

A Proposed Approach to the BVA's Clarified Hearing Duties to Explain and Suggest Pursuant to *Bryant v. Shinseki*

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INTRODUCTION

The United States Court of Appeals for Veterans Claims (CAVC) in *Bryant v. Shinseki*² held that the provisions of 38 C.F.R. § 3.103(c)(2)³ impose two duties on a Department of Veterans Affairs (DVA or VA) Board of Veterans Appeals' (BVA or Board)

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² 23 Vet. App. 488 (2010).

³ The regulation provides:

The purpose of a hearing is to permit the claimant to introduce into the record, in person, any available evidence which he or she considers material and any arguments or contentions with respect to the facts and applicable law which he or she may consider pertinent. All testimony will be under oath or affirmation. The claimant is entitled to produce witnesses, but the claimant and witnesses are expected to be present. The Veterans Benefits Administration will not normally schedule a hearing for the sole purpose of receiving argument from a representative. It is the responsibility of the employee or employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position. To assure clarity and completeness of the hearing record, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony. In cases in which the nature, origin, or degree of disability is in issue, the claimant may request visual examination by a physician designated by VA and the physician's observations will be read into the record.

38 C.F.R. § 3.103(c)(2) (2011).

Board Member⁴ while conducting a hearing in a veterans' benefits claim appeal: (1) a duty to fully explain the issues on appeal, and (2) a duty to suggest that a claimant submit evidence supporting the issues on appeal *if* the record does not already contain evidence on the issue.⁵

In Section I of this Note, the authors discuss the nature and purposes of BVA hearings in the veterans' benefits adjudication process. Section II reviews the *Bryant* decision itself. Section III offers a critique of the *Bryant* analysis and rule, proposing that the CAVC's holding in *Bryant* impermissibly requires the BVA to preadjudicate an appeal. Section IV provides proposals attempting to respond to the critique as offered in Section III. Specifically, the authors propose that given the difficulty in often assembling a clear and succinct "theory of the case" which the veteran is trying to provide, DVA should consider adopting a combination of recommendations, including a pre-hearing questionnaire that could help guide a Board Member in conducting hearings.

I. BACKGROUND

The BVA makes final decisions on behalf of the Secretary on appeals from decisions of DVA Regional Offices (ROs).⁶ Claim

⁴ 38 U.S.C. § 7101(a) (2006) ("The Board shall consist of a Chairman, a Vice Chairman, and such number of [M]embers as may be found necessary in order to conduct hearings and dispose of appeals properly before the Board in a timely manner."); 38 C.F.R. § 19.2(b) (stating that a member of the BVA (other than the Chairman) may also be known as a Veterans Law Judge). The authors note that the CAVC in *Bryant* refers to the Board Members conducting a hearing as "Board hearing officers" but for the purpose of this Note, the term Board Member (the statutory title) is used rather than the terms "Board hearing officer" or "Veterans Law Judge."

⁵ *Bryant*, 23 Vet. App. at 497.

⁶ See 38 U.S.C. §§ 511, 7104(a) ("All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation."); see also BD. OF VETERANS' APPEALS, DEP'T OF VETERANS AFFAIRS, REPORT OF THE CHAIRMAN, FISCAL YEAR 2011, at 1 (2012) [hereinafter REPORT OF THE CHAIRMAN], available at http://veteranslawlibrary.com/files/Board_Chairman_Reports/

adjudication within the DVA is carried out in a non-adversarial and paternalistic setting, although reviewable by federal courts.⁷ The BVA reviews all appeals for entitlement to veterans' benefits⁸ and its stated mission "is to conduct hearings and issue timely, understandable, and quality decisions for veterans and other Appellants in compliance with the requirements of law."⁹

DVA has an obligation to help a veteran substantiate his or her claim under the Veterans Claims Assistance Act of 2000 (VCAA);¹⁰ certain provisions of the VCAA are commonly referred to as the Secretary's "duty to assist." Before this statute was passed, the Secretary had a general duty to assist "a claimant in developing the facts pertinent to the claim."¹¹ Yet, the VCAA put into operation certain language regarding the duty to assist: the DVA must provide assistance in procuring favorable evidence, service records,¹² and, in certain circumstances, a medical examination or opinion.¹³ However, much of the evidence typically evaluated by the BVA is VA medical reports.¹⁴

In addition, during the course of the appellate process and prior to a case being certified to the BVA for review, a claimant may request an RO hearing.¹⁵ An RO hearing may be held prior

BVA2011AR.pdf ("The Board makes final decisions on behalf of the Secretary on appeals from decisions of local [VA] offices.").

⁷ See James D. Ridgway, *Lessons the Veterans Benefits System Must Learn on Gathering Expert Witness Evidence*, 18 FED. CIR. B.J. 405, 411-12 (2009).

⁸ REPORT OF THE CHAIRMAN, *supra* note 6, at 1 (explaining that the types of appeals reviewed by the Board include "claims for service connection, increased disability ratings, total disability ratings, pension, insurance benefits, educational benefits, home loan guaranties, vocational rehabilitation, dependency and indemnity compensation, and health care delivery").

⁹ *Id.*

¹⁰ Veterans Claims Assistance Act of 2000 (VCAA), Pub L. No. 106-475, 114 Stat. 2096.

¹¹ 38 U.S.C. §§ 3007, 5107 (1998).

¹² *Id.* § 5103A(b)-(c) (2006).

¹³ *Id.* § 5103A(d).

¹⁴ See Jonathan Krisch, *Judge, Jury, and the Gatekeeper: Admitting and Weighing Expert Testimony in Veterans' Claims Adjudication and the Federal Courts*, 4 VETERANS L. REV. 41, 61 (2012).

¹⁵ See Marcy W. Kreindler & Sarah B. Richmond, *Expedited Claims Adjudication*

to, or subsequent to, an RO adjudication.¹⁶ These hearings are conducted by Decision Review Officers (“DROs”), who have the authority to consider evidence and render a new determination on a claim prior to BVA review.¹⁷

“The Board shall decide any appeal only after affording the appellant an opportunity for a hearing.”¹⁸ BVA hearings are designed “to receive argument and testimony relevant and material to the appellate issue”¹⁹ and “to permit the claimant to introduce into the record . . . any available evidence which he or she considers material and any arguments or contentions with respect to the facts and applicable law which he or she may consider pertinent.”²⁰ During such a hearing, the testimony will be under oath or affirmation and a claimant may produce witnesses, but they must be in person.²¹ In addition, the “[h]earings conducted by the Board are *ex parte* in nature and nonadversarial.”²² Questions may be asked, but cross-examination is not permitted.²³

Although BVA hearings are not bound or limited by the rules of evidence, reasonable bounds of relevancy and materiality should be maintained.²⁴ “Unlike a traditional judicial appeal where review is of the record, the opportunity for a personal hearing

Initiative (ECA): A Balancing Act Between Efficiency and Protecting Due Process Rights of Claimants, 2 VETERANS L. REV. 55, 57 (2010).

¹⁶ *Id.*

¹⁷ See 38 C.F.R. § 3.2600 (2011); Bryan A. Liang & Mark S. Boyd, *PTSD in Returning Wounded Warriors: Ensuring Medically Appropriate Evaluation and Legal Representation Through Legislative Reform*, 22 STAN. L. & POL’Y REV. 177, 184 (2011).

¹⁸ 38 U.S.C. § 7107(b).

¹⁹ 38 C.F.R. § 20.700(b).

²⁰ *Id.* § 3.103(c)(2).

²¹ *Id.*

²² *Id.* § 20.700(c).

²³ *Id.* (“Parties to the hearing will be permitted to ask questions, including follow-up questions, of all witnesses but cross-examination will not be permitted.”).

²⁴ *Id.* (“Proceedings will not be limited by legal rules of evidence, but reasonable bounds of relevancy and materiality will be maintained. The presiding Board Member may set reasonable time limits for the presentation of argument and may exclude documentary evidence, testimony, and/or argument which is not relevant or material to the issue, or issues, being considered or which is unduly repetitious.”).

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."²⁵

BVA hearings have dual purposes of both development and participation, both to elicit testimony as to any possible overlooked evidence, as well as provide a veteran with an opportunity to participate in his claim.²⁶ Testimony provided at hearings may assist the BVA when the veteran has provided an incomplete theory of entitlement to benefits thus far or when DVA has overlooked any alternative theories of entitlement.

As a procedural aside, the authors recognize that DVA ostensibly abrogated the holding of *Bryant* as it applies to the BVA in a final rule amendment published and made effective on August 23, 2011.²⁷ DVA took the position that it was merely clarifying existing hearing practice and procedures before the Agency of Original Jurisdiction (AOJ) and the BVA.²⁸ Specifically, the final rule amendment clarified that the hearing procedures outlined in 38 C.F.R. § 3.103(c)(2) apply to hearings held before the AOJ and not to hearings held before the BVA.²⁹ DVA also amended 38 C.F.R. § 20.706 to clarify that Board Members presiding over a hearing on appeal are not bound by the hearing procedures in 38 C.F.R. § 3.103(c)(2).³⁰ However, this final rule was challenged by the National Organization of Veterans Advocates, Inc. ("NOVA") at the United States Court of Appeals for the Federal Circuit (Federal Circuit).³¹ NOVA

²⁵ *Arneson v. Shinseki*, 24 Vet. App. 379, 382 (2011).

