OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: HARRIET PAULEY, SURVIVOR OF JOHN C. PAULEY, Petitioner V. BETHENERGY MINES, INC, ET AL;

CLINCHFIELD COAL COMPANY, Petitioner V. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL;

and

CONSOLIDATION COAL COMPANY, Petitioner V. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

CASE NO: 89-1714; 90-113; 90-114

PLACE: Washington, D.C.

DATE: February 20, 1991

PAGES: 1 - 46

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IN THE SUPREME COURT OF THE UNITED STATES

- X

HARRIET PAULEY, SURVIVOR OF :
JOHN C. PAULEY, :
Petitioner :
v. : No. 89-1714
BETHENERGY MINES, INC., ET AL.; :
CLINCHFIELD COAL COMPANY, :
Petitioner :
v. : No. 90-113
DIRECTOR, OFFICE OF WORKERS' :
COMPENSATION PROGRAMS, UNITED :
STATES DEPARTMENT OF LABOR, :
ET AL,; :
and :
CONSOLIDATION COAL COMPANY, :
Petitioner :
v. : No. 90-114
DIRECTOR, OFFICE OF WORKERS' :
COMPENSATION PROGRAMS, UNITED :
STATES DEPARTMENT OF LABOR, :
ET AL. :

- X

Washington, D.C.

Wednesday, February 20, 1991

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

MARK E. SOLOMONS, ESQ., Washington, D.C.; on behalf of the Respondents Bethenergy Mines, et al.

CHRISTOPHER J. WRIGHT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent Director, OWCP, U.S. Department of Labor.

JULIAN N. HENRIQUES, JR., ESQ., Chicago, Illinois; on behalf of the Petitioners Harriet Pauley, et al.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 89-1714, Harriet Pauley v. Bethenergy Mines, consolidated with Director of Officer of Workmen's Compensation Programs, Consolidated Coal Company v. Director.

Mr. Solomons.

ORAL ARGUMENT OF MARK E. SOLOMONS

ON BEHALF OF THE RESPONDENTS

BETHENERGY MINES, ET AL.

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

The Black Lung Benefits Act provides a workers' compensation-type benefit to coal miners and their families on account of total disability or death due to black lung disease. The statute has no other purpose. In the cases before the court, the fact finders have determined that Mr. Dayton and Mr. Taylor do not have black lung disease. Mr. Pauley had an early stage of the disease, but it was determined in his case that he had no disability or impairment due to this disease at all.

Dayton, Taylor, and Pauley nevertheless believe that they are entitled to be compensated for totally disabling black lung disease, even though they do not have

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it. The reason that they give is that a fair factual inquiry in to the truth of the matters in their cases is, they say, prohibited by Section 402(f)(2) of the Black Lung Benefits Act, which they say required the Department of Labor to write eligibility regulations that irrebuttably presumed their entitlement to benefits. The Department of Labor wrote extremely liberal regulations that presumed all of the hard parts of their cases, the hard factual parts, in favor of the claimants. But those presumptions are not irrebuttable.

The questions that have been presented here this morning are, first, whether Section 402(f)(2) of the Black Lung Act required the Department of Labor to enact such irrebuttable presumptions, and secondly, if that -- if it did, whether Section 402(f)(2) is constitutionally viable to the extent that it irrebuttably and retroactively imposes upon these mine operators the obligation to pay for harm that either they did not cause or that does not exist.

We do not believe that it is necessary to reach the due process questions presented because Section 402(f)(2) does not prohibit factual inquiry into the truth in these cases. We think that a fair reading of the act in its context leads to several key conclusions. First of all, the irrebuttability theory that is presented to you

today is solely and exclusively a product of this Court's decision in Pittston Coal Group. It has never before been suggested.

If these cases that are here before you today had almost 20 years ago been presented to the Social Security Administration based upon the records that are here, I am confident that they would have been denied. The claims processors working for that agency would not have ignored the relevant and persuasive evidence that these people did not have pneumoconiosis or any related disability.

The only thing that we can document that the Social Security Administration really did differently is that it did not do much to defend black lung claims. It wrote regulations, as did the Department of Labor, that presumed all of these hard parts of the case in favor of the claimant, but it made no effort, or almost no effort, to assume the burden that it placed upon itself.

It is this practice, we believe, that the claimants want this Court to revive. They don't want an adversary. They --

QUESTION: Even though you are talking about to rebut the presumption?

MR. SOLOMONS: The burden to establish that the miner does not have pneumoconiosis or that any disability

the miner has did not arise out of or in any part out of pneumoconiosis.

QUESTION: Mr. Solomons, would it have been open to such proof under the old HEW regulations?

MR. SOLOMONS: Justice O'Connor, we think that the old HEW regulations were clearly open to such proof. We're talking -- if we're -- we're talking here --

QUESTION: They don't talk about it directly.

MR. SOLOMONS: They talk about it indirectly.

QUESTION: In fact, it is not clear, I think, what would have happened under those old regulations.

MR. SOLOMONS: Justice O'Connor, I think that that may be correct, and it's -- they're very difficult to read. They're messy and complex regulations that were adopted by the Social Security Administration. But nevertheless, they do not say that they are irrebuttable.

And through the cross-references, which is apparently the way the Social Security Administration regulated in those days, you get to, and not on a very hard path, you get to provisions within those regulations that raise criteria that are identical to those criteria that the Department of Labor put in its regulations. The Department of Labor's regulations are neater. The Department of Labor's regulations are designed for adversary proceedings.

