OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1923

TITLE OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., Petitioners V. CITY OF NEW YORK, ET AL.

PLACE Washington, D. C.

DATE February 26, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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OTIS R. BOWEN, SECRETARY OF :

HEALTH AND HUMAN SERVICES, :

ET AL., :

Petitioners, :

V. : No. 84-1923

CITY OF NEW YORK, ET AL. :

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Washington, D.C.

Wednesday, February 26, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:01 o'clock p.m.

APPEARANCES:

EDWIN S. KNEEDLER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the petitioners.

FREDERICK A.O. SCHWARZ, JR., ESQ., Corporate Counsel of the City of New York, New York, New York; on behalf of the respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Bowen against City of New York.

Mr. Kneedler, I think you may proceed when you are ready.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. KNEEDLER: Thank you, Mr. Chief Justice, and may it please the Court, this case presents important questions of subject matter jurisdiction of a Federal District Court in cases arising under the Social Security Act.

Congress granted its consent to such suits when it enacted Section 405(g) of Title 42. But Congress imposed two specific restrictions on that waiver of sovereign immunity.

First, Congress has provided that judicial review is available only after "the Secretary's final decision, after a hearing." And secondly, judicial review is available only if the individual commences an action within 60 days after the mailing to him of the notice of the final decision or within such further time as the Secretary may allow.

This Court has repeatedly made clear in Yamasaki and Diaz and Salfi that in order for a person

to be included as a member of a class, he must individually satisfy the jurisdictional requirements of that section. In other words, in order to be included in the class, he has to have been able to file his own indiviudal suit when the suit was filed.

The Court of Appeals in this case completely disregarded these principles. Respondents brought this suit to challenge the manner in which evidence of mental impairment was being evaluated by the New York State Agency under several regulation issued by the Secretary to implement the statutory definition of disability.

Any member of the class in this case who disagreed with a state agency's decision that he was able to work and therefore was not disabled within the meaning of the Act was free to take an administrative appeal to the ALJ, to the appeals Counsel, and then to seek judicial review in District Court.

In fact, in this case seven of the eight individuals who are claimants in this case did go to the ALJ stage. Several of those were awarded benefits by the ALJ. Others were denied benefits on grounds unrelated to the policy of which the claimants object in this case.

Although the thousands of unnamed class members in this case were explicitly informed that they,

too, had a right to seek further review, including going to the ALJ and appeals counsel, they declined to do so. When they declined to seek review in 60 days, their decisions became final and binding against them, and they therefore accepted the consequence that those decisions were in effect res judicata.

QUESTION: Well, Mr. Kneedler, I guess the problem is that the District Court found that the Secretary's policy involved in this case was a covert one. It had been hidden from public scrutiny. How is somebody who doesn't know of the policy at all or have a reason to know according to the District Court's finding going to meet the requirement, and that is why you have to meet the so-called tolling argument, I think.

MR. KNEEDLER: The District Court labeled the policy secret, but all it could have meant by secret, I submit, is that --

QUESTION: Didn't it label it covert?

MR. KNEEDLER: I don't know if that word was used specifically, but --

QUESTION: And you didn't file any challenge to that in this Court?

MR. KNEEDLER: Well, it wasn't -- if what the courts below meant by that was that there was some affirmative act of concealment of what was going on,

then we certainly do dispute that.

QUESTION: But you didn't raise it in the cert petition, did you?

MR. KNEEDLER: Oh, yes, I think it is at Page -- on the second to --

QUESTION: But dispute to that finding?

MR. KNEEDLER: Not as a separate question as such.

QUESTION: No. So don't we just take that as a given?

MR. KNEEDLER: On Page 26 of our certiorari petition, we point out and we have repeatedly --

QUESTION: You talk about it, but I had just assumed we had to take that finding as a given.

MR. KNEEDLER: We don't regard it as a finding, and have not throughout, and this is what we argued in the Court of Appeals at oral argument and in the rehearing petition, that all that happened here, and all the plaintiffs really tried to establish at trial was that the various memoranda that they relied upon as evidence of the policy were not published, or were not routinely made available to the claimants.

QUESTION: Well, Mr. Kneedler, is that quite accurate? I thought that the trial court found that even the ALJ's were unaware of what the physicians were

doing under that policy. Isn't that so?

MR. KNEEDLER: Well, the ALJ's --

QUESTION: I. the only ones who knew anything whatever about it were the state and perhaps also the federal agency, but it wasn't, as Justice O'Connor said, something that was made generally known to the public, was it?

MR. KNEEDLER: No, I am not suggesting that it was published, but what I am saying is that the application of the regulations that these memoranda refer to were contained in the sort of routine internal memoranda that go on all the time in the administration of the program.

QUESTION: I don't see how the class members could have raised this question before the agency if they didn't know about it.

MR. KNEEDLER: The question is not whether they could have raised this specific question. The issue is whether they knew that their claims were denied on the basis of a finding that they could work. The decisions that the class members in this case received from the state agency said that. While your ability to do some things is limited, we cited these in our brief, it has been determined that you are able to do some work, that you are not disabled. If you disagree with

that, you can seek further review within 60 days.

QUESTION: Well, will you tell me just when the policy of resuming the existence of residual capacity of claimants who don't have a listed mental impairment, when did that policy become publicly known? As of what date?

MR. KNEEDLER: I don't know that it can be pinpointed. It was being litigated in the --

QUESTION: What form did it take when it was finally made public?

