



The Credibility Trap: Notes on a VA Evidentiary Standard

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Essay

The Credibility Trap: Notes on a VA Evidentiary Standard

DANIEL L. NAGIN*

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I. INTRODUCTION

The system we currently use to deliver disability compensation to injured veterans is deeply flawed. This system—the service-connected disability compensation program administered today by the U.S. Department of Veterans Affairs (“VA”)—was de-

* Clinical Professor of Law; Faculty Director, Legal Services Center; Faculty Director, Veterans Legal Clinic, Harvard Law School. The author is grateful to the University of Memphis Cecil C. Humphreys School of Law and its Law Review for the invitation to speak at the veterans law symposium in spring 2015; to the symposium organizers for their hospitality; to the other symposium participants for spirited and inspiring discussions; and especially to Patricia Roberts of the Lewis B. Puller, Jr. Veterans Benefits Clinic at William & Mary Law School for her invaluable leadership to the veterans legal clinic community. This Essay reflects some of the ideas the author discussed during a presentation at the symposium. Christina Lee, Harvard Law School '16, provided excellent research assistance.

signed and built for a different era.¹ But the system's original framework persists, with enormous negative consequences.

VA's system was originally designed to consider average loss of earning capacity based on disability within the context of a mostly agrarian and industrial economy; it was not designed for today's service economy and diversified labor market.² VA's system was originally designed to consider the severity of individual disabilities based on uniform and precise measurement in percentage increments; it was not designed to take into account the enormous expenditure of time that such determinations would require when the number and complexity of disability claims multiplies, as they have in recent decades.³ VA's system was originally designed to consider a relatively narrow range of common disabilities; it was not designed to consider the multifaceted, invisible wounds of war and environmental toxins that are the hallmarks of recent conflicts.⁴ VA's system was originally designed to consider and decide disability claims that were completely insulated from judicial review; it was not designed to decide claims subject to federal court review and the growing body of court-made law that exists today.⁵ VA's nearly century-old framework has performed

1. The roots of the service-connected disability compensation program stretch back to the nation's founding. See Act of Sept. 29, 1789, ch. 24, 1 Stat. 95 (continuing payment of military pensions for one year to "invalids who were wounded and disabled during the late war"). The modern version of the program has its origins in World War I. In 1917, Congress amended the War Risk Insurance Act to allow veterans who incurred injuries, or aggravated pre-existing injuries, in the line of duty to receive ongoing payment as compensation, based on the severity of those injuries and the average loss of civilian occupational earning capacity. See War Risk Insurance Act, ch. 26, 40 Stat. 102 (1917); War Risk Insurance Act, ch. 105, 40 Stat. 398 (1917).

2. See James D. Ridgway, *Recovering an Institutional Memory: The Origins of the Modern Veterans' Benefits System from 1914 to 1958*, 5 VETERANS L. REV. 1, 3–5 (2013).

3. See A 21ST CENTURY SYSTEM FOR EVALUATING VETERANS FOR DISABILITY BENEFITS 92–138, 252–71 (Michael McGeary et al. eds., 2007).

4. See *id.* at 139–200; see generally INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY (Terri Tanielian & Lisa H. Jaycox eds., 2008).

5. See James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 135–37 (2011).

precisely as one would expect any other antique to perform when confronted by the new and more complex demands of a changing world—poorly.⁶

Today, a range of challenges besets the service-connected disability compensation system: claims backlogs, appeals backlogs, remand backlogs, layer upon layer of suffocating complexity, outmoded technology, and poor customer service.⁷ Hoping that VA's current system framework will effectively fulfill the program's fundamental goal of accurately and efficiently compensating veterans for service-connected injuries⁸—not just with respect to today's veterans, but with respect to succeeding generations of veterans too—is a risky proposition.

To be sure, there have been some modest improvements to the system in the last couple of years: the claims backlog has shrunk; modern technology is finally, if haltingly, being integrated into the program; and new initiatives may be increasing efficiency in some respects.⁹ But these improvements reflect changes at the margins. At present, nearly everyone agrees that the program

6. For a superb discussion of these and other historical considerations, how they have shaped VA's current system, and what they suggest about future reform efforts, see James D. Ridgway, *A Benefits System for the Information Age*, in GLIMPSES OF THE NEW VETERAN: CHANGED CONSTITUENCIES, DIFFERENT DISABILITIES, AND EVOLVING RESOLUTIONS 131 (Alice A. Booher ed., 2015).

7. Robert N. Davis, *Veterans Fighting Wars at Home and Abroad*, 45 TEX. TECH L. REV. 389, 400–04 (2013).

8. See VETERANS BENEFITS ADMIN., DEPARTMENT OF VETERANS AFFAIRS (VA) STRATEGIC PLAN TO ELIMINATE THE COMPENSATION CLAIMS BACKLOG 3 (2013), available at http://benefits.va.gov/transformation/docs/VA_Strategic_Plan_to_Eliminate_the_Compensation_Claims_Backlog.pdf (outlining the VA's transformation plan "to deliver faster, better decisions for Veterans").

9. Daniel L. Nagin, *Goals vs. Deadlines: Notes on the VA Disability Claims Backlog*, 10 U. MASS. L. REV. 50, 71–74 (2015). It is important to note that even the apparent improvements at VA are not without controversy. For example, there is increasing evidence that VA's efforts to reallocate resources to reduce the claims backlog have led to an increase in the VA appeals backlog. See Tara Copp, *'Tsunami' of Veterans Appeals Approaches*, WASH. EXAMINER (Jan. 22, 2015, 2:25 PM), <http://www.washingtonexaminer.com/tsunami-of-veterans-disability-appeals-approaches/article/2559098> (quoting member of House of Representatives VA subcommittee as saying "We're trading a claims backlog for an appeals backlog We're trading the devil for the witch.").

needs a meaningful overhaul to reflect modern demands, modern systems management, and modern science.¹⁰ What remains uncertain and deeply contested is what precisely that overhaul should look like. Proposals run the gamut.¹¹ What is more, the politics of veterans benefits suggests that substantial change will be controversial, no matter how well intentioned the various actors and institutions whose voices should and do count.¹²

As important as it is for veterans' advocates to consider these larger questions of systemic reform and to participate in debates about large-scale change, much work remains to be done to ensure that veterans with new and pending claims receive justice today. Thus, while the larger debate continues to unfold, it continues to be useful to dissect individual areas of veterans benefits law in order to highlight more precisely the flaws in VA's existing framework for adjudicating disability claims. By examining the choke points in the existing system, we can better ensure that today's veterans receive fair treatment—and help ensure that the lessons of the past and recent past inform the design of the next system.

10. See generally THE VA CLAIMS BACKLOG WORKING GROUP REPORT (2014) (containing recommendations for reform developed by bipartisan U.S. Senate working group).

11. Compare Rory E. Riley, *Preservation, Modification, or Transformation? The Current State of the Department of Veterans Affairs Disability Benefits Adjudication Process and Why Congress Should Modify, Rather than Maintain or Completely Redesign, the Current System*, 18 FED. CIR. B.J. 1, 3 (2008) (arguing for some amount of reform, but not radical overhaul), with *The Impact of Operation Iraqi Freedom/Operation Enduring Freedom on the U.S. Department of Veterans Affairs Claims Process: Hearing Before the Subcomm. on Disability Assistance & Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 110th Cong. 48–51 (2007) (statement of Linda J. Bilmes, Faculty, Professor, John F. Kennedy School of Government, Harvard University), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hrg34310/pdf/CHRG-110hrg34310.pdf> (recommending, among other things, that in order to address systemic delays in adjudication processes the VA should (1) grant all claims when filed and then audit, in manner akin to the IRS, a sampling of the claims to review for accuracy and (2) should simplify the disability rating categories to yield four basic levels of disability).

