VA "Individual Unemployability" - Key Concepts for Vocational Rehabilitation Professionals Working with Veterans

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1. Context

All too often, the U.S. Department of Veterans Affairs (VA) applies its ratings schedules in a mechanical way, assigning some percentage of compensation less than 100%, or improperly assessing the impact of a particular medical condition on a veteran's ability to work. Further the law requires VA to evaluate the impact of a veteran's service-connected conditions on his or her ability to work, even when the veteran is not rated at 100% combined disability, but VA frequently refuses to do this. This type of grant is referred to as "extraschedular," because if provides compensation beyond what is provide based solely on VA's Diagnostic Codes. Under a type of benefit called "Individual Unemployability," a veteran may be rated less than 100% combined, but paid at the same rate as if their combined disability rating was 100% if their service-connected disabilities prevent them from engaging in a certain level of work. Even when a V.A. vocational rehabilitation specialist reviews the claim file, it seems as if VA frequently ignores some of the most crucial aspects of the veteran's disability. Worse, it is almost like they make up their method of vocational assessment out of whole cloth.

Because strict application of VA's rating scheme often fails to recognize the combined

impact of a veteran's disabilities, private vocational experts are frequently hired to address Individual Unemployability issues. While a vocational expert (VE) may be asked to offer an opinion related to a specific portion of a particular scheduler rating, it is more common for the VE to be asked to provide an opinion related to whether a veteran is unemployable in a claim for extraschedular 100% rating based upon individual unemployability.

This presentation will offer both guidance on how the VA system of Diagnostic Codes results in a percentage schedular ratings and how an inability to work is evaluated in an Individual Unemployability claim. Further, practical tips for engaging in this practice and what to expect from attorneys to conduct your analysis will be covered. In many ways, your analysis will be similar to that in a Social Security Disabilty or Long Term Disability Insurance claim, with the differences lying in VA's unique method of paying benefits only for service-connected conditions.

2. Background: VA agencies, Compensation Claims, & Rating Schedules

2.1 The U.S. Department of Veterans Affairs

VA provides disability compensation for service-connected disabilities through the Veterans Benefits Administration (VBA). VBA also administers other benefits like non-service-connected pension (similar to the SSI system in Social Security) and death benefits.

2.2 Service-Connected Compensation

A veteran may file a claim for service-connected compensation benefits for any medical condition that is related to their service. There are three ways for a veteran to prove service-connection:

- Direct service-connection;
- Presumption of service-connected; and
- Secondary service-connection.

2.3 Diagnostic Codes & Rating Schedules

Once VA determines that a veteran's condition is connected to his service, it then it must rate the condition using its Diagnostic Codes (DC). Each disability is rated using 10% increments, with each percentage rating corresponding to a particular monthly benefit. Few Diagnostic Codes have a rating at each 10% interval (i.e. 0%, 10%, 20%, 30%...100%). Instead, the creators of the rating schedule came up with a system that attempted to evaluate how certain sets of symptoms flowing from a given service-connected disability would impair a person's ability to work. It is not uncommon for ratings to account for only a few points on the zero to 100% scale.

For example, lumbar spine conditions that do not require doctor-ordered bedrest are evaluated using the following schedule:

Unfavorable ankylosis of the entire spine..... 100

Unfavorable ankylosis of the entire thoracolumbar spine 50

Unfavorable ankylosis of the entire cervical spine; or, forward flexion of the thoracolumbar spine 30 degrees or less; or, favorable ankylosis of the entire thoracolumbar spine 40

Forward flexion of the cervical spine 15 degrees or less; or, favorable ankylosis of the entire cervical spine 30

Forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees; or, forward flexion of the cervical spine greater than 15 degrees but not greater than 30 degrees; or, the combined range of motion of the thoracolumbar spine not greater than 120 degrees; or, the combined range of motion of the cervical spine not greater than 170 degrees; or, muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis..... 20

Forward flexion of the thoracolumbar spine greater than 60 degrees but not greater than 85 degrees; or, forward flexion of the cervical spine greater than 30 degrees but not greater than 40 degrees; or, combined range of motion of the thoracolumbar spine greater than 120 degrees but not greater than 235 degrees; or, combined range of motion of the cervical spine greater than 170 degrees but not greater than 335 degrees; or, muscle spasm, guarding, or localized tenderness not resulting in abnormal gait or abnormal spinal contour; or, vertebral body fracture with loss of 50 percent or more of the height..... 10

You will note that this DC fails to address anything other than range of motion. Because of that, veterans are often rated toward the lower end of the spectrum, despite severe pain resulting from sitting, standing or walking (not addressed in the schedule). This is not uncommon across the spectrum of rated conditions.

