ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

CAPTION: PITTSTON COAL GROUP, ET AL., Petitioners v. JAMES SEBBEN, ET AL.; ANN McLAUGHLIN, SECRETARY OF LABOR, ET AL., Petitioners v. JAMES SEBBEN, ET AL.; and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Petitioners v. CHARLIE BROYLES, ET AL.

CASE NO: CONSOLIDATED 87-821, 87-827 and 87-1095

PLACE: WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

PITTSTON COAL GROUP, ET AL.,
Petitioners
v.
JAMES SEBBEN, ET AL.

CONSOLIDATED
No. 87-821

ANN McLAUGHLIN, SECRETARY OF LABOR, ET AL.,
Petitioners
v.
JAMES SEBBEN, ET AL.

No. 87-827

---

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioners
v.
CHARLIE BROYLES, ET AL.

No. 87-1095

Washington, D.C.

Monday, October 3, 1988

The above-entitled matter came on for oral

argument before the Supreme Court of the United States at 10:06 o'clock a.m.

APPEARANCES:

DONALD B. AYER, ESQ., Deputy Solicitor General
Department of Justice, Washington, D.C.;
for the Federal Petitioners:
MARK E. SOLOMONS, ESQ., Washington, D.C.;
for the Private Petitioners:
PAUL MARCH SMITH, ESQ., Washington, D.C.;
for the Respondents:

C O N T E N T S

P R O C E E D I N G S

10:06 a.m.

CHIEF JUSTICE REHNQUIST: We will hear argument first this morning in No. 87-821, Pittston Coal Group against Sebben; No. 87-827, Ann McLaughlin versus Sebben; and No. 87-1095, Director versus Broyles. Mr. Ayer, you may proceed whenever you're ready.

ORAL ARGUMENT OF DONALD B. AYERS, ESQ.,

FOR FEDERAL PETITIONERS

MR. AYER: Thank you, Mr. Chief Justice, and may it please the Court.

The respondents in these cases applied between 1973 and 1980 for Black Lung Benefits under Part C of the Black Lung Benefits Act. The claims in all instances were denied. Some of them were in fact denied for the second time, but all of them were denied under the Department of Labor's so-called interim regulation which was adopted in response to the 1977 Amendments to the Black Lung Benefits Act.

The Courts of Appeals below the Eighth Circuit and the Fourth Circuit struck down the denials of these claims on the ground that the interim regulation was incompatible with the 1977 amendments under the provision which is no codified at 30 U.S.C. 902(f)(2), which requires that the criteria under those iterim

standards be "not more restrictive than criteria applied by HEW to Part (b) claims filed before July 1, 1973."

The Department of Labor interim regulation is similar to the HEW rule in many respects. It is a presumption, and I will talk more later if I get the chance about the details of it. It also however has some major differences. One of the differences is a difference that is an issue in this case, and that is the question of how you can invoke what I will now call the causation prong of the two-prong test necessary to invoke the presumption which exists under both the HEW interim rule and the Department of Labor interim rule.

Under the HEW rule, you were required to show that your pneumoconiosis was caused by coal mine employment, and you were allowed an inference, indeed, a presumption to be drawn from the fact that you had ten years of coal mine experience, a presumption that it was in fact caused by coal mine employment. The difference in this case which is relevant is that under the Department of Labor interim regulation, you simply must have ten years of coal mine employment, and there is no opportunity to prove causation in any other way in order to trigger the presumption.

I should note and I think it is clear from the briefs, that in any event if the presumption is not

invoked, there is still an opportunity to prove entitlement to benefits by going back to permanent regulations in effect, allowing you to prove all the elements, that is, total disability, pneumoconiosis, and causation by coal mine employment.

Our position in this case --

QUESTION: True as for both B and C?

MR. AYER: That is true as to both B and C. There is some confusion now in the Courts of Appeals as to precisely which set of permanent regulations you go back to, but you have an opportunity under both to go back and prove that --

QUESTION: The same kinds of proofs under either?

MR. AYER: Well, the permanent regulations are different in some significant respects, and it would take a good long time to go through all the ways in which they are different. And it's enough off the point here that I would like to pass over that if I can.

The position of the Government in this case is that they are not -- this difference is not a more restrictive criteria because the appropriate reading of criteria within the meaning of Section 902(f)(2), looking to the legislative context and trying to make sense out of the amendments passed in 1977 is to read it

as essentially medical test criteria. Now, in that regard, and in order to come to that conclusion, it is important and necessary I think to look to the background of the amendments in 1977 which were in fact -- it's clear from the hearings and the debate -- a political compromise which like many political compromises had an ambiguous result.

The main focus, if you can say that, of the debate throughout the mid 1970s was that there were different results reached under the HEW interim rules which applied to claims filed prior to 1973 and under the so-called Part B program, and the results reached under the permanent regulations which the Department of Labor was required to apply to Part C claims where the claims were filed after mid-1973.

That was the main focus. There are different views that were taken in the legislature and in the testimony that was given of that difference. One view was the view -- I can encapsulate in the notion that the Department of Labor approval rate was unreasonably low, and something had to be done about it. Its approval rate at that time was something under 10 percent. One of the main focuses of that criticism was the fact that medical test criteria, specifically, the ventilatory study scores, that were applied under the HEW permanent

regulations that the Department of Labor had to apply were tougher, significantly tougher, than the ventilatory study scores applied under the HEW interim presumption.

That was one of the major focuses of the criticism, and a major explanation of the difference, not the only explanation, but a major one. This general view that the Department of Labor approval rate was too low and something had to be done about it was embodied in the House bill which was passed in 1977, and especially, although not again solely, embodied in the language which said that they were to apply criteria "not more restrictive than the criteria applied under the HEW interim presumption under Part B."

A second view, again not mutually exclusive with this first one, but certainly a very different emphasis, was a view that saw -- that expressed significant doubts about the accuracy of the standards and the process that was being applied in general, and particularly, that was being applied by HEW under the interim regulation. That is to say, the extent to which -- doubts about the extent to which they were really identifying cases of people who were disabled with pneumoconiosis from coal mine employment as opposed to simply paying benefits to people who were coal miners of

middle or advanced years who were able to meet certain criteria that really didn't demonstrate that they had the conditions that the statute was aimed at.

