The "Why" of Decision Writing: Wording Credibility Findings and Discussing Weight of Evidence

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I. Weight of Evidence: Whom do I believe? Why do I believe them?

The facts of the case are not determined until the administrative adjudicator makes findings. Ultimately, the conclusions drawn by the ALJ or hearing officer can be reduced to one word: **persuasion**.

One can find any number of textbooks and treatises regarding the admissibility and exclusion of evidence. However, its difficult to find anything more than a definition regarding the process of weighing evidence. This definition is from Cornell Law School's Legal Information Institute:

> **Weight** of the evidence:
> The degree to which evidence convinces triers of fact to either accept or reject a factual assertion. Sometimes, the phrase refers to the strength of a singe piece of evidence. At other times, the phrase refers to the whole set of evidence presented on an issue, such that the overall weight of the evidence.
>
> "In a broad sense, **weight** simply refers to the probative value or predictive validity of any relevant class or piece of evidence in making a probabilistic judgment."[1]

There's somewhat more guidance on weighing evidence and making credibility determinations in some, but not all, jury instructions. Here's an example from the Arkansas Model Jury Instructions for Civil Court:

> You are the sole judges of the **weight** of the evidence and the credibility of the witnesses. In determining the credibility of any witness and the weight to be given his testimony, you may take into consideration his
>
> - Demeanor while on the witness stand,
> - Any prejudice for or against a party,
> - His means of acquiring knowledge concerning any matter to which he testified,
> - Any interest he may have in the outcome of the case, and
> - The consistency or inconsistency of his testimony, as well as
> - The reasonableness or unreasonableness of the testimony.

[1] Barzun, Charles. *Rules of Weight*. Notre Dame Law Review, Volume 83, Issue 5 (2008).

The jury instructions are somewhat more helpful that the definition, however, determining what testimony or other evidence is the most believable is still dependent on the *persuasiveness* of evidence.

The weight of evidence is based solely on the believability or persuasiveness of evidence. The probative value of the evidence, the tendency of the evidence to convince a person of the truth of some assertion, does not turn on the number of witnesses called or the number of exhibits marked but rather on the ability of evidence to persuade. A witness may give uncorroborated but apparently honest and sincere testimony that commands belief, even though other respectable witnesses may contradict her. The question is not which side has more witnesses, nor which side has more exhibits, but what evidence the trier of fact believes.

As the trier of fact, you are the sole authority determining the believability or persuasiveness of individual witnesses as well as the weight to be given a collection of evidence presented on an issue, as compared to the contrary evidence that is presented.

However, simply determining which evidence you believe is only half the task. You must also be able to explain ***why*** you found one witness more persuasive that another or collection of evidence more believable than evidence to the contrary. If you don't offer that explanation in your written decision and your case is appealed, the case may be remanded back to you to explain yourself.

Explaining *why* you believe one witness more than another or one side's version of the story more than the other's is one of the more difficult functions that a trier of fact performs. Why is it so difficult? Because it requires you to state, in no uncertain terms, why you found a party to be unworthy of belief in a decision that the party will read.

II. Credibility Defined

A. The quality or power of inspiring belief;

B. That quality in a witness which renders his/her testimony worthy of belief;

C. Natural probable, reasonable, plausible, and easy to believe.

III. Assessing Credibility

A. The Four-Step Process to Assess Credibility

1. Identify the disputed fact.

2. Summarize the evidence as to that fact.

3. State which version you believe.

4. Explain, in detail, why the chosen version is believed in preference to the contrary versions.

B. Competency v. Credibility

The competence of the witness to testify to an event involves:

1. Did the witness observe the event in question?

2. Does the witness recall the event in question?

3. Can the witness communicate what he/she observed and recalled?

4. Does the witness understand the duty to tell the truth?

Credibility involves an assessment of whether what the witness says is true. Questions regarding a person's ability to see or recall an event raises a red flag regarding his/her competence, not his/her credibility.

C. Evaluating Testimony for Competency or Credibility:

Six Factors to Analyze Witness Testimony for Credibility

1. Opportunity and capacity of the witness to observe the act or event:

   a. Opportunity: requires an evaluation as to time, place, and proximity;

   b. Capacity: refers to the witness' ability to understand what is perceived and to narrate it intelligently.

2. Prior inconsistent statement:

   a. Effect: does not render present testimony false. It raises doubts about the truthfulness of both statements.

   b. Form: can be written, oral, or conduct;

   c. Need not be contradictory so long as it generates a permissible inference;

   d. Does not render testimony incredible *per se*.

