



SECRETARY OF THE ARMY
WASHINGTON

24 JUN 2024

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Army Directive 2024-06 (Soldier Appeal of the Formal Physical Evaluation Board Findings and Recommendations)

1. References.

- a. Title 10, United States Code, section 1216 (10 U.S.C. 1216) (Secretaries: powers, functions, and duties)
- b. 10 U.S.C. 1222 (Physical evaluation boards)
- c. National Defense Authorization Act (NDAA) for Fiscal Year 2022, Public Law 117-81, section 524
- d. Department of Defense (DoD) Instruction 1332.18 (Disability Evaluation System), 10 November 2022
- e. DoD Manual 1332.18, Volume 1 (Disability Evaluation System Manual: Processes), 24 February 2023
- f. Army Directive (AD) 2021-05 (Integrated Disability Evaluation System), 16 March 2021
- g. Army Regulation (AR) 635-40 (Disability Evaluation for Retention, Retirement, or Separation), 19 January 2017

2. Purpose. This directive implements the requirements of references 1c-1e to address Soldier appeals of formal physical evaluation board (FPEB) findings, providing guidance on the appellate review and updating the standardized Soldier election period for the informal physical evaluation board (IPEB), FPEB, and appellate outcomes.

3. Applicability. The provisions of this directive apply to the regular Army, Army National Guard/Army National Guard of the United States, and U.S. Army Reserve.

4. Policy. U.S. Army policy in references f and g for FPEB appellate review and Soldier election periods is amended as follows.

- a. Soldier Entitlements. Soldiers found fit or unfit by an FPEB under the integrated, legacy (includes Soldiers on the Temporary Disability Retirement List), and Reserve

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component (RC) non duty-related processes are entitled to appeal the FPEB findings and recommendations to the Army's designated FPEB appeal authority. This appeal is also called appellate review of FPEB findings and recommendations.

(1) The Soldier is entitled to a formal hearing for the appeal. In lieu of a hearing, the Soldier may submit a written appeal.

(2) The Soldier is entitled to appointed legal counsel from the Office of Soldiers' Counsel (OSC), U.S. Army Legal Services Agency, at no expense, to assist with FPEB appeal proceedings and elections. The Soldier may also elect to be represented by a non-government representative, including, but not limited to, private legal counsel or a representative from a veterans service organization. Any non-government representation will be at no expense to the government. If a Soldier elects a non-government representative, government legal counsel will remain available to the Soldier and the Soldier's representative for consultation but will not participate in a representative capacity during the Disability Evaluation System (DES) proceedings.

b. Appellate Review Limitations. References 1d and 1e implement section 524 of the NDAA for Fiscal Year 2022 and set forth a formal appeal process, including an impartial hearing if requested by the Soldier. Soldiers who do not demand or request an FPEB after the IPEB are not entitled to an FPEB appellate hearing. If the Soldier nonconcurs with the IPEB without seeking an FPEB and provides a statement of rebuttal that is not reassessed to the Soldier's satisfaction by the IPEB, then the Headquarters, U.S. Army Physical Disability Agency (HQ, USAPDA) will conduct a records review of the Soldier's case.

c. Appellate Authority. The Commanding General (CG), USAPDA (or designee) is the Army's appellate authority for appeals of FPEB findings and recommendations, except where approval is reserved for higher authority. Higher authority pertains to cases that come under the jurisdiction of the Army Physical Disability Appeal Board (APDAB), in accordance with this directive and reference 1g, and to certain general and Medical Corps officer cases pursuant to the provisions of 10 U.S.C. 1216.

d. Scope of Appeal. The FPEB appellate authority will consider all records comprising the Soldier's DES case file, including the impartial medical review, if one was prepared; the IPEB and FPEB decisions; and any additional relevant documentation submitted by the Soldier for consideration.

e. Soldier Appellate Elections. The PEB will make the proposed disposition (DA Form 199-1) available to the Physical Evaluation Board Liaison Officer (PEBLO). The PEBLO will immediately make the proposed disposition available to the Soldier. The Soldier and/or counsel must make an election during the 6 calendar days from when the