This general view, I think it's fair to say, was embodied in the Senate bill which was passed in 1977 which called for the re-promulgation of standards, permanent standards, by the Department of Labor taking a different approach really. Not so much treating it as an entitlement program as treating it as a workers' compensation program and specifically trying to identify medical tests necessary to establish whether someone is or is not totally disabled with pneumoconiosis from coal mine employment.

And specifically, they enacted in the Senate bill a provision that says the Department of Labor shall promulgate criteria for all appropriate medical tests which accurately reflect total disability in coal miners. The conference committee put together essentially, in what really I think has to be described as an uneasy compromise, both the provisions of the House bill and the provisions of the Senate bill, and to a significant degree, tried to serve both purposes.

On the one hand, they called for the promulgation of new permanent regulations in the words of the Senate bill, criteria for all appropriate medical

tests to be promulgated with the consultation of the National Institute of Occupational Safety and Health and to be done permanently, and they realized it would take some period of time to do that.

As to the interim period, before the promulgation of those permanent regulations, I must say I think the signals were somewhat mixed as to precisely what was supposed to be done. On the one hand, the House bill's language talking about criteria not more restrictive than the HEW provision, the HEW interim regulation, was included. And there's no question that they intended to move a good deal closer to approximating what the HEW administration was doing than had been done by the Department of Labor previously.

QUESTION: Well, Mr. Ayer, one does get the impression at least that the over-arching purpose of Congress was to make sure that miners who would have been entitled to benefits under HEW's interim Part B regulations would be entitled to benefits under Labor's interim Part C regulations.

MR. AYER: Well, I think that that is certainly -- I think there is a good deal of evidence for that in various parts of, if you pick and choose and you don't have to pick and choose too carefully, you can certainly find people who said things that indicated

that with regard to the enactment of the House bill.

I think it is a good deal harder to find that supported with regard to the Senate bill because they simply didn't take any such step. And I think what we need to do is to try analyze what was the intent in enacting the compromise, which was the conference bill, because that actually is what was enacted.

And in that regard, I would not suggest that the words are wholly unambiguous, but there are indications that they intended something which is quite a lot different than simply whatever HEW was doing. They did not want the same results that HEW achieved, and that is indicated by a number of different sources that we can turn to.

One is the conference report itself where they indicated, and I quote: "The conference substitute conforms to the Senate amendment with the proviso that the so-called interim Part B medical standards are to be applied to all reviewed and pending claims. Such regulations, that is, the interim regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, except that in determining claims under such criteria, all relevant medical evidence shall be considered in accordance with the standards prescribed by the Secretary of Labor."

They did not say in any of the bills and certainly not in the final act as passed that they were trying to mirror precisely what HEW had done. They did not indicate as they could easily have done had they wanted to that the Department of Labor was simply to re-promulgate the HEW interim regulation in exact terms. It's quite clear they didn't intend that at all.

QUESTON: It is not clear to me, Mr. Ayer, why if you prevail in your argument that criteria means medical criteria. That we are not confronted here with the medical criteria anyway. This was raised in the briefs. Isn't disability ultimately, significantly a medical judgment?

MR. AYER: Well, I think the words medical criteria, as has been indicated in the briefs, is not itself wholly unambiguous. But I think when you look to the specific focus of much of the tension which was a very concrete difference in ventilatory study scores that you had to have in order to qualify for the presumption under Part B under the interim regulation as opposed to a table that looked very much the same except it had different numbers on it that applied under the so-called permanent regulations the Department of Labor had to apply.

And it was very clear that that particular

difference made a significant difference simply turning on the day on which you applied as to whether you qualified or not.

QUESTION: But in any number of Social Security cases, especially in the circuit courts, the courts look at medical evidence to determine disability. And then you're telling us that oh, we have to read this regulation to that it means medical criteria, and then respondents point out, what difference does it make, you lose anyway.

Well, isn't disability significantly a medical judgment?

MR. AYER: I don't think, we are not advocating a reading that indicates simply there's a medical judgment involved.

QUESTION: You're advocating that it says medical criteria.

MR. AYER: Medical test criteria.

QUESTION: All right. Medical test criteria.

MR. AYER: Okay.

QUESTION: And my question is why isn't that a large part of the judgment on disability anyway?

MR. AYER: Well, it certainly can be. But we do think it is not dispositive, and it does not -- those kind of criteria do not include the decision by the

Department of Labor whether or not to allow proof of causation, that is, proof of causation by coal mine employment by means other than the fact that you had ten years of coal mine employment.

That is a judgment about how the case will be adjudicated and what kinds of evidence will be allowed in. The --

QUESTION: Mr. Ayer, the problem I have is I find the intent that you ask us to attribute to this statute a very implausible one.

You're telling us that Congress was very concerned that you use medical criteria in your sense, test criteria, that are no more strict than what HEW had been using. But so long as you do that you can import all other sorts of qualifications that will reduce the number of successful claimants, including if you haven't been a coal miner for ten years, you don't get the benefit of the presumption at all.

I suppose you could have said 20 years or 30 years. That's a weird intent. You have to be no more strict on the medical criteria, but as for everything else, you can tighten it up as much as you like. Why would they have that kind of an intent?

MR. AYER: Well, I think what has to be kept in mind is that the Department of Labor was operating in

the face of what were indeed competing signals. And one of the ways they tried to deal with that problem was to go back to Congress and present to the leadership in the legislature what it was they were doing.

The presented one set of regulations which were found to be quite inappropriate. They presented another set which were found to be by and large acceptable, including this provision which no one challenged at all. The one thing that I think needs to be gotten out is that somehow we have to read the statute in a way that allows the existence of additional rebuttal criteria under the DOL regulation which do exist which I think clearly are appropriate and which all parties here agree are appropriate.

