Judge, Jury, and the Gatekeeper: Admitting and Weighing Expert Testimony in Veterans' Claims Adjudication and the Federal Courts

Jonathan Krisch[1]

INTRODUCTION

On November 13, 2005, Mark McEwen was brought to the emergency room of Baltimore Washington Medical Center (BWMC), complaining of dizziness, vomiting, slurred speech, weakness, and fainting.[2] He was treated with anti-nausea medication and released the next morning.[3] Upon arriving in Orlando, Florida, on November 15, however, Mr. McEwen felt additional symptoms of headache, unsteadiness, and nausea.[4] A magnetic resonance imaging (MRI) examination at a Florida hospital revealed that Mr. McEwen had suffered a stroke.[5] He received anti-clotting treatment and his condition improved dramatically.[6]

Mr. McEwen and his wife sued BWMC for negligent treatment.[7] They employed two doctors as expert witnesses to testify that BWMC physicians should have recognized that Mr. McEwen was exhibiting signs of a stroke on November 13, and that the provision of anti-clotting treatment, rather than an anti-nausea treatment, would have averted his November 15 stroke.[8]

---

[1] Law Clerk for a member of the United States Court of Appeals for Veterans Claims (CAVC or "Court"). B.S., Brandeis University; J.D., Georgetown University. The views and opinions expressed in this article are solely those of the author and should not be attributed to the CAVC or any member of the CAVC.
[2] McEwen v. Balt. Wash. Med. Ctr., Inc., No. 09–2141, 404 F. App'x 789, 790, 2010 WL 5129873, at **1 (4th Cir. Dec. 14, 2010).
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.* at 790 & n.1, 2010 WL 5129873, at **1 & n.1.
[7] *Id.* at 790, 2010 WL 5129873, at **1.
[8] *Id.*

However, the testimony of these doctors was never heard by the jury. After a *Daubert* hearing[9] in September 2009, the United States District Court for the District of Maryland ("Maryland District Court") excluded the expert testimony as "unreliable" under Federal Rule of Evidence 702 and granted summary judgment for BWMC.[10] The United States Court of Appeals for the Fourth Circuit (Fourth Circuit) found that the Maryland District Court did not abuse its discretion and affirmed the judgment.[11] The Fourth Circuit specifically noted that Mr. McEwen's improved condition following the anti-clotting treatment "sa[id] little to nothing about the probable effect of such drugs on November 13," and that the medical literature was at odds with Mr. McEwen's experts' viewpoint.[12]

In early 2000, Werner G. Hood also received medical treatment from a hospital and felt that his doctor acted negligently.[13] Unlike Mr. McEwen, however, Mr. Hood sought treatment from a Department of Veterans Affairs (VA) medical center and filed his claim in the veterans' benefits system, and therefore encountered a different system with a different process in response to his request for compensation for his injuries.[14]

Mr. Hood served in the United States Army from March 1945 to January 1947.[15] In March 2000, he underwent coronary

---

[9] At a *Daubert* hearing, the judge renders a determination on the reliability of a party's medical expert before that expert is presented to the jury. It is referred to as a *Daubert* hearing based on the decision of the Supreme Court of the United States in *Daubert v. Merrell Dow Pharmaceuticals*, *Inc*., 509 U.S. 579 (1993). *See infra* Part I.

[10] *McEwen*, 404 F. App'x at 791, 2010 WL 5129873, at **1-2.

[11] *Id.* at 791-92, 2010 WL 5129873, at **2.

[12] *Id.*

[13] Hood v. Shinseki, 23 Vet. App. 295, 295-96 (2009).

[14] Pursuant to statute, veterans are entitled to compensation for injuries, diseases, or disabilities incurred in or aggravated by service ("service-connected disabilities"). 38 U.S.C. §§ 1110, 1131 (2006). Such compensation is received through filing with the Department of Veterans Affairs (VA) a claim for compensation, which then goes through a series of adjudications (referred to in this essay as "the veterans' claims system") by administrative bodies and, if appealed, certain federal courts. *See infra* Part II.

[15] *Hood*, 23 Vet. App. at 295.

artery bypass surgery at a VA Medical Center in Charleston, South Carolina, which resulted in a staph infection.[16] In March 2002, he filed a claim for disability compensation with VA.[17]

Although Mr. Hood provided no medical evidence that his staph infection was the result of negligence by VA health care providers, the Board of Veterans' Appeals (BVA or "Board"), VA's ultimate adjudicating authority, requested an expert medical opinion on the matter.[18] The expert found that there was "no evidence of negligence or lack of due care or skill in regard to the medical care he received from VA," but also that "[i]t is impossible, in retrospect, to know if a cluster of similar infections were simply a statistically unlikely happening or due to a particular source of infection."[19] In an August 2007 decision, the Board found this opinion adequate and probative,[20] relied on the opinion as evidence against VA negligence, and denied Mr. Hood's claim.[21]

On appeal, however, the United States Court of Appeals for Veterans Claims (CAVC or "Court") vacated the Board's decision and remanded the claim back to the Board.[22] The Court stated that the expert's opinion was equivocal with regard to negligence, and concluded that the Board clearly erred in finding the opinion adequate or probative.[23]

---

[16] *Id.* at 295-96.

[17] *Id.* at 296. In addition to entitlement to compensation for service-connected disabilities, veterans are also entitled to compensation for certain injuries caused by VA medical treatment as if they were incurred in service. 38 U.S.C. § 1151.

[18] *Hood*, 23 Vet. App. at 296.

[19] *Id.* at 297.

[20] An extensive discussion regarding what constitutes an "adequate" opinion is presented later in the Article. *See infra* Part II. For the purposes of this Introduction, an adequate opinion is one that provides the Board of Veterans' Appeals (BVA or "Board") with sufficient information to fully inform the Board on a medical issue.

[21] *Hood*, 23 Vet. App. at 297.

[22] *Id.* at 303. The CAVC is a federal court, established in 1988 pursuant to Article I of the U.S. Constitution. *See* History, U.S. Ct. of Appeals for Veterans Claims, http://www.uscourts.cavc.gov/about/History.cfm (last visited Sept. 25, 2011) (providing a history of the CAVC). Because the Court has different evidentiary standards from other federal courts, and for the sake of distinguishing in this essay, I will refer to the "federal courts" as distinct from the CAVC.

[23] *Hood*, 23 Vet. App. at 299.

Mr. McEwen and Mr. Hood encountered different systems, resulting in varied experiences attempting to receive compensation for their injuries. For Mr. McEwen in the federal system, he needed to present experts, establish their reliability in a *Daubert* hearing before their testimony would even reach the jury, and—when he was unable to—the reviewing court upheld the Maryland District Court's determination under the "abuse of discretion" standard. For Mr. Hood in the veterans' claims system, he submitted no medical evidence; nevertheless, VA provided a medical opinion, which directly reached the adjudicating body. Further, the reviewing court deferred less to the findings of the Board, rejected the Board's interpretation of the adequacy and probative value of the opinion, and remanded for another medical opinion.

These cases illustrate that, in the process of admitting and weighing expert testimony, the federal system requires (1) a reliability determination by the judge, and then (2) a probative value determination by the jury; on the contrary, the veterans' claims system requires (1) a determination as to the adequacy of a medical opinion, and then (2) a probative value determination, both rendered by the same body – the Board.

Though both are two-step processes at their core, they are very different attempts at solving the challenging but necessary task of evaluating expert evidence. Ever since expert testimony was first proffered at legal proceedings in 1840, courts have attempted to balance the need for expert information regarding complicated issues of causation involved in cases regarding medical, scientific, or other technical fields, with the danger of exposing the factfinder to charlatans.[24] There has always been a concern that, with such complicated and technical testimony, jurors are unable to weed out the "junk science" and that, once a witness is labeled an "expert," he or she gains immediate credence, authority and respect from jurors.[25]

---

[24] *See* James D. Ridgway, *Lessons the Veterans Benefits System Must Learn on Gathering Expert Witness Evidence*, 18 FED. CIR. B.J. 405, 423 n.138 (2009).

[25] This view has been increasingly attacked in studies throughout the last few decades. *See,*

Although, as noted above and further discussed below, the veterans' claims system provides a different process to restrict the admitting and guide the weighing of expert testimony than the federal courts, the CAVC relied on the federal system's rules of evidence in *Nieves-Rodriguez v. Peake*[26] when reviewing the Board's evaluation of the probative value of an expert medical opinion.[27] In addition, at the Eleventh Judicial Conference of the CAVC, a panel of experts on the veterans' claims system discussed ideas for change, including further incorporation of the Federal Rules of Evidence into the system in order to provide additional guidance in admitting expert opinions.[28] As such, the following question arises: Would it be sensible for the veterans' claims system to import elements of the federal system with regard to admitting expert testimony?

In the following essay, I attempt to answer this question. En route to doing so, I will discuss the processes of the federal courts and the veterans' claims system in evaluating expert testimony, the reasons, motivations, and theories behind each

---

e.g., Daniel W. Shuman et al., *An Empirical Examination of the Use of Expert Witnesses in the Courts—Part II: A Three City Study*, 34 Jurimetrics J. 193, 203 (1994) (finding that thirty percent of jurors believe experts to provide biased testimony); Shari Seidman Diamond, *How Jurors Deal with Expert Testimony and How Judges Can Help*, 16 J.L. & Pol'y 47, 62-63 (2007) (noting that jurors take into account credentials and experience when evaluating technical testimony, but not without evaluating the testimony itself).

[26] 22 Vet. App. 295 (2008).

[27] The CAVC has also used the Federal Rules of Evidence for analogous purposes on a number of other occasions. *See* Posey v. Shinseki, 23 Vet. App. 406, 410 (2010) (noting a presumption of regularity for business records in the Federal Rules of Evidence); Del Rosario v. Peake, 22 Vet. App. 399, 408 (2009) (noting the Federal Rule regarding credibility of hearsay statements); Hyatt v. Nicholson, 21 Vet. App. 390, 394 (2007) (noting that the CAVC's definition of "relevant evidence" comes from the federal rules); Thurber v. Brown, 5 Vet. App. 119, 126 (1993) (using the Federal Rules of Evidence as persuasive authority in determining that basic fair play includes notice and opportunity to be heard); Espiritu v. Derwinski, 2 Vet. App. 492, 495 (1992) (noting that competent expert testimony may only be provided by those with specialized knowledge, as in the federal rules).

