

HOW TO WIN YOUR NAVY IDES CASE

by

John B. Gately, Esq.

If you are referred into the Navy IDES process, you will be provided with a wealth of materials in the form of handouts, videos, training, etc. regarding this system. However, what you will not receive is the actual hands-on knowledge that you need to obtain the optimal results from your case. This e-book is intended to identify the steps that you need to take to enhance your odds of receiving the best results possible from your case. While I will identify these steps and give you broad general advice as to how to accomplish these goals, you will eventually need help in implementing these steps. When you do, feel free to call upon me and I will be glad to help.

STEP ONE- MEETING WITH YOUR PEBLO

The IDES process starts when your medical providers and/or your command determine that you are potentially Unfit to perform your duties due to one or more medical issues. At this point, you will be assigned a PEB Liaison Officer (“PEBLO”) who will be responsible for assembling your case file, helping you complete the all-important VA Form 21-0819, obtaining your Nonmedical Assessment (“NMA”), coordinating with the VA Military Service Coordinator (“MSC”), scheduling medical appointments and counseling you regarding findings. Please note that the PEBLO is NOT your advocate- he or she is simply an administrator coordinating your case processing. It is up to you to ensure that your case file is fully developed and that you exercise all the rights and remedies available to you under the Navy IDES process.

First Tip: The most important form that you will see at the outset of this process is the VA Form 21-0819, Joint DOD/VA Claim Form. This form lists the conditions for which your military health care providers are referring you into the IDES process. Any conditions that you believe prevent you from performing your duties should be listed as referred conditions on this form. If these conditions are not listed, then you will have to fight to include them through either an Impartial Medical Review or a Rebuttal to your Medical Board Narrative Summary (“E-MEB-R”). Otherwise, these conditions are unlikely to be deemed Unfitting when initially reviewed by the Informal PEB.

First Action Step: It is up to you to fight to have any potentially unfitting conditions listed as referred conditions on Page One of this form by rebutting your NARSUM and/or requesting an Independent Medical Review to demonstrate that it is service-disqualifying. Then, if you must appeal to a formal hearing panel to have it added, you can demonstrate that you have been consistently arguing the unfitting nature of this condition from the outset. Otherwise, board members will ask you why you never pressed the issue earlier, if it was so important to you. Deny them this opportunity by consistently arguing to include all potentially service-disqualifying conditions from the outset.

STEP TWO- MEETING WITH YOUR MSC

After your initial meeting with the PEBLO, you will be introduced to the VA Military Service Coordinator (“MSC”). The MSC will review your medical records and assist you in completing the VA Form 21-526EZ listing all of the medical conditions for which you wish to claim service-connection for VA rating purposes. Together, the MSC and the PEBLO will coordinate your VA C&P exams, medical board exams, etc.

Second Tip: Take your time with the MSC and ensure that you claim every potentially disabling condition on the VA Form 21-526EZ. Even something as simple as grinding your teeth may result in a VA disability rating. If in doubt, err on the side of claiming a condition as opposed to omitting it.

Second Action Step: Ensure that your medical record is complete by requesting a copy of it prior to meeting with the PEBLO and MSC. Do not assume that outside providers notes are already in your medical record. Obtain copies prior to meeting with your PEBLO and MSC to make their job easier and thereby enhance your odds of obtaining better results in this process. When you obtain these records, go through them and highlight every diagnosis to make it easier to find them for claim purposes.

Important Note- Once you have completed your VA C&P exams, the results of these examinations will be forwarded to your PEBLO for inclusion in your MEB case file. Please check these exam reports to see if there are any errors or omissions that will need to be addressed as you continue through this process.

STEP THREE- SEEKING COMPETENT COUNSEL

Once you are referred into the IDES process, you should obtain a copy of your service record and your medical records to review these items with competent counsel. Service members may avail themselves of Navy MEB Counsel at no cost or outside counsel at their own expense. This is a crucial step as competent, experienced counsel can help you to define your goals and develop a plan for achieving them.

While I am in direct competition with MEB Counsel and their counterparts from Code 16 at formal boards, it has been my experience that Navy counsel in this venue are exceptionally good at what they do. The only issue is the fact that they have heavy caseloads and cannot give you the attention that you would receive from outside counsel when it comes to drafting nonmedical evidence letters, helping you navigate procedural obstacles and telling you what to say and do at your appointments to maximize the benefits derived from such opportunities.

