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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-4621

MICHAEL R. JOHNSON, APPELLANT,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before HAGEL, *Senior Judge.*[1]

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30 (a), this action may not be cited as precedent.

HAGEL, *Senior Judge*: Michael R. Johnson appeals through counsel a November 10, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to a total disability rating based on individual unemployability. Mr. Johnson's Notice of Appeal was timely, and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. § 7252(a). Neither party requested oral argument. Despite the fact that Mr. Johnson stated in his reply brief that the primary issue that he pursues in this case has been before the Court on at least three prior occasions, *see* Reply Brief at 6 (citing *Jones v. Shinseki*, 26 Vet.App. 56, 64 (2012); *Willett v. McDonald*, No. 13-1383, 2014 WL 2523897 (Vet. App. June 5, 2014); *Colorado v. McDonald*, No. 13-2363, 2014 WL 4248134 (Vet. App. Aug. 28, 2014); *see also Ortiz-Valles v. McDonald*, 28 Vet.App. 65, 72 (2016) (encouraging VA to define substantially gainful occupation), he did not identify that, or any other issue, as requiring a precedential decision of the Court, nor did the Secretary identify any such issue.

[1] Judge Hagel is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 15-16 (Dec. 21, 2016).

Because the Board applied no standard by which the Court can review, or by which Mr. Johnson can understand, the Board's decision, the Court will vacate the November 2015 Board decision and remand the matter for further readjudication, including–if the Board reaches the same ultimate conclusion–an explicit definition of sedentary or semi-sedentary work.

I. FACTS

Mr. Johnson served on active duty in the U.S. Army from May 1977 to May 1981 and from July 1986 to April 1988. He is in receipt of VA disability compensation benefits for residuals of a compression fracture at the L-1 vertebra, with mechanical low back pain, degenerative spurring of the lumbar vertebral bodies, and chronic pain syndrome, evaluated as 40% disabling; residuals of a nasal fracture with sinusitis, evaluated as 30% disabling; an acquired psychiatric disorder diagnosed as post-traumatic stress disorder, evaluated as 30% disabling; and residuals of a fracture of the base of the left fifth metatarsal, residuals of a fracture of the base of the right fifth metatarsal, a fascia defect of the left tibia region with compartment syndrome, and residuals of a fracture of the left mandible, all of which are evaluated as noncompensably disabling. As of February 27, 2012, his combined disability rating is 70%.

A. Procedural History

Mr. Johnson first sought entitlement to a total disability rating based on individual unemployability in June 2007, when he advised VA that his back disability had "prevented [him] from working full[-]time" since October 1997.[2] Record (R.) at 1937. Specifically, he stated that he was unable to "keep and hold even a part[-]time job despite [his] education and training" because his "back hurts and stiffens up." *Id.* Mr. Johnson provided his employment history from December 2003 to May 2007 and reported that his "highest gross earnings per month" at his most recent five jobs were $82.04, $250, $800, $450, and $130. R. at 1936.

In October 2008, a VA regional office denied Mr. Johnson's request for a total disability rating based on individual unemployability. Mr. Johnson filed a Notice of Disagreement with that decision and ultimately appealed to the Board.

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[2] The record reveals that Mr. Johnson was incarcerated–and so had no earned income–between late 1997 and late 2004. *See* R. at 11, 60.

In July 2011, Mr. Johnson testified at a hearing before a Board member that he had not worked full-time since 1997 due to back pain. He reported that he had been participating in a VA work training program for the past month. He stated that, although his part-time work as a receptionist was not strenuous, "I do get hurt." R. at 1052. He explained that one of his responsibilities is taking out the trash on Fridays, which causes him back pain. He also testified that he experiences back problems throughout the day and that he cannot sit for more than half an hour. He reported taking breaks to stretch his back throughout his four-hour shift. Finally, he testified that it is primarily his back disability and sinusitis that affect his ability to work.

In January 2014, the Board denied Mr. Johnson's request for a total disability rating based on individual unemployability. Mr. Johnson appealed to the Court through his current counsel.

In January 2015, the Court remanded the January 2014 Board decision, finding that the Board failed to adequately assess the aggregate effects of Mr. Johnson's service-connected disabilities on his ability to work and failed to consider whether, in light of the evidence provided, the employment that the Board found Mr. Johnson capable of was more than marginal.

