

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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CAPTION: LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND
HUMAN SERVICES, Petitioner V. ELMER HUDSON

CASE NO: 88-616

PLACE: WASHINGTON, D.C.

DATE: April 17, 1989

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LOUIS W. SULLIVAN, SECRETARY
4 OF HEALTH AND HUMAN SERVICES,

5 Petitioner,

6 v.

7 ELMER HUDSON,

8 No. 88-616
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Washington, D.C.
Monday, April 17, 1989

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 10:03
a.m.

APPEARANCES:

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

JAMES E. COLEMAN, JR., Washington, D.C.; on behalf of
Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

EDWIN S. KNEEDLER

On behalf of Petitioner

3

JAMES E. COLEMAN, JR.

On behalf of Respondent

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REBUTTAL ARGUMENT OF

EDWIN S. KNEEDLER

On behalf of Petitioner

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P R O C E E D I N G S

10:03 a.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 88-616, Louis W. Sullivan, Secretary of Health and Human Services v. Elmer Hudson. Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER
ON BEHALF OF PETITIONER

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

The question presented in this case is whether a Social Security claimant has a right under the Equal Access to Justice Act to recover from the United States the attorney's fees and expenses she incurred in administrative proceedings following a remand from a federal district court.

Before summarizing the facts in this case, I will briefly describe the two provisions of each of the Equal Access to Justice Act that have been discussed in connection with the fee award in this case.

EAJA waives the sovereign immunity of the United States to fees and expenses in certain circumstances specified in the Act itself. EAJA contains two basic provisions, one applicable to administrative proceedings, the other to judicial

1 proceedings.

2 The provision of EAJA applicable to
3 administrative proceedings is contained in Section 504
4 of Title 5 of the United States Code. It provides that
5 an agency that conducts what the Act refers to as an
6 adversary adjudication shall award to the prevailing
7 party in such an adjudication the fees and expenses that
8 were incurred unless the adjudicative officer of the
9 agency finds that the position of the United States was
10 substantially justified or special circumstances would
11 make an award unjust.

12 The term adversary adjudication is precisely
13 defined in EAJA to mean circumstances in which the
14 position of the government is represented by counsel or
15 otherwise in the adjudication.

16 The other provision of EAJA concerning the
17 award of attorney's fees and expenses in court is
18 contained in Section 2412(d) of Title 28. It authorizes
19 a court to award a prevailing party fees and expenses
20 incurred by that party "in any civil action, including
21 proceedings for judicial review of agency action,
22 brought by or against the United States in any court
23 having jurisdiction of the action."

24 It is the position of the United States in this
25 case that neither of these provisions of EAJA waives the

1 sovereign immunity of the United States to the award of
2 fees and expenses on remand in this case.

3 Section 504 is inapplicable because
4 administrative proceedings under the Social Security Act
5 are non-adversarial. The government does not take a
6 position in those hearings and is not represented by
7 counsel or otherwise in them.

8 QUESTION: Mr. Kneedler, what does the phrase
9 "or otherwise" mean?

10 MR. KNEEDLER: Well, the model rules
11 promulgated by the Administrative Conference of the
12 United States and followed by federal agencies,
13 including HHS, have given content to that.

14 Those model rules defined "represented by
15 counsel or otherwise" to refer to situations in which
16 there is another sort of representative, such as a
17 paralegal, who might represent the government in the
18 proceedings.

19 The model rules define the phrase "represented
20 by counsel or otherwise" to refer to situations in which
21 the position of the United States is presented by an
22 attorney or other representative who enters an
23 appearance and then actually participates in the
24 administrative proceedings.

25 The Administrative Conference was given

1 authority to coordinate the implementation of EAJA in
2 the administrative context under Section 504(c)(1) of
3 the Act, and these model rules were in effect -- were
4 promulgated in 1981 and have been in effect ever since,
5 and were in effect when Congress reenacted EAJA in 1985.

6 QUESTION: Has that ever happened, Mr.

7 Kneedler? I'm unfamiliar with proceedings where there
8 is somebody representing the government who is not
9 counsel? What kind of proceedings would they be?

10 MR. KNEEDLER: Well, I'm informed, for example,
11 as particularly relevant here, the legislative history
12 of the 1985 Reenactment refers to a special experimental
13 program set up by HHS in the Social Security context in
14 five regional offices whereby the Agency was represented
15 in ALJ hearings. I'm informed that in a number of
16 occasions in those hearings non-lawyers appeared to
17 represent the government in those proceedings.

18 These were program officers who were very
19 familiar with the way in which the Social Security
20 program operated but were not lawyers.

21 QUESTION: How come you can say the United
22 States doesn't take a position in passing on the claim?

23 MR. KNEEDLER: Well, there is no advocate for
24 the government, from the perspective of the government
25 seeking to deny a claim in an administrative hearing.

1 The only government official, the only SSA official,
2 present at a hearing is the ALJ.

3 QUESTION: And you don't think -- you don't
4 think in denying a claim the United States has taken a
5 position?

6 MR. KNEEDLER: Well, I suppose that the ALJ as
7 a Judicial officer could be said to be rendering a
8 decision that the claimant is not entitled. But EAJA
9 refers to the -- to advocacy before the decision-maker.
10 The advocates for the claimant, and if there should be
11 one for the government. Someone advocating that the
12 claim should be denied.

13 The ALJ does not, as this Court recognized in
14 Richardson v. Perales, does not act as an advocate or an
15 adversary. The ALJ is an adjudicator. And, in fact,
16 under governing regulations, the Administrative Law
17 Judge has an obligation to inquire fully into all the
18 circumstances and facts of the case.

19 QUESTION: And so the proceeding really isn't
20 adversary unless the United States is separately
21 represented?

22 MR. KNEEDLER: -That's correct. Through a
23 lawyer or otherwise.

24 QUESTION: Mr. Kneedler, the adjudicative
25 agency proceeding that is being considered here for

1 purposes of attorney's fees is one that occurred on
2 remand as a result of the civil litigation. Is that
3 correct?

4 MR. KNEEDLER: That's -- that's right.

5 QUESTION: And I take it there is no final
6 judgment for purposes of determining the attorney's fees
7 under EAJA until the district court finally enters the
8 judgment at the conclusion of the proceedings on remand?

9 MR. KNEEDLER: Yes. Well --

10 QUESTION: Is that right?

11 MR. KNEEDLER: A final judgment for purposes of
12 awarding the fees.

13 QUESTION: Yes?

14 MR. KNEEDLER: Not a final judgment for
15 purposes of appeal. We believe the remand order was
16 appealable at the time that it was sent back to the
17 Secretary.

18 QUESTION: But for purposes of awarding fees,
19 am I correct?

20 MR. KNEEDLER: That's correct. But that's only
21 for fees in the judicial proceedings.

22 QUESTION: Well, why -- why isn't it the case
23 then that the court in the civil action retains
24 jurisdiction and why isn't this remand proceeding in
25 essence part of the civil action? I think that point

1 troubles me most.