And somehow it has to be found that the statute's prohibition against more restrictive criteria doesn't bar that. I think it's a difficult thing to do, and the most sensible way to do it is to go back to the compromise that was entered into, where on the one hand they wanted to come a good deal closer to what HEW was doing under the interim regulation while at the same time not mirroring the results which they reached.

I would like to just address briefly, if I could, the second issue which the Court will have to reach should it decide that in fact the merits issue was

properly decided against the position of the Government. And that is essentially the question of whether parties, claimants who have had their claims finally decided against them can come in in 1985, where the date for filing claims closed in 1980, and all of them had had exercised whatever opportunity they wanted to and had available to seek review of their claim denials, to come in with a mandamus action in order to direct that the claims be reopened.

The main point I want to make with regard to that is that that is simply not a reasonable reading of the statutory provision with which we're dealing here. Section 945(b)of Title 30 U.S.C. says that the Secretary is to review each claim -- that is, each claim which is pending or has previously been decided at the time these amendments go into effect -- "taking into account the 1977 amendments."

The Department of Labor did this. The Department of Labor adopted these interim regulations, which were not an easy thing to enact, but they adopted them. They considered these cases under them. They reopened many cases. There's nothing in 945(b) that suggests that these cases were to essentially be reopened for all time. And that any time anyone should come in at whatever year in the future and raise a

question about the interim regulation, that these people could come back and their claims would spring back into existence.

It's contrary to the notion of res judicata. It has frightening practical implications. Twenty-eight hundred cases alone in the Eighth Circuit, and that's a tiny fraction of the total in the country, would have to be reopened. And furthermore, mandamus is not the avenue to pursue such relief even if the statute were to properly read as is indicated. Mandamus is a remedy available where there is essentially a clear and indisputable right.

I think it's fair to say that neither the right claimed under 945 nor the right claimed on the merits issue is what you describe as clear and indisputable, and on that basis, we would urge strongly that in any event, the relief given to the seven claimants is inappropriate.

I would like to save the remaining time if I may for rebuttal.

QUESTION: Thank you, Mr. Ayer. We will hear now from you, Mr. Solomons.

ORAL ARGUMENT OF MARK E. SOLOMONS

ON BEHALF OF PRIVATE PETITIONERS

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

and may it please the Court, for the U.S. coal and insurance industries, the two central questions that are presented here are matters of fundamental fairness and economic stability. The Secretary of Labor in drafting his own version of the interim presumption could not replicate the Social Security Administration rule.

The validity of the Secretary's action in this regard in drafting his own interim presumption presents obviously complex questions of interpretation. But we think that those questions become far less difficult if the language to be interpreted is reviewed and analyzed with an appreciation for the special dynamics of the six-year long process that ultimately produced the Department of Labor rule.

From the very beginning in 1969, the Social Security Administration program was a distinct and different phenomenon from that that was entrusted to the Department of Labor. It was different intent and it was different in its design. If the Social Security program had this monolithic purpose to simply pay as many claims as it possibly could, that was not the intent that Congress had for the Department of Labor program.

No one expected that this same one dimensional approach would be adequate at a time when the coal industry was called upon rather than the federal general

revenues to pay the benefits that were to be awarded. The Labor Department's program is a workers' compensation program. It is financed by employers, and employers have the right to litigate cases and to contest non-meritorious claims.

Employers also have a right to have rules and regulations under which these cases are to be adjudicated that are fair and valid both from a statutory point of view and from the point of view of what their contents provide. The Department of Labor's 10 year rule and its rebuttal provisions, which still remain in this case and it was decided I think in the Fourth Circuit's decision below, should be sustained by this Court unless they were prohibited or irrational.

It cannot be argued that the Department of Labor's presumption is irrational or in any way unfair to claimants. That is an argument that cannot be made. The presumption that the Secretary of Labor wrote is probably the most plaintiff-favorable rule that has ever been written by a federal agency, and has delivered billions of dollars in benefits to hundreds of thousands of claimants, many of whom do not have Black Lung Disease or any disability that's related to Black Lung Disease. And this is well documented by successor reports of the Comptroller General.

This is a program, the Department of Labor program, which has never been criticized by Congress. Congress from 1969, 1970 through 1972, through 1978 strongly criticized the programs of the Social Security Administration as being too restrictive, and criticized the programs of the Department of Labor as being too restrictive. That has never happened here.

This presumption that the Labor Department wrote, and particularly, we will focus on its 10 year provision, should be analyzed in the sense that it was not unreasonable for the Secretary of Labor to limit access to this extraordinarily powerful presumption, where the undisputed scientific evidence that was presented to the Congress demonstrated that short-term coal miners are quite unlikely to contract Black Lung Disease, and that even if they did contract Black Lung Disease, the likelihood of it manifesting in a disabling stage is almost nil.

It simply doesn't happen. There is no scientific evidence to support that approach. It was not unreasonable for the Secretary of Labor to begin from that premise and to apply a 10 year screening provision. Of course, this does not as the Solicitor General pointed out, prohibit these people from getting benefits. Any one of them who can come forward with

direct proof of totally disabling pneumoconiosis under criteria, which in a report to Congress in 1983 prepared for the Department of Labor at the request of Congress demonstrated we're still extraordinarily liberal.

QUESTION: No matter how long he has been in the coal mining industry?

MR. SOLOMONS: The other criteria?

QUESTION: Yes.

MR. SOLOMONS: The other criteria also contain presumptions which require a certain period of coal mine employment, but if a miner worked for one day --

QUESTION: What's the period?

MR. SOLOMONS: Ten years, or 15 years in certain circumstances.

If a miner worked for one day and contracted Black Lung, which is in fact impossible, but if that were to happen, that miner can get benefits under this statute on direct proof presented by his physicians that he's disabled by the disease. It can happen. It happens many times.

QUESTION: He would still have to prove causation, wouldn't he?

MR. SOLOMONS: He would have to prove causation and he would have to --

QUESTION: He would not just have to prove his

disability from that disease.

MR. SOLONONS: Well, it would be as in any other civil litigation, there are elements --

QUESTION: All right. So he has to prove causation.

MR. SOLOMONS: He would have to prove causation, yes.

