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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1409

TITLE OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitioner V. JANET YUCKERT

PLACE Washington, D. C.

DATE January 13, 1987

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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, :

Petitioner, :

V. : No. 85-1409

JANET F. YUCKERT :

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Washington, D.C.

Tuesday, January 13, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 o'clock a.m.

APPEARANCES:

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

CAROLE F. GROSSMAN, ESQ., Davis, California; on behalf of the respondent.

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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 REHNQUIST: We will hear arguments next in No. 85-1409, Otis R. Bowen, Secretary of Health and Human Services, versus Janet F. Yuckert.

Mr. Kneedler, you may proceed whenever you are ready.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KNEEDLER: Thank you, Mr. Chief Justice, and may it please the Court, this case presents the question of the validity of the severity regulation that was promulgated by the Secretary of Health and Human Services under the disability programs established by Titles 2 and 16 of the Social Security Act.

The current version of the severity regulation is an integral part of the five-step sequential evalation process that the Secretary esablished by regulation in 1978 to promote the fair, uniform, and efficient evaluation of the more than two million claims that are filed annually under the program.

Within the framework of this sequential evaluation process the severity regulation serves two distinct but largely overlapping purposes. First, it assures that benefits are paid only to persons for whom a significant medical impairment as distinguished from

an adverse vocational profile consisting of age, education, and work experience is the primary or substantial cause of his inability to work.

It is this requirement that distinguishes the disability program from other forms of unemployment compensation.

The second principle or purpose served by the severity regulation is that it screens out at an early stage of the sequential evaluation process those claimants who it may reasonably be presumed would be found not to be disabled even if the Secretary proceeded throughout that process and conducted a fullblown vocational assessment.

Four terms ago, in Heckler versus Campbell, this Court unanimously sustained the medical vocational guidelines that are applied at Step 5 of the sequential evaluation process. The Court recognized the compelling need for efficiency and uniformity of adjudication in the massive disability programs sustaining those regulations. Those same considerations underlie the severity regulation as well.

In this case, however, the Court of Appeals for the Ninth Circuit held that the severity regulation conflicts with the Social Security Act and is invalid on its face. It is the government's position before this

Court that that holding is clearly wrong. The principle on which the severity regulation is based which is that benefits may be denied in appropriate cases on the basis of medical evidence alone that shows an impairment is relatively minor, that principle has been a feature of the disability programs since they were started in 1954, and since that time, and particularly most recently since 1978 literally millions of claims have been screened against that test.

The current version of the regulation, as we show in our briefs, is supported by the text and legislative history of the 1954 and '67 amendments to the Act, but beyond that it is our submission that Congress in the text and legislative history of the disability amendments of 1984 ratified the amendment.

Now, before discussing those arguments in any detail I will briefly --

QUESTION: Ratified the regulations?

MR. KNEEDLER: Yes, I am sorry, ratified the regulation. I will briefly outline the statutory scheme and the sequential evaluation process to explain where the severity regulation fits in. The basic definition of disability for the programs was enacted in 1954. It provides that the term disability shall mean the inability to engage in any substantial gainful activity

by reason of a medically determinable physical or mental impairment. and then with a certain durational requirement.

QUESTION: That necessarily refers to some medical basis?

MR. KNEEDLER: Yes. And as we point out in our brief the House and Senate reports on the 1954 legislation explain two aspects of disability determination under that standard. The first aspect is that there must be an impairment of serious proportions. And then the second, picking up on the by reason of language says that the person must be unable to work by reason of such an impairment, in other words, one that is already --

QUESTION: Whatever impairment it is has to be because of some medically determinable --

MR. KNEEDLER: That's right. In 1967 Congress enacted Section 423(d)(2)(A) to further restrict eligibility in light of some judicial decisions, and under that provision the requirement is that the claimant be unable to engage in any substantial gainful activity that exists anywhere in the national economy irrespective of whether those jobs are in his own vicinity or whether he would be hired for them.

The sequential evaluation process established

by regulation in 1978 implements these statutory standards. It doesn't incorporate new concepts. These are all concepts in the adjudication process that had been in existence long before 1978. The first step in the process is really irrelevant here.

It is that if a person is already engaging in substantial gainful activity, obviously he is not disabled because he can work. Steps 2 and 3 then establish what are really two outer limits or two points oia spectrum in which the least serious and the most serious impairments can be identified on medical grounds alone.

At Step 2 that addresses the least serious impairments and under that test the claimant must satisfy a certain minimum threshold of impairment severity to justify the Secretary's considering it as probably being the primary cause of his inability to work.

QUESTION: Mr. Kneedler, was the respondent's claim rejected at Step 2? It didn't survive Step 2?

MR. KNEEDLER: It did not survive Step 2. That's correct.

QUESTION: And was the respondent's claim evaluated under the Secretary's guidelnes, 8528, which talk now in terms of some minimal impairment?

MR. KNEEDLER: That interpretive ruling was not in effect at the time that --

QUESTION: So presumably this respondent's claim was not evaluated at Step 2 with that guideline in mind.

MR. KNEEDLER: But that guideline as the Secretary made clear in promulgates it, does not state a new policy. It reflects what the proper standard of adjudication should have been and was under the program prior to that time.

QUESTION: Well, it certainly might have been helpful to the administrator considering the claim to have had that in mind, at least if you read about this particular respondent's problems, it would appear anyway that they might well have survived Step 2 under that guideline.

