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FACT, FICTION AND PROOF IN THE 21ST CENTURY:

**EVIDENCE AND CREDIBILITY FOR FACT FINDING
BY ADMINISTRATIVE LAW JUDGES**

**NAALJ Annual Conference
Washington, D.C., October 17, 2007**

**Materials prepared by Professor Lynn McLain,
University of Baltimore School of Law, Moderator**

**Panel: The Honorable Frederic N. Smalkin
The Honorable Paul W. Grimm
The Honorable Thomas G. Welshko**

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I. A Pox on Reversals!

All hail great Judge!
To your bright rays,
We never grudge
Ecstatic praise.
All hail! all hail!
All hail! all hail! all hail!
May each decree
As statute rank,
And **never** be
Reversed in Banc.
All hail! all hail!
All hail! all hail! all hail!



<http://math.boisestate.edu/gas/trial/webopera/tbj03.html>, visited

[Or, perhaps more realistically, to quote the Captain in Gilbert and Sullivan's *H.M.S. Pinafore*: "Never? Well, hardly ever!"]

Administrative law judges (ALJ's), like trial judges, minimize their chances of reversal by writing their opinions so as to persuade the reviewing agency or court that they reached the right decision in the first instance – or that even if the reviewing body would be inclined to rule differently, it should defer to the ALJ. **The ALJ's task is to "make the record sing" so well that the reviewing body finds itself humming along.**

II. Fact-Finding When Credibility Must Be Evaluated

Credibility must often be evaluated, though not always. Sometimes, of course, even assuming all the evidence offered on behalf of a party to be true, that party must lose as a matter of law.

A. What Is “Credibility”?

Most hearings raise issues of credibility: **to which of the evidence, if any, to give credit.** Credibility may be defined as “the quality or power of inspiring belief.” *Indiana Metal Prods. v. NLRB*, 442 F.2d 46, 51 (7th Cir. 1971) (quoting Webster’s Third New International Dictionary (1966)).

Credibility **“involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.”** *Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963). When there is conflicting evidence, ALJ’s may croon:

A nice dilemma we have here,
That calls for all our wit, for all our wit,
That calls for all,
That calls for all our wit.

Gilbert & Sullivan Archive, *Trial by Jury*,
<http://math.boisestate.edu/gas/trial/webopera/tbj12.html>, last visited June 28, 2007.

1. “Demeanor” Evidence

“Demeanor evidence refers to the **non-verbal cues given by a witness while testifying, including voice tone, facial expressions, body language, and other cues such as the manner of testifying, and the witnesses’s attitude while testifying.**” Gregory L. Ogden, *The Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact-Finding: The View of ALJ’s*, 20 J. NAALJ 1, 2 (2000) (survey results).

2. Non-Demeanor Factors Relevant to Credibility

Non-demeanor factors relevant to a witness’s credibility fall into three categories:

(a) The witness’s bad character for truthfulness:

1. The witness’s **prior convictions**;
2. The witness’s pertinent **prior bad acts, which have not resulted in his or her criminal conviction**, but the hearing judge finds relevant to character for truthfulness;
3. The witness’s **bad reputation for truthfulness, or another witness’s bad opinion of the witness’s truthfulness**;

(b) **The witness, even though well-meaning, is mistaken:**

4. **Bad eyesight, hearing, etc.;**
5. **Use of drugs or alcohol at pertinent time (either time of event or when testifying);**
6. **Conditions under which witness's observation were made, e.g., poor lighting, witness upset, fearful;**
7. **Suggestiveness of, e.g., identification procedure; or**

(c) **Either the witness is lying or is mistaken:**

8. **Bias** that may have affected perception and memory; or **bias, interest, prejudice, or improper motive**, giving the witness a reason to lie;
9. The witness's **prior inconsistent statements**, closer to the time of the event, when memory was fresher; or the witness's prior inconsistent statements (showing an inability to "keep his or her story straight");
10. **Contradictory substantive evidence (real or from other witnesses** who observed the same event) (this has the secondary effect of also impeaching this witness's testimony) (corroborating evidence would enhance credibility);
11. The **plausibility** of the facts being as the witness testifies.

See, e.g., Haebe v. Department of Justice, 288 F.3d 1288, 1302 n. 30 (Fed. Cir. 2002); John L. Kane, *Judging Credibility*, 33 LITIGATION NO. 3, 31 (Spring 2007); Christopher W. Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 STAN. L. REV. 291, 358-59 (2004) (for example, in the prosecution of Martha Stewart, evidence that contradicted her defense included both an entry by her assistant in a computer phone log, that "Peter Bacanovic thinks ImClone is going to start trading downward." and the fact that Bacanovic's worksheet with regard to Stewart's holdings contained no notation of an instruction to sell ImClone if it went below \$60/share); James P. Timony, *Demeanor Credibility (Witness Truth-Telling)*, 49 CATH. U. L. REV. 903 (2000).

In a **survey of 56 federal judges** regarding standards for evaluating credibility, "Clear winners were *internal inconsistency* and *external contradiction*. *Demeanor* fared somewhat less well, with . . . most judges rating it somewhat better than middling, tending toward 'one of the better indices' which deserved at least the importance that jurors usually ascribe to it. *Character* . . . was [for most judges] simply 'one of several factors that should be taken into account.'")

H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 825 (1993).

B. More Choices than Either “All or Nothing”

Although the maxim “falsus in unius, falsus in omnibus” suggests that one lie or mistaken statement supports rejecting all of that witness’s testimony, that is neither required nor does it comport with experience. *See, e.g., NLRB v. Regal Knitwear Co.*, 140 F.2d 746 (2d Cir. 1944) (per curiam) [“[C]onfusion as to details is not uncommon in the stories of entirely honest and reliable witnesses.”].

As Md. Pattern Jury Instruction [Civil] 1:3, for example, instructs: “You need not believe any witness even though the testimony is uncontradicted. **You may believe all, part, or none of the testimony of any witness.**”

III. Greater Deference Given to ALJ’s Demeanor-Based (“Testimonial Inferences”) rather than Other (“Derivative Inferences”) Assessments of Credibility

Both administrative agencies receiving “proposed” decisions by ALJ’s and courts performing judicial review of agency decisions distinguish between ALJ’s credibility assessments based on *demeanor* and those based on *non-demeanor* factors. **Only the ALJ’s demeanor-based evaluations (referred to in the literature as “testimonial inferences”) are given special deference.** The agency need not defer to an ALJ’s credibility determinations (referred to as “derivative inferences”) based on non-demeanor factors.

A. The Importance Historically Accorded to Demeanor Evidence

We have long held fast to the notion that seeing a witness while the witness testifies is of great import in evaluating the witness’s credibility. *See, e.g., Pharaon v. Board of Governors of Fed. Reserve Sys.*, 135 F.3d 148, 154 (D.C. Cir. 1998) (citing “**the significance of personal observation to credibility determinations**”); Md. Pattern Jury Instruction [Civil] 1:3 (providing in part: “In determining whether a witness should be believed, you should carefully judge all the testimony and evidence and the circumstances under which each witness has testified. Among the factors that you should consider are the following: (1) **the witness’ behavior on the stand and way of testifying. . .**”).

