Supreme Court of the United States

OCTOBER TERM 1970

In the Matter of:

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Petitioner,

vs.

PEDRO PERALES,

Respondent

Docket No. 108

Place Washington, D.C.

Date January 13, 1971

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, Petitioner,	:	
vs.	:	No. 108
PEDRO PERALES, Respondent.	:	

Washington, D. C.,

Wednesday, January 13, 1971.

The above-entitled matter came on for argument at 11:00 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

DANIEL M. FRIEDMAN, ESQ.,
Office of the Solicitor General
Counsel for Petitioner

RICHARD TINSMAN, ESQ.,
San Antonio, Texas
Counsel for Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 108, Richardson vs. Perales.

Mr. Friedman?

ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF PETITIONER

MR. FRIEDMAN: Mr. Chief Justice and may it please the Court. This case, hdere on a writ of certiorari to the Fifth Circuit, presents an important question as to the evidence that may be utilized by the Secretary of Health, Education, and Welfare in disability proceedings under the Social Security Act.

Specifically, the question is the correctness of a ruling by the court of appeals that written reports made by doctors following the examination of a patient which reflect the results of the examination and the doctor's analysis and conclusions based upon that examination cannot constitute substantial evidence to support a determination of disability if, one, at the hearing before the Social Security authorities the claimant objects to the introduction of this evidence; and, two, if these written doctors' reports are contradicted by oral testimony given at the hearing by the claimant and the claimant's doctor.

The government has brought this case to the Court because of the serious adverse impact it believes this rule

announced by the court of appeals will have upon the operation of the entire Social Security disability program. There is a tremendous number of these administrative hearings conducted each year in disability cases. Last year our figures show that 27,000 of these hearings were held. The hearings are conducted quite informally. They are not adversary in character, as we know the term, and the examiner who presides is not an advocate of one position or the other. He attempts to develop all the facts, both those indicating disability and those questioning disability.

Now, for as long as this program has been in effect, for at least fifteen years, traditionally these cases have been determined on the basis of medical reports, written reports made --

Q How did it all start? Someone has claimed disability?

A Yes. Let me -- I just --

Q Nothing else.

A Yes, let me -- let me start and explain what happened perhaps in this case. This man filed a claim for disability in April 1966 in which he claimed that he had become disabled in September of 1965 as a result of a back injury. Before he had actually filed his claim he had undergone some treatment which had been unsuccessful, and when he filed his claim under the procedures, the statutory procedures, the

claim was referred by the Social Security agency to the state agency that handles disability problems, in this case the Texas agency. Under the statute, the statute authorizes the Secretary to enter into agreements with state agencies to handle and process these claims originally. The state agency then --

Q Do the procedures by which they are handled differ, depending upon the state?

A Well, they may vary some but the basic procedure I think is the same. The state agency makes whatever examinations necessary. The federal government pays for these but it sends a man out for medical examinations; in this case there was a series of examinations by four different doctors.

First they sent the man to an orthopedic surgeon who conducted various tests. Then they sent him to a neurologist. Following that, they also had, I might mention, before this -- they also attached to his application the various reports from his doctors which indicated the problems they saw. And at an earlier stage, an earlier stage before he filed his claim, he had undergone surgery, something called a laminectomy, for the pain he had in his lower back.

Q Would you explain there a little bit? He did have surgery?

A Yes.

Q In other words --

A May I give the chronology of what happened to

him --

Q And was there any curative effect as a result of the laminectomy?

A Apparently not. Apparently not. He was twice hospitalized by the orthopedic surgeon, then the laminectomy was performed, and following this he went from seeing the orthopedic surgeon, he consulted his family doctor, Dr. Morales, who undertook to treat him.

Q Do you know whether the surgery was performed by an orthopedist or a neurosurgeon or by both? Does the record show this?

A I believe he was a neurosurgeon. It is a doctor --

Q And I take it they found pathology but no --

A Well, they didn't find much pathology. This is one of the points. They found some pressure and he prescribed certain procedures, but they did not find any specific neurological involvement of the kind that they believed would cause this pain.

Before the operation, the neurologist, Dr. Munslow, believed there was some problem with the disc, but apparently the laminectomy did not disclose that fact.

Q Well, did preoperative diagnosis through x-rays or other means disclose the presence of pathology?

A There was enough there apparently to suggest it.

They performed two myelograms before the surgery and the first one is not in the record, the second one suggested some disc involvement, but apparently after the surgery was performed they did not find anything which indicated disc involvement. And after that the man was taken -- put himself in the care of Dr. Morales, a family doctor, who treated him more conservatively with such things as heat, he gave him some x-ray -- not x-ray, deep-heat therapy, he gave him drugs, he gave him pain killers, some slight exercises and so forth. None of these conditions, these treatments apparently alleviated his pain.

Now, if I may just go back for a minute to what happened in the case after the state agency had examined the man. The state agency then initially at least decided that he was not disabled and subsequent to that he then said he wished to appear that to the Social Security Administration. After the state agency makes the initial determination, which they are permitted to do under the statute, the case then goes back to the Bureau of Old Age and Disability Insurance at the Social Security Administration, which makes --

Q Would you stop there, Mr. Friedman. If the state agency found that indeed he was disabled, would that be the end of the case so far as Social Security?

A Probably. Probably. Mostly I think in almost every instance the state agency finds the man is disabled, the Social Security Administration --

Q And here they found he was not?

A He was not.

Q Then what is the procedure after that?

A Well, then at this point it then goes to the Social Security Administration, and they wrote him a letter, which is pretty much of a form letter, saying that the examination has been conducted and you are found not disabled. And then they said you have a certain period within which to apply for reconsideration, and he applied for reconsideration. And after he had applied for reconsideration --

Q Reconsideration by whom?

A By the Social Security Administration, by the Bureau of Disability --

Q The state agency is now out?

A The state agency is out. But following that, following that and before he -- well, then what happened is reconsideration was denied and then he was told he had the right to request a hearing and he requested a hearing.

Now, between that period and before the hearing, he underwent a further examination. This was something called an electomyographic study, which is the counterpart of an electrocardiogram.

Q At whose instance?

A Pardon?

Q Done at whose instance?

A This is done at the instance of the Social Security people. And following this examination conducted, then he had a hearing, as he had requested. Now, at the hearing he was represented by counsel and over his objection there was admitted the six doctors' reports which reflected the tests that had been made by these doctors during this series of examinations.

Q Both the state agency and whoever it was that made this last --

A Well, the examinations were made not by the -- I want to make this clear -- they were not made by the state agency. They were all made by independent consultants and specialists.

Q Retained by whom, that is what I --

A Well, they --

Q By the state agency?

A -- they were referred by the state agency. They were referred by the state agency, except I believe for the electromyographic study, but paid for by the federal government. Now, at the hearing testimony was presented by the respondent, Mr. Perales, by Mr. Perales' family doctor, Dr. Morales, who had conducted this conservative treatment over a period of several months, by a fellow employee of his, by a vocational advisor who testified as to what jobs he could perform, and by a man that the examiner had called who is known as the medical

advisor.

Now, the practice in these cases is that where you get a difficult case, where the examiner feels that the case presents medical problems that are somewhat beyond his comprehension, he has the discretion to call a medical advisor to advise him -- it is up to the examiner to decide whether or not to call the medical advisor. Medical advisors are called in roughly one out of seven cases.

The medical advisor in this case was called by the examiner at the second session of the hearing. The first session was held, he heard reports, heard the testimony and decided he needed some assistance. The medical advisor was a Dr. Leavitt, who is the Chairman of the Department of Physical Medicine at Baylor University, at the Medical School, who is also Chief of Staff at several hospitals and a consultant to the VA. And Dr. Leavitt was sworn as a witness. Dr. Leavitt was cross-examined by respondent's counsel, and Dr. Leavitt explained to the examiner what these various reports were, what the tests were, in one case explaining the consequences of the electromyographic study. He used a blackboard in drawing the different lines and graphs to show precisely what the effect is.