²⁶ 38 C.F.R. § 3.103(c)(2).

²⁷ Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals; Clarification, 76 Fed. Reg. 52,572 (Aug. 23, 2011).

²⁸ *Id.* at 52,573.

²⁹ *Id.*

³⁰ *Id.*

³¹ Petition for Review, *Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs*, No. 2011-7191 (Fed. Cir. Sept. 9, 2011).

argued that fundamentally the rule should not have been issued as final, but rather the rule was invalid because it should have gone through the normal notice and comment process under the Administrative Procedure Act (APA).³²

The United States Department of Justice (DOJ) recently indicated that DVA has decided to repeal the rule amendment and revise the rule to its previous language.³³ As part of the motion requesting additional time to accomplish this, the DOJ represented to the Federal Circuit that DVA will not apply the provisions of the August 23, 2011 amendment between the filing of the motion (March 5, 2012) and when the repeal of the amendment takes place.³⁴ DVA subsequently took action to repeal the prior amendment, taking effect on June 18, 2012 and applying to decisions issued by the Board on or after August 23, 2011.³⁵ However, there is nothing precluding DVA from trying again to abrogate *Bryant* by following the appropriate notice and comment procedures under the APA.

II. THE *BRYANT* DECISION

In *Bryant*, the BVA denied claims of entitlement to service connection for bilateral hearing loss, tinnitus, squamous cell carcinoma, and frostbite residuals in both feet.³⁶ Specifically, hearing loss and tinnitus were found to be not related to active service.³⁷ No current disability was found with respect to the squamous cell carcinoma, and frostbite residuals in both feet claims.³⁸

³² *Id.* at 1; Brief for Petitioner at 30, Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs, No. 2011-7191 (Fed. Cir. Dec. 22, 2011).

³³ Respondent's Second Motion for Enlargement of Time at 2, Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs, No. 2011-7191 (Fed. Cir. Mar. 5, 2012).

³⁴ *Id.* at 3.

³⁵ Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals; Repeal of Prior Rule Change, 77 Fed. Reg. 70,686, 70,686 (Nov. 27, 2012).

³⁶ *Bryant v. Shinseki*, 23 Vet. App. 488, 491 (2010).

³⁷ *Id.*

³⁸ *Id.*

On appeal, the appellant argued that DVA failed in its duty to assist, in that during his hearing before the BVA, the presiding Board Member did not suggest submission of medical evidence, relying on 38 C.F.R. § 3.103(c)(2), which outlines the responsibilities of DVA employees who conduct hearings.³⁹ The appellant further argued that the Board Member was required to make a preliminary decision prior to the hearing so that he or she could explain to the appellant any deficiencies in the evidence that would need to be overcome in order to receive a favorable decision.⁴⁰

DVA argued that the regulation applied to overlooked evidence and that in light of the notification letters sent to the appellant there was no overlooked evidence.⁴¹ DVA also argued that a Board Member's 38 C.F.R. § 3.103(c)(2) obligation arose in a narrow set of circumstances where a Board Member, having been placed on notice of the existence of evidence that would help prove a claim, failed to suggest the submission of such evidence.⁴² In addition, DVA argued that even if the Board Member had a duty to inform the appellant that medical evidence was needed to substantiate the claim, failure to meet the duty resulted in no prejudice because the appellant had been informed through the preadjudicatory notice provided pursuant to 38 U.S.C. § 5103(a).⁴³

The CAVC reasoned in the analysis of *Bryant* that the duties under 38 C.F.R. § 3.103(c)(2) do not require preadjudication of an appeal or that preadjudication of the evidence is required prior to a BVA hearing.⁴⁴ It determined that a Board Member need not weigh conflicting evidence in order to (1) ascertain whether the record lacks evidence for establishing a material element of a claim; (2) notify a claimant that evidence on that element should

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 491-92.

⁴³ *Id.* at 492.

⁴⁴ *Id.* at 493.

be submitted, and (3) assure that the hearing record is clear and complete.⁴⁵ Yet, the CAVC went on to note that a Board Member “necessarily must review the record” as part of its duty to fully explain the issues, and concluded that in doing so, the Board Member could not then “ignore a lack of evidence in the record on a material issue and not suggest its submission, unless the record (or the claimant at the hearing) clearly shows that such evidence is not available.”⁴⁶ In addition, the Board Member “must not only be familiar with the claims file but also be engaged in the hearing process.”⁴⁷ The CAVC held that the provisions of 38 C.F.R. § 3.103(c)(2) impose upon a Board Member: (1) a duty to explain fully the issues on appeal, and (2) a duty to suggest that a claimant submit evidence supporting the issues on appeal if the record does not already contain evidence on the issue.⁴⁸

The CAVC found in the case before it that the Board Member had erred as to the duty to explain fully the issues on appeal, noting the outstanding issues material to substantiating the claim, current disability and medical nexus.⁴⁹ The CAVC also found that “the record already contained VA medical examination reports stating that the appellant currently did not have frostbite, and that, although he had hearing loss and tinnitus, these disabilities were not caused by his service.”⁵⁰ In addition, responses were elicited from the appellant as to his frostbite, hearing loss, and tinnitus and that under these circumstances nothing gave rise to the possibility that evidence had been overlooked for these disabilities.⁵¹ However, with regard to squamous cell carcinoma, at the time of the hearing there was no DVA or other examination report addressing nexus; therefore the lack of medical evidence in the record addressing a nexus gave rise

⁴⁵ *Id.*

⁴⁶ *Id.* at 493-94.

⁴⁷ *Id.* at 496.

⁴⁸ *Id.* at 497.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

to the possibility that the evidence had been overlooked and the Board Member should have suggested that the appellant secure and submit this evidence if possible; this failure was error.⁵²

The CAVC then addressed whether there was prejudice to the Veteran in the case before them.⁵³ The CAVC concluded that the Veteran was not prejudiced on the frostbite, hearing loss, and tinnitus claims because the record on those claims had been fully developed, including by providing a DVA examination.⁵⁴ With regard to the fourth claim, squamous cell carcinoma, by contrast, the CAVC found that the Veteran had been prejudiced.⁵⁵ The CAVC explained that the evidence on that claim was absent from the record on the central issue involving nexus.⁵⁶

Judge Lance issued a separate opinion concurring in part and dissenting in part, noting that the holding built on the CAVC's "previously disjointed caselaw" regarding 38 C.F.R. § 3.103(c)(2).⁵⁷ He agreed with the majority that the provisions of 38 C.F.R. § 3.103(c)(2) impose on a Board Member a duty to explain and a duty to suggest.⁵⁸ He felt, however, that the majority did not adequately explain how their holding did not require preadjudication of an appeal.⁵⁹ Judge Lance pointed out that the majority did not adequately explain how its holding did not require preadjudication when the majority specifically

⁵² *Id.* at 497-98.

⁵³ *Id.* at 498-99.

⁵⁴ *Id.*

⁵⁵ *Id.* at 499.

⁵⁶ *Id.*

⁵⁷ *Id.* at 500 (Lance, J., concurring in part and dissenting in part). The majority in *Bryant* discusses and analyzes a number of prior cases regarding 38 C.F.R. § 3.103(c)(2), including *Thomas v. Nicholson*, 423 F.3d 1279 (Fed. Cir. 2005); *Prickett v. Nicholson*, 20 Vet. App. 370 (2006); *Sizemore v. Principi*, 18 Vet. App. 264 (2004); *Constantino v. West*, 12 Vet. App. 517 (1999); *Douglas v. Derwinski*, 2 Vet. App. 103 (1992); *Proscelle v. Derwinski*, 2 Vet. App. 629 (1992); and *Cuevas v. Principi*, 3 Vet. App. 542 (1992).

⁵⁸ See *Bryant*, 23 Vet. App. at 500 (finding that the majority did an excellent job of clarifying the CAVC's previously disjointed case law on 38 C.F.R. § 3.103(c)(2)).

⁵⁹ *Id.*

mandated that a Board Member review the entire record.⁶⁰ He explained that “some evaluation of the evidence” would be required in order to determine what issues were “reasonably in dispute.”⁶¹ Furthermore, he noted, a Board Member would often be required to analyze “the nature or meaning of ambiguous documents or reports” in the record to determine whether favorable evidence was missing from the record.⁶² Importantly, Judge Lance concluded that a Board Member’s central focus should be on the duty to explain, rather than the duty to suggest.⁶³ He felt that if a claimant did not understand the types of evidence needed to prove his claim, then that claimant would not understand what favorable evidence he could submit to support the claim.⁶⁴

Judge Lance proposed an alternative standard, which would be similar to the notice prescribed in *Kent v. Nicholson*,⁶⁵ to avoid requiring the preadjudication of claims.⁶⁶ According to this standard, the BVA would look to the most recent RO decision to determine what evidence was missing and what types of evidence would be needed.⁶⁷

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 500-01.

⁶⁴ *Id.* at 501.

⁶⁵ 20 Vet. App. 1, 9-10 (2006). In *Kent*, the CAVC found:

[I]n the context of a claim to reopen a previously denied claim for service connection, the VCAA requires the Secretary to look at the bases for the denial in the prior decision and to respond with a notice letter that describes what evidence would be necessary to substantiate that element or elements required to establish service connection that were found insufficient in the previous denial. Therefore, the question of what constitutes material evidence to reopen a claim for service connection depends on the basis on which the prior claim was denied.