2 MR. KNEEDLER: Okay. Two separate answers.
3 The district court can retain jurisdiction for purposes
4 of awarding attorney's fees. But the -- when the
5 claimant first seeks judicial review, the question
6 before the court is whether the Secretary's decision
7 denying the claim for benefits is correct or not.

8 In this case, the district court affirmed the
9 Secretary's decision, but the Eleventh Circuit reversed
10 and said the Secretary should -- and remanded back to
11 the Secretary to consider other circumstances.

12 When the case was sent back to the Secretary,
13 the district court's review of that decision was
14 completed. The court of appeals had concluded that that
15 decision was erroneous. The district court could retain
16 jurisdiction for purposes of awarding fees if the
17 claimant should ultimately prevail on remand.

18 QUESTION: Oh, and presumably to make sure that
19 the proceedings on remand were in accordance with the
20 court's view of the overall relief that should be
21 granted.

22 MR. KNEEDLER: But the way the procedure
23 operates is that when the case goes back to the agency
24 -- for example, what happened in this case. The Appeals
25 Council receives the remand from the court and then the

1 Appeals Council, in this case, vacated its prior
2 decision denying the claim for benefits.

3 From that point on there was no outstanding
4 position of the Agency that Respondent should be denied
5 benefits. And then there was the -- the Appeals Council
6 ordered a hearing. There was no representative of the
7 government at that hearing. The government did not take
8 a position before the Appeals Council or the ALJ.

9 QUESTION: Yes, but it's very easy to consider
10 this thing as just part of the civil action.

11 MR. KNEEDLER: But both EAJA and the Social
12 Security Act clearly distinguish between civil actions
13 and proceedings before the Secretary. EAJA itself
14 carefully divides the circumstances for the award of
15 attorney's fees into two categories.

16 One under Section 504 for fees performed for
17 services before an agency. That's only when the
18 proceedings are an adversary adjudication.

19 Section 2412 governs -- requires that the fees
20 be incurred in the civil action in court. Now, a remand
21 proceeding is not part of the civil action.

22 The Social Security Act itself divides the
23 responsibilities in a directly parallel fashion between
24 the Agency and the court. Under Title II, for example,
25 Section 405(b) specifically directs the Secretary to

1 conduct hearings and to find facts. Section 405(b)
2 applies both in the initial hearings and on any hearings
3 on remand. The same standards, the same procedures
4 apply, and they are non-adversarial in the same way as
5 before.

6 Section 405(g), on the other hand, is the
7 provision of the Social Security Act that deals with
8 judicial review, and it deals with the responsibilities
9 of the court, not the Secretary. In fact, 405(g) uses
10 the same phrase, civil action, that EAJA does.

11 So, the attorney's fees that are authorized
12 under Section 2412 under EAJA in a civil action are only
13 those fees incurred in the action for a judicial
14 review. If the court concludes that the case should go
15 back to the Secretary, it is then returning the matter
16 back to the officer of the government having primary and
17 distinct responsibility for the claim, which is the
18 Secretary of HHS.

19 QUESTION: Mr. Kneedler, did the Eleventh
20 Circuit here, when it remanded to the Agency, make any
21 special statement saying this Court is retaining
22 jurisdiction over this case, or is whatever retention of
23 jurisdiction it had simply the normal retention of
24 jurisdiction that occurs by operation of law, if any?

25 MR. KNEEDLER: The latter. There was no

1 specific reservation of jurisdiction in this case.

2 QUESTION: So this is no different from a court
3 of appeals, let's say the D.C. Circuit remanding an
4 agency rulemaking, reversing the rule and remanding for
5 further proceedings before the agency?

6 MR. KNEEDLER: I think that's essentially
7 correct. And the proceedings back before the Agency
8 then are within the primary jurisdiction of the Agency
9 and, therefore, within the ambit of Section 504 and fees
10 can be awarded only if Section 504 applies to them.

11 QUESTION: Are there -- are there any instances
12 to your knowledge -- I seem to recollect some -- in
13 which a court doesn't just remand, but remands with some
14 special indication that it intends to oversee further
15 developments in the case?

16 MR. KNEEDLER: I suppose that could happen.
17 There have been -- there have been district court
18 decisions under the Social Security Act where the court
19 sends the case back to the Agency and purports to retain
20 jurisdiction. I mean, in particular for the award of
21 attorney's fees. But I think that doesn't render the
22 court's review non-final, as is true in an appeal under
23 1291 if there is still an outstanding attorney fee
24 question, as there might be here. That doesn't render
25 the court's review non-final.

1 QUESTION: Do you think courts can retain
2 Jurisdiction and in effect have the Executive Branch
3 operate under the court's supervision thereafter?

4 MR. KNEEDLER: I think not. And, in fact, I
5 think when you read Section 405(g) closely -- and we
6 discuss this at the conclusion of our reply brief --
7 Section 405(g) makes it pretty clear that that's not
8 supposed to happen here.

9 Section 405(g) addresses the question of
10 remands in circumstances such as this where the court
11 reverses the Secretary's decision on the merits and
12 sends it back to the agency for what the statute refers
13 to as a rehearing under what the court regarded to be
14 the proper standards.

15 Section 405(g) provides that that's a judgment,
16 when the court reverses the Secretary's decision and
17 sends it back for a rehearing. That is a judgment even
18 though there will be further proceedings before the
19 Agency. And Section 405(g) -- sentence eight of Section
20 405(g) in fact designates that as a final judgment.

21 So, it seems to us to be particularly clear
22 under Section 405(g) that the court's reviewing job is
23 completed when the case is sent back to the Secretary.
24 And at that point, once the Appeals Council vacates its
25 prior decision denying the claim for benefits, the

1 claimant is back exactly where she was during the time
2 of her first hearing.

3 QUESTION: Well, certainly her attorney was
4 needed on remand to accomplish the ultimate goal of the
5 litigation.

6 MR. KNEEDLER: First of all, in this case it's
7 not at all clear that an attorney was required because
8 it's particularly vivid that the proceedings on remand
9 in this case were non-adversarial.

10 Not only did the Appeals Council vacate the
11 ALJ's prior decision, but the Appeals Council took note
12 of the fact that after the time the ALJ rendered her
13 decision the first time around Congress had ordered the
14 Secretary to revise the standards for mental
15 impairments. The Appeals Council ordered the ALJ to
16 review Respondent's case under the new standards and
17 suggested that the ALJ receive the advice of a medical
18 advisor.

19 All of those are clearly non-adversarial
20 undertakings by the government, and in fact were for the
21 benefit of the claimant. And it was in response to
22 those actions taken by the Appeals Council on its own
23 that Respondent was awarded benefits.

24 So, it seems to us to be particularly vivid in
25 this case that the proceedings were non-adversarial.

1 The only -- the only thing that counsel did in
2 this case that Respondent has pointed to is to correct
3 the typographical error at the conclusion of the ALJ's
4 decision identifying the onset date of the period of
5 disability as May 15th, 1982 rather than 1981.

6 But it was perfectly evident from the prior
7 portions of the ALJ's decision that that was an error,
8 and there is no reason to think that the Appeals Council
9 would have overlooked that onset date on its own.