And that's really the only -- other than with respect to the rebuttal provisions, that's really the only difference here between the Secretary of Labor's rule and the SSA rule.

Under the Secretary of Labor's rule, claimant must go back and establish causation and establish his disability if he is a short-term miner. It was a line drawing process, and as a matter of fact, it is -- what the Secretary of Labor did is perfectly consistent with what Congress did in writing the statute.

When Congress wrote the statute, it did not provide any presumptions to anybody who is a short-term miner. This legislative history which is vast, and this statute contains absolutely not one word of concern about restrictive provisions or anything else having to do with the unfair treatment of short-term coal miners.

And the reason for that is that this is not a disease which is likely to afflict short-term coal

miners. If it does, they can get benefits. But if it does not, it is not unreasonable for the Secretary to require them to prove the elements of their case.

QUESTION: May I interrupt. You say it's a disease not likely to afflict short-term coal miners. I thought it was a progressive disease, and in the simple stages it might well be found in short-term coal miners, but it's highly improbable that that simple disease would be totally disabling.

MR. SOLOMONS: Well, the materials that we've cited in our brief show that the disease is not manifest, period, in short-term coal miners, and those with fewer than 10 years of coal mine employment.

QUESTION: And is it not true that there is a period before ten years where simply pneumoconiosis will appear but it is highly likely that it's totally disabling.

MR. SOLOMONS: Well, the fact is that the information that we have presented and that was presented to Congress showed that they didn't get the disease at all. It is true that once the disease manifests, it may but does not necessarily progress to more advanced stages.

But let me point out something else.

QUESTION: Well, isn't it also true that there

are times when the disease has manifested itself, but it's highly unlikely that it's totally disabling in its early stages.

MR. SOLOMONS: If that was the case, then these individuals are never precluded from coming back and filing a claim. They can -- everyone is --

QUESTION: I understand. I am asking a question of fact. Isn't that a fact that there are many times when a very simple stage of the disease that occurs, but it's highly unlikely that it's totally disabling.

MR. SOLOMONS: That's true.

QUESTION: Yes.

MR. SOLOMONS: And as the Court so found in Turner Alcourt.

I think it's also critical here in terms of analyzing this that there is really no definitive guidance from this statute that cuts with surgical precision. Clearly the word "criteria" does not do so. The word "criteria" in the statute, criteria for total disability, it does not say criteria for causation of disease.

These are words that by their very nature call out for some interpretation. We also have a setting here where the Secretary of Labor was directed to write

his own regulations and to consider all relevant evidence in writing those regulations. We have a situation in which the Secretary of Labor was directed to also apply the statutory presumptions which require ten years of coal mine employment.

This forms -- these various directions form a package which the Secretary of Labor put together in a regulation which is still extraordinarily fair to claimants, extraordinarily fair to claimants. And we think there is certainly sufficient ambiguity in the specific statements that Congress made, and clearly there is from this process. I think it's undeniable. That the Secretary of Labor had flexibility in designing a rule which would meet with Congressional expectations.

But even perhaps more importantly here, this rule, the rule that the Secretary of Labor wrote, was subject to a de facto veto, not by Congress, but by the three people with the most, a proprietary interest in this provision. Three members of the conference committee, the officers of the substantive committee in which the statute was designed.

And the Secretary of Labor, through the regulatory process, took those regulations up there to the Hill and asked is this okay. And once they said, no. This is contemporary with the process during the

same session of Congress during the same year, went back and redid it. Brought them back up there and then with specific reference to these particular provisions, with specific reference to the 10 year requirement that the Secretary could put in his regulations, these same three members of Congress.

QUESTION: Maybe they changed their minds. Maybe it wasn't an election year. They didn't care as much. A whole lot of things could explain that.

MR. SOLOMONS: I doubt it, sir.

QUESTION: Thank you, Mr. Solomons. We'll hear now from you, Mr. Smith.

ORAL ARGUMENT OF PAUL MARCH SMITH, ESQ.

ON BEHALF OF THE RESPONDENTS

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

Our position in this case is essentially two-fold. First, we believe that the Labor interim presumption regulation is clearly in conflict with the governing statute. Under the 1977 amendments, it is our position that the Secretary was required to make available the interim presumption of disability to all Black Lung claimants who filed prior to a certain date.

The Secretary's rule however as has been discussed flatly bars any claimant from invoking the

interim presumption if he does not have ten years of mine employment in his background. For this reason it was fully appropriate in our view for the Fourth Circuit in Broyles to have granted relief to two claimants who had indivicually pursued their claims through more than a decade of administrative appeals.

And the second, we believe that the Eighth Circuit in Sebben was also correct in granting mandamus relief to the affected class of claimants who were denied the interim presumption and did not pursue these individual appeals. Our argument here is primarily based on a separate section of the statute which specifically directed the Secretary to review the files of all pending and denied claims, applying the revised statutory standards, and to grant immediate retroactive benefits to any claimant who under those revised standards would have already demonstrated entitlement.

These reviews, however, were conducted without applying the revised statutory standards where there was less than ten years of mine employment.

QUESTION: Mr. Smith, do you contend that if the Secretary did follow what you say was the statutory mandate and did review a claim under the guidelines, do you agree that that becomes final? If the administrative review isn't pursued, that that's not

everlastingly open?

MR. SMITH: Mr. Chief Justice, if the reviews had been conducted under the appropriate standards, and at that point the claimant had been notified that there had been a determination made that they didn't qualify, at that point I would certainly concede that their only appropriate relief would be an appeal.

But whereas here the reviews were meaningless in that they applied the same standards that Congress had just thrown out. Our contention is that the will of Congress certainly requires that they be allowed the opportunity to enforce this right and have a meaningful first level review as Congress mandated.

QUESTION: Well, when you say meaningful, does that mean if the Secretary says I'm reviewing your case under the applicable law, but the Secretary makes a mistake as to the law, then they can start all over again say five years later?

MR. SMITH: Mr. Chief Justice, what you have here is a situation where they applied precisely the same standards from 1972 which Congress had just identified as being illegal and inappropriate. The same standards which had led to this less than 10 percent approval rate were being applied.