Q Well, was he the proponent of any position?

A No, he is not the proponent of anyone. He is an -- he tries to give objective -- he gives objective testimony.

he interprets for the record, for the examiner what the medical evidence --

Q He is paid by the government?

A He is paid by the government, a rather --

Q Does he get a per diem or --

A No, it is a rather -- I think for a qualified -- a rather nominal sum. He gets $125 for pay as a medical expert. That includes studying the papers before the hearing and testifying for as long as he has to.

Q Is that $125 a day or --

A $125 for the case, that is all he --

Q Suppose the case doesn't go more than a day?

A Cases ordinarily do not go -- this case, of course, there were two days of hearings but he only attended -- normally these hearings just take a couple of hours, a few hours at the most.

Q And he is a member of a panel that has been --

A Yes.

Q -- sort of volunteers to respond to a request for volunteers?

A That is correct. They have in each city panels of different experts, and in this case the record shows that the examiner did not select the particular expert, the examiner asked his assistants, someone called a hearing assistant, to select a doctor from the panel in this area to appear as the

medical advisor, and they got someone familiar with physical problems and orthopedics.

Q How often would any one medical advisor do this job over the course of a year?

A It varies, again it depends on -- several times a year, and it might be just once or twice. Again, it would depend on, I presume, on how many cases involving the particular type of condition --

Q In which he is a specialist?

A -- in which he is a specialist -- arose in the particular locality, and also depending on the examiners. Some examiners might feel the particular medical problems presented a case that they could handle without a medical advisor. Others might not feel that competent and might want the medical advisor.

Q Is this particular doctor a specialist or a generalist?

A No, this doctor was a specialist in something called physical medicine and rehabilitation.

Q That is not neurosurgery or neurology or orthopedics?

A That is right, but he said that he had --

Q Does the report show he is board certified in --

A Oh, yes.

Q -- physical medicine?

A Yes, Your Honor. And he just advised basically, advised the examiner as to what the reports showed and what the significance was. Now, he concluded, where he told -- the examiner's conclusion was that these reports that had been presented and the evidence produced at the hearing indicated that Mr. Perales had a low back syndrome of mild significance -- mild severity, excuse me. That is what he said.

The examiner denied the claim. He said that on all the evidence he concluded that that was basically what the man had, was a low back syndrome of mild significance, and also relying on certain statements made by the psychiatrists and neurologists that there was an emotional overlay to this illness and that neither of these factors individually or in combination constituted disability.

Then under the practice, Perales brought suit in the district court, which set aside the determination. I might say that there was a further step in the interim proceedings. He sought review of the examiner's decision by something called the Appeals Council, and the Appeals Council upheld the examiner's decision and under the statute that then became the final decision.

Q Does the Appeals Council hear argument or do they just hear the appeal on the record?

A In this case they didn't hear argument. On occasions they do hear argument, but in most instances it is just

done on the record. However, briefs are sometimes filed. I don't believe that briefs were filed in this case.

The district court said that the statements, the written reports of the medical advisors were not substantial evidence, and that the testimony of the medical advisor was of little or no probative value, and therefore the district court remanded the case to the Secretary to hold a new hearing before a different examiner. He said that this examiner was out because the district judge a month before this hearing had condemned the use of these medical reports and, despite that, this examiner had admitted them, so he said it had to be before a new hearing and the indication clearly was that the new hearing only the doctors' testimony would be permitted, not the reports unless the parties agreed to it.

Now, the Fifth Circuit affirmed, and what the Fifth Circuit said basically I think was four things: First, the Fifth Circuit said that in view of a provision in the statute that the rules of evidence shall not be binding upon the Secretary in these proceedings, that the medical reports, although hearsay, were admissible. That was the first thing the court of appeals said.

Secondly, the court of appeals said that since under the regulations a claimant has the right to request to subpoena witnesses and since Perales had never sought to subpoena the doctors, he could not complain that he was denied the right to

cross-examiner the doctors because he hadn't sought to attempt to do so.

Q Is that an absolute right to subpoena, Mr. Friedman?

A No, it is not an absolute right. In effect, you have to show good cause, and the practice is that if a man can show some reason why it is necessary to call the doctor to the stand -- for example, he would say that you just can't tell on the basis of these tests alone what his condition is, the significance of the tests depends upon the circumstances under which they were done, how long you have, et cetera, et cetera -- but they will not permit him to subpoena a doctor merely because he says he wants to cross-examine.

Q And the further point was that he hadn't even tried in the past?

A He hadn't even tried. He hadn't even tried. And then they went on, however, and said that despite that nevertheless because the doctors' statements were uncorroborated hearsay, that could not consistute substantial evidence, where the claimant objected to the introduction of the reports and the reports were contradicted by the claimant's testimony and by the doctor's testimony.

The court also said it agreed that the medical advisor had properly been permitted to testify, that once again his testimony was properly admitted, even though he said it

was hearsay because it was built in turn on the reports, but the court then went on and criticized what it said was viewed as the widespread practice of these medical advisors, it called riding the circuit with the examiners for the purpose of reporting on the condition on the basis of reports and so on, and the court said this procedure should be frowned upon if not eliminated entirely.

Now -- and it therefore affirmed the district court's decision. I want to stress, before gett ing into the discussion of merits of the case that neither court in this case has yet passed upon the question whether or not the Secretary correctly held Perales was not disabled. All they had said was that the evidence upon which the Secretary based its decision was not substantial evidence. We don't know in this case, we don't know in this case what the ultimate outcome will be, and if the court agrees with the government that the court of appeals applied the wrong standard, all that we ask is that the case be sent back to the district court for the district court now to review the substantiality of the evidence upon which the Secretary based his determination.

I make this point because some of the amici in their briefs are complaining that this man wasn't disabled and that on this evidence you had to conclude that he was not disabled because these tests were basically unreliable. That is an issue that has not been passed upon by either of the two lower

courts.

Now, I would like, if I may, just briefly to indicate the importance of the issue before coming to the discussion as to the question of substantial evidence. As I have indicated earlier in my argument, there are about 20,000 -- 27,000 last year of these hearings held annually, and since the program has been in effect we have always relied on these reports.

Now, the doctors have been very cooperative in these cases. They have been quite willing to examine the people, presumably knowing that it is only going to be an unusual case when they will be asked to testify. And the Secretary has some information which we have set forth in our brief that if this rule is obtained and if as a necessary result there is going to have to be a great deal more testifying by the doctors, that a lot of doctors who have hitherto been willing to conduct these examinations are going to be very, very reluctant to do so because they know they examine a man and spend an hour or two making tests on him and so forth, and the end result of this may be that several months later they will find themselves forced to attend a hearing at some distant place, perhaps have to sit for a whole day giving -- listening to the testimony and then giving their testimony.

Now, not only will this make -- and this reluctance on the part of doctors to conduct these examinations would have two unfortunate consequences. First, it would make it

more difficult for the Secretary to determine this vast number of claims and, secondly, in the long run we think it would redound to the detriment of the claimants themselves because the majority of these cases in which claims are made following these examinations the claim is allowed, and figures show roughly two-thirds of all claims are allowed without ever going to hearing. So that the claimants themselves might be handicapped if the doctors were generally unwilling and reluctant to conduct these examinations.

And finally we read in the papers all the time about the critical shortage of physicians in this country today. I think 50,000 more are needed. We hear doctors working 50 and 60 hours a week and they don't have enough time to see patients. And as I will now develop, I think -- we think these reports are thoroughly reliable and that really it would not be in the public interest that the doctors should spend a substantial portion of their time, particularly the specialists who I presume are even in more critical short supply, testifying at these hearings.

Now, in the Social Security Act Congress has provided a very flexible procedure for the -- I might just mention one further point in passing, that the flexibility which has characterized these proceedings for many years will be substantially weakened, we think, if everything had to be this formal, if you had to have every time a doctor's report was to be

offered in evidence, if he had to be called as a witness whenever the claimant and the claimant's doctor appear. Normally, of course, in every case the claimant appears, and I would assume this got to be the rule, the normal practice would be that the claimant would always have his physician who would testify and then it would be necessary to call all of these doctors.

