In the

Supreme Court of the United States

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Petitioner,

v. No. 74-204

GEORGE H. ELDRIDGE,

Respondent.

Washington, D.C.
October 6, 1975

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Monday, October 6, 1975.

The above-entitled matter came on for argument at 11:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT H. BORK, ESQ., Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Petitioner.

DONALD E. EARLS, ESQ., Cline, McAfee, Adkins & Gillenwater, 1022 Park Avenue, Norton, Virginia 24273; on behalf of the Respondent.

C O N T E N T S

[Afternoon session - pg. 50]

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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 74-204, Mathews against Eldridge.

Mr. Solicitor General, I think you may proceed when you're ready.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BORK: Thank you, Mr. Chief Justice.

May it please the Court:

We are here on writ of certiorari to the Court of Appeals for the Fourth Circuit. And the issue we brought up is the question of whether Social Security disability benefits can be terminated in a procedure which allows for the submission of evidence by the claimant, written evidence, but does not include an oral hearing.

The court below held that an oral hearing was required by the Fifth Amendment's due process clause under an extension of the rationale of Goldberg v. Kelly.

Here, the Secretary of HEW terminated respondent's disability payments in 1972, on the basis of medical reports, and respondent was given a summary of that evidence, given an opportunity to submit additional evidence and a written rebuttal. There were post-termination procedures available to him, including a full oral evidentiary hearing, which I'll describe in a moment, but he brought this suit instead of

availing himself of those procedures, claiming a constitutional right to a pre-termination oral hearing.

I have two propositions to advance: The first is a late-blooming jurisdictional issue; and, to be candid about it, the reason it's late-blooming is because our initial analysis of the application of Weinberger v. Salfi, decided last June, to this case resulted in a conclusion which we now think erroneous, that the District Court had jurisdiction here. We proceeded for some time on that belief, and it was not until work on other cases required re-thinking of the problem that we reversed ourselves and came to a contrary conclusion, that Salfi's rationale precludes the District Court's assertion in this case.

QUESTION: I'm asking you to make statements against interest, but will you, sometime, tell us why -- the basis for your original conclusion?

MR. BORK: Well, the basis for the original conclusion was not my own conclusion, Mr. Justice Stewart. But I believe it was that the constitutional issue might be final here. I believe the thinking was that the --

QUESTION: When you're attacking the very validity of the very process under which you could proceed?

MR. BORK: I think that was the reason.

QUESTION: But that's the issue, is whether or not the very process, the administrative process is a valid --

constitutionally valid or not?

MR. BORK: That is correct; that is correct.

But, coming to the opposite conclusion, we prepared a brief on the jurisdictional issue and served typescript on respondent's counsel a week ago, and obviously they should have time to reply in a brief --

QUESTION: You mean they should now be given time?

MR. BORK: That's correct, Mr. Justice Stewart.

QUESTION: Yes.

MR. BORK: To file a brief in response.

QUESTION: Right.

MR. BORK: I have really very little to add to the jurisdictional argument made in that supplemental brief. So I'd like merely to outline it, and spend most of my time, if I may, on the due process question, where I believe there may be something to add to the brief.

The jurisdictional problem is this: The relevant statute is Section 205 of the Social Security Act, codified as 42 U.S.C. 405,and 205(h), which was involved in Salfi as it is here, states that "no findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided.

Now, in Salfi, this Court concluded that 205(h) precludes the assertion of District Court jurisdiction, except in so far as jurisdiction is then provided in section 205(g).

And if we turn to 205(g), we see that it confers jurisdiction upon District Courts to review any final decision of the Secretary made after a hearing.

Those provisions were not dispositive in Salfi, but they seem to be here. In Salfi, the only issue was a constitutional issue, whether a categorization made by a statute was a constitutional categorization. So that it would have been, as the Court said, futile and wasteful to require the claimant to exhaust the administrative process. And he also decided, the Court also said that the Secretary had decided that the reconsideration decision involved in Salfi was final.

Now, neither of these grounds is present in this case. Here the Secretary did not base his decision on a statutory provision or a statutory categorisation of eligibility, which is subject to constitutional attack, but upon a factual determination that this respondent was, in medical fact, no longer disabled. And it would not have been futile and wasteful to ask this respondent to exhaust his administrative remedies, which, as I say, would have included an oral hearing.

Moreover, the Secretary has not here determined that the order terminating disability benefits was final. He was entitled to administrative reconsideration, to an evidentiary hearing, and so forth. He availed himself of none of this, but brought suit before the Secretary had made a final

decision after a hearing.

Since 205(g) does not confer jurisdiction under these circumstances, 205(h) bars the assertion of jurisdiction by the District Court.

I think that's no mere technicality. It's important to judicial administration, of course, that administrative remedies be exhausted, even when not required by statute, and here Congress has specifically mandated the exhaustion of administrative remedies.

I should like now to turn to the merits of respondent's constitutional claim about due process.

The issue is whether he is entitled, as a matter of due process, to a full oral evidentiary hearing before any benefits paid to him under the disability insurance program may be stopped.

The considerations to be weighed in making that decision, of course, are well known, they were outlined in Cafeteria Workers v. McElroy and stated in a number of later cases. What constitutes constitutional due process in a given context depends upon intensely practical considerations peculiar to that case and that process, and a balancing of the governmental interests and the private interests that are affected.

We are, in effect, dealing with a cost-benefit judgment, and, so viewed, the question becomes really how many

-- the decision of this case will have a heavy impact upon the decision of how many decisional processes of government must be conformed to a judicial model rather than to an administrative model.

I think that's important, and I think clearly there has to be a stopping point somewhere to the imposition of judicial models upon the governmental decision-making, because it's very expensive, and in some circumstances -- which I would contend this is one -- adds little or nothing to the alternative procedures provided.

Now, --

QUESTION: You mean expensive not only in terms of money?

MR. BORK: I mean expensive in terms of money expended, in terms of --

QUESTION: Time.

