STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

James L. Armstrong,[1]
Petitioner,

v

MTT Docket No. 16-004558

Alaiedon Township,
Respondent.

Tribunal Judge Presiding
David B. Marmon

FINAL OPINION AND JUDGMENT

The Tribunal issued a Proposed Opinion and Judgment ("POJ") on July 12, 2018. The POJ states, in pertinent part, "[t]he parties have 20 days from date of entry of this POJ to notify the Tribunal **in writing, by mail or by electronic filing, if available,** if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions)."

Neither party has filed exceptions to the POJ.

The Administrative Law Judge ("ALJ") considered the testimony and evidence and made specific findings of fact and conclusions of law. The ALJ's determination is supported by the testimony and evidence and applicable statutory and case law.

Given the above, the Tribunal adopts the POJ as the Tribunal's final decision in this case.[2] The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the POJ in this Final Opinion and Judgment. As a result:

Parcel No. 33-06-06-26-400-009 is not entitled to a disabled veteran's exemption under MCL 211.7b for the 2016 tax year.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax year(s) at issue shall correct or cause the assessment rolls to be corrected to reflect the property's disabled veteran's exemption as provided in this Final Opinion and Judgment within 20 days of entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund within 28 days of entry of this Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share

[1] James L. Armstrong and Lois Armstrong were both listed on the petition. The petition was, however, docketed under James L. Armstrong only.
[2] See MCL 205.726.

of any property tax administration fees paid and penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment, and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iii) after December 31, 2011, through June 30, 2012, at the rate of 1.09%, (iv) after June 30, 2012, through June 30, 2016, at the rate of 4.25%, (v) after June 30, 2016, through December 31, 2016, at the rate of 4.40%, (vi) after December 31, 2016, through June 30, 2017, at the rate of 4.50%, (vii) after June 30, 2017, through December 31, 2017, at the rate of 4.70%, (viii) after December 31, 2017, through June 30, 2018, at the rate of 5.15%, and (ix) after June 30, 2018, through December 31, 2018, at the rate of 5.41%.

This Final Opinion and Judgment resolves the last pending claim and closes this case.

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.[3] Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.[4] A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.[5] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[6]

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."[7] A copy of the claim must

[3] See TTR 261 and 257.
[4] See TTR 217 and 267.
[5] See TTR 261 and 225.
[6] See TTR 261 and 257.
[7] See MCL 205.753 and MCR 7.204.

be filed with the Tribunal with the filing fee required for certification of the record on appeal.[8] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[9]

By David B. Marmon

Entered: August 15, 2018
bw

[8] See TTR 213.
[9] See TTR 217 and 267.

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

James L. Armstrong,[1]
Petitioner,

v

MTT Docket No. 16-004558

Alaiedon Township,
Respondent.

Administrative Law Judge Presiding
Peter M. Kopke

PROPOSED OPINION AND JUDGMENT

INTRODUCTION

Petitioner filed this appeal disputing the denial of his request for a Disabled Veterans Exemption for Parcel No. 33-06-06-26-400-009 for the 2016 tax year. Paul V. McCord, Esq., represented Petitioner and Thomas M. Hitch, Esq., represented Respondent.

A hearing was held on April 24, 2018. Petitioner's witness was Petitioner, James L. Armstrong, and Respondent's witnesses were Heidi Roenicke, Respondent's Assessor, and Michael R. Viterna, Esq.

Based on the evidence (i.e., testimony and admitted exhibits) and the case file, the Tribunal finds that Parcel No. 33-06-06-26-400-009 is entitled to a Disabled Veterans Exemption under MCL 211.7b of 0% for the 2016 tax year.[2] As a result, the subject property's taxable value ("TV") is as follows:[3]

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1 James L. Armstrong and Lois Armstrong were both listed on the petition. The petition was, however, docketed under James L. Armstrong only.

2 Although Petitioner's January 8, 2018 Prehearing Statement listed information for both the 2016 and 2017 tax years, Petitioner's August 17, 2016 petition specifically stated that "[t]he tax year at issue is 2016." Further, no motion to amend the petition was filed requesting the Tribunal to include the 2017 tax year or, more importantly, indicating that Petitioner had requested a Disabled Veterans Exemption for that tax year and that the request had been denied by a Board of Review held by Respondent for the 2017 tax year. In that regard, the 2017 tax year would not be automatically added under MCL 205.737(5)(a), as MCL 211.7b(1) provides, in pertinent part:

> To obtain the exemption, an **affidavit** showing the facts required by this section and a description of the real property **shall be filed** by the property owner or his or her legal designee with the supervisor or other assessing officer during the period beginning with the tax day **for each year** and ending at the time of the final adjournment of the local board of review. [Emphasis added.]