MR. KNEEDLER: No, I think it is important to bear in mind here, not to focus on respondent's allegations and testimony but the ALJ specifically found that she was exaggerating those claims. He found no objective clinical evidence to suggest the severity of those symptoms to that extent, so that I think that there is -- it would certainly be our position that even in light of the ruling, which we think didn't change things, that her case would have come out the same.

QUESTION: Well, wouldn't it perhaps be appropriate even if you are correct to remand Ms. Yuckert's claim at least, leave it open in light of the new guidelines?

MR. KNEEDLER: I think not, because applying -- first of all, we would have a concern there about courts sending cases back in light of the new ruling because it suggests the potential for reopening a lot of past claims, even those that are not currently surviving, and in our view because the ruling did not change the substantive standard of disability, there is no occasion to send it back. Now, if --

QUESTION: Well, the judgment was that this rule was just invalid.

MR. KNEEDLER: Invalid on its -- and not the ruling, not the interpretive ruling. The regulation was invalid on its face. Now, we do suggest that --

QUESTION: But for any purpose, it is just invalid on its face.

MR. KNEEDLER: That's right, invalid on its face.

QUESTION: That is the issue, isn't it?

MR. KNEEDLER: That is the only issue in this case. We do --

QUESTION: Where is that interpretive ruling

in your brief? I am having trouble finding it. Do you have it?

MR. KNEEDLER: It is in the Appendix to our certiorari petition at Pages -- beginning on Page 37A.

On Page 41A the Secretary explains that the standard is that a claim will be not severe if it would have no more than a minimal effect on an individual's ability to work even if his age, education, and work experience were specifically considered, that is, that the person's impairment would have no more than a minimal effect on his physical or mental abilities to perform basic work activities.

If we look at the preamble to the notice of proposed rulemaking in 1978, that is exactly the description of the severity regulation itself, not the ruling but the regulation itself that the Secretary gave, so this does not establish new ground. It clarifies what --

QUESTION: That same language is in the preamble?

MR. KNEEDLER: Quite close to it. It is on the portion of the preamble to the 1987 -- yes, it is on Page 9296 of the Federal Register from 1978.

QUESTION: How does that language go? Frankly, the fact that the Secretary said in issuing

this interpretive ruling that he was making no change does not mean that he was making no change. It seems to me that is not something he can make happen by just saying it has happened.

MR. KNEEDLER: Well, in terms of what the department's official position and what the regulation meant, now, if there were individual applications of the regulatio during the interval in which ALJs had misapplied it, that is a different question, but we are talking about what the substantive legal --

QUESTION: No, if in fact he meant something earlier and he now says, no, what I meant all along was something different, he can't change what the past was.

MR. KNEEDLER: Well, in the preamble in 1978 the Secretary explained it, that there is a point in the range of impairment severity below which the effects of the impairment have such a minimal effect on the individual that they would not be expected to interfere with his or her ability to work irrespective of his age, education, or work experience.

QUESTION: Would not be expected to?

MR. KNEEDLER: Would not be expected to.

QUESTION: Mr. Kneedler, the hard thing about this case is really understanding what the threshold is. Is it your view that there could be a medical

impairment, the dizziness and so forth, all the stuff that this particular claimant asserted that could prevent her from doing the hob she used to do in the past but nevertheless could be as a matter of law nonsevere within the meaning of the severity --

MR. KNEEDLER: Yes, that is our position, and that is spelled out in the --

QUESTION: Even though it is clear that it impairs her from doing a particular job, but that is not necessarily --

MR. KNEEDLER: Yes. Now, the most recent ruling does identify an accommodation of the past work principle. First, let me state the general rule. The premise is that the definition of a nonsevere impairment is one that does not significantly limit the ability to do basic work activities that are necessary for most jobs, so the assumption is, if the claimant has an impairment that falls into that category she is able to do most jobs, and therefore would be able to do her own past work.

The new ruling says that if the claimant is unable to do his or her past work by virtue of unique features of that work, then it is not something -- it is not something that is addressed by the most jobs limitation. It is one of those few jobs that is unique,

that has unique job requirements, and the new ruling allows the sequential evaluation process to progress beyond that point.

QUESTION: Well, let me just interrupt you if I may. We have a case here, she was a travel agent, I think, in this case.

MR. KNEEDLER: Yes, and --

QUESTION: Surely that is not a unique job.

MR. KNEEDLER: No.

QUESTION: So that if there were a medical impairment severe enough to prevent her from doing that work, could that end the inquiry? I mean, it is severe enough to prevent her from doing that work, but then they think, well, it may -- would that automatically require her to pass Step 2, enable her to pass Step 2?

MR. KNEEDLER: No, only under the new ruling --

QUESTION: But then it isn't related to the uniqueness of the job.

MR. KNEEDLER: It is not related, and this is spelled out in the sequential evaluation process, and I would point out that that was well known to Congress at the time that Congress ratified --

QUESTION: Well, maybe -- you go too fast for me. I am puzzled, then. Does the uniqueness of the job have any impact on the analysis?

MR. KNEEDLER: The uniqueness of the job does if it has unique job requirements. The example that is sometimes mentioned is the pilot who must have 20-20 vision. If he has 20-30 vision it is a unique requirement of his job.

QUESTION: But you say the regulation can still be dispositive in a nonunique job such as this.

MR. KNEEDLER: Yes. Yes, because the premise of the regulation is that the claimant has the ablility to do basic work functions necessary for most jobs to stand, to -- or that that is not signficantly affected.