Third Tip: Engage competent counsel- MEB Counsel or a civilian counsel- as soon as possible in the process and work with them on a consistent basis to obtain the best possible outcome from your case.

Third Action Step: When hiring civilian counsel, check their peer review and client review ratings via www.lawyers.com. The peer reviews are done anonymously on a regular basis and the client reviews are verified by confirmation through the sender's e-mail address. In other words, you cannot buy a complimentary review. Most lawyers have links to their client and peer reviews on their web sites- you will find mine in the Client and Peer Review tab on my home page at www.gatelylawfirm.com

STEP FOUR- MEETING WITH YOUR MEB PHYSICIAN

When your command or your care providers believe that you are not fit for full duty and are not worldwide deployable, with little likelihood of being able to do so within the next twelve months, you may expect to be referred to a Medical Evaluation Board ("MEB").

While your Medical Evaluation Board Narrative Summary (“NARSUM”) will be signed by two physicians, one will simply be reviewing the work of his or her colleague for any clear or glaring errors. Thus, it will be critical for you and your counsel- military or civilian- to have defined your goals prior to this initial meeting so that you can speak in cogent sound bites that will allow you to shape the information contained within your records to achieve your best-case scenario.

Your MEB physician will be documenting your medical history and the impact of your various medical conditions upon your ability to perform your assigned duties. His or her goal is to determine whether one or more conditions adversely impacts your ability to perform the full range of duties that may be expected of you.

Fourth Tip: Since your MEB physician will be reviewing your medical records in light of the guidance provided in SECNAVINST1850.4 series and DODI 6130.03- Volume 2, this means that you should also be reviewing these regulations to determine whether it is feasible for you to petition to be found fit for full duty or whether you should be trying to identify all the potentially service disqualifying conditions that render you Unfit and thus give you the best odds of being medically retired.

Fourth Action Step: Obtain copies of these regulations and carefully review your medical records in light of the retentions standards for each potentially unfitting condition contained within your medical records. Then discuss with your counsel how each condition does or does not impact your ability to perform your assigned duties, as this will help us determine whether to petition to be found fit or Unfit.

You may find that your MEB physician concludes that you may be able to return to a fit for full duty status within a reasonable period and the board will not proceed further at this time. However, if that does not happen, then your MEB physician will be drafting a complete narrative summary describing the medical conditions that do or do not impact your ability to perform your assigned duties. In the process, your MEB physician will be reviewing your VA C&P exams, your medical records, performance data and, most important of all, your nonmedical assessment from your Commander- the dreaded NMA form.

STEP FIVE- PREPARING FOR VA C&P EXAMS

Many service members devote all their attention to the MEB Narrative Summary and fail to realize one essential fact- the purpose of the Navy Physical Evaluation Board (“PEB”) is simply to determine which conditions render you Unfit to

perform your duties and whether, based upon your disability percentage, you should be separated due to disability or medically retired.

If they recommend medical retirement, then the question becomes whether to place you on the Temporary Disability Retired List (“TDRL”) or the Permanent Disability Retired List (“PDRL”).

HOWEVER, many service members are unaware that the Navy is bound by whatever disability percentages the VA Rating Activity assigns to the conditions listed by the Informal Panel members. And the most important thing that I can tell you about this process is that the VA Rating Activity tends to assign disability ratings based almost entirely upon the findings of their VA C&P exam physicians.

Fifth Tip: It is imperative that you review the VA rating criteria contained within 38 CFR Part 4 to understand how each condition may be rated and to also review the VA Disability Benefit Exam Questionnaires used to conduct your exams so that you will know what you will be asked and what physical exams will be performed in your case. Not to worry, I prepare my clients as to what to say and do before each C&P exam.

Fifth Action Step: Once you have reviewed the rating criteria at 38 CFR Part 4 and the VA DBQ forms that may be found at va.gov, then you will be well-prepared to answer the most important question on each form- how does each condition affect you in the military workplace?

Please do not underestimate the importance of this tip, as your answer to this question will be used by both your MEB physician and the PEB members to determine whether each condition is or is not service-disqualifying.

STEP SIX- THE IMPORTANCE OF YOUR NMA

Many service members underestimate the importance of the Nonmedical Assessment (“NMA”) and do not attempt to provide their chain of command with the input needed to attain their goals.