10 But, more importantly, that error was not in
11 any way due to adversarial representation by the
12 government. Once again, whatever one might think should
13 be the proper rule here, Congress has specified that
14 before an agency, fees may be awarded only when the
15 agency proceedings themselves satisfy the statutory
16 definition of being an adversary adjudication.

17 QUESTION: Mr. Kneedler, could I interrupt to
18 get your help on one part of the 2412(d)(3). The
19 government agrees, does it not, that there are fees
20 payable for the proceedings in court?

21 MR. KNEEDLER: Yes.

22 QUESTION: But those proceedings, under the
23 statute, had to be judicial review of an adversary
24 adjudication, did they not?

25 MR. KNEEDLER: No. 2412(d)(3) refers to

1 circumstances in which a court may award fees for
2 services performed before the agency; 2412(d)(1)(A) is
3 the section that provides for fees awarded in the
4 judicial proceedings themselves.

5 QUESTION: Oh, I see. Because in your brief --
6 or, your petition, rather -- you quoted 2412(d)(3). But
7 you really should have quoted 2412(d)(1).

8 MR. KNEEDLER: Yes. Well, in our brief we add
9 2412(d)(1)(A). This is on page 2 of our brief.

10 QUESTION: Oh, I see.

11 MR. KNEEDLER: But 2412(d)(3) is significant in
12 our view because it is a provision of the Act that
13 specifically addresses the circumstances in which a
14 court may award fees -- in which a court may award fees
15 for services performed before an agency. And 2412(d)(3)
16 is specifically limited to those cases in which the
17 party seeks judicial review of an adversary adjudication.

18 In other words, the only case in which a court
19 may award fees for work done before an agency, the very
20 relief that Respondent seeks in this case, is, once
21 again, when the agency itself has conducted an adversary
22 adjudication in which the agency is represented by
23 counsel.

24 QUESTION: In the program, the pilot program
25 that you described to Justice Scalia, would the

1 attorney's fees -- could attorney's fees be awarded in
2 that instance, where these representatives of the
3 government weren't present assuming other conditions are
4 satisfied that the government's position is not
5 substantially justified?

6 MR. KNEEDLER: If there had been an attorney
7 present in the experimental program?

8 QUESTION: Well, yes. Or one of these
9 non-attorneys --

10 MR. KNEEDLER: Non-attorneys.

11 QUESTION: -- representing the government.

12 MR. KNEEDLER: Well, there is a separate
13 threshold question which we identify in a footnote in
14 our brief. And that is whether -- the definition of
15 adversary adjudication is not only where the government
16 is represented by counsel, but also another requirement
17 is that the adjudication be undertaken under Section 554
18 of Title 5, which is the APA.

19 And it's been the position of the government
20 for many years that the APA does not apply of its own
21 force to Social Security proceedings. And this Court
22 left that question open in Richardson v. Perales. So,
23 there is that threshold question.

24 But here there is no need to reach that because
25 we think it's so clear from the statutory text that

1 absent the sort of experimental program to which you're
2 referring these are simply not adversary proceedings
3 because the government doesn't take a position before
4 the ALJ on the claim, and what's more, it does not
5 appear through counsel or other representative.

6 QUESTION: Although the government does use
7 ALJs in all those proceedings, it's not confident enough
8 about its position on that point that it doesn't decline
9 to use ALJs who are usable only for 554 proceedings.

10 MR. KNEEDLER: Well, at least for the --

11 QUESTION: If it was not a 554 proceeding, you
12 could have any agency officer conduct the hearing, right?

13 MR. KNEEDLER: Yes. But I believe there is --

14 QUESTION: And the government always uses ALJs.

15 MR. KNEEDLER: I believe there is separate
16 statutory authorization for the use of Administrative
17 Law Judges in Social Security programs. Congress
18 converted prior hearing examiners under Title 16. I'm
19 not sure about Title 2.

20 QUESTION: Mr. Kneeder, going back to the text
21 -- and I thank you for calling my attention to the right
22 provision on page 2 of your brief -- 2412(d)(1)(A),
23 including proceedings for a judicial review of agency
24 action.

25 In the government's submission, when did the

1 proceedings for judicial review of the Agency action in
2 this case terminate?

3 MR. KNEEDLER: They terminated when the case
4 was remanded back to the Secretary.

5 QUESTION: And the -- and the filing the order
6 later on and getting fees for the work during the
7 judicial, that was not part of the judicial proceeding?

8 MR. KNEEDLER: Well, it was part of the
9 judicial proceedings only for purposes of the award of --

10 QUESTION: Well --

11 MR. KNEEDLER: -- attorney's fees.

12 QUESTION: -- when did they terminate for all
13 purposes?

14 MR. KNEEDLER: Well, for all purposes,
15 including attorney's fees, it terminated when the fees
16 were awarded. But --

17 QUESTION: Which was after the remand
18 proceedings had taken place?

19 MR. KNEEDLER: Yes.

20 QUESTION: But you say that part of the
21 proceeding is kind of carved out because it was before
22 the Agency rather than before a court?

23 MR. KNEEDLER: The proceedings on remand, yes.

24 QUESTION: Yes.

25 MR. KNEEDLER: Not -- not carved out. They're

1 just separately dealt with under both the EAJA and the
2 Social Security Act.

3 QUESTION: Well, that's the issue, I guess.

4 MR. KNEEDLER: Right. But -- but it -- there's
5 no suggestion whatever in the text or legislative
6 history of this Act that proceedings on remand before
7 the Agency are somehow part of the civil action in
8 court. Congress, again, quite separately dealt with the
9 two different types of proceedings.

10 And, again, in the administrative proceedings,
11 the purposes that Congress was trying to serve by making
12 attorney's fees available in certain adversary
13 adjudications, again, demonstrate why attorney's fees
14 should not be available. And Congress didn't
15 contemplate that they would be in proceedings on remand.

16 What Congress was trying to do, as the word
17 equal access to justice suggests, was to level the
18 playing field. Where the government is represented by a
19 lawyer in an administrative proceeding, or other
20 representative, Congress determined that attorney's fees
21 should be available for the claimant in appropriate
22 circumstances.

23 And by the same token, the legislative history
24 of the 1980 Act makes it particularly clear that it
25 would be unfair to award the -- to require the

1 government to pay for the claimant's attorney when the
2 government itself wasn't represented by an attorney.

3 QUESTION: Well, there is no claim in this case
4 for a fee on the initial administrative proceeding.

5 MR. KNEEDLER: That's -- that's correct. But
6 the same rule -- the same rule applies to the
7 proceedings on remand because they -- because those
8 proceedings on remand are governed by exactly the same
9 regulations, the same standards. And, in fact, after
10 the remand, as I mentioned earlier, the claimant is in
11 exactly the same position as she was in before.

12 QUESTION: Well, really -- really, the claimant
13 is in a much stronger position. The United States'
14 position, if it ever had one, had been overruled.

15 MR. KNEEDLER: Yes. Whatever -- whatever --

16 QUESTION: So, the result is preordained.

17 MR. KNEEDLER: It's not preordained because --

18 QUESTION: Well, it's close.

19 (Laughter.)

