The Medical Examiner as Factfinder: The Effect of the Lay Evidence Doctrine on VA's Duty to Assist in Securing Medical Nexus Opinions

Simone Coyle, Amy Ishizawar, and Holly Seesel[1]

INTRODUCTION

Recently, the United States Court of Appeals for Veterans Claims (CAVC) and the United States Court of Appeals for the Federal Circuit (Federal Circuit) have been focusing attention on analysis of lay evidence by the United States Department of Veterans Affairs (VA), when such evidence has been submitted in support of claims for veterans' benefits.[2] Specifically, CAVC has emphasized that lay evidence may not be categorically dismissed as not competent evidence.[3] Instead, consideration must be afforded and a determination made as to whether such lay evidence is competent and credible as to the purposes for which it was submitted.[4]

While these recent holdings have generated much discussion concerning the level of consideration given to lay evidence, these cases also represent a distinct change in VA's duty to obtain a medical opinion and the manner in which such an opinion is provided.[5] This comment examines the lay evidence doctrine, discusses how the shift in analysis places an undue burden on VA examiners, and explains the conflict in having an examiner serve as a fact finder. Fortunately, as this comment will also discuss, the framework for obtaining a clear and comprehensive opinion that considers all evidence in

---

[1] Simone Coyle, Amy Ishizawar, and Holly Seesel are attorneys with the Board of Veterans' Appeals (BVA or "Board") in Washington, D.C.

[2] *See* discussion *infra* Part I.

[3] *Id*.

[4] *Id*.

[5] *See* discussion *infra* Part II.

the record, including lay statements, is already in place. It is, however, currently underutilized. By following the guidelines for obtaining an independent medical examination (IME) opinion or a VA Veterans Health Administration (VHA) opinion, requests for VA examinations and opinions will be better tailored to the precise medical issues in question, ensure that examiners properly consider all evidence of record when rendering an opinion, and assist the Board of Veterans' Appeals (BVA) in accurately deciding a claim for benefits.[6]

I. THE LAY EVIDENCE DOCTRINE

All evidence, medical or lay, submitted during the course of an appeal must be addressed when VA renders a decision on a claim.[7] In particular, an analysis of the competency and credibility of the evidence must be undertaken by VA before assigning probative weight to the evidence.[8] Competent lay evidence is defined as any evidence "not requiring that the proponent have specialized education, training, or experience," but is provided "by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person."[9] Competency is a legal concept which determines whether the lay evidence is admissible before VA as the trier of fact; credibility is a "factual determination going to the probative value of the evidence to be made after the evidence has been admitted."[10]

---

[6] For further discussion of BVA remand requests for medical examinations, including the importance of obtaining objective opinions which are not prejudicial to the claimant, see Daniel Brook et al., *Federal Jurisprudence Regarding VA's Duty to Provide a Medical Examination: Preserving the Uniquely Pro-Claimant Nature of VA's Adjudicatory System While Providing Timely Decisions*, 1 Veterans L. Rev. 69, 92-97 (2009).

[7] *See* 38 U.S.C. § 5107(b) (2006); *see also* 38 U.S.C. § 7104(a); 38 C.F.R. §§ 3.303(a), 3.304(b)(2), 3.307(b) (2010).

[8] *See* Jandreau v. Nicholson, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (noting that "[w]hether lay evidence is competent and sufficient in a particular case is a fact issue to be addressed by the Board"); *see also* Smith v. Derwinski, 1 Vet. App. 235, 237-38 (1991) (holding that "[d]etermination of credibility is a function for the BVA").

[9] 38 C.F.R. § 3.159(a)(2); *see also* Layno v. Brown, 6 Vet. App. 465, 469 (1994).

[10] *Layno*, 6 Vet. App. at 469 (citation omitted).

Prior to the enactment of the Veterans Claims Assistance Act of 2000 (VCAA),[11] the general trend was to focus primarily upon medical evidence when adjudicating a claim. Cases such as *Hickson v. West*[12] stated that establishing service connection generally required "(1) *medical* evidence of a current disability; (2) *medical* or, in certain circumstances, *lay* evidence of incurrence or aggravation of a disease or injury in service; and (3) *medical* evidence of a nexus between the claimed in-service injury or disease and the current disability."[13] As a result, lay evidence played a limited role in the development and analysis of medical nexus evidence. Medical examiners were likely to discount a veteran's lay statements as to the history of a claimed injury or disease on the grounds that service treatment records did not document the claimed disorder and/or because they found that there was a lack of medical documentation generated since the veteran's separation upon which it could be determined that the claimed disability was "at least as likely as not" related to his or her service.[14] During the adjudication of the claim, medical nexus opinions that were based upon lay evidence were often characterized as inaccurately based,[15] and *LeShore v. Brown*[16] was often invoked for its holding that "a bare transcription of lay history is not transformed into 'competent medical evidence' merely because the transcriber happens to be a medical professional."[17] This resulted in examiners and adjudicators alike focusing primarily on what the objective medical evidence revealed while ignoring or outright rejecting the lay evidence.

---

[11] 38 U.S.C. § 5103.
[12] 12 Vet. App. 247 (1999).
[13] *Id.* at 252 (emphasis added) (citations omitted).
[14] *See* Buchanan v. Nicholson, 451 F.3d 1331, 1336 (Fed. Cir. 2006) (finding the Board had improperly evaluated lay evidence); Dalton v. Nicholson, 21 Vet. App. 23, 39 (2007) (discussing a medical examiner improperly ignoring lay evidence).
[15] *See, e.g.*, Reonal v. Brown, 5 Vet. App. 458 (1993).
[16] 8 Vet. App. 406 (1995).
[17] *Id.* at 409 (citation omitted).

In recent years, however, CAVC and the Federal Circuit have renewed their focus on the appropriate disposition of lay evidence, and particularly upon the doctrines of competency and credibility.[18] These holdings have had a profound impact on the treatment of lay evidence in VA determinations, and have fundamentally altered VA's duties with respect to requesting, analyzing and obtaining medical nexus opinions.[19]

Gone is the singular focus on medical evidence when determining whether a medical opinion should be obtained. VA is obligated to request a medical examination and/or medical opinion if a substantially complete claim has been submitted.[20] A substantially complete claim includes competent evidence of a current disability, or persistent or recurrent symptoms of a disability; evidence that an event, injury or disease was incurred during service or during an appropriate presumptive period; and an indication that the disability or recurrent symptoms of the disability may be associated with the veteran's service or with another service connected disability.[21]

Cases such as *Buchanan v. Nicholson*,[22] *Barr v. Nicholson*,[23] and *Jandreau v. Nicholson*[24] are representative of the move away from a focus on medical evidence in obtaining and conducting medical nexus opinions. In *Buchanan*, the Federal Circuit vacated and remanded a decision of CAVC which had upheld a BVA decision denying entitlement to service connection for an acquired psychiatric disorder.[25] In the underlying decision, BVA highlighted the lack of evidence of a psychiatric disorder