Id.

⁶⁶ *Bryant*, 23 Vet. App. at 500.

⁶⁷ *Id.*

Judge Lance also disagreed with the majority's prejudicial error analysis.⁶⁸ He felt that the majority improperly focused on the duty to suggest requirement of 38 C.F.R. § 3.103(c)(2).⁶⁹ This, according to Judge Lance, denied an appellant the opportunity to be informed of what favorable evidence was lacking from the record.⁷⁰ If a veteran did not submit favorable evidence after a hearing, it might be because he did not understand that he might need to submit favorable evidence to rebut negative evidence already of record.⁷¹ Judge Lance concluded his opinion by emphasizing his belief that the duty to explain fully the issues existed "to help claimants rebut negative evidence."⁷²

III. CRITIQUE OF THE *BRYANT* ANALYSIS AND RULE

Preadjudication, which is also referred to as predecisional analysis or predecisional adjudication, involves any analysis of, or ruling on, the probative value of the available evidence in a claim prior to the time the BVA makes a final decision on the merits of that claim.⁷³ The CAVC, in *Bryant*, found that preadjudication was not necessary for a Board Member to satisfy the duty to suggest.⁷⁴ However, the CAVC's body of prior case law addressing preadjudication, as Judge Lance indicated in his dissent in *Bryant*, calls into question this conclusion.⁷⁵

⁶⁸ *Id.*

⁶⁹ *Id.* at 500-01.

⁷⁰ *Id.* at 501.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Locklear v. Nicholson*, 20 Vet. App. 410, 415-16 (2006).

⁷⁴ *Bryant*, 23 Vet. App. at 492-93.

⁷⁵ *Id.* at 500.

A. Prior Case Law Addressing Preadjudication

The CAVC has previously addressed analogous situations.⁷⁶ The CAVC, in *Locklear v. Nicholson*, addressed the provisions of 38 U.S.C. § 5103(a), which, they explained, imposed three notice duties on DVA once a claim is submitted.⁷⁷ First, DVA has a duty to notify a claimant of any information and evidence “not previously provided to the [DVA] that is necessary to substantiate the claim.”⁷⁸ Second and third, DVA has a duty to notify the claimant of what evidence is to be provided by the claimant and what evidence would be obtained by DVA on behalf of the claimant.⁷⁹ Analogous to the three duties of 38 U.S.C. § 5103(a), the CAVC in *Bryant* identified the provisions of 38 C.F.R. § 3.103(c)(2) as imposing two duties on a Board Member: (1) a duty to fully explain the issues, and (2) a duty to suggest the submission of evidence that was possibly overlooked.⁸⁰ The second duty imposed by 38 C.F.R. § 3.103(c)(2), that a Board Member “suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant’s position,”⁸¹ is consistent with the duty of 38 U.S.C. § 5103(a) requiring DVA to notify a claimant of evidence “not previously provided to [DVA] that is necessary to substantiate the claim.”⁸²

In particular, the CAVC explained in *Locklear* that DVA’s duty to notify concerns the evidence gathering stage of a claim rather than the evidence analysis stage.⁸³ The CAVC in *Locklear* went on to describe DVA’s claims processing structure as “longitudinal and sequential,” such that information and evidence is gathered before DVA undertakes any analysis or adjudication.⁸⁴

⁷⁶ See *Locklear*, 20 Vet. App. at 410; *Hupp v. Nicholson*, 21 Vet. App. 342 (2007); *Kent v. Nicholson*, 20 Vet. App. 1 (2006); *Mayfield v. Nicholson*, 20 Vet. App. 537 (2006).

⁷⁷ *Locklear*, 20 Vet. App. at 414.

⁷⁸ *Id.* (quoting 38 U.S.C. § 5103(a) (2006)).

⁷⁹ *Id.*

⁸⁰ *Bryant*, 23 Vet. App. at 497.

⁸¹ 38 C.F.R. § 3.103(c)(2) (2011).

⁸² 38 U.S.C. § 5103.

⁸³ *Locklear*, 20 Vet. App. at 415.

⁸⁴ *Id.* at 416.

The CAVC clarified that 38 U.S.C. § 5103(a) concerned only the information and evidence gathering step.⁸⁵ In fact, according to the CAVC, “it would be senseless to construe [38 U.S.C. § 5103(a)] as imposing upon the [DVA] a legal obligation to rule on the probative value of information and evidence” before reaching a decision on the merits of a claim.⁸⁶ The CAVC in *Locklear* recognized, however, that 38 U.S.C. § 5103(a) requires DVA to notify a claimant of any “information and evidence ‘not previously provided to’” DVA.⁸⁷ Accordingly, the CAVC found that DVA must undertake “some cognitive review” of a claim before issuing a VCAA notice letter.⁸⁸ The CAVC then referred to *Kent v. Nicholson*,⁸⁹ which directed DVA to “‘look at the bases for the denial in the prior decision,’” and send a claimant notice of “‘what evidence would be necessary to substantiate that element or elements’” found insufficient in the prior decision.⁹⁰

Then, in a non-precedential decision, *Wilson v. Nicholson*,⁹¹ the CAVC addressed a situation where a Veteran’s attorney sent a letter to DVA asking that he be informed of “what information and evidence was *missing* and necessary to substantiate his claim.”⁹² The attorney specifically asked to be advised if DVA “determine[s] there is significant negative evidence on a material issue in this claimant’s record, please let my client know what this evidence is and what types of evidence would aid in rebutting this negative evidence.”⁹³ The CAVC, citing *Locklear*, concluded that DVA was not required to analyze the gathered evidence and notify the attorney of any inadequacies, because this would require predecisional adjudication of the evidence.⁹⁴

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* (quoting 38 U.S.C. § 5103(a)).

⁸⁸ *Id.*

⁸⁹ 20 Vet. App. 1 (2006).

⁹⁰ *Locklear*, 20 Vet. App. at 416 (citing *Kent v. Nicholson*, 20 Vet. App. 1, 10 (2006)).

⁹¹ No. 05-566, 2006 WL 3094166 (Vet. App. Oct. 24, 2006).

⁹² *Id.* at *2.

⁹³ *Id.*

⁹⁴ *Id.*

Similarly, in *Mayfield v. Nicholson*,⁹⁵ the CAVC rejected a claimant's position that 38 U.S.C. § 5103(a) required DVA to notify her of the specific inadequacies in the evidence.⁹⁶ The CAVC found that this would require "preliminary adjudication" and "would be inconsistent with the entire statutory scheme governing the adjudication of a DVA claim, which provides for an extensive review and appeal process."⁹⁷

In *Hupp v. Nicholson*,⁹⁸ the CAVC addressed a claimant's contention that DVA needed to notify her as to what evidence was insufficient to grant service connection at the time she filed her claim.⁹⁹ The claimant in *Hupp* had previously submitted evidence addressing each element of the claim.¹⁰⁰ The CAVC characterized her contention as "in essence, argu[ing] that before providing VCAA notice, DVA is required to conduct a preadjudicatory analysis of the evidence in its possession, prior to issuance of VCAA notification and to then tailor the notice accordingly."¹⁰¹ The CAVC reiterated that according to *Locklear* "the 'not previously provided' language of section 5103(a)" requires "some cognitive review" of the evidence prior to providing notice.¹⁰² This "cognitive review," however, does not require DVA to assess the weight, sufficiency, credibility, or probative value of any assertion or evidence submitted along with the claim.¹⁰³ After reviewing the legislative history of § 5103(a) and the regulatory history of 38 C.F.R. § 3.159, the CAVC found that DVA's "notice must be responsive to the particular application submitted" and would fall within "a middle ground between a predecisional adjudication and boilerplate notice."¹⁰⁴ The CAVC referred to

⁹⁵ 20 Vet. App. 537 (2006).

⁹⁶ *Id.* at 541.

⁹⁷ *Id.*

⁹⁸ 21 Vet. App. 342 (2007).

⁹⁹ *Id.* at 349.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 350.

¹⁰² *Id.* (citing *Locklear v. Nicholson*, 20 Vet. App. 410, 416 (2006)).

¹⁰³ *Id.* at 353.

¹⁰⁴ *Id.* at 352.

Kent in establishing that appropriate notice in a dependency and indemnity compensation (DIC) claim should be (tailored) responsive “to the particulars of the application submitted,” such as issues or theories of entitlement raised by the evidence.¹⁰⁵ Importantly, however, the CAVC found that the type of notice desired by the claimant, which would require preadjudication of the evidence, might be prejudicially misleading.¹⁰⁶ In fact, they found, the claimant might actually have been discouraged from submitting any further evidence supporting her claim.¹⁰⁷

The aforementioned precedential cases establish that the DVA claims process involves two distinct phases: (a) the evidence gathering phase and (b) the adjudication phase.¹⁰⁸ Analogous to the provisions of 38 U.S.C. § 5103(a), as detailed in *Locklear*, the provisions of 38 C.F.R. §§ 3.103(c)(2) and 20.700 apply to BVA hearings held in order to gather evidence.¹⁰⁹ Hearings before the BVA therefore are most properly considered to be within the evidence gathering phase, during which the CAVC consistently and thoroughly finds preadjudication to be impermissible.¹¹⁰ In fact, as the CAVC explained in *Hupp*, any sort of preadjudication would likely be prejudicially misleading.¹¹¹ Thus, preadjudication is impermissible prior to a BVA hearing. Accordingly, the duty-to-suggest, although it may appear to require case-specific notice, should more correctly be understood to require no more than a generic suggestion to the claimant to submit favorable evidence on all material issues.¹¹²

¹⁰⁵ *Id.* at 353.