[28] Linda E. Blauhut, Attorney, The Honorable John J. Farley III, Retired Judge, James D. Ridgway, Senior Law Clerk, and Brian B. Rippel, Attorney, Remarks at the United States Court of Appeals for Veterans Claims Eleventh Judicial Conference: Breakout Seminar—The Court in 2020: Ideas for Change (Mar. 4, 2010) (transcript available at the United States Court of Appeals for Veterans Claims).

process, and the challenges for and critiques of each process. I will then compare the two processes, explore similarities, and draw conclusions on the prospect of integration. More specifically, in Part I, I will discuss expert testimony in the federal system, including the process antecedent and subsequent to the Supreme Court of the United States' (Supreme Court) decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[29] and criticisms of the post-*Daubert* process. Next, in Part II, I will discuss the veterans' claims system, including the required components of an "adequate" medical opinion and the factors for a "probative" one. Then, in Part III, I will discuss the unique situations and challenges that arise when evaluating expert testimony in the veterans' claims system. In Part IV, I will compare the apparent differences and explore possible similarities in the systems' respective processes. Finally, I conclude that, although certain concepts from the federal system may bring important guidance to the veterans' claims system, the importation of the federal process generally would not accord with the veterans' claims system.

I. EXPERT WITNESSES IN THE FEDERAL COURTS

A. Federal Rule of Evidence 702

In the federal courts, in order for an expert witness to impact the outcome of a trial, he must convince a jury to give value to his opinion.[30] However, before an expert is heard by the jury, his or her testimony will not be admitted unless it complies with the Federal Rules of Evidence. Besides requirements that pertain to all witnesses, such as mandates that testimony be relevant[31] and contain probative value that is not substantially outweighed by "the danger of unfair prejudice, confusion of the issues, or misleading the

---

[29] 509 U.S. 579 (1993).
[30] *See, e.g.*, Malta v. Schulmerich Carillons, Inc., 952 F.2d 1320, 1332 (Fed. Cir. 1991) (Newman, J., dissenting) (noting "'the weight and probative value of evidence are to be determined by the jury and not by the judge'" (quoting Baltimore & Ohio R. Co. v. Groeger, 266 U.S. 521, 524 (1925))).
[31] FED. R. EVID. 402.

jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence,"[32] expert evidence must also meet the requirements of Federal Rule of Evidence 702.[33] Rule 702 provides the following:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[34]

Before I explore how this rule affects admitting expert testimony, one must first understand how the rule was formulated.

B. Pre-*Daubert*

Before the enactment of a unified federal system for admitting evidence, rules of evidence were formulated by the common law.[35] Although there were different tests in various jurisdictions for determining whether an expert's testimony was sufficiently reliable to be heard by the jury, the most commonly employed test was the "general acceptance" standard, attributed originally to the United States Court of Appeals of the District of Columbia's (D.C. Circuit) decision in *Frye v. United States*.[36]

---

[32] Fed. R. Evid. 403.
[33] Fed. R. Evid. 702.
[34] *Id.*
[35] Andrew W. Jurs, Daubert*, Probabilities and Possibilities, and the Ohio Solution: A Sensible Approach to Relevance Under Rule 702 in Civil and Criminal Applications*, 41 Akron L. Rev. 609, 613 (2008).
[36] 293 F. 1013, 1014 (D.C. Cir. 1923).

Frye concerned the admissibility of expert testimony based on a systolic blood pressure deception test, which was a crude predecessor of a polygraph machine.[37] The D.C. Circuit found that the test had "not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced" from the machine, and ruled that the results were inadmissible.[38] In so holding, it famously stated that admissibility requires that the scientific principle "from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[39] Henceforth, an admissibility requirement based on "general acceptance" was known as the "*Frye* test."[40]

The notion behind the *Frye* test – and, as stated in the Introduction, the idea behind the caution in admitting expert testimony generally – was primarily that jurors can be easily swayed by false experts.[41] As the Oregon Supreme Court has stated, "[e]vidence that purports to be based on science beyond the common knowledge of the average person that does not meet the judicial standard for scientific validity can mislead, confuse, and mystify the jury."[42] Further, there is a prevalent notion that precautions must be taken before the label of "expert" is bestowed upon the witness because the label itself can sway the jury into seeing the witness as a person of authority on the topic.[43] According to such logic, *Frye* concluded that a judge should screen

---

[37] *Id.* at 1013.
[38] *Id.* at 1014.
[39] *Id.*
[40] *E.g.*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 585-86 (1993).
[41] *See* Christopher G. Shank, *DNA Evidence in Criminal Trials: Modifying the Law's Approach to Protect the Accused from Prejudicial Genetic Evidence*, 34 Ariz. L. Rev. 829, 850 (1992).
[42] State v. O'Key, 899 P.2d 663, 678 n.20 (Or. 1995).
[43] *See* Irving Prager & Kevin S. Marshall, *Examination of Prior Expert Qualification and/or Disqualification—(Questionable Questions Under the Rules of Evidence)*, 24 Rev. Litig. 559, 575-76 & n.63 (2005) ("[A] jury more readily accepts the opinion of an expert witness as true simply because of his or her designation as an expert." (citing Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 722 (Tex. 1998))).

the so-called experts and ensure that the science was "generally accepted" before granting the witnesses an opportunity to be heard in front of the jury.[44]

Before the Federal Rules of Evidence were enacted in 1975, the *Frye* test was commonly criticized for its malleability. The argument was that courts often varied in their analyses of whether a scientific process was "generally accepted," and that courts could easily "manipulate the parameters of the relevant 'scientific community'" to receive a desired outcome.[45]

After the adoption of the Federal Rules of Evidence in 1975, which streamlined standard rules of evidence for all federal courts, it was unclear whether *Frye* co-existed with, conflicted with, or was superseded by the Rules. For example, the United States Court of Appeals for the Third Circuit stated in 1985 that, "in its pristine form the general acceptance standard reflects a conservative approach to the admissibility of scientific evidence that is at odds with the spirit, if not the precise language, of the Federal Rules of Evidence."[46] Curiously, nothing in the Rules either endorsed or disavowed *Frye*, and the Advisory Committee notes did not mention it.[47] Rule 702 in particular addressed expert evidence, but remained vague and did not mention "general acceptance," stating:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a

---

[44] *Frye*, 293 F. at 1014.

[45] *E.g.*, Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 Geo. Wash. L. Rev. 857, 878 & n.108 (1992) (quoting United States v. Downing, 753 F.2d 1224, 1236 (3d Cir. 1985)).

[46] *Downing*, 753 F.2d at 1237.

[47] Lee D. Schinasi, *Teaching the "Portraits, Mosaics and Themes" of the Federal Rules of Evidence*, 29 Miss. C. L. Rev. 83, 125 n.235 (2010).

> witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[48]

With courts divided on the issue, the Supreme Court finally addressed the complaints and issues with *Frye* in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[49]

In *Daubert*, the plaintiffs contended that their birth defects were caused by Bendectin, a Merrell Dow medication their mothers had taken while pregnant.[50] The plaintiffs' expert opined that there was a causal link between Bendectin and birth defects based upon animal-cell studies, live-animal studies, and chemical-structure analyses.[51] The United States District Court for the Southern District of California ("California District Court"), however, found the expert's opinion inadmissible because it was based on studies not generally accepted in its field and thus granted summary judgment for Merrell Dow.[52] Also invoking the *Frye* doctrine, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) affirmed.[53] In particular it noted that the plaintiffs' expert had not submitted his analyses to peer review, published them in a scientific journal, or otherwise established that they would be accepted in the scientific community.[54]

The Supreme Court vacated the ruling, finding that the California District Court and Ninth Circuit "focused almost exclusively on 'general acceptance,'" instead of considering a variety of factors in determining whether the expert evidence was admissible.[55] Notably, the Supreme Court stated that Rule 702

---

[48] Fed. R. Evid. 702 (1992).
[49] 509 U.S. 579 (1993).
[50] *Id.* at 582.
[51] *Id.* at 583.
[52] *Id.* at 583-84.
[53] *Id.* at 584.
[54] *Id.*
[55] *Id.* at 597-98.

bestowed on judges a "gatekeeping" function, to admit only expert evidence consisting of (1) scientific knowledge that (2) assists the trier of fact in understanding the evidence.[56] In other words, under Rule 702, judges are to make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[57] In making this "reliability" determination, the Supreme Court suggested various factors to consider, such as (1) whether the scientific theory has been tested, (2) whether it has been subject to peer review or publication, (3) the theory's rate of error, and (4) whether it has been generally accepted.[58]

The Supreme Court found the four factors an adequate response to both parties' arguments, ultimately stating that the standard would prevent a "free-for-all" of phony science in the courtroom, yet would not be as rigid as requiring universal acceptance before presenting a theory.[59] Accordingly, *Frye* was no longer the sole test in determining the admissibility of expert evidence in the federal courts; but it lived on as one of the factors relevant in determining reliability.