MR. KNEEDLER: Well, it was litigated in the Minnesota mental health case out in Minnesota, and there were, as I understand it, Freedom of Information Act requests for regional documents that referred to this. So that may have been the occasion.

QUESTION: But that is the form that the public notice took?

MR. KNEEDLER: You said when it became public. I misunderstood. The objection that is being raised here is the manner, in a sense almost the thought process by which an adjudicator decides whether a person can work, and what the claimants are objecting to is that the regulations were misapplied in a certain way by an adjudicator. Whether that in turn is attributable to an internal memorandum or the thought processes of the

individual state agency adjudicator seems to us to be irrelevant for purposes of the ability of a claimant to seek review.

If it was found out a year later that a particular adjudicator was consistently applying wrong principles at the state agency level, this would not excuse a claimant from seeking further review within 60 days, just as if a case was being tried in the District Court and it came to light that the District Judge who decided the case was under a misapprehension of how a law should be applied and had entered judgments that didn't spell out his thinking but denied benefits even in a Social Security case. That wouldn't excuse a claimant from --

QUESTION: You know, I am troubled by your characterization of the claim as being a challenge to the thinking process. I had understood that what was being argued is that under the statutory and regulatory scheme, these applicants, these people with mental deficiencies are entitled to a fair individualized assessment at the initial stage instead of just application to -- or half.

I thought that was what it was all about.

MR. KNEEDLER: Well, that is the legal argument, but that is different from the claim for

benefits. Section 405(g) does not provide for judicial review of policies or positions of the Secretary. It provides for judicial review of decisions by the Secretary on claims for benefits, and if a particular approach to the way a claim was decided remains an issue at the time a case gets to the appeals counsel, then the way in which a case was finally disposed of by the Secretary is subject to judicial review when the person files a suit under Section 405(g), but all through the process what a claimant seeks review of is the denial of his claim for benefits. To the extent the decisionmakers approached the problem sheds light on that. That in turn is subject to review. But what he is seeking review of is the denial of his claim. The particular objection that the claimants have here is that they suggest that RFC was determined in an inappropriate manner, but RFC is not an end in itself. The RFC calculation is part of the manner in which the decisionmaker weighs the evidence of the impairment and decides whether it prevents the claimant from working. It is an essential element of the merits of the dispute, so someone who is disagreeing with the way a decisionmaker made that decision is in effect just disagreeing with the decisionmaker's decision that he could work, and the claimants in this case were

specifically informed of all the relevant information that they needed to pursue the denial of their claims. As I said, they were told that it had been found that they could work, that they were therefore not disabled, and that if they disagreed with that determination, they could seek further review within 60 days.

The sort of memoranda that are relied upon by the claimants in this case, I would like to say several things about it. First, there is no suggestion anywhere, and we have repeatedly pointed this out, and the plaintiffs have not disputed it, that there is no evidence in the record of an intent to conceal anything from claimants. The policy disagreements, to the extent there were ones, were openly discussed between the state agency, were openly discussed between the state agency and SSA, within SSA, and they were debated.

The other point is that the disability programs are of massive dimension.

QUESTION: I am a little puzzled, because I have the same difficulty Justice O'Connor does. Judge Weinstein talks repeatedly about this covert policy, evidence of a fixed clandestine policy, the effects, and so forth and so on. I don't understand that to be consistent with your description of open discussion with the people who were affected by the policy.

MR. KNEEDLER: First of all, it was certainly openly discussed with the state agency. The State of New York is a plaintiff in this suit alleging a secret policy, and yet the memoranda that were being discussed were routinely shared with the state agency that was adjudicating the claim.

QUESTION: You may be absolutely right. I have a great deal of confidence in what you tell me about the record, but the trial judge describes the clandestine policy. You don't challenge that in any of your questions presented, as I read it. So don't we have to assume that there was some kind of clandestine policy? You are telling us there wasn't.

MR. KNEEDLER: That is a label. I mean, if that had been regarded as a factual finding --

QUESTION: But it is a policy which according to the trial judge prevented the members of the class from knowing the basis of decision of their claims and therefore deterred them from seeking further review. Isn't that correct?

MR. KNEEDLER: The second part of the decision, I don't think there is any basis for concluding that the 10,000 class members were deterred by the failure --

QUESTION: Well, if you get findings of fact

against you from the trial judge, and he has been taking bribes, and you don't know it, you may just think the findings aren't worth challenging. You have a lot of --

MR. KNEEDLER: That is an extrinsic sort of corruption of the system. That is something quite different from saying a judge made an error on the merits in the way he decided a case.

QUESTION: He decided the case for a reason he did not disclose. That is what the basic policy is, as I understand it, that there was a policy that determined a great number of decisions, and the decisionmakers didn't tell the people they were ruling against why they were doing it. Am I wrong?

MR. KNEEDLER: But that -- they wrote a decision that explained they had arrived at the conclusion the person could work, but there is no requirement that a decisionmaker has to give the basic outlines of his decision, but there is no requirement that he explain all of the thought processes that he goes through, in the same way that there is no requirement that the District Court fully explain every step that it went through.

QUESTION: Well, I think there is. If there is a controlling reason in every case and he decides not to tell them, I disagree with you rather dramatically on

that. There surely is a requirement if there is a principle, a general rule that governs decision in a classic case, and the person making the decision doesn't disclose that, I don't think he is performing his public responsibilities.