The statute was passed for the precise purpose

of throwing out those standards, but when you had a claimant with less than 10 years, they didn't have any revised standards applied. Indeed, if they had been denied previously, when they were reviewed, they were reviewed under precisely the same standards that they had previously applied.

QUESTION: So you say in effect that the Secretary makes an error of law in reviewing, it's everlastingly open?

MR. SMITH: Well, where it goes to the fundamental value of the review mechanism created by Congress.

QUESTION: How can we tell that?

MR. SMITH: Well, certainly, you can look at the legislative history and the intent of Congress in the section. Or maybe I should turn first to the issue of the validity of the regulation and try to demonstrate the centrality of what was going on here.

QUESTION: So you say in effect in your answer that Congress said do it over.

MR. SMITH: Well, that's right, your Honor. In the sense that Congress said we want to reopen these claims.

QUESTION: That had been closed, if Congress hadn't said that.

MR. SMITH: If Congress hadn't said reopen it?

QUESTION: Yes.

MR. SMITH: Well, we would have a different case here than when you have a specific provision that says these people have been abused in this process for the past five years. They've had inappropriate denials. They've had huge backlogs. And we know as a matter of fact, that if they are forced to do anything, even refile their claims in order to take advantage of these 1977 amendments, they will not do so in mass numbers.

The Secretary's action in effect said we're going to eliminate this whole protective mechanism. We're going to review them under the very same standards which Congress through out. And then we're not only going to require them to refile, we're going to require them to go through four levels of administrative review before they get their first opportunity to have this interim presumption applied to their case.

QUESTION: You say the very same standard. Are they the very same medical standards too, or is it just the ten year presumption that was different?

MR. SMITH: No. What happened, Justice Stevens, is that when the interim presumption was found inapplicable by virtue of the ten year exclusion, the

claim was then reviewed under the old 1972 Labor Part C standards. Those standards required proof of all three elements of a claim. The most important feature of those standards was that they required direct proof of disability by the claimant.

So when they reviewed them, and they again found the interim presumption inapplicable, they just went ahead and applied the same regulations which had been in effect before the 1977 amendments.

Let me just start with the --

QUESTION: Mr. Smith, could I ask this about your theory on the liability part. You acknowledge as I recall that the difference in the rebuttal criteria including medical portions of the rebuttal criteria are okay. You're not challenging that.

Well, once you give that away, how can you say that criteria means everything? You're drawing a line it seems to me that appears as little in the text of the statute as does the Government's.

MR. SMITH: The line we draw, Justice Scalia, is based precisely on the statute. There's a separate section of the statute, section 923(b) which says in every adjudication make sure that all relevant medical evidence is considered.

Now, in 1977 in the revised statute, they

incorporate that provision into the definition of total disability which is what we're talking about here, 902(f)(2). And the conference report specifically says apply the SSA, the HEW criteria except be sure you follow this other statutory requirement which is to make sure that all relevant medical evidence is considered in each adjudication.

There was concern that SSA had not been allowing all of the relevant medical evidence to come in on rebuttal. And they drew specific attention to this other statutory requirement which they had incorporated into the Secretary's duties in that bill and said make sure that you follow all the SSA criteria except make sure that all the relevant medical evidence can come into the process at some point.

And then when the Secretary promulgates the broader rebuttal criteria under the revised rule, the Secretary specifically based those broader rebuttal criteria on this other statutory section and on the conference report's reference to it. So what you have here is you have a general requirement, equivalent disability criteria from the SSA rule and the Labor rule.

A specific exception to that general requirement pointed out by Congress and then pointed out by the Secretary. That exception doesn't in any way

suggest that the general requirement is itself in any way soft or loose. It is a specific exception which doesn't support their position here. Certainly, they can't say that by exluding people with less than ten years they've facilitated the consideration of all relevant medical evidence.

So in the end I think the fact that Congress drew a specific exception supports our position. It doesn't support theirs. It shows that Congress knew how to make an exception to the requirement.

QUESTION: Well, you call it an exception. It was in a different section of the statute. It wasn't listed as an exception. It just stated that all relevant medical evidence is admissible.

MR. SMITH: If you read the conference report --

QUESTION: You concede in your brief that under the existing regulation, there are four methods of rebuttal. Previously, there are two. And it seems to me that that is not -- doesn't meet the restrictive criteria standard as you interpret it.

MR. SMITH: Well, it meets it because there was a specific exception to the not more restrictive criteria requirement. The conference report says we have adopted the House bill. The criteria must be not

more restrictive. And then it says except that we want the Secretary to assure that all relevant medical evidence is considered in the process.

So this was a specific exception drawn from another statutory section which they had incorporated into 902(f)(2) in the same bill. And it doesn't in any way suggest that --

QUESTION: Well, the House report may call it an exception. The statute isn't drafted that way.

MR. SMITH: No, the statute's not. The conference report certainly says it's an exception, and that's how they understood it.

QUESTION: Mr. Smith, Section 402(f) uses the words "restrictive criteria," or "more restrictive criteria" in two different places under subsection (1) in referring to total disability. And then in subsection (2), the context in which we consider it here.

I take it under your view, the words mean something different in each of these subsections then.

MR. SMITH: No, your Honor, they don't.

In each of those two contexts, they mean criteria for determining disability. And if you look at the Solicitor General's brief, they concede in their reply brief that criteria in the former reference which is a reference to the Social Security Act includes both

medical criteria and vocational criteria, anything that would ordinarily go toward determining disability.

We don't read the word "criteria" significantly differently in 902(f)(2). What we're saying is --

QUESTION: Well, it means a little something different in both places which certainly indicates to me there may be some room here for agency interpretation of what's included.

MR. SMITH: Your Honor, if I could explain exactly how these people were treated, I think it would be clear that there was no question that the Secretary was acting within whatever range of discretion was left.

It's important to understand that if you had less than ten years, you were assessed under precisely the same old 1972 permanent regulations which Congress had specifically found to be illegal. These were the ones that were producing a less than 10 percent approval rate, and they were --

QUESTION: Yes, but Mr. Smith -- I hate to interrupt in your answer, but it's quite important at this point.