Demeanor evidence has been accorded crucial importance since early Roman times. *E.g., NLRB v. Dinion Coil Co.*, 201 F.2d 484, 487-88 (2d Cir. 1952). *See, e.g.,* Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157 (1993); David S. Buckel, *Penalizing the Failure to Make Proper Credibility Findings in Disability Cases*, 23 CLEARINGHOUSE REV. 945 (1989).

Indeed, **this value underlies the hearsay rule**, a criminal accused's sixth amendment **confrontation right**, and the element of an opportunity to cross-examine that is generally found to be ensconced in the **due process** clause. *See, e.g.*, Fed. R. Civ. P. 43(a) (testimony of witnesses shall be given "in open court") & 52 ("due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses"). *See generally* James P. Timony, *Demeanor Credibility (Witness Truth-Telling)*, 49 CATH. U. L. REV. 903 (2000); Olin G. Wellborn, *Demeanor*, 76 CORNELL L. REV. at 1075, 1076-77 (1991).

B. The Inadequacy of a Cold Transcript

Seeing and hearing a witness testify provides "demeanor evidence" which is unfathomable from a stark transcript of the testimony. Consider this example, plucked by Chief ALJ Timony of the FTC from the movie, "My Cousin Vinnie":

Tony: Why are you arresting me?
Sheriff: Because we think you shot the store clerk.
Tony: I shot the store clerk!!
Sheriff: You shot the store clerk?
Tony: I shot the store clerk!!!
Sheriff: I knew you'd confess.

James P. Timony, *Demeanor Credibility (Witness Truth-Telling)*, 49 CATH. U. L. REV. 903 (2000). The reader cannot tell: Was Tony confessing or was he instead shocked that he was being accused?

As Judge Jerome Frank explained:

[T]he demeanor of an orally-testifying witness is "always assumed to be in evidence." It is "wordless language." **The liar's story may seem uncontradicted to one who merely reads it, yet it may be "contradicted" in the trial court by his manner, his intonations, his grimaces, his gestures, and the like—all matters which "cold print does not preserve"** and which constitute "lost evidence" so far as an upper court is concerned. For such a court, it has been said, even if it were called a "rehearing court," is not a "reseeing court." Only were we to have "talking movies" of trials could it be otherwise. A "stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." It resembles a pressed flower. The witness' demeanor, not apparent in the record, may alone have "impeached" him. . . .

Broadcast Music v. Havana Madrid Restaurant Corp., 175 F.2d 77, 80 (2d Cir. 1949). *Accord*, e.g., *NLRB v. Universal Camera Corp.*, 190 F.2d 429, 431 (2d Cir. 1951) (Learned Hand, J.) (on remand). *But see* Olin G. Wellborn, *Demeanor*, 76 CORNELL L. REV. 1075 (1991) (urging civil trials by deposition transcript).

C. Demeanor Evaluations Are Imperfect at Best

There is no “science” to demeanor evaluations. Like Othello, we may misjudge our fellows’ veracity:

The Moor is of a free and open nature,
That thinks men honest that but seem to be so;
And will as tenderly be led by the nose as asses are.

(Othello, Act 1, Sc. 3, l. 405-8).

1. Empirical Evidence Suggests Visual Cues Are Misleading

Empirical research concludes that demeanor cues – such as fidgeting, blinking, pressing one’s lips, or touching one’s face, and particularly, avoiding eye contact – are *unhelpful* in detecting whether a person is lying. Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157 (1993); Christopher W. Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 STAN. L. REV. 291 (2004); Siegfried L. Sporer & Barbara Schwandt, *Moderators of Nonverbal Indicators of Deception: A Meta-Analytic Synthesis*, 13 PSYCHOL. PUB. POL’Y & L. (2007); Olin G. Wellborn, *Demeanor*, 76 CORNELL L. REV. 1075 (1991) (“**Observers commonly assume that people who are being deceptive are uncomfortable, shifty, restless in their seats, and move their heads in all directions so as to avoid an observer’s scrutiny. During actual deception, however, there is in fact a *decrease* in each of these behaviors.**”). *Contra* PAUL EKMAN, *TELLING LIES: CLUES TO DECEIT IN THE MARKETPLACE, POLITICS, AND MARRIAGE* (2d ed. 1992).

Indeed, a 1999 **survey of 100 ALJ’s shows that they rate the importance of demeanor evidence as merely one of many factors in evaluating credibility.** Gregory L. Ogden, *The Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact-Finding: The View of ALJ’s*, 20 J. NAALJ at 1, 8, 11 (2000). **Its importance increased when coupled with other non-demeanor credibility factors.** *Id.* at 14. The ALJ’s also report that, more frequently than they encounter “liars,” they see witnesses whose memories are frail. *See, e.g., Anderson v. Department of Public Safety & Correctional Servs.*, 330 Md. 187, 201, 623 A.2d 198, 205 (1993) (ALJ there found that “The variations in [the] reports resulted from the difference in recollections of the writers rather than any intent to falsify an official report.”).

2. Auditory Cues May be More Valuable

In addition to visual “tells,” there are auditory ones: **manner of speech, tone of voice, hesitancy**. Controlled experiments provide support for the proposition that evaluation by the fact-finder of auditory aspects of a witness’s demeanor is more reliable than that of visual aspects. Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1195 (1993) (“Most of the behaviors received through the auditory channel that were associated with perceptions of deception were also observed during actual deception: increases in speech hesitations, speech errors, and in the pitch of a speaker’s voice.”) (footnote omitted). This “**manner of testifying (e.g., evasive or direct)**” was also **rated the most important by the ALJ’s** in the survey (others, ranked in descending importance, were “witness’s attitude” (positive or negative), “body language,” “facial expressions,” and “voice tone.”). Gregory L. Ogden, *The Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact-Finding: The View of ALJ’s*, 20 J. NAALJ 1, 13 (2000).

Of course, the empirical evidence is from controlled experiments, not actual hearings. Many, if not all of these auditory behaviors are also correlated with stress. **Stress likely correlates with testifying, but is it clear that it necessarily correlates more closely with testifying falsely?** See John L. Kane, *Judging Credibility*, 33 LITIGATION NO. 3, 31 (Spring 2007); Christopher W. Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 STAN. L. REV. 291, 312 (2004).

3. Cultural Bias

In evaluating demeanor evidence, judges must be sensitive to cultural differences, as well. Some groups, for example, may consider looking one directly in the eye as disrespectful or immodest.

4. Angry Witnesses

Some empirical evidence suggests that judges may discredit the testimony of a witness who demonstrates anger at the opposing party. A natural tendency to write off the angry person’s testimony as exaggerated and vindictive does not take into account that the party’s anger may have been a necessary impetus to enable him or her to have the courage to stand up for himself or herself. See Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U.J. GENDER SOC. POL’Y & L. 733 (2003) (judges expect victim to be demure and fearful, rather than angry and bitter).

5. **Fact that Imperfect Doesn't Mean Either that It is Worthless or that It is Going Away**

[S]ince observation of such “demeanor evidence” is open to a trier of the facts when witnesses testify orally in his presence, and since such observation is not open to a reviewing tribunal, **the fact-trier’s findings, to the extent that they comprise direct or “testimonial” inferences, are ordinarily unreviewable. True, demeanor evidence may sometimes mislead; but our courts regard it nevertheless as an excellent clue to the trustworthiness of testimony.**

NLRB v. Dinion Coil Co., 201 F.2d 484, 487 (2d Cir. 1952). See Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1188 (1993) (“It is clear that demeanor evidence is a **barnacle** firmly fastened to numerous areas of the judicial system.”).