2 Petitioner's January 8, 2018 Prehearing Statement listed information for both the 2016 and 2017 tax years. Petitioner's August 17, 2016 petition specifically stated, however, that "[t]he tax year at issue is 2016." Further, no

Year	TCV	SEV	TV
2016	N/A	N/A	$47,943

FINDINGS OF FACT

The following facts were proven by a preponderance of the evidence (i.e., testimony and admitted exhibits) and concern only the evidence and inferences found to be significantly relevant to the legal issues involved:[4]

1. The subject property is located at 1012 Harper Road, Mason, MI in Ingham County.
2. The property is real property used and owned by Petitioner as a homestead.[5]
3. Petitioner enlisted into the U.S. Navy on or about July 6, 1949 and was honorably discharged on or about July 7, 1950.[6]
4. Petitioner admittedly does not have a service-connected disability.[7]
5. Petitioner admittedly never applied to the U.S. Department of Veterans Affairs ("VA") for a determination that he was individually unemployable and admittedly does not carry a rating that he is individually unemployable.[8] Nevertheless, the VA sent Petitioner a

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motion to amend the petition was filed requesting the Tribunal to include the 2017 tax year or, more importantly, indicating that Petitioner had requested a Disabled Veterans Exemption for that tax year and that the request had been denied by a Board of Review held by Respondent for the 2017 tax year. In that regard, the 2017 tax year would not be automatically added under MCL 205.737(5)(a), as MCL 211.7b(1) provides, in pertinent part:

> To obtain the exemption, an **affidavit** showing the facts required by this section and a description of the real property **shall be filed** by the property owner or his or her legal designee with the supervisor or other assessing officer during the period beginning with the tax day **for each year** and ending at the time of the final adjournment of the local board of review. [Emphasis added.]

[3] See MCL 211.7b(1) (i.e., "is exempt from the collection of taxes under this act"). See also MCL 211.34d(1)(iv), which provides, in pertinent part:

> Previously exempt property. As used in this subparagraph, "previously exempt property" means property that was **exempt from ad valorem taxation** under this act on the immediately preceding tax day but is **subject to ad valorem taxation** on the current tax day under this act. For purposes of determining the taxable value of real property under section 27a . . .
>
> (C) **The value of property previously exempt** under any other section of law is the true cash value of the previously exempt property multiplied by 0.50.
>
> [Emphasis added.]

[4] The Tribunal has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to these findings.
[5] See Transcript ("TR") 4 and 20-21. In that regard, the evidence demonstrates that the property was classified as residential real, that Petitioner owned the property, and that the property had a principal residence exemption ("PRE") of 100% for the tax year at issue. See MCL 211.7cc (i.e., own and occupy).
[6] See TR 60 (i.e., "[t]here's no dispute on that").
[7] See P-1. (All of the parties' exhibits – P-1 through P-6 and R-1 through R-16 – were stipulated for admission and admitted. See TR 6.) See also TR 8-9 and 11.
[8] See TR 10, 34, and 38.

"benefits" letter dated April 12, 2016, increasing or "enhancing" his pension award that indicated, in pertinent part, that:[9]

a. His "combined service-connected evaluation" is "%."
b. He is "entitled to a higher level of disability due to being unemployable" (i.e., "Yes").
c. He is not "considered to be totally and permanent disabled due to [his] service-connected disability" (i.e., "No").
d. He has not "received a Specially Adapted Housing (SAH) and/or Special Home Adaption (SHA) grant."

ISSUES AND CONCLUSIONS OF LAW

The issue in this matter is:

> Whether Petitioner's property qualifies for a Disabled Veterans Exemption under MCL 211.7b.

MCL 211.7cc is a tax exemption statute and, as such, the Tribunal is required to "strictly construe" that statute "in favor of the taxing authority."[10] That does not, however, mean that the Tribunal "should give a strained construction which is averse to the Legislature's intent." In that regard, MCL 211.7b(1) provides, in pertinent part:

> Real property **used and owned as a homestead** by a **disabled veteran** who was **discharged** from the armed forces of the United States **under honorable conditions** or by an individual described in subsection (2) is exempt from the collection of taxes under this act.

MCL 211.7b(3) also provides, in pertinent part:

> As used in this section, "**disabled veteran**" means a person who is a **resident** of this state **and who meets 1 of the following criteria**:
>
> (a) Has been determined by the United States department of veterans affairs to be permanently and totally disabled as a result of military service and entitled to veterans' benefits at the 100% rate.
>
> (b) Has a certificate from the United States veterans' administration, or its successors, certifying that he or she is receiving or has received pecuniary assistance due to disability for specially adapted housing.

[9] See P-1. See also TR 9-11, 24-26, 33, and 35.
[10] See *Michigan United Conservation Clubs v Lansing Twp*, 423 Mich 661, 664–65; 378 NW2d 737 (1985).

(c) Has been **rated** by the United States department of veterans affairs as individually unemployable.

[Emphasis added.]

