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Post-9/11 Army Disability Decisions: Reinforcing Administrative Law Principles in Fitness and Disability Rating Determinations

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POST-9/11 ARMY DISABILITY DECISIONS: REINFORCING ADMINISTRATIVE LAW PRINCIPLES IN FITNESS AND DISABILITY RATING DETERMINATIONS

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I. INTRODUCTION: COUNTER-INTUITIVE TRENDS IN AN ARMY AT WAR

"[T]o care for him who shall have borne the battle, and for his widow, and his orphan . . . ."[1]

—Abraham Lincoln

The terrorist attacks of September 11, 2001 catalyzed two wars in Afghanistan and Iraq.[2] While combat broke Afghan and Iraqi military

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1. Abraham Lincoln, President of the United States, Second Inaugural Address (Mar. 4, 1865).

2. *See* Jennifer S. Martin, *Adapting U.C.C. § 2-615 Excuse for Civilian-Military Contractors in Wartime*, 61 FLA. L. REV. 99, 101 (2009) ("On September 18, 2001, Congress granted President Bush the 'authori[ty] to use all necessary and appropriate force' to combat terrorism in the Middle East." (alteration in original) (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001))).

forces with relatively few American casualties,[3] both wars devolved into protracted insurgencies. As of March 3, 2009, 3,854 American service members had been killed in action in Iraq and Afghanistan.[4] While combat deaths are widely reported, the number of wounded service members is less visible but staggering nonetheless. According to the Department of Defense, 33,790 American service members had been wounded in combat in Iraq and Afghanistan as of March 3, 2009.[5]

These statistics reveal that the wounded-to-killed ratio of soldiers serving in the Iraq and Afghan wars is approximately nine to one.[6] A comparison of this ratio to past wars indicates that a much higher percentage of troops survive battlefield injuries today compared to only a few decades ago.[7] The marked increase in battlefield injury survival can be attributed to a number of causes: improved personnel and vehicle armor, advances in medical technology and training, increased use of helicopters in evacuating injured troops, closer proximity of field hospitals to combat areas, and rapid evacuation of critically wounded soldiers to major hospitals in Europe and the United States.[8]

While the increased soldier survival rate is welcome news, it has imposed a heavier burden on the military's physical disability system. An increase in soldier referral through the disability system is logical under the circumstances, as many wounded troops are no longer able to serve. Thus, in 2001, there were 7,218 Army active duty and reserve soldiers referred to the disability system,[9] while in 2005, after nearly two full years of war in

3. The general terms "casualty" and "casualties," as used throughout this Note, encompasses both military personnel killed in action (KIA) and wounded in action (WIA). The terms include neither deaths and injuries resulting from non-hostile causes, nor civilian injuries or deaths.

4. U.S. Dep't of Def., Casualty Update, http://www.defenselink.mil/news/casualty.pdf (last visited Mar. 3, 2009) [hereinafter Casualty Update]. Note that this website updates casualties regularly and unfortunately, the casualty figures reported on a given visit to the site will probably be higher than the figures listed on March 3, 2009.

5. *See id.*

6. The wounded-to-killed ratio is calculated by dividing the number of service members wounded in action by the number killed in action. *See id.*

7. Wounded-to-killed approximate ratios for previous wars are as follows: Revolutionary War—1.4:1; War of 1812—2.0:1; Mexican War—2.4:1; Civil War (Union forces only)—2.0:1; Spanish-American War—4.3:1; World War I—3.8:1; World War II—2.3:1; Korean War—3.1:1; Vietnam War—3.2:1; Persian Gulf War—3.2:1. U.S. Navy, Navy Department Library, American War and Military Operations Casualties: Lists and Statistics, tbl.1, *available at* http://www.history.navy.mil/library/online/american%20war%20casualty.htm (last updated July 13, 2005).

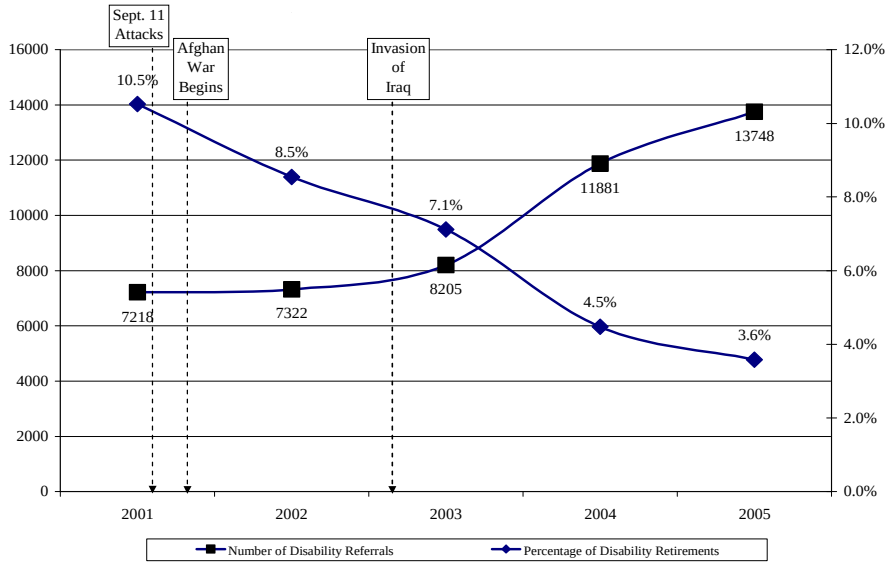
8. *See* Thomas M. Beaver & Paul J. Schenarts, *Battlefield Surgery 2005*, 3 INT'L J. SURGERY 171, 174–75 (2005).

9. U.S. GOV'T ACCOUNTABILITY OFFICE, REP. NO. GAO-06-362, MILITARY DISABILITY SYSTEM: IMPROVED OVERSIGHT NEEDED TO ENSURE CONSISTENT AND TIMELY OUTCOMES FOR RESERVE AND ACTIVE DUTY SERVICE MEMBERS 38 tbl.6 (2006), *available at*

Iraq and four years of fighting in Afghanistan, this number totaled 13,748 soldiers,[10] an increase of more than 90%.

Paradoxically, the number of soldiers who received permanent disability retirement benefits as a result of their referral to the disability system declined. After five years of war and a 90% increase in disability cases, the Army afforded disability retirement benefits to only 3.6% of soldiers referred for disability processing from January to August 2005, down from 10.5% in 2001.[11] This decrease in permanent retirement disability ratings is almost 67%. [12]

Figure 1: Trends in Army Disability Retirements and Referrals[13]



http://www.gao.gov/new.items/d06362.pdf [hereinafter GAO REPORT, MILITARY DISABILITY SYSTEM].

10. *Id.* at 38 tbl. 6.

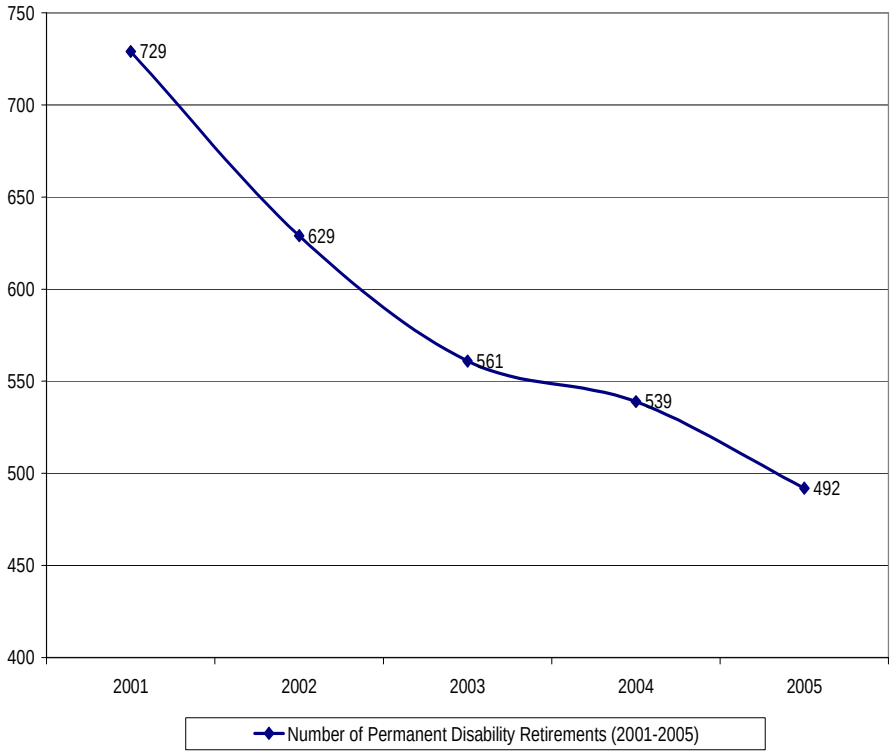
11. *See* GAO REPORT, MILITARY DISABILITY SYSTEM, *supra* note 9, at 50 tbl.14. Calculations made using only permanent disability retirees.