C. Post-*Daubert*

Shortly thereafter, the Supreme Court issued two further decisions elaborating on the standard delineated in *Daubert*. In *General Electric Co. v. Joiner*,[60] the Supreme Court established that the "abuse of discretion" standard was to be used for appellate review of judges' *Daubert* determinations.[61] The Supreme Court also clarified that reliability was not a determination solely concerning the experts' methodology or the experts' conclusion,

[56] *Id*. at 589-90.
[57] *Id*. at 592-93.
[58] *Id*. at 593-94.
[59] *Id*. at 595-96.
[60] 522 U.S. 136 (1997).
[61] *Id*. at 146.

because "conclusions and methodology are not entirely distinct from one another."[62] Moreover, the Supreme Court reiterated that reliability determinations were not to be categorical, but were to examine whether the methodologies in a particular case supported the conclusion in that particular case.[63]

In *Kumho Tire Co. v. Carmichael*,[64] the Supreme Court extended its *Daubert* analysis to "technical" and "other specialized" knowledge, per the other terms in Rule 702.[65] *Kumho Tire* also reiterated that *Daubert*'s reliability factors were "flexible," and did not necessarily or exclusively apply to every expert or in every case.[66]

In 2000, Rule 702 was amended to accord more precisely with the holdings of *Daubert* and its progeny.[67] As previously stated, the current version of Rule 702 mandates that judges scrutinize whether the expert (1) has reliable data, (2) used reliable methods, and (3) reliably applied the methods to the facts of the case, in order for a finding of reliability and thus admissibility.[68]

D. Critiques of *Daubert*

After *Daubert*, *Joiner*, and *Kumho Tire* ("the *Daubert* trilogy") were issued, critics on both sides of the spectrum panned the decisions. A prevalent complaint was that, although *Daubert* stressed flexibility and a less rigid approach than the general acceptance standard, *Daubert*'s anointment of district court judges as "the gatekeepers" would result in district court judges

---

[62] *Id.* ("A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.").
[63] *Id.* at 144, 146.
[64] 526 U.S. 137 (1999).
[65] *Id.* at 147-48.
[66] *Id.* at 141.
[67] Cassandra H. Welch, *Flexible Standards*, *Deferential Review:* Daubert*'s Legacy of Confusion*, 29 Harv. J.L. & Pub. Pol'y 1085, 1085 (2006).
[68] Fed. R. Evid. 702.

strictly guarding that gate.[69] Similarly, others initially argued that *Daubert*'s invocation of a four-prong test would make judges feel that there were three additional tests to meet besides the "general acceptance test."[70] As Jeffry D. Cutler stated, "it doesn't take a rocket scientist to figure out that a four or five part test including 'general acceptance' as one factor will be more difficult to meet than a test based on 'general acceptance' alone."[71]

Similarly, the Maryland District Court has stated:

> Under *Daubert*, therefore, it was expected that it would be easier to admit evidence that was the product of new science or technology.
>
> In practice, however, it often seems as though the opposite has occurred—application of *Daubert/Kumho Tire* analysis results in the exclusion of evidence that might otherwise have been admitted under *Frye*.[72]

The Maryland District Court's analysis is accurate according to one study of cases regarding excluded expert testimony before and after *Daubert*. Prior to *Daubert*, federal judges excluded or limited expert evidence in twenty-five percent of cases, and post-*Daubert*, judges excluded or limited such evidence forty-one percent of the time.[73] Ironically, then, a ruling

---

[69] *See, e.g.*, Donald C. Arbitblit & William Bernstein, *Effective Use of Class Action Procedures in California Toxic Tort Litigation*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 435, 440 (1996) ("[I]t would be a mistake to conclude that *Daubert* loosened the standards as to expert evidence. To the contrary, many district courts have strictly performed the 'gatekeeper' function to exclude expert evidence . . . .").

[70] *See, e.g.*, Jeffry D. Cutler, *Implications of Strict Scrutiny of Scientific Evidence: Does* Daubert *Deal a Death Blow to Toxic Tort Plaintiffs?*, 10 J. ENVTL. L. & LITIG. 189, 214-15 (1995).

[71] *Id.* at 214.

[72] United States v. Horn, 185 F. Supp. 2d 530, 553 (D. Md. 2002).

[73] David M. Flores et al., *Examining the Effects of the* Daubert *Trilogy on Expert Evidence Practices in Federal Civil Court: An Empirical Analysis*, 34 S. ILL. U. L.J. 533, 538 n.37 (2010) (citing Carol Krafka et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL'Y. & L. 309, 322 (2002)).

adopting a less rigid approach may have led to more rigid results, as the Supreme Court's enumeration of flexible factors has too often been interpreted as a multi-factor hurdle over which experts need to jump in order to be heard by the jury.[74]

Another critique is that *Daubert*'s "'exacting standards of reliability'" contravene the liberal nature of the Federal Rules of Evidence.[75] The Project on Scientific Knowledge and Public Policy ("SKAPP") has argued that the best way to expose bad science is to provide for expanded discovery and greater latitude for cross-examination to expose its flaws, not to create a strict standard excluding evidence.[76] Moreover, SKAPP has averred that (1) judges are no more fit to winnow out bad science than jurors, that (2) the *Daubert* factor of "peer review" in particular is overrated, and that (3) there are Seventh Amendment issues with limiting the plaintiff's right to present evidence to a jury.[77]

Other commentators have also expressed concern that the jury system and the Seventh Amendment are threatened by judges overstepping their bounds as gatekeepers and over-excluding reliable experts.[78] Allan Kanner and M. Ryan Casey have argued that *Daubert* has enabled judges to avoid cases they are unwilling to try, by merely excluding experts' testimony as unreliable under *Daubert* and thereafter dismissing cases.[79] Kanner and Casey believe that, between "increasing caseloads, insufficient trial experience, the duty to 'manage'

---

[74] Alternatively, a more lenient standard could have encouraged litigants to experiment more with questionable evidence.
[75] Paul C. Giannelli, *The Supreme Court's "Criminal"* Daubert *Cases*, 33 SETON HALL L. REV. 1071, 1082 (2003) (quoting Weisgram v. Marley Co., 528 U.S. 440, 455 (2000)).
[76] *See* Ronald J. Allen & Esfand Nafisi, Daubert *and its Discontents*, 76 BROOK. L. REV. 131, 139-43 (2010) (discussing Leslie I. Boden & David Ozonoff, *Litigation-Generated Science: Why Should We Care?*, 116 ENVTL. HEALTH PERSP. 117 (2008)).
[77] *Id.* at 140-42, 146.
[78] *See* Allan Kanner & M. Ryan Casey, Daubert *and the Disappearing Jury Trial*, 69 U. PITT. L. REV. 281, 291-92 (2007).
[79] *Id.* at 297-98.

cases, and a bias toward industry," and now the gatekeeping role, judges are presented with overwhelming incentives to exclude experts and dismiss cases.[80]

Other critics have argued that expert evidence should not have to hurdle an additional reliability test, considering that other types of evidence, such as eyewitness testimony, may be directly heard by the jury.[81] This argument may have less merit due to the already-mentioned cloak of being labeled an "expert," but also because experts are granted more leeway in their testimony, including responding to hypothetical questions and rendering conclusions.[82] As Victor E. Schwartz and Cary Silverman have stated:

> Expert testimony, whether presented by plaintiffs or defendants, can strongly influence juries. An expert witness has extraordinary powers and privileges in court. Unlike lay witnesses, "an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." Experts are unique in that their testimony may be based on evidence that otherwise would not be admissible.[83]

On the other side of the spectrum, critics claim that the flexibility of the *Daubert* factors, along with the abuse of discretion standard, make it nearly impossible for a district court judge's individual decision to be reviewed and overturned.[84] In fact, so

---

[80] *Id.*
[81] *See* Mark P. Denbeaux & D. Michael Risinger, Kumho Tire *and Expert Reliability: How the Question You Ask Gives the Answer You Get*, 34 SETON HALL L. REV. 15, 24 (2003) ("The commonsense fear is that factfinders will defer to the unreliable expert and treat the unreliable expert's testimony as reliable. One could respond that this danger exists in regard to all evidence.").
[82] Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217, 220 (2006).
[83] *Id.* (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592 (1993) (citing FED. R. EVID. 703)).
[84] *See* Welch, *supra* note 67, at 1093.

long as the judge does not completely shirk his duty to conduct some kind of reliability inquiry,[85] he or she has the power to include experts that have previously been found unreliable by other district courts of a jurisdiction.[86]

In addition, the flexibility of the *Daubert* factors and the abuse of discretion standard have led to two particularly odd results, likely not envisioned by *Daubert*. First, although "it was inconsistency among the circuits that motivated the [Supreme] Court to grant certiorari in *Daubert*," the extreme flexibility and deference granted to single-judge decisions has strengthened inconsistencies between the courts of appeals and even within circuits.[87] Second, the *Frye* reliability test struck down in *Daubert* – based solely on general acceptance – has now been upheld in some of the circuits due to this emphasis on flexibility. In *United States v. Brown*,[88] for instance, "by focusing on the flexibility of the *Daubert* standard and by reviewing deferentially, [the United States Court of Appeals for the Eleventh Circuit] interpreted *Daubert* as permitting the very test that it had rejected: the *Frye* general acceptance standard."[89]

Overall, the merits of the federal system pre- and post-*Daubert* for admitting and weighing expert testimony have been consistently questioned. But the process in the veterans' claims system is not flawless either. Next, I briefly introduce the veterans' claims system before discussing its process for admitting expert testimony.

---

[85] *See infra* Part IV.A for various but similar standards regarding what constitutes an "abuse of discretion" across the courts of appeals.

[86] *See* Lisa Heinzerling, *Doubting* Daubert, 14 J.L. & Pol'y 65, 81 (2006) ("One of the potential embarrassments of Joiner's abuse of discretion standard is the possibility of apparently inconsistent evidentiary judgments among courts. Since one consequence of this lenient standard of review is that district judges may come to different conclusions on the same evidence, it may be that different judges could find [that evidence regarding a theory of causation] is both reliable and unreliable.").

[87] *See* Welch, *supra* note 67, at 1094.

[88] 415 F.3d 1257 (11th Cir. 2005).

[89] *See* Welch, *supra* note 67, at 1093 (citing *Brown*, 415 F.3d at 1257).

II. EXPERT WITNESSES IN VETERANS' CLAIMS ADJUDICATION

A. The Veterans' Claims System

Veterans alleging that a current disability is related to their service in the United States Armed Forces may apply to VA for compensation.[90] If their disability was incurred in or aggravated by service ("service-connected"), they are awarded various levels of benefits depending on the severity of their disability.

However, in part because of the respect veterans are due for their service,[91] the process of veterans' claims adjudication is vastly different from that of traditional federal litigation. A claim is adjudicated in VA administrative courts in a non-adversarial and paternalistic setting, but is reviewable by federal courts.[92] In the administrative portion of adjudication, there is no trial, no jury, and typically no lawyers.[93] Rather, VA acts as the veteran's investigator, but also a cross-examiner, judge, and jury.[94]

---

[90] 38 U.S.C. §§ 1110, 1131 (2006); *see* Bd. of Veterans' Appeals, Dep't of Veterans Affairs, Rep. of the Chairman: Fiscal Year 2010, at 3 (2011), http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2010AR.pdf [hereinafter 2010 Chairman's Rep.] (noting that ninety-five percent of the claims appealed to the Board in fiscal year 2010 were claims for disability compensation or survivor benefits).