MR. BORK: -- time, and indeed I think, in this case --

QUESTION: And efficiency.

MR. BORK: Yes. And I suppose it's socially expensive because, I think, in this case, for example, if one were required to continue payments until an oral evidentiary hearing could be had, one would pay a lot of money to beneficiaries who claim the hearing, so that only for the purpose of keeping the payments going; but I think that imposes

a social cost, independent of money, upon the erosion of individual character.

But, in this case, which involves one of these massive programs, with thousands and hundreds of thousands of determinations in it, I think we face something not like the ordinary hearing of due process case, although, of course, this Court has had cases similar to this before. But it's crucial here, I think, to understand the --

QUESTION: And what's the issue before us?

We had reached it or something in some other case?

MR. BORK: Yes, in Richardson v. Wright, I believe, Mr. Justice Brennan, although these are the procedures that had just been instituted prior to oral argument in Richardson v. Wright.

QUESTION: Yes. We sent the case back for reconsideration in light of new procedures, wasn't it?

MR. BORK: That's correct. Although I think the thought was that the claimant there might actually, under the new procedures, be paid. And the case would be mooted by that.

QUESTION: And these are those new procedures?

MR. BORK: These are the new procedures, Mr. Justice Stewart.

And I think it's important to see the kinds of safeguards they provide, and the kinds of results they produce.

The Act provides that the initial determination, after

a man has been qualified, a worker has been qualified for disability payments, he is told if there is any possibility of recovery from his medical disability that he will be examined to see if recovery has occurred. Because if disability ceases, the payment ceases.

And the Congress has mandated that State agencies be used for making the initial determination about cessation of disability. And the reason for that is they want to draw these workers into vocational rehabilitation therapy and training. And those are primarily the State agencies that are used for this purpose.

So that a State agency, working under standards and procedures laid down by the Secretary of Health, Education, and Welfare, requests the worker to supply information periodically on a questionnaire, and it shows his present condition, his medical treatment, medical restrictions placed upon him, and so forth.

If that questionnaire does not show clearcut recovery, the State sgency then obtains information from the treating physician of the claimant, it may obtain independent consulting examinations. In this case, of course, the initial determination was made on the basis of a previous medical record which was in the file. The respondent's current answers to the questionnaire abouthis condition, the current report of his treating physician, and the report of an independent

psychiatric consultant who was called in by the agency.

Now, this material, when it's gathered, is then reviewed by a State agency team, which consists of another physician and a trained disability examiner. If the worker is no longer disabled in their opinion, after examining this record -- and I should say that the only issue is one of fact, a medical -- the statute requires that disability be proved or disproved by medical evidence and not by other kinds of intuitions, is evidence that is well presented, in other words, in a written record.

If they decide that the claimant is probably not disabled, they think he's not, they inform him of that tentative conclusion, they provide him with a sumary of the evidence and they provide ten days for him to respond in writing, and they tell him that if he wishes additional time because of the difficulty of procuring the evidence he needs, he may have it. They also tell him he can get his questions answered at the local Social Security office.

Now, here, as in all other stages of this process, the worker is entitled to be assisted by counsel or by any other representative he chooses -- he often is by a union representative or something, somebody of that sort -- and that person is entitled to examine all the evidence in the file, including the medical evidence.

Respondent here declined to offer any additional

evidence, other than to assert that he didn't have back sprain, he actually had arthritis of the spine. Many workers do offer additional evidence, and often get the initial determination of "no disability" reversed.

But if the tentative conclusion of the State examining team is not changed, the report is forwarded to the Social Security Administration's Bureau of Disability Insurance, where it's reviewed, to make sure that it's in conformity with national standards.

If that office thinks that perhaps the decision should have been favorable to the worker but was not, it has no legal power to change it, but it may, and does, send the case back for reconsideration; and I believe about half of those cases sent back for reconsideration are reconsidered favorably to the worker.

If, however, the Social Security Administration accepts the determination of "no disability", it notifies the worker, in writing, states the basis for its initial determination and specifies his right to seek further review. At that stage, benefits are terminated, although there is a two-month grace period, after the month in which he ceased to be disabled.

That grace period may sometimes have run by then, or it may still have some time to run. Respondent, in the course of this stage, filed suit. He had a right to the following additional remedies, which he did not elect to take:

He can ask for a reconsideration. He gets it automatically. That means that a wholly different team of physician and examiner at the State agency review the record de novo, consider any additional evidence submitted by the worker or obtained by the State agency, such as another medical examination, and that decision is again sent for review to the Social Security Administration.

There is a reversal rate that's significant at the reconsideration stage. If the result is again adverse to the worker, he can get an evidentiary hearing before a Social Security Administrative Judge. He may, but he need not, appear personally. The Social Security Administration is not represented by counsel or by staff, it is not an adversary hearing.

QUESTION: Mr. Solicitor General, you referred to the right of the worker to examine the file. I recall, I believe, something in the briefs to the effect that the worker himself could not see the medical evidence in the file, but his counsel could.

MR. BORK: That is correct, Mr. Justice Powell. I said that his --

QUESTION: What is the reason for that distinction?

MR. BORK: Well, it's a station in medical practice, apparently doctors often do not show a patient his own file. Either because embarrassment might result, or, in some cases,

because the doctor is not telling the patient all of the adverse news that is in that file.

HEW and Social Security, as I understand it, are now reviewing that practice and asking themselves whether they should conform to medical practice in that result, or whether they should allow the claimant as well as his representative -- it doesn't have to be a counsel; his representative -- to look at the medical evidence.

QUESTION: Is this distinction in the regulation?

MR. BORK: I believe it is, Mr. Justice Powell, but I can't locate it. I believe it's in the regulation.

QUESTION: Yes. And this means that a claimant who does not have counsel does not have access to that medical information?

MR. BORK: Well, Mr. Justice Powell, a claimant who cannot get anybody to represent him -- that is, it could be a relative, it could be a union representative, it could be any representative he chooses --

QUESTION: Could be his wife?