And I think in all of the attention this has gotten, and not only from this Court -- and this Court has had this before it three times and there is a fourth case waiting in the wings, and the courts of appeals have seen it many times -- one thing that we have not yet focussed upon in looking at and comparing the Social Security regulations with the Department of Labor's regulations is that they are designed for different audiences and for different purposes. The Department of Labor's regulation is designed for adversary proceedings and for application by judges, administrative law judges or other judges.

QUESTION: Yes, but nevertheless, whatever they are designed for, Congress has said that the Department of Labor should not have regulations any stricter than the -- than HEW.

MR. SOLOMONS: That's right.

QUESTION: So if you could rebut -- if you couldn't rebut the case under the Social Security regulations by evidence that the Department of Labor permits -- isn't that one of the claims in this case?

MR. SOLOMONS: That is the claim.

QUESTION: Yes.

MR. SOLOMONS: We think that the Department -- the Social Security regulations, if you go through them, and they don't work very neatly, but if you do go through

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them, each one of those issues is open to factual inquiry. Every single one of them. All you have to do is follow the cross-references. But as I said --

QUESTION: Well, do we know how it was applied by HEW?

MR. SOLOMONS: What we do know -- now there are -- there are very few cases that arise out of the Social Security program. I think there are probably no more than 100 or 200 published decisions out of 600,000 cases. There are a couple of cases which, which show that the Social Security Administration, at least when they got to court, never treated this presumption as being exclusive of anything. It was just an administrative rule.

And one of the cases we cited, Farmer v. Weinberger, the agency came in and argued that you rebutted a death claim under the part that says rebuttal. In another case, much later on, they came in and they did, as we suggest, apply a primary reason test to disability causation. There are very few cases.

But what we do know, and we readily concede that the factual issues that are presented in these kinds of cases are difficult ones, and they cannot be decided without expert testimony, without medical evidence. The Social Security Administration did not get the kind of expert testimony that exists in these cases.

Now, there is nothing anyplace that anybody has been able to find that show that these presumptions were rebuttable or that Social Security claims personnel were unable to look at evidence that came in the door. They're not trained to function that way, it seems to me. They are trained to look at what comes in the door. Nobody told them not to do that.

And it seems that that's what they would have done in these kinds of cases, except that the agency, it said because it lacked resources, it said because there were not enough testing facilities in coal mining regions, it said that these were very hard questions and they didn't really know exactly how to resolve them, and so they didn't do anything.

But let me suggest to you that that is not a criterion. That a lack of resources is not a criterion that is picked up by this statute.

QUESTION: You say that the lack of resources resulted in the Social Security Administration's not developing any evidence of its own?

MR. SOLOMONS: They did not develop the hard evidence, Mr. Chief Justice.

QUESTION: Well, what's hard evidence as opposed to soft evidence?

MR. SOLOMONS: The hard evidence is the kind of

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evidence that you need to prove that a miner's disability, if in fact he has a respiratory impairment, is not due to black lung disease. That is hard evidence.

QUESTION: Or causation. That is disability --

MR. SOLOMONS: Disability causation.

QUESTION: -- caused by it.

MR. SOLOMONS: That's right. It is hard to show but by no means impossible. It's shown all the time, but it is hard to show that an individual who has pulmonary impairment, whether that impairment in fact arose out of the miner's coal mine employment, that's hard too. But the agency didn't do it. They said they didn't do it. They reported to Congress that they didn't do it and that they couldn't do it, and that they didn't have the resources.

QUESTION: You say that's why the Social Security people resolved cases the way they did, not because of an irrebuttable presumption, but because there was no evidence supporting the other view?

MR. SOLOMONS: Well, they created a presumption for use by their claims personnel, which to me looks to some degree like the Social Security grid. It doesn't have an invocation section. What it does is it moves through the steps in the case and at each step in the presumption, in this Section 410-490, you look at a

different issue of ultimate fact.

But the way the regulation is set up, and the Department of Labor certainly followed this, is they did it in a way so that the fact was presumed on the basis of something. If there was nothing there when the claims processor is looking at it he moves along to the next step. That's not the way the Labor presumption worked, but nevertheless the Labor presumption is not more restrictive.

We think that the Labor presumption is less restrictive in several ways. We think that the Labor presumption is more favorable to claimants and that it probably had to be, because there was going to be adversity in these cases, and Labor knew that. And there was no adversity in the Social Security cases and they did not need to be precise in designing a standard for application by judges in formal proceedings, as the Labor Department did.

This is not a case where the Labor Department was an outlaw agency. The Labor Department did what it was told to do, and the Labor Department, I think, favoring claimants at a time when the agency itself was very much in favor of this legislation, the Labor Department did an excellent job in establishing a rule which is extremely liberal. It caused a 1,200 percent

increase in the claims that they were -- that they were reviewing, in the approvals of claims that they were reviewing. This agency was not an outlaw. It was not a rogue agency.

I'd like to reserve the rest of my time for rebuttal, if there are no further questions.

QUESTION: Very well, Mr. Solomons.

Mr. Wright, we'll hear from you.

ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT

ON BEHALF OF THE RESPONDENT

DIRECTOR, OWCP, U.S. DEPARTMENT OF LABOR

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

Justice O'Connor, in response to your question, we know relatively little about how HEW administered the program, but let me call to your attention two things that we do know that were reported in one of the GAO reports and in the congressional legislative history. HEW reported that in cases where the record before it showed that a miner died from an automobile accident or from a malignancy in another organ of the body, it did not award benefits. We think that that shows that it would have done the same thing in a case where the evidence --

QUESTION: And how do we know that? From what? From a report?

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MR. WRIGHT: The GAO report that's cited and the congressional record testimony. We have cited both of those in our reply brief.

QUESTION: Did the GAO report deal with the black lung program in the Social Security agency?

MR. WRIGHT: Yes, it did, Your Honor.

And Justice White, in response to your question, you paraphrase Section 402(f)(2) in a way that I know we sometimes do, that it said that Labor was to adopt HEW's regulation. What Section 402(f)(2) actually says is that Labor is to apply criteria no more restrictive than those applicable on June 30, 1973.

Now, HEW's regulation was applicable on that date, but so was -- so were many other things, including part B of the act generally. And I'd like to focus on the fact that the act provides repeatedly that black lung benefits are only to be awarded to persons who are totally disabled due to pneumoconiosis. The phrase "due to pneumoconiosis" captures both the requirement that the miner must have the disease, and the requirement that his disability must be caused by the disease.

QUESTION: Well, then, I suppose it would follow that if the regulations didn't provide for rebuttal on those -- either one of those two bases, the regulation would be contrary to the statute?

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MR. WRIGHT: That's our position exactly, Justice White. The first section of the Black Lung Benefits Act says that its purpose is to provide benefits to miners totally disabled due to pneumoconiosis. The section authorizing HEW to promulgate regulations says that it is to set forth standards to determine whether a miner is totally disabled due to pneumoconiosis. The rate schedules have a provision for miners totally disabled due to pneumoconiosis. No provision of the act hints that anyone who is -- does not have black lung disease or is disabled by some other cause is entitled to benefits. The three words, due to pneumoconiosis, in effect summarize Labor's third and fourth rebuttal provisions, the provisions at issue in this case. We don't think that a regulation that implements the statute is contrary to the statute.

Dayton and Taylor, who do not have the disease, do not suggest any reason why they should be entitled to benefits. Pauley suggests that she should be awarded benefits because it's too difficult to determine what caused the disability. Well, as I have just stated, the statute repeatedly sets forth a causation requirement, so Congress clearly thought that it was possible.

As Mr. Solomons says, doctors and agencies have been determining causes of disabilities for years under

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this program. In many cases it is obviously quite simple. The automobile accident hypothetical reveals a lot in our view. The claimants have absolutely no argument as to why benefits should not be awarded in such a case, and it seems quite clear to us that Congress did not intend such a result, which can fairly be characterized as absurd under the statute.

QUESTION: Let's acknowledge, Mr. Wright, however, that it's very -- it's very hard to get there through the HEW regulations. And you and the mining companies don't even agree on how you get there through the HEW regulations.

MR. WRIGHT: Well, I --

QUESTION: Of course it's hard to get anywhere through the HEW regulations. I can understand that.

(Laughter.)

MR. WRIGHT: I would be very happy to acknowledge that, Justice Scalia. I would say that we do agree on how you get there with respect to miners not having -- who don't have black lung disease. We have actually emphasized different routes for miners who are not totally disabled, but we have both endorsed each others positions on that issue as well.

We think this Court's decision in the Turner Elkhorn case is very instructive. That decision was

handed down in 1976, 2 years before Section 402(f)(2) was adopted. One of the provisions of the act, the one provision that sets forth an irrebuttable presumption for miners with the advanced stage of the disease, what was at issue. This Court rejected the coal company's claims that that presumption was affirmant of the due process clause. But even with respect to it the Court said that it's perfectly clear under the act that an operator can be liable only for pneumoconiosis arising out of employment in a coal mine, even though that particular provision didn't say that in so many words.

We think that Congress, acting 2 years later in adopting Section 402(f)(2), must have also thought it perfectly evident under the act that an operator can be liable only for pneumoconiosis arising out of employment in a coal mine.

I'd like to say a word about an argument that the claimants have suggested with respect to the Black Lung Disability Trust Fund. They suggested that even if the operators can't be liable where a miner is not totally disabled due to pneumoconiosis, the Black Lung Disability Trust Fund can. And they think that this avoids the constitutional problems.

Now we disagree on that. We don't see how it really makes a difference whether an operator pays or

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whether a fund that is funded by a tax on coal sold by coal companies pays. But we'd also like to note that the Black Lung Disability Trust Fund by its name seems to imply that it gives awards in cases involving black lung disability.

And furthermore I'd like to point out that the provision of the act that they rely on in making this argument just doesn't support their position at all. That's Section 422(c) of the act, which says that no operator shall be responsible for paying benefits to a miner whose disability did not arise at least in part out of employment in a mine during a period after December 31, 1969, when it was operated by such miner. That provision just says that the trust fund pays benefits where the miner stopped working before the Black Lung Benefits Act was enacted, just as it does in cases where the operator isn't solvent or for some other reason isn't paying benefits. It does not suggest in any way that the Black Lung Disability Trust Fund is available where a miner either does not have black lung disease or is not disabled by it.

If there are no more questions, I have nothing further.

QUESTION: Thank you, Mr. Wright.

Mr. Henriques, we'll hear from you now.