[91] *See* Michael P. Allen, *Significant Developments in Veterans Law (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. Mich. J.L. Reform 483, 527 n.245 (2007) (quoting VA Mission Statement, which reads in part that "[v]eterans have earned our respect and commitment, and their health care, benefits, and memorial services needs drive our actions").

[92] *See* Ridgway, *supra* note 24, at 411-12.

[93] *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) (discussing the general lack of attorney involvement in veterans' claims).

[94] Gabrielson v. Brown, 7 Vet. App. 36, 40 (1994) (noting "the reasons or bases for [the Board's] findings and conclusions serves a function similar to that of cross-examination in adversarial litigation" (internal quotation marks omitted)); *see generally* 38 U.S.C. § 7104(d)(1) (stating that the Board is required to provide a statement of the reasons or bases for its determinations).

The process begins when a veteran files a claim with a VA regional office (RO), which then informs the veteran of the necessary evidence to substantiate his or her claim and makes reasonable efforts to obtain the appropriate records in order to determine whether the disability is related to service.[95] Once development of the claim is complete, the RO formulates an initial decision on the veteran's claim.[96] If the veteran disagrees with the RO's decision, he or she may file a Notice of Disagreement.[97] After further development, the RO addresses the disagreement and issues a Statement of the Case either altering or continuing its prior determination.[98] If disagreement remains after the Statement of the Case, the veteran may appeal to the Board, an office within VA which consists of Veterans Law Judges (VLJs).[99] The Board reviews the facts de novo,[100] but must address all favorable evidence in its decision[101] and explain all findings with an adequate "statement of reasons or bases."[102]

If the veteran disagrees with the Board determination, he or she may appeal to the CAVC, an Article I federal court.[103] The CAVC grants deference to the Board's fact-finding determinations, but may set aside or reverse any clearly erroneous factual findings, as well as errors of law.[104] VA may not appeal findings of the Board to the CAVC.[105] If either party disagrees with the CAVC's decision, an appeal may be filed with the United States Court of Appeals for the Federal Circuit (Federal Circuit), which

---

[95] 38 U.S.C. §§ 5103(a), 5103A.
[96] *See id.* § 5104; 38 C.F.R. § 3.103(a) (2010).
[97] 38 U.S.C. § 7105(a); 38 C.F.R. § 20.201.
[98] 38 U.S.C. § 7105(d)(1); 38 C.F.R. § 19.29.
[99] 38 U.S.C. §§ 7101(a), 7105(d)(3); 38 C.F.R. §§ 19.2, 20.202.
[100] Arneson v. Shinseki, 24 Vet. App. 379, 382 (2011).
[101] Thompson v. Gober, 14 Vet. App. 187, 188 (2000).
[102] 38 U.S.C. § 7104(d)(1).
[103] *Id.* §§ 7251, 7252, 7261; *cf.* Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1201 (2011) (noting that before 1988, a veteran whose claim was rejected by VA was generally unable to obtain further review).
[104] 38 U.S.C. § 7261.
[105] *Id.* § 7252(a).

reviews the CAVC's statements and rulings of law, but not factual determinations.[106] Finally, an appeal for a writ of certiorari may be filed with the Supreme Court.[107]

Besides the claims process itself, a number of laws make veterans' claims adjudication unique in the context of federal law. For instance, VA must (1) liberally interpret all filings,[108] (2) notify the veteran of relevant law at the outset of the claim,[109] (3) obtain relevant records that are adequately identified,[110] (4) not specifically gather evidence against a claim,[111] (5) presume service-connection in certain circumstances,[112] and (6) give the benefit of the doubt to the veteran if the evidence regarding his or her claim is in equipoise.[113] Overall, Congress set up the system as a non-adversarial, veteran friendly system.[114]

B. Duty to Assist

The statute mandating that VA help a veteran substantiate his or her claim is the Veterans Claims Assistance Act of 2000 (VCAA),[115] and certain obligations of the VCAA are commonly referred to as the Secretary's "duty to assist." Prior to enactment of the VCAA, the Secretary had a general duty to assist "a claimant in developing the facts pertinent to the claim."[116] However, the

---

[106] *Id*. § 7292(a).
[107] *Id.* § 7292(c).
[108] Robinson v. Shinseki, 557 F.3d 1355, 1361 (Fed. Cir. 2009).
[109] *See* 38 U.S.C. § 5103(a).
[110] *Id*. § 5103A(b).
[111] Mariano v. Principi, 17 Vet. App. 305, 312 (2003); *cf.* Douglas v. Shinseki, 23 Vet. App. 19, 26 (2009) (providing that VA has an "affirmative duty to gather the evidence necessary to render an informed decision on the claim, even if that means gathering and developing negative evidence, provided [it] does so in an impartial, unbiased, and neutral manner" (internal quotation marks omitted)).
[112] *See, e.g.*, 38 U.S.C. § 1112 (presumptions relating to certain diseases and disabilities).
[113] *Id*. § 5107(b).
[114] Kouvaris v. Shinseki, 22 Vet. App. 377, 381 (2009).
[115] Pub. L. No. 106-475, 114 Stat. 2096.
[116] *See* 38 U.S.C. § 3007 (1988); *Id.* § 5107 (1994).

VCAA implemented specific language regarding the duty to assist. VA must provide assistance in procuring favorable evidence, service records,[117] and, in certain circumstances, a medical examination or opinion.[118] Pursuant to the VCAA, a medical examination or opinion is required when there is (1) competent lay or medical evidence of a current disability or recurrent symptoms of a disability, and (2) an indication that the disability or symptoms are associated with the claimant's active service, but (3) insufficient medical evidence for VA to make a decision on the claim.[119] If there is sufficient medical evidence in the record, VA may not request a medical opinion for the purpose of obtaining evidence against a veteran's case.[120]

According to Bradley Flohr, when he was the Chief of Judicial/Advisory Review in VA's Compensation and Pension Service, different circumstances will dictate when an examination and opinion, as opposed to solely an opinion, is requested.[121] An examination is typically requested when an in-service injury has been established by the evidence, but evidence is still needed with regard to the issue of a current disability.[122] An opinion is typically requested when prior medical reports have different diagnoses, for claims of secondary service-connection, or for complex questions regarding etiology.[123] These medical

[117] 38 U.S.C. § 5103A(b)-(c) (2006).
[118] *Id*. § 5103A(d).
[119] *Id*. § 5103A(d)(2); *but see* McLendon v. Nicholson, 20 Vet. App. 79, 81 (2006) (noting a fourth requirement for a medical examination—an established event, injury, or disease that occurred in service—codified at 38 C.F.R. § 3.159(c)(4)(i)(B) (2010)); *see also* Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs, 345 F.3d 1334, 1356 (Fed. Cir. 2003) (finding that 38 C.F.R. § 3.159(c)(4) reasonably separates the requirement of 38 U.S.C. § 5103A(d)(2)(B) into two elements).
[120] *See* Mariano v. Principi, 17 Vet. App. 305, 312 (2003).
[121] Bradley Flohr, Chief of Judicial/Advisory Review, VA Compensation and Pension Serv., Veterans Benefits Admin., Breakout Session: Is There a Doctor in the House? Session One at the Ninth Judicial Conference of the United States Court of Appeals for Veterans Claims (Apr. 24, 2006), *in* 21 Vet. App. LI, at CLI (2006).
[122] *Id.*
[123] *Id.* The Board also has the authority to request medical opinions from a health care professional in VA's Veterans Health Administration when it determines such an opinion

reports, although requested by VA officials and conducted by VA medical examiners, must be requested in an "impartial, unbiased, and neutral manner."[124] VA also has full discretion to request an independent medical opinion from a non-VA medical practitioner,[125] and usually does so when the medical issue is complex or controversial in the medical community at large.[126]

Because VA has a "duty to assist," the majority of medical evidence evaluated by the Board is VA medical reports.[127] These medical experts' reports - like the federal system's two-step process of evaluating expert testimony for (1) reliability and (2) probative weight - are also evaluated in two steps. In order to rely on a VA medical examiner's opinion, the Board must first find that a VA medical examination is "adequate," i.e., that it fulfilled the duty to assist, and then evaluate its probative weight. In order to eventually explore the comparisons between these systems, it is important to first explore the case law developed by the CAVC regarding adequacy and probative weight determinations.

C. *Green* and Adequacy

In *Green v. Derwinski*,[128] the CAVC established that medical opinions obtained by VA had to meet certain requirements to satisfy the duty to assist.[129] In *Green*, the Veteran claimed that

---

necessary for the equitable disposition of an appeal. 38 C.F.R. § 20.901(a). Additionally, the Board can send pathologic material to the Armed Forces Institute of Pathology to secure an opinion based on that material. *Id.* § 20.901(b).

[124] Austin v. Brown, 6 Vet. App. 547, 552 (1994) (holding that a Board member's request to a medical examiner, which included the view of the Board member regarding the outcome, violated fair process); *see* Kahana v. Shinseki, 24 Vet. App. 428, 436-37 (2011); Bielby v. Brown, 7 Vet. App. 260, 267-69 (1994).

[125] 38 U.S.C. §§ 5109, 7109 (2006); 38 C.F.R. §§ 3.328, 20.901.

[126] 38 C.F.R. §§ 3.328, 20.901(d).

[127] In fiscal year 2006, there were approximately 650,000 disability compensation claims filed and 500,000 medical opinions obtained by VA. *See* Ridgway, *supra* note 24, at 415.

[128] 1 Vet. App. 121 (1991).

[129] *Id.* at 124. The CAVC endorsed this notion even before the Veterans Claims Assistance Act of 2000 (VCAA) specifically provided for the duty to assist to include medical examinations or opinions.

he had a left leg disability that was a residual of the poliomyelitis illness that he contracted in service.[130] A VA examination was requested and the medical examiner conducted a neurological examination.[131] The VA examiner concluded that "[t]here are some elements on the neurological examination that are somewhat questionable and not entirely compatible with the diagnosis of polio."[132] The medical examiner additionally stated that further review of the Veteran's hospital records might "clarify the diagnostic doubt" and that "additional diagnostic studies might be helpful."[133] The Board relied on this report in rejecting the Veteran's claim.[134]

The CAVC held, however, that such an opinion, which merely asked for more clarification, did not contain sufficient detail to be adequate for evaluation purposes, and that the duty to assist had not been fulfilled with such an examination.[135] Specifically, the Court found that it is "impossible to square the Secretary's duty to assist . . . with the [VA's] failure to follow up the suggestion by the examining physician that a review of the veteran's records 'might help clarify the diagnostic doubt' and that additional diagnostic studies might be in order."[136] The Court then famously held that "fulfillment of the statutory duty to assist here includes the conduct of a thorough and contemporaneous medical examination, one which takes into account the records of prior medical treatment, so that the evaluation of the claimed disability will be a fully informed one."[137] Clearly, an evaluation noting diagnostic doubt and asking for additional studies did not fully inform the Board regarding the disability.