QUESTION: But what is it that would be necessary for most jobs that would not be necessary for a travel agent? Standing, I mean, those things, if she is disqualified from doing those things in that job, why wouldn't that --

MR. KNEEDLER: Then she would. If there is any one -- if there is any one of the job requirements or the basic work functions that's necessary for most jobs that she can't do she would pass beyond Step 2. Maybe I misunderstood you.

QUESTION: Well, I think -- see, I am puzzled as to this case whether she lost because of the severity regulation or she couldn't have even passed the old standard that she didn't prove she was disabled from

doing her old job.

MR. KNEEDLER: Well, she was denied in the initial application and reconsideration on the basis of inability to do her past work, and the ALJ also noted in stating that she could do basic work activities, he said specifically real estate --

QUESTION: You mean she was denied on the basis of ability to do her last work. Did you state it correctly, or did I misunderstand it? She was denied on the basis that she was even able to do her past work, wasn't she?

MR. KNEEDLER: The ALJ did not rest it at Step 4 of the sequential evaluation process, but when he said she is able to do basic work activities he said, for example, real estate salesperson, so I think this case is a good example of how the regulation does not unfairly weed out people who would be weeded out later on.

The materials that we cite in Footnote 11 of our reply brief show extensive Congressional awareness of how this regulation works, including the explanation that as more people were screened out on the nonsevere step, fewer were screened out on the basis that they could do their past work. There is a very close correlation between the two.

If you are able to do all basic work activities you will be able to do your past work, assuming that it is not unique.

QUESTION: If a pilot should have 20-20 but has 20-30 if he applies for disability he could be weeded out at Step 2?

MR. KNEEDLER: He could be, although the new -- I think the statute would certainly permit that, and that was the adjudication approach prior to the new ruling in 1985. The new ruling provides special protection for a claimant in that situation and says that the Secretary will go on to consider his age, education, and work experience.

QUESTION: Why would he?

MR. KNEEDLER: Well, I think in every case he will be found not disabled at that stage, too, because he would not have an impairment that has significantly affected his ability to do all the other jobs in the national economy.

QUESTION: Mr. Kneedler, I must say I am nothing but confused by the clarifying ruling. When you compare it with the Federal Register prologue it really doesn't say the same thing if that Federal Register prologue says, as you quoted it, a slight abnormality or combination of slight abnormalities which you said would

normally be expected to have no more than a minimal effect. Isn't there some language in that that says, would normally be expected? Right?

But in the new clarification it says a slight abnormality or combination which would have no more than a minimal effect. Does this clarification mean that you really have to inquire into each --

MR. KNEEDLER: No, it does not mean that, and in fact its usefulness as an adjudicatory tool would not be solved.

QUESTION: Yes. That is why I am confused.

MR. KNEEDLER: It does not look at the individual's condition. It looks at the nature of the impairment.

QUESTION: Okay.

MR. KNEEDLER: It does not lock at what the individual --

QUESTION: When it says an individual's ability it doesn't mean the individual before the ALJ.

MR. KNEEDLER: That's right.

QUESTION: It means the average individual's ability.

MR. KNEEDLER: I don't know about average but it is speaking in terms of a category. And this, I think this principle is confirmed by both the --

QUESTION: Well, but, Mr. Kneedler, in this new guideline on Page 41A of your petition it says that dealing with Step 2 an impairment is found not severe and a finding of not disabled is made at this step, meaning Step 2, when medical evidence establishes only a slight abnormality which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered, and we are not talking about the individual's --

MR. KNEEDLER: It is not necessary to focus --

QUESTION: -- age, education, and work experience?

MR. KNEEDLER: It is not necessary to focus on the individual. Otherwise, it would -- there is a regulatory standard of nonsevere, and the adjudicator has to decide how much of a difference an impairment would make. Is it the sort of thing a stubbed toe, 20-30 vision that would affect --

QUESTION: Well, at least what I read to me means that you would have to look at the particular claimant's age and education and work experience.

MR. KNEEDLER: No, it definitely does not mean that. The ruling does not change that aspect of the regulation at all. The severity regulation in 1520(c)

specifically says we do not consider your age, education, and work experience.

QUESTION: Isn't that curious?

QUESTION: It is not a clarification, then. If it is what you have just described, it is not a clarification. It is an argument. What the Secretary is saying by that language is that if, as I have been doing in the past, I have been allowing to pass Step 2 all of those disabilities which are so severe that they prevent your conducting basic work activities, standing and all the things you say, if I am behaving in that fashion, I am automatically, then read this part, saying that the medical evidence establishes an abnormality or a combination which would have no more than a minimal effect on an individual's ability. It is not a new standard. It is not an elaboration of it. It is just an argument that if I do what I have been doing all along, this in fact will be the effect, isn't it?

MR. KNEEDLER: Well it is that. It is also guidance to the decisionmaker. I mean, there is a certain element of a subjectivity here, but an ALJ assessing someone's --

QUESTION: Well, but the crux is still basic work activity.

MR. KNEEDLER: That's right.

QUESTION: That is still the crux.

MR. KNEEDLER: That is, and that has not changed.

QUESTION: So I don't think -- I must say it seems to me that the new regulation, I don't know what effect it has on the ALJ, but the only effect it has on me is to confuse me.

QUESTION: We need a further clarification.

MR. KNEEDLER: Well, there is an ongoing study of the severity concept within the department as there are references in the briefs here to continuing studies, possible reformulations of the standard.

QUESTION: This isn't a new regulation anyway.