20 MR. KNEEDLER: The court -- the court may have
21 -- the court may have disagreed with the Secretary on
22 certain legal issues --

23 QUESTION: Yes.

24 MR. KNEEDLER: -- as was true here in
25 considering several impairments. But the court sends it

1 back to the ALJ for a fresh adjudication under the
2 correct legal standards. And then the parties start all
3 over again, with the government not represented by
4 counsel.

5 And the purposes of the Act that are reflected
6 both in the statement of purposes in Section 202 of
7 EAJA, plus the legislative history, indicate that
8 Congress didn't intend the fees to be available there
9 because there is no disparate -- if there is any
10 disparity in the representation, it's in favor of the
11 claimant since the claimant has a lawyer and the
12 government does not.

13 And it would, in the judgment of Congress in
14 1980, be unfair to require the government to pay the
15 claimant's attorney's fees when the government itself is
16 not represented by counsel.

17 QUESTION: Well, the claimant has got a
18 judgment too.

19 MR. KNEEDLER: The claimant has a judgment and
20 the issues have been narrowed on remand. As this case
21 demonstrates, the adjudication on remand was facilitated.

22 QUESTION: But the way the issues have been
23 narrowed is they have to -- further proceedings have to
24 be in accordance with the opinion of the court of
25 appeals or the district court. So, there is -- you've

1 got a little different set of ground-rules.

2 MR. KNEEDLER: They are, but that's no
3 different from the fact that the ALJ has to conduct the
4 hearing under certain legal rules at --

5 QUESTION: Yes, but the difference, I suppose,
6 is that the -- I think if you were a lawyer representing
7 a client in that position, you'd really have a
8 professional duty to be sure that the standards that you
9 fought for in the litigation were carried out and were
10 interpreted properly.

11 MR. KNEEDLER: Well, and --

12 QUESTION: It's kind of strange for the lawyer
13 to just go home and sit around.

14 MR. KNEEDLER: No, no one is suggesting that.
15 But a lawyer would have the same sort of duty in an
16 initial proceeding before the case had ever gotten to
17 court to make sure that the ALJ obeyed whatever legal
18 standards governed that proceeding. Whether it be
19 regulations or a prior court of appeals decision that
20 didn't apply to the claimant's case.

21 QUESTION: But are the claimants in all these
22 proceedings, these vast number of proceedings, in the
23 initial stages typically represented by counsel?

24 MR. KNEEDLER: The figures that the Social
25 Security Administration gave me is that in about 65

1 percent of hearings the claimant is represented by
2 counsel, and about another 18 percent represented by
3 some other form of representative other than counsel.

4 QUESTION: Those are in claims that go to
5 hearing, of course.

6 MR. KNEEDLER: Claims that go to hearings, yes.

7 QUESTION: Before an ALJ?

8 MR. KNEEDLER: Before an ALJ.

9 QUESTION: So there would be an awful lot of
10 them denied before that, or granted before that, and I
11 suppose that in most of those there probably would not
12 be counsel. Those that are just processed at the
13 administrative level.

14 MR. KNEEDLER: Before the ALJ, yes.

15 QUESTION: Yes.

16 MR. KNEEDLER: A lot of them are not
17 represented by counsel --

18 QUESTION: Yes.

19 MR. KNEEDLER: -- in that. Again, Respondent
20 bases her entire submission in this case on a supposed
21 distinction between administrative proceedings that
22 precede judicial review and proceedings on remand from
23 the court.

24 But, there is nothing in the Act and nothing in
25 the legislative history of the Act that draws such a

1 distinction or furnishes any statutory or textual basis
2 for the award of a claim.

3 Administrative proceedings before the Secretary
4 are just that, whether they're in the initial
5 proceedings or on remand.

6 But if there were any question about it, I
7 would like to refer the Court's attention to the
8 legislative history on page 26 of our opening brief,
9 where Congress was specifically addressing the question
10 of the award of attorney's fees in the context of where
11 a case is remanded by the district court back to the
12 Secretary.

13 Congress was there discussing, in the indented
14 quote, the arrangements that certain courts had made to
15 provide for the award of attorney's fees in those cases
16 before --

17 QUESTION: So, this was a House Committee
18 discussing it?

19 MR. KNEEDLER: Yes. The -- when a case is sent
20 back to the Secretary, the claimant is not yet a
21 prevailing party and so the arrangement several courts
22 arrived at was that the district court could retain
23 jurisdiction over the attorney's fee question to see
24 whether the claimant prevailed on remand. If she did,
25 then the court could award fees for what occurred in the

1 Judicial proceedings.

2 But, as the italicized sentence says, as the
3 courts have found, the only fees which will be available
4 will be for those activities undertaken in connection
5 with the initial or judicial proceedings, and not those
6 associated with the administrative proceeding.

7 And since this quotation was in the specific
8 context of remands, we think it's quite clear from the
9 legislative history that Congress intended the text of
10 the Act to mean what it said.

11 QUESTION: Let me just make sure I understand
12 one other thing, Mr. Kneedler, about the scheme.

13 Supposing the claimant wins in the judicial
14 proceeding in the sense that he or she gets a new
15 hearing but ultimately does not get any money out of the
16 case because on remand they decide the claim is no good
17 for some other reason; that person is not a prevailing
18 party within the meaning of the statute?

19 MR. KNEEDLER: That's correct. There were
20 judicial decisions to that effect and Congress ratified
21 those when it passed the --

22 QUESTION: So that the status of the claimant
23 as a prevailing party in the last analysis depends on
24 what happens in the administrative proceedings on remand?

25 MR. KNEEDLER: That's correct.

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QUESTION: Yeah.

MR. KNEEDLER: But that's just to determine whether he's a prevailing party for fees in the judicial proceedings themselves.

QUESTION: Yes, but that is not part of the judicial proceeding in which --

MR. KNEEDLER: That is -- what happens on remand is not part of the judicial proceeding.

QUESTION: -- in which they become a prevailing party. Okay.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kneeder.

Mr. Coleman.

ORAL ARGUMENT OF JAMES E. COLEMAN, JR.

ON BEHALF OF RESPONDENT

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

Mr. Kneeder referred to the purpose of the Equal Access to Justice Act as leveling the playing field. But there is another equally important purpose of the Act, and that was to shift to the Federal Government the cost of litigation caused by a federal agency or official that took a position against a person such as Mrs. Hudson without substantial justification.

In this case, the government does not contest

1 that the position it took in 1982 when it initially
2 denied the benefits to Mrs. Hudson was without
3 substantial justification.

4 QUESTION: Excuse me, but the Act does not
5 provide compensation in that situation so long as there
6 is no attorney. It's clear that for the initial Social
7 Security determination, even though the ALJ who is an
8 employee of the Agency and a government official,
9 wrongly decides against an applicant -- arbitrarily
10 takes an unreasonable position -- there would be no fees
11 available for that --

12 MR. COLEMAN: That's correct, and we don't
13 dispute that at all. I --

14 QUESTION: Well, but doesn't that cast some
15 doubt on -- on what you're saying?

16 MR. COLEMAN: No. Because the Equal Access to
17 Justice Act is really two statutes. One statute is a
18 provision in which the government is permitted to pay
19 attorney's fees in adversarial adjudicatory
20 proceedings. And we don't contest that.