D. **“Testimonial” vs. “Derivative” Inferences**

Agency decision-makers after an ALJ’s proposed decision¹ do not defer to the ALJ’s non-testimonial, non-demeanor assessments of credibility, on the ground that as to these, the ALJ has no “advantage in logically evaluating such evidence.” *Fuller d/b/a Lewisville Flooring Co.*, 108 NLRB 1442, 1444 n.3 (1954). Accord, e.g., *Butera v. Apfel*, 173 F.3d 1049, 1055-56 (7th Cir. 1996); *Kopack v. NLRB*, 668 F.2d 946, 953-54 (7th Cir. 1982); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1078-79 (9th Cir. 1977); *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 487 (2d Cir. 1952):

See American Tobacco Co. v. The Katingo Hadjipatera, 194 F.2d 449, 451 (2d. Cir. 1951): **“We accept, as we must, those of the trial judge’s inferences of fact which he drew directly from his estimates of the credibility of witnesses whom he observed as they testified in his presence, i.e., his inferences (sometimes called ‘testimonial inferences’) that certain facts existed because he believed some witness or witnesses who testified before him that those facts did exist. We are not required, however, to accept a trial judge’s findings, based not on facts to which a witness testified orally, but only on secondary or derivative inferences from the facts which the trial judge directly inferred**

¹ An ALJ’s decisions may be either “proposed” or “final” agency decisions. See, e.g., Md. State Gov’t Code Ann. § 10-207(a)(1)–(2) (under this Administrative Procedure Act [derived from the 1961 version of the model act] a state agency “may delegate to the [Office of Administrative Hearings] the authority that the agency . . . has to hear particular contested cases” and even “the authority to issue the final administrative decision of the agency in a contested case”).

from such testimony. We may disregard such a finding of facts thus derivatively inferred, if other rational derivative inferences are open. And we must disregard such a finding when the derivative inference either is not rational or has but a flimsy foundation in the testimony.”;

Consumer Protection Div. v. Morgan, 387 Md. 125, 197-201, 874 A.2d 919 (2005); *Community Clinic, Inc. v. Department of Health & Mental Hygiene*, 174 Md. App. 526, 546-48, 922 A.2d 607, 618-20 (2007):

Based on . . . specific findings of fact, the ALJ concluded that appellants’ administrative costs . . . were reasonable. * * *
Assuming . . . that reasonableness in this case is a question of fact, that determination is, nevertheless, a matter of inference to be drawn from all of the primary facts in the record. Where, as here, a hearing officer and the final decision-maker in an agency differ with respect to a question of fact, Maryland cases recognize a distinction between credibility-based determinations of fact and inferences drawn from primary facts.

Judge Motz (now a judge of the United States Court of Appeals for the Fourth Judicial Circuit), writing for this Court in *Department of Health & Mental Hygiene v. Shrieves*, 100 Md. App. 283, 641 A.2d 899 (1994) [which also quoted favorably from *Penasquitos Village*], clearly articulated the distinction.

“[W]hen an administrative agency overrules the recommendation of an ALJ, a reviewing court’s task is to determine if the agency’s final order is based on substantial evidence in the record. In making this judgment, the ALJ’s findings are, of course, part of the record and are to be considered along with the other portions of the record. Moreover, where credibility is pivotal to the agency’s final order, ALJ’s findings based on the demeanor of witnesses are entitled to substantial deference and can be rejected by the agency only if it gives strong reasons for doing so. If, however, after giving appropriate deference to the ALJ’s demeanor-based findings there is sufficient evidence in the record to support both the decision of the ALJ and that of the agency, the agency’s final order is to be affirmed—even if a court might have reached the opposite conclusion. This approach preserves the rightful roles of the ALJ, the agency, and the reviewing court: it gives special deference to both the ALJ’s demeanor-based credibility determinations and to the agency’s authority in making other

factual findings and properly limits the role of the reviewing court.”

* * *

Consequently, in the instant matter, the Secretary was not restrained by the recommended conclusion drawn by the ALJ; rather, the Secretary was free to make the determinative inference, based on the entire record, that the excess costs were unreasonable, if that inference was supported by substantial evidence;

State Board of Physicians v. Bernstein, 167 Md. App. 714, 894 A.2d 621 (2006):

Here, the ALJ stated several times in her proposed decision that the appellee’s expert witnesses were credible, and that they were more credible than the Board’s expert witnesses. The reasons she gave to support her credibility findings did not involve demeanor, however. Clearly, **the ALJ found the appellee’s experts to be more experienced, more proficient, more knowledgeable, and more objective than the Board’s witnesses**, and determined on those bases that their opinions were sound and correct, and were “persuasive” and “credible.” She said nothing to indicate that the outward appearances of the expert witnesses as they testified played a part in her credibility evaluations of their testimony. By her own account of her evaluation of the evidence, **the ALJ did not place any importance upon the demeanor of the expert witnesses in deciding which of them was more credible in their testimony.** * * * **[T]he Board may make its own decisions about bias, interest, credentials of expert witnesses, the logic and persuasiveness of their testimony, and the weight to be given their opinions.** (emphasis added);

State Comm’n on Human Relations v. Kaydon Ring & Seal, Inc., 149 Md. App. 666, 688-703, 818 A.2d 259, 272-80 (2003); *Gabaldoni v. Board of Physician Quality Assurance*, 141 Md. App. 259, 785 A.2d 771 (2001).

IV. Standard of Review

Appropriate deference to the hearing judges has desirable results: it makes more probable the finality of their decisions and enhances respect for and confidence in them. *See* Olin G. Wellborn, *Demeanor*, 76 CORNELL L. REV. 1075, 1095-96 (1991). **When the ALJ’s are independent of the agency, its deference to the ALJ greatly increases the public’s confidence in the fairness of the process.**

In *Universal Camera Corp. v. NLRB*, 340 U.S. 424 (1951), the United States Supreme Court held that, **upon judicial review, an agency’s decision must be upheld as long as there is “substantial evidence” to support it in the record.** The Court made clear that under both the Administrative Procedure Act and the Taft-Hartley Act, “substantial evidence” may not be shown by looking at the evidence supporting the agency decision in isolation; **the record must be evaluated as a whole, and the ALJ’s (examiner’s) report must be considered as part of that record).** Justice Frankfurter, writing for the Court, explained:

We do not require that the examiner’s findings be given more weight than in reason and in the light of judicial experience they deserve. The “substantial evidence” standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that **evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board’s than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case.** To give it this significance does not seem to us materially more difficult than to heed the other facts which in sum determine whether evidence is “substantial.”

Id. at 496-97.