Isn't it highly improbable based on the empirical data that people who had less than ten years underground were totally disabled as a result of

pneumoconiosis even though it was fairly likely that they might have had a very simple beginning stage of the disease?

MR. SMITH: Well, two answers.

First of all, your Honor, it is quite likely that many of them did have simple pneumoconiosis. The studies presented to Congress in 1977, the autopsy studies, showed that 60 percent would have simple pneumoconiosis.

QUESTION: But how many of those under ten years had permanent disability as a result of that simple disease?

MR. SMITH: Well, it depends on what you mean --

QUESTION: According to the empirical data that Congress looked at?

MR. SMITH: Well, it depends on what you mean. If you take what Congress meant by total disability, what Congress said is we will give compensation where simple pneumoconiosis in combination with other medical conditions prevents a person from mining coal.

And the Congress repeatedly found under this statute, that simple pneumoniosis can be and often is totally disabling. It said so flatly in the House

report.

QUESTION: But after two or three years of coal mine employment?

MR. SMITH: Exactly the same level of pneumoconiosis as these people had to demonstrate to achieve the interim presumption is what Congress said can be totally disabling. It often happens where it is in combination with other medical conditions that produces the disability.

And the effect of simple pneumoconiosis will vary from person to person depending on their other characteristics, but Congress was certainly of the view that simple poneumoconiosis of this level is totally disabling in a large number of cases. It said so flatly in the House report, and that finding of Congress is implicit in the whole structure of the statute.

The statute from the beginning in 1969 has irrebuttably presumed total disability in a person with complicated pneumoconiosis. All of the old stuff in the statute that has to do with the adjudications of disability refers only to people that have simple pneumoconiosis, which is what these people had to prove in order to invoke the presumption.

And there's no question that Congress thought these people can be totally disabling. If there are

cases, and there certainly are, where they're not, then it's up to the Government and the coal operator to show that on rebuttal. There's no problem with rebuttal of that presumption. Congress though certainly came to the conclusion that we don't want the coal miner to bear the burden of uncertainty here where it's difficult to establish disability and a causal link between that disability and the pneumoconiosis.

So it's up to the -- you put that into the rebuttal section of the process deliberately. Now --

QUESTION: Well, while you're there. Just one moment before you leave that point. The rebuttal mechanisms are phrased in terms other than medical. They are talking about the ability to work, et cetera.

And so it seems to me that that's quite inconsistent with your justification of the rebuttals as being under the statutory section for all relevant medical evidence.

MR. SMITH: The two rebuttal provisions which were added by the Secretary in 1978, one is rebuttal based on a showing that the claimant does not in fact have pneumoconiosis. And the other is rebuttal on the basis of the showing that while he has pneumoconiosis, the total disability is not caused by the pneumoconiosis. In other words that the pneumoconiosis

is not severe enough to be contributing to his disability.

Those are two certainly very highly medical issues. They're precisely the issues which was -- there was concern that SSA wasn't considering, and that's why they had this statutory exception.

QUESTION: Well, Mr. Smith, these amendments had the effect, did they not, of shifting the financial responsibility to the coal mine operator or employer. And isn't it logical that Congress would have been concerned in making that massive shift of economic responsibility to permit the operator to show that the disease was not caused by coal mine employment?

MR. SMITH: Well, your Honor, they did allow -- in no way does the Secretary's rule serve that. The claimant has to prove causation of the disease by coal mine employment in order to invoke the presumption. So we have no concern about that. That is an issue where the burden of proof under the statute remains on the claimant.

QUESTION: Well, but the presumption affects that of course.

MR. SMITH: Well, the presumption does not affect the issue of causation of the disease. It shifts the burden of proof on the issue of whether disease is

sufficiently severe to be contributing to the disability. That's the issue that it shifted the burden of proof on. And I would point out in terms of who's bearing the burden here that the vast majority of these claims are going to be paid out of the trust fund, not out of individual miner's funds.

Congress specifically mandated that any claim that was denied before 1977 and granted afterwards would come from the trust fund not from a miner. And for that and several other reasons, it's clear that there will not be a large number of coal mine operators held individually liable under this presumption.

QUESTION: Mr. Smith, if seems to me that if we accept your explanation of those two new rebuttal elements as both being medical, then everything is medical. I mean if you can say whether it's severe enough to cause the disability, that's a medical judgment. I suppose it's also a medical judgment whether you're totally disabled because of -- Every single element of the thing, the causation, the total disability, there's nothing that can't be called a medical judgment in the broad sense that you're using that term.

MR. SMITH: But Justice Scalia, if you look at the legislative history, the one thing that is clear is that they wanted the interim presumption to be available to everybody based on a showing of causation in pneumoconiosis.

That was the only feature of the SSA rules that was in any way different from the labor rules prevailing before 1977. When they passed the statute that says, criteria not more restricted than those used by SSA, they can have had no other purpose than to extend the interim presumption to everyone.

Now at that point they did say, "We want to make sure before you give the benefits, once this shift in the burden of proof has been given, that all of the evidence is considered. We want to reject the SSA practice of excluding some relevant rebuttals." But that doesn't mean that the Congress' purpose was nothing, that they left the Secretary total disrection to leave people under the same rules that it had rejected, or to say some people can't get the presumption merely be virtue of a time in the mines.

The presumption was the heart of what they were giving people.

QUESTION: But wasn't there a major change with respect to everyone who had at least 10 years of

coal mine employment, either under, under either view?

MR. SMITH: A major change in the sense that -- sure, absolutely. If you had more than 10 years you had an interim presumption available --

QUESTION: Which was different than it was before.

MR. SMITH: Yeah, but with respect to anybody --

QUESTION: And that's most of the people, wasn't it?

MR. SMITH: Well, it's a large number of people, sure. But there are, certainly the numbers we hear thrown around, there's a large number of people in the other group as well.

And for them the statutory change was essentially meaningless. And there's no indication, not one word in the legislative history have they cited to suggest that Congress could have anticipated this.