The above-exemption is an established class of exemption and, as a result, Petitioner is required to establish the property's entitlement to that exemption by a preponderance of the evidence.[11] Further, a proceeding before the Tribunal is original, independent, and de novo[12] and the Tribunal's factual findings must be supported by competent, material, and substantial evidence.[13] In that regard, "substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence."[14]

Here, Petitioner claims that Respondent improperly denied his request for a Disabled Veterans Exemption under MCL 211.7b(3)(c), as "the text of . . . section 7b(3)(c) speaks for itself and draws no line between a veteran's military service and his or her disability."[15] By way of explanation, Petitioner also claims that "[t]he Legislature merely provided that a veteran determined to be 'unemployable' by the Veteran's Administration qualifies."[16]

In denying Respondent's Motion for Summary Disposition, the Tribunal found that "[t]here is nothing ambiguous about MCL 211.7b."[17] Said finding or conclusion was, however, erroneous,[18] as the underlying statute is ambiguous or, at the very least, contains undefined terms whose definitions do not, contrary to Petitioner's argument,[19] facilitate the interpretation of the

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[11] See *ProMed Healthcare v Kalamazoo*, 249 Mich App 490, 494-95; 644 NW2d 47 (2002).
[12] See MCL 205.735a(2).
[13] See *Antisdale v Galesburg*, 420 Mich 265, 277; 362 NW2d 632 (1984) and *Dow Chemical Co v Dep't of Treasury*, 185 Mich App 458, 462-63; 462 NW2d 765 (1990).
[14] See *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-53; 483 NW2d 416 (1992).
[15] See TR 12 (i.e., "the question we have is whether or not the legislature . . . [by] using the term 'individually unemployable,' a term that's not defined – or phrase that's not defined in the statute – was incorporating into that statute the federal VA benefits system"). See also TR 95-98 (i.e., "the statute is clear . . . in the sense that it says it doesn't require a service connection under Subsection C").
[16] Although Petitioner also claims that the amendment was a "remedial measure that was undertaken by the legislature to expand" the requested exemption, retroactivity is not an issue in this case. See TR 15 and *Davis v State Employees' Ret Bd*, 272 Mich App 151, 158; 725 NW2d 56 (2006).
[17] See December 28, 2017 Order Denying Respondent's Motion for Summary Disposition. See also *Spartan Stores, Inc v City of Grand Rapids*, 307 Mich App 565, 569; 861 NW2d 347 (2014).
[18] See TR 5.
[19] Petitioner or, more appropriately, Petitioner's attorney argues that "[t]he legislature will act and take notice of laws that is enacts and cases within the State of Michigan. State legislatures do not act with knowledge of federal laws. And if a state legislature is going to incorporate a provision of federal law, they usually have to do so **directly and explicitly**." [Emphasis added.] See TR 12-14.

underlying statute.[20] More specifically, the term "rated" is not defined and the phrase or terms that make up the phrase "individually unemployable" are also undefined.[21] In that regard, the term "rated" is the past tense of "rate" and that term has been consistently defined by lay dictionaries as "the amount . . . [or] degree . . . of anything in relation to units of something else."[22] As for the term "individually," that term is an adverb, which, in the instant case, "modifies" the term "unemployable" and "individual," as an adverb, has been consistently defined as "of, relating to, or distinctively associated with an individual," while "individual," as a noun, has been consistently defined as "a particular being or thing as distinguished from a class, species, or collection: such as . . . a single human being as contrasted with a social group or

[20] See *Petersen v Magna Corp*, 484 Mich 300, 307-08; 773 NW2d 564 (2009) (citations omitted), which provides, in pertinent part:

> . . . when statutory language is ambiguous, this Court has consistently held that a court construing it may go beyond the plain language of the statute. In fact, **where the language leaves the statute's meaning ambiguous, it is the duty of the courts to construe it, giving it an interpretation that is reasonable and sensible**. Therefore, a finding of ambiguity has important interpretive ramifications. [Emphasis added.]

Peterson at 329-31 also provides, in pertinent part:

> I adopt a definition of "ambiguity" that encompasses all three of the aforementioned well-established standards for determining ambiguity. Specifically, I would hold:
>
> [W]hen there can be reasonable disagreement over a statute's meaning, or, as others have put it, **when a statute is capable of being understood by reasonably well-informed persons in two or more different senses**, [a] statute is ambiguous. For example, this Court has concluded that statutes [are] ambiguous **when one word in the statute has an unclear meaning**, when a statute's interaction with another statute has rendered its meaning unclear, or when application of the statute to facts has rendered the correct application of the statute uncertain.
>
> This standard gleans the fundamental principles from the "reasonable minds," "doubtful," and "susceptible" tests. It has been applied, in some variation, by every other state in the country, all the federal circuit courts, and by the United States Supreme Court. [Emphasis added.]

[21] See MCL 211.7b(3)(c). See also *Spartan Stores*, *supra* at 574-75, which provides, in pertinent part, "[i]f a term used in a statute is undefined, a court may look to a dictionary for interpretative assistance" citing *Klooster v City of Charlevoix*, 488 Mich 289, 304; 795 NW2d 578 (2011). See also TR 16-17.