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QUESTION: Do you agree, Mr. Henriques, that Dayton and Taylor do not have black lung disease?

MR. HENRIQUES: Mr. Chief Justice, the fact finders found that they did not, but the question of whether a person has black lung disease in a case involving ventilatory studies or blood gas tests, their types of cases, is one in which the state of the medical art -- HEW's view in 1972 was that the state of the medical art had simply not advanced far enough to be able to make the determination about whether a person's respiratory or pulmonary impairment --

QUESTION: I was asking you as a question of present fact.

MR. HENRIQUES: Present fact is that there is no indication in the legislative history that the state of the medical art has --

QUESTION: I was just asking you as a question of present fact whether or not Dayton and Taylor have black lung disease.

MR. HENRIQUES: Well, I -- my response is that we don't know, because the state of the medical art does not allow you to know. The fact finders found that they

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do not. That's so. But HEW believed that such findings of fact were inherently inaccurate, and that's why I can't answer that one yes or no.

QUESTION: Isn't that why they didn't allow the -- this particular type of medical evidence to create the presumption under the old regulation?

MR. HENRIQUES: We believe that that's so, too.

QUESTION: And isn't it true, therefore, that, which -- I don't remember which it was now, but the particular miner who proved his case by those studies would have failed under the HEW regulations?

MR. HENRIQUES: The --

QUESTION: It seemed to me that was rather clear as to that one miner.

MR. HENRIQUES: Well, there were two miners --

QUESTION: And therefore it's a little hard to see how he can be claiming that the Social -- Department of Labor regulation is more restrictive than the HEW regulation.

MR. HENRIQUES: What I believe you are referring to, there were two miners. Mr. Dayton established the presumption using ventilatory study evidence. That was a

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QUESTION: But Taylor relied on the blood gas studies --

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MR. HENRIQUES: Taylor relied on the blood gas test.

QUESTION: -- which would not have entitled him to the presumption under the HEW regulation.

MR. HENRIQUES: That is correct. The -- but at the time it would have been futile for HEW to have included blood gas tests --

QUESTION: Well, that may well be true, but this is a case, it seems to me, which clearly would have failed under the prior regulation, so I find it difficult to understand how the Department of Labor regulation, at least as to that miner, is more restrictive.

MR. HENRIQUES: Well, as we say in Mr. Taylor's brief, it turns on the specific word "criteria" in the statute, and the distinction between substantive criteria on the one hand and forms of evidence on the other. And since blood gas studies show the same fact element, the presence of a respiratory or pulmonary impairment, the same fact element that ventilatory studies show, we believe that DOL later, when it no longer was futile to establish standards for blood gas studies, had to apply the same criteria with respect to blood gas study cases as it did with respect to ventilatory study cases. That's the nature of our argument in the --

QUESTION: This word "criteria" has troubled us

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in the past.

MR. HENRIQUES: These consolidated cases turn on a face of the statute question and on a face of the regulation question. The face of the statute question is simple, because this Court's decision in Sebben has already answered it. In the fact of the regulation question is a straight -- has a straightforward resolution too, because there is only one permissible interpretation of these interim regulations that are pertinent to the case. The regulations are not the model of clarity, but they're clear enough to be able to ascertain that there's simply no permissible interpretation that would allow the extra rebuttal tests of the DOL interim regulation to be read into them.

Now, first with respect to the statutory question. The centerpiece of the 1978 amendments to the Black Lung Benefits Act was Section 402(f)(2). Section 402(f)(2) prohibited the Secretary of Labor from adjudicating claims using criteria that were more restrictive to claimants than the criteria in effect or applicable on June 30th, 1973. The question in this case would have been which criteria were applicable on June 30th, 1973, except that the, this Court's decision in Sebben has already answered that question.

Sebben answered it holding that the criteria

applicable on June 30, 1973, include the criteria of the HEW interim provision. And because the criteria of the HEW interim provision are the most favorable criteria to claimants, Section 402(f)(2) of the act prohibited the Secretary of Labor from using -- from adjudicating claims using the criteria that are more restrictive than the criteria of the HEW interim provision. So the HEW interim provision is the touchstone of Section 402(f)(2) of the act.

Now the regulatory question. The regulatory question is whether any rebuttal criteria of the DOL interim regulation make that regulation more restrictive to claimants than the HEW interim provision.

Now this question has a straightforward resolution, just as the statutory question does. The HEW interim provision has two -- has only two rebuttal tests, whereas the DOL interim regulation has four rebuttal tests. The DOL regulation has the same two rebuttal tests as the HEW provision, and two additional ones as well. The two additional rebuttal tests of the DOL regulation pertain to disability causation and to the presence of pneumoconiosis. Each of the DOL interim regulation's two extra rebuttal tests makes it easier for opponents to rebut the HEW -- the DOL interim regulation than to rebut the HEW interim regulation. So on its face, the DOL

interim regulation is more restrictive to claimants than the HEW interim provision, in violation of Section 402(f)(2).

QUESTION: Your opponents disagree with you as to the rebuttability of the HEW systems, don't they?

MR. HENRIQUES: They do. They contend that this regulation is confusing, can be read to include provisions like the two extra rebuttal tests of the DOL interim regulation, and they offer varying readings of the HEW interim provision that contradict each other. But none of the readings that they offer is a permissible interpretation of the HEW interim provision. When the HEW interim provision is carefully scrutinized in light of HEW's own interpretation of it in its Coal Miners Benefits Manual, no permissible interpretation of it can include any provisions like the two extra rebuttal tests of the DOL interim regulation.