[18] *See, e.g.*, Jandreau v. Nicholson, 492 F.3d 1372 (Fed. Cir. 2007); *Buchanan*, 451 F.3d 1331; Barr v. Nicholson, 21 Vet. App. 303 (2007).
[19] *See* discussion *infra* Part II.
[20] *See* McLendon v. Nicholson, 20 Vet. App. 79 (2006).
[21] *Id.* at 81.
[22] 451 F.3d 1331.
[23] 21 Vet. App. 303.
[24] 492 F.3d 1372.
[25] *Buchanan*, 451 F.3d at 1331.

in the Veteran's service treatment records, as well as a lack of treatment for a psychiatric disorder for some years following the Veteran's separation,[26] and found that the lack of both in-service documentation and post-service evidence of treatment for a psychiatric disorder diminished the probative value of the Veteran's lay statements indicating that he had first observed a change in his behavior during service, and that this behavior had continued since his separation.[27] In reversing CAVC, the Federal Circuit pointed to statutory and regulatory authority governing the admissibility of lay evidence, and found that BVA's outright dismissal of the Veteran's lay evidence of chronicity for a lack of medical records "does not reflect a determination on the competency of the lay statements . . . . [and] reveals that the Board improperly determined that the lay statements lacked credibility merely because they were not corroborated by contemporaneous medical records."[28] The Federal Circuit further held that BVA's finding was a "legally untenable interpretation" of these statutory and regulatory provisions because it would "render portions of the statutes and regulations meaningless as it would read out the option of establishing service connection based on competent lay evidence."[29]

In *Barr*, CAVC found that lay evidence concerning the continuity of symptomatology could represent competent and credible evidence of a nexus to service for the purpose of establishing service connection.[30] Specifically, CAVC in *Barr* found that varicose veins were visible symptoms capable of lay observation, rendering moot BVA's conclusion that no competent evidence of varicose veins was shown during service or in the years subsequent to the Veteran's separation from service.[31]

---

[26] *Id.* at 1333.
[27] *Id.*
[28] *Id.* at 1336.
[29] *Id.*
[30] Barr v. Nicholson, 21 Vet. App. 303, 309-10 (2007).
[31] *Id.* at 309.

The Federal Circuit's holding in *Jandreau* broadened the doctrine of lay evidence by reversing a finding of CAVC that "lay evidence is insufficient 'where the determinative issue involves either medical etiology or a medical diagnosis,'" because it was inconsistent with the Federal Circuit's decision in *Buchanan*.[32] Under its *Buchanan* rationale, the Federal Circuit held that:

> Lay evidence can be competent and sufficient to establish a diagnosis of a condition when (1) a layperson is competent to identify the medical condition, (2) the layperson is reporting a contemporaneous medical diagnosis, or (3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional. Contrary to [CAVC's finding], the relevance of lay evidence is not limited to the third situation, but extends to the first two as well.[33]

II. THE EXAMINER AS FACTFINDER

The aforementioned holdings have significantly altered the manner in which VA conducts its analysis of the evidence of record. The courts have made it clear when reviewing VA's determinations on appeal that any statement of reasons or bases that fails to engage in an analysis of the competency and credibility of a veteran's lay evidence is inadequate.[34] While most of these decisions have focused on BVA's treatment of lay evidence in decisions upon the merits, there is also a growing trend towards holding medical examiners to similar burdens of fact-finding when rendering medical nexus opinions.[35] This

[32] Jandreau v. Nicholson, 492 F.3d 1372, 1376 (Fed. Cir. 2007) (citing *Jandreau*, 21 Vet. App. 402 (2006)).
[33] *Id.* at 1376-77 (footnotes omitted).
[34] *See* Dalton v. Nicholson, 21 Vet. App. 23, 39 (2007) (holding that a Department of Veterans Affairs (VA) examination is inadequate where a VA examiner ignores a veteran's lay statements of an injury or event in service unless VA expressly finds that no such injury or event occurred).
[35] *See, e.g.*, Kahana v. Shinseki, 24 Vet. App. 428 (2011); *Dalton*, 21 Vet. App. 23.

presents a conundrum, not only with respect to the manner in which medical nexus opinions should henceforth be requested, but also with respect to how medical examiners should treat lay evidence when reviewing the files and rendering their opinions.

VA laws and regulations clearly define the scope and duties of a medical professional when rendering an opinion on a claim for benefits. Under VA's statutory and regulatory framework, a person with the proper education, training, or experience may provide evidence concerning medical diagnoses, statements, or opinions.[36] Medical professionals may also provide statements on medical principles found in treatises or other medical and scientific articles, reports or journals.[37] There is nothing in the framework which allows medical professionals to make determinations as to credibility or other findings of fact.[38] Rather, the statutes and caselaw had previously been clear that the adjudicator was responsible for evaluating the evidence in light of the relevant laws and making the ultimate findings of fact.[39]

A. Credibility Determinations by VA Examiners During Examinations

Given these distinct roles, VA has been careful in soliciting medical opinions which would fall within the examiner's competence. In fact, the guidelines for getting a VA examination specify that the medical examiner should not have to "assume any responsibility inherent to the rating activity."[40] VA's Adjudication Procedure Manual ("Manual") provides examples such as not asking the medical examiner to determine if there was "loss of use of an extremity," the legal question for consideration, but rather to ask for a description of the remaining function of the

[36] 38 C.F.R. § 3.159(a)(1) (2010).
[37] *Id.*
[38] *Id.*; *see also Kahana*, 24 Vet. App. at 442; Washington v. Nicholson, 19 Vet. App. 362 (2005).
[39] 38 C.F.R. §§ 3.100, 19.7, 20.101(a).
[40] VA Adjudication Procedure Manual M21-1MR, pt. III, subpt. iv, ch. 3, ¶ A (2007) [hereinafter M21-1MR].

extremity.[41] Similarly, the Manual indicates the medical examiner should be asked whether the disability was caused by or the result of an identified in-service injury event or illness instead of asking the medical authority to determine if the condition is "service-connected," which is the determination to be made by the rating adjudicator.[42] Although VA has sought to avoid seeking legal opinions from VA examiners, regulations required that any opinions rendered be supported by a rationale for the opinion.[43] In particular, the opinion rendered needed to be based upon a review of the claims file or pertinent medical records and include some description of the past medical history.[44]

While the examiner reviews the records in order to render a thorough medical opinion, it is ultimately the adjudicator who is charged with fact finding and making the legal conclusions.[45] In making these findings of fact and conclusions of law, the adjudicator would evaluate the competence, the credibility and the probative value of all evidence submitted, including any VA examinations and their opinions.[46] The adjudicator could consider factors such as the physician's expertise or specialty, the access and depth of review of the claims file and other records, the consistency of the evidence, any bias in the evidence, facial plausibility of the claim, internal inconsistency, bad character

---

[41] *Id.*

[42] *Id.*

[43] *See* Bloom v. West, 12 Vet. App. 185, 187 (1999) (holding that the value of a physician's statement is dependent, in part, upon the extent to which it reflects "clinical data or other rationale to support his opinion").