¹⁰⁶ *Id.* at 354.

¹⁰⁷ *Id.*

¹⁰⁸ *See id.* at 352-54; *Kent v. Nicholson*, 20 Vet. App. 1 (2006); *Locklear v. Nicholson*, 20 Vet. App. 410 (2006); *Mayfield v. Nicholson*, 20 Vet. App. 537 (2006).

¹⁰⁹ 38 C.F.R. §§ 3.103(c)(2), 20.700(b) (2011). *See id.* § 20.700(b) (“The purpose of a hearing is to receive argument and testimony relevant and material to the appellate issue.”).

¹¹⁰ *See Locklear*, 20 Vet. App. at 415 (finding that the argument for preadjudication as part of VA’s duty to notify—“must fail”).

¹¹¹ *Hupp*, 21 Vet. App. at 354.

¹¹² *See Bryant v. Shinseki*, 23 Vet. App. 488, 497 (2010) (discussing the duties to explain and to suggest). A BVA Board Member encounters difficulties when wearing the

Although the CAVC in the precedential cases cited above was specifically addressing the notice requirements of 38 U.S.C. § 5103(a), the provisions of 38 C.F.R. § 3.103(c)(2), as addressed in *Bryant*, are nearly analogous, as noted previously.

B. A Hypothetical Case

The CAVC’s holding in *Bryant* indicates that it foresaw the duty-to-suggest to apply only in those limited situations where the record contains no evidence on a material element of a claim.¹¹³ Its prejudicial error analysis, in particular, best illustrates this as the CAVC found that there was no prejudice to the Veteran regarding some of his claims because the record already contained evidence, although unfavorable, on all material elements.¹¹⁴ In other words, the CAVC concluded that the Board Member need not suggest the submission of favorable evidence because there was already evidence addressing each of the material elements of the claim. This, however, as Judge Lance correctly pointed out, disregards the

“advocate-judge-multiple-hat” role. *Richardson v. Perales*, 402 U.S. 389, 410 (1971); *see also* Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 788-89 (1974) (“The only logical replacement for one man wearing three hats is three men, each wearing one: a neutral hearing officer, and separate representatives for the claimant and the social welfare agency. . . . The costs of such an adversary procedure probably render it unacceptable. No federal social welfare system currently provides representation for claimants as a matter of right . . .”).

¹¹³ *See Bryant*, 23 Vet. App. at 498 (explaining that “the assessment of prejudice generally is case specific, demonstrated by the appellant and based on the record”).

¹¹⁴ *See id.* at 498-99. In finding no prejudice regarding some of the claims, the CAVC wrote:

With regard to the appellant’s claim for benefits for frostbite, hearing loss, and tinnitus, although the Board hearing officer did not explicitly lay out the material issues of medical nexus and current disability, the record reflects that they were developed by the Secretary – to include medical examination reports on each of these disabilities and any nexus to service – and there was no indication that the represented appellant had any additional information to submit. Accordingly, the ‘clarify and completeness of the hearing record’ was intact with respect to these disabilities and the purpose of § 3.103(c)(2) was fulfilled.

Id.

provisions of 38 C.F.R. § 3.103(c)(2), which require the BVA to advise a claimant to submit favorable evidence.¹¹⁵

Judge Lance's opinion in *Bryant* exposes the conflicting requirements placed on a Board Member by the CAVC's holding in *Bryant*. On the one hand, he notes, the majority in *Bryant* require a Board Member to review the entire record prior to the hearing, identify what evidence is missing on the material elements of the claim, and then suggest to the claimant during the hearing that the claimant submit any evidence on that material element.¹¹⁶ On the other hand, he points out, the CAVC finds that such review of the entire record would not require any weighing of the evidence.¹¹⁷

As Judge Lance makes clear, the CAVC's holding in *Bryant* requires a Board Member to review the entire record prior to a hearing and determine if there is a lack of evidence on any material issue, but not weigh the evidence.¹¹⁸ This places the Board Member in a difficult position and presents her with two distinct limitations. The first limitation that the Board Member must overcome is the logistical difficulty involved in determining what, if any, evidence is "missing" on a material issue.¹¹⁹ The second limitation faced by the Board Member occurs when her review of the record discloses any pertinent evidence on a material issue, as she is then constrained in her ability to determine whether that evidence actually supports the claim.¹²⁰

¹¹⁵ *Id.* at 500-01 (Lance, J., concurring in part and dissenting in part); *see also* 38 C.F.R. § 3.103(c)(2) (2011) ("It is the responsibility of the VA employee or employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position.").

¹¹⁶ *Bryant*, 23 Vet. App. at 500.

¹¹⁷ *Id.*

¹¹⁸ *Id.* Judge Lance stated his belief that "the majority fail[ed] to sufficiently explain the distinction between its holding that [38 C.F.R. § 3.103(c)(2)] does not require a preadjudication of the claim or weighing of the evidence and its requirement that the hearing officer must review the entire record to fully explain the issues on appeal." *Id.*

¹¹⁹ *See id.* (pointing out that "[r]eviewing the record to determine what issues it raises necessarily requires some evaluation of the evidence and some judgment about which issues are reasonably in dispute").

¹²⁰ *See id.* ("Determining that there is no favorable evidence in the record will often require making a decision about the nature or meaning of ambiguous documents or reports in the claims file.").

These two limitations are best seen when illustrated by a hypothetical case involving a claim of service connection for posttraumatic stress disorder (PTSD). In this hypothetical PTSD claim, the material issues on appeal are whether there is evidence of (1) a verified in-service stressor, (2) a competent diagnosis of PTSD, and (3) a link between the diagnosis and a verified stressor.¹²¹

In this hypothetical PTSD case, the Board Member must, according to *Bryant*, review the entire record to determine if there is any evidence on each material issue.¹²² The CAVC specifically cautioned that a Board Member “cannot ignore a lack of evidence in the record” on a material issue and fail to suggest its submission.¹²³ Thus, consider that the Board Member in this hypothetical case is presented immediately prior to the hearing with thousands of pages of evidence, including ongoing private and VA psychiatric treatment records, which span twenty years and are largely comprised of handwritten and barely legible psychiatric progress notes. (For sake of visualization, imagine that this evidence fills four packing boxes upon shipment to the BVA.) A review of such an extensive record may take many hours. However, the Board Member may have many more hearings in the same day, possibly with cases involving similarly complex issues or voluminous evidence. Consequently, the Board Member cannot reasonably review the entire record prior to the hearing to determine if the record lacks evidence for establishing a material element of a claim, as required by *Bryant*.¹²⁴ Even with a less extensive record, this time constraint could still inadvertently result in a confirmation bias whereby the Board Member identifies only the evidence that is material to the basic elements of a claim without giving

¹²¹ 38 C.F.R. § 3.304(f) (2011).

¹²² *Bryant*, 23 Vet. App. at 493-94, 496.

¹²³ *Id.* at 493-94.

¹²⁴ *Cf. id.* (stating that “there is no dispute that a hearing officer necessarily must review the record”).

consideration to potential alternative theories of entitlement. Thus, the CAVC's holding in *Bryant* presents a BVA Board Member with a distinct practical difficulty.

Even should the Board Member surpass this initial, logistical difficulty, a greater issue arises should the record before the BVA present some evidence on a material issue. In such a situation, the Board Member would be directly presented with the conflicting mandates of *Bryant*, as discussed above.¹²⁵ In attempting to resolve this conflict, the Board Member would either need to undertake no more than a cursory review of the record in order to avoid impermissibly preadjudicating the evidence, but at the risk of failing to satisfy her duty-to-suggest, or would need to examine the evidence more closely, which would then give rise to the potential for impermissibly preadjudicating the claim.

Consider in the hypothetical PTSD claim that the Board Member prior to the hearing notes the supplemental statement of the case's (SSOC's) negative findings on all material elements. The Board Member then reviews, to the best extent possible in the available time, the evidence of record. This review reveals four different types of evidence that address whether there is a medical diagnosis of PTSD. First, the most recent VA treatment records show a diagnosis of paranoid schizophrenia, but no indication of PTSD. Second, the outpatient treatment records contain a recent VA nursing note showing that a routine PTSD screening test was negative. Third, a VA examination, which was performed fifteen years earlier and is labeled as a "psychiatric examination other than PTSD," also shows a diagnosis of schizophrenia, but not of PTSD. Fourth, a handwritten record from a VA Vet Center appears to show a diagnosis of PTSD.

¹²⁵ See *supra* notes 116-117 and accompanying text.