MR. BORK: Yes, sir. As far as I know, it can. If I am wrong in that statement, I will correct it.

QUESTION: Mr. Solicitor General, doesn't this cut across a rather fundamental proposition that the lawyer may not receive information on terms that it can't be transmitted to his client?

MR. BORK: Well, I have operated under protective orders, I think, --

QUESTION: Beg pardon?

MR. BORK: I think, Mr. Chief Justice, that I have operated under protective orders occasionally, to prevent him from --

QUESTION: Well, protective orders, are you equating the regulation to a protective order?

MR. BORK: It is, in the sense, Mr. Chief Justice, that I think under current medical practice the agency would have some difficulty perhaps getting medical reports, if doctors prefer or insist upon limiting access to their medical files.

Now, here the claimant gets a summary of the medical evidence and what it shows. The raw file is available to any representative he chooses. And HEW is looking at -- and experimenting, as I understand it -- with the possibility of opening the raw file to the claimant as well. But, as matters stand now, he may not look at it.

QUESTION: Well, at the oral hearing that he doesn't get, he can present whatever evidence he wants, I suppose, but he apparently is not entitled to have any witnesses against him appear personally?

MR. BORK: Oh, the regulations say, I believe, that he's entitled to subpoena and examination.

QUESTION: So he can -- but the government needn't put its case on to --

MR. BORK: The government puts on no case at the --

QUESTION: They just -- they've got the file there, and that's it?

MR. BORK: The file goes in, and the Administrative Law Judge is there, but the government is not --

QUESTION: But may the claimant subpoena the doctors and cross-examine them?

MR. BORK: As I understand it, he may. As I understand the regulations. If I'm wrong, I'm sure I'll be corrected on what I thought. The regulations say, as I understand it, that he's entitled to subpoena and he's entitled to witnesses.

QUESTION: And he can call them for cross-examination of what --

MR. BORK: That's what I understood. I hear some signs of dissent at counsel table here; but that was my understanding of the process.

QUESTION: Well, let me ask this: Do you think that the validity of the procedures at that hearing are at stake here?

MR. BORK: No, they are not, Mr. Justice White, because they are --

QUESTION: I thought it was just whether there needed

to be a prehearing, a prior --

MR. BORK: The only question here is whether there should be an oral evidentiary hearing prior to termination, and the post-termination hearing that was given in this case is not challenged.

QUESTION: Well then, it's not at issue here?

MR. BORK: No, it is not.

QUESTION: Except that -- except as it may bear on whether it's any kind of a reliable substitute for a prehearing or a priority?

MR. BORK: Well,it results in a -- as respondent's counsel will tell you, in a very high rate of reversal of those cases taken to it. So that it appears to be making real judgments. Of course, very few cases are taken that far, because most of these determinations are accepted.

QUESTION: I thought this respondent didn't have a post-termination hearing, that he didn't --

MR. BORK: He did not.

QUESTION: -- go into court before --

MR. BORK: He did not. He came straight to court after the initial determination.

But I just thought it was important to point out what this process offers, and it should be said that it does offer an impartial tribunal, it offers a chance to submit evidence; it offers decision wholly on the record; it offers the kinds of

benefits that were noted in Richardson v. Perales. That is, we have independent and unbiased physicians here. These are not government physicians. One of them is the respondent's physician. We have a very vast system with thousands and hundreds of thousands of determination, so that that makes for impartiality.

The agency does not operate as an adversary at any stage in this process; it operates only as an adjudicator.

So the due process question, I think, then comes down as looking at this entire, rather elaborate, procedure that's available. There are safeguards at every step.

What would be gained by moving an evidentiary hearing up before the initial termination decision, and what would be lost. I think very little would be gained, and I think a very great deal would be lost.

The issue is medical condition, which is not an issue that an Administrative Law Judge gets a great deal of information about by looking at a man in a room, if, indeed, the man comes, as he need not. And, indeed, the decision cannot rest upon the Administrative Law Judge's look at the man and feeling about his condition; it has to rest upon medical evidence.

So that the probative evidence here is the kind that can be in writing and can be challenged in writing. And he not only has his own doctor, his treating physician, and any

consulting doctor that Social Security has asked for, or the State agency has asked for. He gets a doctor who reviews the record of the initial determination period.

Now, I think there's no significant likelihood that any claimant is going to be damaged significantly by the timing of the hearing. I've been looking at these briefs, and it seems to me that all of the briefs are a little unrealistic about what the reversal rate is in these cases. Our brief suggests that the error rate in the initial determination is 12.2 percent, measured against what happens later.

But I think it's more realistic to look at this process, really, at the reconsideration stage. Because a worker is terminated and can get reconsideration rather quickly, and any impact he may feel is really almost de minimis at that stage.

And, in addition to that, the reconsideration stage is the same kind of a paper record determination that occurs at the initial determination stage. So that the reversal rate from there on to the oral argument, I think, to the oral hearing, is the relevant one. And if you look at that reversal rate, there were 1,101 workers who succeeded at the oral hearing, having lost at the initial stage, out of about 35,000 termination decisions.

So that we have an oral hearing that cured mistakes at a 3.3 reversal rate. And if you measure that against all determinations concerning disability made in the system that

year, about 150,000, you get a harmful error rate of seven-tenths of one percent.

Now, the worker who receives, who wins at the oral evidentiary hearing or, indeed, at the reconsideration, but the worker who wins at the oral evidentiary hearing stage receives all his back payments.

Now, it would be nice to say, I suppose, that the system must be perfect. Nobody must ever be terminated no matter how many -- how temporarily. But, indeed, I don't think any legal process or any chemical process or any industrial process ever can afford to remove the last bit of impurities in that process. It gets extraordinarily expensive. Indeed, it begins to defeat the result of the end of the process.

I can't put -- I can put, rather, approximate dollar cost on both sides of this due process equation. And I think that's not exactly an inhuman thing to do. Because these claimants are not in the position of the welfare recipients in Goldberg v. Kelly. This program is not based upon need. There may be alternate forms of income in the family or to the worker. And, in addition, if there is a worker who loses his disability temporarily, he has available State, local, and other forms of welfare.