[44] *Id.*; *see also* Nieves-Rodriguez v. Peake, 22 Vet. App. 295 (2008) (holding that it must be clear from the record that an opinion provider "was informed of the relevant facts" when rendering a medical opinion).

[45] *See* Fortuck v. Principi, 17 Vet. App. 173, 179 (2003) (citations omitted) (stating that it is incumbent upon the Board to "analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant"); *see also* Dalton v. Nicholson, 21 Vet. App. 23, 38 (2007) (holding that "[d]eterminations of credibility are findings of fact to be made by the Board in the first instance").

[46] Caluza v. Brown, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996); Gilbert v. Derwinski, 1 Vet. App. 49, 57 (1990).

of the person submitting the evidence, the purpose in which the evidence was created, and the amount of detail and reasoning for the opinions in making these conclusions.[47]

In *Buchanan*, however, the Federal Circuit found fault with the adequacy of a VA medical examination wherein the examiner opined that the claimant's acquired psychiatric disorder was not related to his service.[48] In that case, as was generally customary, the examiner pointed to the lack of evidence of a psychiatric disability in the service treatment records and within one year of the Veteran's separation from active service.[49] In dicta, Federal Circuit noted that "the examiner's opinion appears to have failed to consider whether the lay statements presented sufficient evidence of the etiology of Mr. Buchanan's disability such that his claim of service connection could be proven without contemporaneous medical evidence."[50] Here, the Federal Circuit essentially asks the medical examiner to render an opinion as to whether the Veteran was competent to report the etiology of his disorder, and, if so, whether the lay evidence of etiology was credible.[51]

Similarly, CAVC found in *Dalton v. Nicholson*[52] that BVA relied on an inadequate VA medical examination when it denied a Veteran's claim of service connection for a back disability.[53] In that case, the examiner found that it was not likely that the Veteran's back disability was related to his service as there was no evidence of a back injury or disability in his service treatment records.[54] CAVC in *Dalton* not only attacked the adequacy of the examination report, but also found that the examiner had "impermissibly ignored the appellant's lay assertions that he

[47] *Caluza*, 7 Vet. App. at 506.
[48] Buchanan v. Nicholson, 451 F.3d 1331, 1336 (Fed. Cir. 2006).
[49] *Id.*
[50] *Id.* at n.1.
[51] *Id.*
[52] 21 Vet. App. 23 (2007).
[53] *Id.* at 39.
[54] *Id.*

had sustained a back injury in service."[55] CAVC went on to state that "the medical examiner cannot rely upon the absence of medical records corroborating [an] injury to conclude that there is no relationship between the appellant's current disability and his military service."[56] Although the *Dalton* case specifically addressed the application of the combat presumption,[57] there is no indication that CAVC intended to limit its holding with respect to the inadequacy of the medical examination only to cases in which the combat presumption applies.[58]

While CAVC has never explicitly directed an examiner to make a factual finding concerning the credibility of a veteran, by stating that an examiner "impermissibly ignored" an appellant's lay statements as to in-service incurrence, *Buchanan* and *Dalton* appear to assign at least some of the burden of fact finding to the medical examiner in determining whether the veteran's lay statements are credible.[59] Requiring an examiner to act as a *de facto* finder of fact poses a problem. Medical examiners are

---

[55] *Id.*

[56] *Id.* at 40.

[57] *Id.* at 37. Under 38 U.S.C. § 1154(b) (2006), Congress has provided special consideration of lay evidence in the case of combat veterans:

> In the case of any veteran who engaged in combat with the enemy in active service with a military, naval, or air organization of the United States during a period of war, campaign, or expedition, the Secretary shall accept as sufficient proof of service-connection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service . . . .

Id.; see also 38 C.F.R. § 3.304(d) (2010); Collette v. Brown, 82 F.3d 389, 392 (Fed. Cir. 1996) (holding that 38 U.S.C. § 1154(b) does not create a presumption of service connection for a combat veteran's alleged disability; the appellant is still required to meet the evidentiary burden as to service connection, such as whether there is a current disability or whether there is a nexus to service, both of which require competent medical evidence).

[58] *Dalton*, 21 Vet. App. at 37.

[59] *Id.* at 39 (citations omitted) (noting that the examiner "impermissibly ignored appellant's lay assertion").

generally trained to render diagnoses and opinions based on the objective data before them.[60] Absent appropriate guidance from the adjudicator as to the potential competency and credibility of the submitted lay evidence, it is unlikely that a medical examiner, untrained in the appropriate legal standards, will properly analyze the lay assertions presented. The examiner may not consider the threshold question of whether the Veteran is competent to provide the information.[61] Additionally, depending upon when a VA examination is obtained, the examiner may not have a complete claims file to review. VA's internal guidelines indicate the claims file is to be sent to the physician only in circumstances that may require a claims file review, such as claims for a mental disorder; claims for traumatic brain injury; or upon a request for a complete, formal medical opinion or a BVA remand.[62] Furthermore, as VA does not freeze the record for appellate review, additional evidence which alters the credibility determination may be submitted after an examination has already been completed.[63]

Most concerning, however, is the fact that the examiner might not think to consider such credibility factors as facial plausibility; internal consistency; consistency with other evidence (particularly in situations where the claims folder is not made available); interest or bias; bad character; or demeanor of the claimant; nor may the examiner be aware that previous statements made for the purposes of treatment may be more probative.[64] In fact, the examiner may improperly rely upon one particular type

---

[60] M21-1MR, *supra* note 40, pt. III, subpt. iv, ch. 3, ¶ A (noting that the purpose of a general medical examination is to screen all body systems, document normal findings or identify disabilities that are found or suspected and further indicating the examiner should fully evaluate any disability that is found or suspected according to the appropriate worksheets for the disorders).

[61] *See* Rucker v. Brown, 10 Vet. App. 67, 74 (1997) (clarifying that competency was "a legal concept [used to determine] whether testimony may be heard and considered by the trier of fact, while [weight and credibility involved] a factual determination [concerning] the probative value of the evidence [] after the evidence [was] admitted").

[62] M21-1MR, *supra* note 40, pt. III, subpt. iv, ch. 3, ¶ A.

[63] 38 C.F.R. §§ 19.37, 20.800, 20.1304 (2010).