The statute gives the Secretary authority to provide for the nature and extent of the proofs and evidence and the method for taking and furnishing such proof in evidence in disability cases. And the Secretary in terms of his regulations, leave it to the examiner generally to determine the procedure at the hearings, provided that the procedure will afford the parties a reasonable opportunity for a fair hearing.

And as I have indicated, the statute expressly says evidence may be received even though inadmissible in a court of law under traditional rules of evidence and, of course, finally, the Secretary's findings, if they are supported by substantial evidence, are stated by the statute to be conclusive.

Now, substantial evidence, as this Court has said on many occasions, it is sufficient to support an administrative determination, is evidence from which a reasonable mind might accept as adequate to support a conclusion. Evidence as stated otherwise has rational probative force.

Now, we think under this standard these reports are sufficient to constitute substantial evidence and, of course, I won't belabor the point but the nature of this statute, the kind of determination the Secretary makes means that it is for the Secretary to decide these questions, to evaluate the evidence, to draw inferences.

These reports, it seems to us, are the kind of thing that whether you characterize them as hearsay or non-hearsay, are of the highest probative value. Let's for a moment just look and see what these reports are. The reports are made by highly skilled professionals in the performance of their usual duties. This is what a doctor usually does. He examines patients. This is the form in which normally a doctor reports the results of his examination and the results of his diagnosis. He files a written report. The reports reflect the standardized type of examination and medical tests the doctors traditionally employ in dealing with this kind of a --

Q Would you say, Mr. Firedman, that they have the same -- all marks of reliability that the day to day recording and reporting by doctors in medical records have in a hospital procedure which are admissible under the conventional rules?

A I would think so, Mr. Chief Justice. I think -- what I would say is these technically probably do not come within the business records exception because they are made in response to an individual request for consultation. But they

do have, it seems to me -- it is the basic thing, it is that kind of a label, and we have quoted in our brief a fine opinion by Judge Parker, written almost forty years ago, in which he develops in considerable detail why a report of this type is thoroughly reliable.

Q I ask, Mr. Friedman, this number in a year, I suppose it is hard to answer this, but do not those reports then really determine the basic issue of disability? What purpose does the hearing serve?

A Well, the hearing serves a number of purposes.

Q Let me put it this way: Are there instances in which notwithstanding reports as unfavorable to the disability claim, as these were, as interpreted by the medical advisor, how many cases nevertheless result in findings of disability?

A Well, we do find -- we do have statistics that show that roughly one-third of all the cases that go to hearing result in findings of non-disability. We have statistics in our brief for about two years ago, that there were roughly 20,000 hearings in that year, and I think 6,900 of the cases resulted in awards to the claimants. So that in one-third of the cases --

Q Notwithstanding medical --

A Notwithstanding --

Q -- like this?

A Like this --

Q As unfavorable to the claim as these apparently were?

A Well, I can't say they were unfavorable reports because if on the basis of the reports it was decided that the man was disabled, there wouldn't be a hearing. The hearing is only held where there has been an initial rejection. So in one-third of the cases -- and the evidence, for example, we may have situations in which the man brings in his own experts who explain and throw some doubt about these things.

Q Like in this case?

A In this case, the man, Mr. Justice, was his family doctor, and all his family doctor said was that while he couldn't disagree with basic reports, there seemed to be something the matter with this man which in his view indicated he couldn't work. Now, the examiner rejected that.

Q Well, I gather no matter how many experts he may bring in who would testify that indeed there is disability, nevertheless the government's position would be if the examiner finds there is not, these reports constitute substantial evidence.

A That is correct, because we think under the statute Congress is basically committed it to the discretion of the Secretary and to the examiner and the appeals council to evaluate the evidence and to compare it.

Q Just as though those doctors who wrote the

reports had come and testified personally?

A That's right. That's correct, Mr. Justice, because we think in the majority of cases the doctors, if they had appeared, would merely in effect repeat what they have stated in their records, and I think that is the point that Judge Parker makes so effectively --

Q Well, a typical case that goes to hearing where there has been medical reports adverse to the claimant and yet an award of disability is made, it must be because the evidence that the claimant presents at the hearing --

A That is correct. The claimant may --

Q -- which serves to override the written reports.

A If I may, with the Court's permission, in preparation for this case, I attended a disability hearing last week and I would just like to explain what happened at this hearing because I think this will illustrate it. This was a man who had some pulmonary difficulties and the question was whether he in fact had had tuberculosis. And when he came to the hearing he was very short of breath and this was noticed by the medical examiner and by the hearing examiner and they asked him about this, and they asked him whether he had walked up to the second floor, taken the elevator, and how he had gotten there. And during the medical advisor's testimony, the medical advisor suggested to the examiner that in view of this shortness of breath, which apparently had not been referred to

in the previous reports, that he suggested the appropriateness of performing some additional tests, which the examiner indicated he would have the man undergo.

Now this, it seems to me, is the kind of thing that can be brought out at the hearing which may serve to overcome the doctors' reports. As I say, in roughly one-third of the cases this happens. But our basic position is that if the trier of the facts is not convinced by this evidence, if the trier of the facts concludes on balance the record is enough to warrant a conclusion of non-disability, he can make that determination even though the basis upon which he makes that determination are these reports made by the doctors. That is our basic submission.

Q And I suppose arguably that if the government called doctors, their own doctors, who had made these reports at every hearing, there might be fewer awards of disability?

A There might be. Well, it is hard to say.

Q Well, there would be then personal confrontation between doctors, I suppose.

A Which I think would be unfortunate certainly. But I also suggest that there might be fewer awards of disability for another reason, Mr. Justice, is the difficulty of getting the doctors to make the examinations.

Q Now, Mr. Friedman, you mentioned that there were 20,000 hearings last year and 6,900 were favorable to the

claimant after hearing. Do you have any figures in this record as to how many grants in favor of the claimants were made without going to hearing?

A Yes, we have a figure on that. It is rather rough. It is about 540,000 or 560,000. It is roughly two-thirds of all applications -- I can give you the figure in a moment. Yes, it is note 7, page 18 of our brief, and in the fiscal year 1968 there were 515,000 disability cases processed. And of the 515,000, 343,000 were allowed prior to hearing. Then out of the remaining 160,000 that were initially disallowed, only 20,000 went to hearing. The remaining 140,000 apparently the claimant didn't wish to pursue it further, and then out of the 20,000 roughly one-third of those that went to hearing resulted in awards to the claimant.

Q These figures are all in the one place on page 18, is that right?

A That's right, and these are all, I should say -- that these are figures which have been supplied to us by the Department of Health, Education, and Welfare. They are not shown by the record in this case.

Q They are public records?

A Pardon?

Q They are public records?

A Well, there are public records but they may have involved some calculations. I am sure they are variable.

I don't know exactly where they are.

Q Do you have any idea how those figures compare with figures that would apply to private insurance companies --

A No, I --

Q -- who have to go into court?

A No, I don't, I'm sorry.

Q Mr. Friedman, how often do you know, or do you know, does a claimant attempt to call as a witness one of the doctors who has filed an adverse report? I take it that he has the right to call him, doesn't he?

A He has the right to request that a subpoena be issued for him.

Q And if he -- who has to pay?

A The government would pay whatever the usual witness fees are.

Q And are doctors often called by the --

A I am told that it is relatively rare. The doctors generally are not called. I am also told that what frequently happens, as I have indicated, the procedures are quite informal and what sometimes happens is if the claimant indicates he would like to have a doctor and gives the reasons for it without a formal subpoena being issued, the examiner has someone get in touch with the doctor and arranges for the doctor to appea.

Q I take it this claimant had the choice of either

being faced with written reports or calling the doctor himself?