12. *See id.* at 9. Soldiers who separate from military service for medical conditions, but who do not qualify for medical retirement benefits, receive a one-time lump-sum severance payment, whereas retirees receive personal and family medical benefits as well as a small pension for life. *See infra* notes 69–71 and accompanying text for a detailed explanation of benefits resulting from physical disability ratings.

13. *See* GAO REPORT, MILITARY DISABILITY SYSTEM, *supra* note 9, at 50 tbl.14; *id.* at 38 tbl. 6.

Moreover, not only did the percentage of soldiers deemed qualified as permanent disability retirees decrease from 2001 to 2005, the actual number of soldiers so rated also fell.[14] In 2000, across all military branches, there were 102,000 disability retirees.[15] In 2006, after five years of war and a 90% increase in disability cases, there were only 87,000 disability retirees.[16]

Figure 2: Number of Soldiers Qualified for Permanent Disability Retirement (2001-2005)[17]



These trends have not gone unnoticed by the media, veterans' advocacy groups, or policy makers at the highest levels of government.[18] Each offers

14. *See id.* at 50 tbl.14; *infra* note 17 and accompanying text.

15. Linda Robinson, *Insult to Injury: New Data Reveal an Alarming Trend: Vets' Disabilities are Being Downgraded*, U.S. NEWS & WORLD REP., Apr. 16, 2007, at 44, 46.

16. *Id.*

17. *See* GAO REPORT, MILITARY DISABILITY SYSTEM, *supra* note 9, at 50 tbl.14; *id.* at 38 tbl. 6. 2005 statistics extrapolated using data available through August.

18. *See, e.g.*, *id.* at 50; Ginger Thompson, *Bush Calls for Simplifying Military Disability System*, N.Y. TIMES, Oct. 17, 2007, at A25; Ann Scott Tyson, *Army's Disability Benefit Review System Feels Strain*, WASH. POST, Mar. 13, 2007, at A8.

different theories as to the cause of the downward trend of disability ratings, ranging from institutional or personal bias against injured or ill soldiers (especially those not injured in combat)[19] to budgetary constraints.[20]

Whatever the reasons for these trends, Congress, the media, and advocacy groups have generally acknowledged that there are problems in the disability system.[21] "[S]ervice members often feel like they have to fight for a rating that accurately reflects their disability, i.e., the service they belong to and put on the uniform of acts as their adversary," said U.S. Senator Carl Levin in his opening statement at a Senate Armed Services Committee hearing on military disability.[22] "We simply have to do better than this."[23]

Numerous hearings, studies, and commissions have analyzed the military disability process. The most recent study came from the Veterans' Disability Benefits Commission, jointly appointed by the executive and legislative branches to recommend reforms to the military disability system.[24] In its October 2007 final report, the Commission made a litany of macro-level recommendations, which will no doubt help improve the disability system across the services.[25] However, unless decision-makers

19. Old soldiers say the root of the problem is an Army culture that preaches a "suck it up" attitude. "If you ask for what you are due, you are perceived to be whining or trying to pad your pocket," says a retired command sergeant major. "If you're not bleeding, you're not hurt. That's what we were taught." Robinson, *supra* note 15, at 50.

20. "The total amount paid out for these benefit awards has remained roughly constant in wartime and peacetime, leading disabled veterans . . . to allege that a budgetary ceiling has been imposed to contain war costs." *Id.* at 46–47. Veterans' Disability Benefits Commission Chairman Lieutenant General (Retired) James Terry Scott stated in testimony to Congress, "[The Department of Defense] has [a] strong incentive to assign ratings less than 30 percent so that only separation pay is required and continuing family health care is not provided." *Departments of Defense and Veterans Affairs Disability Rating Systems and the Transition of Service Members from the Department of Defense to the Department of Veterans Affairs: Joint Hearing Before the S. Comm. on Armed Servs. and S. Comm. on Veterans' Affairs*, 110th Cong. 8 (2007) (statement of Lt. Gen. James Terry Scott, Chairman of Veterans' Disability Benefits Comm.) [hereinafter Testimony of Chairman Scott].

21. *See* Robinson, *supra* note 15, at 50 ("'It's hard to ignore the fact that in time of war they are giving out less disability. Is it policy? I don't know. But it is a fact.'" (quoting Steve Robinson, Dir. of Veterans for America)).

22. *Hearing on DoD and VA Disability Rating Systems & Transition of Service Members from DoD to the VA Before the S. Comms. on Armed Servs. & Veterans' Affairs*, 110th Cong. 1–6 (Apr. 12, 2007) (opening statement of Sen. Carl Levin).

23. *Id.*

24. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §§ 1501–1502, 117 Stat. 1392, 1676–77 (2003).

25. *See generally* VETERANS' DISABILITY BENEFITS COMM'N, HONORING THE CALL TO DUTY: VETERANS' DISABILITY BENEFITS IN THE 21ST CENTURY, EXECUTIVE SUMMARY (2007) (making recommendations regarding improvement of the disability system for military personnel).

apply the rules to specific cases in accordance with administrative law principles and court decisions in disability cases, the reforms necessary to improve the military disability system are incomplete. This Note provides a legal framework to assist those decision-makers—the Physical Evaluation Boards (PEB), intermediate review officials, the Army Board for the Correction of Military Records (ABCMR), and legal counsel involved in the process—in making legally sufficient disability decisions.

Part II of this Note explains in detail the Army disability process. Part III discusses case law and legal principles applicable to disability cases, recommends that PEBs prepare findings in accordance with the substantial evidence standard, and uses examples from the author's own disability case to illustrate how the application of administrative law principles could lead to improved decision-making. Part IV summarizes the legal principles discussed in Part III and illustrates the importance of bottom-up reform.

II. A COMPLEX PROCESS: THE ARMY DISABILITY SYSTEM

"At first glance, the disability ratings process seems straightforward. . . . But the system is hideously complicated in practice."[26] Most law review articles dealing with the military disability systems focus chiefly on explaining the system because military lawyers, leaders, and soldiers alike simply do not understand the process.[27] Thus, an explanation of the Army disability process is in order. First, it is important to distinguish the Veterans Administration disability process from the Army's disability systems.[28] By congressional mandate,[29] the Army uses the Veterans Administration Schedule for Rating Disabilities (VASRD) to

26. *See* Robinson, *supra* note 15, 46.

27. *See* Thaddeus J. Hoffmeister, *A Practitioner's Note on Physical Evaluation Boards*, ARMY LAW., Feb. 2001, at 49, 49; James R. Julian, *What You Absolutely, Positively Need to Know About the Physical Evaluation Board*, ARMY LAW., May 1996 31, 31; Eva M. Novak, *The Army Physical Disability System*, 112 MIL. L. REV. 273, 273 (1986); Chuck R. Pardue, *Military Disability in a Nutshell*, 109 MIL. L. REV. 149, 149 (1985).