[64] *See* Caluza v. Brown, 7 Vet. App. 498, 511, *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996).

of evidence, or its absence, in making a credibility determination. For example, CAVC has indicated that a finding is improper when the examiner discounts lay assertions simply because the evidence did not demonstrate contemporaneous treatment for the claimed condition.[65] While the lack of medical evidence of treatment for a condition may be highly significant to a physician when he or she evaluates a claim for disability benefits, VA is precluded from determining that a veteran is not credible based purely upon this lack of evidence.[66]

In contrast to recent cases like *Buchanan* and *Dalton*, CAVC previously held that an examiner's implicit or explicit assessment of the credibility of a veteran was not binding upon VA.[67] Caselaw provides that the explicit or implicit opinion of the physician that the appellant is truthful is not necessarily probative as to the underlying facts of the account.[68] Indeed, although a physician is competent to render medical opinions, CAVC has indicated that the physician's competence does not extend to the factual underpinnings of his or her opinion.[69] In *Reonal v. Brown*,[70] the Veteran sought to reopen a claim for service connection for residuals of a fracture of the left femur with shortening and coax

[65] *See* Buchanan v. Nicholson, 451 F.3d 1331, 1336 (Fed. Cir. 2006); *see also* Owens v. Shinseki, No. 07-0882, 2009 WL 1662184, at *4 (Vet. App. June 15, 2009) (nonprecedential) (finding that the examiner who referred exclusively to the service treatment records "appeared to impermissibly ignore the [Veteran's] lay statements" concerning the onset of his claimed disability); Milnes v. Nicholson, No. 03-852, 2007 WL 879739, at *5 (Vet. App. March 14, 2007) (nonprecedential) (explaining that because the examiner appeared to believe he was required to base his opinion on contemporaneous service treatment records only, and did not address a key aspect of the Veteran's nicotine dependence claim, a remand was necessary so that the Board could instruct the examiner to provide an additional opinion that gave consideration to *all* evidence in the claims file, specifically including his lay statements).

[66] *See Milnes*, No. 03-852, 2007 WL 879739, at *6.

[67] *See, e.g.*, Coburn v. Nicholson, 19 Vet. App. 427 (2006); Jones v. West, 12 Vet. App. 383 (1999); Reonal v. Brown, 5 Vet. App. 458 (1993).

[68] *See, e.g.*, *Reonal*, 5 Vet. App. at 461 (holding that the Board is not bound to accept a physician's opinion when it is based exclusively on the recitations of a claimant).

[69] *See* Jones v. West, 12 Vet. App. 383 (1999).

[70] 5 Vet. App. 458 (1993).

vara deformity.[71] He submitted lay statements attesting to his physical condition prior to service and after service and further described an injury in service.[72] The RO declined to reopen the claim and explained the lay statements were rebutted by in-service treatment records that noted a past medical history of the Veteran having fallen from a tree prior to enlistment.[73] The Veteran again sought to reopen the claim in December 1988 and included a private medical record that described a deformity that was "acquired during his services as Philippine Scout . . . from July 9, 1946 until March 7, 1947."[74] The physician further cited a separation examination of March 7, 1947.[75] BVA ultimately found that the evidence was not new and material, explaining that the private physician appeared to have treated the Veteran once, over forty years after the Veteran's service, and appeared to rely in part, if not entirely, on the Veteran's lay description of his medical history and injury.[76] BVA also found it was unclear whether the private physician had reviewed service treatment records, as there was no separation record dated March 7, 1947, and because he failed to refer to the service treatment records which cited a preexisting fracture of the left leg.[77] CAVC concluded BVA's finding was not clearly erroneous as there was a plausible basis in the record to support the conclusion, and further indicated that the presumption of credibility for the purposes of new and material evidence did not arise in this case as the evidence relied upon a lay history which had previously been rejected by the 1954 rating decision.[78] CAVC further noted "[a]n opinion based upon an inaccurate factual premise has no probative value."[79]

---

[71] *Id.* at 458-59.
[72] *Id*. at 459.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.* at 460.
[77] *Id.*
[78] *Id*. at 460-61.
[79] *Id.* at 461.

CAVC confirmed the basic holding of *Reonal* in *Coburn v. Nicholson*.[80] In *Coburn*, the Veteran sought service connection for bilateral hip and leg injuries.[81] He contended he injured his hip and leg when he jumped from a telephone pole during his service in the 1950s.[82] He submitted a lay statement from his sister who explained she had been informed about the Veteran's telephone pole incident from her mother.[83] BVA obtained a VA examination to determine the nature, severity and etiology of any present orthopedic disorder of the leg or hip.[84] The examiner opined it was "'at least as likely as not' that the leg and hip problems had their onset in service as a result of the telephone pole incident,"[85] explaining that the Veteran had denied "other history of trauma or falls" so the telephone pole incident was "the most likely [medical] explanation."[86] BVA found the examiner's opinion not competent because it was based upon the Veteran's statements and did not address the absence of treatment in the service treatment records.[87]

In reviewing the case, CAVC pointed out that BVA inaccurately stated the examiner had not reviewed the claims file[88] and CAVC noted in pertinent part that BVA had rejected the examination because it was based upon the Veteran's lay testimony,[89] and explained that "reliance on a veteran's statements renders a medical report incredible only if the Board rejects the statements of the veteran."[90] CAVC explained further that while BVA pointed out some conflicting facts in this case, BVA failed to provide a finding concerning the credibility of the Veteran's

---

[80] 19 Vet. App. 427 (2006).
[81] *Id.* at 429.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 432.
[89] *Id.*
[90] *Id.*

statements to the examiner.[91] CAVC then cautioned that while BVA could clearly reject medical opinions, it could not substitute its own medical judgment for the rejected opinions.[92] Although this case overturned BVA's conclusion, it stands for two important theories of law: 1) that BVA may not provide a blanket rejection of a medical opinion solely because it is based upon a veteran's lay history,[93] and 2) that in spite of the first proposition, BVA is free to find the veteran's lay statements to be not credible, regardless of any determination made by the examiner.[94] In other words, BVA must explain why the underlying lay assertion is not competent and credible before rejecting or discounting a medical opinion.

In *Jones v. West*,[95] the Veteran sought service connection for residuals of a fracture of the tibia and fibula of the left leg.[96] The Veteran argued that his service-connected posttraumatic stress disorder (PTSD) caused a motorcycle accident which resulted in the fractured left leg.[97] In support of his claim the Veteran submitted a statement by a VA psychologist which stated that, after service, the Veteran exhibited thrill-seeking behavior, indicative of PTSD.[98] The psychologist further opined that the motorcycle accident was a result of this thrill seeking behavior.[99] BVA concluded there was no reasonable basis to show the accident was caused by the Veteran's thrill-seeking behavior.[100] BVA acknowledged the VA psychologist's opinion but indicated that as he had not been an eyewitness to the accident, and the factual record did not support such a conclusion, his opinion was of little probative value.[101] CAVC explained that the Veteran was