A That's right, he made no attempt to subpoena the doctor, and under the regulation he can see the reports either at the hearing if a request is made. Customarily these reports are all shown to the claimant in advance of the hearing or, alternatively, he can examine the reports at the hearing examiner's office.

Q Mr. Friedman, I notice that -- I gather that out of that 515,000 disability claims, that 320,164 consultant examinations, is that right? Footnote 8, page 18.

A That's right, there were that number of examinations but, of course, that doesn't mean almost a one-for-one comparison because you might have --

Q No, it would appear that a great many disability claims are allowed without a consultant examination.

A A substantial number are because you may have a case in which the man's doctor just brings in evidence that the man is bedridden and has been bedridden for six months. I mean they wouldn't press that any more.

Q Could I ask you one more question. If a claimant calls a doctor, is the government required or is it likely to call the doctor to give testimony if he is there at the hearing rather than present his report?

A If the claimant wants the doctor?

Q The claimant asks for a subpoena and the doctor is there at the hearing.

A The doctor is subpoenaed, you mean?

Q Yes.

A Well, I would assume that they would first present the report and then the doctor would testify about his report.

Q The government would put him on?

A Well, the hearing examiner would call him --

Q I see.

A When you say the government would put him on, I don't want to --

Q This is not really an adversary hearing, is it?

A Precisely, Mr. Justice, it is not an adversary hearing. It is not on one side the government and on the other side the claimant. The examiner presides and informally they sit around a table.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman.

Mr. Tinsman?

ARGUMENT OF RICHARD TINSMAN, ESQ.,

ON BEHALF OF RESPONDENT

MR. TINSMAN: Mr. Chief Justice and may it please the Court. The primary issue to be decided here is this limited one where each side has directly contrary evidence on the crucial issue to be decided in this particular case, disability

of the claimant, and it is directly in conflict what procedure should be followed, the one that the circuit has mandated, where the government must bring in their doctors, their evidence, or the one that has been followed in the past.

And just as Mr. Justice Brennan indicated, this is not an adversary procedure, this is the position that has been taken by the government, but of its very nature this is an adversary procedure because the government on the one hand has reports that say this man is not disabled; the man says those reports are wrong, I am disabled, and my doctor says I am disabled.

So we really can't characterize this as not an adversary proceeding. Of its very nature, it must be because it is a disability hearing where there are two doctors who are directly in conflict. And the problem in Social Security hearings is there must be total and complete disability, not as in some programs, veterans programs, where there may be partial disability.

Now, we start out with the basic proposition that has been enunciated by this Court in numerous decisions that say -- they are all cited by the Fifth Circuit, one of them is Consolidated Edison vs. National Labor Relations Board, and it says uncorroborated hearsay does not constitute substantial evidence. And then this Court has in many cases brought forward the proposition that the right of confrontation and cross-

examination, even in administrative hearings, is a basic right that a person has.

Q Is that the gist of your complaint about the hearsay evidence?

A We actually have three points that I would like to bring out, Mr. Justice Black. First is that -- and the most primary one that the Fifth Circuit decided on -- is that the hearsay reports are not substantial evidence and they should not be allowed to be so.

The second point that we make in the argument is this medical advisor situation, where the man has never examined the man, is improper; and the third point that we will make and have made in our brief is that the whole procedure that is presently followed by Social Security violates due process in that the hearing examiner is both the government attorney and then he becomes the judge, and he is not an impartial fact-finder, as has been required by the court in past situations.

I would like to first --

Q Could you argue that in suits against the government where it is consented to be sued?

A No, because generally in suits where the government has consented to be sued we have an impartial fact-finder and that is the federal district judge.

Q That is what this is, isn't it?

A No, sir, Your Honor, in a suit --

Q Isn't this a suit against the government?

A Yes, sir, but the hearing examiner must be the government's lawyer as well as the judge. He first puts on the government's lawyer hat and then after he introduced the government's evidence he rules on objections of the claimant's attorney or the claimant, then he puts on his judge hat, and it is difficult to determine where he stops being the government's lawyer who must assimulate all of this evidence, and becomes the impartial fact-finder.

In the federal court claim case, of course, the judge does not assimulate the evidence.

Q Can you subject the government to the same kind of constitutional rule there where it can consent to be sued or not as it sees fit that you would a private company?

A Well, Your Honor, all we are saying here is that we are entitled -- if we are entitled to make a claim, as the Congress has held we are, we are entitled to have this before an impartial decision-maker, and this Court has previously held in immigration cases that we cite in our brief, that a man who garners all of the evidence for the government and then comes in and says now that I have gathered the evidence I am now going to hear the evidence that I have gathered and decide whether you should be deported, that this man is not an impartial fact-finder --

Q What kind of suit was that?

A That suit was a deportation proceeding. This was the last point that I was going to cover in my brief. It is on 24. It is Wong Yang Sung vs. McGrath and virtually the identical procedure was followed in that case as is followed in Social Security hearings where the government hearing officer gathers the evidence for the government, then listens to the evidence he gathers and listens to the immigrant in that case, and then decides whether or not he should be deported.

Here the hearing examiner gathers the evidence for the government, arranges for which witnesses he will call and then he just simply decides whether or not he is going to believe the evidence that he gathers or whether he is going to believe the evidence that the claimant puts on. And the problem is particularly poignant in cases such as this, where the evidence is directly conflicting and much of the evidence relied on by the hearing examiner in this case was by evidence from the insurance company doctor. This man had an insurance company claim and the insurance company doctor who did the initial examination, although he said they were only state doctors -- Dr. Munslow, as the evidence will show in the report, in the record, was the insurance company doctor. Dr. Munslow was the doctor he relied on, as well as the hearing advisor, the medical advisor, who had never examined the man.

What we are saying basically here is that this Court, in a number of cases, has said that where government action

directly -- where governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures that have been traditionally associated with the judicial process. That was --

Q Well, was your first point really the same as a charge that the government had provided that hearings could have hearsay evidence, you would say that is unconstitutional?

A We say, Your Honor, when there is basically unfair, and that this Court has held it, in cases where there is direct conflicts in the crucial issue to be decided, and it is an issue which gives rights or denies rights to the individual, that he is entitled under the Constitution to a fair hearing and this Court has held that a fair hearing requires confrontation and cross-examination.

Q Do you mean by that in this instance -- I gather you did --

A Yes, sir, we definitely --

Q -- hearsay evidence should not be used?

A We mean that it cannot be considered by the decision-maker in rendering a decision.

Q Well, then, it would be no good.

A That's right. In fact --

Q What good would it do to subpoena these doctors? Did this man have a lawyer at the hearing?

A Yes, sir. I was his lawyer at the hearing. Let me say this is one of the crucial points.

Q Just one moment. If you subpoena the doctors, do you think that you would be able to shake them down and make them change their testimony?

A Let me say this, Mr. Justice Marshall --

Q Do you?

A Yes, sir. In the Workmen's Compensation proceeding where these doctors were called, the man was granted total permanent benefits --

Q Well, all I am trying to say is --

A -- which is a perfect example.

Q -- did you offer any experts?

A We offered one doctor.

Q My question was did you offer any experts.

A Well, I considered that the doctor was an expert witness.

Q Expert in what field?

A In medicine, Your Honor. In other words, are you saying did I offer any specialists?

Q Yes.

A No, I did not, Your Honor.

Q Were you prevented from doing it?

A No, sir, and it is our position in response to that --

Q Well, do you think the proper way to contradict the medical testimony is by your cross-examination and it could be done by contrary affidavits?

A Your Honor, I would say this to you, it has been my experience -- and I am a trial lawyer who is the plaintiff's lawyer -- that in many cases, one is this example, that when the doctors have to come and testify, not only sometimes it isn't a question of shaking their testimony, but showing their bias and making their position look ridiculous.

For example, the medical advisor in this particular case, Dr. Leavitt, testified on the record that he would consider no person in this country disabled even a quadra amputee if they were given proper treatment.

Q He testified to that?

A Yes, sir, on page --

Q Do we have benefit of that in the record?

A Yes, sir.

Q What page is that?