12. See Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155, 156–57 (1992).

To this end, this Essay explores some of the dimensions of traditional evidence law when it is applied in the realm of veterans benefits. In particular, the Essay focuses on VA credibility determinations, which have been the subject of several important court decisions in the last few years and are a common issue raised on appeal when veterans challenge adverse VA decisions on judicial review.¹³ The central point is that even though the veterans benefits field is permeated with so-called “veteran friendly” presumptions and legal doctrines, including with respect to the weighing of evidence, VA continues to disbelieve veteran claimants by relying on a common law credibility test that is too often nonsensical as applied and decidedly veteran unfriendly in practice. I call this dynamic the credibility trap.

When VA communicates to a veteran that it does not believe him or her, VA sends a powerful and disquieting message to those who have worn the uniform. So, it is especially important that VA get it right when making an adverse credibility determination. No agency can be expected to adjudicate complex cases, which disability claims very often are, with 100% accuracy. But the framework VA uses to decide whether a veteran is credible should have sufficient protections to limit the number of false negative errors. The credibility trap has downstream consequences too, beyond depriving individual veterans of earned compensation. It contributes to VA’s own administrative burdens, as claims denied on credibility grounds are prone to enter already backlogged appeal, remand, and claim reopening pipelines. The point is not

13. The role of lay evidence in VA adjudications has received increasing attention in the law review literature, although the question of VA credibility determinations regarding lay evidence generally has not received sustained analysis. See, e.g., Victoria Hadfield Moshishwili, *Ending the Second “Splendid Isolation”?* *Veterans Law at the Federal Circuit in 2013*, 63 AM. U. L. REV. 1437, 1473–80 (2014); Sarah K. Mayes, *Unraveling the PTSD Paradox: A Proposal to Simplify the Adjudication of Claims for Service Connection for Post-traumatic Stress Disorder*, 6 VETERANS L. REV. 125, 128–29 (2014); Evan R. Seamone & David M. Traskey, *Maximizing VA Benefits for Survivors of Military Sexual Trauma: A Practical Guide for Survivors and Their Advocates*, 26 COLUM. J. GENDER & L. 343, 381–83 (2014); Alison Atwater, Comment, *When is a Combat Veteran a Combat Veteran?: The Evidentiary Stumbling Block for Veterans Seeking PTSD Disability Benefits*, 41 ARIZ. ST. L.J. 243, 244–46 (2009); Andrew Woodbury, Note, *Witnesses to War: Using Lay Evidence to Assert a Veteran’s Claim for Benefits*, 23 FED. CIR. B.J. 159, 160–61 (2013).

that VA should somehow be prohibited from evaluating a veteran's credibility¹⁴ or from finding a veteran's statements incredible, or that VA should approve every claim a veteran files. Rather, as explained more fully below, the point is that the credibility trap reveals one of the less visible tensions in VA benefit scheme when common law standards from adversarial proceedings are married to the supposedly informal, non-adversarial framework of the veterans benefit system. There are important lessons from this experience for efforts to reform VA system.

II. VA SERVICE-CONNECTED DISABILITY COMPENSATION PROGRAM

VA's service-connected disability compensation program is a critical source of support for the nation's injured veterans. There are nearly 22 million veterans in the U.S.¹⁵ In 2013, 3.5 million veterans received service-connected disability compensation totaling \$54 billion.¹⁶ In the last fifteen years, as the veteran's population has aged and newer generations of veterans who served in the conflicts in Iraq and Afghanistan have entered the system, the percentage of veterans receiving service-connected compensation has more than doubled.¹⁷

There are five basic elements to a service-connected disability compensation claim. The first three are: (1) status as a veteran; (2) existence of a current disability; and (3) a connection between the veteran's service and the disability.¹⁸ If these three requirements are established, VA must then (4) decide the severity of the disability by reference to the standards found in the Schedule for Rating Disabilities.¹⁹ Finally, VA must (5) decide the date the

14. *Padgett v. Nicholson*, 19 Vet. App. 133, 145 (2005) (describing the "well-recognized role of the Board" to "assess in the first instance the credibility of the hearing testimony of a claimant"), *withdrawn*, 19 Vet. App. 334 (2005), *reinstated nunc pro tunc sub nom.* *Padgett v. Peake*, 22 Vet. App. 159 (2008).

15. CONG. BUDGET OFFICE, VETERANS' DISABILITY COMPENSATION: TRENDS AND POLICY OPTIONS 1 (2014), *available at* https://www.cbo.gov/sites/default/files/45615-VADisability_2.pdf.

16. *Id.*

17. *See VA Budget Request for FY 2016*, U.S. DEP'T VETERANS AFF., <http://www.va.gov/opa/budget-briefing-charts.asp> (last visited May 6, 2015).

18. *See* 38 U.S.C. §§ 1110, 1131 (2012); 38 C.F.R. § 3.4 (2014).

19. *See* 38 C.F.R. § 4.1.

entitlement to compensation arose.²⁰ These five elements may sound simple.²¹ However, each element is marked by enormous complexity.²²

Moreover, depending on the initial determination VA makes in a case, these steps and the evidence relevant thereto are examined and re-examined at multiple levels of administrative review. VA is made up of fifty-seven regional offices and a centralized Board of Veterans' Appeals ("BVA") in Washington, D.C.²³ The appropriate regional office—via a rating officer—is responsible for making the initial decision on a claim. If a veteran is not satisfied with the outcome at that stage—whether because VA completely denied the claim, partially denied the claim, assigned an improper disability rating, or determined an improper effective date for compensation—there are multiple layers of administrative appeal available. These include a Decision Review Officer hearing at the regional office and an appeal to the BVA, where Veterans Law Judges decide appeals from regional offices.²⁴ As described more fully in the sections to follow, at each stage of the adjudica-

20. See 38 U.S.C. § 5110; 38 C.F.R. 3.400.

21. See VETERANS BENEFITS MANUAL ch. 3 (Barton F. Stichman et al. eds., 2014) (providing an overview of the eligibility requirements for service-connected disability compensation benefits).

22. James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 295–98 (2010).

23. See *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1017 (9th Cir. 2012) (noting that veterans' disability compensation claims begin at one of the VA's fifty-seven regional offices before proceeding to the BVA); *VA Careers*, U.S. DEP'T VETERANS AFF., <http://www.vacareers.va.gov/about-va/divisions.asp> (last visited May 6, 2015); see also OFFICE OF AUDITS & EVALUATIONS, VA OFFICE OF INSPECTOR GEN., INSPECTION OF VA REGIONAL OFFICE ATLANTA, GEORGIA 18 (2014), available at <http://www.va.gov/oig/pubs/VAOIG-14-00902-207.pdf> (noting that disability claims are processed by fifty-six VA regional offices and a Veterans Service Center in Cheyenne, Wyoming); U.S. DEP'T OF VETERANS AFFAIRS, 2014 PERFORMANCE AND ACCOUNTABILITY REPORT 8 (2014), available at <http://www.va.gov/budget/docs/report/2014-VAparFullWeb.pdf> (noting fifty-six regional offices).