Now, I think in terms of the arguments --

QUESTION: But was it meaningless? Because if they could prove pneumoconiosis they then did get the presumption of total disability and that it was caused by that disease.

MR. SMITH: Not if they had less than 10 years in the mines, Justice Stevens. They didn't get any

presumption at all.

QUESTION: If they proved they had the disease, in a simple form, they got the other two prongs, didn't they?

MR. SMITH: No, they got no presumption at all. If they didn't have 10 years in the mines, they're categorically excluded from the presumption--

QUESTION: Oh, that's right. I'm sorry.

MR. SMITH: These people had to prove everything. And that was the, under standards that had a less than 10 percent approval rate before the statute was passed.

Now, as Justice Scalia pointed out, you can't separate out causation from disability here and say they had complete discretion to tinker around with the causation criteria at the same time that they were supposed to promulgate equivalent disability criteria.

Under the Social Security interim presumption regulation, which Congress incorporated, causation was part and parcel of the disability determination. It was one of the elements you proved in order to get the presumption of disability.

So the Secretary's position amounts to the proposition that the Secretary was required to give everybody a presumption of disability and at the same

time retain the discretion to prevent some people from attempting to prove one of the two elements which led to that presumption. Sort of giving with the right hand and taking away with the left.

And then just a final point on the validity of the regulation. When you actually look at what they say about what the Secretary was really thinking, they abandoned their own theory.

They don't talk about causation of the disease at all. They say, well, the Secretary thought there was less likelihood they would have severely disabling levels of pneumoconiosis if they had less than 10 years in the mines.

And whatever's clear, if they were trying to screen out people because they were less likely to be disabled, that's a disability criterion, not a causation criterion at all.

And on that issue, Congress had spoken, said, give people the presumption of disability because we, we, we have incorporated the SSA approach, and we're not going to allow the Secretary then to just come in and say, well, I just think it's, I disagree with Congress, I think these people are less likely to be disabled and I'm going to not give them exactly the benefit that Congress wanted.

Again just a final, a second final point on this point. The notion that Congress in some way ratified this when they sent over this pile of regulations and they didn't notice this problem is, is ridiculous.

There's no indication whatever in the letter that Congress, these three Congressman had any awareness at all that the two interim presumption regulations were different.

Indeed, Mr. Solomons, in previous briefs, has asserted that nobody in Congress was aware of it and nobody in the Department was even aware of it until 1981 when it was raised in the Benefits Review Board.

Now, assuming that the court determines that the regulation did violate the statute, that these people were supposed to get an interim presumption of disability, the next question is the scope of relief available to the class in Sebben, those who did not pursue their administrative appeals.

Now, our position as I explained a little bit at the outset is that exhaustion is not required here because of Section 945, which was a special mechanism created by Congress which mandated an absolute right to an automatic reassessment --

QUESTION: Mr. Smith, I don't think the

government is defending on the grounds of exhaustion. Exhaustion says in effect, you can't yet bring your, the doctrine of exhaustion is you can't yet bring your claim into court because you should have sought more administrative remedies.

Here the government is saying, you had your review; the case became final. That's not exhaustion.

MR. SMITH: Well, Your Honor, the case is similar to a City of New York case a couple of years ago where the claim was being raised well after the time when the administrative remedies could have been invoked.

And the doctrine that applies in that situation is quite similar to the doctrine that applies where you're trying to skip it, as in Mathews v. Eldridge.

In either case, what you have to look for is whether there's a collateral right separate from the issue of substantive eligibility for benefits in the statute, and whether requiring people to go through administrative proceedings to enforce that right would make sense, would be consistent with the enforcement of the right.

QUESTION: I don't understand the distinction you draw between this statute that you say requires that

we let the Secretary, make the Secretary do it over again. And any statute which requires an agency head to make a certain decision, pursuant to certain criteria.

And the agency head purports to do that, but he makes a mistake, and the applicant doesn't appeal, and we say the case is final. And the lawyer doesn't come before us and say, well, it can't be final because what the statute says is that the Secretary had to do this and he didn't do it.

I mean, that's not a very persuasive argument. Everybody -- assuming he didn't do it, still in all the time has passed.

MR. SMITH: The difference is that here you have a specific mechanism created based on findings by Congress, that these people had been treated so poorly by the process over a period of years that the vast majority would not even take the step of refiling an application after the 1977 amendments.

Congress specifically rejected the Senate bill's version of this which said they have to come in and refile.

QUESTION: But that argument could be made with any statute. You can say, you know, you can say to the court, Congress wanted this to be done. It cared very much about this statute. And the Secretary made a

mistake.

We would still say, that's too bad, you should have told us at the time you made the mistake and not come around 10 years later.

MR. SMITH: Sure. You know, that's the argument that's raised. But when you have these specific findings and you have a specific mechanism that said, go back, don't make them do anything.

And the automatic nature of this was emphasized repeatedly in the legislative history, based on the fact that we know they won't do anything. And be sure that you apply the correct standards, apply them immediately, sua sponte, give retroactive relief where it's appropriate, if they've already made their case.

In that situation for the Secretary to conduct these reviews, applying exactly the standards that Congress --

QUESTION: It's a really bad mistake. Is that going to be the criterion when the Secretary makes a really bad mistake, there's no statute of limitations?

MR. SMITH: What you have in effect is that Section 945 no longer exists in the statute.

QUESTION: But Congress said to the Secretary, do this again in these cases. The Secretary promulgated these interim regulations and did them under the

regulations.

Now you say the regulations were invalid and therefore these people got nothing. But they did get something. They got a review which the Secretary thought consistent with the statute. You now say it didn't.

But surely to say that it can be done over is just an attack on the whole doctrine of res judicata.

MR. SMITH: But what they got, Mr. Chief Justice, was a review applying exactly the same standards which had been misapplied to them in the past, so that there was no potential for them to gain anything from this.

And the one glaring figure that's been omitted from all the filings in the government in this case is any suggestion that anybody who had less than 10 years of mining employment got their benefits given to them after they were reviewed after the statute.