So that we're not -- that puts a floor under his income, so we're not dealing with the kind of stark, human

suffering that was perceived to be the alternative in Goldberg v. Kelly.

And that means that in this case, I think the dollar amounts are a real proxy for the interest that go into the due process balance.

As I said, 11,101 workers won reversal at the evidentiary hearing in Calendar '73.

Now, our brief is a little misleading, but the Appendix is much clearer. It apparently takes 10 to 11 months to get an oral evidentiary hearing after the initial termination, and part of that time, part of that average time, as is clear on page 12A of the Appendix to our brief, is waiting for the worker to ask for an oral evidentiary hearing, since he has about six months to do so.

But it's 163 days -- 163 days is the median time from request for an oral hearing to decision.

But if we take, say, 11 months, which appears to be roughly accurate, as the period of time a worker might be without payment, and there are 1101 workers, it turns out that, since we're dealing with a stream of payments, so that only half of the payments are outstanding, that is, the full amount he ultimately would be due is not outstanding all the time.

It turns out that there must have been total payments withheld during 1973 that were later said to be due the worker, $2,028,000. Or an average of $1842 per claimant.

Now, these workers recaptured that money at the end of the period, so that they didn't lose it; what they did lose was the use of the money. And, as I say, I think it's -- it means something to talk about that, because these people do have alternative welfare systems or systems that deal with the needy or alternate forms of income. They lost the use of the money, and at 8 percent interest on that stream of monthly payments means that, for all claimants in that year, about $162,000 or $147 per worker was lost.

Now, you have to measure that, of course, against a cost to the government. HEW estimates that putting in full evidentiary hearings, including the loss of 23 million -- they estimate a loss of 23 million in overpayments that can't be recovered, some of them may be recovered, and they estimate the total cost of the administrative machinery, the bureaucracy and the lost payments, to be between $15 million and $25 million annually, at current rates.

If we take that, take the median figure there of $20 mill cost annually, in order to save benefits to workers of 163,000, we have a trade-off in costs of 122 to 1, which doesn't seem to me to be a terribly good trade-off. And it may be low, because it doesn't really take account, I think, of the full scope of the incentive to ask for an evidentiary hearing to keep the benefits flowing.

But I think it doesn't make a great deal of sense, in

due process terms, which is an intensely practical subject, to spend $122 which could have gone to other recipients to save one dollar to that occasional deserving beneficiary who --

QUESTION: Has the Secretary made any studies in terms of manpower? You've given us a dollar figure, but --

MR. BORK: Our brief contains an Appendix, which estimates what would have to be done, in terms of manpower. I think what would have to be done actually is to create, for the first time, hearing procedures, either in the State agencies or in the local Social Security offices, which would mean an extraordinary proliferation of administrative law judges and an extraordinary call upon doctors' time to testify at these things. The doctors being a scarce resource, I think, is part of the equation that we haven't measured in dollar terms. But it's a very real part.

But that, in detail, I think is found in the Appendices here, Mr. Chief Justice, and how they make their estimate.

QUESTION: Mr. Solicitor General, suppose administrative remedies are completely exhausted, and then, I suppose, at some point there is judicial review.

MR. BORK: After that there is judicial review. The first review, which is not de novo.

QUESTION: But, now, that is on the record?

MR. BORK: That's on the record.

QUESTION: So that it is true that -- you think,

however, that if he wants to, he can have a -- he can test out the strength of the government's case through live witnesses?

MR. BORK: I believe that -- yes, I do, Mr. Justice White, and if I am --

QUESTION: Well, let's assume he could not. Assume he could not.

MR. BORK: You mean at the -- at the --?

QUESTION: Oral hearing, yes.

MR. BORK: The administrative oral hearing?

QUESTION: Yes.

MR. BORK: Yes, sir.

QUESTION: The administrative oral hearing. And whatever record is to be made is made there, and now let's assume he cannot test out the government's case by confrontation of the government's witnesses, or the sources of the government's information. Assume he cannot do that.

Neither can he do it at any later time. Because, in court, the court is limited to the record that's made.

MR. BORK: The court is limited by the substantial evidence rule.

QUESTION: Right. Thanks a lot.

MR. BORK: But I think, in no previous due process case that I know of has there been this kind of a ratio of cost-benefit. In fact, this kind of a disastrous ratio of cost-benefit.

QUESTION: Yes, but that argument is -- you're addressing yourself to the argument that you say is before us, namely, whether there should be a pre-termination hearing.

MR. BORK: That is correct.

QUESTION: Yes. Thank you.

MR. BORK: But I'm only asking that there not be a pre-termination hearing, Mr. Justice White.

But, in any event, for the jurisdictional reason, I think it's proper for the case to be --judgment to be vacated and the case remanded with instructions to dismiss, or, in the alternative, if the due process grounds are reached, we ask that the judgment below be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Earls.

ORAL ARGUMENT OF DONALD E. EARLS, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I wish to basically go over the facts that I don't think Mr. Bork brought out in detail on George Eldridge.

First of all, Mr. Eldridge did go through the full administrative processes --

QUESTION: Mr. Earls, may I ask, are you going to address the jurisdictional question that the Solicitor

General raised in oral argument, or are you --

MR. EARLS: Mr. Justice Brennan, I can. I'm familiar with the Salfi case, I've read it. Although we received the government's final brief less than 48 hours ago --

QUESTION: Well, don't let me pressure you, if you want time to address it in a brief.

MR. CHIEF JUSTICE BURGER: You may respond independently.

MR. EARLS: Yes, sir.