On remand, the United States Court of Appeals for the Second Circuit said that the NLRB must not reject the findings of an Examiner based directly upon the “bearing and delivery” of witnesses who orally testified before him, absent “a very substantial preponderance in the testimony as recorded.” *NLRB v. Universal Camera Corp.*, 190 F.2d 429, 430 (2d Cir. 1951). In *Dinion Coil*, 201 F.2d at 490, one year later, the same court said that it:

“surely may not upset the Board when it accepts a finding of an Examiner which is grounded upon (a) his disbelief in an orally testifying witness’ testimony because of the witness’ demeanor or (b) the Examiner’s evaluation of oral testimony as reliable, unless on its face it is hopelessly incredible — *cf. Gindorff v. Prince*, 189 F.2d 897 (2d Cir. 1951) [finding clear error in trial court’s crediting of a \$62/week clerk’s testimony, without any documentary support, that on short acquaintance an aged multimillionaire had him continue his clerk’s job but also take over direction of the older gentleman’s financial empire] — **or flatly**

contradicts either a so-called ‘law of nature’ or undisputed documentary authority — cf. *Orvis v. Higgins*, 180 F.2d 537 (2d Cir. 1950) [finding clear error where trial judge’s decision was based on no affirmative evidence and conflicted with “the actually irresistible inference drawn from the undisputed facts”].

State law follows suit. For example, Md. State Gov’t Code Ann. § 10-215(g)(v)-(vi) provides in part that a circuit court may reverse or modify a final agency decision if it “is unsupported by competent, material, and substantial evidence in light of the entire record as submitted.”

In *Anderson v. Department of Public Safety & Correctional Servs.*, 330 Md. 187, 212, 623 A.2d 198, 210 (1993), the Court of Appeals of Maryland was mindful of the fact that it “should [not] substitute its judgment for the *expertise* of those persons who constitute the administrative agency from which the appeal is taken” and that “**judicial review essentially should be limited to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.** This need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment.” The *Anderson* court distinguished judicial review of administrative action from appellate review of a trial court judgment in another way, as well:

In the latter context the appellate court will search the record for evidence to support the judgment and will sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon by the trial court. However, in judicial review of agency action **the court may not uphold the agency order unless it is sustainable on the agency’s findings and for the reasons stated by the agency.**

Id. at 213, 623 A.2d at 211.

In *Anderson*, the Secretary had reached factual findings contrary to the ALJ’s without readily ascertainable “substantial evidence” to support them. Stressing the significance of the credibility of conflicting witnesses in the case before it, and the fact that “[o]ne of the main objectives of the Legislature in establishing the OAH was to provide an impartial hearing officer [not employed by or under the control of the agency] in contested cases,” *id.* at 213-14, 623 A.2d at 211, it concluded that the agency’s decision must be reversed and remanded, so that the Secretary could reconsider her order.

We think that the credibility of the witnesses was of the utmost importance in the circumstances here; it played a dominant role; it was pivotal. But **there is no indication that the [Secretary] gave any deference to the ALJ’s assessment of the credibility of the**

witnesses before him. **And she gave no strong reasons for rejecting the ALJ's assessments of credibility.** It seems that the [Secretary] made her own findings of fact, as suggested by the representative of the Penitentiary, and it appears that she did not take into account in making them the factual findings of the ALJ. Therefore, we believe that **the Circuit Court for Baltimore City was wrong when it found that there was substantial evidence to support the order of the [Secretary], because the [Secretary] did not appreciate the proper relationship between her and the ALJ.** The [Secretary] must reconsider her order in the light of what we have found to be the interrelation between her function and the function of the ALJ. We vacate the judgment of the Circuit Court for Baltimore City and remand the case to it with direction to remand the case to the [Department of Personnel] for further proceedings in accordance with this opinion.

Id. at 219, 623 A.2d at 204.

The *Anderson* court quoted with approval from 1 Charles H. Koch, Jr., *Administrative Law and Practice* (1985), § 6.73, p. 520:

*“[T]he credibility findings of the person who sees and hears the witnesses—be he ALJ, juror or judge—is entitled to considerable deference. **While the degree of deference due the ALJ's final decision is related to the importance of credibility in a particular case, the ALJ's decision to give or deny credit should not be reversed absent an adequate explanation of the grounds for the reviewing body's source of disagreement with the ALJ. In sum, the review authority has the power to reject [demeanor-based] credibility assessments only if it gives strong reasons for doing so.**”*

330 Md. at 217, 623 A.2d at 213 (emphasis added).

As explained in *Maryland Bd. of Physicians v. Elliott*, 170 Md. App. 369, 387-96, 415-23, 430-31, 907 A.2d 321 (2006):

The *Anderson-Shrieves Deference* Rule is of limited utility. It is a small wrinkle on the substantial evidence test. It does not apply to an ALJ's proposed decisions or conclusions of law. It does not apply to an ALJ's proposed findings of fact that are based on derivative inferences. **It does not apply even to the assessment of credibility, when the credibility assessment is not primarily**

demeanor-based but is based on, as is frequently the case with expert witnesses, **technical knowledge or specialized practices that implicate the expertise of the reviewing agency**. It does not apply even to demeanor-based credibility findings if the reviewing agency has other substantial evidence supporting its decision to disregard the proposed findings of the ALJ. In the limited circumstances in which it does apply, it still does not necessarily bind the agency. It simply imposes upon the agency the additional burden of articulating a sound reason for not accepting the demeanor-based fact-finding of the ALJ.

See also Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1078-79 (9th Cir. 1977) (through the substantial evidence test, “Deference is accorded the Board’s factual conclusions for a different reason Board members are presumed to have broad experience and expertise in labor-management relations. Further, it is the Board to which Congress has delegated administration of the Act. The Board, therefore, is viewed as particularly capable of drawing inferences from the facts of a labor dispute. Accordingly, it has been said that **a Court of Appeals must abide by the Board’s derivative inferences, if drawn from not discredited testimony, unless those inferences are ‘irrational.’**”) (citations omitted).

V. “Make the Record Sing”

The greater the extent to which an ALJ articulates that he or she is basing a credibility determination at least in part on demeanor, the greater the deference that is likely to be given that determination. *See Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 829 (7th Cir. 2000) (“Arguments to the effect that the ALJ should not have found certain witnesses to be credible are, to put it bluntly, almost never worth making.”)

A. Rarely, If Ever, Does a Case Hinge on Demeanor Evidence Alone

Judge Dunaway, concurring in part and dissenting in part in *Penasquitos Village*, 565 F.2d at 1086, expressed this opinion:

I doubt if there are many cases in which the fact finder relies on demeanor alone. There may not be any; I hope that there are none. I think that in every case in which he thinks about what he is doing, **the fact finder should and does consider both the demeanor of the witness and what he says, the content of his testimony, and weighs those factors in relation to the fact finder’s knowledge of life’s realities, the internal consistency of what the witness is saying, and its consistency, or lack of it, with the other evidence in the case, testimonial, documentary, and physical.**

An example of such a combined evaluation may be found in *Getahun v. U.S. INS*, 1999 U.S. App. LEXIS 10860 (4th Cir. 1999) (per curiam) (unpublished):

Noting a number of inconsistencies, vague areas, and implausibilities in [petitioner] Getahun's testimony, the absence of evidence or documents to corroborate her testimony and the failure to show such were unavailable, and Getahun's seemingly defiant demeanor, the [Immigration Judge] found that Getahun was not a credible witness. The [Immigration Judge] further stated that Getahun did not appear to be forthright, her testimony was constricted and limited to the bare minimum in her responses, and her testimony was vague and evasive. Due to these findings, the [Immigration Judge] stated that she could not credit Getahun's testimony.