[22] MCL 211.7b was amended to include the terms by 2013 PA 161, which requires reference to dictionaries "from the era in which the legislation was enacted." See *In re Certified Question from United States Court of Appeals for Ninth Circuit* (*Deacon v Pandora Media, Inc*), 499 Mich 477, 484-85; 885 NW2d 628 (2016) citing *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 247; 697 NW2d 130 (2005). See also RATE, *Webster's New World Dictionary* (1982) and RATE, *Merriam-Webster.com*. Merriam-Webster, n.d. Web. (July 2, 2018).

institution."[23] With respect to the term "unemployable," that term has been consistently defined as "not employable" or "cannot be employed because of age, physical or mental deficiency."[24] As for any potential "unique legal meanings,"[25] the term "rate" and "individual" have been consistently defined as "[p]roportional or relative value" and "[o]f or relating to a single person or thing," respectively.[26]

As indicated above, the definitions suggest the use of the undefined terms for purposes of measuring whether a single human being can be employed.[27] Said measurement is, however, done "directly and explicitly" by the VA relative to a "whole kaleidoscope of . . . benefit programs."[28] As a result, the undefined terms are, as indicated by Respondent, "terms of art" that require "reference to the art or science to which they [are] appropriate" (i.e., "veteran's law").[29]

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[23] See ADVERB, *Webster's New World Dictionary* (1982) and ADVERB, *Merriam-Webster.com*. Merriam-Webster, n.d. Web. (July 5, 2018). See also INDIVIDUAL, *Webster's New World Dictionary* (1982) and INDIVIDUAL, *Merriam-Webster.com*. Merriam-Webster, n.d. Web. (July 5, 2018).

[24] See UNEMPLOYABLE, *Webster's New World Dictionary* (1982) and UNEMPLOYABLE, *Merriam-Webster.com*. Merriam-Webster, n.d. Web. (July 5, 2018).

[25] See *Spartan Stores, supra* at 575 citing *People v Thompson*, 477 Mich 146, 151-52; 730 NW2d 708 (2007).

[26] Although the terms do not necessarily have "unique legal meaning[s]," the above-noted definitions are consistent with the definitions provided by lay dictionaries. See RATE, and INDIVIDUAL, *Black's Law Dictionary* (8th ed. 1999) and RATE, and INDIVIDUAL, *Black's Law Dictionary* (10th ed. 2014). As for the term "unemployable," that term has not and is not specifically defined by Black's Law Dictionary.

[27] See TR 63 (i.e., "the next . . . determination is whether or not this individual – **it's an individual determination** – isn't **capable of substantially-gainful employment**"). [Emphasis added.] See also TR 63-67.

[28] See MCL 211.7b(3)(c) (i.e., "[h]as been rated **by the United States department of veterans affairs** as individually unemployable") and *People v Blunt*, 282 Mich App 81, 84; 761 NW2d 427 (2009) (i.e., "[t]his Court considers both the plain meaning of critical words or phrases used in the statute, **and their placement and purpose in the statutory scheme**" citing *People v Hill*, 269 Mich App 505, 515; 715 NW2d 301 (2006). [Emphasis added.] With respect to said "purpose," Petitioner's attorney at TR 13-14 also stated, in response to an observation that the applicable legislative history refers to the "federal benefits system," that "the legislative history is [or, more appropriately, was] just an analysis that's done by the Senate Fiscal agency" (i.e., ""). [Emphasis added.] Although said observation was correct, the analyses do clearly indicate that the VA was, as indicated by the underlying statute itself, responsible for determining whether an honorably discharged veteran was rated as individually unemployable as follows:

Committee Summary: Senate Bill 352 (as introduced 5-7-13)
Senate Fiscal Agency - Bill Analysis (Completed 5-14-13)

> The bill would amend the General Property Tax Act to exempt from taxation the homestead of a veteran who was permanently and totally disabled **and** individually unemployable, **according to the U.S. Department of Veterans Affairs**. This would replace the current exemption for the homestead of disabled veteran who is receiving assistance for specially adapted housing . . . . The bill would define 'disabled veteran' as a person who meets **all** of the following criteria: [Emphasis added.]

- ✓ Is a resident of this State.
- ✓ Has been determined **by the U.S. Department of Veterans Affairs (USDVA)** to be permanently and totally disabled as a result of military service and entitled to veterans' benefits at the 100% rate. [Emphasis added.]
- ✓ Has been rated **by the USDVA** as individually unemployable. [Emphasis added.]

Floor Summary: Senate Bill 352 (as reported without amendment)
Senate Fiscal Agency Bill Analysis (Completed 5-21-13)

The bill would amend the General Property Tax Act to exempt from the collection of taxes real property used and owned as a homestead by a disabled veteran who was discharged from the Armed Forces of the United States under honorable conditions. The bill would define "disabled veteran" as a person who meets **all** of the following criteria:

- ✓ Is a resident of this State.
- ✓ Has been determined **by the U.S. Department of Veterans Affairs (USDVA)** to be permanently and totally disabled as a result of military service and entitled to veterans' benefits at the 100% rate. [Emphasis added.]
- ✓ Has been rated **by the USDVA** as individually unemployable. [Emphasis added.]

