations to medical literature.

When the MEB determines it cannot assess the Soldier’s prognosis, the MEB should indicate the prognosis is uncertain. The MEB should provide a reason it is unable to offer a prognosis, e.g., lack of available data.

The PEB will consider the *quality* of the MEB examiner’s prognosis statement. Without more, the mere conclusion or statement from the MEB that the Soldier should be placed, or retained, on TDRL because the condition is unstable, does not satisfy the regulatory standards for placement or continuation on the TDRL. The PEB may return the case to the MEB for further prognosis assessment or may, in some situations, complete the required analysis as follows.

2. The PEB will consider information within standard texts and/or reputable online resources i.e., accepted medical principles (or well-established medical principles) as it relates to the nature of the Soldier’s condition with respect to disease progression.
3. With reference to: the applicable VASRD code and (virtually) irrefutable medical facts relevant to the Soldier’s condition (including those relevant to Soldier’s specific

presentation), the PEB will determine whether clear and convincing evidence supports that the Soldier's rating will change. This rating change may be predicated on consideration of additional ratings for [later] unfitting conditions developing from the currently unfitting conditions.

4. With reference to the clear and convincing evidentiary standard, when the PEB determines the evidence does not support that the Soldier's condition will change over the next five years so as to result in a change in VASRD rating, the PEB will recommend the Soldier be permanently retired.

References:

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E3.P4.5.2. Presumption for Members on Active Duty for More than 30 days. The presumptions listed in E3.P4.5.2.1., through E3.P4.5.2.3., below apply to members on orders to active duty of more than 30 days, for purposes of determining whether an impairment was incurred or aggravated while a member was entitled to basic pay.

E3.P4.5.3. Prior Service Impairment. Any medical condition incurred or aggravated during one period of active service or authorized training in any of the Armed Forces that recurs, is aggravated, or otherwise causes the member to be unfit, should be considered incurred in the line of duty, provided the origin of the such impairment or its current state is not due to the member's misconduct or willful negligence, or progressed to unfitness as the result of intervening events with the member was not in a duty status.

E3.P4.5.2.3. Presumption of Aggravation. The presumption that a disease is incurred or aggravated in the line of duty may only be overcome by compelling evidence or medical judgment that the disease was clearly neither incurred nor aggravated while serving on active duty or authorized training. Such medical evidence or judgment must be based upon **well-established medical principles**, as distinguished from personal medical opinion alone.

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E3.P4.5.2. Presumption for Members on Active Duty for More than 30 days. The presumptions listed in E3.P4.5.2.1., through E3.P4.5.2.3., below apply to members on orders to active duty of more than 30 days, for purposes of determining whether an impairment was incurred or aggravated while a member was entitled to basic pay.

E3.P4.5.2.2. After Entry

E3.P4.5.2.2.1. Presumption of Sound Condition for members ordered on active duty for more than thirty days. This presumption applies in all cases in which a member, on active duty for more than 30 days is found to have a disability and the disability was not noted at the time of the member's entrance on active duty. This presumption is overcome if clear and unmistakable evidence demonstrates that the disability existed before the Service member's entrance on active duty and was not aggravated by military service. Absent such clear and unmistakable evidence, the PEB will conclude that the disability was incurred or aggravated during military service.

E3.P4.5.2.2.2. Hereditary and/or Genetic Diseases. Any hereditary or genetic disease shall be evaluated to determine whether clear and unmistakable evidence demonstrates that the disability existed before the Service member's entrance on active duty and was not aggravated by military service. However, even if the conclusion is that the disability was incurred prior to entry on active duty, any aggravation of that disease, incurred while the member is entitled to basic pay, beyond that determined to be due to natural progression shall be determined to be service aggravated. To overcome the presumption of sound condition, factual evidence based upon well-established medical principles as distinguished from personal medical opinion alone must be presented to rebut the presumption. The quality of evidence is usually more important than quantity. All relevant evidence must be weighed in relation to all known facts and circumstances relating to the condition. Findings will be made on the basis of objective evidence in the record as distinguished from personal opinion, speculation, or conjecture. When the evidence is not clear concerning whether the condition existed prior to service or if the evidence is equivocal, the presumption will not be deemed to have been rebutted and the member's condition will be found to have been incurred in or aggravated by military service.

38 CFR Part 3

§ 3.303 Principles relating to service connection.

(a) *General*. ... Determinations as to service connection will be based on review of the entire evidence of record, with due consideration to the policy of the Department of Veterans Affairs to administer the law under a broad and liberal interpretation consistent with the facts in each individual case.

(b) ...

(c) Preservice disabilities noted in service. There are medical principles so universally recognized as to constitute fact (clear and unmistakable proof), and when in accordance with these principles existence of a disability prior to service is established, no additional or confirmatory evidence is necessary. Consequently with notation or discovery during service of such residuals conditions (scars; fibrosis of the lungs; atrophies following disease of the central or peripheral nervous system; healed fractures; absent, displaced or resected parts of organs; supernumerary parts; congenital malformations or hemorrhoidal tags or tabs, etc.) with no evidence of the pertinent antecedent active diseases or injury during service the conclusion must be that they preexisted service. Similarly, manifestation of lesions or symptoms of chronic disease from date of enlistment, or so close thereto that the disease could not have originated in so short a period will establish preservice existence thereof. ...

...

§ 3.304 Direct service connection; wartime and peacetime.

...

(b) *Presumption of soundness*. The veteran will be considered to have been in sound condition when examined, accepted and enrolled for service, except as to defects, infirmities, or disorders noted at entrance into service, or where clear and unmistakable (obvious or manifest) evidence demonstrates that an injury or disease existed prior thereto and was not aggravated by such service. Only such conditions as are recorded

in examination reports are to be considered as noted.

(Authority: 38 U.S.C. 1111)

(1) History of preservice existence of conditions recorded at the time of examination does not constitute a notation of such conditions but will be considered together with all other material evidence in determinations as to inception. Determinations should not be based on medical judgment alone as distinguished from accepted medical principles, or on history alone without regard to clinical factors pertinent to the basic character, origin and development of such injury or disease. They should be based on thorough analysis of the evidentiary showing and careful correlation of all material facts, with due regard to accepted medical principles pertaining to the history, manifestations, clinical course, and character of the particular injury or disease or residuals thereof.

(2) History conforming to accepted medical principles should be given due consideration, in conjunction with basic clinical data, and be accorded probative value consistent with accepted medical and evidentiary principles in relation to value consistent with accepted medical evidence relating to incurrence, symptoms and course of the injury or disease, including official and other records made prior to, during or subsequent to service, together with all other lay and medical evidence concerning the inception, development and manifestations of the particular condition will be taken into full account.

(3) Signed statements of veterans relating to the origin, or incurrence of any disease or injury made in service if against his or her own interest is of no force and effect if other data do not establish the fact. Other evidence will be considered as though such statement were not of record.

(Authority: 10 U.S.C. 1219)

Sec. 3.306 Aggravation of preservice disability.

(a) General. A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.

(Authority: 38 U.S.C. 1153)

Pre-decisional draft Temporary Disability Retirement List (TDRL) policy.

2. PROCEDURES

1.1. Unstable. A disability shall be considered unstable when there is clear and convincing evidence based on accepted medical principles that the VASRD rating percentage is likely to change within the next five years.

FOR THE COMMANDER:

//signed//

DANIEL L. CASSIDY
COL, IN
Deputy Commander