In November 2015, the Board issued the decision on appeal, again denying Mr. Johnson's request for a total disability rating based on individual unemployability. This appeal followed.

B. Evidence Regarding Employability

The record contains several pieces of evidence regarding Mr. Johnson's employment history:

- An August 2007 employment verification form submitted by 1 LX Resorts Lic. indicates that Mr. Johnson was employed as a telemarketer from December 2005 to August 2006, he worked 30 hours each week, and he earned $6,037.27. The employer wrote that Mr. Johnson's employment was terminated because he did not "follow instructions from [the] manager." R. at 1933.
- An August 2007 employment verification form submitted by Summit Readers Alliance indicates that Mr. Johnson worked a total of almost 16 hours as a phone sales associate before quitting on April 30, 2007; he was paid $95.33.
- An October 2007 employee verification report submitted by Labor Ready indicates that Mr. Johnson worked as a temporary general laborer for 92 hours over 11 days in March 2007 and was paid $653.76.

- An April 2015 Social Security Administration statement reflects Mr. Johnson's earnings from January 1967 to December 2014. Three facts of note: (1) in only two years–1996 and 1997–did Mr. Johnson's earnings exceed $10,000; (2) the report shows no income after 2007; and (3) Mr. Johnson's earnings in 2007 were $803.09. R. at 60.

The record also contains numerous medical examinations and opinions regarding the severity of Mr. Johnson's service-connected disabilities and their effect on his ability to work. These include:

- September 2008 VA back examination: Mr. Johnson complained of daily back pain, reported that he spent hours in bed due to discomfort, and stated that he was unable to sit for more than an hour before he needing to stand.
- September 2008 VA post-traumatic stress disorder examination: The examiner stated that Mr. Johnson "would have difficulty working in settings where he had to have more than very brief and superficial contact with others" and that his post-traumatic stress disorder symptoms "would significantly impact his ability to perform work duties." R. at 1757.
- December 2010 VA "muscles" examination: The examiner, advanced practice registered nurse Amy Sullivan, opined that, based on his physical disabilities, Mr. Johnson would "less likely than not have difficulty with prolonged weight bearing activities including standing, walking, bending . . . [,] pushing, pulling, lifting, carrying[,] and working overhead." R. at 1228. She found "no objective evidence to suggest any impact" on Mr. Johnson's "ability to sit, drive, communicate, follow instructions, remember, concentrate, interact with coworkers and clients[,] and/or other sedentary social/occupational activities." *Id.*
- January 2011 VA post-traumatic stress disorder examination: Lynn Johnson, Ph.D., diagnosed Mr. Johnson with schizoaffective disorder, bipolar type; chronic, mild post-traumatic stress disorder; and polysubstance abuse, in partial remission. Dr. Johnson assigned Global Assessment of Functioning score of 65 for Mr. Johnson's post-traumatic stress disorder and a Global Assessment of Functioning score of 50 for his other disorders. Dr. Johnson stated that Mr. Johnson's post-traumatic stress disorder was mild, related to service, and resulted in "occupational and social impairment which is due to mild or transient symptoms which decrease work efficiency and ability to perform

occupational tasks only during periods of significant stress." R. at 1358. She stated: "[Mr. Johnson] has some superficial ability to interact and converse with others. I believe he retains some employability for at least sedentary work, if he is not too closely involved with others. If he remains in treatment for his other mental disorders, I believe he can retain some employability for at least a sedentary work." *Id.*

- April 2011 VA nose, sinus, larynx, and pharynx examination: Mr. Johnson reported six episodes of sinusitis from March 2009 through September 2010. Ms. Sullivan opined: "Records show intermittent episodes of sinusitis. The various occasions of antibiotic treatment for sinusitis at least as likely as not are separate episodes of sinusitis due to the [service-connected] residuals of nasal fracture or reoccur. [sic]" R. at 1125.
- February 2012 VA general medical examination: Mr. Johnson reported that, after receiving an associate's degree in 1996, he worked two jobs, one at a telemarketing company and one as an apartment manager. Those jobs lasted one year before he was incarcerated. He stated that, after his release from prison, he worked for a few months as a salesman, helped seniors with resume writing and computer training, and began, but did not finish, a degree program in network administration. He also reported that he was a master mechanic and did all his own mechanical work. The examiner, certified nurse practitioner Jackie Lamphier, stated:

  > [C]onsidering these extensive educational opportunities, interview, exam and evaluation of [service-connected] medical cond[ition]s, [Mr. Johnson] is clearly capable of sedentary or partial sedentary work if he wished to do so. He states he is a master mechanic and does all his own mechanic work. He reports comprehensive computer skills which he continues to develop in his home office. He sat comfortabl[y] during the exam, he is able to communicate successfully, [physical examination] was essentially normal for a 62[-year-old] man. There is no reason why [he] cannot work.