Committee Analysis – Senate Bill 352 (Substitute S-1, as amended by Senate)
House Fiscal Agency – Legislative Analysis (Completed 6-19-13):

A revised summary of Senate Bill 352 as reported from House Committee [6-5-13].

Senate Bill 352 (S-1) would extend the property tax exemption so that it would also apply to the principal residence of veterans who have been permanently and totally disabled (as determined **by the VA**) as the result of military service **and** are entitled to veterans benefits at the 100% rate . . . . This would appear to apply to veterans who have a total and permanent (100%) disability rating **and also veterans who have a rating of less than 100% who have an individual unemployability (IU) rating determination that entitles them to veterans disability compensation at the 100% rate even though they do not have a 100% rating**. [Emphasis added.]

Summary as Enacted: Senate Bill 352 (as enacted) Public Act 161 0f 2013
Senate Fiscal Agency Bill Analysis (Completed 11-20-13)

The bill amended the General Property Tax Act to exempt from taxation the homestead of a veteran **who is permanently and totally disabled**, is a recipient of assistance due to disability for specially adapted housing, **or** is individually unemployable. This replaces a former exemption for the homestead of disabled veteran who was receiving assistance for specially adapted housing . . . .

The bill defines "disabled veteran" as a person who is a resident of this State and meets **one** of the following criteria:

- ✓ Has been determined **by the U.S. Department of Veterans Affairs (USDVA)** to be permanently and totally disabled as a result of military service and entitled to veterans' benefits at the 100% rate. [Emphasis added.]
- ✓ Has a certificate from the U.S. Veterans' Administration, or its successor, certifying that he or she is receiving or has received pecuniary assistance due to disability for specially adapted housing.
- ✓ Has been rated **by the USDVA** as individually unemployable. [Emphasis added.]

In "reference" to veteran's law, Petitioner's attorney has, as indicated above, stated that Petitioner does not carry a rating that he is individually unemployable. Nevertheless, Petitioner's attorney has also stated that a rating is basically any benefit action taken by the VA and Petitioner did receive a "benefit letter" enhancing his pension award. Petitioner's attorney did, however, indicate he was "looking forward to hearing from Respondent's expert," as to the meaning or "question of rating."[30] In that regard, Respondent's "veteran's law" expert,[31] Mr. Viterna described the differences between the VA's compensation and pension benefits "for eligible veterans" (i.e., honorably discharged) and stated the benefits are separate and that the totally and permanently disabled finding for pension benefit purposes is "specifically" not service "related."[32] Mr. Viterna also stated that Petitioner is receiving a pension and not a compensation benefit and that Petitioner's disability is non-service connected.[33] However, Mr. Viterna did state that "[a] rating decision is a decision by the agency that talks to a specific benefit" (i.e., "when they rate you and determine the extent of your disability as relates to the schedule or outside of the schedule with extra schedule **or under 4.16**").[34] [Emphasis added.] Mr. Viterna also stated that "a rating decision that speaks to individual unemployability" is "technically . . . not a claim" (i.e., "they will speak to entitlement to individual unemployability;

See *Kinder Morgan Michigan, LLC v City of Jackson*, 277 Mich App 159, 170, 744 NW2d 184 (2007) (i.e., "legislative bill analyses do have probative value in certain, limited circumstances") and *Scott v City of South Haven*, unpublished opinion *per curiam*, issued April 19, 2018 (Docket No. 339007), p 3 (i.e., "[a]lthough not dispositive, this legislative analysis provides persuasive evidence"). See also TR 11-12, 3-38, 61 (i.e., the term "unemployable" is "much more general" than the term "individually unemployability or individually unemployable"), and www.benefits.va.gov/compensation/claims-special-individual_unemployability.asp **(**i.e., "Individual Unemployability is a part of VA's disability compensation program that allows VA to pay certain Veterans disability compensation at the 100% rate, **even though VA has not rated their service-connected disabilities at the total level**"). [Emphasis added.]

[29] See *People v Blunt*, *supra* at 83 citing *West Bloomfield Charter Twp v Karchon*, 209 Mich App 43, 51; 530 NW2d 99 (1995), quoting *Corning Glass Works v Brennan*, 417 US 188, 201; 94 SCt 2223, 41 LEd2d 1 (1974) and *People v Lange*, 251 Mich App 247, 255; 650 NW2d 691 (2002) (i.e., "when the Legislature **acts in a certain subject area**, it is **presumed** that the Legislature is aware of existing judicial interpretations of words and phrases **within that subject area**"). [Emphasis added.] See also TR 71-75 (i.e., "[t]he broad term 'unemployability' is . . . synonymous with the inability to **secure and main substantially-gainful employment**"). [Emphasis added.] See also TR 80.

[30] See TR 16-18.

