OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,

Petitioner v. FRED P. GARDNER

CASE NO: No. 93-1128

PLACE: Washington, D.C.

DATE: Monday, October 31, 1994

PAGES: 1-53

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

JESSE BROWN, SECRETARY OF :

VETERANS AFFAIRS, :

Petitioner :

v. : No. 93-1128

FRED P. GARDNER :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Monday, October 31, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

EDWARD C. DuMONT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JOSEPH M. HANNON, JR., ESQ., Washington, D.C.; on behalf of the Respondent.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 93-1128, Jesse Brown, Secretary of Veterans Affairs v. Fred P. Gardner.

Mr. DuMont.

ORAL ARGUMENT OF EDWARD C. DuMONT

ON BEHALF OF THE PETITIONER

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

This case involves 38 U.S. Code section 1151, which provides so-called service-connected disability benefits to veterans who have suffered an injury not, in fact, as a result of their military service but as the result of hospitalization or medical care provided by the Veterans Administration.

During the statute's 70-year history of enactment, implementation, repeal, reenactment, recodification, and periodic amendment, the VA has consistently held that section 1151 does not authorize the extension of benefits for disabilities arising as a reasonably foreseeable consequence of properly rendered medical care. Rather --

QUESTION: During most of that period there was no opportunity for judicial review of that judgment, is

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that right?

MR. DuMONT: That's correct, Justice Scalia. However, we would point out that in addition to that fact, or precisely because of that fact, it's well-known that the Veterans Committees of Congress have always taken a very active interest in the administration of Veterans Affairs.

QUESTION: Well, that would presumably mean that what was being done pleased the then-current committees of Congress. It would have very little to do with what the statute when originally enacted, by perhaps quite different people, meant.

MR. DuMONT: Well, although we think there is quite a remarkable record of consistency in that regard, since there was a good deal of administration in the twenties, shortly after the enactment, there was a good deal of administration in the thirties, after the reenactment, and there has been a great deal of ongoing administration during the subsequent period -- so we believe really that the evidence that Congress has over all of those years expressed no dissatisfaction, in fact no one in Congress, no one else, to our knowledge, has expressed any great dissatisfaction with the core interpretation of section 1151 not to provide benefits for the ordinary, foreseeable results of proper medical

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

care --

QUESTION: Mr. DuMont --

QUESTION: Would you expect --

QUESTION: I'm sorry.

QUESTION: I'm sorry. Go ahead.

QUESTION: Would you expect the Veterans Committee of Congress to object to the VA giving away too many benefits?

MR. DuMONT: We would expect the veterans and the committee to object if they thought that the Veterans Administration was applying too narrow a construction of the statute, which is the claim that the respondent makes in this case.

QUESTION: Well, we would expect them to object, maybe, if there was a good reason for them to do so.

One thing I don't know, maybe it's in the briefs but I just couldn't get a sense of it, is, what was the percentage of these claims in which the Government's policy would make a difference, because as I understand it, if there were treatment for, later treatment for a service-connected disability, there was no fault requirement at all, so that the only cases in which the Government's policy, if I understand it correctly, would make a difference, are those in which there was no prior service-connected disability, and the veteran simply went

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

in because he was sick or he was hurt or what-not.

Was the percentage of these cases sufficiently high so that anyone would have paid much attention to them? Did -- in other words, I'm saying what practical difference did the policy make?

MR. DuMONT: I think it makes quite a significant practical difference, actually. I'm not aware of the figures from the very early period. However, now I can tell you that a very substantial proportion of the care rendered by the VA, both hospitalization and out-patient medical care, is rendered to veterans whose disability is nonservice-connected, or whose condition is a nonservice-connected condition, and therefore --

QUESTION: But in the early years we just don't know. Prior, for example, to the, what was it, the '34 amendment, we don't know what the substantiality of this effect would have been in that period.

MR. DuMONT: That's correct. I'm not aware of -- well, of course, until 1924, by and large veterans with nonservice-connected disabilities were not entitled to care at all, which is one of the reasons that we think it's implausible to accept respondent's contention that section 1151 in its original incarnation was intended to somehow put nonservice-connected veterans on a par with service-connected veterans, because really they were quite

separate questions.

QUESTION: Mr. DuMont, do we know on the question of numbers, of the unrepresented claimants, and most, if not all, of these were, what percentage prevailed in showing fault or accident? How many of these claimants did this policy screen out? This case was screened out, obviously.

What struck me is, I don't know of another compensation system where an unrepresented party is required to prove fault. If you know of another compensation scheme decided, in the first instance, by an administrator where there is no representation for the claimant and yet the claimant has the burden of showing fault -- that seems to be unique.