---

[91] *Id.* at 433.
[92] *Id.* (citing Colvin v. Derwinski, 1 Vet. App. 171, 175 (1991)).
[93] *Id*. at 432-33.
[94] *Id*.
[95] 12 Vet. App. 383 (1999).
[96] *Id.* at 384.
[97] *Id.* at 384-85.
[98] *Id.* at 384.
[99] *Id.*
[100] *Id.* at 385.
[101] *Id.*

competent to describe the events which led to the motorcycle accident.[102] In this regard, the Veteran had provided testimony that the accident was a result of passing a slow moving automobile.[103] CAVC indicated that although the VA psychologist was a medical professional, competent to testify that the PTSD caused thrill-seeking behavior, the VA psychologist had not been an eyewitness to the accident and as such his opinion concerning the actions or sequence of events leading to the accident was outside the scope of his competence.[104] Therefore, CAVC affirmed BVA's conclusion that the VA psychologist's opinion had no probative weight concerning the cause of the accident.[105]

This push to give proper consideration to lay testimony, even during a medical examination, may result in a situation where the veteran receives a positive medical opinion that links his claimed condition to service but still receives a negative VA determination when that medical opinion is weighed against all other medical evidence of record. Such a change in disposition concerning the credibility of the lay assertion would understandably upset the veteran who most likely would not understand why or how BVA could deny his claim in light of a diagnosis and positive medical nexus opinion. Alternatively, if a VA decision finds a veteran's lay statements to be credible when the examiner did not, such a credibility determination may require further remands for clarification and/or a more complete and accurate medical opinion.[106]

To avoid this conundrum, and to avoid making a legal determination as to the competency and credibility of the veteran's lay evidence, an examiner may very well find that he or she cannot

---

[102] *Id.*
[103] *Id.*
[104] *Id*. at 386.
[105] *Id.*
[106] *See* Barr v. Nicholson, 21 Vet. App. 303, 311 (2007) (noting that once VA undertakes to get a VA examination, VA must provide an adequate examination or explain why one will not or cannot be provided).

reach a decision without resorting to speculation. It is well known, however, that BVA may not rely on such opinions absent clear evidence that all of the "procurable and assembled data" was fully considered and the basis for the opinion provided by the examiner or apparent upon review of the record.[107] This places examiners back in the position of engaging in a legal determination of the competency and credibility of the evidence, or may require that the claims be remanded multiple times for clarification of the matter.

B. Pre-Examination Credibility Determinations by VA Adjudicators

A possible solution to the problems of turning a medical professional into a fact finder is to alter the timing when an examination is requested and undertaken. As suggested above, should VA disagree with an examiner's credibility assessment, further development may be required.[108] Mainly, if VA finds a veteran's lay statements to be credible subsequent to a VA examination wherein the examiner discounted the lay statements, given the new line of cases from CAVC, then BVA would be bound to obtain a new examination specifically directing the examiner to assume the credibility of the veteran in rendering his or her opinions.[109]

Some recent cases have suggested that VA make such factual findings before sending the claim for the appropriate examination. In *Dalton*, for example, CAVC directed the case be remanded to BVA and further instructed that "if the Board determines that the evidence establishes in-service occurrence of a back injury, because the April 2003 VA examination was inadequate, VA's duty to assist requires VA to provide the

[107] Jones v. Shinseki, 23 Vet. App. 382, 390 (2010).
[108] *See* Dalton v. Nicholson, 21 Vet. App. 23, 40 (2007).
[109] *See, e.g.*, Kahana v. Shinseki, 24 Vet. App. 428 (2011); *Jones*, 23 Vet. App. 382; *Dalton*, 21 Vet. App. 23.

appellant with an adequate medical examination of his back."[110] In other words, obtaining an additional VA examination would be contingent upon BVA's finding of fact concerning the credibility of the Veteran's lay statement.

In *Jones v. Shinseki*,[111] the Veteran sought an increased evaluation for right ear hearing loss, service connection for left ear hearing loss, and service connection for erectile dysfunction.[112] Significantly, the VA examiner concluded the right ear hearing loss was directly related to the Veteran's service-connected cholesteatoma and perforated tympanic membrane, but indicated there was insufficient information to provide an opinion as to the etiology or onset of the left ear hearing loss without resorting to mere speculation.[113] The examiner noted the Veteran's tinnitus had a reported onset of 1965 but also noted that the Veteran had reported having tinnitus for as long as he could remember in a 2001 interview.[114] Relying upon this examination, BVA concluded the left ear hearing loss was not related to service and indicated the first documentation of hearing loss was decades after the Veteran's separation from service.[115] CAVC cautioned against relying upon the phrase "resort to speculation," although there were times when it would be medically impossible to provide the requested opinion; in such instances, the examiner was required to explain why it was not possible to provide the requested opinion.[116] In *Jones,* it was unclear if the examiner was missing information that could have helped him make the medical determination, or if the determination could never have been made as the evidence could never be obtained.[117] The record suggested the examiner had sought further information from VA's Appeals Management Center

[110] *Dalton*, 21 Vet. App. at 40.
[111] 23 Vet. App. 382.
[112] *Id*. at 384.
[113] *Id*. at 385.
[114] *Id.*
[115] *Id.* at 385-86.
[116] *Id.* at 390.
[117] *Id.* at 389.

which was not answered.[118] The examiner also cited to a specific contradiction in the lay account concerning tinnitus in his report.[119] CAVC explained that "[t]he examiner's reasoning sets up a perceived credibility issue that relates to both tinnitus and hearing loss, which is for the Board to resolve. The examiner's perceived lack of information requires a response by the Board."[120] CAVC specifically directed that the case was being remanded to BVA so that it could consider the evidence concerning the Veteran's tinnitus and make a finding of fact, and after that return the claim to the examiner for an opinion based upon BVA's fact-finding concerning the Veteran's credibility and the contradictory accounts as to the onset of the tinnitus.[121]

Most recently, in *Kahana v. Shinseki*,[122] the Veteran sought service connection for a right knee disability, including as secondary to his service-connected left knee disability.[123] It was his contention that because his original left knee injury was not fixed properly in service, it caused his right knee to frequently give way, such that when he participated in a kickboxing tournament in service, his right knee snapped and he sustained an "ACL injury."[124] He also admitted to a postservice right knee injury, but attributed both the in-service and postservice right knee injuries to the fact that he tended to favor his left knee.[125] On VA examination, the examiner noted the Veteran's report of an in-service right knee injury from kickboxing, concluded that he

---

[118] *Id*. at 391.
[119] *Id.*
[120] *Id.* at 392.
[121] *Id.* There have also been nonprecedential memorandum decisions indicating that BVA first needs to make the credibility determination prior to deciding whether a VA examination is required. *See, e.g.*, Rosen v. Shinseki, No. 08-3863, 2011 WL 180970, at *2 (Vet. App. Jan. 20, 2011) (nonprecedential) (remanding the claim for BVA to address the Veteran's argument concerning exposure to noise in the first instance and further directing that if BVA found the claimant's assertion to be credible, before it determines whether a new VA audiological examination was necessary).
[122] 24 Vet. App. 428 (2011).
[123] *Id.* at 430.
[124] *Id*. at 431.
[125] *Id*.