MR. KNEEDLER: But I guess the question has to be in a case like this, as I was starting to say before, there are 4,700 state agency employees who adjudicate these claims, 14,000 employees. Not all of them are as expert as ALJ's. They aren't lawyers. They don't necessarily have that sort of background. In order to maintain some quality, some nationwide consistency, the Secretary through, not through the ALJ process, but through a separate program side, has to give guidance and training to the decisionmaker. It is about how you approach a certain kind of case.

These cases come in in a fairly large volume, and the person who is taking them in has to know how to approach them, and so they get guidance, instructions from others who are responsible for running the program, and they follow those steps routinely, and a claimant who gets a decision that is based on that policy, if he decides not to appeal it, just like in any other system, he has to be taken to have made a knowing decision not to challenge the finding that he could work and that he

wasn't disabled.

That is the fundamental question in a Social Security case. If we were in a position where the Secretary had to reopen closed cases that the claimants themselves had abandoned whenever a memorandum sent to a state agency contained erroneous advice, there would be no respose at all in the administration of the Social Security program.

QUESTION: I thought what Judge Weintein was particularly concerned about was that the decisions of the review physicians were based on a policy, a per se policy rather than on a medical judgment, and that fact was never made known to the claimants. Even the ALJ's didn't know that. They were handed what the physician had to say pursuant to whatever the policy was without making an independent medical judgment. Isn't that it? Isn't that what Judge Weinstein found?

MR. KNEEDLER: That is what he found. That is what he concluded.

QUESTION: Well, the claimants who wanted to attack that were unaware, could have attacked it within the 60 days, they weren't aware that that was being done. If they had known about it, they would have appealed.

MR. KNEEDLER: An ALJ's hearing is not an

appeal from the state agency's decision. It is a de novo consideration at which the claimant is perfectly free to argue that he does not have the RFC to work without regard --

QUESTION: Well, he didn't know. He didn't know how the medical -- how the physicians were --

MR. KNEEDLER: But the fact that he didn't know the way the state agency person decided it in no way prevented him from arguing to the ALJ that he did have the RFC -- that he did not have the RFC to engage in unskilled work.

QUESTION: He didn't know it.

QUESTION: Didn't you argue about what you don't know anything about?

MR. KNEEDLER: No, but that did not --

QUESTION: How can you argue that you denied something that you don't know exists?

MR. KNEEDLER: An application for disability benefits is based on the allegation by the claimant that he has a mental in this case impairment that prevents him from working. The decision that he got from the state agency was, no, you don't. You may have a mental impairment, but it doesn't prevent you from working. The claimant knows that the fundamental issue in the disability case has been decided against him. In order

to challenge that before the ALJ, he doesn't have to know the approach that the decisionmaker made at the state agency level. All he has to know that in his view he thinks he can work, and that he does not have the RFC combined with his age, education, and work experience to work.

QUESTION: And he doesn't know that what he is going to argue has already been decided.

MR. KNEEDLER: But it hasn't been decided in any conclusive manner against him. The ALJ can and frequently does receive new evidence on the question of whether the person can work and the degree to which his impairment prevents him from working.

QUESTION: If the guy has got a sore -- or something he can look into and see it?

MR. KNEEDLER: No, the ALJ hearing is a de novo determination at which the claimant starts all over again.

QUESTION: I know it is de novo. I know it is wide open. But it is not that wide open. It also has rules in it which say that when it gets to us we are going to go this way. There are only two people that don't know that. That is the ALJ and the recipient. Everybody else knows it.

QUESTION: How many levels of review are there

after the administrative law hearing?

MR. KNEEDLER: There is one more administrative layer of review. That is the appeals counsel, which is designed to maintain nationwide uniformity over the ALJ's.

QUESTION: Is that an appeal as a matter of right?

MR. KNEEDLER: Well, the appeals counsel has discretion whether to hear it or not. Anyone can apply for it, but the appeals counsel grants review if there is a question of nationwide importance or there appears to be a --

QUESTION: A conflict among the ALJ's.

MR. KNEEDLER: Pardon me?

QUESTION: A conflict among the ALJ's.

MR. KNEEDLER: Yes.

(General laughter.)

QUESTION: Is there a time limit on the petition for review to the appeals counsel?

MR. KNEEDLER: Yes, at every stage of the administrative process there is a 60-day time limit, and the claimant is specifically told that, and at most of the levels of administrative review, particularly after the reconsideration, before the ALJ level, he is told that he can call up a phone number at SSA and ask for

more information if he wants to, if he thinks that he needs it.

The problem in this case is that the rationale of the Court of Appeals is not premised on the existence of a secret policy in the sense that there was affirmative concealment of anything. The District Court's premise of tolling in this case on the 60-day filing was that as long as the Secretary's approach or the state agency's approach to this remained undisclosed, that the 60-day time limit would run apparently for as long as the policy remained undisclosed.

If this had been adopted in 1976 and came to light in 1982, under the Court of Appeals rationale, there is no reason why those old claims could not be reopened, and this, it seems to us, is fundamentally inconsistent with the explicit judgment of Congress in Section 405(g) recognized by this Court in Califano versus Sanders, that a claimant has only 60 days within which to seek further review.