---

[130] *Id.* at 122-23.
[131] *Id.* at 123.
[132] *Id.* (internal quotation marks omitted).
[133] *Id.* (internal quotation marks omitted).
[134] *Id.*
[135] *Id.* at 123-24; 38 C.F.R. § 4.2 (2010) ("If a diagnosis is not supported by the findings on the examination report or if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes.").
[136] *Green*, 1 Vet. App. at 123.
[137] *Id.* at 124.

Green's famous holding has since been the litmus test for determining whether a medical opinion is "adequate."[138] Though the term "adequate" is technically derived from 38 C.F.R. § 4.2, it is apparent from *Green* that § 4.2 and the duty to assist coincide: where the duty to assist is fulfilled by the examiner fully informing the Board regarding the disability, the report has sufficient detail to be adequate for rating purposes; and where the Board has not been fully informed, the duty to assist is not satisfied and the report is inadequate for rating purposes.[139] As such, it has become common parlance to use the term "adequate" when considering whether a medical opinion has fulfilled the duty to assist.[140]

In summary, *Green* elaborated three basic requirements for a medical opinion to be "adequate" under the duty to assist: (1) a thorough and contemporaneous medical examination (2) that takes into account prior medical treatment and (3) fully informs the Board regarding the disability.[141] Over time, these factors have proven to be flexible. For instance, a medical *opinion* need not always include a personal *examination*.[142] In addition, the requirement to fully inform the Board can depend on the type of claim, as an opinion on a claim for increased compensation need not discuss identical factors as a claim for service connection.[143]

---

[138] *See, e.g.*, Martinak v. Nicholson, 21 Vet. App. 447, 454-56 (2007) (noting *Green* and finding that an examination in a claim for an increased rating for hearing loss was adequate); Dingess v. Nicholson, 19 Vet. App. 473, 495-96 (2006) (addressing the criteria espoused in *Green* and holding that two VA psychiatric examinations were adequate to evaluate the Veteran's posttraumatic stress disorder).

[139] *See Green*, 1 Vet. App. at 123-24. As noted in *supra* note 135, 38 C.F.R. § 4.2 concerns evaluating disability ratings, not causation, but has been applied in this context.

[140] *E.g.*, Johnson v. Shinseki, 23 Vet. App. 344, 347-48 (2010).

[141] *See Green*, 1 Vet. App. at 124.

[142] *See* D'Aries v. Peake, 22 Vet. App. 97, 104 (2008) ("An *opinion* is adequate where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one." (emphasis added) (internal quotation marks omitted)).

[143] *See generally* 38 C.F.R. § 3.303 (providing the elements for a grant of service connection); 38 C.F.R. pt. 4, Schedule for Rating Disabilities (providing the requirements for assigning evaluations for service-connected disabilities).

Although not spelled out in *Green*, the reason for these factors is eminently sensible. The Board cannot render a decision without certain medical information, because it is a body of VLJs, not medical experts,[144] and is neither able nor allowed under law to render a medical judgment.[145] Therefore, Congress mandated that a medical examination or opinion provide such information when there is insufficient medical information on a claim.[146] As Judge Moore of the Federal Circuit stated in his concurrence in *Gambill v. Shinseki*,[147] "ratings specialists are not permitted to make their own medical judgments . . . . This is precisely why interrogatories directed to medical opinions are important—to tell a non-physician administrative law judge when the medical evidence is flawed and should be supplemented or discredited."[148]

Accordingly, a medical examination first cannot be "adequate" without a thorough and contemporaneous medical examination, because a medical examination that is inexhaustive or based on outdated information does not provide the Board with sufficiently relevant and informative medical evidence regarding the claim.[149] For example, the Court has held that, where new evidence is submitted indicating that a veteran's disability has worsened but the Board nevertheless relies on an

---

[144] At one time, physicians served as Board members, but this practice was phased out after the decision of *Colvin v. Derwinski*, 1 Vet. App. 171 (1991). *See* 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, 79-80 (2010).

[145] Magusin v. Derwinski, 2 Vet. App. 547, 548 (1992) (noting that the Board may not substitute "its own medical judgment for that of medical experts").

[146] *See* 38 U.S.C. § 5103A(d) (2006) (providing that a medical examination is necessary where there is insufficient medical evidence to decide a claim).

[147] 576 F.3d 1307 (Fed. Cir. 2009).

[148] *Id.* at 1329-30 (Moore, J., concurring). In *Gambill*, the United States Court of Appeals for the Federal Circuit, assuming that veterans have a constitutional right to challenge adverse evidence through interrogatories, held that the denial of such a right was subject to a harmless error analysis. *Id.* at 1311.

[149] In fact, other VA regulations require an updated examination anytime there is an indication of "a material change in a disability or that the current rating may be incorrect." 38 C.F.R. § 3.327(a) (2010).

old examination, VA has not complied with its duty to assist.[150] Second, an adequate medical report must take into account prior medical treatment because an examiner cannot possibly render an informative opinion without understanding the patient's medical history or considering the patient's stated symptoms and complaints.[151] Third, as the ultimate point of the medical report is to fully inform the non-physician Board of the disability, it is paramount that the opinion does so.

Even after the passage of the VCAA, the Court has continually looked to the *Green* standard for adequacy.[152] However, despite the longevity of the standard, it has still proven to be a difficult standard by which to abide: the Board has remanded more claims because of an inadequate medical opinion than for any other reason.[153]

D. Evaluating Probative Value

In order for the Board to rely on a medical opinion, that opinion must not only be adequate, but also probative.[154] It is the Board's duty to assess credibility, assign probative weight to all the evidence,[155] and determine whether the preponderance of the evidence lies for or against the claim (or whether the positive and negative evidence is in equipoise regarding the claim).[156] Probative weight determinations are especially important when there are multiple medical opinions or conflicting medical evidence in the record.

---

[150] *See* Caffrey v. Brown, 6 Vet. App. 377, 381 (1994).

[151] *See* Dalton v. Nicholson, 21 Vet. App. 23, 39 (2007) (holding that a medical examination was inadequate where the "examiner impermissibly ignored the appellant's lay assertions"); *cf.* Reonal v. Brown, 5 Vet. App. 458, 461 (1993) (holding that a medical opinion based upon an inaccurate factual premise has no probative value).

[152] *E.g.*, D'Aries v. Peake, 22 Vet. App. 97, 104 (2008).

[153] *See* Ridgway, *supra* note 24, at 416.

[154] *See, e.g.*, Polovick v. Shinseki, 23 Vet. App. 48, 54 (2009) (finding no Board error in providing no probative weight to a speculative opinion).

[155] Washington v. Nicholson, 19 Vet. App. 362, 367-68 (2005).

[156] 38 U.S.C. § 5107(b) (2006).

In *Guerrieri v. Brown*,[157] the CAVC provided initial guidance on the factors that the Board should consider in evaluating probative value. The Board had to resolve whether "new and material" evidence had been submitted to reopen a claim.[158] At that time, the definition of "material" was "relevant and probative."[159] On appeal, the CAVC found the submitted medical opinions "relevant and probative" – and thus material – and commented that "[t]he probative value of medical opinion evidence is based on the medical expert's personal examination of the patient, the physician's knowledge and skill in analyzing the data, and the medical conclusion the physician reaches."[160]

In *Nieves-Rodriguez v. Peake*,[161] the CAVC provided more definitive guidance on the factors to be considered in evaluating probative value.[162] Notably, its analysis invoked Federal Rule of Evidence 702.[163] In *Nieves-Rodriguez*, the Board discounted two private medical opinions because they were not "informed by the in[-]depth claims file review."[164] The CAVC rejected the Board's reasoning, and determined that, although whether a claims file had been reviewed could affect a probative weight determination, an opinion could not be completely discounted solely because of a failure to review the claims file.[165]

In its discussion, the CAVC noted the factors upon which a proper probative weight determination should be based.[166] Those factors included the three components of Rule 702: whether (1) the medical opinion is based on sufficient facts or data, (2) it is the

[157] 4 Vet. App. 467 (1993).
[158] *Id.* at 470.
[159] *Id.*; *see generally* Shade v. Shinseki, 24 Vet. App. 110, 113-19 (2010) (discussing the evolution of the "new and material" evidence standard).
[160] *Guerrieri*, 4 Vet. App. at 470-71.
[161] 22 Vet. App. 295 (2008).
[162] *Id*. at 302.
[163] *Id.*
[164] *Id.* at 298 (alteration in original) (internal quotation marks omitted).
[165] *Id.* at 304.
[166] *Id.* at 302-06.

product of reliable principles and methods, and (3) the examiner applied the methods reliably to the facts of the case.[167] The Court further stated that "most of the probative value of a medical opinion comes from its reasoning" and that a medical opinion is not entitled to weight if it contains only data and conclusions.[168]

The CAVC explained its reasoning for invoking Rule 702 by stating that, although the Federal Rules of Evidence were not binding on the Court or the Board, Rule 702 provided "useful guidance that has been exhaustively vetted by both the Rules Advisory Committee and by the U.S. Congress."[169] Additionally, the Court noted that "[b]oth VA medical examiners and private physicians offering medical opinions in veterans benefits cases are nothing more or less than expert witnesses."[170]

III. UNIQUE ISSUES WITH EXPERT WITNESSES IN VETERANS' CLAIMS ADJUDICATION

A. Adequacy or Probative Value?

In evaluating the veterans' claims system, it is important to understand the unique issues posed by the process. In the federal system, because the district court judge evaluates reliability and the jury evaluates probative value, one can distinguish the two steps of the process regarding expert testimony. However, in veterans' claims, the Board makes both the adequacy and probative value determinations. As such, one unique and difficult issue is distinguishing between the adequacy and probative value steps. Further, especially with curt medical opinions, it is difficult to determine what constitutes an adequate or probative medical opinion. These two difficulties united in *Stefl v. Nicholson*.[171]

---

[167] *Id.* at 302 (citing FED. R. EVID. 702).
[168] *Id.* at 304.
[169] *Id.* at 302.
[170] *Id.*
[171] 21 Vet. App. 120 (2007).