  R. at 908. Ms. Lamphier noted that numerous nonservice-connected disabilities also affected Mr. Johnson's ability to work, although she did not quantify that impact, despite being asked to do so.

- February 2012 VA post-traumatic stress disorder examination: The examiner, Dean Gregg, Ph.D, concluded that Mr. Johnson "will do best in jobs that do not require a great deal of interpersonal contact" as a result of his post-traumatic stress disorder. R. at 853. He acknowledged that Mr. Johnson had "a number of other limitations," but stated that Mr. Johnson attributed them to his physical disabilities. *Id.* In a March 2012 addendum prepared after reviewing Mr. Johnson's file, Dr. Gregg stated that Mr. Johnson's "[p]sychological symptoms appear to be mild, and the main obstacles to work are related to his physical problems. [He] is well educated and should be able to do a variety of sedentary jobs." R. at 811.
- April 2013 VA record review: The reviewer, certified physician's assistant Scott Dreblow, found "no objective evidence of a deficit or disability described in earlier exams that would prevent [Mr. Johnson] from gainful employment in numerous sedentary or semi-sedentary work settings" and opined that Mr. Johnson "is functionally able to perform tasks required in sedentary and semi-sedentary employment." R. at 792.
- April 2015 private vocational consultation report: Independent vocational consultant Edmond Calandra reviewed Mr. Johnson's claims file at the request of his current counsel and stated:

> As relates to the opinions from Lynn S. Johnson, Ph.D.[,] dated 1/31/11, [Dean L. Gregg], Ph.D.[,] dated 3/19/12, and Scott Deblow, PA-C[,] dated 2/25/13[,] in which they offer that [Mr. Johnson] may be capable of sedentary work activities, jobs of this nature are most exclusively found in a business or clerical setting for which Mr. Johnson has no particular skills, but most importantly require frequent contact with the general public from which his [post-traumatic stress disorder] condition prevents [sic]. Even unskilled sedentary occupations require attention to task and concentration[,] which[,] again, his [post-traumatic stress disorder] presents a problem [sic]. [Mr. Johnson's] statements to me are consistent with information contained in the medical records which document his functional impairment in occupational and personal situations since at least 1997, but even during that year he was only capable of working part[-]time. Note that[,] although I have reviewed the entire claim file and considered all of [Mr. Johnson's] other conditions and disabilities, both service-connected and non-service[-]connected, it is my opinion that it is as likely as not that Mr. Johnson's service[-] connected conditions alone have resulted in his inability to secure or

> follow a substantially gainful occupation, even a sedentary occupation, since at least October 1997.

R. at 50-51.

II. ANALYSIS

On appeal, Mr. Johnson argues that the Board inadequately explained its determination that he is capable of obtaining and maintaining substantially gainful sedentary or semi-sedentary work. To that end, he raises numerous arguments that the Court will address in turn. First, however, a brief summary of the relevant law and the Board's findings.

"[T]otal disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation." 38 C.F.R. § 4.15 (2016). Even where a service-connected disability is less than total, a veteran may be entitled to a total disability rating if he is "unable to secure or follow a substantially gainful occupation" as a result of service-connected disabilities. 38 C.F.R. § 4.16(a) (2016). If there are two or more service-connected disabilities, at least one of them must be rated 40% disabling with "sufficient additional disability to bring the combined rating to 70[%] or more." *Id.* As the Board found, Mr. Johnson meets the percentage requirements for the application of § 4.16(a). The only question is whether he is capable of obtaining and maintaining substantially gainful employment.