24. See VETERANS BENEFITS MANUAL, *supra* note 21, at pt. V (describing the VA claims adjudication process). Once the BVA issues a final decision, judicial review is available at the U.S. Court of Appeals for Veterans Claims. See 38 U.S.C. § 7252.

tion process, VA's assessment of the veteran's credibility can play a crucial role determining whether the veteran's claim is approved, only partially approved, or denied.

III. VA ASSESSMENT OF LAY EVIDENCE

In order to appreciate the troubling ways in which VA sometimes renders adverse credibility determinations within this system, one must first take into account the singular backdrop against which these credibility determinations are supposed to be made. First, unlike virtually all other administrative adjudication systems, VA's service-connected disability compensation system is intended to be uniquely pro-claimant—that is, the entire system is intended to be veteran friendly.²⁵ Second, there is no deadline by which a veteran must file a claim for service-connected disability compensation—claims may, and often are, filed years and sometimes decades after a veteran's military service, meaning that numerous evidentiary challenges may exist in adjudicating a case.²⁶ Third, VA has an affirmative duty to assist claimants throughout the benefit application and adjudication process—VA “shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim.”²⁷ Fourth, “in the veterans' context, traditional requirements for admissibility [of evidence] have been relaxed.”²⁸ Fifth, under the benefit-of-the-doubt doctrine, whenever the evidence is in equipoise, and unless a different standard applies because of the particular issue in dispute, VA must find in favor of the veteran.²⁹ And sixth, the entire VA system is intended to be fundamentally “non-adversarial.”³⁰

25. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1200 (2011).

26. James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 *VETERANS L. REV.* 113, 115–16 (2009).

27. 38 U.S.C. § 5103A(a)(1).

28. *Jandreau v. Nicholson*, 492 F.3d 1372, 1376 (Fed. Cir. 2007) (citing 28 U.S.C. 5107(b)).

29. 38 U.S.C. § 5107(b) (“When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.”).

30. *Trilles v. West*, 13 Vet. App. 314, 326 (2000) (en banc) (describing “the VA pro-claimant nonadversarial claims adjudication process”); *see also Caluza v. Brown*, 7 Vet. App. 498, 508 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir.

This backdrop, one would think, might suggest that VA would also be subject to a particularly onerous standard before it denies a claim on the basis that it disbelieves the veteran. Not so.

VA considers a veteran's statements to be "lay" evidence, as distinguished from medical evidence.³¹ Lay evidence can be critical to a successful claim for service-connected disability compensation. Such evidence may provide the critical link to establish that an in-service event occurred, that the veteran experienced illness or injury at a particular point in time, that an injury or illness has a particular origin, that an illness or injury interferes with the veteran's activities of daily living or ability to obtain or maintain employment, and the like. Numerous cases have found that lay evidence can provide the necessary link in substantiating a veteran's claim for compensation.³²

While the VA has a duty to consider pertinent lay evidence, VA "retains discretion to make credibility determinations and otherwise weigh the evidence submitted, including lay evidence."³³

1996) ("[VA] is not a party trying to disprove a claim; indeed, VA's special obligations to assist claimants are the very antithesis of adversarial claims adjudication."). It is also worth noting that—although not always directly implicated in cases involving a contested credibility determination—where a dispute does arise regarding the meaning of a veterans benefits statute, the statute must be interpreted liberally in favor of veterans. *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991)). For a discussion of the interaction of this veterans-friendly interpretative principle with other statutory interpretation doctrines, see Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner's Presumption that Interpretive Doubt Be Resolved in Veterans' Favor with Chevron*, 61 AM. U. L. REV. 59 (2011).

31. In deciding a claim, the VA must consider "all pertinent medical and lay evidence." 38 U.S.C. § 1154(a); *see also* 38 U.S.C. § 5107(b); 38 C.F.R. §§ 3.303(a), 3.307(b) (2014). While this Essay assumes that the claimant harmed by an adverse credibility determination is a veteran, the claimant before VA could just as easily be a dependent or survivor of a veteran.

32. *See, e.g., Jandreau*, 492 F.3d at 1376–77 (holding that the VA erred in concluding that veteran's lay evidence by itself was inadequate to establish element of veteran's claim).

33. *Id.* at 1376. Whether lay evidence is competent is a distinct—and antecedent—question. *Id.* at 1376–77. If lay evidence is incompetent, the credibility question is never reached. My focus is on the second question: whether and how competent lay evidence is determined to be credible or incredible.

This Essay focuses on that discretion—and how it is exercised.³⁴ In making credibility determinations, Veterans Law Judges (“VLJs”)³⁵ at the BVA may consider the following factors: interest, self-interest, bias, inconsistency, bad character, desire for monetary gain, and witness demeanor.³⁶

The seminal case regarding the credibility of lay evidence is *Caluza v. Brown*, a 1995 decision of the U.S. Court of Appeals for Veterans Claims (“the Veterans Court”) that was affirmed by the U.S. Court of Appeals for the Federal Circuit.³⁷ These courts—and the BVA—consistently cite to *Caluza* as the foundational basis for the factors VLJs should rely upon when assessing the credibility of lay evidence.³⁸ The key language in *Caluza* is this, and it is worth excerpting citations included:

The credibility of a witness can be impeached by a showing of interest, bias, inconsistent statements, or, to a certain extent, bad character. *See State v. Asbury*, 187 W. Va. 87, 415 S.E.2d 891, 895 (1992); *see also Burns v. HHS*, 3 F.3d 415, 417

34. To be clear about my goals here, the unique evidentiary issues that pertain to claims based on personal assault and military sexual trauma (“MST”) are specialized topics outside the scope of this Essay. For a discussion of those topics, see Seamone & Traskey, *supra* note 13, at 384–86. The same is true of the many questions that pertain to VA’s evidentiary standard for PTSD found in 38 C.F.R. 3.304(f), which among, other things, requires “credible supporting evidence that the claimed in-service stressor occurred.” For a discussion of that topic, see generally Mayes, *supra* note 13. Rather my purpose is at a layer removed from these subjects: to examine the tensions that exist in general when common law evidentiary standards from adversarial proceedings are married to the supposedly informal, non-adversarial framework of the veterans benefit system.

35. VLJs are agents of, and act in the name of, the BVA when they conduct appeal hearings and issue decisions. *See* VETERANS BENEFITS MANUAL, *supra* note 21, at ch. 13.1 (“Veterans Law Judges . . . are the principal actors in the BVA decision-making process . . .”). This Essay uses the terms VLJ and BVA mostly interchangeably, except in places where it is helpful to emphasize that it is an individual VLJ who presides at a hearing and makes credibility determinations regarding a veteran’s lay evidence.

36. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006).

37. 7 Vet. App. 498, 511 (1995), *aff’d*, 78 F.3d 604 (Fed. Cir. 1996).

38. *See, e.g., White v. Shinseki*, No. 08-2526, 2010 WL 1017046, at *2 (Vet. App. Mar. 22, 2010) (quoting *Caluza*, 7 Vet. App. at 511).