So the struggle in the questioning when my opponents were here talking to you was about what did HEW, what did the Social Security Administration really do in these cases. What we know, and something that they did not mention, what we know is that they issued a -- the Coal Miners Benefits Manual, they issued it 3 weeks after the HEW interim provision was promulgated. And that Coal Miners Benefits Manual is their contemporaneous

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interpretation -- is SSA's contemporaneous interpretation of its interim provision. And it makes clear beyond peradventure that with respect to that with respect to these extra rebuttal tests that Labor later added, HEW simply did not allow inquiries into anything like those two extra rebuttal tests.

QUESTION: Mr. Henriques --

QUESTION: Do you think that would be valid under the statute, that regulation?

MR. HENRIQUES: Yes, we -- it is valid.

QUESTION: I mean at the time, at the time.

MR. HENRIQUES: It was valid under --

QUESTION: Although the act is aimed at giving benefits to those who have this disease caused by coal mining.

MR. HENRIQUES: Right. That's the superficial --

QUESTION: And so they -- it would be all right for the agency to say well, you can't offer any evidence that rebuts the notion of causation, for example.

MR. HENRIQUES: Right. That's the -- that's the superficially appealing point that our opponents try to --

QUESTION: You hope it's superficially.

(Laughter.)

MR. HENRIQUES: -- try to press in their briefs.

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They try to press the superficial point in their briefs. The legislative rule-making authority that Congress had delegated HEW was well broad enough, certainly broad enough to allow SSA to decide to conclusively presume facts.

Now, when we say conclusively presume, it's different than irrebuttability. This regulation was rebuttable. It was rebuttable by certain facts that were not directly related -- directly related to disability causation or the presence of pneumoconiosis.

But SSA believed that it was permissible to indirectly prove these facts, based on a miner who has pneumoconiosis and who is totally disabled would prove these facts by a conclusive presumption based on -- based on these facts.

Now the reason that SSA decided to do that was because it had come to the realization or the belief, based on study -- HEW's officials and medical officers believed that the state of the medical art simply was not advanced far enough at the time to be able to allow fact finders and physicians to make reasoned determinations concerning the element of disability causation.

QUESTION: And -- let's assume that the state of the medical art had changed between then and now so that you really can determine causation. You would say,

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nevertheless, that until Congress changes the act you have to go by the HEW regulation.

MR. HENRIQUES: Well, more than that. Congress decided in Section 402(f)(2) of the act to incorporate the HEW interim provision. It specifically said the Secretary of Labor cannot apply criteria more restrictive than the criteria in effect on June 30, 1973, and those criteria included the HEW interim provision, the most liberal, the most favorable regulations to claimants at the time. That was the touchstone in Section 402(f)(2).

QUESTION: Although you don't think it modifies the criteria to update medical science for purposes of determining whether -- whether your client has black lung disease. But only -- it only altered because -- the first point that was put to you by Justice Stevens: why isn't it that the miner here who benefitted by the updating in medical knowledge, why doesn't he have a much more liberal criterion applied to him than HEW applied. And you said well, you know, medical knowledge has advanced and we use it. But you only use it on one side.

MR. HENRIQUES: No, I -- the -- Justice Scalia, I believe that it's permissible for two different agencies to come to different conclusions about the state of the medical art. There were physicians that testified on both sides of the question.

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QUESTION: Well, it's not just two different agencies; it's 20 years. I mean, that's, that's a lot of time in medical technology.

MR. HENRIQUES: That may be so, but there's nothing in the legislative history that suggests that the state of the medical art has advanced far enough even now. The -- that was --

QUESTION: How does the legislative history cover whether the medical art has advanced? They were leaving that to fact finders.

MR. HENRIQUES: Well, I -- we believe that we don't need to resort to the legislative history because what SSA's view was -- is why they left the two rebuttal tests out of the, of its own interim provision. And Congress took that at face value in 1972. There is no suggestion anywhere in the legislative history that the -- that DOL could change it, the regulation, based on even its different view, if it had one, that the state of the medical art had been updated.

QUESTION: Are you saying that in no case was the medical art with respect to the two additional criteria, in no case could it demonstrate that pneumo -- say it for me.

MR. HENRIQUES: Pneumoconiosis.

QUESTION: There it is.

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(Laughter.)

QUESTION: In no case could it determine that that didn't exist?

MR. HENRIQUES: No, there are obviously cases in which the -- it would have been possible to conclude that. But we have --

QUESTION: Well, why wouldn't that be a violation of the statute, if the statute says you have to have black lung disease and it has to have been caused by coal mining, and if at least in some cases the medical technology, as crude as it was, could demonstrate absolutely that you didn't have it or that you didn't get it from coal mining, why wouldn't that be a violation of the statute for HEW to say absolutely you can't use it in any case?

MR. HENRIQUES: Because HEW was an administrative agency and had a line-drawing problem, the typical kind of line-drawing problem in the law. They had to decide whether to be underinclusive or to be overinclusive. And they made the decision that --

QUESTION: Well, but this is a rebuttal. I mean, the burden is on the employer, at that time on HEW. Your client gets the benefit of the doubt. But in at least, if in one case in 100 I can come in and show conclusively that this is true, what harm is there in

letting me show that?