Also, it is important to keep in mind here the role that Section 5 of the Social Security Disability Benefits Reform Act of 1984 plays in this. When it enacted Section 5, Congress specifically focused on the question of mental impairments. It specifically

focused, and I would like to read the House report to you, that serious questions have been raised by federal courts, professionals in the field of psychiatry and vocational counseling and GAO about the adequacy of SSA's listing of mental impairments and the appropriateness of SSA's current methods of assessing residual functional capacity and predicting ability to work in individuals with mental impairments. That is the precise issue raised in this case. What Congress did when it enacted Section 5 of the 1984 Act was to extend a moratorium the Secretary had previously adopted to direct her to finish something that she had undertaken on her own, which was to reexamine the criteria for evaluating mental impairments and to reevaluate the listings. And even before this suit was filed, the Secretary had undertaken those measures.

Then what Congress did to provide a remedy for people who might have been wrongfully denied benefits under the prior approach, it said that any claimant whose claim was denied after March 1 of 1981 could reapply for benefits and have his claim reexamined under the new standards the Secretary promulgated, which were finally promulgated last August. So any class member in this case whose claim was denied after March 1, 1981, which was as far back as Congress chose to go, can

reapply for benefits under the special regime that Congress established for dealing with this problem.

Congress did not, however, provide for the reopening of the past decisions in which those claims were originally denied. Congress, in order to do that, it would be necessary for a court to excuse the failure of class members to seek further review within 60 days and to exhaust their remedies.

Congress knew how to do that, too, when it wanted to do so, when it wanted to excuse claimants from their failure to comply with the rules, because in Section 2 of the 1984 Act, Congress took class actions as they were then existing when it enacted that Act on the medical improvement question and said all such class members can be sent back to the Secretary to have their claims reevaluated, whether or not they satisfied the 60-day rule or the exhaustion requirement. So Congress looked at that problem and took that approach. It did not take that approach under Section 5 of the 1984 Act.

QUESTION: Was the 1984 Act passed before or after the District Court decision?

MR. KNEEDLER: It was passed after the District Court's decision.

QUESTION: Presumably they knew about the decision and may not have thought anything more was

necessary.

MR. KNEEDLER: It was passed after the Court of Appeals decision as well.

QUESTION: Did they indicate any disapproval of those decisions?

MR. KNEEDLER: Well, the decision in this case, the jurisdictional questions were not really addressed. This was and the Minnesota case were discussed in the legislative history, including a mention of the notion that it was a --

QUESTION: Your argument is, as I understand it, that they made a number of special reopening provisions in other areas of the law. They didn't do it here, but if they knew about what had been done in this case, they really didn't have to.

MR. KNEEDLER: But it was still pending on appeal, and the point was that the problem Congress perceived was not one, while it viewed the Second Circuit, the New York example as an example of what had happened, Congress perceived that this was a problem of nationwide dimension and fashioned a nationwide solution. It didn't provide for grandfathering class actions that happen to have been filed, and that is what Congress did in the Section 2 on the medical improvement.

It didn't grant relief to everybody nationwide. It granted relief where there was already a class action pending, and I think in these circumstances before the Court should adopt an approach to the jurisdictional requirements under 405(g) that is potentially openended and gives rise to a hydraulic pressure to dispense with the necessary rules, it should have a pretty compelling reason to do so, and the fact that Congress has stepped in and addressed what it perceived was perhaps a systemic problem I think makes it unnecessary for the Court to have to fashion, judicially fashion rules of exhaustion or 60 days here. I think we are entitled to take Congress at its word in doing this.

As I say, the Court of Appeals rationale was simply that what the state agency decisionmakers did was not affirmatively disclosed. Well, something is supposed to be affirmatively disclosed. The rule would be to require publication of it, or to seek review and to say that in the review process the agency can't rely on something that previously hadn't been published, but the notion that something contained in a memorandum that is not published in the Federal Register excuses somebody from complying with the fair and simple procedural rules that govern this program is really

quite an openended principle, and we think it would really lead to havoc in the administration of the Social Security Act.

By the same token, the Court of Appeals' approach to the exhaustion question was not at all dependent upon the notion of a secret policy in this case. The Court of Appeals adopted what it called an ad hoc balancing approach to the question of exhaustion rather than adhering to the strict final decision requirement where judicial review is available only after a hearing, which suggests that everything that would be resolved in a hearing has to be resolved before judicial review is there, and the only exception this Court has recognized to that was in the case -- was in Matthews versus Eldridge, which precisely fits the three-part test for the Cohen doctrine for the collateral order doctrine under 1291 which uses the same final decision language. We have a very -- from this Court's decisions and what Congress has said, a very precise jurisdictional regime that is fair and reasonable for the claimants.

The Court of Appeals approach would greatly undo that.

I would like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Mr. Schwarz.

ORAL ARGUMENT BY FREDERICK A.O. SCHWARZ, JR., ESQ.,
ON BEHALF OF THE RESPONDENTS

MR. SCHWARZ: Mr. Chief Justice, and may it please the Court, what happened here in the Social Security Administration was highly disturbing, as was found by the courts below in a series of detailed findings which the government did not challenge on appeal and did not raise in their cert petition to this Court.

The question for this Court, however, is whether relief can be awarded responsive to conduct unbefitting an agency of the United States without opening the door to an excessive or premature use of the courts in derogation of the usually appropriate administrative scheme of review.

And so I want to start by describing a very narrow rule where full exhaustion is excused, a rule that arises from what one hopes are the unique or at least truly extraordinary circumstances of this case. Then I want to show why this narrow exception fits directly within what this Court has said, particularly in Eldridge and Ringer.

