

No. 15-2710

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ARMANDO DIAZ
Appellant

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,
Appellee.

APPEAL FROM FINAL DECISION OF THE BOARD OF VETERANS' APPEALS

REPLY BRIEF OF APPELLANT, ARMANDO DIAZ

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES..... iii

I. POST-HOC RATIONALIZATIONS CANNOT LEND ADEQUACY TO THE BOARD'S DEFICIENT ANALYSIS..... 1

II. THE SECRETARY OFFERS NO REBUTTAL FOR HIS ETHNICITY BASED CLASSIFICATION 3

CERTIFICATE OF SERVICE..... 7

TABLE OF AUTHORITIES

U.S. CONSTITUTION CASES

U.S. Constitution, Amendment 14, § 2 5

STATUTES

38 USC, §7261(a)(1) 6

U.S. FEDERAL COURT CASES

Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 156 (1991) ... 1

Grutter v. Bollinger, 539 U.S. 306 (2003)..... 5

McLaughlin v. Florida, 379 U.S. 184 at 191-192 (1964)..... 5

Carey v. Piphus, 435 U.S. 247 (1978)..... 6

U.S. ex rel Motley v. Rundle, 340 F. Supp 807 (E.D. Pa. 1972) 6

MEDICAL JOURNALS

Kaufman Jay S., and Cooper, Richard S: "Commentary: Consideration for Use of Racial/Ethnic Classification in Etiologic Research"; Am. J. Epidemiology, Vol. 154, Issue 4: 291-298 4

Accord, Kwateng, Margaret, "Repackaging Racism: The Role of Sickle Cell Anemia in the Construction of Race as Biological" (2014). Senior Capstone Projects..... 4

OTHER AUTHORITIES

Appellee's Brief, Page 12-14 1,3, 5

Accord, Appellant's Brief, Page 11-12, 17-18 3

CITATIONS TO RECORD BEFORE THE AGENCY

R. 994-995 (June 28, 1966) (Report of Medical Examination)..... 2

R. 1954-60 (November 2008) (Compensation and pension examination)..... 1, 2,3

1. **Post-Hoc Rationalizations Cannot Lend Adequacy to the Board’s Deficient Analysis.**

This Court has refused to entertain the Secretary’s post-hoc rationalizations of agency action advanced for the first time in the reviewing court. *See Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 156 (1991) (“ [L]itigation positions’ are not entitled to deference when they are merely appellate.”) The Secretary in his principal brief, urges post-hoc rationalization of the Examiner inadequate opinions:

“[T]he November 2008 examiner noted that Appellant’s “[s]eparation examination . . . list[ed] normal clinical psychiatric evaluation and no complaints o[r] diagnosis or any cervical spine disability.” *Id.* A plain reading of this sentence suggests that the sole premise for the examiner's conclusion was not the lack of notation or treatment of a back injury in service, see *id.*; rather, the examiner’s opinion was based upon the normal clinical evaluation of Appellant’s spine, subsequent to the alleged in-service cervical spine injury [citations to the record omitted].” Secretary’s Brief, Page 12. (emphasis added). *Appellee’s Brief*, at 12.

It is axiomatic to argue a “plain reading” suggests anything.

The Secretary asks the Court to extrapolate from the examiner’s November 2008 statement (i.e. the absence of notations on a separation exam) a conclusion that the examiner’s etiology opinion was based on a “normal clinical evaluation of Appellant’s spine.”

First, the Secretary misstates the Examiner’s actual words: the examiner only states that the psychiatric evaluation was a “normal clinical” evaluation. R. at 1956 (1954 - 1960). There is no evidence - and the Examiner does not state - that the Veteran’s separation exam evaluation as to his cervical spine was either clinical or normal. *Id.* The

Examiner never uses or implies that his opinion was based on a “normal clinical evaluation” of the cervical spine at discharge:

“It is the opinion of this examiner that the veteran’s current claimed cervical spine condition is not a result of or caused by the condition he suffered while on active duty in the United States Army as documented in his service medical record in 1966. The veteran has 40 years of essentially absent medical records for chronicity of his cervical spine. From a review of the records and the available information and evidence, there is no indication that the veteran suffered a significant cervical spine condition in 1966 while on active duty. More likely etiologies for these claimed conditions are the more common etiologies for osteoarthritis including, but not limited to: age, obesity, deconditioning, heredity, ethnicity, concomitant health issues, subsequent trauma and intercurrent injury, life style choices and post-service occupation.” R. at 1960 (1954 - 1960)

The separation exam is silent as to the methodology used for the evaluation of the spine. R. at 994-995. It is silent whether that evaluation was of the thoracic, lumbar or cervical spine. *Id.* It does not state whether it was merely an external evaluation of the exterior appearance or shape of the spine. *Id.* It does not indicate whether x-rays of the cervical spine were taken. R. at 994-995. If the Examiner had meant to say his opinion was based on a “normal clinical evaluation of Appellant’s spine”, he would have said that; he did not. R. at 1954 - 1960 (1954 - 1960).

Instead, the Examiner attributed the etiology of the cervical spine disability to “... age, obesity, deconditioning, heredity, ethnicity, concomitant health issues, subsequent trauma and intercurrent injury, life style choices and post-service occupation” without any explanation to help this Court determine how those factors were etiological factors of a physical disability. R. at 1960 (emphasis added).

The Secretary’s extrapolation of unstated meaning from the 2004 and 2008 Examiner opinions, twisting of the Examiner’s actual words, and justification of the

Board's decision based on word-games are post-hoc rationalizations. Appellant respectfully requests the Court not entertain these arguments.

II. The Secretary Offers No Rebuttal for his Ethnicity Based Classification.

What the Examiner did write, what the Board endorsed, and what the Secretary does not rebut, is a troubling assertion of the “more likely etiology” of the Veteran’s cervical spine condition:

“More likely etiologies for these claimed conditions are the more common etiologies for osteoarthritis including, but not limited to: “... age, obesity, **deconditioning**, heredity, **ethnicity**, concomitant health issues, subsequent trauma and intercurrent injury, **life style choices** and post-service occupation.” R. at 1960 (emphasis added).

Neither the VA Medical examiner nor the Board, nor the Secretary or his counsel, explain how a cervical spine condition could possibly be related to a person’s Hispanic ethnicity.

Appellant pointed out his concerns with the Secretary’s reliance on ethnicity as a justification for denial of benefits; the Secretary failed to respond beyond re-characterizing charged language as a “general recitation of risk factors”. *Accord*, *Appellant’s Brief* at 11-12, 17 - 18; *Appellee’s Brief* at 13-14. Contrary to any post-hoc rationalization, the Examiner was clear: he was not reciting “general risk factors” for the Veteran’s cervical spine condition, but in fact identified the Veteran’s Hispanic ethnicity (et al.) as the “more likely” etiology¹ for that condition. R. at 1960 (1954 - 1960).

¹ The Examiner’s so-called “common etiologies” for cervical spine injuries parallel “charged” phrases; left unexplained these phrase suggest of improper motive and unconstitutional classifications: “lifestyle choices” suggest gender or sexual

To be clear: there is no known medical condition for which Hispanic ethnicity² is known to be an etiology or risk factor. The idea that race or ethnicity is an etiological factor for any medical condition is widely rejected.³

The assertion that being an “ethnic Hispanic” is in any way a “general risk factor” for a spine condition is so “beyond the pale” it defies explanation or justification. While the Examiner may or may not have a legal duty to explain how Hispanic ethnicity could in any way be an etiological factor for a cervical spine condition, the Board assuredly

orientation/preference; “post-service occupation” suggest economic classification; “deconditioning” connotes race-based stereotypes of “work-ethic”; “ethnicity” in this case clearly suggests race.

² An ethnic group or ethnicity is a category of people who identify with each other based on common language, ancestral, social, cultural, or national experiences. *See*, https://en.wikipedia.org/wiki/Ethnic_group (last visited August 31, 2016).