MR. KNEEDLER: This is not a new regulation. Again, we are focusing only on the validity of the regulation on its face, and in that connection I would like to turn to the text and legislative history of the 1984 disability amendments, which Congress thoroughly studied the entire disability program, changed the things that thought needed changing, and left unchanged the things that it did not. Congress in this context acted against the background of the severity regulation that specifically said your age, education, and work experience will not be considered and against the

background of the regulations that said if you are weeded out at any step the process will not proceed, which includes the consequence that if you are weeded out at the severity step you don't get to the point of considering the person's ability to do past work.

QUESTION: And all of that is still true.

MR. KNEEDLER: All of that is true.

QUESTION: Including that your particular age, background, and experience will not be considered.

MR. KNEEDLER: Yes, all of that is still true. That was clear on the face of the regulations against which Congress acted.

QUESTION: Mr. Kneedler, is it true that 12 different Circuit Courts of Appeals have held that that goes beyond the Secretary's statutory authority?

MR. KNEEDLER: Well, five courts have sustained the regulation. They have sustained it on the ground that it did not accomplish a change from what the Secretary -- the standard the Secretary was applying prior to 1978. That has always been the Secretary's position.

That is explained in the preamble to the severity -- to the vocational regulations in 1978, so that is not -- that is not really an issue here, but whether or not there is a change is really irrelevant at

this point, because whatever the prior law might have been, Congress ratified the current severity regulations when it enacted the 1984 Act. And this is clear from looking at the text of the provision that was added in 1984, which is on Page 27 of our brief.

The first sentence of that says -- first of all, the purpose of the 1984 amendments was to require the Secretary to consider the combined effect of multiple impairments, but Congress otherwise left the sequential evaluation process untouched, and that appears -- the significance of that appears in the very language Congress used in the Act.

It says, "in determining whether an individual's physical or mental impairments are sufficient medical sevrity that they could be the basis of a finding of eligiblity, the Secretary will consider the comined effect." Well, that first sentence clearly says medical severity, and it states it in terms of whether it could be a basis of eligibility, which is language of a threshold test. Then the second sentence says, if the Secretary does find a medically severe combination of impairments, he will consider that combination throughout the disability determination process, in other words, throughout the subsequent steps of the sequential evaluation process.

The obvious intent of this is that those subsequent steps will be reached only if, in the words of the statute, the Secretary first does find a medically severe impairment, so the endorsement of the Secretary's approach in the regulations, which were clear on their face, is right in the language of the Act, but if there could be any doubt about that it is dispelled by a reference to the legislative history of the Act.

First, we -- as this Court recognzied in Heckler versus Day several terms ago, Congress was very aware of the way the disabilty program was being run in the late seventies and early 1980s. We have listed in Footnote 11 of our reply brief a whole series of Congressional references to the way the severity step of the sequential evaluation process worked. That shows Congress was fully aware of the various features that are being discussed here and that have been discussed by respondents, including the fact that the number of denials on the basis of nonsevere impairment went from 8 percent in 1975 to 40 percent in 1981.

Congress knew all of that, so Congress ratified this regulation against the background of a thorough knowledge of the way in which it operated. Several of those as well as the committee prints cited

in the amicus brief of the AARP, there is a House committee print that specifically refers to the fact that the burden of proof with respect to prior work does not occur until Step 5. Congress understood how it worked, but the Committee reports on the 1984 legislation make that even clearer. The Senate brief, for example, stresses that this new rule of considering combined impairments is to be applied in strict conformity with the current sequential evaluation process.

The House report discusses the sequential evaluation process and says that the ability to do past work and other work will be considered only after a finding of severity. The conference report paraphrases the existing regulation in terms of whether there is a significant effect on the ability to do basic work actvities, and it says we do not intend to impair the use of that sequential evaluation process.

Finally, Senator Long, who had an extended history in the development of the disability program, explained what Congress had done in the conference report. He said that some courts had ruled the Secretary can't rule out claimants on the basis of medical grounds alone, and there were District Court decisions like that at that time, Dixon and others.

But Senator Long said the Senate bill after which the conference bill was patterned was drafted in a way to make sure the Secretary can do that.

QUESTION: Mr. Kneedler, can I ask one other question? As I understand it, there are three kinds of impairments, ones that are nonsevere, those that are severe enough to go past Step 2, and then you have an exhibit at the end of the regulations that say some of them are so severe that you win right away.

MR. KNEEDLER: Yes.

QUESTION: Is there a list identifying nonsevere impairments, the kind of per se nonsevere comparable to these?

MR. KNEEDLER: There used to be a list in rulings, SSR 8255. That was rescinded at the time that 8528 was adopted. But the standard, the notion that there should be a uniform standard is still in place, but the specific listing of impairments was rescinded but that was well within the Secretary's authority just as he can promulgate --

QUESTION: The concept is easy enough to understand, but the question really is, I suppose they contend, in effct, that you have got too many things that you regard as nonsevere that really ought to be in the intermediate stage.

MR. KNEEDLER: Well, but Congress was aware of how many people were being weeded out. Again, the statistics in every hearing, every committee report reveal that --

QUESTION: Of course, you say those people would have lost at a subsequent stage anyway.

MR. KNEEDLER: Would have lost anyway, and the House Ways and Means Committee report in 1978 explains that those people would have been weeded out -- past work for the most part.

QUESTION: Well, some of the statistics cited by the respondent don't bear that out, that is, that in those jurisdictions that did strike down the Secretary's regulation the grant rates went up something like 35 percent.