A 115 of the record, Your Honor, and it is down right at the bottom. The reporter has got quadra amputee spelled wrong, but it is right at the bottom.

Q If he is given proper training?

A If he is given proper training, proper care, he says there is no person who is disabled in the country, even one with all of his arms and legs off. I don't think this was

the intent of Congress, that no person should be disabled.

Q Well, he was there for cross-examination, wasn't he?

A That's right, but he had never examined the man, and this is the significant thing. He comes along and says, even though I have never examined this particular individual, I have looked at the doctors' reports and I have looked at the transcript of Dr. Morales' testimony, and I think these doctors' reports are wrong and this doctor is right. Well, we don't feel that that is necessary in any event.

Q Well, is the administrative determination subject to judicial review?

A Yes, sir, it is, but only under the substantial evidence rule, and I think this is another significant thing, is 32 percent of the awards which have been appealed under the substantial evidence rule have been sent back, which means that the courts found there was no evidence --

Q Oh, not necessarily. They are sent back for re-evaluation many times, and are set for further hearing. This doesn't follow what you said.

A They --

Q Now, let me ask you this: Why did you not call a specialist in?

A It is our opinion, it was our judgment at least that once we made our case, it is not our burden to disprove

the government's case. In effect, that is what we are being asked to do.

Q You feel you made your case with the general practitioner's testimony on as an elusive a subject as back injury?

A Yes, sir.

Q How was the injury incurred in this case?

A This man was picking up a bundle of shingles, Your Honor, and -- he was a truckdriver and unloading some shingles, he picked up a bundle and injured his back.

Q And has he worked at all since then?

A No he has not. In fact, it shows in the record only in his application to proceed in formal pauperous, one year after this hearing this man had a back fusion, which means all of these doctors who said there was nothing wrong with him were found to be wrong and the general practitioner, who testified that he was disabled and there was something there even though he had no objective evidence, was subsequently proven correct.

Q Now let me track you down on that. There was something wrong with him because he had a fusion, is that what you are --

A In other words, the doctor would not have done a fusion unless he found that there was some problem in his back that required this fusion.

Q Well, he might have felt it might help this man in some way, knowing he had a fusion.

A Well, the doctor obviously would not have done a fusion if he felt the man did not need it, Your Honor.

Q Well, he was in there, he was in the back --

A Yes, sir.

Q -- and many times, do they not make a fusion anyway?

A It has been my experience, at least in the trial practice, and I have tried many back cases, that a fusion is done only as a last resort when you cannot eliminate the pain by any other method.

Q Did it eliminate his pain?

A This man has had less pain but he is still -- the man has a third grade education and he has not been able to go back to work. This accident happened in 1965.

Q What does the third-grade education have to do with his pain?

A Well,many people can -- for example, a lawyer can work with pain, or an accountant, even though he has back pain, can perform labor. But a laboring man whose really only asset is his back is one who if he has a great deal of pain in his back cannot continue to earn a living.

Q You seem to be saying that when a back fusion is done, a spinal fusion is done, that proves that it should

have been done.

A No, sir. We are saying that there was something wrong with this man's back at the time that all of the specialists said this was just of a mild severity and that he could go to work.

Q Well, this isn't in the record anyway, is it?

A This is not in the record and we simply mention it because these questions were brought up.

Q In your judgment, did the trouble he had have a medical name?

A Well, the doctors that we had said it was a back sprain. I have not gone in and -- actually, after the Workmen's Compensation proceeding that was tried where he was granted total disability, I have not gone in and followed the medical records that closely because that would have to be reserved for another hearing. But at the time of the hearing it was held that he had a back sprain. His own doctor said that the pain was so severe that he could not work. The insurance company doctor, as well as the doctors from the state agency, said he had something wrong with his back but they felt that he could work, based on this.

Q What was it you said caused this sprain?

A His lifting a bundle of shingles, Your Honor, when he was unloading a truck.

Q You have made the point that there should be an

independent hearing examiner for each one of these.

A Yes, sir.

Q Does this record contain any estimate as to how many hearing examiners it would take to handle the 20,000 hearings?

A In an article cited in the amicus brief in the Mississippi Law Journal, it states at the present time there are approximately 200 examiners in the United States, each of whom hear an average of 8 to 10 cases per month.

Q Well, are you suggesting that we apply that to figure out how many hearing examiners we would need to hear these 20,000 cases?

A Well, those hearing examiners now hear these 20,000 cases, Your Honor. All we are saying is that we should make these hearing examiners independent and do just like is done in the longshoremen's cases and make the government attorney come in and present the government evidence.

Q Then it doesn't make any difference. You have got to get some more people to take the place of those bodies. You would have to get some lawyers to do what the hearing examiner now does for the Social Security department, wouldn't you?

A Yes, sir, that is correct.

Q But if they stayed on as lawyers, is there any figure as to how many examiners you would need, how many --

A No, sir. In other words, we don't see that they would need any more examiners. They would just need about -- they could use members from the U.S. Attorneys Office, that with only 200 examiners, this would not be an extensive available use of manpower. I mean if you say that a lawyer can be basically fair in this context, you could say well the plaintiff's lawyer should be the hearing examiner, he is a lawyer, he has gathered the evidence for his claimant, he can listen to the government's evidence, but that is ridiculous and we all agree with that. But it is really not any more ridiculous than allowing the government's lawyer who has gathered the government's evidence to be the hearing examiner and the independent man.

Q Assume that you put on government lawyers at each one of those hearings, then the next request would be to insist that each one of the applicants have a lawyer to represent them, paid for by the government.

A Not necessarily, Your Honor.

Q Why not?

A Well, the reason is that this is not such a -- in other words, the rights granted by Social Security are not such a fundamental right that you are required to have counsel, although HEW has pilot programs around the country where they are providing attorneys for all Social Security claimants. But they have done this on their own.

Q Well, I mean there would be a legal requirement, I would assume. If you raise it to the state where you have to have a formal fact-finder and a formal presenter of evidence, you are getting pretty formal.

A Well, there have been --

Q You then have an adversary proceeding.

A Yes, sir, but there has been no requirement in civil cases that you are required to have a lawyer.

Q Well, what are you required to do that you object to?

A Pardon, sir?

Q What does the examiner do? He gets these medical reports, right?

A Yes, sir, he does.

Q He puts them -- he reads them and puts them into evidence?

A Yes, sir.

Q All right. What else does he do other than to hear --

A Well, he cross-examines the claimant, he --

Q Does he cross-examine or does he examine?

A Well, I think if you look at the record in this case, Your Honor, you will find that really he cross-examines the claimant and almost takes an adversary attitude.

Q Well, suppose I find that he didn't cross-examine,

then what would you say?

A Well, our position would be --

Q What is so evil about it?

A Well, as we have cited in our brief, it is mere appearance of evil. You may have a man who is completely fair as a district attorney and who could get up and judge exactly the cases that you put on.

Q So in this case if we had a lawyer presenting the evidence, you wouldn't be here now?

A I would be here on the point of the hearsay evidence, yes, sir, I would.

Q I am just trying to find how we can get out of this completely and satisfy you.

A What we ask is we ask that there be an impartial fact-finder which Mr. Justice Brennan says has to be essential in Goldberg.

Q Like a jury?

A No, sir. A hearing examiner can be an impartial fact-finder but not one who is required to gather all of the government's evidence.

Q Wait a minute now. Again I say what is all of the government's evidence, it is reports of these doctors. Is that all of it?

A No, he can gather other evidence such as evidence of --

Q Well, how about in this case?

A In this case he went out and subpoenaed in the evidence of fellow employees, he brought in the medical advisor, and this is all that he did in this case.

Q Right.

A What we are asking for is --

Q All he got in this case was the medical advisor.

A That's right.

Q And he says you look over this at your expertise and give me your impression of it, which I can take or leave, is that right?

A That is correct, Your Honor.

Q Now, how do you extend all of that to he marshalled the evidence and all? All he did was to pick up what was mailed to him.