3. Motives for testifying:

   a. Bias rests on the assumption that certain relationships and circumstances impair impartiality, and that a witness who is not impartial may consciously or unconsciously shade his/her testimony for or against a party or witness. The trier of fact must be sufficiently informed as to underlying relationships, circumstances, and influences to measure in light of his or her own experience whether coloration of the witness' testimony could reasonably be expected as a probable human reaction.

   b. Financial or other interest in the outcome of the case

4. Consistency with or contradiction by other evidence:

   a. Arises through the calling of other witnesses to confirm or deny facts asserted by a different witness and/or dispute a writing;

   b. The contradicting testimony must itself be credible. It has no probative value unless it is believed in preference to the testimony it contradicts.

   c. Rejecting the credibility of the witness for inconsistency depends on the inference that a witness who is mistaken about one fact in his/her testimony could be mistaken about others—and therefore his/her testimony is not trustworthy;

   d. Discrediting a witness on one issue does not compel a finding that all his/her testimony is discredited.

5. Inherent improbability: the reasonable of the witness's testimony

   Relies on the trier of fact's evaluation of the likelihood of the events occurring in the manner described.

6. Demeanor

   a. Describes carriage, manner, behavior, bearing, and appearance.

   b. Not just words uttered, but ***how*** they are said. Auditory cues, such as manner of speech, tone of voice, hesitancy, and whether the witness's manner of testifying is evasive or directed, was rated as the most important and reliable type of demeanor evidence.

   c. May be used to determine a witness to be either credible or incredible.

7. Drug or alcohol use or addiction, if any

8. Memory: Memory is not an exact recording of past events. It is possible for witnesses to misremember events and conversations. Scientific research has established:

   a. Human memory is not at all like video recordings that a witness can simply replay to remember precisely what happened.

   b. When a witness has been exposed to statements, conversations, questions, writings, documents, photographs, media reports, and the opinions of others, the accuracy of their memory may be affected and distorted.

   c. A witness's memory, even if testified to in good faith, and with a high degree of confidence, may be inaccurate, unreliable, and falsely remembered; thus, human memory can be contaminated or changed, and events and conversations can event be falsely imagined.

   d. Distortion, contamination, and falsely imagined memories may happen at each of the three stages of memory:

      (1) Acquisition—initial perception of events
      (2) Storage—period of time between acquisition and retrieval
      (3) Retrieval—recalling stored information

IV. Credibility Impeachment: Testing Credibility Through Cross-Examination

A. Definition:

The process or proving, by questioning, offering evidence which is contradictory, or by other means, that a witness is unworthy of belief.

B. Grounds for Impeachment:

   d. Demeanor while testifying

      (1) Eyes
         (a) with whom does the witness make eye contact?
         (b) point of focus
         (c) taking or looking for cues
         (d) rolling eyes in response to question

      (2) Behavioral changes from direct examination to cross exam

(a) differences in ability to recall events
(b) difference in the amount of the detail of testimony
(c) hostility to cross examiner of defensiveness
(d) hesitation before answering questions on cross
(e) vocal changes: volume, pitch, speed, rhythm, phrasing, inflections, mumbling, quiver, breaking, stammering or stuttering, verboseness.
(f) posture: squirming, slumping, wringing hands, respiration
(g) discomfort: dry mouth, blushing, obvious perspiration

(3) Changes in emotion, especially if abrupt
(a) anger
(b) obvious nervousness (nervous laughter, agitation, etc.)
(c) crying, especially if inappropriate or feigned
(d) sighing
(e) snickering
(f) aggressive
(g) evasive
(h) obsequious, servile, ingratiating, sycophantic, fawning, etc.
(i) snide, facetious or callous

e. Character or nature of his/her testimony

(1) too pat, obviously rehearsed
(2) exaggeration, hyperbole, distortion
(3) repeating certain questions before answering
(4) detail—too much or too little
(5) incongruous technical vocabulary, unlikely use of terminology
(6) mental capacity and testimony don't match
(7) overconfident, cocky, arrogant
(8) candid, open, forthcoming
(7) hesitant, uncertain or vague