MR. KNEEDLER: Well, they isolate on what happened at the ALJ stage. In the Smith class action in District Court in California, for example, at the initial and reconsideration stages there was a difference in only 6 percent of the cases. It is also important to bear in mind that if the decisionmaker reflexively applies the vocational guidelines then you might find people disabled because the vocational guidelines are expressly premised on the existence of a severe impairment. It says so in the charts that

describe the matrix of various factors.

QUESTION: I don't understand what you have just said. Say it again.

MR. KNEEDLER: If someone is found disabled at Step 5 of the sequential evaluation process by considering his age, education, and work experience, the regulations are drafted in a way that you are only supposed to get there if the claimant has first been found to have a severe impairment.

If the decisionmaker applies these regulations without having made that threshold determination, you will get improper decisions at Step 5 because they are not predicated on the existence of a severe impairment.

I would like to reserve the balance of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kneedler.

We will hear now from you, Ms. Grossman.

ORAL ARGUMENT OF CAROLE F. GROSSMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MS. GROSSMAN: Mr. Chief Justice, and may it please the Court, Congress created the disability insurance program with a specific goal in mind. That was to provide benefits to fully insured workers whose medically determinable impairments prevented them from

working. The Secretary has designed through the severity regulation a mechanism which prevents many disabled workers from establishing their eligiblity for benefits.

The Court of Appeals as well as ten other Courts of Appeals have found the Secretary's construction and use of the severity regulation is illegal in that it denies claimants the opportunity to prove that their medically determnable impairments in fact prevent them from working.

QUESTION: Those were in indivdiual cases?

MS. GROSSMAN: Some were in individual cases, and some were class actions. There are classes --

QUESTION: But have other Courts of Appeals declared the regulation invalid on its face?

MS. GROSSMAN: I take issue with the reading that even the Ninth Circuit declared --

QUESTION: Well, has any Court of Appeals then held the regulationinvalid on its face?

MS. GROSSMAN: All the Courts of Appeals who have invalidated the regulation have found that it is invalid by its terms as well as by its application.

QUESTION: So your answer is yes?

MS. GROSSMAN: Yes, it --

QUESTION: It is just invalid?

MS. GROSSMAN: Yes, it has been --

QUESTION: It can't be applied in any case?

MS. GROSSMAN: It has been found invalid both by its terms and as applied. The conflict between the severity regulation and the Social Security Act is straightforward. The Act defines disability as "the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" of sufficient duration.

The definition clearly measures the disabling impact of an impairment in vocational terms. This Court recognized in Heckler v. Campbell in 183 --

QUESTION: (Inaudible) does that. It doesn't define what is an impairment. It seems to me that that is the peg that the Secretary is hanging his hat on. What is an impairment? Is taste a deficiency for example? You don't taste things quite the way other people do. Is that an impairment?

MS. GROSSMAN: Justice Scalia, there is a definition that was provided by the '67 amendment which fills out the definition of an impairment. In the basic statutory definition, we say medically determinable. There is a fuller elaboration of that in the '67 amendmets which indicates that it must be one which can be diagnosed and supported by clinical findings.

QUESTION: An impairment that can be, but you are still left with the preliminary question, what is an impairment? Is it a blemish on your face? Is it any abnormality whatever is an impairment?

MS. GROSSMAN: Well, there --

QUESTION: It seems to me you ycurself acknowledge in your brief, you must acknowledge some running room. You say that there can be a de minimis exclusion, can't there?

MS. GROSSMAN: Absolutely, Your Honor.

QUESTION: What is the basis for that? Isn't it that some things just aren't impairment? What is the textual basis for any kind of an exclusion at Step 2, whatever?

MS. GROSSMAN: Well, we do not dispute that there must be a medical basis for entitlement to disability benefits.

QUESTION: All right, I --

MS. GROSSMAN: Whether we are going to talk about the word "severe" or whether we are going to talk about the word "impairment" what we have to look at is the standard that is applied. There is no dispute --

QUESTION: You acknowledge --

MS. GROSSMAN: -- and a medical basis is necessary.

QUESTION: Fine, a medical basis is necessary. I can medically demonstrate a very, very minor abnormality. As I understood your brief, you --

MS. GROSSMAN: The Secretary would be entitled to screen out those claims which are so groundless on a common sense basis, as the First Circuit says --

QUESTION: All right.

MS. GROSSMAN: -- that they could never be found disabling despite the vocational analysis.

QUESTION: Why? Could never be found disabling at Step 2. You would allow them to kick them out at Step 2, and what I am suggesting is, if you believe that, the only reason you could believe it is that you must think that the word "impairment" has some objective content in and of itself. Some things just aren't an impairment. Otherwise, I don't see the basis for even a de minimis rule.

MS. GROSSMAN: Well, the de minimis rule does use the word "impairment." It does use "slight abnormality." The definition which was in effect prior to this regulation used the terms "slight abnormality," did not use the word "impairment."

QUESTION: Okay, so the Secretary has to give some content to the word "impairment."

MS. GROSSMAN: Well, the statute has given the

word "impairment" its meaning.

QUESTION: No, it hasn't. It says that the impairment shalnot be found disabling unless such and such things, and it says other things about when an impairment will be disabling or not, but the statute never does say what is an impairment in so many words, does it?

MS. GROSSMAN: Well, again, Justice Scalia, I suggest that the term "medically determinable impairment" has some significance and that the --

QUESTION: Oh, yes. In addition to being an impairment, it has to be a medically determinable one, in addition, but you still have to start off with -- you don't go anywhere unless you have an impairment to begin with.