On a “cognitive review,” the VA Vet Center record appears to contain favorable evidence on the material issue of whether there is a medical diagnosis of PTSD. The Board Member may also conclude that the VA examination is neither favorable nor unfavorable (as it did not address PTSD), and that the VA PTSD screening test was entirely unfavorable. Consequently, the Board Member, mindful of the CAVC’s prejudicial error analysis in *Bryant*, may determine that no further action needs to be taken with regard to the duty-to-suggest in light of the record.¹²⁶

However, this Board Member’s understanding of the law and her past experience would also immediately reveal to her that this evidence is, in fact, entirely unfavorable to the veteran. Regarding the VA Vet Center progress note, the Board Member may determine that although there is a notation of PTSD, the assessment was made by an intake counselor who has no medical qualifications whatsoever, and thus is not a competent medical diagnosis. Because this assessment would amount to no more than a lay determination, the Board Member may find that this evidence does not actually support the appeal in light of the provisions of 38 C.F.R. § 3.304(f), which specifically require “medical evidence diagnosing the condition.” Moreover, the Board Member might also find that the diagnosis was based entirely on the veteran’s own reports, which the Board Member finds not credible during the course of the hearing. Thus, it is not favorable evidence.

Next, regarding the VA examination from fifteen years earlier, this Board Member might see, upon further consideration, that the VA examiner did, in fact, carefully consider a diagnosis of PTSD, but ruled it out after performing an extensive psychiatric evaluation. This evidence would thus appear to be entirely unfavorable to the veteran’s claim, except that it was performed so many years prior to the filing of the claim for

¹²⁶ *Bryant*, 23 Vet. App. at 498-99.

PTSD. Next, regarding the more recent diagnosis of paranoid schizophrenia, the Board Member might find that rather than PTSD, this is the actual diagnosis and basis for the veteran's claim. Finally, regarding the routine PTSD screening test that was conducted during the course of a VA treatment session and determined to be negative, the Board Member would clearly find this as unfavorable evidence. In short, the Board Member might be confronted with a record that is entirely lacking in evidence that supports the veteran's claim particularly concerning whether there is medical evidence diagnosing the condition. Moreover, this review of the record may show that the claim should actually be developed as a claim of service connection for schizophrenia. The Board Member's cognitive review, however, results in impermissible preadjudication of the evidence.¹²⁷ This approach is particularly problematic because the Board Member would not have satisfied her duty to suggest the submission of favorable evidence unless she impermissibly weighed the merits of the evidence. This hypothetical PTSD case illustrates that there is, in fact, no distinction between a "cognitive review" of the record, which contemplates that there is no investigation into the comparative merits of the evidence, and a preadjudication of the evidence. In other words, this hypothetical demonstrates that it is only by preadjudicating a claim, which is impermissible, that a Board Member would be able to (1) determine whether there is relevant evidence on the material issues of the case, and (2) best meet the duty-to-suggest, to include fully developing all alternative theories of entitlement that may be discovered. Thus, the duties of 38 C.F.R. § 3.103(c)(2) to explain and suggest, as identified by the majority in *Bryant*, necessarily require (the impermissible) preadjudication of a claim.¹²⁸

¹²⁷ *Id.* at 500 (Lance, J., concurring in part and dissenting in part) (noting that a determination of no favorable evidence may require evaluating the meaning of ambiguous documents or reports in the claims file).

¹²⁸ *See id.* (suggesting that there is little distinction between the majority's acknowledgment that preadjudication of a claim is not required and its expectation that a Board Member review the entire record to fully explain the issues on appeal).

It is beyond the scope of this Note and not the authors' intention to argue that preadjudication should be permissible. Certainly, such a position is against the pertinent case law, as discussed above.¹²⁹

IV. PROPOSALS

Several potential solutions are available to a Board Member that would allow her to both fully satisfy the duty-to-suggest while maintaining the evidence-gathering goal of a BVA hearing. None of these approaches would require a Board Member to review the entire record prior to the hearing or undertake any degree of preadjudication of the claim.

One criticism of the current claims adjudication process is that evidence gathering and development procedures are fundamentally flawed.¹³⁰ Further, the VCAA notice letters designed to facilitate this evidence gathering “have not succeeded in enabling veterans to support their claims with adequate medical evidence,”¹³¹ and have not improved the veterans' understanding of the benefits adjudication system or what they truly need to provide in order to substantiate their claim.¹³² The CAVC's decision in *Bryant* attempts to address these flaws in the context of the duties to explain and suggest, as indicated in 38 C.F.R. § 3.103(c).¹³³ Although these duties would provide a claimant with an additional opportunity to understand what is required to prove their claims and submit evidence to do so, the discussion above shows that the CAVC's framework either limits the BVA's application of

¹²⁹ See *supra* notes 76-112 and accompanying text.

¹³⁰ See Ridgway, *supra* note 7, at 405-06, 415 (noting that the VA “adjudication system . . . lacks adequate evidence-gathering tools” and is thus “destined to breed both inefficiency and resentment”).

¹³¹ *Id.* at 415.

¹³² See *id.* (“[T]he high ratio of VA medical examinations to claims suggests that veterans routinely submit private medical evidence that VA deems to indicate that a claim might have merit, but which is ultimately not adequate to grant benefits.”).

¹³³ *Bryant*, 23 Vet. App. at 497-99.

the duty to suggest to those situations where there is no evidence on a material issue or requires some degree of impermissible preadjudication, if there is evidence on a material issue.

The below proposals are designed to minimize or eliminate the amount of preadjudication required if the BVA is presented with a record containing potentially conflicting evidence while still providing a meaningful opportunity for a Board Member to satisfy the duties to explain and suggest.¹³⁴ What the proposals have in common is an attempt to improve the interaction between DVA and the claimant during the iterative process that is the lifecycle of a claim, thereby attempting to improve an evidence development process that is quite often deficient.

The various goals of the claims process by which the authors will evaluate the hearing proposals are evaluated as follows: efficiency, claimant satisfaction, truth-seeking, development of the claim to its optimum, and respect for the claimant-representative relationship. Efficiency concerns whether the hearing proposal adequately advances the evidence gathering goal while also speeding claims processing. Claimant satisfaction is a measure of whether the claimant feels as though they have been provided a fair opportunity to explain his or her claim. Truth-seeking concerns whether the proposal effectively results in the production of evidence that actually supports a grant of a claimed benefit as a result of the hearing. Development of the claim to its optimum goes to whether the proposal helps effectively further develop evidence for the claim, whether favorable or unfavorable. Respect for the claimant-representative relationship looks at whether the proposal reinforces or lessens the relationship between the claimant and his duly appointed representative.

¹³⁴ See 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, 127 (2009) (noting that “fundamentally, the appellate role of the BVA is completely contrary to the traditional model. . . . Because the role of the BVA is supposed to be aggressive, it is much easier for it to fall short” of the high standard set by statute, regulation and jurisprudence that delineates its duties as both advocate and adjudicator).

A. Reading of VCAA Notice on the Record During a Hearing

A simple solution is to read out loud at a BVA hearing a shortened version of the content contained in the VCAA notice letter that the RO's send out to veterans at various points in the claims process.¹³⁵ This would address the information that the veteran needs to provide in order to prove his claim in a generic fashion, particularly the basic elements of claims for service connection, increased ratings, earlier effective dates, etc. Hearing the elements necessary to substantiate a claim in person, and on record, could very well help the veteran better understand the issues material to his case.¹³⁶ This repetition would likely help a claimant retain information more effectively. The drawback to this approach is that it would be duplicative of what the RO has already done via the VCAA letters. Here, it appears that the burden on DVA is low, but by itself, the probable effectiveness is also low.¹³⁷ This proposal seems to score highly on the measures of efficiency, truth seeking and development of the claim to its optimum. It does not address the measures of claimant satisfaction or the claimant-representative relationship. It is also noted that the critiques of VCAA notice letters often center on their confusing prose and use of "legalese" rather than providing a clear and simple notification.

¹³⁵ See 38 U.S.C. §§ 5100, 5102-03A, 5106-07, 5126 (2006); 38 C.F.R. § 3.159(b) (2011).

¹³⁶ See 38 C.F.R. § 3.103(c)(2) ("The purpose of a hearing is to permit the claimant to introduce into the record . . . any available evidence which he or she considers material and any arguments or contentions with respect to the facts and applicable law which he or she may consider pertinent.").

¹³⁷ See Terrence T. Griffin & Thomas D. Jones, *The Veterans Claims Assistance Act of 2000: Ten Years Later*, 3 VETERANS L. REV. 284, 320 (2011) ("[T]he recent actions by the CAVC, and to a lesser extent VA, that seek to inform a claimant of every conceivable regulation that may, or may not, apply to the specific claim, not only unnecessarily consume VA resources and confuse claimants, but also often prove to serve no real benefit to the claimant.").

B. More Board Member Direction During a Hearing

There are a number of different approaches that individual Board Members take when conducting their hearings.¹³⁸ If a veteran is represented, most Board Members will let the representative direct the examination of the veteran during the hearing. However there is very little private attorney representation at the DVA level; rather most representatives are members of veterans' service organizations (VSOs).¹³⁹ If a Board Member hears something that is elicited from the veteran that she feels she needs more information on, she will ask direct questions for clarification. Otherwise, the Board Member will allow the representative and the veteran to proceed however they wish, as long as the questions stay relevant to the issue before the BVA. Sometimes a veteran will come into a hearing and simply unburden himself, with his testimony providing little to no relevance to the actual evidence necessary to prove the elements of the issues on appeal.¹⁴⁰ In addition, there is a wide variety in the quality of representation, with the representatives themselves sometimes focusing on evidence with little to no relevance to the issue actually before the BVA.¹⁴¹ An example is when an issue before

¹³⁸ The observation that individual Board Members take different approaches during hearings is based on the authors' personal experience observing BVA hearings.