(Fed. Cir. 1993) (testimony was impeached by witness' "inconsistent affidavits" and "expressed recognition of the difficulties of remembering specific dates of events that happened . . . long ago"); *Mings v. Department of Justice*, 813 F.2d 384, 389 (Fed. Cir. 1987) (impeachment by testimony which was inconsistent with prior written statements). Although credibility is often defined as determined by the demeanor of a witness, a document may also be credible evidence. See, e.g., *Fasolino Foods v. Banca Nazionale del Lavoro*, 761 F. Supp. 1010, 1014 (S.D.N.Y. 1991); *In re National Student Marketing Litigation*, 598 F. Supp. 575, 579 (D.D.C. 1984).³⁹

What should be obvious from this excerpt is that the *Caluza* Court borrowed tools for assessing credibility from numerous other legal contexts and imported them wholesale into the veterans benefit context. There is nothing inherently wrong with having done so. Indeed, at the time *Caluza* was decided, the Veterans Court was but five years old, and judicial review of VA decisions was in its infancy.⁴⁰ As it set about to construct for the first time a court-made law of veterans benefits, the Veterans Court naturally needed to look to doctrines, conventions, and tools used in other legal contexts in order to fulfill the function Congress created for the Veterans Court.⁴¹

We should ask, however, whether VLJs have used the factors first articulated in *Caluza* in a defensible and appropriate way—one that fits the singular ecosystem of the veterans benefits framework. In a system intended to be veteran friendly and non-

39. *Caluza*, 7 Vet. App. at 511.

40. See Veterans' Judicial Review Act, Pub. L. No. 100-687, § 4051, 102 Stat. 4105 (1988) (codified as amended at 38 U.S.C. § 7251 (2012)) (establishing the Court of Veterans' Appeals).

41. But see *Hodge v. West*, 155 F.3d 1356, 1361 (Fed. Cir. 1998) (admonishing Veterans Court for looking outside the veterans benefit context to guide interpretation of veterans benefit statute and regulations). For a discussion of the increasing trend in the other direction (that is, towards incorporating elements of law from outside the veterans benefits context), see Hadfield Moshishwili, *supra* note 13, 1511–12.

adversarial, where substantial gaps in time between a veteran's military service and the adjudication of his or her claim can create difficult evidentiary questions, where the agency has a statutory duty to assist the veteran, where the benefit of the doubt must be given to the veteran, and where there are widespread and lengthy delays in deciding individual claims and appeals once they are filed—given all of this, has it made sense for VLJs to use the same factors to determine a veteran's credibility as a trier of fact would use for a plaintiff testifying in a tort suit or a defendant in a criminal trial?

It turns out that the informality and non-adversarial process that are supposed to be the hallmarks of the veteran-friendly VA system have, in perhaps surprising ways, created genuine challenges in the area of credibility determinations.

IV. VA CREDIBILITY DETERMINATIONS

Decisions by VLJs and the Veterans Court about witness credibility frequently cite *Caluza*, and they frequently refer to one sentence from *Caluza* in particular: “[t]he credibility of a witness can be impeached by a showing of interest, bias, inconsistent statements, or, to a certain extent, bad character.”⁴² Particularly telling is the *Caluza* Court's phrasing here: witnesses can be “impeached” when certain “showing[s]” are made.⁴³ This language invokes the trappings of a traditional adversarial proceeding, where each side in the litigation is armed with attorney representation and seeks through questioning to undermine the credibility of the adversary's witnesses. Indeed, the *Caluza* Court derived this key sentence from the 1992 West Virginia Supreme Court decision in *State v. Asbury*.⁴⁴ In *Asbury*, the West Virginia Supreme Court affirmed a defendant's conviction for assault following a jury trial.⁴⁵ The *Asbury* Court saw no error in the prosecutor's cross examination of a defense witness, finding that the questions were a

42. See, e.g., *White*, 2010 WL 1017046, at *2 (quoting *Caluza*, 7 Vet. App. at 511).

43. *Caluza*, 7 Vet. App. at 511.

44. 415 S.E.2d 891, 895 (W. Va. 1992) (“The term ‘credibility’ includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness’ character.”).

45. *Id.* at 897.

proper and expected attempt by one party to impeach an adverse witness's credibility through cross-examination suggesting bias or interest.⁴⁶

VA benefit adjudications exist in an entirely different universe.⁴⁷ In appeal hearings before a VLJ, there is no such cross-examination of a veteran.⁴⁸ Counsel does not represent VA. A VLJ will of course ask questions of a veteran to elicit relevant evidence and develop the record, but a VLJ is not permitted to cross-examine the veteran and should not be in the business of making a "showing" of any kind.⁴⁹ VA is prohibited from seeking to defeat the veteran's claim.⁵⁰

The credibility standard identified in *Caluza* therefore—at least rhetorically—seems quite out of place in the non-adversarial veteran-friendly context of VA appeals. In this way, as an initial matter, we might be concerned that the rhetoric found in *Caluza* may contribute to unjustifiably aggressive adverse credibility determinations by VLJs. Whether *Caluza* is a contributing factor or not, there is ample evidence that VLJs have frequently exceeded their authority in discrediting lay evidence from veterans.⁵¹

46. *Id.*

47. *See supra* notes 25–30 and accompanying text.

48. 38 C.F.R. § 20.700(c) (2014) ("Parties to the hearing will be permitted to ask questions, including follow-up questions, of all witnesses but *cross-examination will not be permitted.*" (emphasis added)).

49. *Id.*

50. *Manio v. Derwinski*, 1 Vet. App. 140, 144 (1991) ("Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits. . . . I[m]plicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. Even then, VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof." (alteration in original) (emphasis omitted) (quoting H.R. Rep. No. 100-963, at 13, *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795)).

51. *See, e.g., Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006) (stating that the VA's interpretation of the standard for assessing the credibility of lay evidence—which, in the VA's view, required lay evidence to be corroborated by medical evidence—is "legally untenable"); *Kahana v. Shinseki*, 24 Vet. App. 428, 433 n.4 (2011) ("We generally agree . . . that too often the

But there is another concern about the *Caluza* standard that has more to do with process than substance—and about which we should be equally, if not more, troubled. This is where the credibility trap truly comes into play. In a traditional adversarial proceeding in which one party seeks to impeach the other party's witness, the second party will always have the opportunity to attempt to rehabilitate the witness whose credibility has been undermined. Whether through questions proffered on re-direct, through a rebuttal witness, or through closing argument, a party can always take steps before the case is submitted for decision to respond and to defend a witness's credibility.⁵²

In the non-adversarial context of a VLJ hearing, the veteran has no opportunity to rehabilitate himself, except perhaps in one narrow circumstance. If the regional office decision on appeal to the VLJ denied the claim by finding the veteran's lay evidence incredible, then the veteran is presumably on notice to some extent that his credibility is at issue. The veteran is aware that he should use the opportunity of the VLJ hearing to seek to bolster his credibility by explaining inconsistencies, providing context for past statements, offering corroborating evidence, making a strong personal presentation, or the like.⁵³ If the regional office denied the veteran's claim in whole or part on the basis of finding the veteran's lay evidence incredible, the veteran would receive notice of

Board makes overbroad categorical statements regarding the competency and credibility of lay testimony.”).