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PEBLO makes the proposed disposition available to the Soldier. A Soldier's election for an FPEB appeal hearing must be made on the DA Form 199-1. The PEBLO will return the DA Form 199-1 upon the earlier of the Soldier's election or at the end of the sixth calendar day. If additional time is required, the Soldier and/or counsel may request an extension through the PEBLO. The PEB President or designee is the approval authority for extension requests to the 6 calendar day election period. Any request for an extension must be received by HQ, USAPDA before the sixth calendar day. When a Soldier elects to submit a written appeal in lieu of having an FPEB appeal hearing, the written appeal must include a statement that the Soldier is waiving an FPEB appeal hearing and include the rationale for nonconcurrence.

f. Appellate Authority Notification Responsibilities. HQ, USAPDA will ensure that Soldiers who elect an appeal of FPEB findings and recommendations are informed of the following requirements:

(1) HQ, USAPDA will consider all records in the Soldier's DES case file. These records include, but are not limited to, the impartial medical review, medical evaluation board (MEB) rebuttal, IPEB and FPEB findings and recommendations, and any additional relevant documentation submitted by the Soldier for consideration.

(2) The Soldier, Soldier's counsel, and HQ, USAPDA will have access to all records. However, the Soldier may submit documentation of new evidence for consideration when making the election for appeal of the FPEB.

(3) HQ, USAPDA will identify for the Soldier which documents have been considered in rendering a decision.

(4) An FPEB appeal is a *de novo* hearing of all the adjudicative determinations made by the FPEB. Thus, the FPEB appellate authority may affirm or deny any finding or determination made by the FPEB, regardless of whether the Soldier raised the issue in appeal. Revisions may be less favorable to the Soldier than the findings and recommendations of the PEB.

(5) The hearing will be recorded, and a copy provided to the Soldier on request.

(6) The Soldier is entitled to a final appeal to the APDAB in two circumstances:

(a) HQ, USAPDA makes a unilateral change to the FPEB findings and recommendations during mandatory or qualitative assurance review following the Soldier's concurrence to the FPEB findings and recommendations.

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(b) HQ, USAPDA issues revised findings in response to the Soldier's appeal of the FPEB findings and recommendations, and the Soldier submits a timely nonconcurrency with a written statement of rebuttal to the HQ, USAPDA revision. (The election period for Soldier appeal to the APDAB is addressed in paragraph 4k(4) of this directive.)

g. Appellate Board Composition. Appeals of FPEB findings and recommendations (hearing and rebuttal appeal) will be heard by a board of three members, including a presiding officer, personnel management officer, and physician (military or DoD civilian) assigned to USAPDA. When the case involves an RC Soldier, the board must include a member of the RC who is in a qualified, paid RC duty status (including for points only), when serving as the RC board member. The assigned members must not have served on the Soldier's IPEB or FPEB hearing or been involved in any capacity with the Soldier's medical treatment or MEB. Board members must be current on annual certification of their formal training before being assigned to perform case adjudication duties.

h. Board Reconsideration Prior to Appellate Hearing. The board slated for the Soldier's appellate hearing may consider the Soldier's statement of appeal at any point prior to the hearing and issue revised findings for the Soldier's election. Reconsideration will not cancel the appellate hearing unless the Soldier withdraws the appeal.

i. Appellate Hearing. HQ, USAPDA will have 10 calendar days to complete an FPEB appeal, starting on the date the Soldier submits an election for FPEB appeal and ending on the date the Soldier receives the FPEB appeal decision or requests a U.S. Department of Veterans Affairs (VA) rating reconsideration, if appropriate. The default means for conducting the hearing will be video teleconference. Exceptions to the default are limited to the Soldier's request for a telephonic hearing and CG, USAPDA (or designee) approval of the Soldier's written request for physical appearance based on a demonstration of good cause. Any written request for physical appearance must be made at the time of filing the FPEB appeal. When physical appearance is approved, the Soldier's unit will fund the cost of travel to HQ, USAPDA or any other costs associated with travel for the hearing if such costs are reimbursable under the Joint Travel Regulation. In addition, HQ, USAPDA will fund travel for Soldiers currently placed on the Temporary Disability Retirement List, who are approved for physical appearance. The Soldier must be afforded more than 1 calendar day to arrive before the scheduled hearing for the purpose of conferring with the OSC attorney.

j. Office of Soldiers' Counsel Legal Representation and Soldier Rights. An assigned OSC attorney will consult with the Soldier at least 24 hours before the scheduled FPEB appeal hearing if the Soldier has not waived the right to consult with

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government-provided legal counsel. The Soldier will have the same rights before the appellate hearing as those prescribed in reference 1g for the FPEB hearing.

k. Documentation of Appellate Review.