MR. HENRIQUES: Because it -- HEW's view was that it was virtually impossible to prove. That necessarily meant -- that didn't -- that wasn't --

QUESTION: No problem. Then the employee wins.

MR. HENRIQUES: No, because physicians didn't necessarily share that view. Employers could go out and hire physicians who believed that they could give an opinion, an opinion that would defeat the claim. Nevertheless, HEW's view was such opinions are inaccurate, inherently inaccurate. HEW, as an administrative agency, had the authority to make the decision, as between competing views in the medical community, as to which one was right. And they concluded that it was virtually impossible.

Now that wasn't -- certainly some physicians disagreed with that, and employers could get them to write opinions that would beat claims. HEW took that away from the physicians and from the administrative law judges.

That's why HEW had a line-drawing problem. By drawing the line where it did, it avoided being underinclusive. It ensured that all deserving claimants would get benefits. It also meant that some undeserving claimants might get benefits as well, like the miner in the car accident hypothetical. But we -- they have never

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shown anything to suggest that that miner -- that there is such a miner who ever filed a claim for benefits. They have never pulled anything out of a file, an unpublished, published decision, at administrative or judicial level showing that that miner even existed. So we may have a -- they raise that as a specter, but it may be a nonexistent downside of the traditional rule-making, line-drawing problem.

QUESTION: I thought they argued that these miners fit that category because they didn't have the disease. Why aren't these just like somebody who got killed in an automobile accident --

MR. HENRIQUES: Under SS --

QUESTION: -- who had been in the mines for 10 years and had pneumonia or something else, you know?

MR. HENRIQUES: Our opponents say that SSA would not have approved benefits in these claims.

QUESTION: Well, why wouldn't they? I don't understand why they wouldn't if they were in the mines for 10 years and they had had some -- some ailment that was, you know, qualified for the presumption, why wouldn't they recover? Why wouldn't they recover under your view of the earlier --

MR. HENRIQUES: They would have.

QUESTION: They would have.

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MR. HENRIQUES: They certainly would have recovered under the HEW interim provision.

QUESTION: Even if they could prove later beyond a shadow of a doubt they did not have serious pneumonoconiosis -- if that's the way you pronounce it -- and also that they, rather the cause of their disability was an automobile accident?

MR. HENRIQUES: Right, because the HEW interim provision did not address those inquiries. But again --

QUESTION: Well, how is it that HEW reported to the contrary to the GAO, do you suppose?

MR. HENRIQUES: Excuse me, I --

QUESTION: How do you explain, then, the HEW report to the GAO?

MR. HENRIQUES: HEW's report to the GAO was that it was virtually impossible to make these determinations. That's why it didn't include the disability causation in the --

QUESTION: I thought it also established that some claims were denied, for instance the auto accident case.

MR. HENRIQUES: That is incorrect. There -- the -- any representation that may have been made to you that the car accident hypothetical would have lost is incorrect. The car accident hypothetical would have won,

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and we realize that such a miner would not have been a deserving miner, but he would have won. The -- it's a downside of the line-drawing problem. It simply was not feasible to draw a line that would exclude everything.

It's like the Morning v. Family Publications case. You can't -- it's very difficult for legislatures and agencies which legislatively rule make to draw precise lines.

But again, I'd like to emphasize that the Government and the coal industries have access to all the files in all the cases, and they haven't shown you evidence of even one case in which a claim was even filed that had -- that was based on an accident of any kind, much less a car accident claim.

QUESTION: Mr. Henriques, I didn't think that the car accident hypothetical was one that had been invented. I -- my recollection was that that was something contained in the -- in the report to the GAO. Is it -- am I wrong about that?

MR. HENRIQUES: I don't -- I have never seen any reference. I certainly don't remember any reference of a car accident hypothetical in any report to the GAO. The first time we have heard of the car accident hypothetical is in the briefs of our opponents. It's a specter that they have raised that may well be nonexistent. They

haven't backed it up with even any indication that there was ever such a claim filed.

Besides deciding that its interim provision would conclusively presume disability causation, HEW also decided that it would conclusively presume the presence of pneumoconiosis in ventilatory study cases. As we --

QUESTION: May I just clarify one thing? When you say "conclusively presume," is that a term that is used in either the HEW regulation or the manual that you -- I haven't looked at the manual.

MR. HENRIQUES: No, it is not. It's a term --

QUESTION: A term -- well, who, who introduced the word "conclusively"?

MR. HENRIQUES: We coined it in our briefs --

QUESTION: Oh, well.

MR. HENRIQUES: -- and it's fraught with problems. But the notion --

QUESTION: It wouldn't be fraught with problems if it was in the regulation, but --

MR. HENRIQUES: The regulation does conclusively presume it in the sense that we use it --

QUESTION: I see.

MR. HENRIQUES: -- because it says on its face HEW recognized the act's requirement that miners be totally disabled due to pneumoconiosis. And it -- and the

regulation, the HEW regulation says that miners who invoke the presumption get a presumption that they are totally disabled due to pneumoconiosis arising out of coal mine employment.

QUESTION: Yes, but as I remember the text of the regulation, it does not say that the presumption is irrebuttable or conclusive.

MR. HENRIQUES: It doesn't use those words --

QUESTION: Right.