21 The second part of the Act is where the
22 government is involved in civil proceedings, in court
23 proceedings, and takes a position that's not
24 substantially justified. Fees are also available in
25 that circumstance.

1 And it's our position in this case that it is
2 Title 28 that governs, and not Title 5. There is no
3 dispute in terms of what happens in the initial
4 proceedings. That the government can take any position
5 it likes. It can be arbitrary, it can protract the
6 proceedings, and when the Secretary makes a final
7 decision the claimant is not entitled to attorney fees.

8 But, what the Act says is, that if there is a
9 civil action initiated to review that, the government
10 gets only one chance to do that. It's already had its
11 chance in a case such as this. Then we have a civil
12 proceeding and we never go back to the administrative
13 proceedings that are governed by Section 504 of Title 5.

14 QUESTION: Mr. Coleman, the court below relied
15 instead on the Agency adversary adjudication section.
16 But you don't seem to be defending that now. You are
17 urging us to affirm, but on a different ground, that it
18 is part of the civil action. Is that basically right?

19 MR. COLEMAN: That's correct, Justice O'Connor.

20 QUESTION: So, you agree essentially with Mr.
21 Kneedler, then, that the United States was not
22 represented otherwise within the meaning of the
23 adversary adjudication provision before the Agency?

24 MR. COLEMAN: Well, not exactly because our
25 position is that Section 504 is not relevant to the

1 remand proceedings.

2 If it is relevant, if this Court determines
3 that Section 504 and Section 2412 together -- determine
4 whether a fee is awarded in a case to review a decision
5 of the Secretary, then the Eleventh Circuit's decision
6 would be correct and we would defend it on that basis.

7 But, in our view, the way in which the statute
8 was enacted makes it very clear that the administrative
9 proceedings are what precedes the judicial review, and
10 that after the final Agency decision in the
11 administrative proceedings, the only thing that you have
12 left is a judicial proceeding. And that's true whether
13 it was an adversarial proceeding below or whether it was
14 a non-adversarial proceeding.

15 QUESTION: And how do you respond to the
16 language in the House report that is cited on page 26 of
17 the government's opening brief?

18 MR. COLEMAN: That report is cited -- first of
19 all, it's edited in the government's brief in a way that
20 distorts the meaning.

21 For example, the portion of the report that is
22 emphasized in the government's brief refers to "as the
23 courts" and they replace "these" with "the". This
24 sentence referred to cases that were cited in the Brown
25 v. Secretary of HEW case which they deleted right before

1 the sentence that they emphasized.

2 In Brown, the court noted that there were a
3 number of decisions in which courts had awarded fees for
4 obtaining a remand, without waiting to see what happened
5 in the remand proceedings. And what the Congressional
6 Report, what the House Report says, is that as these
7 courts found in those cases where the remand proceedings
8 had not even occurred -- and none of the cases reflect
9 what happened on remand -- that the judges awarded fees
10 for the judicial portion leading up to the remand but
11 not for the administrative proceedings, which --

12 QUESTION: Mr. --

13 MR. COLEMAN: -- can only refer to the
14 administrative proceedings that --

15 QUESTION: Mr. Coleman --

16 MR. COLEMAN: -- came first.

17 QUESTION: Mr. Coleman, are you paraphrasing
18 now the language of a House Report or are you quoting
19 directly?

20 MR. COLEMAN: Well, I can quote it directly. I
21 was --

22 QUESTION: No, I was just curious.

23 MR. COLEMAN: I was paraphrasing.

24 QUESTION: You were paraphrasing.

25 MR. COLEMAN: I was paraphrasing. But what the

1 government also did in its brief was to -- there was a
2 typographical error in the original House Report which
3 said "Initial". It should have been "Judicial". And
4 that was corrected in a supplemental report.

5 But, because it said "initial", the government
6 then put in brackets "i.e., judicial proceedings" when
7 in fact all it referred to were the judicial proceedings
8 that led to the remand, and not -- it did not intend to
9 indicate any relationship in time between the
10 administrative proceedings and the judicial proceedings.

11 QUESTION: How do we know that was a
12 typographical error in the House Report?

13 MR. COLEMAN: We -- we cite in our brief the
14 supplemental House Report which makes the correction.

15 QUESTION: Oh. That proves that it was a
16 typographical error?

17 MR. COLEMAN: Well, I assume what it proves is
18 that the initial word -- that the word "Initial" was
19 intended to be judicial.

20 QUESTION: Or, at least, the later House
21 Committee thought it should have been "judicial".

22 MR. COLEMAN: No, it was -- I'm sorry -- it was
23 the same committee.

24 QUESTION: The same committee --

25 MR. COLEMAN: It was a supplemental --

1 QUESTION: -- later?

2 MR. COLEMAN: Yes. It was simply issued a few
3 weeks, I think, later.

4 QUESTION: Uh-huh.

5 MR. COLEMAN: Section 504 of Title --

6 QUESTION: Mr. Coleman, can I ask you about the
7 -- what seems to me to be the logical basis for your
8 case is that everything that happens until the judicial
9 proceeding is terminated, is part of the judicial
10 proceeding. Since the case was not over until the
11 remanded proceedings were completed, everything that
12 occurred had to be part of the judicial proceeding.

13 But it seems to me those are two different
14 questions: when the proceeding ends and what
15 constitutes part of the proceeding while it is still
16 continuing. When we remand something to a lower court
17 or when a court of appeals remands something to the
18 district court, you may well say -- and explicitly says,
19 "we retain jurisdiction" or something of that sort --
20 you may well say that the case doesn't end until it's
21 completed below.

22 But you would not say that the proceedings
23 below are part of the court of appeals proceeding. That
24 seems to me a very strange way to think. And that's
25 what you're saying here. You're saying the proceedings

1 below are part of the judicial proceeding.

2 They're not. They haven't been completed yet,
3 but that doesn't make them part of the judicial
4 proceeding.

5 MR. COLEMAN: Well, that is what we're saying,
6 but I don't think the analogy with what happens when
7 this court or a court of appeals remands a case.

8 There are some circumstances where there is a
9 limited remand by a court of appeals, for example, in
10 which the court of appeals retains jurisdiction in order
11 to enter an order pending further proceedings in the
12 district court. That is more analogous.

13 But in this case, Section 405 of the Social
14 Security Act itself makes the remand proceedings a part
15 of the judicial proceedings because the Secretary does
16 not have the authority in the remand proceedings to
17 issue a final decision that would terminate the
18 proceedings.

19 It's very clear. And the government took the
20 position in this case and has taken the position in all
21 of these cases. And that also is reflected in the House
22 Report that the government cites on page 26, that a
23 remand, a limited remand in a Social Security case is
24 for the purpose of the Secretary to take some action in
25 accordance with the court's decision.