(1) When appellate review results in no change to the FPEB hearing findings and recommendations, HQ, USAPDA will publish a memorandum to the Soldier and provide a copy to the Soldier's counsel. Pursuant to reference 1b, the memorandum will convey the appellate findings and conclusions in an itemized listing, with specific attention to each issue presented by the Soldier and the basis for applying total or extra-schedular ratings or unemployability determinations, as applicable. The signature authority is the CG, USAPDA (or designee), who will approve the FPEB hearing findings and recommendations on behalf of the Secretary of the Army. The Soldier does not have an election when appellate review affirms FPEB hearing findings and recommendations.

(2) When appellate review revises (modifies) the FPEB hearing findings and recommendations, the results will be documented and conveyed to the Soldier using DA Form 199-2 (USAPDA Revised PEB Proceedings). Pursuant to reference 1b, the form will convey the appellate findings and conclusions in an itemized listing, with specific attention to each issue presented by the Soldier and the basis for applying total or extra-schedular ratings or unemployability determinations, as applicable.

(3) When approval of findings is subject to higher authority (for example, the Secretary of Defense, pursuant to 10 U.S.C. 1216), the CG, USAPDA (or designee) will sign the DA Form 199-1 or DA Form 199-2, as applicable, implementing the higher authority's decision on behalf of the Secretary of the Army.

(4) Soldiers have the right to make an election to a revision. Election includes the right of the Soldier to submit a VA request for reconsideration when the revision includes an unfit finding for a new condition or, otherwise, a condition that the PEB does not find to be unfitting. HQ, USAPDA will forward the revised findings to the responsible PEBLO (or RC referring organization for an RC Soldier's non duty-related case) to receive counseling and obtain the Soldier's election. The PEBLO will advise the Soldier that HQ, USAPDA must receive the Soldier's election (and written rebuttal if the Soldier nonconcurs) to the revision within 6 calendar days, starting on the date that the PEBLO (or RC referring organization for an RC Soldier's non duty-related case) provides the Soldier the findings, unless HQ, USAPDA receives the Soldier's written request for an extension by the sixth calendar day. The PEBLO will respond to the USAPDA upon the earlier of the Soldier's election or at the end of the sixth calendar day.

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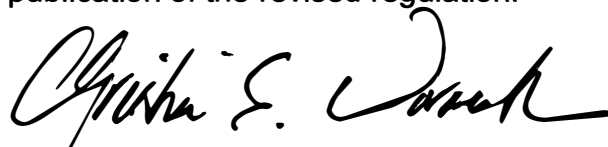
(5) If the Soldier submits a timely nonconcurrency with written statement of rebuttal in accordance with paragraph 4k(4) of this directive, and the rebuttal is not favorably considered by the appellate board, then HQ, USAPDA will forward the case to the APDAB for final decision, unless final decision is reserved to a higher authority under another provision of law.

I. Discretionary Determination for Higher-level Review. Except as otherwise required in paragraph 4f(6) of this directive, the CG, USAPDA (or designee) will review FPEB appeal cases to make a discretionary determination whether to refer to the APDAB for final determination (unless final determination is reserved for higher authority) a case involving the submission of a minority report by a member of the FPEB appellate board or a case in which all of the following occurred:

- (1) The case was returned to the FPEB for reconsideration.
- (2) The FPEB revised its findings.
- (3) The Soldier nonconcurred with the revision and submitted a written statement of rebuttal.
- (4) The FPEB revision was upheld by subsequent FPEB appellate review.

5. Proponent. The Assistant Secretary of the Army (Manpower and Reserve Affairs) has oversight responsibility for this policy. The Deputy Chief of Staff, G-1 will incorporate its provisions into AR 635-40 within 2 years of the date of this directive.

6. Duration. This directive is rescinded on publication of the revised regulation.



Christine E. Wormuth

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