Ratings are combined using a system that is not based on addition but takes into account the theoretical combination of two or more disabilities. Often called "VA Math" by veterans, one cannot simply add rating percentages together to determine a veteran's combined rating. The chart promulgated by VA must be used. In the alternative, there are spreadsheets and phone apps today that will allow you to determine a veteran's combined rating.

Because of "VA Math," it is not uncommon for a veteran who is already rated for one or more conditions to file a claim for another condition to be service-connected, only to find once that condition is granted and a percentage assigned, that their combined rating does not increase.

NOTE: Many veterans do not know that the Diagnostic Codes or the combined rating chart exist. It is not uncommon for a veteran to think they should be rated 100% for a single condition, when a 100% rating for that condition is not even listed in the DC.

2.4 Extraschedular Ratings

A veteran may claim that the Diagnostic Code fails to compensate them for the impairment that results from a single condition. In such cases, the veteran must demonstrate why their level of functionality due to symptoms is either more closely aligned with the rating schedule for a similar condition or, rarely, prove that their unique set of impairments compels the VA rating specialist to go off the chart and assign a higher rating due to the severity of the impairment. Total Disability due to Induvial Unemployability is perhaps the most extreme of all extraschedular ratings, because it results in payment at the 100% level.

3. What Documents Do You as a Vocational Expert Need to Review?

Like any other opinion, the more information upon which an opinion is based, the better. At a minimum, a VE must review the veterans's complete VA Claim File (C-File) (and state that it was reviewed in her/his report). An easy way for VA to reject a medical or vocational expert's opinion is to note that the expert failed to review the C-File. In *Nieves-Rodriguez v. Peak*, 22 Vet.App. 295 (2008), the Court of Appeals for Veterans Claims explained that

> the Court and VA have invoked the notion of reviewing the "claims file" as a surrogate for obtaining an overview of the entire medical history.[footnote omitted] *See Proscelle v. Derwinski*, 2 Vet.App. 629, 632 (1992) ("The [VA] examiner should have the veteran's full claims file available for review."). The claims file, generally speaking, contains all documents associated with a veteran's disability claim, including not only medical examination reports and SMRs, but also correspondence, raw medical data, financial information, rating decisions of VA regional offices, Notices of Disagreement, such materials pertaining to claims for conditions not currently at issue and, often, Board decisions disposing of earlier claims.

22 Vet.App. at 301. While the Veterans Court does not require an expert to review the claim file in every case, *Id*., there is no reason to provide VA a reason to afford less weight to your opinion simply because you did not reviewed the entire claim file. Therefore, expect to receive a copy of the C-File in **every case**; and if it is not provided, ask for it.

By way of example, my law firm typically provides the Claim File on a CD in PDF format. We organize the PDF by bookmarking it, with links to each document in the file. If there is particularly relevant information for the VE, it will be highlighted. This includes information that we consider favorable, as well as facts which may hurt our client's claim or may need to be explained in more detail than was provided by the VA personnel.

You should expect to speak to the veteran and conduct an interview. Although VA may not disregard an opinion solely based upon history provided by the veteran, *Kowalski v. Nicholson*,

19 Vet.App. 171, 179 (2005), you need to make sure that any oral history provided by the veteran is consistent with and has support in the written Claim File. VA may reject an opinion that is based on facts provided by the veteran that have previously been found to be inaccurate. *Reonal v. Brown*, 5 Vet.App. 458, 461 (1993). If you are receiving an attorney referral, the veteran should have been prepared for your interview. It can be very helpful to the attorney and veteran (and can save some time during the interview) for a VE to share a list of questions that you ask in every case. Obviously, the interview does not have to be limited to such questions, but it can set the veteran's mind at ease and allow them to prepare in advance to make the interview more productive.