They couldn't have because they didn't get anything new applied to their case.

QUESTION: Of course they didn't -- you say there was no potential for them to get anything from it, they could have gotten everything from it if they had come before the courts then, when it was wrongfully denied, instead of coming around 10 years later.

They were able to go to court to appeal the Secretary's determination, weren't they?

MR. SMITH: Your Honor, in fact, in order to get to court, even if you follow the administrative process, it still would have taken 10 years. Mr. Broyles and Mr. Colley have been trying to get here and they are finally here.

QUESTION: Well, whatever, they could appeal the wrongful denial, at the time it was wrongfully denied.

MR. SMITH: There's no question about it.

QUESTION: So you can't say they didn't have an opportunity to get anything. They did have the opportunity.

MR. SMITH: But, but the requirement that they do that, that they exhaust, produced exactly the harm that Congress was trying to avoid when it set up this mechanism.

It didn't have to set up this mechanism. It could have just said, re-adjudicate claims where people ask you to, and then give them an appeal. Instead it said, go out, give them retroactive benefits, we know they won't refile if we require them to do anything.

When the Secretary then doesn't change his conduct, applies precisely the same old inappropriate

standards, and then says exhaust or I won't give you anything, what you have is the massive abandonment of claims by at least 90 percent of the affected people that were intended to benefit, precisely the harm that Congress tried to avoid.

And to say that exhaustion is required here is to say that Congress can't do anything to rectify past errors, and where the Secretary has to do it themselves. In a situation like this it makes Congress powerless to deal with the problem where the Secretary fails to comply with the will of Congress.

QUESTION: Did each claimant get notice that his or her claim was being opened?

MR. SMITH: What they got is notice that they had been reviewed and that they were again denied, because the interim presumptions still did not apply.

QUESTION: And you say that so far as the class of persons who had worked under 10 years, you know not of a single case where the decision was favorable to the claimant?

MR. SMITH: Well, Your Honor, I don't know of a case, but I, I can't claim to have studied the matter.

I have merely pointed out that the Secretary has never suggested any figure of that sort. And

there's an awful lot of figures being thrown around here.

If they could demonstrate that there was in fact any substantial meaning to these reviews for the less-than-10-year group, I think they would have pointed that out.

Just a moment on this mandamus point. We do rely on a different jurisdictional theory than under City of New and Eldridge, but that's simply a result of differences between the Social Security Act and the Black Lung Act.

Under the Social Security Act, you can go to the District Court from any final order of the Secretary, and in City of New York this court determined that there was such a final order.

Here you have, the only jurisdictional grant in the statute is under the Longshoreman's Act, which says you can go to a court of appeals from a final order of the Benefits Review Board.

And if you're going to enforce a collateral right directly in court, you obviously can't go to the Benefits Review Board and get a final order first. So we had to go to a non-statutory jurisdictional approach.

The approach that was selected was 1361

jurisdiction rather than the usual 1331 jurisdiction and APA review, because the Federal Coal Mine statute has a section that says the APA doesn't apply. And there was then some question of whether 1331 was available.

We do think a mandamus is the appropriate statute here, if these other routes were not available, because it exists exactly to provide a fallback in situations where Federal officers are disobeying the law and there's no other method to enforce the law against them.

And certainly I think the proposition that if we have shown the regulation to be invalid that somehow we haven't shown it clear enough, asks it to be cut too thinly.

You have -- if we can overcome the usual deference to administrative discretion here and have shown a flat inconsistency between the regulation and the statute, that's certainly enough for mandamus as well.

Just one more point on the City of New York case, because I think it is an important case here. The government and the private petitioners attempt to distinguish this case from City of New York on the theory that there you had a secret policy which was not known to people at the time they could have filed their

administrative appeals.

The fact of the matter is, though, that the whole last section of that opinion dealt with people who did have time to file their administrative appeals at a time when the secret policy being applied in the Social Security Administration was publicly known.

And the court held that even as to those people where you have a right to a valid first-level disability assessment, and it's clear that administrative review would be futile and that there be massive abandonment of claims if we require it, that the court would, allowed direct enforcement of the collateral right in that case.

Our case is much easier, because you have this special provision in the statute, 945, that said, reopen these things under the 1977 amendments. That case is really one where you, which is much like the one hypothesized by Justice Scalia, one where they simply were told to apply the law in the adjudications and they weren't doing it.

If there are no further questions --

QUESTION: One very -- well, never mind.

QUESTION: Thank you, Mr. Smith. Mr. Ayer, you have one minute remaining.

REBUTTAL ARGUMENT BY DONALD B. AYER, ESQ.

MR. AYER: Thank you, Your Honor. I would just like to make two points.

One is that the 1977 amendments did indeed do some significant things to help miners with less than 10 years of experience.

It expanded the definition of pneumoconiosis, it put a prohibition on rereading X-rays to disqualify people, it made clear that a worker's compensation concept of causation that allowed only partial causation to be enough was sufficient, and it gave a right to a full pulmonary exam in order to generate the evidence you needed.

The other point I'd like to make is that this, these interim regulations rest on a solid foundation in the legislative record. The conference committee made clear in the report that the conferees also intended all standards are to incorporate presumptions contained in another section of the act.

The presumptions include the presumption of causation from 10 years of coal mine experience, which this provision in these interim regulations essentially is identical with.

Secondly, the scientific data which was appended to a number of reports throughout and to the final House report includes information that indicates

that 10 years is sort of the presumptive beginning for serious black lung problems.

QUESTION: Thank you, Mr. Ayer. The case is submitted.

[Whereupon, at 11:05 o'clock a.m., the case 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:

#87-821 - PITTSTON COAL GROUP, ET AL., Petitioners V. JAMES SEBBEN, ET AL.:
#87-827 - ANN McLAUGHLIN, SECRETARY OF LABOR, ET AL., Petitioners V. JAMES SEBBEN, ET AL.; and
#87-1095 - DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Petitioners V. CHARLIE BROYLES, ET AL.

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

BY Judy Freilicher

(REPORTER)