28. *See* Army Board for Correction of Military Records [hereinafter ABCMR], Memorandum of Consideration, No. AC95-01533, at 3 (Nov. 25, 1998), *available at* http://boards.law.af.mil/ARMY/BCMR/CY1995/00000-13999/9508236.rtf (last visited Mar. 5, 2009).

> There is a difference between the VA and Army disability systems. While both the VA and the Army use the VA Schedule for Rating Disabilities (VASRD) to determine disability ratings, not all of the general policies set forth in the VASRD apply to the Army; thus there are sometimes differences in ratings.

Id.; *see also* Nat'l Coal. for Homeless Veterans, Homeless Veterans Reintegration Program: Understanding the VA and DoD Disability Benefit System Fact Sheet #1, at 2 (Mar. 2008), http://www.nchv.org/docs/VADoDFactSheet11.pdf.

29. *See, e.g.*, 10 U.S.C.A. § 1203(b)(4) (2009).

determine the degree of a soldier's disability.[30] But there are important differences between the VA disability system and the military services'.[31] The VA rates all of a soldier's disabilities, even if those disabilities do not render the soldier unfit for military service.[32] The Army, on the other hand, only rates and compensates for those disabilities that render the soldier unable to serve on active duty.[33] Further, the Army and its sister services are not bound by the VA ratings.[34] As one ABCMR memorandum put it: "The VA, operating under its own policies and regulation, assigns disability ratings as it sees fit. Any rating action by the VA does not compel the Army to modify its rating."[35]

The Department of Defense implemented its disability system under the authority of Department of Defense Directive 1332.18,[36] pursuant to congressional authority granted in Title 10 of the United States Code, § 1216.[37] In turn, the Army promulgated Army Regulation 635-40[38] to govern the administration of the Army disability system.[39]

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30. The VASRD is codified by 38 C.F.R. § 4.1 (2008). The VASRD prescribes symptoms for a comprehensive list of potential medical conditions that correspond to a particular disability rating, ranging from 0% to up to 100%. *Id.*

31. *See supra* note 28 and accompanying text.

32. U.S. Army Human Res. Command, Army Physical Disability Evaluation System (PDES), https://www.hrc.army.mil/site/Active/TAGD/Pda/ArmyPDES.html (last visited Mar. 5, 2009) [hereinafter USAHRC, APDES]; *see also* Robinson, *supra* note 15, at 49.

33. *See* Pardue, *supra* note 27, at 163.

> In order for a member to be discharged or retired from the Army for physical disability, there must be a determination that the soldier is physically unfit. This is so even if the member has serious physical impairments ratable by the VA or has a physical condition listed as a physical fitness retention standard under Chapter 3 of AR 40-501. A member may fail to meet the retention standards of AR 40-501 and have ratable disabilities of 100 percent disability from the VASRD, and still be found fit for duty and not receive any disability from the military.

Id. (footnotes omitted).

34. *See* Johnson v. United States, 149 F. Supp. 648, 650 (Ct. Cl. 1957).

35. ABCMR, Memorandum of Consideration, No. AC97-06529, at 3 (Nov. 10, 1998), *available at* http://boards.law.af.mil/ARMY/BCMR/CY1997/9706529.rtf (last visited Mar. 5, 2009); *see also* USAHRC, APDES, *supra* note 32.

36. JOHN P. WHITE, DEPUTY SEC'Y OF DEF., DEP'T OF DEF., DIRECTIVE NO. 1332.18, SEPARATION OR RETIREMENT FOR PHYSICAL DISABILITY 1 (Nov. 4, 1996), *available at* http://www.dtic.mil/whs/directives/corres/pdf/133218p.pdf.

37. 10 U.S.C. § 1216(b)(4) (2006).

38. DEP'T OF THE ARMY, REGULATION 635-40, PERSONNEL SEPARATIONS: PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION i (Feb. 8, 2006) [hereinafter AR 635-40], *available at* http://www.army.mil/usapa/epubs/pdf/r635_40.pdf.

39. Pardue, *supra* note 27, at 150.

AR 635-40 outlines the military disability process and regulates its stages.[40] The regulations first require evaluation and treatment of a soldier who has an injury or illness.[41] A soldier may be referred for such medical evaluation by commanders of medical treatment facilities[42] or field commanders.[43] If medical evaluation and treatment reveal that the soldier is not fit to perform military duty because of a medical condition, then the medical facility will refer the soldier to a Medical Evaluation Board, or MEB.[44] The MEB then evaluates the soldier based upon retention standards found in Army Regulation 40-501.[45] AR 40-501 sets out medical conditions that "render a Soldier unfit for further military service and which fall below the standards required for [soldiers on active duty] . . . ."[46]

If the MEB deems a soldier unfit for military service, he is referred to a Physical Evaluation Board, or PEB .[47] Once a soldier is referred to a PEB, the Board's first consideration is whether the soldier is fit or unfit for duty.[48] Given that the MEB has already determined the soldier has a medical condition rendering him or her "unfit for further military service,"[49] the requirement that the PEB determine fitness for duty is confusing.

The difference between the boards is that the MEB determines fitness according to medical standards only, while the PEB then determines if a soldier's medical condition prevents the satisfactory performance of his duty.[50] According to AR 635-40, "[a]n unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty."[51]

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40. AR 635-40, *supra* note 38, at i.

41. AR 635-40, *supra* note 38, § 4-9, at 9.

42. *Id.* § 4-7, at 9.

43. *Id.* § 4-8, at 9.

44. *Id.* § 4-9, at 9.

45. *Id.* § 4-10, at 9.

46. DEP'T OF THE ARMY, REGULATION 40-501, MEDICAL SERVICES, STANDARDS OF MEDICAL FITNESS § 3-1 (Dec. 14, 2007) [hereinafter AR 40-501], *available at* http://www.army.mil/usapa/epubs/pdf/r40_501.pdf.

47. *Id.* § 3-3, at 21. The PEB is the most critical step in the Army disability process, as its findings generally determine the benefits to which a soldier is entitled. *Id.* § 3-4, at 21. Even though judicial appeals technically appeal the judgment of the Army Board for the Correction of Military Records, it is the PEB decision that is often the subject of that appeal, as the administrative appeals process within the Army rarely disturbs the PEB finding. *See generally, e.g.*, ABCMR, Memorandum of Consideration, No. AC97-11215, *available at* http://boards.law.af.mil/ARMY/BCMR/CY1997/9711215.rtf (last visited Apr. 13, 2009).

48. AR 635-40, *supra* note 38, § 4-19(d)(1), at 14.

49. AR 40-501, *supra* note 46, § 3-1, at 20.

50. *See* Julian, *supra* note 27, at 33.

51. AR 635-40, *supra* note 38, § 3-5(c), at 6.

The PEB considers medical and performance evaluations in its determination, and either may be more probative to the fitness decision, depending on circumstances.[52] A finding of unfitness cannot rest solely on certain effects that a medical condition may have on military service,[53] such as creating a failure to qualify for specialized duty, inability to deploy worldwide, inability to transfer between different components of the service, a lack of special skills in demand, or failure to meet initial medical entry requirements.[54]

A condition that existed before the soldier entered the service will not be grounds for a finding of unfitness,[55] even if the condition did not cause problems before military service.[56] Further, there is a presumption of fitness if a soldier is retiring or separating through a process independent from the disability system.[57] If applicable, this presumption is difficult to overcome.[58] If a soldier is found fit for duty, he will return to his unit and perform duties in accordance with his medical limitations.[59]

If the PEB finds a soldier unfit for duty, the board next assigns a disability rating,[60] assuming all other criteria for eligibility for medical disability benefits are met.[61] As discussed later, the PEB rates only disqualifying conditions[62] using the VASRD.[63] All other medical conditions, even if listed on the VASRD, will not form the basis of a disability rating from the Army.[64] This point is vital to understanding PEB disability ratings.[65]

> The decision of fitness is subjective. Soldiers performing duties may be found fit for duty, even though suffering from a serious illness or injury. Exactly what makes a soldier unfit varies not only among MOSs but also among soldiers within a particular MOS. For example, two soldiers, one an infantryman and the other a supply clerk, have identical knee injuries. The finding that the infantryman is unfit does not mean that the supply clerk, or even another infantryman with the same injury, also would be considered unfit.