4. What is Individual Unemployability & What Does the Vet Have to Prove?

4.1 An Extraschedular Way to Get to 100%:

Your starting point is an understanding of your end game – what is required under the law for a veteran to prove entitlement to and receive Individual Unemployability benefits (often abbreviated "IU" or "TDIU" – short for Total Disability based on Individual Unemployability). Individual Unemployabililty is an extraschedular alternative for a veteran to achieve compensation at the 100% level. Put differently, it is an Extraschedular Total Rating – "It is available when the veteran's scheduler rating is less than 100%, and when they can prove an inability to work. TDIU "is part and parcel of the determination of the initial rating of disability." *Rice v. Shinseki*, 22 Vet. App. 447, 454-55 (2009). There is no question that the V.A. must consider "whether a TDIU award is warranted whenever a pro se claimant seeks a higher disability rating and submits cogent evidence of unemployability, regardless of whether he states specifically that he is seeking TDIU benefits." *Comer v. Peake*, 552 F.3d 1362, 1366 (Fed. Cir. 2009) (citing *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001)); *see also Rice v. Shinseki*, 22 Vet. App. 447, 453-54 (2009) (same). "[A] request for TDIU, whether expressly raised by a veteran or reasonably raised by the record,

is not a separate claim for benefits, but rather involves an attempt to obtain an appropriate rating for a disability or disabilities, either as a part of the initial adjudication of a claim or . . . as a part of a claim for increased compensation." *Rice v. Shinseki*, 22 Vet. App. 447, 453-54 (2009); *see also Floyd v. Brown*, 9 Vet. App. 88, 96 (1996) (the question of an extraschedular rating is a component of the appellant's claim for an increased rating). A request for a higher disability rating and evidence indicating that the claimant's ability to work was "significantly impaired" by his or her service connected conditions reasonably raises the issue of entitlement to TDIU as an alternative basis for increased compensation. *Id.*

4.2 What is Required for a Veteran to Obtain TDIU?

In a 2015 case called *Pederson v.* McDonald, 27 Vet.App. 276 (2015), the CAVC provided an excellent outline of the law related to TDIU. Writing for the entire court sitting en banc, Judge Moorman began by citing to the regulations which give rise to an IU assessment:

> Total disability ratings will be assigned "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. § 3.340(a) (2014). A TDIU rating may be may be assigned to a veteran who meets certain disability percentage thresholds and is "unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." 38 C.F.R. § 4.16(a) (2014). If a veteran fails to meet the percentage standards set forth in § 4.16(a) but is "unemployable by reason of service-connected disabilities," the RO should submit the claim to the Director for extraschedular consideration. 38 C.F.R. § 4.16(b).

Id. at *285-86. To qualify for a TDIU evaluation, the law requires that a veteran must have either of the following:

- at least one service connected disability rated at least at 60%,

OR

- two or more service connected disabilities, with at least one disability ratable at 40 percent or more and with a combined rating of 70% or more.

Further, the veteran must demonstrate that they have an inability to maintain substantially gainful employment as a result of their service-connected disabilities (marginal employment, such as odd jobs, is not considered substantial gainful employment for VA purposes). However, the regulations provide for an exception to the schedular requirements where a lower disability rating exists if the service-connected disability or disabilities present such an exceptional or unusual disability picture, due to such factors as marked interference with employment or frequent periods of hospitalization, that applying the normal disability requirements is impractical.