MR. DuMONT: I'm not aware of another system that has this structure, but I think the entire system of veterans' benefits is unique, but part of what's unique about it is that it is meant to be nonadversarial at the initial stages, and I think there is really no evidence -- despite the allegations from respondent, there's no evidence that the claims adjudicators at the VA don't do a proper job of trying to develop the facts of these cases when they're presented and try to figure out whether there was fault on the part of the VA, or some fault that comes within the meaning of the statute.

QUESTION: But the burden is supposed to be on the claimant, the unrepresented claimant, to prove the fault.

MR. DuMONT: Well, that's not -- not really true. At the administrative stage, by statute all factual questions are to be resolved in favor of the claimant, and it's not really a question of who has the burden.

The claimant is supposed to come to the Veterans Administration, and the Veterans Administration has an obligation to help the claimant develop the facts of that claim, so it's really an objective investigation process which the VA people are perfectly capable of implementing, and there's no evidence they're not implementing it correctly.

QUESTION: But the claimant loses unless fault is shown.

MR. DuMONT: The plaintiff cannot -- the claimant cannot require -- recover benefits unless there is some showing of fault or an accident within the meaning of the regulations, that's correct.

QUESTION: Who must make that showing?

MR. DuMONT: It must be -- it must be made on behalf of the claimant, that's correct, but --

QUESTION: Mr. DuMont, may I ask you, if we agree with the court below that the statute just doesn't

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

require the proof of negligence, you point to examples such as, well, what about the removal of a lung, and that results in shortness of breath, should that be covered by the statute. Does the statute still contain an injury requirement, and is it conceivable that some of the examples you gave would just not be injuries within the meaning of the statute?

MR. DuMONT: I certainly think that that's --

QUESTION: Quite apart from any negligence requirement.

MR. DuMONT: I certainly think that that is conceivable. We think that, as we've said in our brief, that the term "injury" as used in this particular statute has room for interpretation, and that what Congress was thinking about when they passed this statute was not the ordinary, foreseeable result of proper medical care, which is all we are talking about here.

Remember, the respondent came to the VA with a herniated disk that had nothing to do with his military service. He received a perfectly proper operation. There's no contention that the care was improper, and he experienced, apparently, a common and foreseeable result of that surgery, which is some weakness of dorsiflexion in the left foot.

Now, the question is, when Congress passed this

whole scheme, as they've watched it be administered over the years, did they really intend to extend not only the benefit of free care to an indigent veteran, which is what happened here, for a nonservice-connected disability, but also a lifetime of disability compensation benefits for a perfectly foreseeable result of the proper care he received?

QUESTION: Well, that's why I'm asking the question, because it seems to me that quite apart from any requirement of finding negligence on the part of the hospital, there may be other requirements in the statute to be met for coverage.

MR. DuMONT: Well, we think that's quite right. The veteran has to suffer an injury, and we don't think -- we think it's perfectly acceptable for the Veterans Administration to say that within the context of this statute you do not suffer an injury when you get the care that you were entitled to, it was proper care, and all that happens is that you have some common, foreseeable side effect of that care.

QUESTION: But that's a separate issue. I mean, you can come to that conclusion and still say that when recovery is required, it is a nonfault-based system.

MR. DuMONT: Yes.

QUESTION: You're saying, if -- the Government's

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

case, if I understand it, is there is no recovery even if it is not a common, foreseeable consequence of the operation, but if there is some flukish consequence of the operation you would say there's no recovery unless it's a result of negligence, right, whereas the question that Justice O'Connor puts is a question where it is the foreseeable and normal consequence of the operation.

MR. DuMONT: And that, of course, is the normal case and the case we have here, but --

QUESTION: Well, but that's not the argument you're making. You are not making the argument that this plaintiff cannot recover because this was the normal consequence and, therefore, when the operation was decided upon you expected to have this and, therefore, you suffered no injury. You're making the argument that even if you didn't expect this, even if it was unforeseeable, it's not an injury because there was no negligence. That's a quite different argument, isn't it?

MR. DuMONT: The argument we're making, Justice Scalia, is this: the statute was intended to cover -- let me back up, if I may for a minute, to 1924, and what was the situation in 1924.

Since 1917, the VA had provided hospitalization and medical care benefits for veterans with service-connected disabilities, and that left a gap, a perceived

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

gap in the coverage of the statute.

The VA felt that its authority to compensate for the foreseeable result of the injury would cover the normal results of medical care, but it did not feel that it would cover something where an intervening cause had come along in the form of malpractice by a VA physician or some particularly unforeseeable thing that happened while the veteran was under VA care, and it was for that reason that it proposed the statute in 1924.