To briefly hit the jurisdiction question, we do not feel that the Salfi case is applicable in our Eldridge case. The reasons, we feel this, are as follows:

In Salfi, Mrs. Salfi was trying to get a determination that she was entitled to benefits through the District Court. In Eldridge, we are not concerned with determination as to whether or not George Eldridge is entitled to benefits. Judge Turk, in his District Court opinion, and the government in their brief, admit that this is not a case determining whether or not George Eldridge is entitled to benefits. Certainly that's distinguishable from the Salfi case. And, as far as --

QUESTION: But Salfi, as I recall, said that actions brought for benefits under the Social Security Act could only be brought under that particular jurisdictional section, whatever it was.

MR. EARLS: Mr. Justice Rehnquist, this is not -- the District Judge in his first sentence points out that this is not a case for benefits. The government, in their own briefs, have said this is not a case for benefits. We are not here under 405 --

QUESTION: But this man would never be in court if he weren't asserting some claim to a benefit under the Social Security Act, would he?

MR. EARLS: Your Honor, we're --

QUESTION: Would he?

MR. EARLS: Could you repeat the question, please?

QUESTION: This man would not be in court if he were not asserting some claim to a benefit under the Social Security Act.

MR. EARLS: Mr. Justice Rehnquist, we had -- Mr. George Eldridge had benefits under Social Security --

QUESTION: Okay. Can you answer my question?

MR. EARLS: He is claiming benefits under the Social Security Act, yes, sir.

QUESTION: Yes. And the statute that we construed in Salfi said that if you were claiming benefits under the Social Security Act, you bring your action under 205(g) and not otherwise, didn't it?

MR. EARLS: Mr. Justice Rehnquist, that is what Salfi hailed. However, in the facts in this particular case,

in the George Eldridge case, we are challenging the procedural regulations of the Secretary. We are not asking that benefits be awarded. We're challenging merely the procedure of the Secretary, not as to whether or not George Eldridge should draw benefits.

QUESTION: But you still would not be in Court if you had won out in the administrative process?

MR. EARLS: Your Honor, we did -- we did win out in the administrative process.

QUESTION: Well, the --

MR. EARLS: The facts, basically, that maybe should be brought out, is that initially --

QUESTION: Well, wait a minute, wait a minute.

What -- is your case moot, or what?

MR. EARLS: No, sir, it is not moot.

QUESTION: Well, you haven't won the benefits that you hope to have; you've been terminated.

MR. EARLS: No, sir, we're drawing benefits.

QUESTION: Well, is there a termination order outstanding?

MR. EARLS: Sir?

QUESTION: Is there a termination order outstanding now?

MR. EARLS: Yes, sir.

QUESTION: Well, you haven't prevailed, then.

You're drawing benefits, but there's a termination order outstanding.

MR. EARLS: Your Honor, I don't understand what you mean by a termination order. You mean from the Secretary --

QUESTION: Well, what's your dispute with the government now?

MR. EARLS: Is the procedure --

QUESTION: Well, I know, but what's your dispute about benefits?

MR. EARLS: All right. The issue in this case is whether or not a disability recipient should be given an evidentiary hearing --

QUESTION: I know; I understand that.

MR. EARLS: -- prior to terminating the benefits.

QUESTION: I understand that. I understand that. But you must -- don't you have some case or controversy with the government about termination of benefits?

MR. EARLS: Yes, we do.

QUESTION: Well, what is it?

What is your case or controversy with the government about benefits?

Have they terminated you or not?

MR. EARLS: The Secretary did terminate Mr. Eldridge's benefits. The District Court reinstated his benefits.

QUESTION: Right.

MR. EARLS: Until such time as he was afforded an evidentiary hearing, Mr. Justice White.

QUESTION: I see. So that the government challenges the District Court's order --

MR. EARLS: The government challenges the District Court order, --

QUESTION: Right.

QUESTION: So you lost -- you lost out in the administrative process.

QUESTION: You lost out before the Secretary. He terminated you, didn't he?

MR. EARLS: Yes. That's correct, Mr. Justice --

QUESTION: And the District Court reinstated your benefits.

MR. EARLS: That's correct.

QUESTION: But you never --

QUESTION: And the government is now here challenging the District Court order reinstating those benefits, isn't it?

MR. EARLS: Challenging the District Court order and the Fourth Circuit Court of Appeals order upholding the District Court.

QUESTION: But you never exhausted your administrative remedies.

MR. EARLS: Your Honor, what we're --

QUESTION: Well, did you? You did not exhaust your

administrative remedies, and you might have won.

MR. EARLS: That is the government's argument, Mr. Justice White.

QUESTION: Well, you might have.

MR. EARLS: Our contention is this: that by being terminated -- by our benefits being terminated prior to being afforded an evidentiary hearing, we were denied due process.

QUESTION: I understand, I understand that.

MR. EARLS: We twice -- Mr. Eldridge, factually speaking, went twice through an administrative hearing.

QUESTION: I understand that.

MR. EARLS: There is not the great revamp of the Social Security system, as outlined by the government in their brief. They afford an oral evidentiary hearing after a reconsideration determination.

All we're asking is that the oral evidentiary hearing be moved up -- in other words, that the individual receive his benefits.

QUESTION: But what date were you terminated?

MR. EARLS: Your Honor, we were -- we have been terminated twice.

QUESTION: Well, the first time.

MR. EARLS: The first time, we were terminated on June 26 --

QUESTION: Whatever the year, then what did --

MR. EARLS: The first time is February 18, 1970, that was the first termination.

QUESTION: Then what did you do at that time?

MR. EARLS: After that, we requested a reconsideration.

QUESTION: Before the administrative -- in the administrative process?

MR. EARLS: Yes, sir.

QUESTION: And what kind of reconsideration did you get?

MR. EARLS: It was unfavorable.

QUESTION: I know, but what was the nature of it? Was it on paper, what was it?

MR. EARLS: It's a paper thing. They review the medical evidence.

QUESTION: And did you object to that form of reconsideration?

MR. EARLS: No, we did not.

QUESTION: All right. Then, next, what happened?

MR. EARLS: Next we went to an oral evidentiary hearing before an Administrative Law Judge; at that time they were called Hearing Examiners.