had injured his right knee in service, and opined that his right knee injury was the result of his placing more weight on the right knee after numerous left knee injuries.[126] The examiner noted that she had reviewed the Veteran's private medical records, but not his service or VA treatment records, and explained that her opinion was based on the history provided by the Veteran and his private medical records.[127] Because the Veteran's service treatment records were not reviewed, VA requested an addendum opinion and specifically noted that Social Security Administration records showed a postservice work-related right knee injury and further directed that there was no right knee injury during service.[128] After an additional review of the claims file, the same examiner who had rendered the prior opinion concluded that the Veteran's right knee injury was not related to his service as there was no documentation of a right knee injury in his service treatment records.[129] The examiner also noted that the Veteran had sustained a postservice work-related injury in which he sustained an ACL tear, and opined that there was no relationship between his right knee injury and his left knee, explaining that his right ACL ligament sprain was the result of a specific trauma incident and was not an overuse type of injury.[130] The examiner then concluded that the records did not support an injury during service but rather was a work-related injury.[131]

In denying service connection, BVA not only relied upon the VA examiner's addendum opinion, but also noted that the Veteran's service treatment records did not show a right knee injury and further found his assertions of a right knee injury in service not credible.[132] Specifically, BVA stated, an "ACL tear is quite a significant injury, [therefore] one would expect to see at least some

[126] *Id.*
[127] *Id.*
[128] *Id.* at 431-32.
[129] *Id.* at 432.
[130] *Id.*
[131] *Id.*
[132] *Id*.

documentation of it in the [service treatment records]."[133] CAVC, however, found this statement to be an impermissible medical determination as to the severity, symptomatology and usual treatment of an ACL injury as it did not cite to any independent medical evidence to corroborate the finding.[134] CAVC additionally found that VA had, in its request for an addendum opinion, violated its duty to request a medical opinion in an "impartial, unbiased, and neutral manner."[135] In particular, CAVC noted that although the examiner had initially concluded that the Veteran sustained a right knee injury in service, when VA requested its addendum opinion, it stated categorically that he had not injured his right knee in service.[136] This assertion constituted a medical finding that was not based on an adverse credibility determination, but was based merely on the lack of documentation for such an injury in service.[137] Therefore, in the CAVC's opinion, it was not clear whether the examiner's subsequent opinion that the Veteran had not sustained a right knee injury in service was "based on additional evidence she reviewed or because she felt coerced by [VA's] proclamation against her earlier conclusion."[138] CAVC then emphasized that where there was a crucial fact at issue for which a medical opinion was required, VA could not bias the examiner by either limiting the scope of his or her investigation or by suggesting an outcome.[139] VA could, however, ask questions such as:

> (1) whether there is any medical reason to accept or reject the proposition that had the appellant had a right knee injury in service, such injury could have lead to his current condition; (2) what types of symptoms would have been caused by the type

---

[133] *Id.* at 434.
[134] *Id.*
[135] *Id.* at 436 (citing Austin v. Brown, 6 Vet. App. 547, 552 (1994)).
[136] *Id.*
[137] *See* McLendon v. Nicholson, 20 Vet. App. 79, 85 (2006) (noting that the lack of medical evidence in service does not constitute negative evidence).
[138] *Kahana*, 24 Vet. App. at 437.
[139] *Id.*

> of ACL injury at issue; and (3) whether a right knee injury as described in the [service treatment records] . . . could have been mistaken for a sprain but was a precursor to the current condition.[140]

Despite the holding in *Kahana*, it is significant to note that the CAVC does not preclude VA (or BVA) from ever dictating when a fact must be accepted as true.[141] Judge Lance's concurring opinion appears to recognize that there is "delicate balance" between BVA's role as factfinder and its obligation to seek impartial medical opinions.[142] Specifically, he noted that there was a tension created from BVA's obligation to reject insufficient medical reports and from caselaw which found medical opinions based on inaccurate factual premise to be inadequate.[143] He then stated that although this requirement is "straightforward in principle, this case demonstrates the types of chicken-or-egg problems that frequently arise in a system where adjudicators and experts do not converse directly."[144] Ultimately, Judge Lance agreed that VA's instruction to the examiner that there was no right knee injury in service was in violation of *Austin*.[145] He suggested that a request inquiring "whether there was any medical reason to accept or reject the proposition that the appellant had a right knee ACL injury that could have lead to his current condition" may have avoided such a violation.[146] Alternatively, BVA could have asked the examiner to specify typical symptoms that would be seen or whether an ACL injury could be mistaken for another condition or even gone undiagnosed.[147]

---

[140] *Id.*

[141] *Id.* In a footnote, the United States Court of Appeals for Veterans Claims (CAVC) explicitly declined to provide detailed guidance on when it may be appropriate for BVA to inform an examiner that a fact must be accepted as true as "[s]uch an opinion would depend on the evidence (or medical evidence) presented in a particular case." *Id*. at n.7.

[142] *Id.* at 441.

[143] *Id.*

[144] *Id.*

[145] *Id.* at 441-42.

[146] *Id.* at 442.

[147] *Id.*

Similar to the *Dalton* and *Jones* cases, Judge Lance emphasizes that there are many cases where it is "perfectly appropriate" for the adjudicator to "define the facts that a medical examiner must accept are true."[148] He reiterates that this is, in fact, the role of the adjudicator, and not the examiner.[149] Accordingly, he feels there may be times when BVA could make specific factual findings before obtaining a medical opinion and direct the physician to accept those findings are true.[150] However, there are also cases where it may be prudent to ask a physician to opine on specific narrow issues (such as symptoms or usual treatment) that could assist BVA in determining whether the veteran's assertions are credible.[151] Judge Lance acknowledges the inherent problem created by VA's "piecemeal" system of developing claims and obtaining evidence and the evolving nature of theories of the claim which may result in numerous "cycles of requests and opinions."[152] Judge Lance indicated, however, that the number of BVA requests and medical opinions could be reduced "if adjudicators are explicit as to whether any underlying facts are in dispute at any given point and if medical experts are explicit in stating how and why they are resolving any disputes as to the underlying facts."[153]

III. VHA AND IME OPINIONS

The framework promoted under *Jones* for requesting medical opinions – specifically, of providing more information to the medical examiners concerning the facts of the claim as well as guided direction as to the opinions being sought – is the exact practice currently in place for obtaining VHA and IME opinions and independent medical opinions requested by the RO.[154] Medical

---

[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.* at 443.
[153] *Id.*
[154] Dep't of Veterans Affairs, Med. Review Assistance to Bd. of Veterans Appeals Cases, VHA Directive 2006-019 (Apr. 3, 2006) [hereinafter VHA Directive], *available at* http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=1404.

opinions may be requested by the RO[155] or by BVA,[156] and they may be sought from appropriate health care professionals within the Department of Veteran's Health Administration (VHA) or from independent medical experts (from recognized medical schools, universities, clinics, or medical institutions with which arrangements for such opinions have been made by the Secretary of VA).[157]

These outside medical opinions are generally more thorough because the requests for opinions made by VA are based on detailed reviews of the claims files and because the questions they present to the health care professionals are tailored and case-specific.[158] Therefore, even though the methodology employed by VA may require more legwork and thus involve more time initially, it is recommended that requests for medical examinations and/or opinions should be this detailed to promote overall expediency and efficiency during the appellate process.