52. What is more, an attorney can also seek, in the moment, to protect a witness who is being impeached on cross-examination—by objecting to the questions that are being proffered. Such objections might go to the form of the question or the substance of the question. Timely and well-grounded objections may have the effect of limiting the harm done to a witness whose credibility is under attack. For a general discussion of impeachment and rehabilitation of witnesses in an adversarial proceeding, see Penny J. White, *The Art of Impeachment and Rehabilitation*, PRAC. LITIGATOR, Mar. 2002, at 29.

53. While this sentence and others use the male pronoun to refer to the veteran, it must be noted that an increasing percentage of veterans are women. See generally NAT'L CTR. FOR VETERANS ANALYSIS & STATISTICS, U.S. DEP'T OF VETERANS AFFAIRS, AMERICA'S WOMEN VETERANS: MILITARY SERVICE HISTORY AND VA BENEFIT UTILIZATION STATISTICS I (2011), available at http://www.va.gov/vetdata/docs/specialreports/final_womens_report_3_2_12_v_7.pdf (stating that by 2035 women will make up 15 percent of all living veterans).

the adverse credibility finding via the Statement of the Case issued by the regional office or the written decision issued by the Decision Review Officer (“DRO”) in cases where the veteran requested review by a DRO.⁵⁴ The VLJ would then reinforce that notice and be duty bound to explain to the veteran at the outset of the BVA appeal hearing that the question of credibility is before the VLJ and to suggest to the veteran the submission of evidence that might help him substantiate his claim.⁵⁵ As discussed below in Part V, this scenario—particularly with respect to the regional office placing the veteran on notice in the first instance that his personal credibility has been rejected—may not be very likely at all.

In any event, outside of this single circumstance, a VLJ’s determination that the veteran’s lay evidence is incredible will, almost by definition, catch the veteran off guard. The veteran will have no opportunity to respond at all before the VLJ issues the Board’s final decision in the matter. Instead, the veteran will first learn that his credibility was even in question when he receives the final Board decision in his appeal.⁵⁶ This is the credibility trap. It exists not because of nefarious actors but because of dynamics inherent to the current veterans benefit framework.⁵⁷

First, a VLJ is extraordinarily unlikely to declare during an appeal hearing that the VLJ has already found—or is inclined to find or is considering finding—the veteran incredible. Indeed, to do so would presumably violate the VLJ’s duty to impartially consider the evidence in the case and to avoid pre-adjudicating the case.⁵⁸

54. See VETERANS BENEFITS MANUAL, *supra* note 21, at pt. V (providing an overview of the VA claims adjudication process).

55. 38 C.F.R. § 3.103(c)(2) (2014); see also *Bryant v. Shinseki*, 23 Vet. App. 488, 496–97 (2010); *Procopio v. Shinseki*, 26 Vet. App. 76, 81 (2012).

56. At this point, the record is closed and the only further appeal is to the Veterans Court.

57. See *Arneson v. Shinseki*, 24 Vet. App. 379, 382 (2011) (“Unlike a traditional judicial appeal where review is of the record, the opportunity for a personal hearing before the Board is significant because it is the veteran’s one opportunity to personally address those who will find facts, make credibility determinations, and ultimately render the final Agency decision on his claim.” (citing *McDowell v. Shinseki*, 23 Vet. App. 207, 214 (2009)))

58. See *Bryant*, 23 Vet. App. at 496 (stating that “there is no requirement to preadjudicate an issue or weigh the evidence” and that a VLJ “should focus

Second, the informal, non-adversarial nature of a VLJ hearing makes it unlikely that a veteran will receive even informal and indirect warning that a VLJ questions his credibility. It might be appropriate to expect an experienced litigator to detect during a trial that a line of questioning to a witness reflects skepticism about the witness's credibility, and to further expect the experienced litigator to respond in the moment through the give and take of a trial to protect and bolster his witness. But that is not the format of a VLJ hearing, that is not the design of the veterans benefit adjudication system, and those are not appropriate expectations for *pro se* veterans or non-attorney advocates.⁵⁹ Most veterans appear before VLJs with non-attorney representation.⁶⁰

Third, a sizeable number of appeals are decided without a hearing—meaning there is no opportunity for the veteran in those cases to interact directly with the VLJ and to receive even minimal cues that the VLJ views, or might view, the veteran's credibility with skepticism.⁶¹

on the issues that remain outstanding, and whether evidence has been gathered as to those issues”).

59. See *Forshey v. Principi*, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (Mayer, C.J., dissenting) (“[T]he veterans’ system is constructed as the antithesis of an adversarial, formalistic dispute resolving apparatus. It is entirely inquisitorial in the regional offices and at the Board . . . where facts are developed and reviewed. The purpose is to ensure that the veteran receives whatever benefits he is entitled to, not to litigate as though it were a tort case.”). To be clear, in making these arguments, I am not suggesting that more formalistic procedures akin to a civil trial and correspondingly greater attorney involvement in the VA system are the solution. Whether the VA benefit system should be open or closed to attorney representation of veterans, should encourage or discourage attorney representation, should limit or expand the role of attorneys based on the stage of the case—all are questions of considerable controversy, complicated history, and continuing debate. For a discussion of some of the general tensions between formality and informality and between inquisitorial and adversarial modes in the mass administration of benefit claims, see generally JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983); Jon S. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289 (1997).

60. See U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS’ APPEALS: ANNUAL REPORT 25 (2013), available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2013AR.pdf.

61. See *id.* at 27.

And fourth, the BVA—unlike the regional offices—is required by statute to provide reasons or bases for its decision, including the reasons or bases for its credibility determinations.⁶² This is the first moment when VA is duty bound to explain in greater detail the grounds for its decision.

Put together, we are left with a troubling paradox. VLJs possess wide latitude to decide whether a veteran's lay evidence is credible—the same wide latitude that a judge would possess when presiding at a traditional adversarial bench trial. But, unlike the parties participating in such a bench trial, the informal and non-adversarial design of VA appeal process deprives many veterans of the opportunity to effectively defend themselves against an attack on their credibility.

To underscore the point that veterans may receive no meaningful notice at the agency level that their credibility is very much in dispute, consider that the Veterans Court described the reasons or bases requirement found in 38 U.S.C. § 7104(d)(1) for VLJ decisions as “serv[ing] a function similar to that of cross-examination in adversarial litigation.”⁶³ In other words, it is only in the written final decision that marks the end of the administrative process that the adjudicator must show his hand with respect to his assessment—or, as the case may be, his critique—of the evidence, including a veteran's lay evidence. The Veterans Court's use of the term “cross-examination” is telling because it is suggestive of precisely what I have argued here—that VLJs, understandably given their assigned role, engage in a kind of adversarial cross-examination of the evidence through their written decisions, but in doing so of course afford no opportunity for the witness to respond, explain, or rebut the problems seized upon by the VLJ.

In short, when a veteran first learns that his credibility is under attack and the specific basis for that attack, it is often too late to do anything to defend himself before the agency. Hence the term “trap” to describe this phenomenon. A veteran who disagrees with a VLJ's credibility finding can certainly appeal to the Veter-

62. 38 U.S.C. § 7104(d)(1) (2012); 38 C.F.R. § 3.103(f) (2014); *see also Bryant*, 23 Vet. App. at 494 (“[T]he Board's statement of reasons or bases was inadequate”); *Procopio v. Shinseki*, 26 Vet. App. 76, 84 (2012) (“[T]he Board's statement of reasons or bases was not inadequate”).