4.3 The Purpose of TDIU

In *Pederson*, the court next explained how TDIU differs from an assessment under the ratings schedules and how it must be assessed:

> An award of TDIU does not require a showing of 100% unemployability. *See Roberson v. Principi*, 251 F.3d 1378, 1385 (2001). However, an award of TDIU requires that the claimant show an inability to undertake substantially gainful employment as a result of a service-connected disability or disabilities. 38 C.F.R. § 4.16(b) ("[A]ll veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled."). In determining whether a claimant is unable to secure or follow a substantially gainful occupation, the central inquiry is "whether the veteran's service-connected disabilities alone are of sufficient severity to produce unemployability." *Hatlestad v. Brown*, 5 Vet.App. 524, 529 (1993). When making this determination, VA may not consider non-service-connected disabilities or advancing age. 38 C.F.R. § § 3.341, 4.19 (2014); *see also Van Hoose v. Brown*, 4 Vet.App. 361, 363 (1993).
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> Unlike the regular disability rating schedule, which is based on the average work-related impairment caused by a disability, "entitlement to TDIU is based on an individual's particular circumstances." *Rice v. Shinseki*, 22 Vet.App. 447, 452 (2009). Therefore, when the Board conducts a TDIU analysis, it must take into account the individual veteran's education, training, and work history. *Hatlestad v. Derwinski*, 1 Vet.App. 164, 168 (1991) (level of education is a factor in deciding employability); *see Friscia v. Brown*, 7 Vet.App. 294, 295-97 (1994) (considering veteran's experience as a pilot, his training in business administration and computer programming, and his history of obtaining and losing 19

> jobs in the previous 18 years); *Beaty v. Brown*, 6 Vet.App. 532, 534 (1994) (considering veteran's eighth- grade education and sole occupation as a farmer); *Moore v. Derwinski*, 1 Vet.App. 356, 357 (1991) (considering veteran's master's degree in education and his part-time work as a tutor).

Id. at 286. It is crucial to understand that the VA must assess the veteran's mental and physical limitations in conjunction with the work skills derived from their schooling and past work. "VA must consider a claimant's educational and occupational history when determining whether his or her service-connected disabilities preclude maintaining substantially gainful employment." *Id*. at 9. The lack of a college education by itself is not going to preclude working. *Id*.

4.4 Analysis of the Actual Job Market is Not Required:

Pederson also reiterated that a TDIU analysis is about abilities, not availability of jobs. "[**A] TDIU determination does not require any analysis of the actual opportunities available in the job market,"** *Smith v. Shinseki*, 647 F.3d 1380, 1385 (Fed. Cir.2011); *Pederson*, 2015 WL 590779 at *9. In *Pederson*, the CAVC let stand the Board's conclusion that a vocational assessment was not necessary, because of its blanket conclusion that the veteran could engage in sedentary work. In other words, if the Board decides that the evidence supports a finding that the veteran has physical and mental abilities to work, it arguably does not need to conduct a vocational evaluation. Of course, that begs the question of whether the Board needed to obtain a vocational assessment in deciding that the veteran can do a range of work, such as sedentary jobs as it concluded in *Pederson*.

5. Use Standard Vocational Principles

VA regulations contain very little guidance in terms of evaluating a veteran's ability to engage in substantial gainful activity. Unlike the Social Security Administration, which has a highly detailed disability program outlined in the Code of Federal Regulations, VA regulations provides no guidance for its staff to assess whether a veteran is capable of working. However, VA

will reject any assertion that it must accept Social Security's rules. Administration. *See Faust v. West*, 13 Vet.App. 342, 356 (2000) (stating that the "we find appropriate guidance in – albeit that we are not bound by – the definition of 'substantially gainful activity' provided in regulations promulgated by the [SSA]"). However, you can use accepted principles within the vocational rehabilitation community – concepts that every VE (even the ones who work for VA) should be using. This means that you may incorporate SSD rules, for example, by simply explaining that those rules are standard principals that all vocational rehabilitation professionals use. You avoid VA rejecting your opinion because it is based on SSA law that way, and you strengthen your opinion by documenting that your opinion is based on sound principles accepted by your professional community. To the extent you can support that with text or journal articles, you strengthen the opinion even further.