You see, it is vital that your NMA be drafted in a manner that supports your goals. Why? Well, first because your servicing medical officers will want to incorporate its language into your MEB Narrative Summary, if the form has been completed prior to your medical board physical. Second, because IPEB members review it line by line to determine which conditions you should be found unfitting on the DOD side of your case.

Sixth Tip: you must provide your supervisors with the input needed to ensure that it is drafted in a manner that will best achieve your goals.

Sixth Action Step: If you become one of my clients, we will provide your chain of command with bullet points to be included in the NMA as well as nonmedical evidence letters to remove any doubts regarding the accuracy of the bullet points that we will provide your Commander. This is a key step to taking control of your board- ignore it at your peril.

STEP SEVEN- REVIEWING YOUR MEB NARSUM

When your NARSUM and any specialty addenda are completed, you will have several days to determine whether you concur, non-concur or wish to request an impartial medical review. This decision will be based upon both the contents of these documents and your own goals. While you may file a rebuttal to correct inaccurate information or submit new medical and nonmedical evidence for the drafter's review, it is often best to first seek an impartial medical review. If you do not agree with the findings of the impartial medical review, you may then submit a rebuttal.

Seventh Tip: Request a copy of your VA C&P exams and any new medical records prior to consulting with your attorney so that you can then determine what it is that you are asking of the impartial reviewer. Your goals should be straightforward- to add additional referred conditions as service-disqualifying or, if you wish to be found fit, to demonstrate why these conditions are not service disqualifying. Anything else is simply a waste of time.

Seventh Action Step: Work with your counsel to provide the impartial reviewer with a brief outline supported by medical records that show why your various medical conditions should or should not be found to be service-disqualifying. If the reviewer denies your request, raise these issues again in your rebuttal so that you can later argue to the FPEB members that you have been consistent in your position. If you become one of my clients, then we will work through these steps together to obtain the best results possible for you.

Please note that the reviewing physician must respond in writing and grant your rebuttal in whole or in part, send the case back for additional information or deny relief and forward the board as written. However, any such responses must be completed within a specified period and you are entitled to a copy of it. At this point, your case will be forwarded to the PEB for an initial adjudication.

STEP EIGHT- IPEB ADJUDICATION & RATING DECISIONS

Once your case is sent to the Informal Panel (“IPEB”), the board members will decide whether you are Fit or Unfit for each of your medical conditions as well as whether the conditions are medically stable, combat-related or were incurred in a combat zone.

If you are found Fit and agree with this finding, then the case is done and you will be returned to a fit for full duty status. If you disagree, then you must request a formal hearing to seek to reverse this decision and provide the justification for this request along with your appeal. This is an important step as hearings are only granted in the discretion of the Board President.

As your counsel, I will draft this brief for you and attach the medical and nonmedical evidence needed to enhance your odds of being granted a formal hearing.

If you are found Unfit for one or more conditions, then your case will be sent to the VA Rating Activity for the assignment of a combined disability rating. The VA decision will be sent back to the PEB to enable the board members to draft their findings regarding your disabling conditions, the percentages assigned to them, whether the condition is medically stable and whether you should be medically retired (TDRL or PDRL) or medically separated due to disability.

The PEB will also be determining whether you have been compliant with medical treatment, whether the condition existed prior to service (if so, was it service aggravated?) and whether the condition was incurred in the line of duty and while entitled to basic pay.

If you disagree with the percentage assigned by the VA to your service-disqualifying conditions, then we must draft a VA One-time Reconsideration request providing new medical evidence supporting a rating increase or showing why the initial decision was incorrect.

If you wish to add unfitting conditions to your initial IDES case, then we must go to a formal hearing to present evidence as to why the FPEB should grant this request. In advance of the hearing, I will draft and submit a written brief with new medical and nonmedical evidence supporting our contentions.

Eighth Tip: If you have been found Unfit and your case has been sent to the VA for the assignment of rating percentages, then we will begin reviewing your VA C&P exams to determine the likely rating percentages based upon the C&P exams and whether there is new medical evidence meriting a rating increase through a VA Reconsideration Request (“VARR”). In addition, we will begin updating your medical and nonmedical evidence to support why these conditions should be viewed as service-disqualifying.