Here, the Board summarized all of the evidence cited by the Court in Part I above and then concluded that the evidence supported a finding that Mr. Johnson is capable of securing or maintaining substantially gainful employment. Specifically, the Board found:

> [Mr. Johnson's] service-connected disabilities[,] either individually or collectively[,] do not render him unable to secure and follow a substantially gainful occupation. In this regard, the multiple VA examinations consistently conclude that[,] based on [Mr. Johnson's] education, prior work history[,] and experience, he could engage in sedentary or semi-sedentary employment. These conclusions were based on interviews of [Mr. Johnson], review of the claims file[,] and examination of [Mr. Johnson].
>
> Notably, [Mr. Johnson] is well-educated, holding a basic computer repair certificate, and having earned an [associate's] degree in accounting and a bachelor's degree in

business. He also professed to have skills as a master mechanic. This, and his past occupations, introduce a wide variety of occupations consistent with [his] education and occupational experience that he would be capable of performing.

With respect to [Mr. Johnson's] low back disability, VA examiners have reported that during the interview, [he] sat comfortably in his seat, changing position occasionally. The reports also indicate that [he] was able to perform multiple diverse tests of the physical function of the spine, trunk, and extremities without any remarkable deficits. The VA examination reports of [Mr. Johnson's] physical capabilities are credible and probative evidence, as they are fairly consistent in the relative levels of impairment assessed. Furthermore, the Board finds the reports of physical testing to be particularly probative of the fact that [Mr. Johnson] would not be precluded from sedentary or semi-sedentary employment.

With respect to the functional impact of [Mr. Johnson's] sinuses, the February 2012 examiner found no evidence of functional impact that would limit [his] employability. While [Mr. Johnson] claims his sinus disability leaves him fatigued and unable to breath, the April 2011 VA examination found that sinusitis occurs intermittently. Due to the specificity of the examination report, the Board finds the examination to be highly probative. The Board[] thus[] concludes that [Mr. Johnson's] sinus disability has an impact in only a mild and intermittent fashion on [his] employment capabilities.

The Board acknowledges [Mr. Johnson's] reports that [post-traumatic stress disorder] causes him to have diminished concentration[] and his claim that, thus, he is incapable of securing and following even sedentary employment. However, the occupational and social impairment of [his post-traumatic stress disorder] has been deemed by VA examiners to be[,] at worst[,] due to mild or transient symptoms which decrease work efficiency and ability to perform tasks only during periods of significant stress. Again, these reports are credible and probative evidence, as they are fairly consistent in the relative levels of impairment assessed. The reports show decreased work efficiency and difficulty in performing the acts of employment, but not an inability to perform them.

. . .

Viewing the combined effects of [Mr. Johnson's] service connected disabilities, the preponderance of the evidence shows a requirement for sedentary or semi-sedentary work, mild concentration deficits, interaction with others limited to only brief and superficial contact, and intermittent illness due to sinus infection. The Board finds that such limitations are compatible with sedentary or semi-sedentary employment.

Examples of such jobs include office, clerical, and data entry positions. [Mr. Johnson] also suggested computer repair technician in his September 2004 statement.

> The Board finds that, given [Mr. Johnson's] education, experience, and functional limitations, he is capable of performing such occupations.

R. at 15-18.

A. Definitions of Sedentary and Semi-Sedentary

Mr. Johnson first argues that the Board failed to adequately define the terms sedentary and semi-sedentary and therefore misinterpreted the evidence regarding his ability to perform those types of jobs. He argues that the term sedentary "requires that a person be able to sit for over [five] hours a day, and stand or walk for over two hours a day," which he cannot do. Appellant's Brief (Br.) at 10.

As Mr. Johnson concedes, no VA regulation defines the terms sedentary or semi-sedentary, or the phrases "sedentary work" or "semi-sedentary work." The Court notes that this is so because the word "sedentary" appears in only a single VA regulation, unrelated to the matter of total disability ratings based on individual unemployability. *See* 38 C.F.R. § 4.115a (2016) (concerning disabilities of the genitourinary system).

In the absence of a regulatory definition, Mr. Johnson urges the Court to adopt the definition of "sedentary work" contained in Appendix C of the *Dictionary of Occupational Titles*, which is compiled by the U.S. Department of Labor. *See* Appellant's Br. at 11. Specifically, the Department of Labor states that sedentary work involves:

> Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

DICTIONARY OF OCCUPATIONAL TITLES, Appendix C.IV.c, available at http://www.occupationalinfo.org/appendxc_1.html#STRENGTH (last visited March 3, 2017). Citing *Faust v. West*, 13 Vet.App. 342, 356 (2000), Mr. Johnson asserts that the Court may articulate a definition where VA fails to do so. Appellant's Br. at 6. In *Faust*, however, the Court adopted a definition of "substantially gainful employment," a phrase that actually appears in § 4.16. *Cf. Ortiz-Valles*, 28 Vet.App. at 72 ("It is

VA's responsibility to define the terms contained within its regulations, and the Court encourages it to do so."). Accordingly, that case is inapposite here.