In *Stefl*, the CAVC found a medical report inadequate because the examiner discussed presumptive service connection due to Agent Orange exposure but did not discuss direct service connection for Mr. Stefl's nasal and sinus polyp disease.[172] The Court noted that "the report failed in its purpose" because it either did not consider direct service connection, or did not address it in a manner clear enough to be understood, and therefore was "inadequate on its face."[173]

However, the Court then began to speak in terms of probative value, stating that the opinion did not "support its conclusion with an analysis that the Board can consider and weigh against contrary opinions."[174] It even cited *Guerrieri* for its statements on probative value.[175] The CAVC then concluded that "[t]he disputed medical opinion has no such analysis even if it was an opinion on direct service connection. Therefore, the Court finds the medical opinion inadequate."[176]

Chief Judge Greene, in dissent, found no clear error in the Board's determination that the report was adequate.[177] He noted that the examiner "reviewed the claims file, examined Mr. Stefl, performed a fiberoptic endoscopic examination, and concluded that Mr. Stefl's nasal and sinus polyp disease is not related to service *or* exposure to Agent Orange."[178] Chief Judge Greene interpreted the "related to service" aspect of the conclusion as regarding direct service connection and the "Agent Orange" aspect as regarding presumptive service connection.[179]

---

[172] *Id.* at 123-24.
[173] *Id.* at 124.
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.* at 125.
[178] *Id.* (internal quotation marks omitted).
[179] *Id.*

The majority responded to Chief Judge Greene that "the medical opinion is at best a conclusion that fails to provide sufficient detail for the Board to make a fully informed evaluation" regarding direct service connection.[180] It explained that its holding was "only that a mere conclusion by a medical doctor is insufficient to allow the Board to make an informed decision as to what weight to assign to the doctor's opinion."[181]

Stefl brings up two issues. First is the mixing of adequacy and probative value analysis. The majority's holding invoked "informed decision" as in adequacy, but "weight" as in probative value.[182] Additionally, the majority cited *Guerrieri* and posited the notion that *analysis*, seemingly a Rule 702 factor and not an aspect of *Green*, was needed to make an opinion adequate.[183] How should this be interpreted?

Although *Green* did not include analysis as a requirement for an adequate opinion, in *Stefl*, a discussion of the examiner's analysis in the context of determining the adequacy of an opinion may have been justified. In all likelihood, the majority engaged in a discussion of the examiner's analysis because *the lack of analysis regarding direct service connection illuminated the fact that the examiner did not address direct service connection*, and therefore the opinion was inadequate for not fully informing the Board about direct service connection. Alternatively, although the majority found the opinion inadequate, it still discussed the examiner's analysis in order to address the Board's finding that the opinion was entitled to probative weight.

The second interesting issue presented by *Stefl* was the differing views of the majority and dissent concerning what constitutes sufficient information to fully inform the Board. The majority found that fully informing the Board required more than a

---

[180] *Id.* at 124.
[181] *Id.* at 125.
[182] *Id.*
[183] *Id.* at 124.

"mere conclusion," and that the examiner did not present more.[184] In contrast, the dissent stated that the examiner's review of the facts, examination, and the rendering of a conclusion provided the requisite information for the Board.[185] Overall, this disagreement highlights the difficulty with interpreting medical reports and applying the standards for adequacy. In federal courts, where there is no requirement to fully inform the decisionmaker, it is the responsibility of counsel in the adversarial system to provide the necessary information through an expert; if that expert does not, the expert will either likely be excluded by the judge on reliability grounds or his opinion will be granted low probative weight by the jury. Thus, the consequences of the failure of an expert to provide sufficient information are borne by the party.[186] However, in the veterans' claims system, the adjudication will not cease until VA provides an examiner who will fully inform the Board.[187] The consequences of a failure to fully inform the decisionmaker are borne by the agency.

B. Inconclusive Opinions

Another difficulty that arises with VA medical experts, but rarely in the federal courts, is evaluating expert testimony where the expert either cannot come to a conclusion or states his opinion in opaque terms. In federal courts, when medical experts are indecisive or cannot come to a conclusion, parties do not typically employ them to take the stand on their behalf. By contrast, because VA must consider all medical opinions of record, the Board must grapple with inconclusive opinions.

VA routinely requests that medical examiners state their conclusions in terms of probability, e.g., whether a certain outcome

---

[184] *Id.* at 125.
[185] *Id.*
[186] *See generally* Mirjan Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. Pa. L. Rev. 1083 (1975) (discussing responsibilities in the adversarial system).
[187] *See, e.g.*, Voyles v. Brown, 5 Vet. App. 451, 453-54 (1993) (remanding where the Board did not analyze the effect of pain on disability and improperly relied on a medical report that failed to discuss the impact of functional loss due to pain).

is "most likely caused by" or "at least as likely as not due to" a certain source.[188] Medical examiners, however, often fail to provide conclusions in these terms due to a lack of information, the limitations of medical science, or other reasons.[189] In such situations, because of the two-step process of evaluating VA medical experts, the question arises as to whether the duty to assist is unfulfilled or whether an inconclusive opinion is merely a matter of probative value.

Roberts v. West[190] is the first notable case addressing this issue.[191] In *Roberts*, a VA medical opinion was requested and rendered, but the opinion was inconclusive regarding the relationship between the Veteran's current arthritis disorder and his in-service frostbite.[192] The Court found it "not surprising that the rheumatologist could not determine whether the frostbite had caused the arthritis," considering that "the appellant suffered frostbite almost forty years prior to the VA rheumatologist's examination."[193] As such, the Court concluded that the mere fact that "the medical opinion was inconclusive . . . does not mean that the examination was inadequate."[194] Although the medical examiner did not phrase the likelihood that the Veteran's arthritis was related to his service in terms of probability, the Court interpreted the opinion, in context, as stating that the relationship between the in-service disability and the current disability *could never be determined*, because the lapse of time was too substantial, and therefore the opinion had fully informed the Board about the medical circumstances.[195]

---

188 VA Adjudication Procedure Manual Rewrite, M21-1MR, pt. III, subpt. iv, ch. 3, ¶ A.9.e. (amended December 29, 2007) (providing guidelines for VA adjudicators regarding how to instruct a medical practitioner to provide an opinion using a legally recognized phrase).
189 *See, e.g.*, Jones v. Shinseki, 23 Vet. App. 382, 385 (2010) (noting examiners stated that they were unable to ascertain the etiology of the Veteran's left ear hearing loss and tinnitus without resort to speculation).
190 13 Vet. App. 185 (1999).
191 *Id*. at 187.
192 *Id.* at 187, 189.
193 *Id.* at 189.
194 *Id.*
195 *Id.*

In *Daves v. Nicholson*,[196] the medical examiner concluded that "without an autopsy, [the cause of Mr. Daves' death] cannot even be speculated upon."[197] The Court recognized this conclusion as presenting two possible interpretations, depending on its context. First, the examiner could have been stating, similarly to the examiner in *Roberts*, that a medical opinion *can never be rendered* because an autopsy was not performed immediately at death.[198] Alternatively, the examiner could have been stating that a medical opinion cannot be rendered *at this point* without an autopsy being performed.[199] The CAVC determined that clarification was required and, therefore, the Board had not been fully informed and the duty to assist remained unfulfilled.[200] More specifically, the CAVC stated that "the medical examiner specifically state[d] that a medical opinion [could not] be provided without information not currently available;" therefore, VA's duty to assist required VA to determine "whether that information may reasonably be obtained, and if so, to make efforts to obtain it and seek an additional medical opinion which considers the relevant information."[201]

Jones v. Shinseki[202] most recently summarized the law on this matter.[203] *Jones* endorsed the analysis in *Roberts* by stating that, even if an examiner was unable to draw a conclusion without resort to speculation, his or her inconclusive opinion "is a medical conclusion just as much as a firm diagnosis or a conclusive opinion."[204] In so stating, the Court acknowledged that, due to the limits of current medical knowledge, there are situations where the examiner cannot reasonably furnish a conclusion, and, as long

---

[196] 21 Vet. App. 46 (2007).
[197] *Id*. at 49 (alteration in original) (internal quotation marks omitted).
[198] *Id.* at 51.
[199] *Id.*
[200] *Id.* at 51-52.
[201] *Id.*
[202] 23 Vet. App. 382 (2010).
[203] *Id.* at 389-91.
[204] *Id.* at 390.

as he or she explains why no medical expert could, it is still an adequate opinion.[205] It also recognized *Daves* and noted that, if an examiner states that he or she does not have the expertise, or that additional testing is needed and possibly available, then the opinion does not satisfy the duty to assist.[206]

However, in the two-pronged analysis of expert opinions, just because in certain circumstances an inconclusive opinion can satisfy the duty to assist does not mean that such an opinion will garner significant probative value. In *Hood v. Shinseki*,[207] the case expounded upon in the Introduction, the Board, relying on a VA medical opinion, ultimately determined that VA was not at fault for the Veteran's infection.[208] However, the examination report stated that it was "impossible . . . to know if [the infections] were simply a statistically unlikely happening or due to a particular source of infection" caused by VA medical treatment.[209] The CAVC found that the Board had no sufficient basis for denying benefits based on that medical opinion alone because it was speculative and of little probative value, and that a more definitive medical opinion was required to reject benefits.[210] The CAVC also cited other cases that have characterized speculative opinions as consisting of little or no probative value at all.[211]

A final aspect of evaluating inconclusive medical opinions is distinguishing between the speculative and the conclusive. In *Bostain v. West*,[212] a private medical examiner opined that a Veteran's "service related condition may have . . . contributed to