63. *Gabrielson v. Brown*, 7 Vet. App. 36, 40 (1994).

ans Court.⁶⁴ But there, the veteran is generally precluded from offering new evidence to rehabilitate his credibility or otherwise.⁶⁵ Moreover, the Veterans Court will review the VLJ's adverse credibility finding under a deferential standard—whether the VLJ's finding was clearly erroneous.⁶⁶ The veteran's best hope might be to argue to the Veterans Court that the VLJ failed in his written decision to provide adequate reasons or bases for disbelieving the veteran, in violation of 38 U.S.C. § 7104(d)(1). Whether this argument is successful will depend on the extent to which the VLJ adequately justified in his written decision the adverse credibility finding. Even then, if the veteran is successful in his appeal to the Veterans Court, the veteran will secure only a remand back to the BVA for further proceedings. The veteran will have spent many months—if not more than a year—just to get right back where he started.

V. A CASE EXAMPLE

While there do not yet appear to be any reported cases that address this paradox, the problem is percolating beneath the surface. Consider the following case, an otherwise unremarkable appeal which resulted in an unpublished memorandum decision from the Veterans Court.⁶⁷ A veteran filed a claim with VA for service-

64. See 38 U.S.C. §§ 7252(a), 7266 (providing the Veterans Court with exclusive jurisdiction over BVA appeals and procedures for filing a notice of appeal). True, a veteran can also file a motion for reconsideration with the BVA itself. See 38 C.F.R. § 20.1000. However, that is typically an unfruitful strategy. See VETERANS BENEFITS MANUAL, *supra* note 21, at ch. 14.3.1 (describing reasons that motions for reconsideration are “generally not an effective means for obtaining a change in a previous final BVA decision”).

65. See 38 U.S.C. § 7252(b) (“Review in the Court shall be on the record of proceedings before the Secretary and the Board.”).

66. 38 U.S.C. § 7261(a)(4).

67. This same troubling dynamic—veterans who have been blindsided by adverse credibility findings in BVA decisions—can be seen in some of the cases we have reviewed and accepted on referral for our Veterans Court docket at the Veterans Legal Clinic. These case referrals prompted much of my thinking about the role of BVA credibility findings in the veterans benefit system. The Veterans Legal Clinic is part of the Legal Services Center of Harvard Law School, a community-based public interest law firm and clinical teaching program.

connected disability compensation.⁶⁸ The regional office denied the claim, but did not state in its decision to deny that the veteran's personal credibility had anything to do with the adverse outcome. The veteran appealed the denial to the BVA, where the case was assigned to a VLJ. The VLJ denied the claim because the VLJ found the veteran not credible about an in-service occurrence.⁶⁹

At the Veterans Court, the veteran argued through counsel that the BVA's decision to deny the claim based on an adverse credibility determination was fundamentally unfair given that the regional office had never specifically called the veteran's personal credibility into question.⁷⁰ Counsel argued that the veteran was therefore never properly on notice that his credibility would be in dispute at the BVA, in violation of *Bernard v. Brown*.⁷¹ In *Bernard*, the Veterans Court found that the BVA erred when, without advance notice to the veteran, it proceeded to reopen a claim and decide that claim on the merits in circumstances where the regional office has denied the claim to reopen and never developed or adjudicated the merits.⁷² The BVA's decision to adjudicate the claim on the merits undermined the "extensive procedural requirements to ensure a claimant's rights to full and fair assistance and adjudication in the VA claims adjudication process."⁷³

The Veterans Court rejected counsel's argument that the principle articulated in *Bernard* applied to the BVA's decision to make an adverse credibility determination without first placing the veteran on adequate notice of that risk. In rejecting counsel's argument, the Court made three points. First, *Bernard* was distinguishable because, unlike adjudicating a claim to reopen at the BVA in the first instance, the question of credibility is inherently subsumed within claims on appeal.⁷⁴ So long as the regional office had adjudicated the veteran's claim for compensation, then the veteran's credibility was fair game for the BVA to consider, even if the regional office had been silent on the credibility question or

68. *Stegall v. Shinseki*, No. 10-3268, 2012 WL 445919, at *1 (Vet. App. Feb. 14, 2012).

69. *Id.* at *2.

70. *Id.* at *1.

71. *Id.* (citing *Bernard v. Brown*, 4 Vet. App. 384 (1993)).

72. *Bernard*, 4 Vet. App. at 394.

73. *Id.* at 392.

74. *Stegall*, 2012 WL 445919, at *2.

had even found the veteran credible.⁷⁵ Second, the veteran should have been on notice that his credibility would be an issue before the BVA because it was an obvious question in the case and the regional office had sent notices describing the types of corroborating evidence the veteran might obtain.⁷⁶ And third, the Court noted that the veteran had recourse by virtue of the instant appeal to the Court, where the veteran could argue that the BVA was clearly erroneous in finding the veteran not credible or failed to offer adequate reasons or bases for finding the veteran not credible.⁷⁷ In other unpublished memorandum decisions, the Veterans Court has rejected a version of this same argument for nearly identical reasons.⁷⁸

The Veterans Court's resolution of this argument is certainly understandable to a point. As one of the unpublished decisions put it, there is no existing authority "for the proposition that a party must be notified that his credibility, or the credibility of any evidence, is for consideration."⁷⁹ Sure enough, the *Bernard* decision that served as the linchpin of the veterans' arguments did not involve a credibility determination. Instead, it involved a BVA decision—without notice to the veteran—to reopen a claim and determine the merits of that claim where the regional office had done neither.⁸⁰

75. See *id.* at *2 ("[T]he board has jurisdiction to decide any question pertaining to a matter that the [regional office] has decided. . . . The determination of credibility of any evidence pertaining to such matters is a fundamental function that is committed to the Board." (citations omitted)).

76. *Id.*

77. *Id.*

78. See, e.g., *Dailey v. Shinseki*, No. 11-2660, 2013 WL 1964837, at *6 (Vet. App. May 13, 2013); *Cavalli v. Shinseki*, No. 11-1898, 2012 WL 6082708, at *3 (Vet. App. Dec. 7, 2012).

79. *Dailey*, 2013 WL 1964837, at *6.

80. The holding in *Bernard* did not explicitly limit the principle that the veteran must be given adequate advance notice to the BVA's potential adjudication of previously unadjudicated "claims," a term that has a particular legal meaning within the veterans benefits scheme. See, e.g., *Cacciola v. Gibson*, 27 Vet. App. 45, 53 n.2 (2014) ("Although there have been efforts to definitively define what is and is not a 'claim,' such efforts have not produced uniformity."). The *Bernard* court used the term "questions":

[T]he [c]ourt holds that[] when . . . the [BVA] addresses in its decision a *question* that had not been addressed by the [re-

What is missing from the discussion, however, is a fuller sensitivity to the difference between credibility being at issue in a general sense and a veteran's credibility being subject to attack on specific grounds. For starters, regional office initial rating decisions, Statements of the Case, and decisions from DROs, are typically long, intricate documents filled with boilerplate language.⁸¹ And when such documents finally address the facts of an individual veteran's case, they are written at a fairly high level of generality. Even when they may suggest indirectly that the regional office disbelieves a veteran, they almost never give a reason, let alone a specific reason.⁸² Instead, a regional office decision will, for example, in a personal assault case, state in conclusory and non-personalized terms that "[t]he evidence of record does not provide credible evidence that the claimed stressor occurred."⁸³ Or in the case of an in-service sexual assault, the decision will state, "To this date the record of evidence has not shown that a military sexual

gional office], it must consider whether the claimant has been given adequate notice of the need to submit evidence or argument on that *question* and an opportunity to submit such evidence and argument and to address that *question* at a hearing, and, if not, whether the claimant has been prejudiced thereby.