[31] See TR 52-53 relative to the stipulation and admission of Mr. Viterna as an expert in VA benefits law.

[32] See TR 54-55 (i.e., "for service connection [disabilities], they provide compensation for impairment in the average veteran's ability to have a substantially-gainful occupation"), 55-57, 61-63, and 75-77 (i.e., "[t]he pension is a needs-based program that . . . [is] tied to a period of war-time service," "there's a basic pension; but then there's an enhancement"), and 61-63. See also TR 58 (i.e., "[i]t's a pension"). See TR 59 (i.e., service-connected disabilities apply to the compensation program "only").

[33] See TR 58-60 regarding the definition of service and non-service connected. See also TR 60 (i.e., "[i]t's non-service connected").

[34] See TR 67-68.

and they're speaking to 4.16").[35] [Emphasis added.] More specifically, Mr. Viterna stated that "unemployability" is considered "any time there's a claim for increase," as VA has an "obligation" to maximize a veteran's benefits (i.e., "[y]ou're not going to get both . . . . [y]ou'll either get compensation, or you'll get pension").[36] As for Petitioner's "claim," Mr. Viterna stated that:[37]

> "The VA has **not** found him to be individually unemployable. **They found him entitled to pension with the additional benefit for aid and attendance**. And that's strictly **under the pension program**." [Emphasis added.]

Mr. Viterna further indicated that the April 12, 2016 "rating decision" does not, even though it states "[y]es" in response to the question "[a]re you entitled to a higher level of disability due to being unemployable," indicate that Petitioner is individually unemployable, as his combined service-connected evaluation was "[z]ero." Rather, the "rating decision" was related to Petitioner's pension benefit only.[38] Finally, Mr. Viterna stated, in response to questioning by the Tribunal:[39]

> "They say a rating - - there's a couple meanings. One is a decision, promulgation of a decision, **tell you if you're eligible for compensation or pension**. But, when they go on to write them individually, under the compensation is where they assign the numbers based on the disability." [Emphasis added.]

Given the above, the Tribunal finds the testimony offered by Mr. Viterna sufficiently credible and documentation submitted by Respondent sufficiently reliable to support a finding that Petitioner has not been "rated" by the VA as required by MCL 211.7b(3)(c). More specifically, Petitioner has not been rated "individually unemployable." In that regard, Mr.

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[35] See TR 68.
[36] See TR 68-71.
[37] See TR 77.
[38] See TR 77-82 (i.e., "you can't get there without, A, service connection; and, B, meeting the requirements of 4.16, which is the 60,70, 40 combination"). With respect to the objection posed by Petitioner's attorney, the Tribunal finds, as indicated above, that the phrase or term "individually unemployable" is a term of art that was incorporated by the Legislature in amending the underlying statute at issue. See also TR 83-87 (i.e., "would a person be rated individually unemployable if the service-connected disability was a no . . . [n]o, that's a condition - - **a service connection is a condition prerequisite to a finding of individual employability under 4.16**"). [Emphasis added.
[39] See TR 90.

Viterna testified that this phrase or term of art has, as indicated above, a common meaning to those knowledgeable in the area of veterans affairs and veteran's law:[40]

> "When you say individual unemployability, called IU, we call it TDIU, total disability based on individual unemployability. But, **in all instances**, **it falls back to** [**38 CFR**] **4.16**, **normally** [**subsection**] **A**, **of this regulation**." [Emphasis added.]

This testimony is supported by Respondent's Exhibit R-12, a fact sheet prepared by the VA on Individual Unemployability (IU), which states, in pertinent part, that "IU is part of VA's disability compensation program that allows VA to pay certain Veterans compensation at the 100% rate, even though VA has not rated their service-connected disabilities at the 100% level." Petitioner's attorney seemed to acknowledge as much, noting that:[41]

> "[Petitioner] did not apply to the VA for what they call a UI status, individually unemployable status. He has not gone through that process, and he does not carry a rating specifically where the VA has determined that he is individually unemployable.
>
> He has a -- he has a rating but discusses that he has a disability, and we have a benefits letter that discusses his -- his increased pension award and that he's -- and that he's unemployable."

Petitioner's attorney later reiterated this point, stating, as indicated above, that:[42]

> ". . . the VA has sent him a letter. The benefits letter says he's unemployable. So we have a letter from the VA that states unemployable. **What we don't have** . . . **and what we never have had or claim to have, is that, under VA benefits law, that he has been found by the VA as individually unemployable**." [Emphasis added.]