---

[205] *Id.* at 390-91.
[206] *Id.* at 390.
[207] 23 Vet. App. 295 (2009).
[208] *Id.* at 297. *See* 38 U.S.C. § 1151 (2006) (allowing for disability compensation due to faulty VA medical treatment in certain circumstances).
[209] *Hood*, 23 Vet. App. at 297.
[210] *Id.* at 298-99.
[211] *Id.* (citing Goss v. Brown, 9 Vet. App. 109, 114 (1996); Tirpak v. Derwinski, 2 Vet. App. 609, 611 (1992)).
[212] 11 Vet. App. 124 (1998).

his ultimate demise."[213] The CAVC noted that the term "may" also implied "may not" and was therefore a speculative opinion and not material evidence sufficient to reopen a previously denied claim.[214] The CAVC has ruled similarly regarding opinions invoking the term "could."[215] However, in at least one case, the CAVC has found a medical conclusion employing the term "probably" to be "competent evidence that the claim is plausible," i.e., to be evidence containing at least some probative value.[216]

C. Requests for Clarification

Another issue unique to the veterans' claims system involves the mandatory clarification of ambiguous VA medical opinions. Pursuant to 38 C.F.R. § 19.9, "[i]f further evidence, clarification of the evidence . . . or any other action is essential for a proper appellate decision, [the Board] shall remand the case . . . , specifying the action to be undertaken."[217] The Court has often remanded cases for clarification of a VA medical opinion.[218] However, a new application for § 19.9 arose recently in *Savage v. Shinseki*.[219]

In *Savage*, the Board assigned no probative value to the results of private audiological examination reports because it was unclear whether the examinations used the Maryland CNC Word Recognition Test, as required by regulation.[220] Mr. Savage argued

---

[213] *Id.* at 127.
[214] *Id.* at 127-28.
[215] *See* Bloom v. West, 12 Vet. App. 185, 187 (1999) (noting that use of the term "could" in an opinion without other supporting data is speculative); *Goss*, 9 Vet. App. at 114 (noting that use of the phrase "could not rule out" was too equivocal to rely on to deny service connection).
[216] *See* Watai v. Brown, 9 Vet. App. 441, 443 (1996) (noting that the term "probably" in a medical opinion regarding nexus established that the claim was well-grounded).
[217] 38 C.F.R. § 19.9 (2010).
[218] *See, e.g.*, Hicks v. Brown, 8 Vet. App. 417, 421-22 (1995) (indicating remand warranted where an examination report lacked specificity regarding appellant's functional loss due to pain and was unclear whether statements were explaining physical examination results or describing the condition).
[219] 24 Vet. App. 259 (2011).
[220] *Id*. at 262; *see* 38 C.F.R. § 4.85(a).

that, even though the medical opinion was private and VA cannot mandate the actions of a private person, under § 19.9, clarification was essential for a proper appellate decision and should have at least been attempted.[221]

The CAVC agreed that, in a set of very limited circumstances such as Mr. Savage's, clarification was required.[222] More specifically, the CAVC provided the following explanation:

> [W]hen VA concludes that a private medical examination report is unclear or insufficient in some way, and it reasonably appears that a request for clarification, both as limited elsewhere in this opinion, could provide relevant information that is otherwise not in the record and cannot be obtained in some other way, the Board must either seek clarification from the private examiner or the claimant or clearly and adequately explain why such clarification is unreasonable.[223]

The CAVC's holding was "limited to those instances in which the missing information is relevant, factual, and objective—that is, not a matter of opinion—and where the missing evidence bears greatly on the probative value of the private examination report."[224] Thus, in Mr. Savage's case, instead of merely discounting the probative value of the opinion, the Board had a duty to seek clarification as to which test was used.[225]

Although *Savage*'s holding is quite limited, it will be interesting in the near future to see when and how often *Savage* is invoked.

---

[221] *Savage*, 24 Vet. App. at 263.
[222] *Id.* at 269-70.
[223] *Id.* at 269.
[224] *Id.* at 270.
[225] *Id.*

IV. COMPARING THE PROCESSES

A. Standard of Review

In both the veterans' claims system and the federal courts, the reviewing court must defer to the finders of fact, whether the findings involve the first step (finding an expert "reliable" or a VA medical opinion "adequate") or the second step (granting weight to the expert's testimony) of the evidentiary process.

In the federal courts, the district court judge's determination on the reliability of expert witness testimony is reviewed under the "abuse of discretion" standard,[226] which only overturns decisions that are "arbitrary, fanciful, or clearly unreasonable . . . where no reasonable person would adopt the district court's view."[227] The jury's determination regarding probative weight is reviewed, as part of the jury's entire determination, under the "no reasonable juror" standard, which only overturns verdicts if "no reasonable juror could have reached the disputed verdict."[228]

In the veterans' claims system, the Board's determination of the adequacy of a medical opinion is reviewed, like all determinations regarding whether the "duty to assist" has been

---

[226] General Elec. Co. v. Joiner, 522 U.S. 136, 143 (1997).

[227] United States v. Green, 617 F.3d 233, 239 (3d Cir. 2010) (internal quotation marks omitted). Although various courts of appeals have different "abuse of discretion" standards, many are similar to the United States Court of Appeals for the Third Circuit's characterization stated above. *See* United States v. Isaacs, 593 F.3d 517, 525 (7th Cir. 2010) ("[A] district court abuses its discretion only when we can say that the trial judge chose an option that was not within the range of permissible options from which we would expect the trial judge to choose under the given circumstances." (internal quotation marks omitted)); United States v. Regan, 627 F.3d 1348, 1352 (10th Cir. 2010) ("A district court abuses its discretion when it renders a judgment that is arbitrary, capricious, whimsical, or manifestly unreasonable. We will reverse the district court's determination only if the court exceeded the bounds of permissible choice, given the facts and the applicable law in the case at hand." (citations omitted) (internal quotation marks omitted)).

[228] United States v. Magleby, 241 F.3d 1306, 1312 (10th Cir. 2001) (internal quotation marks omitted); *accord* Hunt v. Neb. Pub. Power Dist., 282 F.3d 1021, 1029 (8th Cir. 2002); United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987).

fulfilled, under the "clearly erroneous" standard,[229] which overturns determinations if the reviewing court has a "definite and firm conviction that a mistake has been committed."[230] The Board's determination on the probative value of a medical opinion, as with its determinations regarding all evidence, is also reviewed under the "clearly erroneous" standard.[231]

Although the difference between "clearly unreasonable" (of the "abuse of discretion" standard) and "clearly erroneous" is not apparent on its face, the two standards produce vastly different outcomes. Federal district court evidentiary rulings on the admissibility of expert testimony are very difficult to overturn: one study of the United States Court of Appeals for the First Circuit found no *Daubert* decisions overturned in the thirty-four cases examined.[232] In general, studies show that the courts of appeals affirm 62% of all published cases.[233] On the contrary, under the "clearly erroneous" standard of review for Board findings of fact, CAVC decisions ultimately remanding back to the Board are more frequent: In fiscal year 2006, 53% of Board decisions were affirmed, 22% were affirmed in part and remanded in part, and 25% were remanded (either reversed or vacated in whole).[234]

---

[229] Gilbert v. Derwinski, 1 Vet. App. 49, 52 (1990).
[230] *Id*. (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)).
[231] *See* Owens v. Brown, 7 Vet. App. 429, 433 (1995). Although the CAVC reviews non-factual findings, conclusions, and decisions under an "abuse of discretion" standard, the Board's factual findings—which include findings on adequacy and probative value—are reviewed under the "clearly erroneous" standard. 38 U.S.C. § 7261 (2006).
[232] *See* Brett Baber, *Much Ado About* Daubert*: The Gatekeeper's Decisions on the Admissibility of Expert Testimony*, 25 Me. B.J. 84, 85 (2010).
[233] *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, 157 & n.247 (2009) (citing Ashlyn K. Kuersten & Donald R. Songer, Decisions on the U.S. Courts of Appeals 40 (2001)).
[234] *See id.* at 154 & n.232; Annual Reports For FY 1998-2007, U.S. Ct. of Appeals for Veterans Claims, http://www.uscourts.cavc.gov/documents/Annual_Reports_2007.pdf. These numbers do not include joint motions for remand, where the Secretary and veteran come to an agreement and remand the case back to the Board. Earlier statistics from the CAVC show an even lower rate of affirming the Board: 12.1% in fiscal year 2004 (although this statistic may be skewed by the high number of remands pursuant to initial errors involving the VCAA). *See* Allen, *supra* note 91, at 495 n.72.

In my view, the different standards for the different systems – with their different processes and different purposes – make sense. In the federal system, the judge and jury are neutral decisionmakers, parties are able to cross-examine experts, and the expert must testify personally, such that the judge can interject with questions for clarification. Accordingly, substantial deference regarding district court judge and jury findings is warranted.[235] In the veterans' claims system, the decisionmakers are employees of VA, veterans receive a hearing only upon their request,[236] such a hearing does not include a forum for Board members to personally interact with or cross-examine VA medical examiners,[237] and veterans are often unrepresented by counsel.[238] Considering these factors, as well as the claimant friendly nature of the system, one can understand why the Board is analyzed more strictly.

In other words, in an adversarial system, the goal of judicial review is to determine whether the process was fair. In a non-adversarial system, the goal of review is to determine whether the outcome was reliable. Hence, poor performance by counsel in developing and presenting evidence in the adversarial system, though potentially malpractice, is not remandable error; on

---

[235] *See* Anderson v. City of Bessemer, N.C., 470 U.S. 564, 575 (1985) (noting that "variations in demeanor and tone of voice" bear heavily on credibility assessments); *In re* Schoenfield, 608 F.2d 930, 935 (2d Cir. 1979) ("[T]he factfinder who is given the opportunity to observe witnesses as they testify is in a better position to make factual findings based on that evidence than is the factfinder who is restricted to a written record of the same testimony. . . . [T]ranscripts of testimonial evidence . . . cannot capture the sweaty brow, the shifty eye, the quavering voice [and] never fully reflect what was communicated by the testifying witness.").

[236] 38 C.F.R. § 20.700(a) (2010). In fiscal year 2010, 13,515 hearings were held and 49,127 decisions were rendered by the Board. 2010 Chairman's Rep., *supra* note 90, at 3.