¹³⁹ See 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, 261-62 (2010) (providing statistics regarding attorney representation at the BVA). It was also stated that "cases involving claimants without attorney representation dominate the landscape of veterans law." *Id.*

¹⁴⁰ See VETERANS ADMINISTRATION, VA REGULATIONS COMP. & PENSION – TRANSMITTAL SHEET 494: EXPLANATION OF 38 C.F.R. § 3.103(c) (July 18, 1972) [hereinafter TRANSMITTAL SHEET] ("[I]t is reasonable to assume that the claimant who requests a hearing is, in general, a disgruntled claimant and one who brings some feeling of antagonism into the hearing room though it may not be manifest. He is a person who believes sincerely in the merit and validity of his claim and feels that he has been unjustly denied. The most effective and certainly the most appropriate counter to such antagonism is an attitude on the part of the VA personnel of friendliness, helpfulness, courtesy and respect. In many instances a full explanation of the issues and an attentive ear are full satisfaction to the claimant.").

¹⁴¹ See generally Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases before VA: The "New Paternalism"*, 1 VETERANS L. REV. 2, 17-18 (2009) (discussing the developing Federal Circuit case law and noting that "an appellant who

the BVA is service connection and the veteran and representative spend the bulk of the hearing focused on describing the current symptoms and effects of the claimed disability, which is more relevant and probative to a rating issue.¹⁴²

If a veteran is unrepresented, sometimes, a Board Member will allow the veteran to simply speak his mind, but often, a Board Member will take tighter control of the hearing and provide more directed questions. The purpose of this action is to try to ensure that the veteran understands the hearing process and can put relevant testimony on the record.¹⁴³

is represented by a veterans' service organization must be afforded the same treatment as one who proceeds with no representation, effectively placing veterans' service organization representation in the pro se category"); *see also* *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009) ("Indeed, even if [the claimant] had received more significant assistance from the [VSO], representation by an organizational aide is not equivalent to representation by a licensed attorney. Although aides from veterans' service organizations provide invaluable assistance to claimants seeking to find their way through the labyrinthine corridors of the veterans' adjudicatory system, they are 'not generally trained or licensed in the practice of law.'" (citing *Cook v. Brown*, 68 F.3d 447, 451 (Fed. Cir. 1995)); *but see* *Kreindler & Richmond*, *supra* note 15, at 67 ("An attorney, however, is not considered to be inherently superior to a VSO, as VSO representatives are expected to be familiar with VA law, and provide invaluable assistance to claimants in the unique field of veteran benefits, many of whom have been working in this single field of law for many years.").

¹⁴² *See generally* 38 C.F.R. § 4.1 (2011). In pertinent part this regulation provides:

[The] rating schedule is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service. The percentage ratings represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations. Generally, the degrees of disability specified are considered adequate to compensate for considerable loss of working time from exacerbations or illnesses proportionate to the severity of the several grades of disability. For the application of this schedule, accurate and fully descriptive medical examinations are required, with emphasis upon the limitation of activity imposed by the disabling condition.

Id.

¹⁴³ *See* 38 C.F.R. § 20.700(b) (discussing the purpose of a hearing, to include receiving relevant argument and testimony).

In order to fully satisfy the duties to explain and suggest, however, the Board Member could more carefully direct the course of all hearings. In particular, with regard to the duty to explain, the Board Member could open the hearing with a discussion of the material elements of the claim presented, such as those discussed in the hypothetical PTSD claim herein. Rather than a mere recitation of the issues and elements, the Board Member could allow the veteran and the veteran's representative to ask follow-up questions to seek clarification. Such an approach would allow a Board Member the flexibility to advise the claimant to his level of understanding. Of course, this approach would be difficult to implement where the legal issues in a case involve novel or complex elements that are difficult for a layperson to understand. Nonetheless, this would allow the Board Member to more carefully discern whether the veteran understands the elements of his claim and then restate the elements of the claim as often as necessary to help the veteran understand the issue.

Regarding the duty to suggest, the Board Member could choose between two alternatives. First, she may simply proceed by informing the claimant in a nonspecific way that he should submit evidence supporting each material element of the claim. The Board Member could concurrently explain what types of evidence may favorably support each of those elements. This approach would allow the claimant to ask questions should he need more clarification and would also allow the Board Member to avoid preadjudicating the evidence. The limitations of this discussion-approach are twofold. First, it would require more time, particularly if there are several issues with complex legal elements that the claimant may have difficulty understanding or where the claimant wishes to ask many questions. Second, such a nonspecific approach does not allow the Board Member to address the evidence already of record, which may or may not be favorable. Similarly, the Board Member may too narrowly focus the discussion based on her initial impression of the veteran's theory of the case. For instance, by carefully directing

the discussion, the Board Member may inadvertently prevent the claimant or representative from offering any alternative theories of entitlement.

An alternative is for the Board Member to carefully identify the evidence already of record and discuss how that evidence may be favorable to the claim. As discussed in great detail herein, however, such an approach would require some degree of preadjudicating the evidence.

A more open-ended approach would allow the claimant to fill out the record more completely with his “theory of the case,” but at the cost of that claimant’s propensity to fill the record with testimony irrelevant to the material issues of the case.

Overall, the drawback to this BVA-directed approach is that claimants may not feel as comfortable in the hearing, as they may be anxious or even intimidated by a “Veterans Law Judge.” Moreover, a BVA hearing may be the only time they testify or even speak directly to anyone at DVA regarding the specifics of their claim.¹⁴⁴ Accordingly, they may not feel that they satisfactorily presented their case if the Board Member carefully controls the discussion. This is also somewhat analogous to the lack of interaction between clinicians and adjudicators in the process by which DVA develops medical examinations and opinions.¹⁴⁵ The veteran in this instance may feel as though he

¹⁴⁴ 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.”).

¹⁴⁵ See James D. Ridgway, *Erratum to: Mind Reading and the Art of Drafting Medical Opinions in Veterans Benefits Claims*, 5 PSYCHOL. INJ. & L. 72, 74 (2012) (“One reason that evidence problems are tragically frequent in the VA claims system is that there is little interaction between psychologists and adjudicators in the VA process.”); see also Dr. Patrick Joyce, *Is There a Doctor in the House?*, Breakout Session at the Ninth Judicial Conference of the United States Court of Appeals for Veterans Claims (Apr. 24-25, 2006), in 21 Vet. App. LI, CLII (noting that communication between the BVA and a DVA medical examiner “is usually one way”: the BVA sends a request, and the examiner renders an opinion).

is being cross-examined or not being allowed to focus on items he may feel are important to the case (even if the Board Member does not think so).¹⁴⁶

In addition, when a veteran is represented, the representative may feel as though the Board Member's direction is impinging on her role; not allowing her to do her job, in ways she could feel would be more effective if allowed to present the hearing testimony in the manner in which she sees fit.¹⁴⁷ The VSOs in particular are very cognizant of their place in the veterans benefits' adjudication process and may be reluctant to cede what they feel is an appropriate role.¹⁴⁸ Overall this proposal scores highly on the measures of truth seeking and development of the claim to its optimum, but less highly on the measure of efficiency. Furthermore, it may have a negative impact as to the measures of claimant satisfaction and respect for the claimant-representative relationship.

C. Application of a Standard Similar to *Kent v. Nicholson*

One of the suggestions in Judge Lance's dissent was an alternative standard, which would be similar to the notice prescribed in *Kent v. Nicholson*.¹⁴⁹ As noted in *Locklear*, DVA would undertake

¹⁴⁶ *But see* 38 C.F.R. § 20.700(c) (stating that hearings conducted by the BVA are nonadversarial and that "cross-examination will not be permitted").

¹⁴⁷ *See generally From the Inside Out: A Look at Claims Representatives' Role in the Disability Claims Process, Hearing Before the H. Comm. on Veterans' Affairs*, 112th Cong. (2012).

¹⁴⁸ *See, e.g.,* Rory E. Riley, *Simplify, Simplify, Simplify – An Analysis of Two Decades of Judicial Review in the Veterans' Benefits Adjudication System*, 113 W. VA. L. REV. 67, 72 (2010) (explaining how starting in the 1950s, there were divisions among the VSOs regarding the issue of judicial review, with some of the VSOs taking the position that "the informal, pro-claimant nature of the VA system would be lost if VA claims were taken to a more adversarial setting"); *see also* Victoria L. Collier & Drew Early, *Cracks in the Armor: Due Process, Attorney's Fees, and the Department of Veterans Affairs*, 18 ELDER L.J. 1, 16 (2010) ("Some VSOs . . . opposed proposals to increase attorney participation in the process. They rationalized that inserting lawyers into VA benefits claims would require the VA to divert existing resources in order to effectively handle oversight of lawyers and would decrease the benefits paid out to the veterans. They also viewed such involvement as unnecessary.").

¹⁴⁹ *Bryant v. Shinseki*, 23 Vet. App. 488, 500 (2010) (Lance, J., concurring in part and dissenting in part) (citing *Kent v. Nicholson*, 20 Vet. App. 1 (2006)).