Julian, *supra* note 27, at 32. MOS stands for military occupational specialty—it is essentially a job description, such as pilot, mechanic, cook, infantryman, etc. *Id.* at 31.

52. AR 635-40, *supra* note 38, § 3-1(c), at 3–4.
53. *Id.* § 3-1(c)–(d), at 3–4.
54. *Id.*
55. *Id.* § 4-19(e)(1)(a), at 15.
56. *Id.* § 4-19(e)(1)(b), at 15.
57. *Id.* § 3-2(b)(2), at 4–5.
58. *Id.*
59. Julian, *supra* note 27, at 32.
60. AR 635-40, *supra* note 38, § 4-19(i), at 16–17.
61. *Id.*; *see id.* § 4-19(f), at 15–16; *see also* Pardue, *supra* note 27, at 155 (listing eligibility requirements to receive benefits under the Army disability system).
62. AR 635-40, *supra* note 38, § B-3, at 66.
63. *Id.* § 4-19(i), at 16–17.
64. *Id.* § 3-5(d), at 6.
65. *See supra* notes 31–35 and accompanying text.

After finding the soldier unfit, the PEB then rates the severity of the disability according to the standards for each unfitting medical condition set forth in the VASRD, as modified for Army use.[66] The percentage of disability helps determine the amount of compensation and benefits that a medically discharged soldier receives.[67] If a soldier is rated at 30% disabled or higher,[68] he receives a pension based upon the percentage of disability, years of service, and rank.[69] Additionally, the soldier and his family continue to receive military health care and other benefits afforded to military members and retirees.[70] If a soldier receives less than a 30% rating, then the soldier receives a one-time severance payment based on time-in-service and rank.[71]

If the PEB assigns a 30% or higher disability rating to an unfit soldier, the PEB's final determination is whether to permanently retire the soldier or place him on temporary retirement.[72] If the PEB deems that the soldier's condition is not stable, meaning that it could either improve or degenerate, the soldier may be placed on the Temporary Disabled Retirement List, or TDRL.[73] A soldier may remain on the TDRL for up to five years,[74] at which time he will be placed on permanent disability retirement, given severance pay for a disability rating of less than 30%, or declared fit for duty.[75] During this period, the soldier receives all benefits as if he were permanently retired,[76] but is required to undergo physical examinations and periodic PEB evaluations for the purposes of re-evaluation and final determination.[77] After any periodic re-evaluation, however, a final determination may be made on a soldier's case.[78]

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66. AR 635-40, *supra* note 38, § 4-19(i), at 16–17. For an example of a VASRD rating for hypertension, *see* 38 C.F.R. § 4.104 (2008). *See also* EDWIN DORN, DEP'T OF DEF., INSTRUCTION NO. 1332.39, APPLICATION OF THE VETERANS ADMINISTRATION SCHEDULE FOR RATING DISABILITIES 58–62 (Nov. 14, 1996), *available at* http://www.dtic.mil/whs/directives/corres/pdf/133239p.pdf.

67. *See* Robinson, *supra* note 15, at 46.

68. *Id.*

69. *Id.*; *see also* Pardue, *supra* note 27, at 166–67.

70. Pardue, *supra* note 27, at 167.

71. *Id.* at 169. The difference in value between severance pay for a disability rating under 30% and disability retirement provides a powerful incentive for soldiers deemed unfit for service to seek the maximum rating supported by their condition. *See* Testimony of Chairman Scott, *supra* note 20 and accompanying text. At the same time, it provides a possible incentive for the Army to minimize such ratings. *Id.*

72. *See* Novak, *supra* note 27, at 279–80.

73. *Id.*

74. *Id.* at 280; *see also* AR 635-40, *supra* note 38, § 7-7, at 47.

75. Novak, *supra* note 27, at 280.

76. *Id.*

77. *Id.*; *see also* AR 635-40, *supra* note 38, § 7-4, at 47.

78. *See* AR 635-40, *supra* note 38, § 7-7, at 47; Novak, *supra* note 27, at 280.

The decisions outlined above are first made by an informal PEB board.[79] The informal PEB records its findings and forwards the results to the soldier through a liaison officer, normally located at the soldier's military installation.[80] At this point, the soldier must choose whether or not to concur with the PEB's decision; if the soldier does not concur, he may demand a formal hearing or submit a rebuttal while waiving the formal hearing.[81]

If the soldier concurs with the findings, the case moves to the United States Army Human Resources Command (USAHRC) for final disposition.[82] If the soldier does not concur and submits a rebuttal without requesting a formal board, then the PEB will respond to the soldier.[83] According to the regulation, "[w]hen the Soldier's rebuttal does not result in a change to the PEB's findings, the response will acknowledge receipt of the rebuttal and explain the PEB's decision to adhere to the earlier findings."[84] Otherwise, the PEB will modify the findings in the soldier's favor.[85] The PEB may also modify results of an informal board when additional medical or other evidence necessitates such a change.[86]

Non-concurrence and election of a formal hearing is more complex:

> While it is the soldier's absolute right to request a formal board, there are certain hazards associated with having a formal board. The formal board is not bound by decisions made during the informal board process, as it is a "de novo" proceeding. Therefore, if the soldier elects a formal board, he may have his disability rating raised, lowered or maintained. In addition, the formal board may find the soldier fit and return him to duty or recommend further tests at the M[edical] T[reatment] F[acility].[87]

This de novo standard is authorized by the regulatory language, "The [formal] PEB may change, modify, or correct its findings and recommendations at any time . . . ."[88] After the soldier receives the formal proceeding's findings, the soldier may concur in the results, at which time the case will be forwarded for final disposition, or the soldier may provide

79. AR 635-40, *supra* note 38, § 4-20(a), at 19.
80. *Id.* § 4-20(b), at 19.
81. *Id.* § 4-20(c)(1)(a)–(d), at 19.
82. *Id.* § 4-20(e)(1), at 20.
83. *Id.* § 4-20(e)(2), at 20.
84. *Id.* § 4-20(e)(5), at 20.
85. *Id.* § 4-20(e)(6), (f)(1)(b), at 20.
86. *Id.* § 4-20(f)(2), at 20.
87. Hoffmeister, *supra* note 27, at 50.
88. AR 635-40, *supra* note 38, § 4-21(r)(2), at 25.

a rebuttal indicating his reasons for disagreeing.[89] This rebuttal is limited to a few grounds, such as fraud.[90] If the rebuttal does not spur a change in the findings, the PEB will respond to the soldier indicating the reasons that the decision of the formal PEB will stand.[91]

If the soldier does not concur with the final findings of either the informal or formal PEB (as well as in other limited circumstances), the United States Army Physical Disability Agency (USAPDA) reviews the case.[92] The USAPDA may revise the findings, concur in the result, or remand the case to the PEB.[93] If the USAPDA concurs in the PEB's results or modifies the findings and the soldier concurs, the case moves to the USAHRC for final disposition regarding the discharge or retention of the soldier.[94] At this point, the Army Board for the Correction of Military Records (ABCMR) is the only universally available administrative recourse for a soldier or veteran wishing to appeal the Army's decision.[95] This Board is extremely deferential to the Army's decisions and rarely remands or overturns the decisions of the PEBs and their reviewing agencies.[96] The filing of an appeal with the ABCMR is the last step soldiers take before suing in federal court.[97]

III. A LEGAL FRAMEWORK FOR ARMY DISABILITY DECISIONS

Army disability decisions, whether at the initial PEB level or in a ABCMR final review, result from the application of regulations promulgated by the Department of Defense and the Army, pursuant to congressional authority. Thus, the decisions are subject to administrative law principles. This Part outlines relevant administrative law principles, beginning with an explanation of judicial deference afforded by courts to the services' disability determinations. The analysis then turns to several cases that illustrate the limits of this deference. Finally, the author's PEB case is used to illustrate how application of the legal principles set forth in this Part may have led to a different outcome.[98]

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89. *Id.* § 4-21(s)(1)–(2), at 25.