A Not necessarily, Your Honor. He had --

Q In this case.

A He went out and secured the insurance company, all of the records of the insurance company doctors as well.

Q Did he go out and get them?

A Well, he had members of his staff go and obtain them, yes, sir.

Q So it wasn't him?

A Well, his staff was acting under his direction, I assume. Actually the type of hearing we are asking for has

been provided under the Longshoremen's Act for a number of years where there is an independent fact-finder, the government lawyer presents evidence, or the insurance company lawyer, depending on whether they are insured or not, and the claimant lawyer presents evidence.

Q And therefore it is unconstitutional -- is it done that way everywhere else?

A Pardon, sir -- no, I am not saying that just because the Longshoremens Act does it that way it is unconstitutional, but --

Q Your reference to the Goldberg case confuses me a little bit. Justice Brennan's opinion in the Goldberg case didn't describe the kind of examiner you are talking about. He merely said, as I recall it, that once the benefit has been declined by one member of the staff of the agency, then the review of that must be by a different member of the staff. Now that is not the kind of independent examiner you are talking about.

A Well, Mr. Chief Justice, he stated in the opinion, of course an impartial decision-maker is essential, and then cited two cases, In Re Murchison and the Wong Yang Song vs. McGrath.

Q But you have to relate that to what was decided by the Court in the case. It merely said that a different member of the staff --

A Yes, sir. The actual decision was not this but the dicta was in the opinion, that this impartial decision-maker is essential, and cited these two cases, one of which has almost the identical type of hearing examiner that we have here, and this Court held that it was a denial of due process.

Q Is this procedure subject to the Administrative Procedure Act?

A Well, this has been raised -- we took the position that it was, the Fifth Circuit took the position that it was not. The American Bar Association has filed a brief here saying that it was. Actually in the facts of this case --

Q The Wong Yang --

A -- it doesn't make any difference but --

Q One of the cases that Mr. Justice Brennan cited was the Wong Yang Sung case?

A That case held that the Administrative Procedure Act actually required this.

Q It wasn't a constitutional holding at all?

A No, sir.

Q You say required this, do you mean what?

A Required an impartial hearing examiner who does not marshall the evidence for the government.

Q But that wasn't a constitutional decision, Wong Yang?

A No, it was an Administrative Procedure Act

decision but there have been a number of -- in other words, the decisions of this Court have indicated that an impartial decision-maker is something that is implicit in a fair trial.

Q Let me ask you from your brief whether you believe that the APA applies or should apply at all?

A Well, in the facts of this particular case it makes no difference. I would agree with the American Bar Association that the Administrative Procedure Act does apply. In our brief in the Fifth Circuit we took this position, but the Fifth Circuit, although they held for us, inferentially held that the Administrative Procedure Act does not apply. But both of these acts --

Q I suppose you are free here to defend the judgments you won below on the ground that they didn't decide in your favor if you want to, aren't you?

A Well, we --

Q Do you want to take the position with us that the Administrative Procedure Act does apply?

A Well, under the facts of this case, Your Honor, it doesn't make any difference.

Q All right.

A Because --

Q Why do you say that, because it applies, your hearsay would be admissible but it would be subject to cross-examination?

A No, sir. The Administrative Procedure Act says in the discretion of the hearing examiner the procedure at the hearing shall be in the direcretion of the hearing examiner in such a nature to afford the parties a reasonable opportunity for a fair hearing. That is all the Administrative Procedure Act holds. And the Social Security Act basically holds the same thing, but the Social Security Administration has taken the position in the past that even where there is a direct conflict, a fair hearing does not require the right of confrontation and cross-examination of the people on the crucial issue to be decided.

Now, this super hearsay that they say should -- the rule that should be adopted, they don't say whether it applies to engineers or architects or dentists or accounts or lawyers or any other professionals. They are trying to restrict this hearsay rule that we don't have to apply the normal rules of hearsay only to doctors, and we are trying to apply this on the basis --

MR. CHIEF JUSTICE BURGER: You will have five minutes after lunch. If you find that our questioning has discommoded your argument, we might add a little bit to that if you need it.

(Whereupon, at 12 o'clock meridian, the court was in recess, to reconvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION

1:00 p.m.

MR. CHIEF JUSTICE BURGER: Do you think you will need any more than the five minutes you have remaining?

MR. TINSMAN: I may need an extra five minutes, Your Honor.

MR. CHIEF JUSTICE BURGER: Well, we will give you three.

MR. TINSMAN: All right.

ARGUMENT OF RICHARD TINSMAN, ESQ.,

ON BEHALF OF RESPONDENT - RESUMED

MR. TINSMAN: Mr. Chief Justice, and may it please the Court --

Q You said, as we left, that you were not relying upon the APA?

A Yes, sir. It is our position that we are relying upon the APA --

Q I asked you about the cross-examination and you said that was not provided.

A The Administrative Procedure Act, Your Honor, provides that cross-examination --

Q Section 7(b) is the one that I was referring to.

A Yes, sir. A party is entitled to conduct --

Q I know what it says, but you said you were not relying upon that?

A Yes, sir, we are, but it has been interpreted because it says --

Q You say it is the same as in the Social Security Act, and I don't find it in the Social Security Act.

A Well, it is in the Social Security regulations, Your Honor, which are in the record -- I don't have it right here, but the Social Security regulations in effect says that you are entitled to it. But the Administrative Procedure Act, I agree, spells it out clearly, more clearly, when it says a party is entitled to conduct such cross-examination as may be required for a full and true disclosure of the facts. It is just that the HEW has interpreted that there is never a requirement for cross-examination of medical doctors for a full and true disclosure of the facts.

Q Well, that doesn't preclude you relying on it here.

A No, sir, it doesn't.

Q You want us to give it a different interpretation.

A No, sir, it does not.

Q I suggest to you again that you have merit in your point, that since you are defending a judgment below, you don't have to defend the opinion, you can defend it on any ground you raised below, can't you?

A Yes, Your Honor, in other words -- thank you, sir.

Q You can even defend it on the ground that it is right.

A Yes. Well, what we are taking the position is that regardless of whether or not the Administrative Procedure Act said this or not, the due process requires this, and Mr. Justice Brennan, in Goldberg, said in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.

Q You notice he said "almost."

A Yes, sir.

Q Not every situation, and you have to read that in light of what was decided there.

A Yes, sir.

Q In that the hearing officers were not totally independent and it wasn't a total adversary due process.

A Well, Your Honor, what the government itself says when it comes to other cases where the poor people aren't involved really doesn't rely on this concept of inherent rightness of the doctor's reports; in cases involving the revocation of a pilot's license, for example, where a $40,000 or $50,000 job may be at stake, the FAA does not simply allow introduction of reports. But they go ahead and allow the pilot to put on his doctor, the FAA puts on their doctor, and then the hearing examiner, after evaluating that testimony, not the reports,

goes ahead and makes the decision. And so the government is seen to take the position when there are a lot of cases and where poor people are involved, we have one standard, and where there are few cases and more affluent people involved, we have a different standard.

Basically, the Solicitor General took the position that it really doesn't make any difference that the doctor is just going to get up and read his report and that is all there is to it; where, as a member of the trial bar and have tried a number of cases, I will say to you that in my opinion this is the real key, this makes a tremendous difference as to whether you can win or lose your case, as to whether you can cross-examine the doctors who are relied upon by the government.

Many doctors, for example, we see --

Q Well, if it makes that much difference, why didn't you call the doctor?

A Because it is our position first a practical matter. You recall the government doctor gets paid $125. If we subpoena them they get paid the witness fee of $20. In our area, it is unethical, because we have agreement with the medical association, to subpoena a doctor without paying him his reasonable fee as set up between the bar.

Q I thought the government would pay him.

A They pay him the $20 witness fee, Your Honor, and nothing more, not any stipend like they pay their own

doctor. And so what we are faced with if we have to call their doctor is we have to pay his fee for coming in attempting to disprove the government's case, which as a practical matter --

Q Pardon me, Mr. Tinsman. The Social Security taxes support the disability --

A Yes, sir, they do.