QUESTION: And at that, did you --

MR. EARLS: The Hearing Examiner gave us a final --

QUESTION: I know, but what was the nature of the

hearing? Were there witnesses and cross-examination and all that?

MR. EARLS: No. That is not true. That is the first time --

QUESTION: Well, what did happen? That's what I want to know. What did happen?

MR. EARLS: That is the first time, at the evidentiary hearing, is where the claimant, and his attorney, may sit down at a table and look at the medical evidence which the Secretary has, concering the claimant.

QUESTION: But the Secretary produced no witnesses?

MR. EARLS: No, sir.

QUESTION: Did you ask for these witnesses?

MR. EARLS: No, sir.

Practically speaking, we do not cross-examine medical doctors at these evidentiary hearings. This is the time --

QUESTION: And did you win on that?

MR. EARLS: Yes, we did. This is where the claimant, his neighbors, his wife can come in and subjectively tell what's wrong.

QUESTION: But, in any event, you won on that, didn't you?

MR. EARLS: Yes, we won.

QUESTION: And you got back disability payments?

MR. EARLS: Yes, Your Honor. Yes, we did.

QUESTION: Right. Then, next, what happened?

MR. EARLS: Then, next, the Secretary sends a termination letter to Mr. Eldridge, advising him that they have determined that he is no longer entitled to disability benefits.

QUESTION: And when you got that, what did you do?

MR. EARLS: We then requested reconsideration.

QUESTION: And then what happened?

MR. EARLS: He was -- the Secretary' holding was upheld. And I'd like to point out that the Secretary in their --

QUESTION: Then did you get an oral hearing?

MR. EARLS: Yes, we did, Your Honor.

QUESTION: And what happened after that oral hearing?

MR. EARLS: We were awarded benfits.

QUESTION: You won twice? So that's the second time you won on an oral hearing?

MR. EARLS: Yes, that's correct.

QUESTION: And you got the back disability payments?

MR. EARLS: That's true.

QUESTION: You did.

MR. EARLS: Well, in the meantime, before our second hearing, the District Judge issued a writ of mandamus requiring the Secretary to continue payments until we received

our hearing.

QUESTION: Well, I know, but --

MR. EARLS: We've had two --

QUESTION: -- whatever it was, you -- the Secretary, himself, after the second oral hearing, reinstated your disability payments, did he?

MR. EARLS: That's correct. Yes, sir.

QUESTION: All right. Then what happened?

MR. EARLS: All right. Then, after one year, again Mr. Eldridge receives a termination letter from the Secretary advising him that they have determined that he is no longer entitled to disability benefits.

QUESTION: And then what did you do?

MR. EARLS: We filed suit in the District Court --

QUESTION: You didn't ask reconsideration of this?

MR. EARLS: Yes, we did, Your Honor.

QUESTION: And what happened then?

MR. EARLS: The government -- if you'll notice on the government's Appendix, in the Fourth Circuit -- brief for the appellant in the Fourth Circuit -- informed us that they determined that Judge Turk's order to be final and appealable. And the government appealed, and we have not been reconsidered, we have not been offered an oral evidentiary hearing.

QUESTION: Did you ask for one?

MR. EARLS: We can't ask for a hearing until after we've had reconsideration.

QUESTION: I see. That's because meanwhile you had filed suit?

MR. EARLS: Yes, sir.

QUESTION: And, as I understand it, you had filed suit, you got an order from Judge Turk,--

MR. EARLS: Yes, sir.

QUESTION: -- the government appealed that order.

MR. EARLS: Yes, sir.

QUESTION: And did this obviate your asking for reconsideration, the fact that the government appealed that order?

MR. EARLS: We had already asked for reconsideration -- the Secretary did nothing.

QUESTION: Did nothing --

MR. EARLS: That's right.

QUESTION: -- because the government had appealed Judge Turk's order?

MR. EARLS: I don't know why they did it. They just didn't act upon our request.

Now, I think the George Eldridge case points out the fairness of the oral evidentiary hearings. The government would have us believe that many -- practically speaking --

QUESTION: But you filed suit actually before the

second reconsideration, didn't you?

MR. EARLS: Yes, sir, we did. But -- yes, sir, we did.

QUESTION: Before the second?

MR. EARLS: Yes, sir.

QUESTION: That isn't this case, though?

MR. EARLS: No, sir.

QUESTION: It's another case.

Then you filed this case after the third termination?

MR. EARLS: Yes, sir.

QUESTION: But before reconsideration.

MR. EARLS: The government reconsiders, we don't reconsider.

QUESTION: I understand.

MR. EARLS: We requested reconsideration.

QUESTION: Yes, but before request for reconsideration, you filed suit?

MR. EARLS: Yes, sir.

QUESTION: And you never got reconsideration --

MR. EARLS: We were never given any reconsideration.

QUESTION: -- after you filed suit, is that it?

MR. EARLS: That's correct.

QUESTION: Wait a minute, I thought you said --

QUESTION: Is that the reason you didn't reconsidera-

tion? Because you filed suit?

MR. EARLS: The Secretary has never told us why, Mr. Justice Brennan.

QUESTION: On this third one, I thought you said you asked for reconsideration before you went to court?

MR. EARLS: No, we requested reconsideration.

QUESTION: You requested it before you went to court?

MR. EARLS: That's correct.

And they appealed, as, on page 16A of their Appendix in the Fourth Circuit is the letter advising me that they are appealing, that they consider Judge Turk's order final and appealable.

I also --

QUESTION: Now, precisely what order of Judge Turk's did they advise you they thought was final?

MR. EARLS: Judge Turk issued an order requiring the Secretary to continue disability benefits to George Eldridge until after he had been afforded an evidentiary hearing under the standard of Goldberg vs. Kelly.

QUESTION: This was on the ground that the procedures did not satisfy the standard of Goldberg?