5.1 Classifications of Work – Sedentary to Very Heavy - Sources:

As you likely know, vocational rehabilitation professionals typically follow the U.S. Department of Labor's classification of work outlined in the DICTIONARY OF OCCUPATIONAL TITLES, ("the DOT"), a publication that classifies 12,741 occupations into various categories and describes the occupational duties and requirements of those occupations. *See* http://www.oalj.dol.gov/libdot.htm. The Department of Labor stopped updating the DOT in1991, and its website explains that it is in the process of replacing the DOT with a new publication called "the O*Net." *See* http://www.onetonline.org/. O*Net's website states, "The Occupational Information Network (O*NET) is being developed under the sponsorship of the US Department of Labor/Employment and Training Administration (USDOL/ETA) through a grant to the North Carolina Department of Commerce." In other words, O*Net is an unfinished project. Not only is O*Net unfinished, its contents provide little, if any, information which can be used to address physical and mental impairments and their impact on performing the 974

occupations intended to be covered by its scope. Because of the limited functionality of O*Net, even the Social Security Administration has given a directive that O*Net is not to be used in disability evaluation. Social Security continues to rely upon the DOT. You may do so as well, simply explaining why.

The DOT classifies all work into five categories: sedentary, light, medium, heavy, and very heavy. In a typical vocational evaluation, particularly with the VA, sedentary work is the most significant, because it is the physically easiest category of work to perform (i.e., one needs the most impairment to be precluded from doing sedentary work).

"Sedentary work" is a term (or phrase) of art that has been defined by the United States Department of Labor as follows:

> 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.[1] Parsing this definition and analyzing the actual requirements of sedentary jobs is common in disability insurance litigation, and you may do so as well in VA TDIU claims. *See also Black and Decker Disability Plan v. Nord*, 538 U.S. 822, 826 (2003) (noting job class of "sedentary" required up to six hours of sitting); *Tackett v. Apfel*, 180 F.3d 1094, 1103 (9th Cir. 1999) ("[T]o be physically able to work the full range of sedentary jobs, the worker must be able to sit through most or all of an eight hour day."); *Connors v. Conn. Gen. Life Ins. Co.*, 272 F.3d 127, 136 n.5 (2d Cir. 2001) (recognizing sedentary work generally involves six hours of sitting); *Curry v. Apfel*, 209 F.3d 117, 123 (2d Cir.2000); *Wykstra v. LINA*, 849

[1] A similar definition exists quantifying "Light Work" -- "Light work involves lifting no more

F.Supp.2d 285, 295 (N.D. NY 2012) ("the generally recognized definition of sedentary work is work that 'involves up to two hours of standing or walking and six hours of sitting in an eight-hour day.'"); *Gordon v. Northwest Airlines, Inc.*, 606 F.Supp.2d 1017 (D. Minn. 2009) (noting ability to sit less than six hours per day contributed to finding of that plaintiff was unable to perform sedentary work); *Miller v. Life Insurance Company of North America*, CV 13-3028-GHK (CWx) Civil Minutes (C.D. Cal. October 1, 2014) ("Sedentary work generally is understood as requiring the ability to sit for most of a typical eight-hour workday. Being able to sit for one-third of a workday clearly is not "most" of the day."); *LaVertu v. Unum Life Ins. Co. of Am*., 2014 WL 1224736 at *13 (C.D. Cal. 2014) (de novo case) ("Unum's finding that Plaintiff was limited to sitting 'frequently' – between 2.72 and 5.28 hours in an 8-hour day – supports the conclusion that Plaintiff has less than sedentary work capacity."); *Mondolo v. Unum Life Ins. Co. of Am*., 2013 WL 178711 *8 (C.D. Cal. 2013) (abuse of discretion case) (vocational reviewer reached incorrect result when determining ability to sit frequently was compatible with performing a sedentary occupation); *Juszynski v. Life Ins. Co. of North America*, 2008 WL 877977 at *7 (N.D. Ill. 2008) (ability to sit up to 5.5 hours in a day does not corroborate a finding that plaintiff was capable of performing the duties of a sedentary occupation); *Salz v. Standard Ins. Co.*, 380 Fed.Appx. 723, 724 (9th Cir. 2010) (finding administrator was "unreasonable" in finding claimant capable of sedentary work when claimant was not able to sit for a prolonged period of time).

It is common for VA staff to determine that a veteran may be limited but is still capable of engaging in a full range of sedentary work. It seems rare that VA actually engages in a full analysis of all of the components of sedentary work. As in *Pederson,* VA will often issue a blanket conclusion that a veteran can engage in the entire class of sedentary work.