Bernard v. Brown, 4 Vet. App. 384, 394 (1993) (emphasis added). A "question" is "[a]n issue in controversy; a matter to be determined." BLACK'S LAW DICTIONARY 1366 (9th ed. 2009). According to the Veterans Court, *Bernard* is not helpful here because a veteran's credibility is always in controversy—is always a matter to be determined. See *Dailey*, 2013 WL 1964837, at *6 (providing that "credibility determinations are an inherent part of every decision by a trier of the fact[,] including decisions of the regional offices and the BVA).

81. For discussions of VA's use of lengthy and unhelpful boilerplate notices, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-395, VETERANS BENEFITS ADMINISTRATION: CLARITY OF LETTERS TO CLAIMANTS NEEDS TO BE IMPROVED 35–38 (2002), available at <http://www.gao.gov/assets/240/234416.pdf>; David E. Boelzner, *In Sight, It Must Be Right: Judicial Review of VA Decisions for Reasons and Bases vs. Clear Error*, 17 RICH. J.L. & PUB. INT. 681, 693 (2014); Ridgway, *supra* note 26, at 121.

82. Decisions issued by the regional office—whether in the form of initial rating decisions, DRO decisions, or Statements of the Case—are not subject to the adequate reasons or bases requirement. These decisions must give a reason for the decision and a summary of the evidence considered, but specifics or adequate explanations are not required. 38 U.S.C. § 5104 (2012).

83. Redacted documents from this case are on file with the author.

trauma took place.”⁸⁴ The veteran will typically be provided no further explanation for why his or her lay account of what occurred has been disbelieved. Indeed, decisions will rarely if ever even convey the sense that the veteran has actually been personally disbelieved—only that more evidence is needed if the claim is to be substantiated. For these reasons, even where a veteran is arguably on notice that something like credibility is at issue, it is only in the most vague and non-specific sense. The veteran will not have any inkling of the specific reasons—such as particular alleged inconsistencies in the veteran’s lay evidence—that led to the failure to convince the regional office.

Whether or not the regional office denied the claim for reasons having anything to do with the credibility of the veteran’s lay evidence, the BVA of course serves as the final agency arbiter of the veteran’s credibility.⁸⁵ As described above, however, unlike a party in an adversarial proceeding who can readily identify during the course of motion practice or trial the specific bases for an attack on his credibility and can take steps to respond to the attack, a veteran appealing to the BVA will typically have no warning of the specific inconsistencies, alleged biases, or other grounds a VLJ might rely on to discredit the veteran.⁸⁶ The veteran will first receive notice of these grounds when the appeal is over—that is, when the veteran receives final agency action in the form of a BVA decision.

84. Redacted documents from this case are on file with the author.

85. See *Arneson v. Shinseki*, 24 Vet. App. 379, 382 (2011) (“[T]he opportunity for a personal hearing before the Board is significant because it is the veteran’s one opportunity to personally address those who will find facts, make credibility determinations, and ultimately render the final Agency decision on his claim.” (citing *McDowell v. Shinseki*, 23 Vet. App. 207, 214 (2009))).

86. To be clear, pursuant to *Bryant* and *Procopio*, a veteran might be told by the VLJ at the appeal hearing what additional evidence might be needed to substantiate the claim. However, that is quite different than putting the veteran on notice that there are specific grounds for calling into question his credibility, identifying those grounds, and providing the veteran an opportunity to respond directly to the particular grounds cited. The submission of additional evidence may not be responsive directly to the specific grounds the VLJ considers.

VI. THE CREDIBILITY TRAP IN ACTION

To appreciate how the credibility trap actually plays out in practice—and to highlight how the BVA is prone to overreach in making adverse credibility determinations—it is helpful to look at the specific facts in dispute in a case example. As it happens, the very same unpublished case decision described above—in which counsel unsuccessfully argued to the Veterans Court that the BVA had violated *Bernard* by blindsiding the veteran with its credibility determination—provides a revealing exemplar.

There, the veteran had filed a claim for disability compensation stating that he had mental disorders arising from an in-service physical assault.⁸⁷ According to the veteran, the regional office denied the claim without addressing his personal credibility.⁸⁸ The veteran appealed to the BVA, where a hearing was conducted. In the written decision following the hearing, the BVA agreed that the veteran was suffering from diagnosed mental disorders.⁸⁹ The BVA also agreed that there is “at least provisional medical evidence linking [the veteran’s] disability to an in-service injury, the alleged beating.”⁹⁰ The BVA, however, found that the in-service personal assault never occurred.⁹¹ According to the BVA, the veteran’s account of the assault was “not credible, given inconsistencies in statements made to VA, and given a lack of documentation from civilian and military authorities regarding the alleged assault.”⁹² The BVA decision went on to identify what it described as multiple inconsistencies in the veteran’s lay evidence.⁹³ From all appearances, the veteran did not learn that the BVA had identified these putative inconsistencies and considered them decisive to the outcome of the case until the BVA issued its written decision.⁹⁴

87. *Stegall v. Shinseki*, No. 10-3268, 2012 WL 445919, at *1 (Vet. App. Feb. 14, 2012).

88. *Id.* at *2.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

One by one, the Veterans Court concluded that the BVA failed to provide adequate reasons or bases for finding the veteran's lay evidence incredible. Among other things, the BVA had found the veteran not credible because of an absence of certain records.⁹⁵ This is an extraordinarily common basis for the BVA to discredit a veteran's lay evidence, a dynamic the Veterans Court and the Federal Circuit have repeatedly sought to curtail.⁹⁶ The records in question in this case were law enforcement records regarding the assault, which the veteran said he had reported to authorities at the time.⁹⁷ The BVA issued its decision in 2010.⁹⁸ The alleged assault occurred forty-six years earlier, in 1966.⁹⁹ The record in the case indicated that local law enforcement had informed VA that it did not have records from as long ago as 1966.¹⁰⁰ In scathing language, the Veterans Court declared that "[i]t is hardly logical to derive a negative credibility finding, even in part, because the [veteran's] allegations are not corroborated by nonexistent records."¹⁰¹

The BVA also found the veteran not credible because "variations [had] occurred in [his] story since the filing of his claim."¹⁰² This too is a common basis for finding a veteran not credible, as it is not difficult to locate putative inconsistencies in records that span hundreds if not thousands of pages and many years of a veteran's life. Here, the BVA seized upon the following variation: in filing his claim with VA, the veteran stated that personnel from one branch of service assaulted him; at the hearing before the BVA, the veteran stated that personnel from a different branch of service assaulted him.¹⁰³ The Veterans Court found this rationale from the BVA lacking:

95. *Id.* at *6.

96. *See, e.g., AZ v. Shinseki*, 731 F.3d 1303, 1311 (Fed. Cir. 2013); *Buczynski v. Shinseki*, 24 Vet. App. 221, 224 (2011) (holding that the BVA may not treat absence of evidence as substantive negative evidence).