The principle test of waiver of exhaustion suggested by this case is indeed narrow because the

circumtances are so unusual. Let me try and lay the test out. Where the government by use of a pervasive procedural practice which is secret, which is in flat derogation of regulations or a general rule per the comment of Mr. Justice Stevens, which functions to deprive a class of claimants of the right guaranteed by statute to a meaningful first level evaluation and where further administrative review cannot possibly give you the lawful first level process which you were denied, then further administrative review is excused.

Debate is possible on whether each of those elements is indeed absolutely necessary, but all of those elements were found to be the fact by the judge below and by Judge Larson in Minnesota. Let me make clear what we do not suggest. It is obviously not enough for a claimant to argue that the initial decisionmaker made a legal or factual mistake in the claimant's particular case.

In such circumstances, there is no collateral right to assert because the statute and the regulations here obviously do not contemplate that the initial decisionmaking process be error free. Individual mistakes are precisely what administrative reviews are designed to correct. A fair and meaningful decisionmaking process, not a perfect one, is what is

expected.

We also are not saying that an erroneous general interpretation of the law is enough. Rather, what we are saying is that where there has been a pervasive subverting of the legal process itself, further exhaustion was not required.

QUESTION: Well, you say pervasive subverting of the legal process itself. That is a very fine sounding phrase. Would it include a regulation by the Secretary which a court were later to find invalid announcing a presumption in the case of certain decisions, but that there was no violation of any administrative regulation --

MR. SCHWARZ: No, if you had a regulation which is within the administrative discretion of the Secretary, and I will assume that, like in your decision in Ringer, the matter was clearly discretionary. The Secretary issued a regulation on whether or not a certain operation would be covered. You cannot excuse exhaustion just because you disagree with that regulation, but that is, of course, not this case.

QUESTION: What if a court were later to find that that regulation was unauthorized. Would it be -- enough cases that it would become final?

MR. SCHWARZ: First, you don't have to reach

that here.

QUESTION: Well, but I would like your answer.

MR. SCHWARZ: Okay. The regulation was simply unauthorized, was unconstitutionally unauthorized, or what?

QUESTION: Unauthorized either by statute -- let's say unauthorized by statute.

MR. SCHWARZ: I don't think you are going to excuse exhaustion there, Your Honor. I don't believe so. But of course that isn't this case. Here we have a flat contradiction of the regulation in two respects. The regulation called for there being a separate process after Step 3 to assess by a medical person whether the claimant had or did not have residual functional capacity, and they simply passed a per se rule or adopted secretly a per se rule that truncated the process and eliminated Steps 4 and 5. In addition, the regulations called for medical professionals to make those judgments with respect to RFC, and as the findings in this case demonstrate, the views of the medical professionals were just plain disregarded. So in those two respects our case is different than the one you posed, Your Honor.

Now, our primarily collateral claim is, and

the unchallenged finiing of fact was that the initial decisionmaking process had been made a meaningless and unfair hurdle instead of an opportunity for an objective review of the medical facts by medical professionals, and the regulation, as I said, stated quite flatly that where the impairment was severe, as it was in this case for all class members, but they didn't meet the listings, there should be an RFC evaluation by doctors, and that simply was not done.

QUESTION: When did that come to light?

MR. SCHWARZ: It came to light, Your Honor, not until, as was found by Judge Weinstein, not until after both the Minnesota case and the filing of this case. There is a specific finding to that effect, and you can tell me the page of it in a minute, but there is a specific finding to that effect. Moreover, Judge Larsen -- the Minnesota case was a little bit ahead of this case, and in that case, Judge Larsen in his opinion granting attorneys' fees against the government on the ground that their defense of fact had been fundamentally unreasonable, found that they had said in the Minnesota case that they had lied in the Minnesota case. They had said this was a policy which existed only in the Chicago region. He found when he awarded over $100,000 in attorneys' fees that that was using his words

"fundamentally untruthful." And then Judge Weinstein at Page 39A of the appendix to the cert petition found "the change" in the unlawful truncation of the regulatory requirements, "the change was precipitated only after the filing of this lawsuit and after a preliminary injunction was issued in the Minnesota case."

Suppose -- I would like to change the facts a little bit, and suppose the Secretary had simply announced publicly that claimants would not get a complete evaluation pursuant to what the regulations require at the initial decisionmaking stage. Suppose the announcement said claimants have to go through a truncated process at the first stage in violation of the regulations in order to get a full and fair hearing, but only to get that in compliance with the regulations if they appealed them to the ALJ.

I say rhetorically would that not be a fit case for exhaustion, for waiver of exhaustion, but what was done here was worse, and even more clearly a case for exhaustion, because again as the District Court found, the violation of the regulation and the consequent deprivation of the right to a meaningful initial hearing was undisclosed to the claimants and the ALJ's, so it couldn't be corrected in the administrative process.

As the ABA stresses in their quotation from some baseball figure in their amicus brief, this deprivation, this particular deprivation could not be cured in the administrative process because you can't hit what you can't see. Not only were claimants secretly denied their right to a meaningful initial hearing in compliance with the regulations, but in addition what was done at the initial stage was found by Judge Weinstein based upon admissions by the government, by the way, to have tainted the record at the ALJ stage. The ALJ's were instructed by regulation to give weight to the RFC findings by the medical professionals. The record before the ALJ's purported to contain such findings but of course we now know those findings were not made, and as the deputy chief ALJ testified at the trial, admitted at the trial, had they known the truth, they would have given no weight to the RFC finding in the record.