B. Need for Record to Be Explicit

1. The ALJ Should Articulate His or Her Grounds for Crediting or Discrediting Particular Evidence

If an ALJ bases his or her decision on a finding of demeanor-based credibility, the ALJ must so state on the record, or the agency and/or the reversing court cannot defer to the ALJ. *E.g., Ceguerra v. Secretary of Health & Human Servs.*, 933 F.2d 735, 738, 741 (9th Cir. 1991) (citations omitted):

The district court erred by deferring to the ALJ's opportunity to evaluate the credibility of the witnesses. In appropriate cases, administrative law judges may base their conclusion on a determination that witnesses did not testify credibly. They cannot, however, tacitly reject a witness's testimony as not credible. **When the decision of an ALJ rests on a negative credibility evaluation, the ALJ must make findings on the record and must support those findings by pointing to substantial evidence on the record.**

Napoleon Ceguerra was the only witness at the hearing. The ALJ in this case did not find that the testimony lacked credibility. **Because the ALJ made no findings to suggest that he did not believe Napoleon Ceguerra, the ALJ's opportunity to observe demeanor provides no grounds for affirming.**

Rejection of a witness's positive testimony must be supported by "a 'specific, cogent reason.'" *Figeroa v. U.S. INS*, 886 F.2d 76, 78-79 (4th Cir. 1989). *See See v. Washington*

Metro. Area Transit Auth., 36 F.3d 375, 382-86 (4th Cir. 1994) (deference to ALJ, where duty to assess credibility is “nondelegable,” but which will not be adequately supported by “merely and conclusory” and uncorroborated findings); David S. Buckel, *Penalizing the Failure to Make Proper Credibility Findings in Disability Cases*, 23 CLEARINGHOUSE REV. 945 (1989) (decisions of Second and Ninth Circuits hold that **pain testimony of Social Security disability claimant will be taken as true, as will uncontroverted expert physician’s testimony, unless agency has made proper adverse findings regarding credibility**); James P. Timony, *Demeanor Credibility (Witness Truth-Telling)*, 49 CATH. U. L. REV. 903, 927-28 & nn. 118-23 (2000) (proper basis is not ALJ’s observations as to whether claimant appears to be in pain); Md. State Gov’t Code Ann. § 10-214(b) (**a final decision in a contested case must state findings of fact, with a concise and explicit statement of supporting facts, and conclusions of law**). *Cf. State Comm’n on Human Relations v. Kaydon Ring & Seal, Inc.*, 149 Md. App. 666, 705, 818 A.2d 259, 282-83 (2003) (**where an ALJ did not make a credibility determination resolving the conflicting testimony in a crucial fact, the agency should remand the matter to the ALJ**).

2. The Difficulty of Analyzing and Recounting Demeanor Evidence and Its Impact

How much should we require ALJ’s to put on the record? Can a judge adequately and accurately record and express her evaluations based on demeanor, other than in a most conclusory form? As the United States Court of Appeals for the Second Circuit explained in *Dinion Coil Co.*, 201 F.2d at 488, 90, there are no rules to follow but those of experience:

“[M]ethods of evaluating the credibility of oral testimony do not lend themselves to formulations in terms of rules and are thus, inescapably, ‘un-ruly.’ In his brilliant discussion of evidence, Sir James Stephen illuminated the difficult task of a trial judge who, observing a witness in the brief period when the witness appears in court, tries to ascertain how far the witness’ ‘powers of observation and memory * * * enable him to tell the truth’ and ‘how far the innumerable motives, by any one of which he may be activated, dispose him’ to do so. ‘No rules of evidence * * * can perceptibly affect this difficulty,’ Stephen remarked. **‘Judges (i.e., trial judges) must deal with it as well as they can by the use of their natural faculties and acquired experience,** and the miscarriages of justice in which they will be involved by reason of it must be set down to the imperfection of our means of arriving at truth. * * * Insofar as [this power of discernment] can be acquired at all, it is to be acquired only by experience, for the acquisition of which the position of a judge is by no means peculiarly favourable. * * * Such observations are seldom, if ever thrown by those who make them into the form of express propositions. Indeed, for obvious reasons, it would be impossible

to do so. **The most acute observer would never be able to catalogue the tones of voice, the passing shades of expression or the unconscious gestures which he had learnt to associate with falsehood; and if he did, his observations would probably be of little use to others.** Every man must learn matters of this sort of himself, and though no sort of knowledge is so important to a judge, no rules can be laid down for its acquisition. * * * No process is gone through, the correctness of which can be independently tested. The judge has nothing to trust but his own nature and acquired sagacity.’ Sir Henry Maine agreed with Stephen. He said that there are no ‘rules to guide’ a “judge of the Fact’ in ‘drawing inferences from the assertion of a witness to the existence of the facts asserted by him.’ * * * [I]t is the rarest and highest personal accomplishment of a judge to make allowance for the ignorance and timidity of witnesses, and to see through the confident and plausible liar. * * * This lack of rules (‘unruliness’), with its concomitant wide discretion in the fact-trier, yields inherent difficulties not surmountable by a reviewing court, regardless of whether the fact-trier by a judge, a jury, or a trial examiner.

3. Damned If You Don’t and Damned If You Do — Striving for that Perfect Medium

As NLRB Trial Examiner Henry S. Sahm has explained, the general statement of an evaluation based on a “observation of the witnesses” has been held insufficient:

It is often quite difficult, if not impossible in some instances, to describe by the written word the impressions derived from observing a witness testify. Impressions are extremely difficult to imprison within any form of words. Not only would it not serve any useful purpose but it would unduly prolong and add nothing to a decision to describe a witness as having a furtive look, a nervous twitch, a flushed face or perspiring freely. Those indicia are better left unsaid in the hope that judgment as to such matters should be left to the sense and experience of the one who observed the witnesses, guided, of course, by acceptable standards.

However, the Labor Board in two recent cases, *Allied Chain Link Fence Co.*, 126 NLRB No. 74 and *Buckley Development Co.*, 126 NLRB No. 147, indicates that examiners must, in the future, spell out in detail, the indicia upon which they

believe one witness as against another. In both those cases **the Board reversed the examiners' credibility resolutions because they** did not rest their evaluation of the witnesses' credibility on "demeanor." Both examiners **merely prefaced their conclusions by stating that they based their credibility findings on their "observation of the witnesses."** Evidently, this is not sufficient. It would appear that in evaluating a witness' testimony in terms of demeanor evidence, the Board will require examiners to delineate specifically the impressions derived from observing the witness testify.

Henry S. Sahm, *Demeanor Evidence: Elusive and Intangible Imponderables*, 47 A.B.A. J. 580, 582 (1961). See *Briggs v. Massanari*, 248 F.3d 1235 (10th Cir. 2001) (reversing ALJ's decision) ("Although the ALJ need not discuss all of the evidence in the record, he may not ignore evidence [here, test results] that does not support his decision, especially when that evidence is 'significantly probative.' * * * The ALJ deemed the testimony of Johnny [the childhood disability claimant] 'and his mother unconvincing, not substantiated by objective medical findings, and credible only to the extent that claimant's impairments have not produced marked and severe limitations.' '**Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence.'** **In the present case, we must view the ALJ's determination with skepticism. A significant portion of the record evidence supports the testimony, and the ALJ must explain why he has determined that the testimony is not credible. Standard boilerplate language will not suffice.** *Evaluation of Symptoms in Disability Claims*, 1996 WL 374186, at *4 (stating that credibility determinations cannot be based on intangible or intuitive reasons; rather they 'must be grounded in the evidence and articulated in the determination or decision'); see also *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir. 1995) (stating that a credibility determination 'should be closely and affirmatively linked to substantial evidence and not just a conclusion in the guise of findings') (quotation omitted)") (some citations omitted) (emphasis added).