To the extent that the Court has the authority to define the terms sedentary or semi-sedentary for the purposes of total disability ratings based on individual unemployability, despite the fact that those terms do not appear in the pertinent VA regulations, "the Court declines to do so without first allowing VA to take a position on the matter." *Id.*

In any event, the Court agrees that the Board failed to adequately explain its determination that Mr. Johnson is capable of obtaining and maintaining substantially gainful sedentary or semi-sedentary work. Nowhere in its decision did the Board define those terms, which necessarily renders its decision incapable of review by the Court–the Court simply cannot review a finding made under an unarticulated standard. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

Because the Board failed to explain what it intended by sedentary or semi-sedentary work, that classification is so arbitrary as to be completely meaningless. Without a precisely articulated agency-level definition of these terms, there can be no guarantee that such a standard will be–or even can be–fairly applied to all claimants. Such a situation is unfair and untenable.

By now it is well settled that entitlement to VA benefits is a property interest protected by the Due Process clause of the Fifth Amendment of the U.S. Constitution. *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009). Accordingly, claimants are entitled to a "fundamentally fair adjudication of [their] claim[s]." *Id.* at 1296. There can be no doubt that consistent application of the law is part of a fundamentally fair adjudication. In other words, if VA adjudicators have different understandings of what it means for employment to be sedentary or semi-sedentary–as they well might, given that VA has never defined those terms (despite the ubiquity of their use in cases of requests for total disability ratings based on individual unemployability), and given that medical examiners rarely explain what they mean when they use these terms–then it is fair to conclude that whether a claimant is found to be capable of sedentary or semi-sedentary work is often dependent on the understanding of those terms held by the medical examiner and rating specialist to whom his or her case is assigned. *See, e.g.*, *King v. LaMarque*, 464 F.3d 963, 966 (9th Cir. 2006) ("Just as inconsistent application leads to ambiguous standards, overly ambiguous standards almost inevitably lead to inconsistent application."). The application of different standards to the same legal question

is unquestionably arbitrary. *See, e.g.*, *South Shore Hosp., Inc. v. Thompson*, 308 F.3d 91, 103 (1st Cir. 2002) ("[P]atently inconsistent applications of agency standards to similar situations are by definition arbitrary."); *Henry Ford Health Sys. v. Shalala*, 233 F.3d 907, 912 (6th Cir. 2000) ("[I]nconsistent application of a regulation is often a hallmark of arbitrary or capricious agency action."); *Contractors Transport Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) ("Patently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary."). Although "the law does not demand perfect consistency in administrative decisionmaking," *South Shore Hosp.*, 308 F.3d at 103, in the absence of a clearly articulated meaning of the terms sedentary or semi-sedentary, the use of those terms to deny claimants entitlement to total disability ratings based on individual unemployability is, at best, inadequately explained, *see* 38 U.S.C. § 7104(d)(1), and, at worst, an arbitrary application of the law, *see* 38 U.S.C. § 7261(a)(3)(A). *See, e.g.*, *Baltimore Gas & Elec. Co. v. Heintz*, 760 F.2d 1408, 1418 (4th Cir. 1985) ("[W]hen an agency treats two similar transactions differently, an explanation for the agency's actions must be forthcoming.").

Moreover, to the extent that the Board adopted the medical examiners' apparent understanding of the terms sedentary or semi-sedentary, the Court notes that those understandings are not clear from the context of the examiners' opinions. This is not sufficient to permit Mr. Johnson to understand the basis for the Board's decision or to permit review of the Board's decision by the Court, nor does it come close to ensuring a fundamentally fair adjudication of Mr. Johnson's claim. *See* 38 U.S.C. § 7104(d)(1); *Cushman*, 576 F.3d at 1296; *Gilbert*, 1 Vet.App. at 57. Remand is necessary.

If, on remand, the Board again concludes that Mr. Johnson can be employed in sedentary or semi-sedentary employment that is substantially gainful, the Board must articulate the objective standards under which this determination is made. *See Ortiz-Valles*, 28 Vet.App. at 72. Absent the Board's willingness to adopt objective standards, it will apply the standards contained in the *Dictionary of Occupational Titles*, compiled by the U.S. Department of Labor, as advanced by Mr. Johnson in his briefs.