We have a second collateral claim which is perhaps less important, and I will be briefer on it, the first one being the deprivation of the right given by Congress to a meaningful initial stage hearing. The second collateral claim is derivative of the first. In violation of the statute and the Secretary's regulations, the claimants were not told the real basis

why the initial decisionmakers denied their benefits.

This was in flat -- I would here like to use what was said in Mr. Justice Powell's opinion in Eldridge when he got to the merits about the assumptions on how the Social Security review system was meant to work, and what was done here by the government, by the Social Security Administration, was in flat contradiction to what the government had represented about the administrative review system in Eldridge, and I urge you to review what is said in Eldridge at the bottom of Page 345 and the top of Page 346.

I cannot pause to read it all, but the heart of the matter on our second collateral issue was that the agency was expected to give its full reasoning and a summary of the most relevant evidence. Why was that to be done? Well, it was stated in your Eldridge opinion why it was meant to be done, and now quoting. It was done "to enable the recipient, the claimant, to mold his argument to respond to the precise issues which the decisionmaker regards as crucial."

Now, here no such thing was done. And thus a collateral right to a fair process was in this second way a fair process in compliance with the statute and in compliance with the regulations and in compliance with what this Court said it expected was denied to us.

Let me turn in more detail perhaps to Eldridge and Ringer. I submit that this is, if anything, a stronger case for waiver of full exhaustion than was Eldridge. There the claim was that a due process hearing was required before disability benefits could be terminated. In concluding that exhaustion after initial presentment of the claim was not required, this Court said that it would be "unrealistic" to expect the Secretary -- by that it means the regular administrative review process -- to change the challenged procedure or practice at the behest of a single aid recipient.

Under our facts, it was not simply unrealistic, but rather it was impossible. Neither the claimants nor their advisors nor the subsequent levels of administrative review such as the ALJ's knew of the challenged practice which deprived claimants of a meaningful and lawful first stage analysis.

Similarly, here precisely as in Eldridge the nature of the issue is such that whatever happened in subsequent stages of administrative review, even if we could have been able to bring it up, even if we had known the facts, whatever happened in subsequent stages of administrative review could not give the claimant the procedural right that had been denied to him or her.

In summary, on Ringer, although I am going to

come back to it in more detail, this is a very different case than Ringer, among other reasons because this is not at bottom -- your words in that opinion -- a claim for benefits, and also because what was done in Ringer was done by the Secretary within the area of appropriate discretion, of appropriate administrative discretion, but I submit there is no discretion, there is no appropriate discretion for a government agency to issue a regulation promising to act in one way and then to break that promise and to do so secretly.

In Eldridge, in your opinion in Eldridge, the single most important factor is that the claim be collateral. Eldridge's claim was characterized by this Court as entirely collateral. The general principle in Footnote 11, which sets out the general principle, the Court said that the core principle of the exhaustion rule is that if possible finality requirements should be construed so that crucial collateral claims not be lost and potentially irreparable injuries suffered.

The claims in this case are collateral. They are crucial collateral claims, and if it were necessary to show that they are entirely collateral, which I believe it is not, but if it were necessary, the claims in this case when properly described are entirely collateral.

QUESTION: Mr. Schwarz, I take it this litigation is of great importance to the City and indeed the State of New York.

MR. SCHWARZ: Um-hm.

QUESTION: Tell me what happens as a practical matter if you should win an affirmance here.

MR. SCHWARZ: Let me tell you, I am corporation counsel for the city, and I am arguing this case by consensus among all the parties. Let me say why we are interested in the case, why we joined it. I suppose most poignantly is the finding that was made by Judge Weinstein that 40 percent of the homeless people who are now sleeping on the streets of New York, increasingly making our city look like Calcultta, are people who were terminated from the -- mentally disturbed persons with severe mental disabilities who were terminated by the Social Security Administration per this policy.

So, we have an interest in stopping this policy. Now, we also have a fiscal interest. If the judgment here is affirmed, the claimants -- by the way, they don't automatically get benefits. They have to still establish the right under a fair proceeding without the tilting of the balance that was improperly and secretly put in by the Secretary.

If they prevail, we will be entitled to some portion of the back benefits that they receive to the extent that the city or the state made good our obligation to care for the needy, which calls for us to spend less money, and it is far less adequate than the federal benefits under the Social Security Administration.

QUESTION: You feel you can move in and pick up those funds under certain circumstances.

MR. SCHWARZ: That, of course, would remain to be decided by the District Court as a matter of the remedial details of the decree. And I don't think -- there has been no decision to that effect, Justice Blackmun, but I think we would have a claim upon those moneys, and the claimants would have a claim on the residue, the amount that is greater than the moneys which were reimbursed to the claimants by the city.

But as I say, that has not been resolved in a case, and first and foremost, our interest is that our people not be thrown out of a government program and as was found by Judge Weinstein thrown out on the streets to their detriment and to the general population's detriment.

Now, I was saying that if we had to, and I don't think we do, but if we had to, I believe we can

show properly construed, properly understood, properly articulated that the claim in this case is entirely collateral. Why? Because the result of the Secretary's actions here was to deny altogether the claimant's right to a fair or meaningful assessment of their claims at the initial evaluation stage.