That's -- if you look at the legislative materials, what they are talking about is, Congress, we have to fix this statute because there are a limited number of cases where we have a veteran who comes in and there's no current statutory authority to compensate for cases of malpractice or error in judgment and so on. Now, they therefore passed section 213, which is now section 1151.

Now, we know that that was not intended to address the question of nonservice-connected veterans because there was no treatment for nonservice-connected veterans, with limited exceptions, for that, and we know that it could not have been intended exclusively to address the cases of examinations, where somebody might be examined, be injured, and then be found not to have a service-connected condition. That was a set of cases.

But Congress didn't focus exclusively on that, because in fact they had to amend the statute in 1925 to cover those cases.

So what we're left with, as a matter of detection, is saying, what was Congress getting at? What they were getting at is these cases of service-connected veterans who were injured under care of the VA in some way that was not considered to be a proximate cause of their service-connected injury, and that was either for one -- it was for one of two reasons, either because there was intervening negligence on the part of some VA agent, or because something simply freakish happened, something that was completely unforeseeable.

What it was never intended to cover is the ordinary results of care.

QUESTION: Isn't it possible to interpret that legislative history that you describe as reflecting an intent to have the period when the service-connected disability of a veteran is being treated in hospital as though it were treatment while he was in service, and therefore whatever happened as a result of that would be sort of the equivalent to a service-connected disability itself?

MR. DuMONT: Well, we don't think so, and we don't think so because the question is, what would

Congress have intended when it was extending these benefits, and it's perfectly plausible that they intended to cover a veteran for anything that happened as a result of Government fault.

QUESTION: But to give a specific example of the doctor does the best he can and without neglect, a General Hines -- that's quoted in the court of appeals opinion.

MR. DuMONT: That's correct. That statement from the legislative history is inconsistent with our view, and I think we have to say that, reading the legislative history as a --

QUESTION: It is consistent with the view that they wanted to more or less treat the period when the former serviceman is in the hospital as though that was military service, so that any consequences of that would be just as though he had been wounded on the battlefield or something like that.

MR. DuMONT: One could take that view, but I suggest that by reading the entire legislative history and thinking about what Congress would have had in mind, that would be an unlikely conclusion to reach, because it is simply not plausible that Congress, when they were extending benefits in 1924, thought that what they were doing was saying, not only are we going to -- well, remember that they were thinking about service-connected

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

veterans in the first place. There was a separate issue about nonservice-connected veterans.

But in 1924 they thought, we will liberalize the system. We will extend care to nonservice-connected veterans on a relatively general basis, but it's not very plausible to me that they thought what they were doing when they extended that limited hospitalization benefit was to say we will pick up the tab for the original care for your nonservice-connected condition plus a lifetime disability bill for anything that happens that really is a result not of your care but of that condition.

QUESTION: Mr. DuMont, why do you divide it into two categories? You say that there are two things that they had in mind, one is negligence and the other is unanticipated consequences. Wouldn't unanticipated consequences alone cover negligence as well?

I mean, couldn't it simply be a regime in which the normal consequences of this operation are expected to be borné? They are not an injury, but if they are unanticipated, whether because the doctor was negligent, and surely that's not anticipated, or for any other reason, they are covered. Doesn't that come to the same thing?

I have a lot of trouble reading in a negligence requirement. There's just no language in this statute

that smells of negligence.

MR. DuMONT: Well, let me focus on that. We think the language that's key here as to that point is the language, as a result of, and that language -- respondent would have the Court interpret that language as plain on its face, to mean nothing more than factual causation, but I think that's not only inconsistent with some of this Court's precedents in the antitrust area, which we cited in our reply brief, Halmers v. SIPC being the obvious example.

But it's inconsistent with common sense. I mean, when you have a statute where you --

QUESTION: There's a further textual element that you're leaving out, and that is, there's a provision in there specifically referring to the fault of the claimant, so that there is on the face of the text an expression of consciousness of fault, but it was expressed only with respect to the claimant.

MR. DuMONT: That's true, but I think it, with respect -- that it is of limited significance, because that exclusion for fault of the claimant is one that runs throughout the entire gamut of veterans' benefits statutes.

QUESTION: What does that screen out? Is that for people who are alcoholics or, what is wilful

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

misconduct on the part of the veteran?

MR. DuMONT: It could be a variety of things. It could be self-injury, it could be -- in many cases in the early days, it was sexually transmitted diseases which were considered misconduct diseases and were not covered. It might be a veteran who got in a fight while in the VA hospital and injured himself, or didn't take --

QUESTION: Well, suppose the veteran slips when he's -- during, in the recovery convalescent period, because he has a cast on, and he slips and falls through no fault of his own and reinjures himself, is he covered?