Yet a judge who specifically and irrationally relies on a physical trait is likely to be reversed:

Without doubt, the result of our procedure is to vest the trial judge with immense power not subject to correction even if misused: His estimate of an orally testifying witness' credibility may stem from the trial judge's application of an absurd rule-of-thumb, such as that when a witness wipes his hands during his testimony, unquestionably he is lying; but, unless the judge reveals of record that he used such an irrational test of credibility, an upper court can do nothing to correct his error.

Broadcast Music v. Havana Madrid Restaurant Corp., 175 F.2d 77, 80 (2d Cir. 1949).

No doubt for these reasons Chief ALJ Timony of the FTC **advises the description of demeanor evidence determinations as “behavioral conclusions”** (e.g., “‘recalcitrance and obvious reluctance’ to answer questions, ‘sudden lapse[s] of memory,’ or ‘hesitant and noncommittal,’” **frank, sincere, or straightforward, rather than “physical descriptions”** (e.g., twitching, stuttering, sweating, or blinking”). James P. Timony, *Demeanor Credibility (Witness Truth-Telling)*, 49 CATH. U. L. REV. 906, 928 (2000).

Butera v. Apfel, 173 F.3d 1049, 1055-56 (7th Cir. 1996) provides a good example of an ALJ’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 ALJ’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 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.

4. Example: How to Credit Absence of Records: Negative Evidence v. Affirmative Evidence?

Cf. Armstead v. U.S. Dept. of HUD, 815 F.2d 278, 282 (3d Cir. 1987) (over dissent of J. Hunter) (“After declining her request to accept an assignment of her mortgage, **the Department of Housing and Urban Development told plaintiff that she could have a face-to-face conference with an agency official if she telephoned for an appointment. In an affidavit plaintiff stated that she did call the agency, but was dissuaded from further action by the unidentified [female] who answered the phone. Relying on the fact that its records contain no notation of the call [though its employees are supposed to make such records, but not having canvassed its female employees reachable at that telephone number], the agency refused a**

renewed request for a conference. We conclude that by failing to credit the plaintiff's uncontradicted affidavit in denying this de minimis accommodation, the agency action was arbitrary and capricious.”).

VI. Effect of New Technology

Given the research concluding that auditory cues are more reliable than visual, do **audio-taped records** give the reviewing agency or court as much insight as the ALJ?

Judge Frank, in a “1984”-type reference in 1949, *supra* page 7, said, “Only were we to have ‘talking movies’ of trials would” a “rehearing court” be a “reseeing court.”” Do **video-technological advances** make that available? See James P. Timony, *Demeanor Credibility (Witness Truth-Telling)*, 49 CATH. U. L. REV. 903, 914-15 (2000). If so, would the reviewing agency eclipse the role of the ALJ?

Fed. R. Civ. P. 43(a) (with style changes, effective December 1, 2007, absent contrary congressional action), provides for the option of “long distance” live testimony:

At trial, the witnesses’ testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit **testimony in open court by contemporaneous transmission from a different location.**

Some agencies already use **telephone hearings**. James P. Timony, *Demeanor Credibility (Witness Truth-Telling)*, 49 CATH. U. L. REV. 903, 915-16 (2000). **Due process challenges** have been raised:

Compare Gray Panthers v. Schweiker, 716 F.2d 23, 37-38 (D.C. Cir. 1983) (ordering the district court to examine the class of Medicare claims under \$100 to determine if credibility was involved and suggesting that in the minority of cases where credibility was determinative, telephone hearings may violate due process rights), *with Casey v. O’Bannon*, 536 F.Supp. 350, 353-54 (E.D.Pa. 1982) (holding that a hearing officer’s visual analysis is not a constitutional requirement and reasoning that the hearing officer “can effectively judge credibility over the phone by noting voice responses, pauses, [and] levels of irritation”); *see also Bigby v. INS*, 21 F.3d 1059, 1064 (11th Cir. 1994) (holding that “when credibility determinations are not in issue, an [administrative law] judge may hold a hearing by telephonic means”).).

Id. at 916 n.56.

VII. Examples of Cases Where ALJ's Decision re: Credibility Upheld by Court

A. Instances Where Agency Had Wrongly Rejected ALJ's Findings

- *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456 (1951), on remand, *NLRB v. Universal Camera Corp.*, 190 F.2d 429 (1951) (hearing examiner → rejected by NLRB → Board aff'd by Court of Appeals → Court of Appeals rev'd by S.Ct. → Board was then rev'd by Court of Appeals, which considered itself, under the facts of the case, in as good a position as was the Board to evaluate the record, and held that **Board had wrongly disregarded Examiner's demeanor-based findings**) (see *supra* p. 13).
- *Haebe v. Department of Justice*, 288 F.3d 1288 (Fed. Cir. 2002) (ALJ found for discharged DEA agent → Merit Systems Protection Board rev'd → Board was rev'd by Court of Appeals) ("The AJ's twenty-page opinion reflects a three-day hearing and extensive consideration and discussion of disputed issues that the AJ resolved in large measure based on his assessment of the credibility and demeanor of the various witnesses who testified." The ALJ found the agent to have an "extraordinarily" fine reputation for honesty, integrity, and devotion to duty; and that, based on the confidential informant's demeanor, his testimony supporting the agent was "honest and credible." "**When . . . the AJ's finding is explicitly or implicitly based on the demeanor of a witness, the board may not simply disagree with the AJ's assessment of credibility. . . . If the board reverses such a finding, we will not sustain its decision on appeal unless the board has articulated sound reasons, based on the record, for its contrary evaluation of the testimonial evidence.**" Such sound reasons were lacking here. "**When the demeanor-based deference requirement is not in play, the MSPB is free to re-weigh the evidence and substitute its own decision as to the facts or the law commensurate with the substantial evidence standard, but it cannot substitute its judgment on issues of credibility based on the demeanor of witnesses.**").
- *Dantran, Inc. v. Department of Labor*, 171 F.3d 58 (1st Cir. 1999) (ALJ rejected Secretary's request to bar contractor from doing business with government → Admin. Review Board authorized debarment → district court aff'd → Court of Appeals rev'd Board) (**Court of Appeals' decision was largely based on an interpretation of the law, which conflicted with the Secretary's, but also on ALJ's demeanor evaluation**; ALJ noted that where the testimony conflicted, he found contractor's principal "more 'credible, persuasive and probative'"; under applicable statutory scheme, ARB's review was limited to correction of clear error).
- *Willbanks v. Secretary of HHS*, 847 F.2d 301 (6th Cir. 1988) (per curiam) (ALJ found disability benefits were appropriate as of January 1976 → Appeals Council rejected that date → district court aff'd → court of appeals rev'd) ("In the instant case, establishing

substantial evidence involves carefully evaluating the credibility of Willbanks and his mother, the testimony of various medical experts and the sparse medical data. We think the ALJ's opportunity to observe the demeanor of Willbanks and his mother, to evaluate what they said in light of how they said it, and to consider how it fit with the rest of the evidence was invaluable and should not have been discarded as lightly as the Appeals Council discarded it. *Mullen v. Bowen*, 800 F.2d 535, 545 (6th Cir. 1986) (en banc). This is especially so since the Appeals Council's findings conflict with the findings of an ALJ who has been intimately involved with a case.”).