MR. EARLS: Well, twice, when George Eldridge met before an individual rather than through the mails, twice he was given benefits by the Secretary's own representative; that is, a hearing before -- when he had his oral evidentiary

hearing before an Administrative Law Judge or a Hearing Examiner. Judge Turk had no problem at all of awarding him benefits until he had received an oral evidentiary hearing. And I think this points out the unfairness of terminating the benefits prior to an oral evidentiary hearing.

In this particular case, George Eldridge had his home foreclosed, he and his six children were sleeping in one bed because all of their furniture had been repossessed, and yet the Secretary says in his argument today that there is some delay of 160 days from request for hearing until termination.

By their own figures, in their reply and supplemental brief, on page 14, their figures show that, indeed, 58 percent -- roughly 58 percent, 58.6 percent of those cases that go before -- that have an evidentiary hearing are reversed.

That means that there are 58.6 individuals who are entitled to disability benefits, who have their disability benefits terminated wrongfully.

Figurewise, this is 1100. So, doing a little subtraction, we have approximately 600 people drawing benefits that should not.

Our main contention is that the evidentiary hearing should be moved up before benefits are terminated.

QUESTION: Would you say that -- let's assume that the present evidentiary hearing that is afforded after

reconsideration were moved up; would that satisfy you?

MR. EARLS: Yes, sir, and it would -- yes, sir, it would.

QUESTION: You mean it has --

MR. EARLS: It would not change anything at all. They already allow the --

QUESTION: You mean the content and the opportunity available in the present evidentiary hearing is, you think, adequate?

MR. EARLS: Mr. Justice White, the figures the Secretary gives you -- yes, sir, absolutely.

QUESTION: Well, let me see what that means --

MR. EARLS: Its timing.

QUESTION: -- that means, as you described it, that's an oral hearing at which the --

MR. EARLS: The Claimant is present.

QUESTION: -- the claimant and his lawyer?

MR. EARLS: Possibly his lawyer, or a neighbor.

QUESTION: Well, you said, I think, earlier that this claimant had a lawyer present, didn't he?

MR. EARLS: Yes, sir.

QUESTION: But you would be satisfied if it were a neighbor or union representative or someone like that?

MR. EARLS: Anyone he wants to take.

QUESTION: Now, are you satisfied just to look at

the medical reports rather than to have the doctors there to be cross-examined?

MR. EARLS: Your Honor, in the case of Underwood vs. Ribicoff, the Fourth Circuit has held that a main element in determining benefits is not the objective, cold medical record, as the Secretary says, but they say that subjective evidence, such as the claimant's appearance before the Administrative Law Judge and the testimony of the claimant, his wife, and neighbors, as to his ability to work -- and on many of these cases, and George Eldridge is a very good example, you can look at him and tell he's disabled.

QUESTION: Well, you haven't answered me whether you insist on having the doctors present.

MR. EARLS: No, Your Honor, we do not insist upon having the doctors present. But I do want to point out that --

QUESTION: Well, I just want to get what you're satisfied -- you're satisfied to have the claimant there?

MR. EARLS: Yes, sir.

QUESTION: And his lawyer, if he wants his lawyer, --

MR. EARLS: Yes, sir.

QUESTION: You're satisfied -- and a neighbor, members of the family --

MR. EARLS: Yes, sir.

QUESTION: -- to testify as to what his condition --

MR. EARLS: Yes, sir, and the medical records that

are used against him.

QUESTION: And the medical records that are used against -- only the medical records?

MR. EARLS: Yes, sir.

QUESTION: And without the doctors personally present?

MR. EARLS: There would be no need in having the doctors there.

QUESTION: Well, do you have the power of subpoena?

MR. EARLS: At the -- that is not really the issue here --

QUESTION: I know, but do you or not?

MR. EARLS: The -- by way of cross-examination to medical doctors, if you start subpoenaing doctors, you can never get one to examine a disability claimant. I mean, there just is not enough money in the program for it.

If a doctor is -- if you do feel a doctor is antagonistic, you could --

QUESTION: Well, I know, but I just ask you whether you have the power of subpoena, to require a doctor who has written one of these reports to attend the hearing?

MR. EARLS: Yes, sir, I believe you do. Practically speaking, I have never --

QUESTION: Well, I know, but legally speaking, you have the power to call witnesses? If you want to.

MR. EARLS: Yes, you do.

QUESTION: So if you are not satisfied with the record before you, you can call the doctor?

MR. EARLS: At the oral evidentiary hearing is the first time that you can see the record.

QUESTION: I know that. So the answer is yes?

MR. EARLS: My answer is yes.

QUESTION: Yes.

QUESTION: Mr. Earls, you're not saying that a cold medical record, as you described it, is totally objective and does not include subjective aspects, are you?

MR. EARLS: Mr. Justice Blackmun, I think the statistics that the Secretary provided to you point out that the cold medical record is in error 58 percent of the time.

In other words, --

QUESTION: Translate that for me. That --

MR. EARLS: In other words, according to their --

QUESTION: -- medical diagnoses are 58 percent wrong?

MR. EARLS: According to their records, after an initial determination is made, that is accepted by 24,800, roughly 25,000 of the persons who had been drawing disability payments and are cut off; so it's accepted roughly by 25,000 people. And this is explanable. Youhave 25,000 people who are involved in industrial accidents and, for some reason or another, are drawing disability benefits. When they

recover, or when they're able to go back to work, then they certainly would not contest that they may now be gainfully employed and should be terminated.

Of these, then you have 8,700 remaining, who may request reconsideration. Of those that do, 5,700 accept the unfavorable determination after reconsideration. That leaves 1100 people for a hearing.

I'm sorry, 1800 people for a hearing. And of those, 1100 win out after the hearing.

QUESTION: Why don't you compare 1100 with the total number rather than with the 1800?

MR. EARLS: Because there's -- I'm sorry.

QUESTION: Presumably the ones most having the strongest cases are the ones that are going to go to the hearing. The ones with the least substantial claims are going to accept the adverse determination.

MR. EARLS: We have 25,000 people who realize that they are no longer disabled, and don't contest the determination --

QUESTION: Yes, but that itself is a medical determination, isn't it?