Medical opinions, whether requested from a VHA health care professional or an outside, independent source, are intended

[155] 38 C.F.R. § 3.328 (2010); *see also* Independent Medical Opinions, 55 Fed. Reg. 18,601 (May 3, 1990) (adding 38 C.F.R. § 3.328, and thus expanding the authority to request independent medical opinions; such authority to obtain opinions from non-VA employees had previously been limited to appeals pending before BVA).

[156] 38 C.F.R. § 20.901.

[157] *See* 108 Cong. Rec. 18,407 (1962) (statement of Cong. Teague) (noting that veterans should be able to benefit from the "greatest facilities for medical research and expertise generally available in the medical field such as the National Institutes of Health and in world renowned clinics such as those operated by the Mayo Bros. and the Menninger Clinic in Kansas"). In 1962, the Senate Committee on Finance introduced a bill (that would eventually become 38 U.S.C. § 7109 after it was renumbered from section 4009 in May 1991) to allow BVA to obtain medical opinions from appropriate health care professionals outside of VA. This bill addressed only the permissibility of requesting medical opinions from non-VA health care professionals because it was already recognized that BVA had a longstanding practice of requesting medical opinions from Veterans Health Administration (VHA) health care professionals. Therefore, this bill merely extended such authority to allow for opinions to be sought from non-VHA health care professionals. *See* 108 Cong. Rec. 16,105 (1962).

[158] In contrast, as discussed *supra*, several examinations obtained by the Regional Office (RO) may not include such a detailed review of the file or require the claims file be sent to the examiner. *See* M21-1MR, *supra* note 40, pt. III, subpt. iv, ch. 3, ¶ A.

to help resolve medical questions in cases that are particularly complex or contain controversy.[159] In essence, a medical opinion is a tool by which BVA may "gain a better understanding of a particularly complex or controversial medical issue, thereby enabling it to render an informed decision."[160] An example of controversy and/or complexity would be if the claims file contained evidence of a "substantial disagreement between the opinions of two physicians with respect to an issue material to the outcome of the case."[161] However, it should be noted that requests for independent medical opinions should not be limited only to those instances where there are two or more opposing medical opinions of record. A medical opinion may be needed because the issue at hand is so medically complex that clarification is necessary.[162]

Medical opinions may not, however, circumvent the need for an examination.[163] Because a medical opinion does not include a physical examination, if, after reviewing a claims file, BVA determines that a VA examination is necessary or that the examination of record is inadequate, then BVA must still remand the matter to the RO for additional development.[164] However, if the VA examination of record is adequate or there is no examination of record but BVA determines that only an opinion is necessary to satisfy VA's duty to assist, then BVA may request a medical opinion from VHA or an independent medical examiner.[165] Requesting a VHA or an independent medical examiner opinion is often preferable to remanding a matter for the same because it reduces the amount of time that a claimant

[159] 38 C.F.R. § 20.901.
[160] Board of Veterans' Appeals: Rules of Practice – Medical Opinions from the Veterans Health Administration, 69 Fed. Reg. 19,935, 19,936 (Apr. 15, 2004) (discussing BVA's authority to obtain medical opinions from VHA opinions).
[161] 125 Cong. Rec. 1712 (1979) (noting also that "[t]he question of whether a 'substantial difference' exists on an 'issue material' to the outcome of the case would be for determination by the Administrator").
[162] 38 C.F.R. § 20.901.
[163] 38 U.S.C § 5103A(d) (2006); 38 C.F.R. § 3.159(c)(4).
[164] Barr v. Nicholson, 21 Vet. App. 303, 309 (2007).
[165] 38 U.S.C § 7109(a); 38 C.F.R. § 20.901.

will need to wait before receiving a final disposition in his or her claim.[166] Also, VHA or independent medical examiner opinions are also preferable because of the thorough and specific qualities of the opinions that are produced.[167]

There are no set guidelines that VA must follow or adhere to when requesting an advisory opinion.[168] Generally, in the experience of the authors, requests are drafted after a full review of the Veteran's claims file has been conducted. The requests themselves identify and describe briefly pertinent evidence, such as medical treatment records and/or competent lay testimony, and include discussion of applicable legal criteria, if necessary. Since the medical opinions are being sought to resolve a medical question and/or to explain a complex medical issue, some explanation for why the opinion is being sought is also typically included.[169]

The effect of such detailed and direct line of questioning is that the medical opinions elicited are thorough and responsive.[170]

---

[166] While an estimate may not be given for the amount of time it takes for a claim to be sent for a medical examination and/or opinion once it has been remanded to the RO from the Board, the guidelines for VHA and independent medical examiner opinions require that they be returned within sixty days. *See* Dep't of Veterans Affairs, Med. Review Assistance to Bd. of Veterans Appeals Cases, VHA Directive 2010-044 (Sept. 29, 2010), *available at* http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2296.

[167] *See* Rules of Practice: Medical Opinions from the Veterans Health Administration, 66 Fed. Reg. 38,158 (July 23, 2001) (interim rule) (suggesting that "the thoroughness and specificity of many VHA advisory opinions have provided sufficient information to allow the Board Members to issue final decisions without the need to remand cases to the [ROs] to obtain the same information").

[168] VHA Directive, *supra* note 154.

[169] 38 C.F.R. § 20.901.

[170] CAVC has affirmed BVA's findings that medical opinions are adequate, even if they did not fully address lay statements, when BVA had made an express finding as to the veteran's credibility. *See, e.g.*, Cornaire v. Shinseki, No. 08-3303, 2011 WL 1464912, at *2 (Vet. App. Apr. 11, 2011) (nonprecedential) (noting that "[w]hen VA provides a medical examination, it must be based on a factual predicate, but there is no requirement that VA provide an examination that is based on a history that the Board has determined is not credible"); Garcia v. Shinseki, No. 09-3727, 2011 WL 835116, at *4 (Vet. App. Mar. 10, 2011) (nonprecedential) (finding that a VA examination was adequate although it did not consider subsequently created medical records documenting knee injuries because the examiner took into account the lay statements

The health care professionals being asked to provide an opinion know exactly what kind of information is being sought to decide a claim, and can tailor their review of the file and their response accordingly. This includes responding to the specific allegations and/or medical opinions that are already of record by expressing either agreement or disagreement, and then providing an explanation for that opinion.