MS. GROSSMAN: That's correct.

QUESTION: Are you saying that the statute expressly defines the term "impairment" somewhere?

MS. GROSSMAN: I am saying that the --

QUESTION: Are you saying that the statute expressly defines the term "impairment" somewhere?

MS. GROSSMAN: As a medically determinable --

QUESTION: Are you able to answer my question yes or no.

MS. GROSSMAN: Yes, I am able to answer your

question. A medically --

QUESTION: And how do you answer it?

MS. GROSSMAN: I am saying there is another provision which elaborates on medically determinable as a physiologically based anatomically based impairment that is capable of being documented by clinical and laboratory techniques. That is as much as the statute answers in terms of the word itself.

QUESTION: That is the extent of the statutory definition of impairment?

MS. GROSSMAN: That's correct.

QUESTION: Can there be in your mind such a -- something that could exclude the person at Step 2 even if the impairment keeps him from doing his or her old job?

MS. GROSSMAN: No, we do not believe -- it is respondent's --

QUESTION: Nothing can be that -- if it keeps him from doing his or her old job it just isn't that minor then.

MS. GROSSMAN: That's right. What proof of inability to do prior work does is to conform to one of the central statutory questions, which is whether or not the impairment prevents the individual from performing substantial gainful activity.

The entire establishment --

QUESTION: Well, isn't that a different question than asking whether the person can perform his or her old job?

MS. GROSSMAN: It is the preliminary question to the ultimate determination of whether or not the person can perform any work in the national economy. The cases which have interpreted the Act, all 12 circuits have interpreted the Act to show, to require the claimant to prove that they could not do their prior work.

Once that showing is made, there is an evidentiary shift of burdens to the Secretary to produce evidence that there is other work in the national economy which the claimant can do.

QUESTION: Well, you really don't acknowledge a de minimis exception then. I thought you acknowledged it.

MS. GROSSMAN: Yes --

QUESTION: What you have just said means that you have to flunk Step 1 before you can flunk Step 2. That is no exception at all. You say no matter how minimal the impairment is, if it is an impairment that stops you from doing your current job, it qualifies. But then Step 2 is useless, because that test is Step 1.

MS. GROSSMAN: Justice Scalia, it is our psition that this is not a meaningless standard, the inability to perform prior work, and every Court of Appeal in the country has interpreted the Act to require that showing, so that --

QUESTION: That wasn't my question. I am really trying to pin down whether you acknowledge -- your briefs seem to acknowledge that there was a certain de minimis level where Step 2 could have some effect, but what you just said in response to the last question indicates that you don't acknowledge any effect for Step 2.

MS. GROSSMAN: I am sorry if I gave that impression. Our position is clearly that you may not impose a de minimis standard which imposes a higher threshold than the claimant's proof that they cannot do their prior work.

QUESTION: Than Step 1, so you are saying Step 2 is useless. If you pass Step 1 you automatically pass Step 2.

MS. GROSSMAN: No, because Step 1 has nothing to do with proving that you can do your prior work. Step 1 is simply an evaluation of whether you are currently engage in substantial gainful activity.

QUESTION: Your example would be the airline

pilot who can no longer pass the vision test, but might well be able to do lots of things, and you would say the regulation would improperly disqualify him because, simply because he couldn't do his -- I mean, simply because he can't pass the -- I mean, simply because it is quite obvious on its face that there are a lot of other jobs that a well trained pilot could perform.

MS. GROSSMAN: Well, I think --

QUESTION: You would say he is entitled to -- he passed -- he must pass the severe impairment -- he must pass Step 2.

MS. GROSSMAN: The threshold --

QUESTION: The airline pilot whose vision is just not quite good enough to pass the FAA regulation standards. What about him?

MS. GROSSMAN: He has -- he would survive a threshold inquiry. I think a better example are the portraits of people who are denied most commonly by the severity regulation. Those are individuals with multiple imparaments, pulmonary obstructive disease, cardiovascular disease, seizure disorders, who clearly cannot perform their prior work.

QUESTION: Well, take an airline pilot, take an airline pilot with a sufficient cardiovascular disease not to be able to continue to pass the medical

exam, but he looks to be pretty healthy for most other things. You say he --

MS. GROSSMAN: He would survive -- he would survive a --

QUESTION: The statute requires that he survive.

MS. GROSSMAN: The statute requires that he survive the threshold test, and he will go on, and the Secretary will be able to examine whether or not there is other work in the national economy which he is capable of performing.

QUESTION: Even though common sense would tell you that there are an awful lot of jobs this particular indivdiual could do, right?

MS. GROSSMAN: Well, and it will be extremely easy, and that is the point of this Court's decision in Heckler v. Campbell invalidating the regulations, because the medical vocational guidelines allow the Secretary with ease to determine whether or not somecne with his qualifications, of his age, education, work experience, and skills can do other work in the economy.

QUESTION: Why should he have to make that further determination if it is so obvious that an airline pilot with 20-30 vision can do all sorts of

things?

MS. GROSSMAN: Well, Justice White, I would suggest that that case is one which will be easily accomplished. It is not the case of the thousands of disabled workers who were denied at the severity regulation. It is not as easy when you have an older individual with a marginal education and a history of prior work limited to heavy unskilled work. Then I think it is not -- you cannot say clearly totally on a discretionary basis their impairments are nonsevere, we don't have to look at their vocational analysis.