Consequently, while 38 CFR 4.16 and 4.17 both provide for total disability ratings based on the unemployability of the individual, the phrase "individually unemployable" is a term of art that refers specifically to the compensation scheme set forth in the former (i.e., the "touchstone").[43]

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[40] See TR 81.
[41] See TR 10.
[42] See TR 10.
[43] See TR 87. See also 38 CFR 4.16 is titled "[t]otal disability ratings **for compensation** based on unemployability of the individual" [emphasis added] and provides:

> (a) Total disability ratings for compensation may be assigned, where the schedular rating is less than total, when the disabled person is, **in the judgment of the rating agency**, unable to secure or follow a substantially gainful occupation **as a result of service-connected disabilities**: *Provided* That, if there is only one such disability, this disability shall be ratable at 60 percent or more, and that, if there are two or more disabilities, there shall be at least one disability ratable at 40 percent or more, and sufficient additional disability to bring the combined rating to 70 percent or more. For the above purpose of one 60 percent disability, or one 40 percent disability in combination, the following will be considered as one disability: (1) Disabilities of one or both upper extremities, or of one or both lower extremities, including the bilateral factor, if applicable, (2) disabilities resulting from common etiology or a single accident, (3) disabilities affecting a single body system, e.g. orthopedic, digestive, respiratory, cardiovascular-renal, neuropsychiatric, (4) multiple injuries incurred in action, or (5) multiple disabilities incurred as a prisoner of war**. It is provided further that the existence or degree of nonservice-connected disabilities or previous unemployability status will be disregarded** where the percentages referred to in this paragraph **for the service-connected disability or disabilities** are met and in the judgment of the rating agency **such service-connected disabilities** render the veteran unemployable. Marginal employment shall not be considered substantially gainful employment. For purposes of this section, marginal employment generally shall be deemed to exist when a veteran's earned annual income does not exceed the amount established by the U.S. Department of Commerce, Bureau of the Census, as the poverty threshold for one person. Marginal employment may also be held to exist, on a facts found basis (includes but is not limited to employment in a protected environment such as a family business or sheltered workshop), when earned annual income exceeds the poverty threshold. Consideration shall be given in all claims to the nature of the employment and the reason for termination. [Emphasis added.]
>
> (Authority: 38 U.S.C. 501)
>
> (b) It is the established policy of the Department of Veterans Affairs that all veterans who are unable to secure and follow a substantially gainful occupation **by reason of service-connected disabilities** shall be rated totally disabled. Therefore, rating boards should submit to the Director, Compensation Service, for extra-schedular consideration all cases of veterans who are unemployable **by reason of service-connected disabilities**, but who fail to meet the percentage standards set forth in paragraph (a) of this section. The rating board will include a full statement as to the veteran's service-connected disabilities, employment history, educational and vocational attainment and all other factors having a bearing on the issue. [Emphasis added.]

While 38 CFR 4.17 is titled "[t]otal disability ratings **for pension** based on unemployability and age of the individual" [emphasis added] and provides:

> All veterans who are basically eligible and who are unable to secure and follow a substantially gainful occupation **by reason of disabilities** which are likely to be permanent shall be rated as permanently and totally disabled. **For the purpose of pension**, **the permanence of the percentage requirements of § 4.16 is a requisite**. **When the percentage requirements are met**, and the disabilities involved are of a permanent nature, a rating of permanent and total disability will be assigned if the veteran is found to be unable to secure and follow substantially gainful employment **by reason of such disability**. Prior employment or unemployment status is immaterial if in the judgment of the rating board the veteran's disabilities render him or her unemployable. In making such determinations, the following guidelines will be used:
>
> (a) Marginal employment, for example, as a self-employed farmer or other person, while employed in his or her own business, or at odd jobs or while employed at less than half the usual remuneration will not be considered incompatible with a determination of unemployability, if the restriction, as to securing or retaining better employment, is due to disability.

As such, the Tribunal finds that MCL 211.7b(3)(c) requires a rating under 38 CFR 4.16. This interpretation harmonizes the provisions of MCL 211.7b(3), as while subsection (a) appears to be the only section of the statute with a service-connected disability requirement, this requirement is inherent in the compensation scheme set forth in 38 CFR 4.16, as well as that for assistance for specially adapted housing.[44] Being inherent to these VA determinations, there would have been no need for the Legislature to specifically identify the service-connected disability requirement in subsections (b) and (c). Indeed, such inclusion would constitute surplusage rendering the fact that the Legislature "is presumed to know the rules of statutory construction and therefore its use or omission of language is generally presumed to be intentional" of no consequence.[45] This interpretation is also supported by the statute's legislative history and interpretations of the Michigan State Tax Commission ("STC").[46] While the 2013 amendment clearly expanded the statute, the Tribunal is not persuaded that it was intended to make the exemption available to those with non-service-connected disabilities. As discussed above, the legislative analyses for 2013 PA 161 refers to the IU compensation scheme, which is, although not dispositive,

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> (b) Claims of all veterans **who fail to meet the percentage standards but who meet the basic entitlement criteria and are unemployable**, will be referred by the rating board to the Veterans Service Center Manager or the Pension Management Center Manager under § 3.321(b)(2) of this chapter. [Emphasis added.]