- *Aylett v. Secretary of HUD*, 54 F.3d 1560 (10th Cir. 1995) (ALJ found no racial discrimination → HUD rejected ALJ's credibility findings and found Fair Housing Act violated → **Court of Appeals reversed HUD's decision as being “thin at best, if it can be regarded as more than speculative”**) (“ALJ had found landlady's son “to be the ‘most credible witness’ and ‘the only eyewitness to the conversion’: ‘Based on my observation of his demeanor, I found him to be very frank and sincere. Despite the fact that he is a Respondent and Ms. Aylett's son, I found his testimony to be very convincing. Thus, I place great weight on his eyewitness testimony that Ms. Aylett did not make the alleged statement.’ The ALJ further found Barbara Aylett's testimony to be ‘credible’ and stated: ‘Based on my observation of Ms. Aylett's demeanor, I found her testimony to be very sincere.’ Finally, the ALJ concluded that ‘based on my observation of [the landlord's] demeanor, I found him to be very believable.’ Although the ALJ did not find [the complainant, who bore the burden of persuasion] and her daughter to be incredible, he determined that their testimony was ‘simply not more believable than that of Ms. Aylett and [her son].’”) (**“heightened scrutiny” of the agency's decision applies when it has rejected, rather than affirmed, an ALJ's assessment of witness credibility**”).
- *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977) (ALJ → rev'd by NLRB → NLRB rev'd by Court of Appeals) (**Board had based its decision solely on testimony that had been discredited — here “by clear implication” — by the ALJ** who “believed Zamora, whom he characterized ‘as an honest and forthright witness,’ and disbelieved Ruiz, whose testimony he characterized as ‘equivocal’” and described Rios as having “fabricated facts” and as having demonstrated “animosity toward Zamora” during his testimony; **the Board's special expertise in labor-management relations gave it no upper hand on this question of testimonial inferences**).
- *Anderson v. Department of Public Safety & Correctional Servs.*, 330 Md. 187, 623 A.2d 198 (1993) (penitentiary guard charged with excessive force and suspended without pay after a preliminary hearing → ALJ proposed that officer be reinstated → **Secretary's designee reviewed record, including taped proceeding**, before ALJ and heard arguments and rejected ALJ's proposal → Circuit Court aff'd order of separation → **Court of Appeals took case from Court of Special Appeals and rev'd and remanded Secretary's decision as it did not adequately take into account the ALJ's**

assessments as to credibility of the witnesses and gave “no strong reasons for rejecting” them).

B. Instances Where No Conflict Between Agency and ALJ’s Findings

- *Rollins v. Massanari*, 261 F.3d 853 (9th Cir. 2001) (over dissent of Ferguson, J.) (ALJ denied claim for disability benefits to claimant who had fibromyalgia → Appeals Council denied review → magistrate judge aff’d → court of appeals aff’d) (The **ALJ provided “specific and legitimate reasons supported by substantial evidence in the record” for rejecting testimony of claimant’s treating physician**; the ALJ found the doctor’s testimony contradicted by his written records and “so extreme as to be implausible”; likewise the ALJ “stated **sufficient specific reasons for not fully crediting [claimant’s] pain testimony**. For example, the ALJ noted that when Rollins was discharged from the Behavioral Medicine Center of Loma Linda University Medical Center after treatment for addiction to painkillers, the doctors discharging her said that she had ‘no restrictions on activity’ and gave her a Global Assessment of Function level of 70, ‘indicating only mild symptoms and generally quite adequate function.’ While subjective pain testimony cannot be rejected on the sole ground that it is not fully corroborated by objective medical evidence, the medical evidence is still a relevant factor in determining the severity of the claimant’s pain and its disabling effects. 20 C.F.R. § 404.1529(c)(2). The ALJ also pointed out ways in which Rollins’ claim to have totally disabling pain was undermined by her own testimony about her daily activities, such as attending to the needs of her two young children, cooking, housekeeping, laundry, shopping, attending therapy and various other meetings every week, and so forth. For example, in her daily activities questionnaire, Rollins stated that she attended to “all of [her] children’s needs; meals, bathing, emotional, discipline, etc.” because her husband worked six days a week, usually from early in the morning until 10 p.m. In the same questionnaire, she also stated that she left the house “daily” to go to places such as her son’s school, taekwondo lessons and soccer games, doctor’s appointments, and the grocery store. It is true that Rollins’ testimony was somewhat equivocal about how regularly she was able to keep up with all of these activities, and **the ALJ’s interpretation of her testimony may not be the only reasonable one. But it is still a reasonable interpretation and is supported by substantial evidence; thus, it is not our role to second-guess it.**”)
- *Johnson v. Apfel*, 240 F.3d 1145 (8th Cir. 2001) (ALJ aff’d denial of disability benefits; district court aff’d → court of appeals aff’d) (**ALJ articulated sufficient specific reasons, both testimonial and derivative**, to reject claimant’s and treating physician’s testimony).
- *NLRB v. Beverly Enters.–Mass., Inc.*, 174 F.3d 13, 26 (1st Cir. 1999) (ALJ found violations of NLRA → NLRB agreed with ALJ → Court of Appeals aff’d) (**ALJ’s “implicit” resolution of credibility disputes** meant that evidence cited by employer was not “uncontradicted”).