Q In other words, your client has been making contributions toward disability as well as the other benefits?

A Yes, sir, he has.

Q Well, would you have any real objection here if the government said to you, look, we give you your choice, you can either get a subpoena out to the doctor or not, now you have got your choice of either -- we will use either the report or the doctor, whichever one you prefer, but we are going to -- I mean that happens to be the rule, and you just don't happen to call a doctor at that time.

A Well, I think what you are basically saying, if you take that position, Mr. Justice White, is that we are not only having to prove our case but then once the government simply puts in a report we have to go forward and disprove the government's case, and that --

Q Well, that is a different point. But on the point you were making, would you have any real complaint if the government says you just tell us which you want, the report or the doctor?

A Well, in other words, we would always say we want you to bring the doctor here, and you pay them.

Q You would always say?

A Yes, sir.

Q Even though you have got an expert that you are going to call?

A Yes, sir, because we have found, Mr. Justice White, it has been my experience that we have found that many of these doctors in their reports will say this man has a 20 percent disability, which means of course he doesn't have a total disability. But this same doctor will testify, when he comes to a hearing, that the only way he will give a man a hundred percent disability is if he is paralyzed from the neck down, unless he is bedridden he doesn't give people a hundred percent disability.

And the further thing that is shown here in this very case, in the Workmen's Compensation proceeding, the doctors had to be called and had to testify, that fact finder found that he was totally and permanently disabled.

Q What does he do now, anything?

A He does not do anything, sir. I think if the government really believes that the doctors' reports were so inherently -- of such inherent probative value, why wouldn't they just simply take the claimant's doctor's report and dispense with all these independent doctors?

Q Was it his own physician who indicated that there was so psychosomatic involvement here?

A His own physician indicated that there was an emotional overlay, and this together, these two factors, that prior to the injury he was able to go out and earn a living, even with the pre-existing emotional overlay, but with the back condition that he had and the emotional overlay that he had partly brought on by his destitute circumstances, and Social Security said you cannot even apply until you have been unemployed for six months, and in this case the hearing wasn't had until he had been out of work for over a year and a half.

So generally these people are pretty destitute by the time they get to a hearing examiner, and anyone who has been out of work for a year and a half is going to have some emotional overlay.

Q Mr. Tinsman, what would you say if instead of calling these -- using these panels of doctors, specialists, if these matters were referred to the panel of specialists to act as triers and let them make the decision? You wouldn't expect that you could cross-examine a hearing officer, would you?

A No, sir, but in effect what you are saying is allow the medical advisor to be the hearing officer as to medical disability, is that correct?

Q Do you think that is unconstitutional or

otherwise --

A I would say this, Mr. Chief Justice, that unless at the hearing before the hearing officer that you allowed the man to have the cross-examination of the doctors who opposed the contention of his doctor, that this would be a denial of due process. Now, if you allowed a doctor to be hearing examiner, that would be fine.

Q Perhaps that would -- you see no objection in the statute or the Constitution to having the file in a situation like this referred to the doctors and let their decision be made as the determiner, the triers of the issue?

A It depends on how -- I don't agree that just a file should be referred to them, Your Honor, maybe the testimony as taken --

Q Testimony and the file.

A -- down, and if you make them the final arbiter on all medical questions, this would be -- in other words, you would be making them the independent fact finder, and this would be constitutionally permissible. But one of the problems is who do you accept as a doctor. The state agencies many times select doctors who, because they are attempting to hold down the costs of their own disability programs, are generally very conservative and are hesitant to find disability in a man, particularly where it means that money will be paid out of the public treasury, and this is the type of doctor generally that

is selected by the state agency.

An example is Dr. Leavitt here, who would find no one disabled unless they were -- even if they had both arms and both legs gone --

Q Well, he didn't quite put it that way, did he?

A No, he didn't quite put it that way.

Q No.

A I think it indicates his thinking.

Q Mr. Tinsman, let me bring you back to the merits. How many specialists had reports in this man's file?

A This man had been seen by Dr. Munslow, who was a doctor --

Q How many? How many?

A As I recall, there were four, Your Honor.

Q Four.

A And then there was an additional one we submitted to the appeals council, so five.

Q What would you do, as an attorney, would you demand all five physicians show up at this hearing?

A No, sir, I do not say that.

Q What would you do?

A In other words,I would say that the government has to have at least one doctor, specialist or non-specialist. In other words, they have to have some substantial evidence.

Q Well, suppose one showed up, would you object to

his reference to the reports of the other four?

A It depends on what the other four found. If the other four were finding subjective things, such as noncooperation and things of that, I would object. If they were simply referring to actual positive tests, like the reading of an x-ray or --

Q Suppose they contain what they usually contain, the diagnosis, would you --

A I would object to them referring to another doctor's diagnosis. I would say you have to testify from what you found.

Q In this case you would insist on five physicians being subpoenaed?

A No, sir, I would not.

Q Being present?

A No, sir, I would not. I would insist on only one being present, and if the government had one present and he testified, then this would be for the hearing examiner to evaluate -- not all five present. And I would say this, there was one specialist who we found out later, because normally reports to the state welfare agency are not open to the claim-and, we found that a specialist in the same office as of Dr. Langston, who was relied on by the government, who was a partner of his, had found this man did have a post-operative herniated disc, but we couldn't find that out until later because this

report was not made available to us.

Q Well, I still don't understand why the government hasn't in effect said to you, look, Mr. Claimant, you know we're going to rely on written reports of doctors, but all you have to do is tell us and we will have the doctors there by subpoena if you want them. Now, why isn't that the practical situation?

A The practical situation is not there, Your Honor, because, number one, they don't have to subpoena who you request and, secondly, even if they do --

Q I know, but you didn't even ask them.

A That's right,because we take the position that what in effect then you are requiring us to do is not only prove our case but we have to come in, if we put the witnesses on, and disprove the government's case.

Q No --

A What if these witnesses testify adversely to --

Q You don't know what would have happened if the doctors had been there. The government might well, in putting on its case, if there is any formality at all, the government might have much preferred to have the live testimony of the doctor, if he was there.

A Well, they had a second hearing, Your Honor, in this case. The government did not choose to call their doctors in the second hearing, and brought in --

Q Well, you didn't choose to ask them to be there, either. All you had to do is say so and they would have been there.

A Well, from the reports they certainly wouldn't have helped us, and so it was our position --

Q Exactly, and you tell me that you would always have the doctor there. If you thought that doctor was going to hurt you, you wouldn't have him there; if you thought he was going to help you, you would have him there.

A If I was calling him directly.

Q All you had to do is ask and, as far as we know, the government would have had the doctor there. And you didn't ask.

A But if I had to have a choice between the report being relied on by the hearing examiner or the doctor's personal testimony being relied on by the hearing examiner, even though I knew both were adverse to me, I would rather have the doctor there.

Q Well, why didn't you ask the doctor to be there?

A Well, it was a decision that we made that we felt that if we had asked the doctor to be there, in effect, number one, we would be vouching for the doctor, number two, we would have had to pay the doctor.

Q Well, I don't know how you can stick the government with some agreement by your local bar association that you

pay doctors. I mean if you issue a subpoena for a doctor, he is going to show up.

A Yes, sir, but I have to continue to practice law in that community and if you do this as a practical matter there are going to be some doctors --

Q You can't build a due process claim out of that, I don't think.

A No, we're not building -- in other words, what we are saying is that we just don't have this obligation to in effect disprove the government's reports. In effect, this would mean that any administrative hearing, if the government put on the report of a lawyer or an engineer or anything else--

Q No, they tell you in advance we are going to rely on the written reports unless you want the live testimony there. Now, if you want the doctors there, you just tell us, we will have them there before the hearing ever starts.

A Let me say this, as a practical matter, Mr. Justice White, they don't tell you that. They say the reports we will rely on can be examined by you on the morning of the hearing or in the examiner's office, and he is in Houston and it is not feasible to go two-hundred miles to look at the report that happens to be in his office.