B. 38 C.F.R. § 4.10

The Court also agrees with Mr. Johnson that the Board erroneously relied solely on the medical examiners' statements regarding his behavior during examinations and failed to adequately account for evidence that his limitations are more severe than demonstrated in the limited setting of an examination. In support of this argument, he relies on 38 C.F.R. § 4.10, which provides, with respect to functional limitations, that "it will be remembered that a person may be too disabled to engage in employment although he or she is up and about and fairly comfortable at home or upon limited activity." 38 C.F.R. § 4.10 (2016).

The entirety of the Board's analysis focuses on Mr. Johnson's observed performance at various VA medical examinations. Mr. Johnson has consistently reported that he can sit comfortably for up to 30 minutes before needing to get up to stretch his back; an examiner's statement that he sat comfortably during the examination is not, then, necessarily evidence that he can sit for a majority of the day at a desk job (using the Secretary's proffered dictionary definition of sedentary as meaning "doing or involving much sitting; not doing much physical activity," Secretary's Br. at 19 (citing MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/sedentary)).

Further, the Board did not adequately account for any of Mr. Johnson's lay evidence of his physical limitations, particularly as they relate to his back disability, only stating generically that it had "considered" those statements but found the objective medical evidence more probative. R. at 17. In light of this discussion, the Court concludes that the Board failed to provide adequate reasons or bases for its decision. *See* 38 U.S.C. § 7104(d)(1); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). Remand is also necessary for this reason.

On remand, Mr. Johnson is free to submit additional evidence and argument in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). "A remand is meant to entail a critical examination of the justification for the decision" by the Board. *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). In addition, the Board shall proceed expeditiously, in accordance with 38 U.S.C. § 7112 (expedited treatment of remanded claims).

C. Physical Limitations v. Mental Limitations

Although not argued by Mr. Johnson, the Court finds that the Board did not adequately account for the limitations on employability imposed by Mr. Johnson's post-traumatic stress disorder. The Board acknowledged the evidence showing that Mr. Johnson has concentration and memory deficits and should attempt to find work that limits his contact with others, but concluded that such limitations are "compatible with sedentary or semi-sedentary employment." R. 17. Whatever definition VA ultimately establishes for the terms sedentary and semi-sedentary for its purposes, it is clear from the Secretary's cited dictionary definition and the context of the Board's decision that those terms relate to the *physical requirements* of a given position. The Board did not explain how its conclusion that Mr. Johnson can physically perform sedentary or semi-sedentary work has any relevance to whether he can successfully mentally perform those jobs. Accordingly, the Board's analysis is also deficient in this respect. *See* 38 C.F.R. § 7104(d)(1); *Caluza*, 7 Vet.App. at 506.

D. Other Arguments

Although the Court has already determined that remand is necessary, the Court will nevertheless address two of Mr. Johnson's remaining arguments. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that, to provide guidance to the Board, the Court may address an appellant's other arguments after determining that remand is warranted).

1. Adequacy of VA Medical Examinations

Mr. Johnson argues that the Board erroneously adopted the VA examiners' opinions as to employability as its own. He contends that VA examiners are not "competent to opine on vocational issues." Appellant's Br. at 19. This argument is unpersuasive.

Although Mr. Johnson is correct that the adjudicator is the ultimate arbiter of whether a total disability rating based on individual unemployability is warranted, *Geib v. Shineki*, 733 F.3d 1350, 1354 (Fed. Cir. 2013), there is simply no support for his assertion that medical examiners are not competent to offer an opinion on whether a claimant's disability affects his ability to work. Indeed, medical examinations assessing a veteran's ability to work in light of his or her service-connected disabilities are a long-accepted practice approved many times over by both this Court and the U.S. Court of Appeals for the Federal Circuit. *See, e.g.*, *id.* at 1354 (discussing VA's responsibility to obtain a medical examination to assess employability when necessary); *Smith v. Shinseki*, 647 F.3d

