

Disability system unfair to injured, says lawyer

Burden of proof on soldiers

By Kelly Kennedy

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The Army disability retirement system stacks the deck against injured soldiers by forcing them to prove they have post-traumatic stress disorder, demanding physical evidence for traumatic brain injuries, and restricting access to rules and regulations they need to make their cases, said an Army lawyer who helps soldiers appeal their claims.

"I think the problems are systemic," said Steven Engle, head legal counsel for soldiers going through the disability physical evaluation system at Fort Lewis, Wash. "The rules are inequitable."

In some cases, he said, they may even be illegal.

And the cases that are coming to define the wars in Iraq and Afghanistan — traumatic brain injury, post-traumatic stress disorder and musculoskeletal injuries — are the ones most affected by unfair or unclear rules coming from the service's top-level Physical Disability Agency, Engle said.

The rules undeniably keep soldiers' disability ratings low, but Engle said he could not claim that as an intentional outcome.

"I have no evidence to make that allegation," Engle said. "Locally, I know they're good and honorable people. I've never met anyone from the Physical Disability Agency."

Engle, a civilian in charge of two Army Reserve JAG officers who also assist soldiers through the process, said he is speaking out about the inequities because the Army's legal command wants to fix the problems stemming from the fact that the Army "grossly oversimplifies" Defense Department guidance on rating disabilities.

Military Times asked the Army Physical Disability Agency March 27 for comment on Engle's charges. At press time on April 5, a spokesman for the agency said officials had been too busy to respond. They did, however, provide some statistics requested by Military Times.

The most troublesome cases involve injuries that can't be proven with medical evidence, Engle said. One major issue: soldiers with PTSD must prove they witnessed a traumatic event.

In its guidance for preparing psychiatric reports on soldiers going through the physical evaluation board process, the Physical Disability Agency cites various ways soldiers can prove they have had a PTSD-level "traumatic stressor": statements from a commander or from fellow soldiers, awards with citations, statements from the soldier's family showing behavior changes, police reports and sworn witness statements.

"Where a data source includes information based only on what the soldier has related," the guidance states, "you should not use this data source as supportive collateral information."

That seems to contravene the Army's own regulations. AR 635-40 states that if there is no proof against a soldier's claim, "reasonable doubt should be resolved in favor of the soldier."

Engle said decisions on PTSD ratings should be based on the same information as all other mental disabilities — a psychiatrist's formal diagnosis.

'Grossly unfair'

Putting the burden of proof for PTSD on the soldier, he said, "is grossly unfair."

In one case, he said, a soldier watched a buddy die in Iraq and has since suffered nightmares, played the event over in his mind continuously, and remains hyper-alert to possible danger.

To help prove he had PTSD, the soldier was told to contact the family of his dead friend to get documentation that the friend had died. Then, Engle said, he was told to prove he witnessed the death.

"He just couldn't ... do it," Engle said.

According to the guidance for psychiatrists, even if a soldier proves he witnessed a traumatic event and afterward develops PTSD symptoms, it may not be PTSD, but rather strong emotional reactions to other stressors — contentious relations with a commander, marriage problems, financial difficulties, a history of poor job adjustment, significant personality problems or disciplinary action.

The guidance also suggests psychiatrists should be alert to the possibility that a soldier's "current mental disorder began or existed



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A soldier sits in shock after an IED detonation March 19 in the al-Dora neighborhood of Baghdad. IED blasts can leave service members with invisible wounds, such as traumatic brain injury or post-traumatic stress disorder, that often result in low disability ratings.

prior" to joining the military.

In such cases, soldiers with less than eight years of service are discharged with no severance check, no medical benefits, and no access to care from the Department of Veterans Affairs.

In one case documented by Military Times, a soldier with a brain tumor was considered to have a pre-existing condition even though there was no medical evidence to prove it. Because he had been in for less than eight years, he received no disability benefits from the Army.

Soldiers with traumatic brain injuries face a similar situation: If they can't prove with medical evidence that damage was done, they may be rated as only 10 percent disabled, well below the threshold required to earn lifetime medical retirement.

"Those cases are terribly underrated," Engle said. "I think there's great confusion on how to rate it. There's an inherent skepticism built into the rules if you can't see an injury or measure it with a tool."

Five concussive head injuries

Jeannette Mayer recently took her husband, Staff Sgt. DeWayne Mayer, to the Elks Rehab Hospital in Boise, Idaho, where he was diagnosed with traumatic brain injury in February.

She said the injury should have been obvious much earlier to Army physicians, and that he should have been rated for it at his physical evaluation board.

Between May and October of 2005, DeWayne Mayer suffered at least five concussive head injuries, his wife said — three from being close to roadside bomb blasts, one when his Humvee flipped, and one when American troops blew up a downed U.S. helicopter that he was guarding before he had gotten clear.

"There are times when he is to-

tally confused," his wife said. "He doesn't understand what you're saying to him. If you try to get his attention, he gets violent."

He suffers migraines, slurs his speech, shuffles his feet, and has been diagnosed with short-term memory loss.

As he recuperated at Fort Lewis, she said she asked doctors again and again if it could be a traumatic brain injury. She said he was never seen by a traumatic brain disorder specialist, and that his physical evaluation board gave him three disability ratings of 10 percent each for short-term memory loss, cognitive disorder and a neck injury.

"They told me the TBI program was not for people with short-term memory loss," she said. "That was a different diagnosis."

Engle said it may not have mattered. In another example of seemingly conflicting rules, the guidance for psychiatrists on mental disorders says soldiers should be evaluated based on their ability to work in a civilian setting — even though the physical evaluation board's stated task is to determine if soldiers are still fit for their military jobs.

The guidance tells doctors to determine if a soldier has an "acceptable level of attention and concentration" to allow him to be civil with co-workers, make simple work decisions, ask simple questions and request help.

"My colleagues call it the 'Walmart greeter test,'" Engle said. "If you could be a greeter at a discount store, you don't qualify for more than 10 percent."

Engle also said getting Army rules, regulations and guidance from the Physical Evaluation Board is often difficult, and that those documents are not stored in a central location.

In March, Engle said he received an e-mail from the PEB

with disability ratings guidance for musculoskeletal issues and neurological and convulsive disorders — dated 2005. Engle did not know the changes existed.

Challenge the system

He believes more soldiers need to challenge the system by appealing their initial, informal board decisions.

"Dozens and dozens" of clients have told him medical evaluation board members have said soldiers can be rated for only one disability, and that's not true, he said. Soldiers should be rated for all injuries that affect their ability to work.

Data provided by the Army shows that about 80 percent of injured soldiers at Fort Lewis accept the decision of their initial, informal evaluation board, while the remaining 20 percent appeal. About half of those who decide to appeal eventually choose not to follow through after consulting with legal counsel, the Army said.

That means only 10 percent of injured soldiers entering the disability system at Fort Lewis ever go before a formal evaluation board for their conditions.

Engle has recommendations of his own, starting with lowering the time-in-service threshold for pre-existing conditions from eight years to three.

He also said the Army should more closely follow Defense Department guidance and policy in rating injuries.

Critics say the Navy and Air Force do so — which may be one reason why their average disability ratings and payments are higher than the Army's, even though the Army has many more serious injuries coming out of the war zones.

"It boggles my mind to see higher ratings in the Air Force with so many traumatic injuries coming through the Army," Engle said. □