“some cognitive review” of a claim before issuing a VCAA notice letter.¹⁵⁰ According to this standard, the BVA would look to the most recent RO decision and “clearly explain to the appellant what element or elements of the claim were found deficient by that decision and what types of evidence would help the appellant prevail as to those issues.”¹⁵¹

The Board Member could review the record directly or rely on the RO’s adjudications, such as in a statement of the case (SOC) or SSOC, to identify the evidence already of record on each material issue of a claim.¹⁵² In doing so, the Board Member could maintain a position of “suspended judgment” while identifying this information.¹⁵³ In other words, the Board Member could consider that such evidence may be favorable, but could also be unfavorable upon a further review of the evidence when weighed and compared upon further adjudication. The Board Member could advise a veteran as such. For instance, the Board Member could inform the veteran that although such evidence is of record, no decision has been taken on the strength of the evidence, but that it may support the claim.

The benefit of this approach is that again it reiterates or perhaps would provide in more layman’s terms, the reason that the RO had denied the veteran’s claim. Thusly, the veteran would be made aware of whatever DVA perceived as the weakness of his claim.¹⁵⁴ In addition, it would be relatively simple to apply; looking to the reasons for denial from the last RO adjudication.

¹⁵⁰ *Locklear v. Nicholson*, 20 Vet. App. 410, 416 (2006).

¹⁵¹ *Bryant*, 23 Vet. App. at 500 (Lance, J., concurring in part and dissenting in part).

¹⁵² *See Procopio v. Shinseki*, 26 Vet. App. 76, 82 (2012) (noting that a Statement of the Case is a document that “a hearing officer should have encountered in his review of the record, that will likely assist . . . in identifying the outstanding issues” (internal quotation marks omitted) (quoting *Bryant*, 23 Vet. App. at 496, n.3)).

¹⁵³ *See, e.g., Donald J. Kochan, Thinking Like Thinkers: Is the Art and Discipline of an “Attitude Of Suspended Conclusion” Lost On Lawyers?*, 35 SEATTLE U. L. REV. 1, 22-23 (2011) (noting that the essence of critical thinking is suspended judgment).

¹⁵⁴ *See Bryant*, 23 Vet. App. at 500 (suggesting that BVA should “look at the most recent RO decision . . . and clearly explain to the appellant what element or elements of the claim were found deficient by that decision and what types of evidence would help the appellant prevail as to those issues”).

The drawback of a *Kent*-like approach is that while this procedure may provide additional explanations as to why the RO denied the claim, the reasons for the RO's denial is of *no moment* to the BVA.¹⁵⁵ The BVA conducts a *de novo* review of the claim on appeal before it and so the findings of the RO are not binding on the BVA.¹⁵⁶ For instance, when an adjudicator reviews a claim at the RO, he may determine that in fact there was no injury the veteran suffered in service but that the veteran suffers from a current disability. Logically it would follow that the main basis of the RO's denial would be the lack of an in-service event or injury. When the claim is before the BVA, however, the BVA may view the evidence as showing an in-service injury but appearing weak on the issue of a current disability or a nexus between the in-service injury and a current disability.¹⁵⁷ This would then be the "material issue" that needs to be fully explained.¹⁵⁸ So while a "cognitive review" may provide further insight into perceived weaknesses of the veteran's claim, such a procedure would entail an increased likelihood of potentially prejudicing the veteran by having him focus on an RO decision rather than making his case fully as to each element of the claim on appeal before the Board Member.¹⁵⁹ This proposal scores

¹⁵⁵ See 38 U.S.C. § 7104(a) (2006) ("All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation."); see also 38 U.S.C. § 511; 38 C.F.R. § 20.101(a) (2011).

¹⁵⁶ See *McBurney v. Shinseki*, 23 Vet. App. 136, 139 (2009) ("[T]he Board, as the final trier of fact, is not constrained by . . . determinations below."); *Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (1990) (noting that the BVA "functions as a factfinder in a manner similar to that of a trial court").

¹⁵⁷ *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996) (per curiam) (explaining that the establishment of service connection generally requires medical evidence or, in certain circumstances, lay evidence of the following: (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability); see generally *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009) (finding that lay evidence can be competent and sufficient to establish the issues of etiology or diagnosis).

¹⁵⁸ See, e.g., *Bryant*, 23 Vet. App. at 496.

¹⁵⁹ See *Hupp v. Nicholson*, 21 Vet. App. 342, 354 (2007). The CAVC noted in *Hupp*:

highly on the measures of efficiency and claimant satisfaction, while not having an adverse impact on the measure of respect for the claimant-representative relationship. It is unclear as to how helpful this measure would be as related to development of the claim to its optimum and truth seeking.

D. Pre-Hearing Questionnaire

Another approach would be to provide the veteran with a pre-hearing questionnaire, somewhat akin to interrogatories.¹⁶⁰ For a claim for service connection, for instance, the veteran could be asked to answer a series of questions in layman's terms about what his current disability is now (including does he have a current diagnosis and from whom he received the diagnosis), what event or injury occurred during his time in service, and why he believes the two are linked—has a doctor provided a link, does he have a continuity of symptomatology since service or is it just his own personal belief?¹⁶¹ Optimally this questionnaire would be

[B]ecause it was possible that upon readjudication VA could have reassessed the probative value of the . . . medical opinion, any notice informing [the claimant] that that opinion would be discounted would be misleading. Indeed, if she submitted evidence that corroborated the . . . physician's opinion, that additional evidence could bring new significance to the sum total of evidence by adding weight to, thereby confirming the validity of previously rejected medical evidence.

Id.; see also 38 C.F.R. § 20.700(b) (“The purpose of a hearing is to receive argument and testimony relevant and material to the appellate issue. It is contemplated that the appellant and witnesses, if any, will be present. A hearing will not normally be scheduled solely for the purpose of receiving argument by a representative.”).

¹⁶⁰ See *Gambill v. Shinseki*, 576 F.3d 1307, 1317-18 (Fed. Cir. 2009) (noting that there is an ongoing discussion regarding the introduction of interrogatories into the veterans' benefits system as it relates to due process).

¹⁶¹ See generally U.S. Dep't of Veterans Affairs, *Claims Transformation Initiatives*, <http://benefits.va.gov/TRANSFORMATION/docs/initiatives.asp> (last visited Jun. 2, 2012) (highlighting various pilot programs, including process design for case management at Pittsburgh, “Experiment with several processes including phone development, physician statements and queuing evidence,” and phone development nationwide, “Proactive phone development for collecting evidence from veterans, physicians, VHA and other sources”); Letter from Pritz Navaratnasingam, Dir. of the Houston Regional Office, U.S. Dep't of Veterans Affairs, to National Service Organizations (Feb. 8, 2012) (on file with authors) (explaining that as part of the Appeals Pilot program, which was implemented in March 2012, a “Standardized

completed and returned to the hearing site to be associated with the claims file prior to the date of the veteran's hearing or perhaps while the veteran is waiting on-site to attend his hearing.¹⁶² For video-conference hearings, the questionnaire could be e-mailed or faxed to the Board Member from the RO.

The purpose of the questionnaire would be to help provide the Board Member with a short, succinct and clear roadmap of the theory of why the veteran believes he is entitled to benefits. This would then be used as a basis to structure the hearing, thereby exploring the elements of a claim more systematically and allowing a Board Member to suggest overlooked evidence without having to engage in a preadjudication of all the evidence currently of record.¹⁶³ This is another approach to providing a theory of the case or looking to ensure that the veteran has enough evidence in the record to survive an imaginary "motion to dismiss."¹⁶⁴ In a motion to dismiss in a traditional, adversarial environment, the non-moving party must show that he has alleged a sufficient pleading on its face, such that if the facts alleged were shown to be true, it meets the elements of the cause of action.¹⁶⁵

Notice of Disagreement" would be used to provide a format for a claimant to more clearly explain their claim and disagreement, as well as an option to have a Decision Review Officer from the RO call them about the notice of disagreement).

¹⁶² See 38 C.F.R. § 20.702 (explaining the scheduling and notice of hearings conducted by the BVA in Washington, D.C.); *id.* § 20.703 (explaining when a hearing before the BVA at a DVA field facility may be requested); *id.* § 20.704 (explaining the scheduling and notice of hearings conducted by the BVA at DVA field facilities).

¹⁶³ See *Bryant*, 23 Vet. App. at 500 (Lance, J., concurring in part and dissenting in part).

¹⁶⁴ See TRANSMITTAL SHEET, *supra* note 140; see also Ridgway, *supra* note 134, at 130 ("Simply put, both advocacy and decision making are made more difficult when there is uncertainty as to history of the claim and difficulty verifying the integrity of the record.").

¹⁶⁵ See *Robinette v. Brown*, 8 Vet. App. 69, 75 (1995) ("The well-grounded-claim requirement applicable in that nonadversarial process resembles the rule applied in civil actions to determine whether a complaint has stated a cause of action—a basis for affording the relief sought—for which purpose the facts alleged are accepted as true."); see also *Dickson v. United States*, 831 F. Supp. 893, 896 (D.D.C. 1993) (stating that for "purposes of a motion to dismiss for failure to state a claim upon which relief can be granted, all factual allegations contained in the complaint are to be construed as true").