Seeking to vindicate this right was or is in the relevant sense entirely collateral to their claim for benefits, and as in Eldridge, precisely as in Eldridge, this right could not be vindicated by subsequent layers of administrative review. Eldridge also calls upon the Court to consider the "consequences" of deferred administrative review or similarly "claimant's interest in having a particular issue resolved promptly." That has to be looked at along with collaterality.

Here, just as in Eldridge, to defer is to deny the right which we seek to vindicate. To force claimants to a second stage hearing before they receive their first fair evaluation in compliance with the regulations is to deny forever the right they sought to vindicate in the first place.

It was enough for Mr. Eldridge that he made a colorable claim that an erroneous termination would damage him in a way not recompensable through

retroactive payments. Here again, if anything, our case is stronger on the point than was Eldridge's. The harm here is not just a claim of damage or a colorable assertion. Here there were explicit actual uncontested findings that this class of mentally disturbed claimants was devastating, some even becoming suicidal, some indeed committing suicide by the improper denials, and there were uncontested findings that because of their condition, their mentally disturbed condition, they were particularly likely to be deterred from pursuing their claim further through the administrative appeal process by the crushing news of the denial, and of course if they did pursue it further, as Judge Weinstein found, even though some of them would win, there was nonetheless a taint to the record that went to the ALJ's.

To insist on exhaustion here would not only be inconsistent in principle with the legal claims we raise. It would also in practice insulate from any remedy a policy that caused real injuries to thousands of mentally ill persons, and none of the benefits that can be achieved from exhaustion as defined in Salfi, as earlier articulated in McCart, could have been achieved in this case through further exhaustion.

So, with no benefits from exhaustion, with

substantial and irreparable injury from exhaustion, and with a crucial collateral issue, we squarely fit the Eldridge standard. And nothing which you said in Ringer changes this analysis. First, Ringer was recognized as being at bottom a claim for benefits, and that is laid out at some length. But here, another point about Ringer and the issues, the holding by the Secretary there or the statement by the Secretary that BCBR surgery was not reimbursible is a kind of matter which, as this Court said, is clearly discretionary, clearly within the discretion of the Secretary to decide whether a particular medical procedure is reasonable and necessary under the Act.

It is not within the discretion of the Secretary or any other government official to secretly violate their own regulations and deprive people of their rights in that fashion. It is not normal and within the administrative power to say that claimants will not be given a meaningful first stage evaluation, and to do so secretly, and I stress again that in Ringer it was an appropriate medical judgment that was made.

Here, the medical judgment had been made in the regulations as to what has happened, meant to happen. There were meant to be five stages. They truncated it after three. Who was to do it? The

doctors were to evaluate it. They ignored the opinions of the doctors as found repeatedly by Judge Weinstein.

It is perhaps helpful again for me to compare -- to illustrate the extent of the government's misconduct and its departure from both the letter and the spirit of the statutory scheme. I would like again to illustrate that by comparing what was found to have been actually done in this case with what this Court assumed was the practice in your Richardson v. Perales opinion, and in your Eldridge opinion.

In Richardson, it was stated, in holding that the written report of doctors could be relied upon in these kinds of hearings, it was stated that disabilities decisions turn on, quoting from your opinion, "routine standard and unbiased medical reports of physician specialists." The same quote was repeated when you got to the merits in Eldridge. But here, in contrast to that expectation, and as found by the District Court, the professional opinions of physicians that claimants could not work were consistently overridden and disregarded.

There is a lot more both in Richardson to a great extent and in Eldridge also describing how this system is meant to work, which is utterly disregarded by what happened here. It is meant to be nonadversarial.

It is meant to be open and fair. It is not meant to be something where a secret rule is imposed in violation of the regulations.

The government tries here to reargue the facts. The first point is that these are curious arguments to make in this Court. The District Court found that the policy was secret, was illegal, was uniformly imposed, was not discovered until after this case was brought, and it was imposed upon physicians whose professional judgment differed.

The District Court found that this was imposed by high level officials of the Social Security Administration. The government chose not to appeal a single one of those findings. They were confirmed by the Second Circuit. They were made also in the --

QUESTION: How could they be confirmed if the government didn't appeal them?

MR. SCHWARZ: That is a good point. The Second Circuit wrote those same things and assumed them to be true, the government not having confirmed them. I think that is a fair -- not having appealed them. That is a fair point. But I still take pleasure from the fact the Second Circuit articulated that they were the facts as they are the facts.

And again, the opinion by Judge Larsen on

attorneys' fees which we mentioned is relevant, is hopeful, is helpful, is showing that the defense on the merits tried in the District Courts was not in good faith. That is why he awarded attorneys' fees.

On 60 days -- let me just give the briefest of points. I rely on our brief for the point that this is a statute of limitations as this Court has twice before said. I rely on the brief for the point that even if this is jurisdictional, the time never started to run because the true reasons for the decision were not given to the claimants.

If we win on exhaustion, it doesn't make sense, I submit, to go against us on 60 days. The same bad faith, the same clandestine policy which excuses, which contributes to the excusing of the further administrative review causes this statute to be told.

Now, there is a lot of discussion -- Justice Rehnquist, you made the point about when the government is involved, shouldn't you turn square corners? True. True. One has to pay -- first, of course, they cut the corner here, but one has to pay attention to what kind of tolling you are talking about. Tolling, as was argued, for example, in Soriano, for war is something which the Court in Soriano quite correctly said you do not assume, particularly against the government unless

it has been specifically included in the statute.