90. *Id.* § 4-21(t)(1)(a)–(c), at 25.

91. *Id.* § 4-21(t)(2), at 25–26.

92. *See id.* § 4-22(a)(1)–(7), at 26.

93. *Id.* § 4-22(c)(1)–(4), at 27.

94. *Id.* § 4-22(e)(1)–(2), at 27. Note that throughout the explanation of the Army physical disability system in this Note, there are myriad special circumstances that may result in alternate or additional procedures in a case at each of the administrative levels. These are not addressed as the intent of this Part of the Note is to provide a general understanding of the process as it applies to most soldiers.

95. Pardue, *supra* note 27, at 162.

96. *See supra* note 47 and accompanying text.

97. Pardue, *supra* note 27, at 162.

98. For the reader to understand the application of the legal principles discussed *infra*, it is

A. *Judicial Review of Agency Legal Interpretations*

The seminal case regarding review of an administrative agency's interpretation of a statute is *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[99] In that case, the Supreme Court set forth what has come to be known as the Chevron Doctrine.[100]

When reviewing an agency interpretation of a statute, courts must first determine whether Congress has clearly spoken to the issue at hand.[101] If Congress has spoken, courts must not adopt any other interpretation and congressional intent will control.[102] To determine whether Congress expressed an intent regarding the statute, the court must first examine the text of the statute itself.[103] If the statutory language is ambiguous, then courts should examine legislative history to glean congressional intent.[104] If the history and statutory text are ambiguous, and there is no explicit

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necessary to establish the background of the author's disability case. The author, a veteran Iraq war commander, was a U.S. Army aviator who was medically grounded from flight duties because of symptoms later determined to be asthma. He was denied career-enhancing reassignments, incentive pay, and was restricted from deployment and certain physical activities normally associated with duty. He was processed through the Army disability system, and an informal PEB found him unfit for duty with a disability rating of 10%. He then filed a rebuttal and requested informal reconsideration of his case, based chiefly on his prescription for daily asthma medication, which, according to the VASRD, qualified for a 30% disability rating. *See* 38 C.F.R. § 4.97 (2008). Upon reconsideration, the PEB did not address the issue appealed, the level of disability, but instead found the author fit for duty, precluding any need to address the disability rating. The author, faced with the same career restrictions as before his finding of fitness, elected to leave the service and received no benefits from the Army. The author does not imply that his medical condition is similar in severity to that of many brave servicemen and women who have been grievously wounded in combat, but it is his hope that this Note will assist the services in providing just disability decisions for these brave warriors. This Note is intended to be constructive, and is motivated by a genuine concern for the welfare of disabled veterans. Further, although the author discloses certain personal medical information for the purposes of this Note, he does not waive HIPAA protections beyond the scope of what is revealed herein and does not authorize the release of any medical information relating to his case without his express written permission. The author maintains on file all relevant material regarding his case.

99. 467 U.S. 837 (1984). For a discussion of how courts have applied *Chevron* in other areas of the law, see Dustin G. Hall, Note, *The Elephant in the Room: Dangers of Hedge Funds in Our Financial Markets*, 60 FLA. L. REV. 183, 202–13 (2008) (discussing *Chevron*'s application to the SEC's Hedge Fund Rule); Jeffrey A. Bekiares, Note, *In Country, On Parole, Out of Luck—Regulating Away Alien Ineligibility for Adjustment of Status Contrary to Congressional Intent and Sound Immigration Policy*, 58 FLA. L. REV. 713, 722–26 (2006) (discussing *Chevron*'s application to agency immigration decisions).

100. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 296–97 (2001). For a basic understanding of the Chevron Doctrine, see Dustin G. Hall, Note, *The Elephant in the Room: Dangers of Hedge Funds in Our Financial Markets*, 60 FLA. L. REV. 183, 202–04 (2008).

101. *Chevron*, 467 U.S. at 842.

102. *Id.* at 842–43.

103. *See id.* at 859–61.

104. *See id.* at 862–64.

delegation of authority to the agency, the *Chevron* Court stated that delegation to the agency is implied.[105] In any event, where a statute and its legislative history are ambiguous and there is either an explicit or implicit delegation of authority to the agency to interpret the statute, courts will defer to the agency's interpretation as long as it is reasonable, and is not arbitrary and capricious.[106]

In a subsequent case, *United States v. Mead Corp.*,[107] the Court stated that the Chevron Doctrine's high level of deference only applied where Congress intended for the agency to act with the "force of law."[108] If a court finds that Congress did not have such an intent, then the agency's interpretation is subject to lesser deference under *Skidmore v. Swift & Co*.[109] Federal courts have applied *Chevron* deference to the military's interpretations of disability statutes.[110] This deference comports with the language of Title 10 of the United States Code, § 1216(a),[111] which gives broad authority to the military services to administer the disability system.[112] Further, courts have applied *Chevron* deference not only to the services' interpretations of statutes concerned with disability proceedings, but also to the services' interpretations of its own regulations.[113] Thus, while the military must follow its regulations,[114] reasonable interpretations of military regulations receive extreme deference from the courts.[115]

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105. *See id.* at 865–66.

106. *Id.*

107. 533 U.S. 218 (2001).

108. *Id.* at 226–27.

109. 323 U.S. 134 (1944); *see id.* at 140 (holding that agency actions are not controlling by virtue of the inherent authority of the agency, but such actions should be afforded deference commensurate with their thoroughness and consistency).

110. *See, e.g.*, Sorrough v. United States, 295 F.2d 919, 922 (Ct. Cl. 1961) (per curiam) (stating that an Air Force regulation "establish[ing] the presumption that any disease contracted by a member of the Air Force while on active duty was incurred in line of duty *unless* there was substantial proof that the contracting of the disease came within one of several excepted categories" had force of law); Prichard v. United States, 135 F. Supp. 420, 422 (Ct. Cl. 1955) (holding that Army regulations relating to compensation for service-connected disability were reasonably designed to carry into effect Acts of Congress and had force and effect of law).

111. 10 U.S.C. § 1216 (2006).

112. *See id.* § 1216(a).

113. *See* Wronke v. Marsh, 787 F.2d 1569, 1573 (Fed. Cir. 1986) ("If the applicable regulations are interpreted by the [armed services] in a reasonable manner, any charge of procedural irregularity must fail even though the [plaintiff] may present another reasonable interpretation of the regulations." (citing Wronke v. Marsh, 603 F. Supp. 407, 412 (C.D. Ill. 1985))).

114. *See* Biddle v. United States, 186 Ct. Cl. 87, 95 (1968) (holding that the military services are bound by their own regulations).

115. *See supra* note 113 and accompanying text. *But see* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 676–77 (1996) (arguing that deference to agency interpretations of the regulations it prescribes leads to vague and arbitrary results and opens up administrative policymaking to excessive interest

B. *Judicial Review of Agency Factual Findings*

Courts also give deference to agency determinations of fact. A federal court stated that "responsibility for determining who is fit or unfit to serve in the armed services is not a judicial province; . . . courts cannot substitute their judgment for that of the military departments when reasonable minds could reach differing conclusions on the same evidence."[116] Further, the plaintiff bears the burden of proof when seeking review of a military disability decision.[117] Particularly for military disability cases, the reviewing court is limited to determining if the service's decision was "arbitrary, capricious, unsupported by substantial evidence, or contrary to applicable statutes and regulations."[118]

This standard of review, oft cited in military disability cases,[119] mixes two distinct standards of review pertaining to administrative decision making: the substantial evidence test and the arbitrary and capricious standard. Because the substantial evidence test is generally considered to be a more difficult standard of review for an administrative agency to withstand,[120] it is difficult to imagine that a litigant would seek review under the arbitrary and capricious standard.