MR. HENRIQUES: -- but it all but uses the words because it specifically says that you obtain the presumption by invoking the presumption, and then when you look at rebuttal there is no rebuttal test that addresses directly, or indirectly --

QUESTION: No, that's true, but supposing, for example, after they get all through they find out that the man is just -- is a forgery. I mean, there -- sometimes you can rebut claims in ways that are not spelled out as the normal methods of rebuttal. I don't think it necessarily follows because you have two methods of rebuttal specified in the regulation that that's an exhaustive list. It doesn't say these two ways and no others.

MR. HENRIQUES: I believe it does say these two ways and no others. Certainly the natural -- a natural

reading of the regulation says that you invoke by meeting the invocation provisions, and then when you wish to, when the opponent is going to rebut, here are the ways that you can rebut.

QUESTION: It doesn't say only. It could have said only very easily. Section C says the presumption in paragraph B may be rebutted if.

MR. HENRIQUES: Right.

QUESTION: If could have said may be rebutted only if, if it really meant that those are the only ways to do it.

MR. HENRIQUES: Well, any doubt about that is certainly resolved, and I don't think there is doubt about it because the natural reading of the regulation, I think, would be that you list two rebuttal tests, you certainly -- a disability causation under the statute is an element. It's omitted from the regulation. Something essential to that, when it's omitted -- but the manual, the manual --

QUESTION: Well, that might be a natural reading if it wouldn't lead to such a natural result that somebody who dies in an automobile accident gets compensated for dying from black lung. I mean, if you want to talk about natural meaning.

MR. HENRIQUES: But the -- but HEW had a, had a line-drawing problem, and if they, in order to draw a line

that would have excluded the car accident hypothetical it would have been extremely difficult if not impossible to not exclude deserving claimants. And that's the problem. And it was certainly within HEW's reasonable exercise of its rule-making discretion to draw that line.

QUESTION: Yes, but --

QUESTION: Well, how is it reasonable, though, to draw a line that is contrary to the whole thrust of the statute? I just don't understand how such a regulatory scheme could possibly be deemed a reasonable interpretation of the statute.

MR. HENRIQUES: The -- one of the judgments that an agency would make is what's the likelihood that there will be cases that would win for, with respect to undeserving clients. And -- because you can't draw a line that's perfect. And as I said, the theoretical possibility that a car accident hypothetical may -- that the person in the car accident hypothetical may get benefits is only a theoretical possibility. We have seen no evidence that any such person ever received benefits, or any other undeserving person ever received benefits, although we readily acknowledge that it was theoretically possible under the regulations.

QUESTION: Well, what about these cases? What about these case? The issue is whether you can prove --

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be allowed to prove that these claimants didn't have the disease or that the disease wasn't caused by coal mining. And you say it doesn't make any difference. We can assume that they could prove it by present medical standards, but nevertheless they get benefits.

MR. HENRIQUES: These three cases are, we think, paradigm cases for the wisdom of HEW's rule.

QUESTION: Are there a lot of these cases out there somewhere?

MR. HENRIQUES: Like the three cases here?

QUESTION: Like these?

MR. HENRIQUES: These are -- these are absolutely typical kinds of cases in the law.

QUESTION: How many, thousands of them?

MR. HENRIQUES: The Government estimates that the remaining number of cases is anywhere from 2,500 up to a couple thousand more. But these are the paradigm cases.

QUESTION: Well, but not 2,500 cases in which the ALJ has found there was either no causation or no black lung disease at all.

MR. HENRIQUES: Yeah, when I -- excuse me, Justice Stevens. What I meant was 2,500 remaining cases out there.

QUESTION: Remain. And there are some of those in which the employer bore the burden -- you see, the

thing that troubles me about your argument is that all this uncertainty means that once the miner gets the benefit of the presumption he is normally going to win, because the uncertainty makes it very difficult to rebut the presumption.

But if you do have the unusual case in which the evidence clearly establishes the absence of the disease or the absence of causation, it seems to me there it's rather unusual to say we just won't permit the rebuttal to come in. Because then the miner is getting not only the benefit of the uncertainty, but the benefit of a conclusive presumption that I don't see mentioned anywhere in any of the materials.

MR. HENRIQUES: Well, the agency had to -- did take that into consideration, and the Comptroller General's report that talks about HEW's decisions in this regard makes it clear just how difficult it is to tell pneumoconiosis apart from other conditions. And they weren't just other respiratory conditions.

QUESTION: Which means that in 99 cases out of 100 close cases the miner will win when he gets the presumption.

MR. HENRIQUES: And in -- that is so. But in those cases the medical art simply could not, in HEW's view, be -- was not advanced far enough at the time then,

perhaps also now, to be able to allow the determination to be made as to whether -- that it wasn't pneumoconiosis. And so HEW made the reasonable decision that we're going to look at the reasonable connection between having pneumoconiosis and being totally disabled, and saying that the reasonable connection is that the disability occurred. In other words, proving the fact of disability causation indirectly was, in their view, more -- a more accurate endeavor than to try to allow physicians to prove it directly when the state of the medical art did not allow that determination.

The other point, and HEW also was under instructions from Congress. Congress clearly encouraged HEW to eliminate this huge backlog of claims using interim criteria. And the Comptroller General's report says that one of the primary causes for this backlog of claims was the -- this inadequacy in the state of the medical art to prove disability causation. So the agency says look, we've got to eliminate this, we have this problem in the state of the medical art. It's -- it uses lots of resources for us to get doctors opinions and then to assess them. Let's eliminate -- follow Congress' directive. Let's eliminate this backlog of claims and at the same time follow what we believe the state of the medical art requires, which is not to inquire into

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disability causation directly, but only to do so indirectly.