MR. DuMONT: Well, I think that would depend on, if it's through no fault of his own and there is no suggestion there is any fault on the part of the Veterans Administration in the conditions that gave rise to the accident, then it would really be a question of whether that was an accident, something simply unforeseeable that might have happened, and in that case he would recover.

QUESTION: If wilful misconduct --

MR. DuMONT: Now, if he was at fault, or if VA was at fault --

QUESTION: If wilful misconduct does not allow recovery, it seems to me that all other injuries are covered, and all other aggravating conditions.

MR. DuMONT: Well, I really don't think so, and

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

I think one can interpret the language --

QUESTION: That's the dichotomy the statute sets up.

MR. DuMONT: Well, one could interpret the statute very broadly to be any factual cause except for wilful misconduct, or one can interpret those same words, I think quite plausibly, to draw a line that says, look, what is this as a result of? You have some further disability. Is that as a result of your medical care, or is it as a result of the original condition you walked in the hospital with?

And our position is that any kind of foreseeable, common side effect of treatment is a result of the condition you walked in the hospital with, and not a result of the treatment you received from the Veterans Administration.

QUESTION: I -- but that brings you back to Justice Scalia's question. What's the difference between foreseeable and unforeseeable? Suppose there's an unexpected and very rare reaction to the medication, and he has a rash that creates some permanent disability, is that recoverable?

MR. DuMONT: That's exactly the kind of case that would normally be covered under the accident definition of the regulations. It's something that's

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

simply unforeseeable. It's not the veteran's fault, it's not a normal result of the condition or the treatment, it's not really the fault of the VA, but it's something that happened while you were under VA care, and the Government has chosen to accept responsibility for that.

And I -- with respect, I think that's the key point here. What we're looking for is what has Congress chosen to accept responsibility for in the case of these veterans, and again, I would suggest that it's not plausible that they have chosen to accept responsibility for the ordinary consequences of properly rendered medical care.

QUESTION: I can understand that. Why do you make your case hard by trying to drag in a negligence requirement? You're not arguing for a negligence requirement at all. You're simply arguing for foreseeability versus nonforeseeability. That's really a different thing.

What is added to the things that are excluded by your arguing about negligence? Isn't it the case that any injury produced by negligence would have been an unforeseeable injury, not the normally expected consequence of the procedure?

MR. DuMONT: We certainly think that's -- that's essentially what we're arguing, and we'd be perfectly

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

happy to express it that way as opposed to, through negligence. In fact, focusing on negligence is, we think, erroneous, because the standard has never really required the same kind of proof that you would have in a tort case in the civil context.

QUESTION: -- question that you're on when you were responding to Justice Kennedy. You do cover what you call unforeseen, untoward events, right?

MR. DuMONT: That's correct.

QUESTION: And you don't cover contemplated, foreseeable events unless they're negligent.

MR. DuMONT: That's correct.

QUESTION: Well, there are a whole lot of complications that may occur 10 percent of the time, 20 percent of the time, but say, normally, less than half the time.

That's an awful lot of injury, actually, and I take it the issue is whether you cover those, and what -- would it work to have a test which said, if it's something bad that occurs more than half the time, okay, that's part of the treatment, but if it occurs sporadically, or less than half the time, approximately, then that's something different, then you'll cover it? That seems to be what the case is about, that big lump of things there that occur not always, but fairly often.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. DuMONT: I think that might be a possible line that the VA could have drawn in interpreting the statute, because we think that the words, "as a result of," give plenty of leeway for deciding what it was that Congress was getting at.

The fact is, the VA has drawn a somewhat different line, a somewhat more conservative line, which is to say, at the 5 or 10 percent level, if this is something that if you open the textbook of medicine and said, you're going to have this operation and here are the possible side effects.

Or to look at it in another way, if this is something you would be considered to have consented to as a matter of informed consent when you underwent the treatment in the first place, then that is not the kind of thing that Congress meant to cover as a disability matter under the statute.

So that's the line that VA has drawn. We think it's a reasonable line, and we think it's entitled to deference from the courts.

QUESTION: Well, I thought the line that they had drawn was one based on requirement of negligence on the part of the VA. I mean, that was how I understood your argument to be.

MR. DuMONT: The case most often comes up in a

posture of somebody -- of the question being, was there fault or not fault, and that's most often thought of in terms of negligence of care versus nonnegligence of care.

But it's in fact a little bit broader than that. It's any kind of demonstrated fault or error in judgment on the part of the people at the VA, or any kind of simply freakish, unforeseeable accident that might occur, that the Government is willing to accept responsibility for, because after all you were under VA care when it happened, and that seems to be a reasonable line, giving the benefit of the doubt to the veteran.