But tolling for misconduct of the sort that was involved here is something which the general statements of this Court starting in 1874 in Bailey against Glover say is, under the common law of England and the United States is assumed, and which this Court in 1947 in Homeburg, quoting Bailey against Glover, said that this equitable doctrine is read into every federal statute of limitations.

QUESTION: Well, was that a case -- was Homeburg a case involving the government?

MR. SCHWARZ: It was not. It was not, Your Honor, but I would submit that the government of all parties should not be allowed to give inaccurate reasons --

QUESTION: Well, that is quite contrary to our decision in a case like Hibbey, where we say that estoppel does not apply against the government, even though it does apply against private parties.

MR. SCHWARZ: On this particular wrongdoing estoppel or tolling, which I think is the right label to use, should apply. The nature of the wrongdoing is important to consider in deciding whether -- what it means to say square corners should be followed when you are litigating against the government.

QUESTION: Where did the District Judge get that statistic of 40 percent of the --

MR. SCHWARZ: He got it from testimony from some witnesses who worked for the government, and as to which --

QUESTION: Where did they get it?

MR. SCHWARZ: I think there was a survey done, Your Honor.

QUESTION: It strikes me as an almost impossible figure for anyone to get, find out from the drifters on the street why they are drifters. It seems very implausible. I don't know how relevant it is, but it is certainly --

MR. SCHWARZ: If it is too relevant, I am not going to get my last point in. I might want to do that.

(General laughter.)

QUESTION: Go ahead.

MR. SCHWARZ: Let me just conclude with a couple of points. They say the sky will fall if you affirm. They say the consequences to the vast Social Security Administration will be harmful. Well, it won't unless the government is reserving the right to once again systematically and secretly ignore their own regulations.

Actually, I am glad they raised the subject, because the consequence of accepting the government's position will be to flood the administrative system with more cases, and to flood the courts with more cases, because if the rule, as the government argues, is that they can secretly violate someone's rights, and then the person who didn't know what was done to them has lost their chance to go to court, well, everybody -- it would be malpractice for lawyers not always to go to court. They would go to court, like Mr. Macawber, hoping that something will turn up. So, they have the consequences upside-down.

Finally, on Congressional intent, the government speaks passionately about Congressional intent. Of course, that begs the question. Here, as in Eldridge, the issue at bottom is what is that intent. Let me ask the question rhetorically. Why would Congress want to require a vulnerable class of mentally impaired persons to have to take further administrative appeals when those appeals could not possibly right the systematic wrong, the systemic wrong that had been done to them?

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Kneedler?

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. KNEEDLER: Yes, Mr. Chief Justice. I would like to make several points about the secret policy point.

First, this is a time limit for a suit against the government. This Court has made clear that such a limit could be told, if at all, only upon a showing of affirmative misconduct by the government. Here the District Court did not even reach the question of whether the APA required these internal memoranda to be published. There has been no finding that the statute was violated by not giving more complete decisions, explanations of the decisions to include this particular approach. Respondents raised that issue for the first time in this Court.

Third, the named plaintiffs in this case all -- seven of the eight all went to the ALJ. They were not deterred or misled by the government from seeking further review. And fourth, the unnamed claimants, none of them invoked the procedure Congress has set out for extending the time limit when equity warrants it.

QUESTION: Were the ALJ's bound by this so-called --

MR. KNEEDLER: The ALJ's were not bound by it. In the Joint Appendix at Page 111-A there is a

specific mention of an ALJ disregarding an RFC determination by a judge.

QUESTION: So an appeal to the ALJ exhausting of it wouldn't have been futile.

MR. KNEEDLER: That's right. In fact, this is precisely the issue presented in Ringer. In Ringer, the claim was that the claimant was not getting a fair, indivdualized consideration of his claim for surgery at the first two levels --

QUESTION: I suppose the less the ALJ's knew about it, the more chance it would be they would get relief.

MR. KNEEDLER: Precisely. They would not be unaffected by it, but the point in Ringer was that claimants -- and there it was a conclusive presumption. The claimants could not recover in the first two levels of review no matter what they said. The Court said that you have to exhaust administrative remedies.

QUESTION: What about the appeals counsel? Did they know about the policy?

MR. KNEEDLER: I am not sure. I am not sure about that. One point on the collateral issue argument. If this issue is collateral, then there is no reason why respondent should -- the class members should be entitled to have their claims for benefits reopened.

This was truly collateral. It has nothing to do with the claims for benefits. It is entirely separate from the merits. But what they are trying to do is require the secretary to go back and reopen claims even though they were specifically told that they could seek further review within 60 days because they could not work or because they could work, and they declined to do so.

Also, there is no affirmative misconduct in this case in the sense that it be required. It was simply a misapplication of the law. I urge the Court to look at the documents in the case. There is no suggestion of an intent to subvert the applicable regulations. The decisionmakers were trying to implement them in the best way they knew how. I suggest the Court look at Joint Appendix Page 41 and 47 and the transcript at Page 127, 140, 196, 747 to 756, and 789. A reading of those does not leave anyone with the impression that there was affirmative misconduct going on in this case. If there are no further questions.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 3:01 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1923 - OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners V. CITY OF NEW YORK, ET AL.

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BY Paul A. Richardson

(REPORTER)