1 The Secretary then files the transcript, to the
2 extent that there was a transcript developed in the
3 remand proceedings, plus any new decision or modified
4 decision that the Secretary makes on the basis of the
5 remand proceedings. All of that is then filed in the
6 federal district court, and the district court then,
7 upon review of that, issues a final decision -- the
8 final decision -- either affirming, reversing, or
9 modifying.

10 What happened in this court and what the
11 Eleventh Circuit did -- what happened in this case and
12 what the Eleventh Circuit did was to say that in the
13 initial proceedings, which we acknowledge -- we concede
14 -- Mrs. Hudson was not entitled to claim attorney's fees
15 for.

16 But in those proceedings the government took a
17 position that was contrary to its regulations, which was
18 that Mrs. Hudson suffered from various impairments, none
19 of which taken alone was sufficient to render her
20 disabled. But the Eleventh Circuit had decided in a
21 number of cases, going back to 1980, that in a situation
22 like that, the Agency is to consider the impairments in
23 combination.

24 And that's what the Agency failed to do in this
25 case, and it litigated that position in the judicial

1 action to review its decision. The Eleventh Circuit
2 said -- you should have done it that way, now do it that
3 way. And then under 405 you file the transcript and any
4 decision, and the district court enters the final
5 judgment. The --

6 QUESTION: Mr. Coleman, I'm a little troubled
7 by the consequences of the rule that you're urging for
8 as far as the governmental risk is concerned. Let's
9 assume a lot of Social Security attorneys realize that
10 the Agency has been taking a position that things in
11 combination don't count, that it has to be
12 individually. They figure this is wrong on the law and
13 they figure they can win that on an appeal.

14 Even those who have clients who -- even though
15 they know that their clients can't prove a disability
16 even in combination, those attorneys could bring a suit
17 on behalf of those clients before the Social Security
18 Administration, lose there, go up on appeal, win on
19 appeal on the issue of law, get remanded to the Agency.
20 Fight before the Agency on the issue of fact, whether
21 there is any disability even in combination, on the
22 issue of fact that they know they can't win on.

23 And then they can go home with attorney's fees
24 for both their work in the court of appeals and their
25 work before the Agency. Wouldn't they be able to?

1 MR. COLEMAN: That's not the case. And that's
2 a very significant point because in order to obtain
3 attorney fees in these cases, the claimant must receive
4 benefits.

5 QUESTION: You acknowledge that they have to
6 win when they get back?

7 MR. COLEMAN: Yes. And that is why it is
8 important that the remand proceedings be considered a
9 part of the judicial proceeding. Because in order to
10 get attorney fees under 2412 the claimant must win in
11 the remand proceedings or must establish a record that
12 will permit him or her to win in the judicial
13 proceedings.

14 So, the case that you suggest would --

15 QUESTION: Couldn't happen.

16 MR. COLEMAN: -- not result in attorney's fees.

17 Section 504 of Title 5 -- I think by its terms
18 it's clear that it was intended to deal with
19 administrative proceedings that occurred prior to
20 judicial review and that were concluded prior to
21 judicial review. There are three provisions of Section
22 504, I think, that are relevant in that respect.

23 First, the party must prevail in the adversary
24 adjudication, and that's Section 504(a). Second, the
25 fee sought must be sought within 30 days of a final

1 disposition in the adversary adjudication. Then,
2 finally, Section 504(c) provides that if there is
3 judicial review sought of the final decision following
4 the adversary adjudication, then fees can be awarded
5 only by the court that reviews the final action. That
6 is Section 504(c), and fees in that case would be awarded
7 under Section 2412(d)(3).

8 There is no other circumstance, even in Section
9 504, where the Agency makes a final decision, a final
10 determination, and then that is reviewed by a court in
11 which you go back to the Agency to recover fees.

12 The notion is that the action is terminated on
13 judicial review for purposes of the administrative
14 proceeding as well.

15 In this -- In this case, the government for the
16 first time in its reply brief takes the position that
17 the -- that the judicial proceeding terminated with the
18 remand order. That is contrary to the position that it
19 took earlier in the case and is contrary to the position
20 that it has taken in all of these cases. And, it's
21 contrary to the house report that specifically referred
22 to cases decided in the Fourth Circuit and the Third
23 Circuit dealing with this issue.

24 The remand proceedings -- first of all, in
25 order to recover attorney fees the party must prevail.

1 In other words, In a Social Security case, the party
2 must obtain benefits. That happens only after the
3 remand proceedings have been concluded and the findings
4 of the Secretary and a decision is filed back with the
5 court which has Jurisdiction under Section 405(g) to
6 enter the final order.

7 In addition, the 30-day time period for filing
8 the application begins to run from the time of a final
9 Judgment. And the cases have consistently interpreted
10 that requirement to mean the time that the district
11 court enters an order terminating the proceeding, the
12 Judicial proceeding.

13 In the section of the legislative history cited
14 by the government at page 26 of its brief that talks
15 about remand proceedings, first of all, it's important
16 to note that that section of the legislative history
17 dealt only with whether or not fees would be available
18 at the point that a remand order is obtained, as opposed
19 to whether they are available as cases have held
20 following the receipt of benefits on remand.

21 But in that section of the legislative history,
22 the House Report says that the remand decision is not a
23 final Judgment nor is the Agency decision after remand.
24 Instead, the district court should enter an order
25 affirming, modifying, or reversing the final Agency

1 decision, and this will usually be the final judgment
2 that starts your 30 days for filing the EAJA petition.

3 That is the position that the government has
4 taken throughout in this case until the reply brief.
5 For the first time in the reply brief the government
6 suggests that the final judgment in this case came at
7 the time that a remand order issued, as opposed to the
8 time, December 1, 1987, when the district court entered
9 an order dismissing this case but retaining jurisdiction
10 to entertain a petition for attorney fees.

11 QUESTION: If the government had given up after
12 the -- after the decision on appeal and just paid the
13 claim, they could have done that.

14 MR. COLEMAN: They could have done that.

15 QUESTION: And there would have been a final
16 judgment.

17 MR. COLEMAN: There would have been a final
18 judgment in that instance and we wouldn't have this
19 case. And that is the -- that is the point of the --

20 QUESTION: Well, there was a final judgment of
21 the court of appeals on the law.

22 MR. COLEMAN: That's correct. But what the
23 court of appeals finally determined -- the effect of the
24 Secretary's regulations. And that was final. But what
25 the Eleventh Circuit did not finally determine was

1 whether or not the respondent was entitled to --

2 QUESTION: Was entitled to benefits.

3 MR. COLEMAN: -- benefits. And that was the
4 point of the complaint in the first instance, was to
5 reverse the Secretary's decision that she was not
6 disabled and not entitled to benefits.