Q Are you suggesting you didn't know you had the right to subpoena the doctor?

A Oh, we knew that we had the right to subpoena the

doctor.

Q Well, then, you knew what choice you had.

A We did not know all of the reports that he had in his file. Some of the reports, Your Honor -- in fact, all Social Security reports that are made are not released to the claimant. It is against Social Security -- we have attempted to get them in other cases in the federal district court and the Social Security Administration has come in and said these are not to be released to the claimant, the man that was examined, because under the federal regulations they are absolutely privileged. So the only time you can see them is when the hearing examiner's file is opened to you, which means either going to Houston to look at them or on the morning of the hearing.

Q Mr. Tinsman, suppose the examiner says that I am going to appoint a medical advisor and I instruct him not only to look at the reports but to personally examine the man, and that doctor testifies, does that satisfy you?

A In other words --

Q Would that satisfy you?

A Yes, sir, that would satisfy me.

Q So the only difference is that the medical advisor didn't personally examine the man?

A That is correct, Your Honor, and it is our position --

Q That is your only point?

A No, no, no, no, that is our point on the medical advisor. Our point is that the government's evidence as to the disability was only --

Q It said that my report is based on the reports of the other doctors plus my personal examination of the man.

A I would object to that. I would say his opinion should be only on his examination of the man.

Q Well, suppose they didn't agree with the report, he --

A Well, that is another matter.

Q -- you mean you don't want him to read the report?

A I think he can read the report but he must form his own independent evaluation. In other words, he can say I have read these reports --

Q Of course.

A -- and I disagree with them.

Q That would satisfy you?

A Yes, sir, that would satisfy me.

Q That is all you want?

A What we want is a man that has examined him to testify in the hearing, yes, sir. And our position on this medical advisor thing is if they really believe in these doctors, whose reports they say are inherently right, why don't

they just bring one of those doctors to be the medical advisor rather than bringing in a man who has never examined the man.

Q By the way, who has got the burden of proof, the claimant?

A The claimant has the burden of proof, Your Honor.

Q That is what I thought.

A And he has the burden of proof and --

Q And so the government asking you to prove your case is not really turning things around.

A Well, when we bring our doctor who testifies that this man is totally disabled, Your Honor, we feel that we have met our burden of proof, and then the burden of -- if the government wishes to contest this, then they must come in with the proof that says no, your doctor is wrong, he is not disabled.

Q Suppose Congress passed a law providing these people to sue in court, but provided in the law hearsay evidence would be admissible?

A Well, I think, Your Honor, that if we really feel that what Mr. Justice Brennan said in Goldberg is that -- in almost every setting where important decisions turn on questions of fact -- due process requires an opportunity to confront and cross-examine adverse witnesses, that this would be highly suspect as a violation of due process, that Congress cannot provide this. Now, the Court said almost every situation

is for this Court to determine which are the exceptions.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Tinsman.

Mr. Friedman, we have gone considerably over, if you have some more observations, we will give you some additional time here.

MR. FRIEDMAN: Thank you --

MR. CHIEF JUSTICE BURGER: How much do you think you would --

MR. FRIEDMAN: Oh, I think another five minutes will certainly be plenty.

ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF PETITIONER -- REBUTTAL

MR. FRIEDMAN: Right at the outset, I would just make two little factual points. First, in the previous discussion over the role of the examiner in this case, I want to make it clear, these examiners are appointed under the Administrative Procedure Act. They are the typical APA examiners who preside at normal agency hearings. They are not under the control of the Secretary of Health, Education, and Welfare. They are independent examiners.

Now, on another point that was made, I have been advised by the Social Security people that if a written is subpoenaed at the request of the claimant, the government will pay a reasonable fee for his appearance. I am also told that if a request is made to examine the file prior to the hearing,

and if the hearing examiner's office is 200 or 250 miles away, arrangements can be made to temporarily send the file to a local place where the man is so that the claimant or his attorney can examine it.

Now, finally, I think it is important to note two aspects of the case. First, on the medical examiner's testimony, it seems to me that basically what the medical examiner's doing in this case is pretty much the same thing --

Q Adviser, you mean?

A Pardon?

Q Adviser.

A The medical adviser. I'm sorry, I misspoke myself. What the medical adviser is doing in this case is what any expert witness is doing, the only difference is in the case of the traditional expert witness in court, he gives his opinions in response to a hypothetical question, a whole string of hypotheses that are put together. And I take it if in this case the examiner had attempted to summarize the medical reports that had been presented and then to summarize what had been testified to at the hearing, there would be no objection to the adviser giving his expert judgment on that basis.

Now, certainly in this kind of informal proceeding that we have in these hearings, I don't think there is any need to resort to such formalism. The examiner made it very clear in his questions put to the medical examiner, that he

was asking the medical examiner to give his opinion on the basis of the material included in the reports, on the basis of the testimony, and to whatever extent there might be any infirmities in the report, to whatever extent there might be reason that the report might not be accepted, that was clear on the record. This is not the case of a jury having to have expert opinion solicited on the basis of hypothetical questions because otherwise they might assume facts that hadn't been proven. This is an informal administrative proceeding.

Now, the charge has been made here that the examiner was unfair, that this whole proceeding is unfair, and there are references to the statement of the need for cross-examination and so on.

Q Does the statute use the word "unfair"?

A No, no. The statute, Your Honor, says that the Secretary shall -- it says the Secretary shall have full power to make rules and regulations and shall adopt reasonable rules and regulations to regulate and provide for the nature and extent of the proof and the evidence and the method of taking and furnishing the same. And then under that statute the Secretary has adopted regulations which give the examiner broad authority to conduct the hearing as he sees fit, and it says that it is within the discretion of the examiner to determine the procedures as hearing examiner provided it is in such nature as to afford the parties a reasonable opportunity for a

fair hearing.

We think that has been given, and we think the fairness of this is demonstrated by the fact that in at least a third of these cases the claimant prevails after the hearing. And I suppose in many instances it may be that when the examiner receives the claimant before him, he gets a different view of the examiner's judgment as to what the reports show and what their significance is.

Q Mr. Friedman, is the hearing of these kinds of cases a full-time job for these examiners?

A Yes, this is a --

Q This is all they do?

A Yes, this is all they do. And I might say that these examiners, prior to the time they start on the job, they get some kind of a course in which they get some basic medical information, you know, a six- or eight-week course, in which they are instructed, I understand, by various specialists in the field. And certainly when, as I said, the proceeding was not an adversary one, and the failure of the claimant in this case even to request that these witnesses be made available -- he never subpoenaed them. And the court of appeals -- he doesn't mention that the court of appeals itself in this case recognized that his failure to call the witnesses precluded him from complaining of the fact they weren't there for cross-examination.

Q Suppose the Congress were to pass a law providing that cases against private insurance companies should be tried under this same statute, and that the findings of the Secretary would be final and binding, what would you say about that?

A Well, in effect, I think it would again depend on what kind of case it was. There might be some problems of the Seventh Amendment on the right to a jury trial, but we do have --

Q It would be, wouldn't it?

A Yes, but we do have a similar kind of proceeding, Mr. Justice, under the Harbor Workers Compensation statute which traditionally you have it held before a deputy commissioner and there are two parties. There will be the claimant on the one hand and the --

Q That is against the government? That is the difference, isn't it?

A That is a government case, yes.

Q That is the difference in both of these cases, isn't it?

A That is correct. That is right. This is the government, and the government I think can, in dealing with these many problems resort to these more informal proceedings that have been developed in recent years.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman. Thank you, Mr. Tinsman. Mr. Tinsman, you acted at the Court's request and our appointment?

MR. TINSMAN: Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: We thank you for your assistance to not only the petitioner here but for your assistance to the Court.

MR. TINSMAN: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: The case is submitted.

(Whereupon, at 1:25 o'clock p.m., argument in the above-entitled matter was concluded.)

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