Eight Action Step: We will request a copy of the TRIM case file- the official Navy Yard case file- to determine whether anything was missing from your file when it was sent to the IPEB and work to supplement it.

STEP NINE- THE VA ONE-TIME RECONSIDERATION REQUEST (“VARR”)

The VARR process is straightforward- we will need to provide a written brief for the VA Decision Review Officer that is supported by new medical and nonmedical evidence showing why the initial ratings assigned to the conditions at issue do not reflect your actual degree of impairment and should be increased.

Ninth Tip: We will begin preparing for a potential VARR once you have received copies of the VA C&P exams. Why? Because it is more persuasive to obtain new objective testing and develop new medical evidence while your case is pending than after you receive a decision that you do not like.

Ninth Action Step: Obtain copies of your VA C&P exams as well as the IPEB forwarding letter and review these documents with your counsel to determine what conditions will need to be the subject of a VARR and which ones will require going to an FPEB. At that point, develop a plan for acquiring the medical and nonmedical evidence needed to prove your case in both venues. Not to worry, I have done this hundreds of times and will walk you through what we need to do in both venues to obtain the best possible results.

STEP TEN- THE FORMAL HEARING PANEL (“FPEB”)

The formal hearing is our chance to petition to add other service-disqualifying conditions if you have been found Unfit or for you to petition to be found Unfit if you were found Fit in the initial decision by the IPEB. In addition, it is possible for a sailor or Marine who has been found Unfit to argue why he or she should be found Fit.

Although you have the option to simply submit a written appeal and not personally appear, this is rarely a winning tactic unless you are hospitalized, in a coma or are so traumatically injured that it is manifestly impossible for you to travel. Otherwise, you should appear with your counsel of choice- military or civilian- by videoconferencing, telephonically, or in person.

Tenth Tip: When you appear, you will be given the option of testifying under oath or making an unsworn statement. If you testify under oath, then you are subject to questioning by board members. Frankly, unless there is a misconduct issue in your case, you should testify under oath.

Tenth Action Step: The Navy has been primarily conducting formal hearings virtually by video conference or as telephonic hearings, although in-person hearings are granted upon request. Frankly, based upon my experiences during the pandemic, there is little to be gained by electing an in-person hearing as I have achieved great results for my clients in a virtual format. However, whether virtually or in-person, you can count on spending several days prior to your hearing date with me putting you through every question that I will ask you and that board members could potentially ask you several times over. We will do the same with any other witnesses that you bring with you or that we have testify via speaker phone. Trust me, you will be very well-prepared your formal hearing.

STEP ELEVEN- APPEALS FROM THE FPEB

If we need to appeal the findings of the FPEB, our first step will be to request a copy of the audio recording of the hearing and review together. Then we will review the rationale of the FPEB line by line to look for mistakes of fact or law as well as determining whether we can develop new medical and nonmedical evidence to effectively refute their findings.

The appeal to the Council of Review Boards can be either a written appeal or an in-person appeal that is limited in time and scope. This type of appeal is called a Petition for Relief (“PFR”). Once a PFR is submitted, we will continue to supplement it with any new evidence until a final agency decision is issued. If that decision is not favorable, then we will discuss the merits of filing an appeal with the Board of Corrections for Naval Records.

Eleventh Tip: Always remember to request a copy of the audio recording so that you have a record of what transpired during the proceedings.

Eleventh Action Step: Please keep up with all your medical appointments as we develop any potential appeals so that we show continuity of care and work with me to keep your nonmedical evidence up to date as well.

STEP TWELVE- CALL TO ACTION

This step is simple- if you like what you have read in this e-booklet and would like to work with me to obtain the best possible results in your Navy IDES Case, then please contact me on my direct phone line at (757) 481-0772 or via my web site at www.gatelylawfirm.com.

Not to worry, distance is immaterial in this area of practice. I have successfully represented clients both within and outside of CONUS. Most of our work prior to any formal hearings will be done by phone, Skype, e-mail and fax. In closing, please accept my thanks for your service and the opportunity to earn your business!

All the best,



JOHN B. GATELY

Attorney & Counselor at Law

2332 Croix Drive

Virginia Beach, Virginia 23451

(757) 481-0772

Fax: 481-9629

Cell: 589-0837

www.gatelylawfirm.com