[237] *See* Patrick C. Joyce, Chief Physician, VA Compensation and Pension Program, VA Medical Center, Breakout Session: Is There a Doctor in the House? Session One at the Ninth Judicial Conference of the United States Court of Appeals for Veterans Claims (Apr. 24, 2006), *in* 21 Vet. App. LI, at CLII (2006) (noting that communication between the Board and VA medical examiner "is usually one way": the Board sends a request, and the examiner renders an opinion).

[238] *See* Ridgway, *supra* note 93, at 261-62 (discussing attorney involvement in veterans' claims).

the other hand, poor performance by VA in developing and presenting evidence constitutes error.

Moreover, although the CAVC is a federal court, the Supreme Court's recent decision in *Henderson ex rel Henderson v. Shinseki*[239] recognized and emphasized that specialized Article I courts such as the CAVC may follow different rules than Article III courts if specified by Congress.[240] More specifically, *Henderson* stated that rules of "review by an Article I tribunal as part of a unique administrative scheme" should be based on congressional intent rather than the application of a categorical rule for all federal courts.[241] With the system of veterans' claims adjudication in particular, "[t]he contrast between ordinary civil litigation—which provided the context of our decision in [*Bowles v. Russell*[242]]—and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic."[243]

In sum, although both the federal courts and the veterans' claims system engage in evaluating expert testimony, the different standards of review fit the varied contexts of the particular systems.

B. Adequacy and Reliability

Although both systems have a two-step process for admitting expert testimony, one question yet to be answered is whether the steps correspond to each other. Does adequacy have any relation to reliability? In the same vein, it has been mentioned that the federal courts have termed the reliability evaluation as a "gatekeeping" function restricting faux experts from spouting phony science to the factfinder; can the adequacy evaluation be considered a type of "gatekeeping"?

---

239 131 S. Ct. 1197 (2011).
240 *Id*. at 1204.
241 *Id*.
242 551 U.S. 205 (2007).
243 *Henderson*, 131 S. Ct. at 1205-06.

It is my view that the adequacy determination does not equate to "gatekeeping" because there is no gate to keep. In the federal system, the jury's determination is secret; thus, it will not be known if its determination is based on an improper reason such as the testimony of an expert whose analysis or methodology is not scientifically valid. Accordingly, the jury must be secluded from hearing expert testimony until that testimony is established as reliable. On the contrary, the Board hears all expert testimony, phony or not. Furthermore, there is less necessity for a gate on the front end because, if the Board renders a determination on improper bases, such will be illuminated through the requirement that the Board provide a statement of reasons or bases for its determinations.[244] In short, bad evidence will taint the jury in unquantifiable ways, while the Board must discuss its evaluation of the evidence considered, and therefore the legitimacy of the evidence can be reviewed on appeal.

Another reason that the adequacy step is not equivalent to the reliability step is that, while reliability is the mandatory first step in evaluating experts in federal courts, a determination of adequacy is not always a hurdle that experts must surmount. Because the duty to assist only requires that the Board be fully informed by a medical opinion, if there is already an adequate medical opinion of record, private medical opinions need not be evaluated for adequacy.[245]

---

[244] *See* 38 U.S.C. § 7104(d)(1) (2006).

[245] *See* Kahana v. Shinseki, 24 Vet. App. 428, 439 n.8 (2011) (Lance, J., concurring) (noting that opinions lacking in detail may still have some evidentiary value). Although 38 U.S.C. § 5103A(d) only requires obtaining an adequate medical opinion when there is insufficient medical evidence, the CAVC has held that any VA medical opinion, once undertaken, must be found adequate before it receives probative weight. *See* Barr v. Nicholson, 21 Vet. App. 303, 311-12 (2007). Even though the Board often analyzes the adequacy of private opinions (and the probative value of an opinion includes an evaluation of whether the opinion was based on sufficient facts or data, which is similar to an adequacy requirement), the CAVC has not formulated any *Barr*-like requirement for private medical opinions.

However, the adequacy and reliability evaluations certainly have similar missions. The adequacy standard – ensuring that an expert has performed an examination (i.e., actually examined the patient), reviewed the medical history (i.e., actually became informed of the relevant facts), and informed the Board (i.e., actually presented medical knowledge) – at its most basic level confirms that the medical examiner is not a faux expert, rendering conclusions while unaware of the facts and without demonstrating medical knowledge. From this perspective, the test for adequacy may be seen as ensuring that the opinion is at least scientifically valid, i.e., reliable.

C. Reliability and Probative Value

Additionally, the two systems under examination in this essay have both invoked Federal Rule of Evidence 702, which requires a medical opinion to (1) be based on sufficient facts or data, (2) be the product of reliable principles and methods and (3) reliably apply the methods to the facts of the case. Notably, however, the two systems have used Rule 702 in different contexts. In the federal system, Rule 702 is applied to determine whether an expert is reliable *before* a probative value determination takes place. Conversely, when the Court in *Nieves-Rodriguez* invoked Rule 702 for guidance, it was in the context of *actually evaluating* the probative value of an expert's testimony.[246] Thus, there seems to be a disconnect: are the factors of Rule 702 for application in establishing reliability or probative value?

The short answer is that the Supreme Court has determined that the Rule 702 factors are factors for reliability, which is distinct from probative value.[247] But after a judge

[246] *See* Nieves-Rodriguez v. Peake, 22 Vet. App. 295, 302 (2008) ("The Court agrees that these are important, guiding factors to be used by the Board in evaluating the probative value of medical opinion evidence . . . .").
[247] *Compare* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590 n.9 (1993) (defining evidentiary reliability as "trustworthiness"), *with* Black's Law Dictionary 1323 (9th ed. 2009) (defining probative as "[t]ending to prove or disprove").

determines that (1) the expert's testimony is based upon sufficient facts or data, (2) the expert's testimony is the product of reliable principles and methods, and (3) the expert's principles and methods have been reliably applied to the facts of the case, what more is there for the jury to decide? As some *Daubert* critics have stated, the reliability test is so thorough that the district court judge – making determinations which result in the exclusion of an expert witness – has essentially usurped the jury's authority and has left little for jurors to decide.[248] According to this perspective, *Nieves-Rodriguez* provides a more sensible use of Rule 702, using these factors to help determine probative value. *Nieves-Rodriguez* reasonably states that the expert who uses more data to form his conclusion, who explains the reliability of his principles and methods, and who faithfully applies these principles and methods, is the expert whose testimony is most probative.

Seen alternatively, the Rule 702 factors should be seen as merely ensuring scientific validity.[249] Many different theories of causation can be scientifically valid in any given case; it is the jury's decision as to which theory of causation is most persuasive.[250] That determination regarding persuasiveness can include the perceived credibility of the expert, factors such as bias, and – distinct from a determination on reliability – a weighing of which expert's testimony is the *most* reliable. As

---

[248] *See* Edward J. Imwinkelried, *Trial Judges—Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury's Province to Evaluate the Credibility and Weight of the Testimony?*, 84 Marq. L. Rev. 1, 4-7 (2000).

[249] *See Daubert*, 509 U.S. at 592-93 (finding that applying Rule 702 "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is *scientifically valid* and of whether that reasoning or methodology properly can be applied to the facts in issue" (emphasis added)).

[250] *See* Heather P. Scribner, *Rigorous Analysis of the Class Certification Expert: The Roles of* Daubert *and the Defendant's Proof*, 28 Rev. Litig. 71, 106 (2008) ("'When a trial court, applying [Rule 702], rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. [Rule 702] is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise.'" (alteration in original) (quoting Fed. R. Evid. 702 advisory committee note)).

such, Rule 702 creates a baseline for scientific validity but can also be used in order to determine the most scientifically valid and, save any credibility issues, likely the most probative.

Under this paradigm, *Nieves-Rodriguez* did not incorrectly use Rule 702 for guidance regarding probative value. Because the jury is not required to explain its determinations, including why it was convinced by one expert and not another, pronouncing factors for determining probative value is unneeded; however, because the Board must explain its probative value determinations,[251] a list of factors for assigning probative weight is useful. The probative value determination should ultimately be based on which expert opinion is most credible and most scientifically valid, and therefore the factors of Rule 702 can provide worthwhile guidance in rendering probative weight determinations.

CONCLUSION

Although Mark McEwen and Werner Hood experienced different processes in their attempts at compensation for their injuries, each process was sensible in the context of its system. Mr. McEwen's experts, for instance, had to undergo a reliability evaluation by the district court judge before any opportunity to address the jury. The Supreme Court decision in *Daubert* held that this "gatekeeping" function should be based on a variety of flexible factors. Although Mr. McEwen would likely argue, alongside critics of *Daubert*, that judges are overzealous in their gatekeeping, that their decisions are too insulated from meaningful judicial review, and that the Seventh Amendment is compromised by excluding plaintiff evidence from the jury, *Daubert* has been codified in Rule 702, and Mr. McEwen's experts landed on the wrong side of that rule.

[251] *See* 38 U.S.C. § 7104(d)(1) (2006).

The expert medical reports regarding Werner Hood's claim, on the other hand, directly reached the factfinder, the Board, and had to surmount a "duty to assist" requirement pursuant to the factors laid out in *Green*. The probative value of the expert medical reports was then evaluated under *Nieves-Rodriguez* and, as an example of a unique issue that arises in the veterans' claims system – along with inconclusive medical opinions and different approaches as to what constitutes "fully informing the Board" – the CAVC found that the VA medical reports were inadequate and unworthy of probative value.

At the beginning of this Article, I asked whether it would be sensible for the veterans' claims system to import elements of the federal system with regard to admitting expert testimony. After an examination of the purpose of each system and the fundamental differences between the systems, I must conclude that, although analogies are appropriate between the systems, the further importation of the federal system's process for admitting experts does not make sense for the veterans' claims system.

First, the veterans' claim system properly has a different standard of review, based on the fact that the Board is the factfinder and it must disclose reasoning for its factfinding. Second, the adequacy standard is necessary in the veterans' claims system in light of VA's duty to assist, and no reliability determination separate from a probative value determination is necessary because the Board, unlike a jury, needs no gatekeeper. However, the federal system's reliability factors of Rule 702 remain useful guidance for the probative value step in the veterans' claims system. In conclusion, although the processes for admitting experts in the federal courts and the veterans' claims system both follow a two-step process, the processes contain important differences based on the purposes of the systems, and importing the federal system's process does not make sense for the veterans' claims system.