MR. EARLS: No, sir, not --

QUESTION: Then the medical record is right there.

QUESTION: Yes.

MR. EARLS: No, sir, because you can also determine

a -- terminate benefits based upon the work record. If an individual returns to work, then, of course, his disability benefits will cease. He may call up to the district office and say, "I'm going back to work; I don't want your benefits."

QUESTION: Well, is there any way of knowing in the case of these 25,000 that accept the initial determination whether the basis for the determination was medical records or return to work?

MR. EARLS: Possibly the Secretary could provide that. I don't have those figures --

QUESTION: There's nothing in this record?

MR. EARLS: Realistically speaking, I would say that it would be such as industrial accidents, recovery from injuries, and this sort of thing.

QUESTION: But there's nothing in this record that permits any breakdown?

MR. EARLS: No, Your Honor, there is not.

But we do want to point out that George Eldridge twice went through the adversarial hearing and was twice awarded benfits after this.

We're not asking for any great reshuffling, any hirings; what we're asking is that the hearing which is afforded him be moved up prior to the termination of benefits. We don't think that this is an unreasonable burden, and certainly, 58 percent of the time, what we're doing is we're

sacrificing 58 percent of the people that are entitled to the benefit to the 42 percent that are not.

The Secretary has said that disability benefits are not based upon need. The statement was made from this stand today.

I would like to point out, on page 20A of the government's petition for a writ of certiorari, their first sentence in the Secretary's manual states that most people who get a Social Security check depend on it for the necessities of life. And this is certainly the case in George Eldridge, an individual who has paid into such a system, such as Social Security, must forfeit, in many jurisdictions, or at least submit to a lien for any welfare benefits which he may draw.

QUESTION: Well, this manual covers Old Age Pension and Survivor's Benefit as well as disability benefits, doesn't it?

MR. EARLS: Mr. Justice Rehnquist, I think it does.

QUESTION: Then, I take it the statement is a general one, presumably referring to all appects of the Social Security program.

MR. EARLS: Well, the Secretary's figures point out that 90 percent of the total beneficiary population earn nothing. So I would say that, as opposed to need -- as opposed to Goldberg vs. Kelly and need, they are indistinguishable.

I feel in the George Eldridge case, where Mr. Eldridge was required to sleep in one bed with five children, lost his home that he had worked all of his life for as a laborer on the railroad, and then as a soda distributor, driving a truck and carrying in cases of soda pop, then certainly he lost everything which could not be recouped after the -- in other words, he can't go buy his house back once it's been foreclosed, and this is what happened in the George Eldridge case.

And this is what happens in many of the cases. In 58 percent of the cases it may happen, because in 58 percent of the cases that go to hearing, they are reversed.

QUESTION: I take it you're saying that the house would not have been foreclosed had there not been termination?

MR. EARLS: That is true, yes, sir. He would have had some money.

QUESTION: Well, would he have enough money?

MR. EARLS: No, sir, he would not have had enough money, enough income of any kind --

QUESTION: So the house would have been foreclosed, in any event?

MR. EARLS: That's correct, Mr. Justice Blackmun.

QUESTION: Then why are you arguing about the six in a bed?

QUESTION: What's the point of your argument --

MR. EARLS: My point is that if he had been continued on benefits prior to terminating, those benefit payments would have kept his house payments up.

QUESTION: But I thought you just said exactly the opposite.

MR. EARLS: Perhaps I misunderstood your question, I'm sorry.

QUESTION: My question is: Would he have lost his house had the benefits not been terminated?

MR. EARLS: No, sir, he would not have. He would have had money to make house payments.

QUESTION: So that the termination was the difference between keeping his house and not keeping it?

MR. EARLS: That's correct, sir.

QUESTION: Does this record show that?

MR. EARLS: The record in the District Court -- the transcript of the record in the District Court should show it, yes, sir.

QUESTION: Any findings on that subject?

MR. EARLS: As to need?

QUESTION: No, any findings on the issue you're talking about now.

MR. EARLS: We were not pursuing the issue as to whether or not Mr. Eldridge is entitled to benefits in the District Court. We were merely challenging the procedures

employed by the Secretary.

And I would point out that the reversal rates now, after hearing, are greater than those reversal rates prior to the decision in Wright vs. Richardson. In the --

MR. CHIEF JUSTICE BURGER: We'll resume there after lunch.

You have about five minutes left.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Earls, you have five minutes left.

ORAL ARGUMENT OF DONALD E. EARLS, ESQ.,

ON BEHALF OF THE RESPONDENT -- Resumed

MR. EARLS: Thank you, Your Honor.

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

I'd like to point out that the reason we are here is that the District Court held that it was a violation of George Eldridge's due process rights to terminate his benefits, his disability benefits prior to an evidentiary hearing.

The District Judge, Turk, was upheld by the Fourth Circuit Court of Appeals. The government chose to appeal it, to apply for certiorari to this Court, and that's why we're here.

We do not question the constitutionality of any hearings. We're just saying that the money should not stop prior to an evidentiary hearing.

If there are no further questions, that concludes Mr. Eldridge's argument.

MR. CHIEF JUSTICE BURGER: Very well, Mr. --

QUESTION: If I may -- at the end of last week, when the government filed its supplementary brief, you had no reason to know that there would be any jurisdictional question

in this case, as I understand it.

MR. EARLS: Mr. Justice Stewart, that's correct.

QUESTION: And I, for one, would be interested in a written brief from you --

MR. EARLS: All right, sir.

QUESTION: -- on that issue that the government has belatedly brought up.

MR. EARLS: We'd be happy to do so, and would like approximately ten days to prepare one.

MR. CHIEF JUSTICE BURGER: As you recall, I advised you this morning that you may file one.

MR. EARLS: Yes, sir.

MR. CHIEF JUSTICE BURGER: In ten days -- if you want fifteen, you may have it.

MR. EARLS: All right, sir.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:03 o'clock, p.m., the case in the above-entitled matter was submitted.]

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