It is crucial that practitioners directly refute such a generalized statement by highlighting in the Claim File which addresses limitations that eliminate ability to do the different components

of each particular strength level. Failure to do so will be fatal to the claim. For example, when the CAVC decided *Pederson* in February 2015, the en banc court rejected an argument from the veteran that VA's decision did not properly explain the basis for its denial when it stated its finding as: "the evidence clearly demonstrates that the [veteran is physically able to perform sedentary work." 2015 WL 590779 at *9. R. at 26-27. VA had concluded that "while the [v]eteran's education and work experience may limit his employment opportunities, it does not seem that the lack of a college degree would preclude the [v]eteran from *all* sedentary employment." *Id*. However, Mr. Pederson did not point to any evidence in the record which would have refuted that conclusion. *Pederson* demonstrates that even a bald-faced conclusion by VA about a broad classification of work will stand unless a veteran challenges the conclusion and provides evidence to contradict the VA.

5.2 Exertional Impairments That Impact the Ability to Work

Disease and injury can impact the human body and mind in many ways. Limitations may or may not result from the various maladies that can befall a veteran, but if they do, the quantity and severity of those limitations are what prevent working. The phrase that is used to cover all of the ways one's range of motion can be limited is "exertional impairments." Limitations in this area often fall within quantifiable time or weight units of measure (i.e., minutes or pounds.) Some examples of activities that fall within the exertional category include:

- Lifting, pulling, pushing
- Standing
- Sitting
- Reaching
- Walking
- Crawling

- Climbing

How someone is limited in these types of activities may be itself prevent categories of work, but it needs to be documented, particularly by health care providers in their records or on forms that they are asked to complete. A Functional Capacity Evaluation (FCE) may be very helpful to document these impairments as well.

5.3 Non-Exertional Impairments That Impact the Ability to Work

There are numerous other impairments that may not be easily quantified, but which will impact the ability of a person to engage in substantial gainful activity. These "non-exertional" impairments relate to things that are not associated with a limitation in range of motion or strength. All of them should be addressed and documented as well, ideally in medical records. These include, but are not limited to:

1. Concentration deficits,
2. Inability to focus,
3. Memory deficits
4. Inability to take criticism
5. Inability to be around other people
6. Inability to accept direction for a superior
7. Pain (which may cause both physical and mental limitations)
8. Limitations in stooping (bending forward at the waist)
9. Limitation in bending down
11. Limitation in using foot pedals
12. Limitation in reaching forward or overhead
13. Balance issues
14. Vision limitations (may impact reading, focus, or understanding)

15. Problems sleeping and the impact that has on mental acuity

16. Fatigue

17. Communication limitations

Two key non-exertional limitations are expanded upon in the sections below, but every non-exertional impairment one can think of should be addressed to demonstrate a decline or elimination in the ability of the veteran to work.

5.4 Bilateral Manual Dexterity

Many courts outside of the VA context have found that limitations like: (1) intellectual and psychological limitations, including those related to the side effects of prescription medications and pain; (2) limited manual dexterity; and (3) a limited ability to remain seated for an extended period of time, are non-exertional limitations that are important aspects of vocational capacity. *See Rabuck v. Hartford Life and Accident Ins. Co.*, 522 F.Supp.2d 844, 876-77 (W.D. Mich. 2007) (holding that failure to consider non-strength limitations of former company president with short-term memory limitations rendered Transferable Skills Analysis "incredible").

We have had success in proving entitlement to TDIU for veterans based on dexterity issues, because VA rarely addresses those issues. A key component of sedentary work is the ability to engage in bilateral manual dexterity. One needs their hands to do sitting work. "[U]nskilled sedentary positions almost always require bilateral manual dexterity and rarely permit changes of position at will." *Smith v. Champion Intern. Corp.*, 573 F.Supp.2d 599, 654 (D. Conn. 2008).