QUESTION: But there is the possibility that in passing this law Congress was only willing to compensate people for impairments, and that some things it considered so trivial that they were not impairments, and you get no compensation. Take the example I gave you before --

MS. GROSSMAN: I agree with you, Justice Scalia.

QUESTION: -- of some distortion in taste Now, that would not make any difference to most people, but if you happen to be the Tetley Tea taster, you are suddenly out of a job. Now, as I understand your analysis, that person has to go on through the rest of the -- you know, through the rest of the procedure and

gets compensation if he can show that --

MS. GROSSMAN: No, I'm sorry --

QUESTION: -- he is 65 years old. He has a lot of other problems. Really, the only thing the poor fellow is good for is tasting tea. He used to be very good at that, and now he has this sudden dysfunction of his taste buds.

MS. GROSSMAN: Well, if he were 65, of course, he would be eligible for retirement benefits, but if he is younger --

QUESTION: Sixty-four.

(General laughter.)

MS. GROSSMAN: -- if he is younger than 65 --

QUESTION: You got me.

MS. GROSSMAN: If he is younger than 65 and he has no transferrable skills and his impairments seriously prevent him from working, then the medical vocational guidelines would direct a finding of disability.

QUESTION: It is entirely conceivable to me that Congress did not mean that by an impairment, that Congress meant something more substantial than that by an impairment.

MS. GROSSMAN: I'm sorry. What was your example of his impairment?

QUESTION: His impairment is that he just doesn't taste things as well as he used to, or as well as a younger person might or an normal person might.

MS. GROSSMAN: Well, in that case he may not have a medically determinable impairment. Let's not forget that there is no contest on respondent's part that impairments need a medical basis.

QUESTION: Ms. Grossman, may I inquire whether you think that the guidelines adopted in SSR 8528 adequately explain what should happen at Step 2?

MS. GROSSMAN: Justice O'Connor, the Socila Security ruling 8528 is ambiguous. Its content is ambiguous. It is very difficult to tell whether or not any change has occurred from the severity regulation. I think that the Secretary has recently argued that it does not constitute a change.

Although there are some procedural protections offered that are clearly not in the regulation itself, such as a great care standard, the standard itself remains a substitution of basic work activities for the ability to do prior work.

In that sense the standard itself has not changed. I thin it is important to note that --

QUESTION: It does, though, clarify the fact that it is only a -- something that has more than a

minimal effect on a person's ability to do basic work activities, right?

MS. GROSSMAN: It does use the language of a de minimis threshold. I agree. What concerns respondent is that most recently the Secretary argues both in reply and before this Court that it does not matter whether a de minimis standard is articulated, although the Secretary insists that there is a de minimis standard in the new ruling, in the interpretive ruling, in their reply they argue that it makes no difference whether there is a de minimis standard because the entire regulation has been ratified.

QUESTION: Well, but as we read it here, when it says that a claim may be denied at Step 2 only if the evidence shows the individual's impairments are not medically severe. Do you quarrel with that?

MS. GROSSMAN: No, we have no quarrel with that. I think the greatest problem in this case is figuring out what terms mean, and the only way you can figure out what terms mean is to see how the regulation is construed and applied by the Secretary. Every Court of Appeals that has considered the issue has found that the Secretary's construction and use of the severity regulation violates the Social Security Act because it does deny claimants who are potentially disabled under

the definition of the Act.

QUESI(N: Those decisions didn't have in mind the guideline in 8528, did they?

MS. GROSSMAN: Well, two Courts of Appeals have now considered 8528. The Tenth Circuit has rejected it as not representing any change, and therefore the conflict between the regulation and the ruling being -- still existing.

The First Circuit has read 8528 as an indication that the Secretary has changed his policy and says that if there hadn't been that change there would be a serious question in the circuit's mind whether or not more judicial interference were necessary, but the First Circuit, it is important to note, reads 8528 consistent with a de minimis standard insofar as it says that if a claimant cannot do their prior work, then it does not matter the particular level of severity that claimant is entitled to an evaluation under the Act. The Secretary in his reply brief has repudiated that reading of 8528 so we are left with only one Circuit Court embracing 8528 as a change, and the Secretary now saying you may not read this as the de minimis standard which you are reading it as.

If you do we disagree. I think the Secretary has made clear today that there is disagreement.

QUESTION: You said a while ago that all the Courts of Appeals have disagreed with the Secretary's construction and application of the regulation. Now, is there a construction he has put on it that is not -- that isn't revealed by the words of the regulation or what? If you were reading --

MS. GROSSMAN: The terms --

QUESTION: If there had never been a construction of it or an application of it.

MS. GROSSMAN: Okay, if you just read the words, the language clearly substitutes. I think it is clear that there is a substitute of basic work activities for an inquiry into the ability to perform prior work. That overbroad irrebuttable presumption which the Secretary in other rulings agrees produces fallacious and insupportable findings in terms of whether or not somebody can actually work, that is clear on the face of the regulation.

QUESTION: And you think that is enough to invalidate it?

MS. GROSSMAN: The lack of consideration. I think what is more significant is that the regulation clearly spells out that there will be no consideration of those vocational factors of age, education, and work experience which the statute clearly identifies as

relevant to the determination of disability.

QUESTION: Ms. Grossman, one of the points in the government's case that I found quite persuasive was their reference to the '84 amendment to the Benefits Reform Act, and I don't recall that your brief responded to that. If it didn't --

MS. GROSSMAN: Thank you, Justice Scalia, for giving me the opportunity to talk about the '84 amendments.