[44] See 38 USC 2101, which provides: "(a) Acquisition of housing with special features. (1) Subject to paragraphs (3) and (4), the Secretary may assist a disabled veteran described in paragraph (2) in acquiring a suitable housing unit with special fixtures or movable facilities made necessary by the nature of the veteran's disability, and necessary land therefor. (2)(A) A veteran is described in this paragraph if the veteran (i) is entitled to compensation under chapter 11 of this title for a **permanent and total service-connected disability** that meets any of the criteria described in subparagraph (B); or (ii) served in the Armed Forces on or after September 11, 2001, and is entitled to compensation under chapter 11 of this title for a **permanent service-connected disability** that meets the criterion described in subparagraph (C)." *Id*. (emphasis added). Subsection (b) of this statute provides for adaptations to a residence of a disabled veteran as defined in 38 USC 2101(a)(2). See also 38 CFR 3.809, which provides: "In order for a certificate of eligibility for assistance in acquiring specially adapted housing under 38 U.S.C. 2101(a)(2)(A)(i) or 2101A(a) to be extended to a veteran or a member of the Armed Forces serving on active duty, the following requirements must be met: (a) General. A member of the Armed Forces serving on active duty must have a **disability rated as permanent and total that was incurred or aggravated in line of duty in active military, naval, or air service.** A veteran must be entitled to compensation under chapter 11 of title 38, United States Code, for a **disability rated as permanent and total**." *Id*. (emphasis added). 38 CFR 3.1(k) defines "service-connected" as "with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service." *Id*.

[45] See *Bronson Methodist Hospital v Allstate Ins Co*, 286 Mich App 219, 228; 779 NW2d 304 (2009).

[46] The exemption has historically been limited to veterans with a service-connected disability. The prior version of the statute exempted "real estate used and owned as a homestead by a soldier or sailor who was discharged under honorable conditions with a service connected disability . . . ," though it was limited to those receiving assistance for specially adapted housing.

persuasive evidence that the Legislature intended to make the exemption available to those with service-connected disabilities.[47] Referencing the same scheme, the STC has correctly stated that "all three disability ratings from the Department of Veterans' Affairs which qualify the veteran for an exemption require that the veteran's disability must have been service-connected," and "the . . . determinations which qualify for exemption must not be confused with other veteran's programs which provide benefits based on a disability which is not service connected."[48] Although these guidelines also do not have the force of law, "agency interpretations are granted 'respectful consideration,' and if persuasive, should not be overruled without 'cogent reasons.'"[49] As a result, Petitioner does not qualify for an exemption under MCL 211.7b(3)(c), as Petitioner does not have a service-connected disability and was awarded an enhanced pension benefit under 38 CFR 4.17 and not a compensation benefit under 38 CFR 4.16.

Based on the above, the Tribunal concludes that the subject property is not entitled to the requested Disabled Veterans Exemption for the tax year at issue as indicated in the Introduction Section of this Proposed Opinion and Judgment (POJ).

PROPOSED JUDGMENT

This is a proposed decision and **not** a final decision.[50] As such, no action should be taken based on this proposed decision **until** a final decision is issued by the Tribunal.

After the expiration of the time period for the opposing party to file a response to the exceptions, the Tribunal will review the case file, including the POJ and all exceptions and responses, if any, and:

1. Issue a Final Opinion and Judgment (FOJ) adopting the POJ as the final decision.
2. Issue an FOJ modifying the POJ and adopting the Modified POJ as the final decision.
3. Issue an Order vacating the POJ and ordering a rehearing or such other action as is necessary and appropriate.

EXCEPTIONS

[47] See *Kinder Morgan Michigan, LLC, supra and Scott, supra*.
[48] See the STC's Frequently Asked Questions on MCL 211.7b: Disabled Veterans Exemptions (2018) and STC Bulletin No. 22 of 2013, which also references the VA's Individual Unemployability Fact Sheet.
[49] See *CMS Energy Corp v Dep't of Treasury*, unpublished opinion *per curiam* of the Court of Appeals, issued October 15, 2013 (Docket No. 309172) at 4. See also *In re Complaint of Rovas against SBC Mich*, 482 Mich 90, 117-118; 754 NW2d 259 (2008).
[50] See MCL 205.726.

This POJ was prepared by the Michigan Administrative Hearings System. The parties have 20 days from date of entry of this POJ to notify the Tribunal **in writing, by mail or by electronic filing, if available,** if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions).

Exceptions are **limited** to the evidence submitted prior to or at the hearing and any matter addressed in the POJ. There is **no** fee for filing exceptions and the opposing party has 14 days from the date the exceptions were mailed to that party to file a written response to the exceptions.[51]

Exceptions and responses filed by *e-mail or facsimile* will **not** be considered in the rendering of the Final Opinion and Judgment.

A copy of a party's written exceptions or response **must** be sent to the opposing party **by mail or email, if** email service is agreed upon by the parties**, and** proof **must** be submitted to the Tribunal demonstrating that the exceptions or response were served on the opposing party.

By Peter M. Kopke

Entered: July 12, 2018
EJG/pmk

[51] See MCL 205.726 and TTR 289(1) and (2).