In *Universal Camera Corp. v. NLRB*,[121] the Supreme Court construed the meaning of "substantial evidence" under the Administrative Procedure Act.[122] The Court rejected the notion that an agency action was supported by substantial evidence if the "reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board's findings."[123] While substantial evidence review is neither de novo review, nor intended to countervail the expertise held by administrative agencies in making decisions, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight,"[124] and "a reviewing

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group influence).

116. Heisig v. United States, 719 F.2d 1153, 1156 (Fed. Cir. 1983) (footnote omitted).

117. Rose v. United States, 35 Fed. Cl. 510, 512 (1996).

118. de Cicco v. United States, 677 F.2d 66, 70 (Ct. Cl. 1982).

119. *See*, for example, cases cited by Banerjee v. United States, 77 Fed. Cl. 522, 533 (Fed. Cl. 2007).

120. *See* Pac. States Box & Basket Co. v. White, 296 U.S. 176, 182, 186 (1935) (employing the arbitrary and capricious standard in ruling, where the agency made no findings of fact to support its action, that "where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches . . . to orders of administrative bodies"); *cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (holding that agency decisions must be supported by substantial evidence in light of the evidence contained in the entire administrative record).

121. 340 U.S. 474 (1951).

122. *See id.* at 477.

123. *Id.* at 478.

124. *Id.* at 488.

court is not barred from setting aside a . . . decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes."[125]

The Court of Claims clearly applied the substantial evidence test in *Jordan v. United States*,[126] reversing the decision of the ABCMR regarding Plaintiff's fitness for military duty. The court stated:

> Even though defendant's evidence in the instant case, considered of and by itself, might support the administrative decision by the Army to discharge plaintiff as physically fit, we find, as hereinafter discussed, that there is "opposing evidence [principally, plaintiff's medical record with the VA] so substantial in character" as to detract from the weight of the evidence in support of the Army discharge, and to render it "less than substantial on the record as a whole."[127]

Yet even the *Jordan* Court, while clearly applying the substantial evidence test, referred to the Army's action as "arbitrary [and] capricious."[128] This language confuses the appropriate standard of review for military disability cases. Indeed, in other cases, courts, while purporting to use the substantial evidence test, appear not to actually employ it, instead showing extreme deference to the military services under an arbitrary and capricious standard of review.[129]

Given the great importance of arriving at correct decisions in military disability cases, PEBs and military review authorities should formulate their conclusions so that their decisions will satisfy the substantial evidence standard. Doing so will necessarily mandate a thorough and consistent depth of analysis in each case and lead to clear and well-reasoned explanations of the findings.

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125. *Id.*

126. 205 Ct. Cl. 65 (1974).

127. *Id.* at 73 (quoting Ward v. United States, 178 Ct. Cl. 210, 217 (1967)). It is interesting that a VA disability rating, while not dispositive, tends to diminish the validity of contrary findings by the Army under the substantial evidence test. *Id.* This ruling seems directly contrary to numerous ABCMR rulings that disregard VA evidence when reviewing PEB determinations. *See, e.g.*, ABCMR, Memorandum of Consideration, No. AC97-06529, *supra* note 35; *supra* note 33 and accompanying text.

128. *See Jordan*, 205 Ct. Cl. at 84.

129. "To prevail under the arbitrary and capricious standard, plaintiff must demonstrate that evidence was ignored or unreasonably construed, or that designated duties were not performed by the AFBCMR. . . . 'While the court might disagree with the board's decision, it cannot substitute its own judgment for the board's if reasonable minds could reach differing resolutions of a disputed fact.'" Banerjee v. United States, 77 Fed. Cl. 522, 533 (Fed. Cl. 2007) (quoting Fluellen v. United States, 44 Fed. Cl. 97, 101 (Fed. Cl. 1999)).

C. *Limitations on Deference to Military Disability Decisions*

Federal courts, primarily the Court of Federal Claims, tend to defer to the decisions of the military services regarding disability.[130] This deferential treatment, coupled with the burden of the plaintiff to show by clear and convincing evidence a defect in the disability decision, makes it difficult indeed for a soldier or veteran to prevail in an appeal of a disability claim.[131]

Even so, a body of law demonstrates the outer limits of judicial deference. First, it is imperative that a military board articulate proper grounds for its decisions. The Supreme Court in *SEC v. Chenery Corp.*[132] held that the propriety of an administrative decision must be decided based only on the reasons given by the agency itself.[133]

Further, even though an administrative agency is free to change or reverse course from a previous decision, the agency must provide a reasoned explanation for the change.[134] Courts look unfavorably upon disability boards that change disability ratings in subsequent proceedings even though there is no change in the evidence.[135]

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130. "Judicial deference to administrative decisions of fitness for duty of service members is and of right should be the norm." Maier v. Orr, 754 F.2d 973, 984 (Fed. Cir. 1985).

131. *See* Colon v. United States, 71 Fed. Cl. 473, 484 (Fed. Cl. 2006) (stating that plaintiff "bears the burden of establishing by 'cogent and clearly convincing evidence' that the ABCMR's decision was arbitrary, capricious, unsupported by substantial evidence, or contrary to law" (quoting Wronke v. Marsh, 787 F.2d 1569, 1576 (Fed. Cir. 1986))); *see also* Dorl v. United States, 200 Ct. Cl. 626, 633 (1973).

132. 332 U.S. 194 (1947).

133. *Id.* at 196. A later case further explained:

> Normally, an agency [decision] would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies . . . .

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

134. *State Farm*, 463 U.S. at 42.

135. In disapproving one disability board's downward revision of a disability rating, the court stated:

> Just 6 weeks after an MB recommended retention on the TDRL, the PEB suddenly determined that plaintiff's condition had stabilized, and that his condition warranted only a 10-percent rating due to the "improvement" plaintiff experienced while on the TDRL. As far as we can determine, this decision was based on *exactly* the same medical evidence as led the MB to conclude that plaintiff's condition had not stabilized.

Another notable case, *Beckham v. United States*,[136] held that a military service may not, because of a service member's medical condition, move that person among multiple duty assignments until a job is found that the person can incidentally perform despite the medical condition, and then use that assignment to declare him fit for duty.[137] The *Beckham* court stated: "[T]he [military] cannot shift an officer from assignment to assignment until a job is located that is not affected by the officer's physical disability."[138]

Perhaps the most scathing reversal of a service's disability determination by a court is *Van Cleave v. United States*.[139] In that case, a pro se veteran filed suit against the government, alleging arbitrary and capricious decision making by the Navy PEB and Board of Corrections of Naval Records (BCNR).[140] Plaintiff suffered debilitating headaches while on active duty in the Navy and, in 1997, was rated at 10% disability by the Navy PEB.[141] Plaintiff accepted the findings of the informal board and was discharged with severance pay.[142]

Subsequently, Plaintiff discovered that the PEB rated him based upon an incorrect diagnosis of chronic headaches rather than migraine headaches, and he petitioned the BCNR for upward adjustment of his disability rating.[143] The *Van Cleave* court remanded the case to the BCNR for further review, noting that Plaintiff was not rated according to his actual medical condition, that the difference between a 10% and 30% rating was only the frequency of prostrating migraine headaches , and that Plaintiff's rating may change based on the BCNR's knowledge that Plaintiff's headaches were, in fact, migraines rather than ordinary headaches.[144]

On remand, the BCNR had found that the evidence did not reveal error or injustice in Plaintiff's disability rating.[145] The BCNR attacked Plaintiff's credibility, stating that the diagnosis of his migraines was based on his subjective reports to his physicians, that just because he was prescribed medications for migraines did not mean that he required the medications to treat migraines, and that his real motivation for seeking discharge was because he was over the body-fat standards established by the Navy, a

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Istivan v. United States, 689 F.2d 1034, 1037–38 (Ct. Cl. 1982).