QUESTION: I knew you would want to.

MS. GROSSMAN: The '84 -- there is a lot of controversy about whether the House or the Senate report should be looked to to understand what happened in the legislative history. It is repondent's position that the conferees' report is the most authoritative guide to what was at least agreed to in Congress.

The conferees' report very carefully defines a de minimis standard. It says an individual -- that a determination may be made that an individual is not disabled based on a judgment that an individual has no impairment or that the medical severity of his impairment or combination of impairments is slight enough, slight enough to warrant a presumption even without a full evaluation of vocational factors that the individual's ability to perform SGA is not seriously

affected.

That is a standard which was in effect prior to the promulgation of the severity regulation in 1978. That is what is called a slightness standard. For the conferees to say that they did not mean to impair the use of such a presumption is -- indicates that there is no ratification of the current severity policy.

QUESTION: They went back and approved what existed in '78 and not what was existing in '84 when they passed it? I mean, the statute -- never mind the legislative history.

MS. GROSSMAN: Okay.

QUESTION: The statute as enacted says, refers to medical severity as a threshold test.

MS. GROSSMAN: That's correct.

QUESTION: And you are telling me that at the time the Secretary was using a particular system to determine medical severity which the Congress presumably knew about and it was not that system that the '84 amendment meant to approve but the system that had previously existed in '78.

MS. GROSSMAN: They -- the conferees noted that the Secretary was in the middle of reevaluating the criteria. The House expressed a great deal of concern that this reevalaution be done expeditiously. The

Secretary had assured Congress that they were reevaluating the nonsevere impairment criteria, so that this statement of the conferees stands as a guide to the Secretary to what they would find to be an acceptable de minimis threshold inquiry with the -- notice that they say even without a full evaluation of vocational factors. There is no indication whatsoever that they intended to substitute a test of medical severity of a very high threshold for the analysis that is called for in the statute.

QUESTION: Is it clear that the Secretary -- and this -- I am really not sure what you two are arguing about. Is it very clear that the Secretary's test does not meet the language that you quoted from the conference report?

MS. GROSSMAN: May I say that every Court of Appeals the consider the issue has found that the Secretary's test does not meet that standard. The Courts of Appeals which have not invalidated the regulation but which have imposed a narrowing construction on the regulation and said to the Secretary, unless you reference your decisions on the nonsevere regulation to this Court's opinion telling you how the regulation must be interpreted in order to be consistent with the Act, then we will simply remand

those decisions because we cannot tolerate your interpretation of the Act through the implementation of this regulation.

Now, we would argue that invalidation of the regulation is a less intrusive means of correcting the Secretary's interpretation. It leaves the Secretary free to develop his own de minimis standard or to skip Step 2 as in 1978 he said he had some questions about whether or not the severity regulation produced all the efficiency measures and uniformity that they had expected it would, and that it might be just as easy to use the previous methods, which were consistent, I would argue, consistent with the act of determining whether or not the person could do their prior work, and then on to the vocational factors once they made that prima facie showing.

The severity regulation has been preliminarily or permanently judicially enjoined in more than 20 states, yet many disabled workers continue to have their claims summarily and illegally denied on the basis of the regulation. Until the conflict between the severity regulation and the Social Security Act is resolved by regulatory revision pursuant to the APA, there will be no resolution. Interpretive rulings may be issued and they may be rescinded. Although 8255 has been rescinded

they are not repudiating what is in the ruling. 8528 exists today. It may not exist when a claim is remanded. It provides no clear standard. Respondent respectfully requests that this Court require the Secretary to resolve the confict by regulatory revision. Thank you.

QUESTION: Thank you, Ms. Grossman.

Mr. Kneedler, you have two minutes remaining.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KNEEDLER: Thank you, Mr. Chief Justice. There are several points I would like to make. With respect to the conference report I would like to point out on Page 47 of our brief we set out the pertinent paragraph of the conference report. Respondent does not quote the relevant sentence of ratification here. The sentence she quotes says that "The judgment that a person is not under a disability may be based on a determination that the impairment is slight enough to warrant a presumption" -- note it is presumption, not individualized determination -- "presumption that the impairment is not -- that the person's ability to engage in substantial gainful activity is not sericusly affected."

The next sentence says, "The current

sequential evaluation process allows such a determination, and the conferees do not intend to either eliminate or impair the use of that process. As I have explained, it is entirely clear on the face of the regulations establishing the process that the inability to do past work does not get you past the severity step, and the severity step says that age, education, and work experience are not considered.

Respondents suggest that Congress must have had something other than the severity standard in the regulations in mind when it ratified the regulations. It did not. The previous page of the conference report quotes the Social Security rulings that say in order to be nonsevere an impairment must not significantly affect the ability to basic work activities. Respondent quarrels with the concepts that are in the regulation that Congress quoted in the reports and that Congress ratified.

Congress in the conference report quotes two Social Security rulings that explain precisly how it operates, including with respect to past work. Those are reproduced in respondent's brief and referred to on Page 29 of the conference report. Congress knew what it was ratifying.

I wanted to clarify one point from what

Justice Scalia was saying. The severity threshold comes not simply from the word "impairment" but by reason of impairment in the basic definition, which --

CHIEF JUSTICE REHNQUIST: Your time has expired, Mr. Kneedler.

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

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 12:06 o'clock p.m., the case in the above-entitled matter was submitted.)

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#85-1409 - OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitione
V. JANET F. YUCKERT

. that these attached pages constitutes the original
nscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)