While it may seem curious that a “roadmap” is necessary after extensive development has been accomplished by the AOJ, it is paramount due to both the time/resource constraints the Board Member is subject to, as well as the nature of the claims file itself. It stretches the bounds of credulity in these circumstances that absent a succinct summary or theory of the case, a Board Member would be able to be “familiar” enough with the claims file to adequately meet the clarified Board Member duties imposed by *Bryant*.¹⁶⁶

¹⁶⁶ *Bryant*, 23 Vet. App. at 497-98; see also REPORT OF THE CHAIRMAN, *supra* note 6, at 4, 11 (“The Board conducted 14,727 hearings, which is an increase of 1,212 hearings over Fiscal Year 2010 and the most hearings ever held by the Board in a year. Most VLJs exceeded their productivity goals and most traveled to at least three ROs to conduct one week of hearings at each site For most Travel Board visits, the Board has historically sent an attorney along with the VLJ to assist in preparing for the 43 hearings that are generally scheduled each week In March 2011, however . . . due to budget reductions and concomitant travel expense increases, the Board was no longer able to maintain attorney staffing for Travel Board visits at the same level as the Board has done in the past. Hence . . . a policy was instituted to significantly reduce the number of trips that include an accompanying counsel in order to maintain our productivity.”); James D. Ridgway, *Equitable Power in the Time of Budget Austerity: The Problem of Judicial Remedies for Unconstitutional Delays in Claims Processing by Federal Agencies*, 64 ADMIN. L. REV. 57, 116-17 (2012) (“Each BVA member is already deciding nearly 700 appeals annually, and these numbers wildly understate the actual number of claims being decided because decisions typically address more than a single claim and often address several.”); Kenneth M. Carpenter, *Why Paternalism in Review of the Denial of Veterans Benefits Claims is Detrimental to Claimants*, 13-SPG KAN. J.L. & PUB. POL’Y 285, 294-95 (2004) (“Claim files are currently and historically maintained by the [DVA] in a single and unmanageable file containing information concerning every claim ever made by the claimant. . . . Claim files are not organized chronologically, nor are their contents paginated. . . . [They] can range from several hundred to several thousand pages, [and] are without any form of organization, making the task of reviewing and understanding a claims file’s contents increasingly problematic as the number of pages contained in the claims file increases.”); Victoria H. Moshiashwili & Aaron H. Moshiashwili, *Rearranging Deck Chairs on the Titanic: Lessons from the History of VA’s Growing Disability Claims Backlog* 23 (Oct. 31, 2011) (unpublished article), available at <http://ssrn.com/abstract=1952070> (referencing “a file that was over twelve thousand pages long A claims file has no table of contents. . . . By the time it has been through multiple levels of adjudication and remands, it is often no longer organized in any way. Many claims that have been up and down the system for years are often kept in a box, or several boxes, rather than a folder”).

This proposal is somewhat analogous to the disability benefits questionnaires (DBQ) that VA is implementing.¹⁶⁷ The DBQs are forms created to help “streamline the collection of necessary medical evidence for the purpose of processing Veterans’ claims.”¹⁶⁸ While still in the early stages, the goal of the DBQs is to help reduce the time it takes for VA to make a decision on a pending claim by allowing private medical providers to fill out forms that provide the necessary medical information pertinent to evaluating a pending veterans’ benefits claim.¹⁶⁹

The drawback of this questionnaire approach is that it could be burdensome to implement, both for the regional offices and the veterans.¹⁷⁰ Further, it provides a duplication of effort, as theoretically the veteran has already asserted his “theory of the case” in his various submissions and presentations to the RO.¹⁷¹ In addition, some advocates may be concerned that any inconsistencies in the questionnaire answers would be used to impeach the veteran’s

¹⁶⁷ See U.S. Dep’t of Veterans Affairs, *Disability Benefits Questionnaires (DBQs)*, <http://benefits.va.gov/TRANSFORMATION/disabilityexams/index.asp> (last visited Jul. 25, 2012) (describing the benefits of DBQs).

¹⁶⁸ U.S. Dep’t of Veterans Affairs, *Disability Benefits Questionnaires (DBQs) – Frequently Asked Questions*, <http://benefits.va.gov/TRANSFORMATION/dbqs/FAQS.asp> (last visited Jun. 2, 2012).

¹⁶⁹ *Id.* (“[Disability benefits questionnaires (DBQs)] allow Veterans and Servicemembers to have more control over the disability claims process by giving them the option of visiting a primary care provider in their community, at their expense, instead of completing an evaluation at a [DVA] facility. The streamlined forms use check boxes and standardized language so that the disability rating can be made accurately and quickly. . . . DBQs simplify the documentation of medical conditions. By completing check-the-box DBQs rather than generating long narrative summaries, it is anticipated that VBA will reduce the time it takes to make a claims decision. Also, providers treating Veterans who are familiar with their conditions can speed the process by completing DBQs for their patients.”).

¹⁷⁰ REPORT OF THE CHAIRMAN, *supra* note 6, at 4 (noting that in Fiscal Year 2011, 14,727 hearings were held by the BVA).

¹⁷¹ *But see* Rory E. Riley, *The Importance of Preserving the Pro-Claimant Policy Underlying the Veterans’ Benefits Scheme: A Comparative Analysis of the Administrative Structure of the Department of Veterans Affairs Disability Benefits System*, 2 VETERANS L. REV. 77, 83-87 (2010) (explaining that one of the reasons for the traditionally pro-claimant adjudication model of veterans’ benefits determinations is that veterans are dependent on DVA to assist them in developing their claims); Reiss & Tenner, *supra* note 141, at 2-5 (discussing the paternalistic intent of the veterans’ benefits system).

credibility and rather than helping the veteran the process would actually hurt him.¹⁷² Perhaps a more workable and reasonable approach would be to send in advance a list of questions that would be similar to the questionnaire approach, but indicate that this is what the veteran should be prepared to talk about in his hearing.¹⁷³ The burden on DVA is much higher in this questionnaire approach, as it would require a great deal of work to produce probative questions and then implement the process of asking veterans to prepare them in advance of the hearing (either far in advance or right before). This proposal scores highly on the measures of truth seeking and development of the claim to its optimum. However, it may impact negatively on the measure of claimant satisfaction if the claimant feels as though they are repeating information. It also scores low regarding efficiency, and has a questionable effect on the respect for the claimant-representative relationship.

V. RECOMMENDATION

Of all the proposals above, the best approach to meet the duties to explain and suggest may be a hybrid approach, combining elements of each of the proposals. The claimant should be provided a basic pre-hearing questionnaire that will give an example of the kinds of questions they should be prepared to answer. The Board Member could subsequently read off the required basic elements to prove a particular claim on the record, followed by a recitation of the reasons for the previous RO denial. In addition, the Board Member should take tighter control of individual hearings and ask more detailed and directed questions.

¹⁷² See *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995) (“[T]he Board’s statement of reasons or bases must account for the evidence which it finds to be persuasive or unpersuasive, analyze the credibility and probative value of all material evidence submitted by and on behalf of a claimant, and provide the reasons for its rejection of any such evidence.”).

¹⁷³ See 38 C.F.R. § 3.103(c)(2) (2011) (noting that the purpose of a hearing is to permit the claimant to introduce pertinent argument and facts); *id.* § 20.700(b) (noting that the purpose of a hearing on appeal is to receive relevant argument and testimony on the appellate issue).

This hybrid approach may be the most effective approach available, because while the burden on DVA might be higher to incorporate these various elements, it would appear to have a high probability of effectiveness in allowing a veteran to provide a clear roadmap to improve both the quality of his hearing, any subsequent development and ultimately the quality of the adjudication at both the RO and the BVA.¹⁷⁴

CONCLUSION

In the context of an evidence gathering hearing and the *Bryant* opinion, it is crucial that a Board Member elicit pertinent testimony that further illuminates the material issues upon which a BVA decision will be adjudicated. DVA can help both veterans and the Board Members by modifying its current hearing procedures in an effort to provide appropriate notice. In an era of proposed budget austerity, DVA must look carefully at ways in which it can both fulfill its mission of serving veterans and do so in a cost-effective manner.¹⁷⁵ Given the strain the DVA claims system faces,¹⁷⁶ the proposed solution of combining the elements of the above proposals, to include employing a veteran-produced questionnaire or hearing worksheet, provides the most effectiveness compared to the burden and cost that DVA would have to shoulder. This proposal also responds directly to the holding of *Bryant* and most importantly should help improve the quality and timeliness of final administrative adjudications of veterans claims at the BVA.

¹⁷⁴ See generally Ridgway, *supra* note 139, at 270 (“Ultimately, the best measure of how well the system is performing is the accuracy of the decisionmaking. . . . [T]he small sample of cases appealed to the CAVC suggests agency errors are frequent . . . there is ample reason to be concerned about how well the current VA adjudication process works.”).

¹⁷⁵ See Ridgway, *supra* note 166, at 136.

¹⁷⁶ See U.S. Dep’t of Veterans Affairs, FY 2012 Budget Submission, Vol. I, at 2B-2 (2011), available at <http://www.va.gov/budget/products.asp> (stating that DVA expects to receive over 1.3 million claims for disability benefits in Fiscal Year 2012); REPORT OF THE CHAIRMAN, *supra* note 6, at 17, 20 (estimating that 184,000 notices of disagreement will be received in Fiscal Year 2012, leading to an estimated 72,600 appeals filed at the agency of original jurisdiction for Fiscal Year 2012).