97. *Stegall*, 2012 WL 445919, at *6.

98. *Id.* at *1.

99. *Id.*

100. *Id.* at *6.

101. *Id.*

102. *Id.*

103. *Id.*

It is clear from all the veteran's testimony . . . that he did not know the men who allegedly attacked him and that he was speculating on who they might have been from second-hand hearsay. The [c]ourt does not perceive that any inconsistency about such a peripheral matter is to be used as grounds for a negative credibility determination.¹⁰⁴

The BVA also found evidence that the veteran was “fabricating his story” by pointing to a single line in a psychologist's report.¹⁰⁵ In that line, the psychologist observed that it was not clear to the psychologist whether the veteran had “actual memories” of the assault or had “reconstructed it later by interviewing several people who witnessed it.”¹⁰⁶ This, the Veterans Court concluded, was an entirely insufficient basis to suggest fabrication on the part of the veteran. According to the Veterans Court, the psychologist's statement “neither highlight[s] an inconsistency nor logically lead[s] to a conclusion of fabrication.”¹⁰⁷ Rather, the psychologist's statement simply reflected that the psychologist “was uncertain where memory left off and hearsay began.”¹⁰⁸

The Court concluded its assessment of the BVA's credibility findings by counseling the BVA: “Sometimes corroboration or refutation of allegations such as those presented in this case is not merely a matter of reviewing documents.”¹⁰⁹ The Court set aside the BVA decision and remanded the case for further proceedings and readjudication.¹¹⁰

The point is that each of the BVA's grounds for finding the veteran incredible was relatively easy to rebut, if not refute outright. But only if one knows these grounds are being considered by the BVA. Had the veteran been on notice that the BVA was challenging his credibility on these grounds, he—and his advocate—had ready and persuasive responses: the lack of documentation from law enforcement should be immaterial because law en-

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at *7.

110. *Id.*

forcement has not maintained records from that period; the inconsistency in describing the branch of service of his attackers should not be given significance because it is a trivial difference and the veteran acknowledged he could only speculate about the identity of his attackers; the single sentence from the psychologist's report simply should not, by its own terms, suggest fabrication on the part of the veteran.

VII. REMEDIES

The credibility trap is at odds with a system that is intended to be non-adversarial, uniquely pro-claimant, and veteran friendly, and in which VA has a duty to assist the veteran and to apply the benefit of the doubt doctrine to the evidence. What, if any, remedy exists for the credibility trap? Fully exploring potential remedies is beyond the purpose of this short Essay. For the moment, a few general possibilities are worth mentioning—none of them, however, without weaknesses.

Some potential remedies are within the Veterans Court powers. First, the Veterans Court introduced the *Caluza* credibility standard into VA cases when judicial review of VA decisions was in its infancy;¹¹¹ the Court could, in response to arguments from appellants' counsel, presumably amend the standard to reflect the experience of the standard's application at VA during the past twenty-five years. This might entail, for example, requiring an inconsistency to be material before the BVA relies upon it to make an adverse credibility determination. This would not be an unprecedented doctrinal innovation. In the immigration law context, several circuits at one point made use of, and sometimes still use, a "heart of the claim" test, whereby inconsistencies could only be grounds for an immigration judge's adverse credibility determination in an asylum case if the inconsistencies were truly material to the claim at issue in the case.¹¹²

111. See *supra* note 40 and accompanying text.

112. See Tania Galloni, *Keeping It Real: Judicial Review of Asylum Credibility Determinations in the Eleventh Circuit After the REAL ID Act*, 62 U. MIAMI L. REV. 1037, 1047 (2008) (describing the heart of the claim test, but also examining the impact of the REAL ID Act of 2005, Congress' effort to override the heart of the claim test).

Second, the Veterans Court could, under *Bryant* and *Procopio*, require the BVA in some circumstances to place the veteran on notice that personal credibility is at issue. The Court could also interpret *Bernard* to extend to credibility determinations, requiring that the BVA provide advance notice of some kind when personal credibility is directly at stake and to undertake a prejudice analysis when advance notice is not provided. Among many potential downsides, including uncertainty whether these doctrinal reforms are achievable, these court-driven remedies entail creating more law—further complicating the maze of rules that burden the system and too often imperfectly serve their original goals of encouraging accurate and efficient decisions.¹¹³

Some potential remedies are within VA's powers. VA could require that decisions from regional offices that rely on personal credibility to deny a claim to actually say so and to provide greater specificity as to the reasons for that determination. VA could require that the pre-hearing notices issued to veterans in advance of a BVA appeal hearing highlight that personal credibility will potentially be at issue and provide guidance about how veterans can prepare for and address this issue. VLJs could be tasked with doing the same at the outset of a BVA hearing. Among many potential downsides, these possibilities entail adding to the already overwhelming amount of information, both in the form of written notice and otherwise, VA provides to veterans. Any single piece of information is easily lost in this avalanche of communication, much of it already boilerplate, confusing, and unhelpful.

Some remedies are within the advocacy community's powers. Advocates who represent veterans at the BVA could be more attentive to the credibility trap and attempt prophylactically to address what issues the VLJ might seize upon to discredit the veteran's lay evidence. Advocates who represent veterans at the BVA could, consistent with 38 C.F.R. § 3.103(c)(2) and *Bryant* and *Procopio*, inform the VLJ before the appeal hearing's close that the veteran wishes to be informed of any evidence in the record the VLJ considers to be negative evidence and to be informed of what types of additional evidence might rebut this negative evidence. Both of these possibilities have disadvantages too. As to the first, for the same reason that it is relatively easy for a VLJ to pick apart

113. Ridgway, *supra* note 22, at 253.

a voluminous record and find numerous inconsistencies, it is relatively difficult to anticipate which grounds the VLJ will seize upon for rendering a credibility determination and immunize the veteran from having his lay evidence discredited on those grounds. As to the second, it is not clear that VLJs are fully responsive to the proffered interpretation of 38 C.F.R. § 3.103(c)(2), *Bryant*, and *Procopio*.

Finally, the most far-reaching remedies are of course within Congress' powers. Congress, faced with innumerable questions about the future shape of the service-connected disability compensation system,¹¹⁴ has mostly tinkered around the edges. At a minimum, any remedy that Congress might consider for the credibility trap—whether targeted or part of a larger reform effort—should be mindful of the following: it should not elongate the appeal process; it should not have the net effect of increasing the complexity of the system; and it must balance the need for efficiency with the value of accuracy.¹¹⁵

VIII. CONCLUSION

The potential remedies briefly noted above have many more nuances than can be catalogued here. And there are certainly many other remedies one might consider, both small scale and large scale. In the end, no matter how we think about the credibility trap—whether as a problem in need of an immediate fix or an unavoidable element of the system we have—the phenomenon ought to inform our thinking about what the next version of VA's adjudication system might look like. That next system would be best served if a veteran had a meaningful and timely opportunity to respond directly to VA—and not just to the Veterans Court—when VA decides not to believe the veteran.

114. See *supra* note 11 for examples of the continuum of reform proposals that have been proposed to Congress.

115. See Ridgway, *supra* note 6, at 131, for Professor Ridgway's more extended discussion of these and other considerations in reform efforts.