f. Capacity of witness to perceive and/or recall

g. Capacity to communicate any matter about which he/she testifies

h. Extent of his/her "opportunity" to perceive any matter

i. His/her character for honesty or veracity or their opposites

j. Witness' bias, intent or other motive – or non-existence of these traits

k. Prior inconsistent, or consistent, statement made prior to hearing

l. His/her admission of untruthfulness

m. Incompetency

n. Poor memory

o. Intoxication and/or narcotic addiction

p. Financial interest in outcome

q. Benefits received or contemplated

r. Acts of friendship or hostility toward opposing parties

V. Hearing Officer's Affirmative Duty to Make Credibility Findings

Although many cases include substantially uncontested facts, many involve contradictory testimony on essential issues. Did the physician timely report the child's injuries to the agency? Is the engineer or the client telling the truth? Did the licensee file the renewal application form before or after 5:00 p.m.? These are the types of factual conflicts that may arise in administrative cases. The ALJ is the arbiter not only of the facts but also of the credibility of each of the witnesses.

When the ALJ recognizes that one or more issues will be based on the ALJ's determination of the more credible witness, the ALJ should include in the decision a discussion of the credibility of each contested witness, including the factors on which the ALJ is relying to make that determination and the particular evidence that has led the ALJ to a decision.

Determination of the credibility of witnesses is a subset of an administrative adjudicator's findings of fact:

A. The courts have historically deferred to the trier of fact--whether jury or judge--in determining the credibility of witness testimony.

B. To overcome that deference, a party must provide evidence and a compelling explanation to assist an appellate court to reach a contrary conclusion.

C. Cases:

Garland v. Dai, 141 S.C. 1669 (2021)
In a unanimous decision authored by Justice Gorsuch, the Court found that the Ninth Circuit's requirement that a federal court of appeals must deem an asylum-seekers' testimony credible unless the Board of Immigration Appeals (BIA)

explicitly finds that it is not credible, does not comport with the Immigration and Nationality Act (INA). In reaching its holding, Justice Gorsuch spelled out the procedure the Supreme Court expects the IJ and BIA to employ:

> "[I]mmigration cases like these should proceed as follows. First, the factfinder—here the IJ—makes findings of fact, including determinations as to the credibility of particular witness testimony. The BIA then reviews those findings, applying a presumption of credibility if the IJ did not did not make an explicit adverse credibility determination. Finally, the court of appeals must accept the agency's findings of fact as 'conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."

Rodriguez-Ramirez v. Garland, 11 F.4th, 1091 (U.S. App., 9th Circ., 2021)
Substantial evidence supported immigration judge's adverse credibility determination, as grounds for denying noncitizen's application for asylum and withholding of removal. Noncitizen's testimony about report to local prosecutor regarding threat from gang members made in 2016, which prompted him to flee his country, was inconsistent with the report he made to the prosecutor at the time of the alleged threat. Noncitizen did not provide explanation for discrepancy. Judge also noted noncitizen's evasive and unresponsive demeanor while testifying.

B.C. v. U.S. Attorney General, 12 F.4th 306 (U.S. App., 3rd Circ., 2021)
Although adverse credibility determinations can be based on inconsistencies, inaccuracies, and other factors, an immigration judge may not cherry pick facts or inconsistencies to support adverse credibility finding that is unsupported by the record as a whole.

See, in accord, *Munyuh v. Garland*, 11 F.4th 750 (U.S. App., 9th Circ., 2021)

Liang v. Garland, 10 F.4th 106 (U.S. App., 2nd Circ., 2021)
Substantial evidence supported the immigration judge's adverse credibility determination, in applicant's request for asylum, withholding of removal, and Convention Against Torture (CAT) relief; applicant, until subject to cross-examination, failed to mention that police in China had visited his family home one month after their initial visit, which had been disclosed, and that police informed applicant's father at that time that applicant was on a "blacklist," applicant's father, who submitted documentary evidence, did not mention the second police visit or knowledge that applicant had been "blacklisted," and church friend, who allegedly knew about applicant being "blacklisted," made no mention of the fact in his letter.

Villalobos Sura v. Garland, 8 F.4th 1161 (U.S. App., 9th Circ., 2021)
Substantial evidence supported immigration judge's (IJ) decision to discredit noncitizen's testimony and other evidence in proceeding involving application of the serious nonpolitical crime bar to withholding of removal, where

IJ found noncitizen's testimony to be self-serving and unpersuasive when compared to evidence presented by government, testimony lacked specific allegations of who framed noncitizen for murders in his native El Salvador, and IJ found noncitizen's decision to flee El Salvador soon after murders to be suspicious given that he could have left several months earlier if he were motivated to flee by an alleged gang threat.