136. 392 F.2d 619 (Ct. Cl. 1968).

137. *Id.* at 623.

138. *Id.*

139. 70 Fed. Cl. 674 (2006).

140. *Id.* at 675–78.

141. *Id.* at 675.

142. *Id.* at 675–76.

143. *Id.* at 676.

144. *Id.* at 676–77.

145. *Id.* at 677–78.

condition that would have precluded his promotion and continuation on active duty.[146] The BCNR further stated that his "habit of lying down in a dark room [during the] headache[s] d[id] not [establish] that the headaches were prostrating,"—part of the criteria for rating migraines—and also that a more "hale" individual would have been able to continue his duties.[147] The BCNR also used evidence of Plaintiff's performance, namely his evaluation reports, as evidence that he was performing his duties satisfactorily, while simultaneously making veiled accusations of malingering, to support the position that Plaintiff did not deserve an increased rating.[148] Finally, the BCNR attacked Plaintiff's reliance on his disability counselor's advice, stating "that plaintiff could not be believed because '[he] relied on a summary of the [PEB's] findings provided by [his] disability counselor, a mess management specialist chief petty officer, whose normal duties prior to becoming a counselor probably consisted of cooking, operating a dining facility, and/or managing military quarters.'"[149]

Plaintiff appealed this decision to the Court of Federal Claims, alleging bad faith on the part of the BCNR and also alleging that the BCNR's decision was arbitrary, capricious, and contrary to law.[150] After stating that "[t]his court assumes the regularity of military records and the good faith of government officials,"[151] the court went on to deliver a scathing eleven-page opinion, holding that the BCNR's actions evidenced bad faith and were *per se* arbitrary and capricious.[152]

In its reasoning, the court stated that by making unwarranted attacks on Plaintiff's credibility, toughness, and motivations, rather than addressing the issues raised by Plaintiff, BCNR failed in its mandate.[153] Further, the court required the BCNR to satisfactorily articulate the reasons for its decision.[154] The court pointed out that the record clearly did not support the BCNR's findings, especially given the reasons the BCNR offered.[155]

Additionally, the court offered several other insights applicable to other disability cases. First, it presumed that medication prescribed to treat a specific medical condition was convincing evidence that the service member required such medicine to treat the condition.[156] Second, the court

146. *Id.* at 678.
147. *Id.* at 678, 682, 684.
148. *Id.* at 685.
149. *Id.* at 683.
150. *Id.* at 678.
151. *Id.* at 679.
152. *Id.* at 684.
153. *Id.* at 679.
154. *Id.*
155. *Id.*
156. "We are not aware that physicians routinely prescribe medications for ailments from which they think their patients do not suffer, nor does the record show that Mr. Van Cleave's

inferred that administrative boards may not use personnel evaluations to demonstrate fitness performance while at the same time questioning, either directly or indirectly, the credibility of a service member to claim fitness or justify a minimal disability rating.[157] Finally, the court rejected the government's contention that Plaintiff's failure to seek medical attention for headaches for a time indicated Plaintiff did not experience headaches during this period, especially considered in the light of medical treatment Plaintiff had received to cope with the condition.[158]

These cases are only a sample of the body of law on military disability cases. Despite their varying facts, these cases provide a framework that military disability officials and their counsel may use to ensure consistent and legally sufficient disability findings. Application of these legal principles will improve the depth of analysis in disability cases and thereby also improve the outcome of disability decisions.

D. *Application of Administrative Law Principles to a Disability Case*

The author's case[159] provides several issues that may be analyzed under the preceding legal framework. This analysis shows that thoughtful application of the law can lead to better disability decisions.

First, in its initial informal consideration of his case, the PEB found that the author was medically unfit for duty and rated him as 10% disabled under the VASRD. The PEB reasoned that because the author did not seek emergency treatment for asthma attacks during a period during which he was not prescribed medication for asthma, he did not require the medication prescribed by his physicians. Under the VASRD, a soldier who requires daily medication for asthma is entitled to a 30% disability

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doctors followed such a protocol here." *Id.* at 680.

157. *Id.* at 685.

> The BCNR charged plaintiff with malingering throughout its decision, yet when it suited the Board's purpose, it commented on plaintiff's high standards of performance. Its purposes were to bring plaintiff's "overweight condition" to the court's attention once again; and to suggest that his migraine headaches must not have been severe enough to interfere with his performance. The Board managed to use even Mr. Van Cleave's positive performance evaluations against him.

Id.

158. *Id.* at 682–83. The court recognized that medical attention during the attacks was difficult and unnecessary. *Id.* at 683.

159. *See supra* note 98 and accompanying text.

rating,[160] which qualifies the soldier and his family for a pension, medical care, and other disability retirement benefits.[161]

The author's medical records reveal that physicians prescribed asthma medications for the author's daily use to treat his condition, and his medical records contained annotations confirming that he required these medications. The PEB, however, concluded that not seeking emergency medical attention outweighed this evidence, even though emergency medical treatment is not a criterion for a 30% VASRD disability rating for asthma. The PEB based its rationale on the dubious premise that only persons who seek emergency treatment for a medical condition require medication for that condition.

The PEB's determination fails the substantial evidence standard under *Universal Camera* and *Jordan*.[162] Under this standard, "[t]he substantiality of [the] evidence must take into account whatever in the record fairly detracts from its weight."[163] In the author's case, the PEB disregarded uncontroverted evidence of the author's requirement for medication in favor of a logically flawed rationale—the dubious premise underlying the PEB's conclusion that the author does not need medication requires as much proof as the conclusion it supports. The *Van Cleave* Court addressed the military's disregard of physician-prescribed drugs in disability cases.[164] "We are not aware that physicians routinely prescribe medications for ailments from which they think their patients do not suffer, nor does the record show that [plaintiff's] doctors followed such a protocol here."[165] Further, even assuming, *arguendo*, that there was a legitimate reason for the 10% disability rating assigned to the author, the PEB failed to articulate that rationale. Thus, under *Chenery* and *State Farm*, the decision in the author's case cannot stand on the basis put forward by the PEB.[166]

The author's case also provides an example of a colorable issue regarding the PEB's interpretation of Army regulations. After the Board's initial determination of unfitness with 10% disability, the author, in good faith, requested an informal reconsideration and submitted a rebuttal arguing for an increased disability rating. The PEB reconsidered its previous decision and, instead of modifying or confirming its previous

160. 38 C.F.R. § 4.97 (2008); *see also* ABCMR, Memorandum of Consideration, No. AC94-05416, *available at* http://boards.law.af.mil/ARMY/BCMR/CY1994/00000-13999/9405416.rtf (last visited Mar. 5, 2009) (remanding a decision of the PEB and concluding that daily asthma controller medications necessitated a disability rating greater than 10%).

161. *See supra* notes 67–70 and accompanying text.

162. *See supra* notes 120–29 and accompanying text.

163. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

164. Van Cleave v. United States, 70 Fed. Cl. 674, 680 (Fed. Cl. 2006).

165. *Id.*

166. *See supra* notes 132–34 and accompanying text.

disability rating, reversed its fitness finding, finding the author fit for duty.