QUESTION: But it seems to me you eliminate the backlog just as effectively by simply adopting a presumption and then, although you may have ability to rebutting it -- to rebut it, simply not rebutting it.

MR. HENRIQUES: The -- but again, nothing would have prevented physicians from issuing decisions that HEW had already determined could not be accurate. If they believe that the state of the medical art is inadequate, and physicians nevertheless, an individual physician in an individual case is asked to write an opinion, that opinion may be one that says -- like in these cases -- that says that the disability causation didn't happen, or the presence of pneumoconiosis was not there when they focussed on diseases that HEW said you can't tell from pneumoconiosis. You can't tell. Nothing prevented physicians from issuing opinions, but HEW believed those opinions were not accurate. That's why HEW excluded the disability causation inquiry --

QUESTION: I don't understand where these physicians would come from. I assume HEW is in charge of the investigation, either HEW or the claimant. And if HEW doesn't ask the physician for these kinds of studies that they -- that they think aren't worth anything -- are these

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roaming physicians that would just come in and say by the way, I have a study I want you to hear about in this case?

MR. HENRIQUES: No. I thought you were positing the point. Let's say the HEW interim provision did allow rebuttal --

QUESTION: No. I mean, it seems to me HEW could get rid of its backlog very easily, as it did, by adopting presumptions. And if there is nothing brought in to refute them, the presumptions will carry the day. That would -- that would get rid of the backlog.

MR. HENRIQUES: Well, the, the backlog -- HEW still would have had to assess the medical evidence, obtain it and then assess it, which was an enormous administrative undertaking, whether or not it's focussed on invocation or on rebuttal. That doesn't eliminate the, the administrative burden of the backlog of claims. The way to eliminate that is to tell -- is to say we're no longer going to focus on that evidence, so physicians need not give us that information.

Now I, I -- the reason why I responded to your statement about where the physicians reports come from is that I thought you were positing the question of --

QUESTION: Thank you, Mr. Henriques. Your time has expired.

Mr. Solomons, do you have rebuttal? You have 4

minutes remaining.

REBUTTAL ARGUMENT OF MARK E. SOLOMONS

ON BEHALF OF THE RESPONDENTS

BETHENERGY MINES, ET AL.

MR. SOLOMONS: A few things, Mr. Chief Justice. First I would like to address some of the points that were made with respect to the GAO study. Although I think that it is of limited significance, nevertheless, this was an investigation by the investigative arm of Congress. They came in, they leveled charges at the agency, said you're not doing these things that you ought to be doing. And the agency came back and they said, oh, well, it's real hard to do them, and we don't have the resources to do them.

And then on the medical issues they said that -- and this, by the way, as far as we know, never appeared in any congressional materials -- they said, citing a magazine article, that it's very difficult to make these kinds of factual determinations. This is one of the most studied diseases on the face of the earth. A magazine article is hardly proof of anything in any form, it seems to me.

But one of the things that's very interesting, the -- looking only at this GAO report. Social Security on page 36 of the report told the investigators -- I will

read it to you. Social Security officials told us that benefits were almost always denied in cases of deaths which occurred less than 24 hours after onset of acute diseases or traumas such as coronary occlusions or so forth and so on.

I don't have a crystal ball to go back and tell you precisely how SSA would have handled any particular case, but neither do the claimants.

It seems to me, however, that if they wanted to do something as radical as to adopt a -- an irrebuttable presumption, to tell their employees, who have very few of those kinds of rebuttable presumptions in the jobs that they do, that this is the way you're going to do it, you're going to ignore evidence of certain types in these cases, that they would have done it somewhat more clearly than they did. And in fact there is an irrebuttable presumption in the statute, and they did instruct their employees how to use it. But this presumption, the Social Security presumption, is not one that was irrebuttable.

I would also like to address the question of the meaning of the term criteria in Section 402(f)(2). It's a broad word. It doesn't say adopt their regulation. It says adopt the criteria applicable. The criteria applicable include the statute, which had lots of criteria in them, and in many cases the responses of the claimants

to that is that these are effectively repealed by implication. But I don't think you can make a case for that.

It includes the interim adjudicatory criteria, and it includes the rest of Social Security's regulations to the extent that they are applicable. Those regulations bring in, we think very clearly -- as by the way does the manual. I think the manual is devastating to this case because the manual brings in all sorts of factual inquiries, as I read it, into causation and disease and anything that comes in.

But let me address what's not a criterion, I think. Obtuseness in the drafting of this regulation is not a criterion. A lack of resources on the part of the Social Security Administration is not a criterion. Failure to file -- follow the Federal Register Style Handbook, and not using -- overusing cross-references is not a criterion. And the state of the medical art in 1972 is not a criterion either.

It seems to me that the Department of Labor again did the job that it was supposed to do here.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Solomons.

The case is submitted.

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(Whereupon, at 11:00 a.m., the case in the above-entitled matter was submitted.)

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#90-113 - CLINCHFIELD COAL COMPANY, Petitioner V. DIRECTOR, OFFIC
OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR, ET AL;
and
#90-114 - CONSOLIDATION COAL COMPANY, Petitioner V. DIRECTOR,
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