Singh v. Garland, 6 F.4th 418 (U.S. App., 2nd Circ., 2021)
An immigration judge's reasons for finding an asylum applicant not credible must be both supported by substantial evidence in the record and must be logically related to the applicant's credibility. While adverse credibility determinations may be based on any inconsistencies, inaccuracies, or falsehoods, "without regard to whether the inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor," it does not follow that an adverse credibility finding may be based on an inconsistency so trivial and inconsequential that it has little or no tendency to support a reasonable inference that an asylum applicant has been untruthful; such an inconsistency bears no legitimate nexus to credibility and thus cannot, on its own, constitute the substantial evidence needed to support an adverse credibility finding.

VI. What Happens When Hearing Officers Fail to Make Credibility Findings

Tadeusz Strycharz v. Florida DHSMV

The refusal affidavit (DDL 4) completed by the arresting deputy stated that he requested the Petitioner to submit to a breath test, informed Petitioner of implied consent and that Petitioner refused to submit to the test. At the formal review hearing, the deputy was asked when he read Petitioner the implied consent and asked him to take the breath test. He replied: "I believe I let the Intoxilyzer operator read implied consent." The deputy testified he could not remember who the on-duty Intoxilyzer operator was. When questioned about his statement in the probable cause affidavit that the Petitioner refused to provide a breath sample, the deputy explained that he was referring to Petitioner's two previous refusals to submit to the last two field sobriety exercises before refusing the breath test. The Deputy further explained:

> "If he had refused [to submit to the breath test] I wouldn't have sent him in with the breath test operator to…the Intoxilyzer operator to (indiscernible) the refusal on paper. We only go one time, and there's no sense in tormenting them with another asking and asking over again. We do it one time."

The deputy stated that upon arrival at the jail, he handed Petitioner over to the breath technician to start the twenty-minute observation. The deputy testified that he was not present when Petitioner refused to submit to a breath test. The deputy stated that he was in another room preparing the booking sheet. In the "Findings of

Fact, Conclusions of Law and Decision," the hearing officer found:

> "Petitioner refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer, subsequent to a lawful arrest; and that Petitioner was told that if she refused to submit to such test, his or her privilege to operator a motor vehicle would be suspended…"

The court held:

> "According to the refusal affidavit (DDL 4) executed by Deputy Stauffer, he requested Petitioner to submit to a breath alcohol test and informed Petitioner of implied consent. However, at the formal review hearing, Deputy Stauffer testified that he did not read implied consent to Petitioner and was not present when Petitioner refused to submit to a breath test. Deputy Stauffer's sworn testimony is in direct conflict with the sworn affidavits for which he executed. There is no other record evidence that a law enforcement or correctional officer read implied consent to Petitioner nor any record evidence that Petitioner refused to submit to a breath alcohol test…Accordingly, the Court finds that the hearing officer's administrative findings and judgment are not supported by competent substantial evidence to support the decision."

VII. Drawing an Adverse Inference from Failure to Testify to Support Contention

Baxter v. Palmigiano, 425 U.S. 308, 96 S. Ct. 1551 (1976)
In his administrative hearing, appellant was informed that he had a right to remain silent during his hearing but that if he remained silent, his silence would be held against him. After consultation with counsel, appellant remained silent during the hearing. Permitting an adverse inference to be drawn from a party's silence at his administrative proceeding is not, on its face, an invalid practice. Although it is constitutional error under the Fifth Amendment to draw an inference of guilt from a criminal defendant's failure to testify about facts relevant to his case, the same is not true of a civil hearing. Palmigiano remained silent at the hearing in the face of evidence that incriminated him; and, as far as the record revealed, his silence was given no more evidentiary value than was warranted by the facts surrounding his case. There were no concurrent criminal charges pending against him related to the issues in the civil hearing. Thus, it did not violate his privileges against self-incrimination to draw an adverse inference from his silence in a civil hearing.

VIII. Avoiding Your Personal Biases in Evaluating Credibility

A hearing official's perceptions of the witness can be affected by:

A. Socio-economic status of witness

B. Hearing officer's personal biases or prejudices

C. Assumptions and expectations

D. Incorrect, outdated, misleading ideas about witness demeanor[2]

E. Apparent expertise of witness, or lack thereof, for expert *and* lay witnesses

F. Relative power of the witness within the community

G. Gender and/or sexual orientation

H. Accent or comprehension and proficiency in the English language

I. Culture or ethnicity

J. Education level

K. Age

L. Physical or mental ability of disability

M. Appearance (especially if they're wearing a military or police uniform)

IX. Articulating Credibility Findings: Examples

Butera v. Apfel, 173 F.3d 1049, 1055-56 (7th Cir. 1996) provides a good example of an ALl's persuasive reasoning regarding testimonial (and derivative, based on character) inferences:

> "While the ALJ found that Butera experienced some pain that would prevent him from performing heavier work, he specifically detailed a number of reasons for disbelieving Butera's description of the degree of functional limitation he was experiencing: (1) Butera was vague and evasive in answering questions; (2) Butera was hesitant and indefinite in describing the character, severity, and location of his pain; and (3) Butera declined, for reasons unknown, to volunteer any information about his work history, forcing the ALJ to ask detailed questions which revealed that Butera had been imprisoned on a burglary conviction and had been assessed interest and penalties for income tax evasion. The ALl's credibility determination of Butera, based on these three factors, is precisely the sort of determination that this Court has recognized is entitled to particular deference as it "involve[s] intangible and unarticulable

[2] Empirical research concludes that demeanor cues—such as fidgeting, blinking, pressing one's lips, touching one's face, nervousness, perspirations, and, particularly, avoiding eye contract, are unhelpful in detecting whether a person is lying. 1999 survey shows ALJs rate demeanor as the least important factor in evaluating credibility.

elements which impress the ALJ, that, unfortunately leave 'no trace that can be discerned in this or any other transcript." [W]e are of the opinion that the ALJ reasonably determined that the evidence as a whole did not lend credibility to Butera's assertion that he was "disabled" and completely unable to work as a result of back and leg pain."

A. Lack of Credibility Due to Inherent Improbability of Testimony:

I find that the testimony of _____ regarding _____ is (completely) lacking in credibility because of the inherent improbability of the testimony. In evaluating the testimony of _____ , it is so highly unlikely that the events could have occurred in the manner described, that I do not find the testimony to be plausible, much less convincing.

B. Lack of Credibility Due to Contradictory Evidence:

The majority of the substantive evidence that was presented in this case, specifically _____ , contradicts the testimony of _____ . Consequently, I do not find his/her testimony to be credible.

C. Lack of Credibility Due to Interest in Outcome of Hearing:

Any decision rendered in this matter must be based on the ability of the witnesses to induce belief. The reliability of the testimony of each witness is often dependent upon their interests in the outcome of the matter being heard. This hearing, regardless of the outcome, will have no impact on the life of _____ . Recent events, however, have likely resulted in substantial problems for the Petitioner, possibly culminating in _____. Giving weight to each individual's testimony in relation to their interest in the outcome of this hearing, I find _____'s account of this incident to be more credible than the account offered by the Petitioner.

D. Lack of Credibility Due to Faulty Memory:

The reliability of the testimony of each witness is often dependent upon their ability to competently recall events at the time of their occurrence. The evidence in the record, specifically_____, demonstrates that the Petitioner was impaired by drugs or alcohol at the time of this event. It is reasonable to infer that _____, on the other hand, had not been consuming impairing substances at the time he observed the Petitioner. In addition, _____ was testifying from his refreshed recollection after reviewing a report created contemporaneous with the event. Based on the factors involved in evaluating witness credibility and giving weight to each individual's testimony based on their ability to accurately recall the events at issue at the time of their occurrence, I find _____'s

account of this incident to be more credible than the account offered by the Petitioner.

E. Lack of Credibility Due to the Demeanor of the Witness:

"The demeanor of the witness detracted from his/her credibility. While testifying, this witness demonstrated the following behavior:"

1. On cross examination, the witness was taking unspoken cues from his/her attorney, which is some evidence that the witness was more interested in the impact of his/her testimony on the outcome of the case than in the accuracy of the facts testified to.

2. On direct examination, the witness spoke at a normal rate of speed and seemed relaxed. On cross examination, the witness's speech was much more rapid and seemed stressed, which implied that the witness was not entirely candid on cross examination.

3. The witnessed maintained eye contact with the attorney and the administrative law judge on direct examination but failed to maintain eye contact with the attorney and with the administrative law judge on cross examination, which implied that the witness was not entirely candid on cross examination.

F. Credibility Determinations Based on the Manner or Nature of Testimony

1. Recalcitrance or obvious reluctance to answer questions

2. Sudden lapses of memory

3. Hesitant or noncommittal testimony

4. Frank, candid, sincere, or straightforward testimony

5. Testimony is too pat, as if coached or rehearsed

Resources

Gregory L. Ogden. *The Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact-Finding: The View of ALJ's*. 20 1. NAALJ 1, 13 (2000).

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