Implicit in this reversal is the PEB's interpretation of AR 635-40, that the PEB has the authority, in an informal reconsideration, to reverse the finding of fitness where a soldier's rebuttal only addresses a disability rating increase.[167] In the case of a rebuttal submitted with a waiver of a formal board, AR 635-40 states that unless the Board changes its findings based on the rebuttal, it "will" state the reasons for adherence to the previous findings.[168] In contrast, the portion of the regulation that governs formal hearings states, "[t]he PEB may change, modify, or correct its findings and recommendations at any time before the record of proceedings is delivered to the CG, USAPDA or Commander, USA HRC."[169] No such authority is prescribed in the portion of the regulation concerning informal reconsiderations.[170] Under the maxim of construction *expressio unius est exclusio alterius*,[171] the absence of this authority in AR 635-40 § 4-20(e) and its specific inclusion in § 4-21(r) lead to the conclusion that the only revision in an informal PEB reconsideration should be based on the soldier's rebuttal.

While AR 635-40 allows the PEB to change previous decisions outside a formal hearing, this power is only applicable when new evidence is presented that was not available to the Board during its initial consideration.[172] In the author's case, however, the PEB justified its new conclusion based on the officer's evaluation reports, medical records, and physical profile limitations, all of which were considered in the PEB's initial decision.

Finally, notwithstanding the question of whether the PEB possessed the authority to revise its fitness finding in an informal reconsideration, the PEB's revised factual determination that the author was fit for duty is also susceptible to critical analysis. Instead of addressing the author's contention that he was eligible for 30% disability under the VASRD, the PEB reversed its own previous finding, made just two weeks earlier, and declared him fit for duty. While the PEB was authorized to reverse its own

167. *See supra* notes 83–88 and accompanying text.

168. *See supra* notes 83–85 and accompanying text.

169. AR 635-40, *supra* note 38, § 4-21(r)(2), at 25. CG stands for Commanding General, USAPD stands for United States Army Physical Disability Agency, and USAHRC stands for United States Army Human Rescources Command.

170. *Id.* § 4-20(e), at 20.

171. *See, e.g.*, Gen. Motors Corp. v. United States, 496 U.S. 530, 538 (1990) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))).

172. *See* AR 635-40, *supra* note 38, § 4-20(e), at 20.

decision, it must provide a reasoned explanation for doing so.[173] The PEB made no attempt to explain its changed finding regarding the author's fitness.[174]

To support its conclusion of fitness, the PEB cited the author's excellent performance evaluations and reiterated its conclusion that the author did not require asthma medication. In addition to the inadequacy of the PEB's conclusion regarding the necessity for asthma medication,[175] the remainder of the PEB's explanation for its finding relied upon the same evidence it used to find a directly contrary finding just two weeks earlier. Courts look unfavorably on disability decisions that, without further explanation, change earlier findings based on previously considered evidence.[176]

Further, under the substantial evidence test, the propriety of the PEB's decision can only be determined in light of the entire record.[177] While some of the evidence, namely a positive evaluation report, supports the PEB's conclusion in isolation, the courts impose a higher standard.[178]

In this case, the PEB disregarded evidence that the author, an aviator, could not pilot aircraft due to his medical condition and could not deploy to combat. This evidence seemed sufficient for the conclusion that the author could not perform the duties required of his military specialty.[179] Additionally, the author was moved to different positions twice due to his medical condition. As previously stated, a service may not move a person from position to position until locating a job that the person may incidentally perform, despite medical limitations, then use that performance as a basis for finding the person fit for duty.[180] Finally, the author's final evaluation report, though favorable, stated that he could not perform his duties as a staff officer because of asthma. On the entire record, it would appear that the PEB's revised fitness finding was not supported by substantial evidence.

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173. *See* Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

174. On June 2, 2006, the PEB stated, "The findings of the PEB are the Soldier's medical and physical impairment prevents reasonable performance of duties required by grade and military specialty." On June 16, 2006, after its informal reconsideration, the PEB stated, "Based on a review of the objective medical and personnel evidence of record and considering the physical requirements for reasonable performance of duties required by grade and military specialty, the PEB finds the soldier fit for duty . . . ." The explanation given for the revised findings were based only on evidence available to the PEB in its June 2 determination.

175. *See supra* notes 160–65 and accompanying text.

176. *See supra* note 135 and accompanying text.

177. *See supra* notes 121–27 and accompanying text.

178. Universal Camera Corp. v. NLRB, 340 U.S. 474, 478 (1951) (holding that an agency action is not supported by substantial evidence simply because "the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board's findings").

179. *See supra* notes 50–51 and accompanying text.

180. *See* Beckham v. United States, 392 F.2d 619, 623 (Ct. Cl. 1968).

IV. CONCLUSION: REFORM FROM THE BOTTOM-UP

This Note provides decision makers in the Army disability system a legal framework to guide their determinations. While it does not encompass the entire body of law on disability decisions or the myriad facts involved in individual disability cases, this Note shows that applying administrative law principles, including making decisions in accordance with the substantial evidence standard, leads to more sustainable and correct disability decisions. Even if most cases are correctly decided, there is no acceptable margin of error in the Army disability system, especially where improper decisions cause hardships for soldiers and their families.

The twin purposes of the military disability system are to provide for a fit and ready force and to care for those soldiers who become ill or injured in the line of duty. Given general dissatisfaction with the recent counter-intuitive trends of the Army disability system as described in Part I of this Note, there is no doubt that global reform of the disability system will lead to substantial improvements in the consistency and accuracy of the disability system. No amount of reform, however, will be effective unless the decision makers in the disability process have the tools to make legally sufficient decisions.

To say a remedy is available in the courts for those unfortunate enough to have their disability case improperly adjudicated belies the reality that many soldiers, especially those who are physically infirm and financially burdened, may not have the means to litigate their claims. Rather, ensuring the maximum accuracy of decisions from the outset will alleviate the hardships that a soldier will incur as the result of an improperly decided case.

Consider, as an example of these hardships, United States Army Sergeant Daniel Webb, who recalls his first back injury on a night infantry patrol in Iraq: "One minute, I'm standing; the next minute, I'm on the ground."[181] Sergeant Webb had fallen in a hole; he was given pain medication and continued the patrol.[182] A week later, on another night mission, a wall collapsed on him, exacerbating his injuries.[183] "It got to the point where I just couldn't take it anymore. I felt like I couldn't really walk, could hardly move," said Webb.[184] Sergeant Webb was found to have three herniated discs, but was not a candidate for spinal fusion; instead, doctors implanted a morphine pump to help him manage the chronic pain.[185]

181. *NewsHour: Veterans Struggle for Adequate Disability Compensation*, (PBS television broadcast Jul. 23, 2007) (*available at* PBS Online NewsHour, http://www.pbs.org/newshour/bb/military/july-dec07/disability_07-23.html) (last visited Feb. 8, 2008).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

The Army found Sergeant Webb unfit for continued military service due to his medical condition, but instead of rating his disability sufficiently severe to merit permanent medical retirement and the concomitant pay and benefits of such a status, he was given a 10% disability rating and a one-time severance check of $30,000.[186] Neither he nor his family has access to military healthcare or any other benefits.[187] Webb's attorney, who works with Disabled Veterans of America, maintains that Webb's disability was severely underrated: "It's a very bad decision for Sergeant Webb. His case has been terribly underrated. And the other bad news is that he is by no means alone. We've looked at this point at several hundred of these, and we have yet to find one that we looked at and we thought, 'This was done right.'"[188]

Sergeant Webb appealed the disability decision, but was unable to secure a higher rating.[189] Instead, he moved his family from their quarters on base to a campsite until he could find affordable housing.[190]

The importance of correct analysis in PEB decisions cannot be overstated. While some veterans have the opportunity, resources, and ability to overcome improper disability decisions, others are not so fortunate. For these disadvantaged veterans, even if they have the means to litigate the PEB decision and are successful, the reality is that they need benefits sooner, not later, to help them transition to a productive civilian life. The federal court system is not the appropriate venue for such a timely remedy.

It is incumbent on all players in the Army disability system to redouble their efforts to stay abreast of developing administrative law principles, especially as they relate to disability decisions. Part III of this Note can be the starting point of that effort, and PEBs and legal counsel can use it to assist in the proper application of administrative law. Our soldiers deserve no less.

186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*