7 QUESTION: Could the government, in your view
8 of the thing, have taken an appeal on the merits from
9 the court of appeals immediately without --

10 MR. COLEMAN: I'm not --

11 QUESTION: -- going through the remand?

12 MR. COLEMAN: I'm not sure that the government
13 could have. In other words, whether the government
14 could have sought cert in this court following the
15 decision in the Eleventh Circuit -- I'm not sure whether
16 the government could have done that from the Eleventh
17 Circuit. But I don't think --

18 QUESTION: A court of appeals judgment doesn't
19 have to be a final judgment.

20 MR. COLEMAN: Yes. I'm --

21 QUESTION: I mean, it's appealable. They can
22 seek cert from a court of appeals judgment.

23 MR. COLEMAN: That's correct. And that's why
24 I'm not sure that it's relevant to this issue. Because
25 at that point, just as they did here where the Eleventh

1 Circuit determined that the government's position had
2 been without substantial justification and remanded to
3 the district court, the government sought cert in this
4 case.

5 And so the civil case, obviously, continues in
6 that circumstance. The remand would then have waited
7 until this court either denied cert or granted cert and
8 reviewed and issued a decision. So, there is no
9 circumstance where if an appeal had been taken, the
10 remand proceedings would have gone on simultaneously.

11 This Court -- or, at least Justice Brennan in a
12 concurrent opinion in the case of Webb v. Dyer County
13 Board of Educations referred in Interpreting Section
14 1988 of Title 42 of the U.S. Code -- referred to an
15 analogous situation in which the district court in a
16 civil rights case abstains in order to permit the
17 parties to litigate a state law issue in a civil rights
18 action.

19 And then, once the state law issue is
20 litigated, then the district court proceeds with a
21 determination of the civil rights claim.

22 Justice Brennan referred to that as a taking
23 the ancillary proceedings and making them a part of the
24 civil rights litigation for purposes of Section 1988. I
25 think that what happened in this case is analogous to

1 that situation where the remand proceedings were for
2 purposes of establishing a record on which the district
3 court could then make a determination of whether Mrs.
4 Hudson was entitled to benefits whether or not the
5 Secretary issued a decision that she was.

6 QUESTION: But the district court doesn't make
7 the initial determination of whether she's entitled to
8 benefits. That's for the Secretary, is it not?

9 MR. COLEMAN: That's correct.

10 QUESTION: And what's the standard of review in
11 the district court?

12 MR. COLEMAN: Whether or not it's supported by
13 substantial evidence. And that's also -- that also is
14 the standard with respect to what happens in the remand
15 proceedings as well.

16 But the remand proceedings are limited remand
17 proceedings only for the purpose of the Secretary taking
18 an action that she should have taken in the initial
19 proceedings.

20 QUESTION: Well, you use the term "limited
21 remand." Are you suggesting that there are some remands
22 involved in Social Security cases which are not limited
23 remands?

24 MR. COLEMAN: Yes.

25 QUESTION: What would be an example of one of

1 those?

2 MR. COLEMAN: For example, where the Secretary
3 makes a ruling of law that terminates the proceeding
4 prior to a final decision. In other words, terminates
5 it and says that the claimant, for example, does not
6 qualify under the statute without regard to what the
7 facts are.

8 That is litigated; The Secretary has reversed.
9 Then that would terminate the judicial review. The
10 proceedings would then resume before the Secretary to a
11 conclusion.

12 But that's not what happened in this case. In
13 this case there was a final decision by the Secretary.
14 The administrative proceedings went through to their
15 conclusion. And the only thing that happened following
16 the Eleventh Circuit's decision was that the court
17 decided that the Secretary had failed without
18 substantial justification to consider the impairments in
19 combination.

20 QUESTION: So, in your first example of the
21 unlimited remand -- there, would the decision of the
22 Secretary have been final on remand?

23 MR. COLEMAN: It would be a -- It would be a
24 final decision, but it would not be a final decision
25 with respect to the claim that the claimant is

1 disabled. The Secretary doesn't reach that decision
2 because she rules on an issue of law that she doesn't
3 have to reach that decision.

4 If she's wrong about that, I think that, the
5 party who seeks judicial review is the prevailing party
6 under the Equal Access to Justice Act, and the
7 administrative proceeding simply continues.

8 In this case, the remand was solely for the
9 purpose of the Secretary considering the impairments in
10 combination. That's reflected in the recommended
11 decision of the Administrative Law Judge on remand,
12 which is a part of the appendix to the petition for cert
13 In this case, beginning at page 21 of the Appendix.

14 QUESTION: Mr. Coleman, may I interrupt you
15 because I'm not sure I follow part of your argument?

16 You say there are two kinds of proceedings.
17 One where there is a threshold legal objection that is
18 sustained by the Secretary, and no facts. And the
19 other, the case like this.

20 In the threshold legal determination kind of
21 case, supposing you went on appeal and the court says,
22 go ahead and have a full hearing. Do you take the
23 position that before that hearing you would become a
24 prevailing party?

25 MR. COLEMAN: I think so, because the relief

1 that you -- the relief that you sought --

2 QUESTION: But now would the district judge be
3 allowed to give you that award of fees without waiting
4 to see if you prevail at the actual hearing?

5 MR. COLEMAN: Yes. And that has been done.
6 That was one of the decisions that was cited in the
7 Brown v. Secretary of HEW case cited in the House Report.

8 One of the cases involved just that, where the
9 administrative proceedings were terminated because the
10 Secretary determined that the claimant had not met a
11 requirement for seeking an appeal to the Appeals Council.

12 QUESTION: But then, conversely, you are
13 agreeing with the government, I guess, that in that sort
14 of case you would not be entitled to fees in the remand
15 proceedings before the Agency?

16 MR. COLEMAN: That's correct because the remand
17 proceeding then is simply a continuation of the one that
18 had begun but in which the Secretary had not reached a
19 final decision on the question of whether the person was
20 disabled.

21 QUESTION: And then one other question. Do you
22 think all of these cases fall neatly into one or the
23 other of these two categories?

24 MR. COLEMAN: I think that they probably fall
25 neatly within one or the other. I think that there may

1 be some circumstances where -- in the Instance that I've
2 just described, where there's sort of an interlocutory
3 appeal or Interlocutory review in federal court under --
4 in an administrative proceeding that would be governed
5 by Section 504 where the remand proceedings would
6 continue and they would be governed by Section 504.
7 It's simply that the two ends would be put together.

8 In this case, what the government, by its
9 position, is attempting to do is to carve out the remand
10 proceedings and treat them as if they sort of exist out
11 in space independently of anything. The remand
12 proceedings exist only for purposes of the further
13 consideration ordered by the district court to permit
14 the district court to issue a final judgment in the
15 case. And that's without regard to the Equal Access to
16 Justice Act.

17 That's the purpose of it. It simply is a part
18 of the judicial proceedings that the district court has
19 ordered in order to give the Secretary an opportunity
20 first to, as in this case, consider the impairments in
21 combination.

22 Once that was done, then the judicial
23 proceedings will continue.

24 QUESTION: Do you think it's critical that we
25 consider the proceedings that went on after remand to be

1 part of the judicial proceedings?

2 MR. COLEMAN: Well, it's --

3 QUESTION: Or are you -- I understood your
4 brief to say that once the government has ever taken a
5 legal position, then any administrative proceeding that
6 occurs after that, whether the government is represented
7 or not, is -- is subject to a fee award.