This is not to suggest, however, that the health care professionals need not review the entire claims file on their own, and should focus only on the pieces of medical and/or competent lay evidence identified in the request letters. Letters requesting a medical opinion only serve to explain why such an opinion is necessary and should provide an objective, unbiased overview of the evidence of record without steering the health care professional in one direction or another.[171] In the authors' experience, in drafting the request letter, certain pertinent pieces of evidence are necessarily highlighted to help explain why, in BVA's opinion, a controversy exists or why additional clarification of a complex medical issue is needed. Highlighting the most relevant pieces of evidence also ensures that the health care professional rendering the opinion will consider all pertinent facts. This is important for two reasons. As discussed above, health care professionals generally are not fact finders but are medical professionals, and thus should not be expected to verify the validity of a claimant's allegation.[172] Instead, the request letters should identify for the health care professional those sets of facts

---

of the Veteran concerning the knee giving way and causing falls and there was no indication "that the examiner did not base [the] opinion on the [Veteran's] medical history" or prevented the Board from making a fully informed decision).

[171] *See, e.g.*, Mariano v. Principi, 17 Vet. App. 305, 312 (2003) (noting that because it is not "permissible for VA to undertake such additional development [] to obtain evidence against an appellant's case, VA must provide an adequate statement of reasons and bases for its decision to pursue such development where such development reasonably could be construed as obtaining additional evidence for that purpose"); *see also* Colayong v. West, 12 Vet. App. 524, 535 (1999) (holding that questions that the RO presented were "fatally flawed").

[172] *See* discussion *supra* Parts I, II.

that have already been accepted as fact so that he or she may take that into consideration when rendering his or her opinion. In other words, the very dilemma discussed above concerning the proper timing of making the credibility determination is avoided. The VHA or IME physician would have a sense of whether or not the allegations were credible prior to rendering their opinion. In the case where the VHA or IME was being requested because of conflicting factual information, that also would be discussed in detail and boiled down to a discrete medical question which would subsequently assist BVA in making the credibility determination. Second, it is helpful to pinpoint evidence for the reviewing health care professionals because claims files may often consist of multiple volumes of evidence to be reviewed and pertinent evidence may be inadvertently overlooked. Assisting health care professionals in identifying the relevant facts and pertinent pieces of evidence ensures that all pertinent records are reviewed, and results in a more comprehensive medical opinion.

Similarly, ROs also have set instructions and guidelines for requesting medical opinions.[173] According to the Manual, ROs are to request a medical opinion (versus an examination) when only the following is necessary to decide the claim: reconciliation of different diagnoses; opinion concerning the relationship between two conditions; etiology and nexus opinions; opinion as to whether a service-connected condition has aggravated a non-service connected condition; and opinion regarding the extent to which service-connected disabilities have affected a claimant's ability to perform physical and non-physical tasks in order for VA to determine unemployability.[174]

The Manual instructs that a request for a medical opinion should specify the issue(s) under review, the claimant's contention(s), and the opinion requested.[175] It should also provide

[173] M21-1MR, *supra* note 40, pt. III, subpart iv, ch. 3.
[174] *Id.* pt. I, ch. 1, ¶ C.
[175] *Id.* pt. III, subpt. iv, ch. 3, ¶ A.9.b.

a summary of evidence available in the case by identifying the source of the evidence (provider and/or facility), subject matter involved, and approximate dates covered by the evidence.[176] When requesting a medical opinion, the nature of the opinion required should be clearly stated along with an explanation of why the opinion is needed, if such would clarify the request.[177] The health care professional rendering the opinion should also be advised that he should identify the specific evidence reviewed and considered in forming his or her opinion and provide a rationale (explanation or basis) for the opinion provided.[178] The guidelines provided in the Manual are intended to ensure that the opinions received are thorough and detailed, responsive to the questions asked, and pertinent to the issues at hand.

The intended effect of these instructions is similar to what is produced at the BVA level. Unfortunately, the volume of cases that the ROs must deal with and the amount of time that each individual case demands likely plays a role in this, but the quality of opinion resulting from a more exacting request would make the investment of time and effort well worth the cost. Most importantly, submitting a detailed and specific request for a medical opinion will ensure that VA abides by its duty to assist a claimant in developing his or her claim, by making certain that the health care professional is considering all parts of a claimant's claims file (competent lay statements, treatment records, medical opinions already of record, and any medical treatises that may be associated with the record). This is important because, as was discussed in the earlier sections of this article, CAVC is becoming increasingly stringent on making sure that VA considers all competent evidence of record, including lay statements.[179]

---

[176] *Id.* ¶ A.9.c.
[177] *Id.* ¶ A.9.b.
[178] *Id.* ¶ A.
[179] *See* discussion *supra* Part I.

CONCLUSION

There is a fine line between requesting that an examiner provide an opinion that considers lay assertions as well as other relevant facts, and requiring that the examiner turn into a fact finder. Tasking the examiner with making credibility determinations could result in inaccurate determinations based upon legally impermissible standards. Furthermore, it could result in confusing and contradictory opinions between a medical examiner and an adjudicator.

As CAVC has not overturned caselaw concerning VA's role as a fact finder, including its ability to assign less probative weight to medical opinions that are based on lay assertions which have been found incredible or otherwise lacking in support from the record, VA must carefully word requests for examinations. As discussed above, CAVC precedent may even require VA to render an initial determination concerning the credibility of the veteran to assist the medical professional in providing an accurate opinion.[180]

Such a format is already in place for BVA's requests of VHA, IME and medical opinions and is generally viewed as successful. As discussed above, these requests are carefully thought out and direct the examiner to focus their attention on a particular medical question which requires further elucidation. Studies have shown that such detailed requests result in thorough and more probative opinions.[181]

Thus, VA should examine the extent to which the framework and methodology currently in place for obtaining outside medical opinions should be implemented in obtaining

[180] *See, e.g.*, Kahana v. Shinseki, 24 Vet. App. 428 (2011).

[181] *See* Rules of Practice: Medical Opinions from the Veterans Health Administration, 66 Fed. Reg. 38,158 (July 23, 2001) (interim rule) (suggesting that "the thoroughness and specificity of many VHA advisory opinions have provided sufficient information to allow the Board Members to issue final decisions without the need to remand cases to the [ROs] to obtain the same information").

standard medical nexus opinions. Providing the examiner with a description of the evidence and any indicated predecisional determination as to its competency and credibility could have the desired effect of ensuring that examiners appropriately consider all of the evidence, including competent and credible lay evidence of in-service incurrence or current disability, in rendering a medical opinion. Moreover, the appropriate consideration of lay evidence at the RO level will result in fewer remands for examinations, thereby rendering the entire system more efficient. In the meantime, VA adjudicators are urged to carefully consider the lay evidence of record in determining whether a medical nexus opinion should be obtained, and, if so, to request that the medical examiner carefully consider that lay evidence in rendering an opinion.