The Social Security Administration has adopted this principle as well. For low skill, sedentary and light duty positions, bilateral manual dexterity, and the ability to remain in a particular posture are important non-exertional limitations. Social Security Ruling 83-14. More recently, Social Security Ruling 96-9p provided:

> *Manipulative limitations*: Most unskilled sedentary jobs require good use of both hands and the fingers; *i.e.*, bilateral manual dexterity. Fine movements of

> small objects require use of the fingers; *e.g*., to pick or pinch. Most unskilled sedentary jobs require good use of the hands and fingers for repetitive hand-finger actions.
>
> Any *significant* manipulative limitation of an individual's ability to handle and work with small objects with both hands will result in a significant erosion of the unskilled sedentary occupational base. For example, example 1 in section 201.00(h) of appendix 2, describes an individual who has an impairment that prevents the performance of any sedentary occupations that require bilateral manual dexterity (*i.e*., "Iimits the individual to sedentary jobs which do not require bilateral manual dexterity"). When the limitation is less significant, especially if the limitation is in the non-dominant hand, it may be useful to consult a vocational resource.

This ruling specifies significant limitations and loss of manipulative ability to work with both hands results in a significant erosion of unskilled sedentary occupations. The ruling also cites an example from 404 C.F.R. Appendix 2. The example cited in SSR 96-9p addresses an individual under the age of 45 with no transferable skills (i.e., skills developed from past work or education) with a right hand injury precluding bilateral manual dexterity. n such a situation, Social Security acknowledges most unskilled sedentary jobs require the use of both hands and fingers and where there is an inability to perform this type of activity, the only range of work available is significantly compromised and a finding of disability would be necessary. This example is specifically referenced in SSR 96-9p. Again, citing this as a standard vocational principle and explaining how this limitation will preclude work can make or break a claim for a veteran.

5.5 Unpredictable Symptoms – Dependability of the Worker

Courts also recognize that to maintain work, particularly unskilled jobs which are the most regimented in terms of work hours and limited breaks, a person must attend work and maintain a schedule. An advocate should argue that the VA must evaluate the impact of the veteran's service connected conditions on their ability to be dependable as a worker to conduct a complete vocational evaluation. For example, in *Ruggerio v. Fedex,* 2003 U.S.Dist.LEXIS 14048 (D.Mass. 8/14/2003), the court found that the claimant in an ERISA disability plan claim was an "unreliable

worker [because her symptoms] do not manifest in a linear fashion and, at worst, totally disable her for unspecified and unpredictable periods of time." *Also see, Bright v. Life Insur.Co. of North America,* 327 F.Supp.2d 1230 (D.Hawaii 7/21/2004)(periodic flare-ups of plaintiff's rheumatoid arthritis would prevent her from holding a job)(decision vacated); *Holler v. Hartford Life and Accident Insur.Co.,* 2005 U.S.Dist.LEXIS 25099 (S.D.Ohio 10/26/2005)(fibromyalgia produces good days and bad days); *Black v. Jefferson Pilot Financial Insurance Co.,* 2006 U.S.Dist.LEXIS 1186 (W.D.Ky. 1/12/2006)("Jefferson Pilot's conclusion that "if a fellow can hike the woods in pursuit of the elusive wild turkey he can surely do some kind or work" fails to consider the entire question" of whether someone can maintain work and earn a salary); *Thivierge v. Hartford Life & Accident Insur.Co.,* 2006 WL 823751, 2006 U.S.Dist. LEXIS 25216 (N.D.Cal. 3/28/2006)(good days and bad days prevent consistent work); *Peterson v. Federal Express Corp. Long Term Disability Plan,* 2007 WL 1624644 at *34, 2007 U.S.Dist.LEXIS 41590 at *103-104 (D.Ariz. 6/4/2007)("Finally, the court notes that a total- disability determination cannot reasonably hinge on whether an employee is minimally capable, on a good day, at the right hour, of fulfilling her job duties in barely tolerable fashion. Qualification for employment requires an ability to work effectively and to be reliable.... It is not persuasive or even plausible that another employer would put her on a payroll for work that will be performed sporadically and cannot be counted on); *Ruder v. Commonwealth Edison*, 2000 WL 1741921 *10 (N.D. Ill. Nov. 22, 2000)(Sedentary work does not exist that allows frequent breaks and rest from the worker's duties.).