1380, 1384 (Fed. Cir. 2011) (discussing VA's duty to assist with respect to total disability rating based on individual unemployability requests as including obtaining a medical examination when necessary); *Floore v. Shinseki*, 26 Vet.App. 376, 379 (2013) (explaining that a claimant is entitled to a medical examination when one is necessary to substantiate the claim, including a request for a total disability rating based on individual unemployability); *Moore v. Nicholson*, 21 Vet.App, 211, 219 (2009) ("[A] medical professional may be required to give an opinion on specific questions such as whether a claimant's condition precludes standing for extended periods, lifting more than a certain weight, sitting for eight hours a day, or performing other specific tasks."), *rev'd on other grounds sub nom. Moore v. Shinseki*, 555 F.3d 1369 (Fed. Cir. 2009); *Friscia v. Brown*, 7 Vet.App. 294, 297 (1995) (holding that, where entitlement to a total disability rating based on individual unemployability is raised, VA has a duty to "obtain[ ] an examination which includes an opinion on what effect the appellant's service-connected disability has on his [or her] ability to work"); *Gary v. Brown*, 7 Vet.App. 229, 232 (1994) (stating that, when a request for a total disability rating based on individual unemployability is submitted, "a VA examining physician should generally address the extent of functional and industrial impairment from the veteran's service-connected disabilities"); *see also VA Adjudication Procedures Manual*, M21-1, Part IV, subpt. ii., ch. 2, § F(2)(d) (directing an adjudicator to request that a VA examiner "comment on the [v]eteran's ability to function in an occupational environment" and "described functional impairment caused solely by the [service-connected] disabilities").

In the present case, there is simply no evidence that suggests that the VA examiners impermissibly reached a legal conclusion about whether Mr. Johnson qualifies for a total disability rating based on individual unemployability–a legal question reserved to the adjudicator–rather than a medical determination about whether his service-connected disorders affect his ability to function in a workplace setting. The Court finds no error in the Board's conclusion that the VA examinations are adequate and competent evidence. *See* 38 U.S.C. § 7261(a)(4); *D'Aries v. Peake*, 22 Vet.App. 97, 103 (2008); *Gilbert*, 1 Vet.App. at 52.

2. Rejection of Private Vocational Consultation

Finally, Mr. Johnson argues that the Board inadequately explained its rejection of Mr. Calandra's private vocational assessment. The Board acknowledged Mr. Calandra's conclusion that

> it is at least as likely as not that [Mr. Johnson] is unable to secure or follow a substantially gainful occupation. However, the Board finds that [his] conclusions are not consistent with other evidence of record. In particular, [Mr. Calandra] concluded that [Mr. Johnson] does not have the business or clerical skills for sedentary jobs and that sedentary jobs require frequent contact with the general public. This conclusion is contrary to the bulk of the evidence, which establishes that [Mr. Johnson] is educated in business principles and has worked in a variety of business settings such as a receptionist, a telemarketer, an apartment manager, and a manager at a fast food restaurant. Additionally, the Board is unpersuaded by how [Mr. Calandra] limited sedentary jobs to those "most exclusively" found in a business or clerical setting, and which require frequent contact with the general public. Accordingly, the Board finds the private vocational assessment not to be credible and affords it little probative weight. It follows, therefore, that the report's conclusion that [Mr. Johnson] is unable to secure or follow a substantially gainful occupation has little probative value.

R. at 17.

Mr. Johnson's contention that Mr. Calandra's opinion is the "only competent analysis in the record of actual opportunities in the job market that would accommodate [his] functional limitations" is reliant on his earlier argument that the VA examiners' opinions are not competent. Appellant's Br. at 22. The Court has rejected that argument, and therefore this argument must fail as well.

That said, the Court believes that the Board paid insufficient attention to Mr. Calandra's extensive qualifications, which are attached to his report. *See* R. at 52-54. The Board also required a degree of explanation from Mr. Calandra that it did not require of itself: "The Board is unpersuaded by how [Mr. Calandra] limited sedentary jobs to those 'most exclusively' found in a business or clerical setting, and which require frequent contact with the general public." R. at 17. This statement suggests that the Board found that Mr. Calandra did not adequately explain this statement, yet the Board itself did not explain why the statement was incorrect. Yet again, the Board's reasons or bases are inadequate to permit Mr Johnson to understand the basis for its decision or to permit review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57.

III. CONCLUSION

Upon consideration of the foregoing, the November 10, 2015, Board decision is VACATED, and the matter is REMANDED for further development, if necessary, and readjudication consistent with this decision.

DATED: March 3, 2017

Copies to:

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VA General Counsel (027)