³ “Race/ethnicity is ill-suited to be considered a cause” for medical conditions: race as an etiological factor is - contrary to the Examiner’s opinion and the Board’s endorsement of that opinion - widely rejected in modern medicine. *See e.g., Kaufman, Jay S., and Cooper, Richard S: “Commentary: Considerations for Use of Racial/Ethnic Classification in Etiologic Research”*; *Am. J. Epidemiology*, Vol. 154, Issue 4: 291-298 (2001). While volumes could be spent explaining the lack of connection between race, ethnicity and the etiology of any medical condition, it is enough to say that race and ethnicity cannot be clearly delineated in medicine and science because they are socio-political, not biological or genetic, constructs. Factors such as income, education, occupation, access to health care, geographic birthplace, diet - and the infinite unknown combinations of genetic “races” over the millenia of human history that contribute to a single person’s genetic or “racial” identity - dictate that in medicine and science there is no possible way to identify race or ethnicity as an etiological factor in any medical condition. Even sickle-cell anemia, wrongly considered in America to be a disease correlated with a particular race, appears in a plethora of races around the world and is the result not of race, but of a malaria resistant gene variant. *Accord, Kwateng, Margaret, “Repackaging Racism: The Role of Sickle Cell Anemia in the Construction of Race as Biological”* (2014). *Senior Capstone Projects*. There is no known medical condition for which a person’s ethnic heritage is a risk factor. The examiner’s conclusion that the Veteran’s Hispanic ethnicity is a common etiology of a cervical spine condition is nothing less than *prima facie* evidence of discriminatory animus - government action based on a suspect classification for which the Secretary has offered no rebuttal.

does. The Board failed that duty when it did not explain how the fact of the Veteran's Hispanic ethnicity, and other non-medical classifications, are "common" etiologies that would preclude service connection of a medical condition.

Thus, to say one's Hispanic ethnicity is a "risk factor" or "more likely etiology" for a cervical spine condition, and then deny the claim in implicit or explicit reliance on such statements, is the functional equivalent of denying the Veteran's claim because he is Hispanic. The Board - explicitly or implicitly - endorsed this "prima facie" discriminatory rationale contained in the Examiner's opinion.

As argued in Appellant's principal brief, the Board's decision denied Appellant equal protection of the law. U.S. Const. Amendment 14, § 2. The Secretary argues that absent a showing of prejudice, the "general recitation" of ethnicity as a risk factor is unavailing. *Appellee's Brief*, at 13. To the contrary, no legal burden or standard in a Congressional statute, federal regulation, or Court decision relating to Veterans' benefits may outweigh the burden imposed by the US Constitution: government action based in whole or in part on a suspect classification is only constitutional if it can survive strict scrutiny. *See, Grutter v. Bollinger*, 539 U.S. 306 (2003). All racial and ethnic classifications are subject to strict scrutiny under the Equal Protection Clause of the US Constitution. *Id.* Government action based on race or ethnicity is justified only when it is necessary to further a compelling governmental interest and is narrowly tailored to further that interest. *Id.* Race, nationality, and alienage are "in most circumstances irrelevant to any constitutionally acceptable legislative purpose." *McLaughlin v. Florida*, 379 U.S. 184 at 191-192 (1964).

The Board's decision - and the Examiner opinions underpinning it - withers under such scrutiny.

Beyond any other error, consideration of the Veteran's ethnicity - unrebutted by the Secretary - renders the Board's decision a violation of Mr. Diaz's constitutional right to Equal Protection, and compels remedy above and beyond mere vacatur and/or remand. 38 USC § 7261(a)(1). "Constitutional rights of a citizen are so valuable that an injury is presumed to flow from the deprivation itself". *U.S. ex rel Motley v. Rundle*, 340 F. Supp 807 (E.D. Pa. 1972). *See e.g., Carey v Piphus*, 435 U.S. 247 (1978)(Constitutional violations are actionable for nominal damages even absent proof of actual injury). Appellant respectfully seeks remedy not only in the form of Vacatur and Remand of the Board's decision, but remedy for the Board and Examiner's violations of his constitutional rights.

DATE: SEPTEMBER 6, 2016

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America that on September 6, 2016, I served a copy of this APPELLANT'S REPLY BRIEF, in the matter of Diaz v. McDonald, Docket No. 15-2710, via Court's CM/ECF filing system.

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