Attendance at work, maintaining a schedule without excessive breaks, and avoiding calling out due to unpredictable symptoms are all factors that are significant for maintaining competitive work. Your ability to highlight any such limitations and explain their significance may be a key component to a veteran winning her/his TDIU claim.

5.6. Side Effects of Prescription Medication and Their Impact on Working

Similarly, the side effect of medications prescribed to treat a veteran's service-connected conditions could have a huge impact on a veteran's vocational situation. There are no regulations or cases in the VA arena that address this, but numerous cases outside of VA law stand for the proposition that an evaluator must consider the impact of side effects on the ability to work. *Smith v. Continental Cas. Co.*, 450 F.3d 253 (6th Cir. 2006); *Lawrence v. Motorola Inc.*, 2006 U.S. Dist. LEXIS 63730 at *18-19 (D. Ariz. Aug. 24, 2006); *Godfrey v. BellSouth Telecomms., Inc.*, 89 F.3d 755, 759 (11th Cir. 1996); *Sabatino v. Liberty Life ("Sabatino I")*, 286 F. Supp. 2d 1222, 1231 (N.D. Cal. 2003) (citing *Adams v. Prudential*, 280 F. Supp. 2d 731, 741 (N.D. Ohio 2003) and *Dirnberger v. Unum Life*, 246 F. Supp. 2d 927, 934 (W.D. Tenn. 2002)); *Conrad v. Reliance Standard*. 292 F. Supp. 2d 233 (D.Mass. 10/31/03); *Gerhardt v. Liberty Life*, 2008 U.S.Dist.LEXIS 48861 (E.D.Ark. June 17, 2008)(July 2008)(court criticized the insurer for its refusal to consider side effects of medications); *Utter v. Unum Life*, 404 F. Supp. 2d 1204 (C.D. Cal. 2005); *Chapman v. Plan Administration Committee of Citigroup, Inc*., 2008 U.S.Dist.LEXIS 2654 (W.D.N.Y. 1/14/2008). Very frequently, VA fails to do this, and a solid rationale that includes an explanation of how unpredictability will impact the veteran's ability to secure or follow work can be very effective.

6. Competitive vs. Marginal Sheltered Employment

The concept of substantial gainful activity typically involves what is called "competitive employment." **Competitive employment** is defined as employment in the national economy that provides a competitive wage when compared to similar occupations while taking into consideration education and/or past experience. This type of employment is usually 40 hours per week. It requires the worker to understand and follow guidelines regarding conduct and performance of specific job tasks associated with an occupation while observing a regular and

consistent work schedule as expected by the employer. The worker must be able to meet the pace and production standards outlined by the employer without special accommodation. The competitive employment position must be one in which the employer is required to fill for purposes of producing a specific product and or providing a specific service. If the employee cannot perform to required standards, termination results.

Contrast this with "marginal sheltered employment." **Marginal sheltered employment** is defined as employment that does not adhere to the standards normally found in competitive employment. The employee may not be required to follow the standard guidelines of conduct and performance of performing specific job tasks. The employee may not be required to maintain a typical 40-hour work week while observing a regular and consistent work schedule. Pace and production demands may be flexible. Education and past work experience may flexible. Accommodations for disability or other limitations may be provided in this setting.

Even sedentary work in a competitive market requires the ability to sit for up to 6 hours and stand and/or walk up to possibly 2 hours in an 8 hour work day, five days per week, 40 hours a week or the equivalent. The worker must be capable of maintaining the expected pace and production required by the employer and do so with minimal absences or breaks from work. The worker must also be able to complete tasks fully while maintaining appropriate relationships with coworkers, supervisors or possibly customers depending on the occupation. The service-connected disorder would have a significant negative impact preventing the veteran from performing critical job demands consistently as well as interacting with co-workers, supervisors, or the general public in an appropriate productive manner that would be required for work in the national economy even at the sedentary level.

Physical Demand Definitions from the Dictionary of Occupational Titles (Department of Labor)

S-Sedentary Work – 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.

L-Light Work - Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.

M-Medium Work - Exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Light Work.

H-Heavy Work - Exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Medium Work.

V-Very Heavy Work - Exerting in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force frequently, and/or in excess of 20 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Heavy Work.