8 QUESTION: That's -- That's the alternative
9 ground that we argue. And that is the -- that's the
10 ground on which the Eleventh Circuit awarded fees in
11 this case, which was, the Eleventh Circuit determined
12 that the remand proceedings were proceedings in which
13 the government had taken a position because of its
14 relationship to the civil case.

15 QUESTION: But you are defending that decision
16 on that ground, I guess.

17 MR. COLEMAN: Well, we think the --

18 QUESTION: But you think you have a better
19 ground?

20 MR. COLEMAN: That's correct. We think the
21 better ground is to view the remand proceedings as part
22 of the civil action and -- and not have to reach the
23 question of whether 504 applies at all.

24 QUESTION: Mr. Coleman, all of this argument
25 has assumed that you can't get fees just from the court

1 -- just for the court proceeding until you get your
2 award.

3 Have we said anything that makes that clear? I
4 mean, it seems to me -- let's assume the government
5 takes on the appeal, on your appeal, a position that is
6 not substantially justified. And you win the appeal,
7 even though you later lose back in the court. The
8 government has still made you jump over a lot of
9 obstacles that you shouldn't have had to jump over.

10 Have we ever said whether -- whether you can
11 get your court attorney's fees?

12 MR. COLEMAN: This -- This Court has not
13 addressed the question of at what point do you become a
14 prevailing party in a Social Security case.

15 QUESTION: Well, how we come out in this case
16 very much depends on how we would come out in the other
17 one, doesn't it? I mean, if we were to say that you are
18 entitled to your attorney's fees in the court right
19 away, as soon as you won the appeal, then there would be
20 less reason to say that you're entitled to attorney's
21 fees back at the Agency, wouldn't there?

22 MR. COLEMAN: Well, there wouldn't be less
23 reason. That portion of the fees are not in dispute in
24 any event. The government doesn't contest that for the
25 work done to obtain the remand order we're entitled to

1 fees.

2 QUESTION: Well, the appeal wouldn't be over.
3 The appeal wouldn't be over. You wouldn't have to await
4 the remand in order to determine whether you could award
5 attorney's fees.

6 MR. COLEMAN: That's correct. That's correct.
7 And that still would not -- that still would not
8 foreclose the argument, the position that we take in
9 this case. Although, we --

10 QUESTION: It would make it a lot weaker.

11 MR. COLEMAN: In effect it would -- it would be
12 in the nature of interim award of fees, such as is done
13 under the Civil Rights Act where fees can be obtained on
14 an interim basis for significant successes short of
15 actually winning on the merits.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
17 Coleman.

18 Mr. Kneedler, do you have rebuttal?

19 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

20 ON BEHALF OF PETITIONER

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

22 Respondent's primary submission here is that
23 the proceedings before the Agency on remand are somehow
24 part of the judicial proceeding.

25 First of all, we think that stretches the

1 common sense notion of what a civil action is beyond
2 recognition. But there is not -- there is not a need
3 to focus just on the word "civil action" here. The
4 whole structure of EAJA is to treat administrative
5 proceedings separately from judicial proceedings.

6 When a case is remanded back to the Agency,
7 they are, again, Agency, or administrative proceedings

8 --

9 QUESTION: Mr. Kneedler --

10 MR. KNEEDLER: -- not judicial proceedings.

11 QUESTION: -- would you respond to Justice
12 Scalia's question about -- would it be open to this
13 Court, given the statutory scheme, to hold that your
14 opponent became a prevailing party when the case was
15 remanded?

16 MR. KNEEDLER: No, it would not. The
17 legislative history on page 26 of our brief that we cite
18 discusses --

19 QUESTION: Say, if we don't -- If we don't look
20 at legislative history, as some of us don't like to, and
21 just looked at the text of the statute. Is there
22 anything that would prohibit us from doing that?

23 MR. KNEEDLER: Yes, there --

24 QUESTION: You say --

25 MR. KNEEDLER: -- is the statutory phrase

1 "prevailing party." The person may have prevailed on
2 one issue, but until you know whether he prevails in any
3 substantial way in terms of his entitlement --

4 QUESTION: But he's prevailed on the only issue
5 that was adjudicated in the judicial proceeding.

6 MR. KNEEDLER: But he has filed a claim for
7 benefits and he hasn't prevailed on his claim for
8 benefits. And the legislative history on page 26 -- I'm
9 sorry to refer to it, but it's discussing cases that
10 have construed the language "prevailing party," and
11 Congress is essentially saying, "We agree with those
12 cases that give meaning to prevailing party as not
13 including the situation where the party simply prevails
14 in one legal issue in the case and gets sent back to the
15 Agency."

16 QUESTION: Well, that's sort of an argument
17 that the judicial proceedings are part of the
18 administrative proceeding.

19 MR. KNEEDLER: No, it's not. Because it's a
20 condition subsequent to the entitlement to benefits for
21 the judicial proceedings. That the person not only
22 prevail on his legal issue, but also prevail on his
23 overall claim for benefits.

24 Section 2412(d)(1)(A) itself distinguishes
25 between judicial and administrative proceedings, and 1

1 think it's important to focus on that language. It
2 refers to the authorization for a court to award fees in
3 any civil action, including proceedings for judicial
4 review of agency action.

5 What's encompassed in the term "civil action"
6 is only the judicial review of the agency action. The
7 agency action is something else.

8 And when a case gets remanded back to the
9 Secretary, in this case the Secretary vacated the first
10 administrative decision denying the claim, held further
11 proceedings, and then entered a new decision on the
12 remand.

13 That new decision on remand was Agency action,
14 taken by the Secretary pursuant to statutory authority.

15 QUESTION: I agree with all that. But somebody
16 who talks that way, when he says "prevailing party"
17 probably means prevailing party in the separate civil
18 action.

19 I mean, you ask us to regard them as separate
20 for one purpose and not to regard them as separate for
21 another purpose.

22 MR. KNEEDLER: Well, Congress, in our view, did
23 precisely that because the administrative proceedings
24 are separately dealt with in Section 504, and the word
25 "prevailing" carries two meanings here. Prevailing on

1 the particular issue in court and on the overall claim
2 for benefits. And, as I said, it's a condition
3 subsequent, that you not only have to prevail on the
4 legal issue the first time around in court, but also
5 have to prevail on the claim for benefits in the main to
6 be entitled to benefits.

7 Also, I'd like to point out that in Section
8 405(g), it does not require that the record get sent
9 back to the court in all proceedings as if the Secretary
10 were just a special master for the court. The provision
11 for certifying the record back to the court is only in a
12 narrow sort of pre-judgment remand by the court where
13 the case gets sent back to the Secretary to receive new
14 evidence.

15 And, far from making the Secretary an agent of
16 the court in those circumstances, that provision for
17 sending it back to the Secretary demonstrates that the
18 Secretary is a separate entity, not part of the court.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
20 Kneeder.

21 The case is submitted.

22 (Whereupon, at 11:03 o'clock a.m., the case in
23 the above-entitled matter was submitted.)

CERTIFICATION

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

No. 88-616 - LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner V. ELMER HUDSON

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

BY alan friedman
(REPORTER)

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