- *Getahun v. U.S. INS*, 1999 U.S. App. LEXIS 10860 (4th Cir. 1999) (IJ denied asylum request → Board of Immigration Appeals aff'd → Court of Appeals aff'd) (**ALJ and Board provided “specific, cogent reasons” for discrediting petitioner, both as to testimonial and derivative matters**).
- *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 838 (D.C. Cir. 1998) (ALJ found violations of NLRA; Board agreed; court of appeals aff'd) (“ ‘ “[C]redibility determinations may not be overturned absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its fac[e] incredible.” ’ ” The ALJ ‘credit[ed] Smith’s testimony that Williams did announce a change in the attendance system to a less severe method at the June 13 meeting.’ **While not expressly based upon observation of the witness’s demeanor, the ALJ’s decision to credit Smith’s testimony reflected his consideration of conflicting testimony from Williams and Scarborough, as well as of Scarborough’s June 30 memorandum. Although Smith admitted that his memory of the June 13 meeting was ‘not good,’ and although he needed to refresh his recollection before testifying, his testimony was neither incredible nor did it become so simply because he was not completely certain of every detail of the meeting.** Because Perdue has failed to demonstrate ‘extraordinary circumstances,’ we decline to overturn the ALJ’s decision to credit Smith’s testimony.”) (citations omitted).
- *Ostronski v. Chater*, 94 F.3d 413 (8th Cir. 1996) (ALJ found disability benefits were properly denied by SSA → Appeals Council remanded → after 2nd hearing, ALJ again held denial proper → district court aff'd → court of appeals aff'd) (**ALJ had sufficient (derivative) reasons for discrediting claimant’s physician’s medical opinions**; “The ALJ [also] properly considered the [lay] witness testimony and refused to place controlling weight on it for acceptable reasons. **The ALJ noted that Ostronski’s mother, sister, and husband were not qualified to render an opinion as to Ostronski’s capacity to work; their statements merely corroborated Ostronski’s testimony regarding her activities; and the testimony conflicted with the medical evidence regarding Ostronski’s functional capabilities. Thus, the ALJ had a solid basis for discounting Ostronski’s lay witness testimony.** In these circumstances, the ALJ was not required to make credibility findings as to these witnesses in order to decide their testimony was not entitled to great weight.”).
- *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211 (6th Cir. 1996) (ALJ awarded black lung benefits to claimant → Benefits Review Board aff'd → Court of Appeals aff'd) (“**In deciding whether the substantial evidence requirement is satisfied, we consider whether the ALJ adequately explained the reasons for crediting certain testimony and evidence over other evidence** in the record in deciding to either award or deny benefits. *See Director, OWCP v. Congleton*, 743 F.2d 428, 430 (6th Cir. 1984). Finally, **when dealing with a claim for benefits, we must keep in mind that the Act is remedial in nature and must be liberally construed** “to include the largest number of

miners as benefit recipients.” *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042 (6th Cir. 1993).”).

- *NLRB v. Lakepark Indus., Inc.*, 919 F.2d 42 (6th Cir. 1990) (ALJ found violations → Board adopted ALJ’s report, with modifications → court of appeals aff’d) (the ALJ’s “credibility findings are consistent with a reasonable reading of the record”).
- *NLRB v. Dinion Coil Co.*, 201 F.2d 484 (2d Cir. 1952) (unfair labor practice: firing employees because they were union members) (hearing examiner → NLRB agreed → Court of Appeals aff’d) (Trial Examiner had stated in his report: ““On the entire record, including his observation of the witnesses, the undersigned is not persuaded that [employee] was discharged by the [employer] for the reasons advanced by it.” * * * “These facts constitute a sufficient foundation for a rational inference that [the employee’s] union activity induced the discharge.”).

VIII. Examples of Cases Where ALJ’s Findings Were Ultimately Rejected

A. Where ALJ Relied on Demeanor Evidence

- *Be-Lo Stores v. NLRB*, 126 F.3d 268 (4th Cir. 1997) (over J. Ervin’s dissent) (ALJ found some alleged NLRA violations existed and others did not, and issued a mandatory bargaining order (rather than an election) → Board both affirmed and reversed some of ALJ’s findings of violations but affirmed bargaining order → court of appeals rev’d) (**ALJ explained, in a “perfunctory footnote,” that he “credited” all of the Union’s 37 witnesses over all 43 of the employer’s witnesses;** “Where an ALJ provides no more than a generalized, conclusory statement purportedly incorporating a host of individual comparative credibility determinations with respect to multiple witnesses, we refuse to indulge the presumption that its findings are entitled to the ordinary deference. *Cf. Burlington Industries, Inc. v. NLRB*, 680 F.2d 974, 977 (4th Cir. 1982) (“We are not however, required to accept [the] ALJ’s credibility determinations where they are not supported by substantial evidence.”). **Otherwise, savvy ALJ’s could simply ground their judgments in broad, categorical statements that they credit all of one party’s witnesses, and thereby effectively insulate their decisions from meaningful judicial review.”).**
- *NLRB v. New York-Keansburg-Long Branch Bus Co.*, 578 F.2d 472, 477-78 (3d Cir. 1978) (ALJ found violations of NLRA → Board summarily aff’d → Court of Appeals denied Board’s petition for enforcement) (“**The ALJ made his findings and reached his conclusions by relying almost exclusively on the testimonial, as distinct from the documentary, evidence presented** by certain Union representatives. Even if the ALJ had properly credited this testimony, which we believe he did not, we would still find that: **the inferences on which (his) findings were based were so overborne by evidence calling for contrary inferences that the findings of the (ALJ) could not, on**

the consideration of the whole record, be deemed to be supported by ‘substantial evidence.’”).

B. Where ALJ Relied on Derivative Inferences

- *Briscoe v. Barnhart*, 425 F.3d 345 (7th Cir. 2005) (ALJ rejected claim for disability benefits → Appeals Council denied review → district court rev’d and remanded for an award of benefits → court of appeals rev’d and remanded to SSA because **ALJ had not included required “narrative discussion describing how the evidence supports each conclusion, citing specific medical facts”** and record did not support ALJ’s conclusions, and ALJ gave unsupported reasons for rejecting witness’s testimony, such as that she did not give information for whom she was not asked).
- *Mancia v. Director, Office of Workers’ Comp. Programs*, 130 F.3d 579 (3d Cir. 1997) (ALJ denied Black Lung survivor’s benefits → Benefits Review Board aff’d → Court of Appeals rev’d and directed an award of benefits) (record supports only one conclusion: death caused by Black Lung disease; **only evidence supporting ALJ was report of a non-testifying, non-treating physician**; ALJ’s characterization of long-time treating physician’s conclusion as based on “an assumption” did not suffice to discredit the doctor’s “reasoned medical judgment”).
- *Kopack v. NLRB*, 668 F.2d 946 (7th Cir. 1982) (ALJ found improper threats and retaliatory discharges → rev’d in part by Board, which found discharges were not retaliatory → Board upheld by Court of Appeals) (portion of ALJ’s decision regarding threats “relied primarily on demeanor” and was affirmed by Board; **portion of ALJ’s decision crediting discharged employee’s testimony over supervisor’s did not refer to demeanor of either; the reviewing agency need not apply to an ALJ’s findings the same deference a reviewing court of appeals must to an agency, when the agency’s “broader experience and expertise” apply**; here, the Board differed from the ALJ “in the inferences it drew from the whole of the testimony”; both sets of inferences had support in the record, and **there was “substantial evidence” in support of the Board’s conclusion** that employees were discharged for legitimate reasons).
- *Community Clinic, Inc. v. Department of Health & Mental Hygiene*, 174 Md. App. 526, 922 A.2d 607 (2007) (ALJ proposed reimbursement from Medicaid, as claimant’s costs reasonable and state administrative cap, applied to claimants, was in conflict with federal law → Secretary adopted ALJ’s findings of fact but rejected her reasoning (regarding derivative inferences) and legal conclusions → Board of Review aff’d → circuit court aff’d → Court of Special Appeals aff’d).

C. Example Where Decision Hinged Only on a Question of Law

- *Ceguerra v. Secretary of HHS*, 933 F.2d 735 (9th Cir. 1991) (ALJ → Appeals Council → District Court had all ruled in favor of Secretary; Court of Appeals rev'd) (Court of Appeals reversed Secretary's decision on ground that it applied an incorrect interpretation of the law in holding that value of room and board could not be a "loan"; Secretary had, on that ground counted value of the in-kind services as income to applicant's retroactive award of SSI benefits by 1/3).

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