QUESTION: Can I be clear, though, it has to be sufficiently freakish that it would not have normally been covered in the textbooks and that sort of thing? I mean, the fact that it's just 1 out of 100 cases would not be enough to make it freakish.

MR. DuMONT: That's correct, and I think, you know, one good example of that is the recent reconsideration of the accident definition in the case of blood transfusions in the early 1980's that might have transmitted the HIV virus.

In those cases, it was determined that up to a certain point it was really just not foreseeable to anybody that was a way you could get HIV, and those, therefore, were covered, those cases. But when it became

foreseeable, then there was merely a question of negligence or consent.

If there are no further questions at this time, I'd like to save the remainder of my time for rebuttal.

QUESTION: Very well, Mr. DuMont.

Mr. Hannon, we'll hear from you.

ORAL ARGUMENT OF JOSEPH M. HANNON, JR.

ON BEHALF OF THE RESPONDENT

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

Good morning. I would like first to address a number of points that were made by Mr. DuMont in his argument before I proceed to my presentation.

First, there was a suggestion that because the VA adjudicates compensation claims in a proper fashion and there's no evidence that they do so in an improper fashion, this scheme of fault or accident is permissible.

In Mr. Gardner's own case, the VA did not adjudicate his compensation claim according to their own standards. He applied to the regional office in Waco, Texas, with the assistance of VA personnel who actually gave him the form to fill out initially, and the hearing officer, who was a lay person, not trained in the law or medicine, but someone whose job it is to attempt to apply the statutes of Congress to compensation claims, denied

Mr. Gardner's claim based upon an outdated regulation.

The regulation that was utilized by the hearing officer was one that was amended by the Veterans Administration in 1978. It had existed from 1936 to 1978. It was the most stringent regulation that the VA has ever applied.

QUESTION: Mr. Hannon, how does this bear on the question that's presented in the petition for certiorari?

MR. HANNON: It bears on the question that's presented because of the argument of the Veterans Administration that the Court should defer to a so-called longstanding method of interpreting the statute, and their longstanding method of interpreting the statute wasn't even applied accurately in Mr. Gardner's case.

There was a question of Justice Souter, I believe, about the percentages of cases that we're really talking about here, and that question was asked by Judge Archer at the Federal circuit, and this Court doesn't know, because the VA hasn't presented to the Court any evidence, or to any court any evidence of what kinds of cases we're talking about here, and the numbers of cases we're talking about, other than the Harvard study, which is completely speculative, as amicus Paralyzed Veterans indicates. The Veterans --

QUESTION: Mr. Hannon, could you tell me

whether -- what is the difference between you and the Government, if the Government's position is taken to be not a requirement of negligence but simply a requirement that the injury not be one of the normal or possible -- known to be possible consequences of the medical procedure? Would you still quarrel with that test?

MR. HANNON: I would, Your Honor.

Mr. Gardner read the statute and wrote a letter to the VA that said, I have an injury as a result of surgical treatment that has resulted in additional disability.

QUESTION: What about shortness of breath after removal of a diseased lung?

MR. HANNON: There --

QUESTION: Is that covered?

MR. HANNON: It is not, and the Department says it's not covered --

QUESTION: Why not?

MR. HANNON: -- and we say it's not covered for different reasons.

QUESTION: What is the reason?

MR. HANNON: The reason of the Department is that it's an absurd result of a literal reading of the statute. If the Court wishes to accept that explanation,

that doesn't mean that the statute is ambiguous and requires a fault-based or accident-based regulation --

QUESTION: You mean, there's no language in the statute that would exclude that, but just, it's so absurd you will ignore the language of the statute?

MR. HANNON: That's the Department's view.

QUESTION: No, is that your view?

MR. HANNON: It is not. My view is --

QUESTION: What language in the statute excludes the veteran suing for shortness of breath after he has voluntarily agreed to have a lung removed?

MR. HANNON: The language in the statute is that language which requires that there be an additional disability as a result of an injury which itself is the result of hospital treatment. The VA --

QUESTION: Well, this is an additional injury. I mean, he didn't have shortness of breath before. Now, he does.

MR. HANNON: Under the VA compensation system, an additional disability is a disability which causes a diminishment in the veteran's ability to earn a living. That is the gist of the compensation scheme that runs throughout the Veteran's Administration law.

QUESTION: I'm looking for the language in the statute. What language in the statute excludes this?

MR. HANNON: That's the language that we rely on.

QUESTION: What language?

MR. HANNON: It must result in an "additional disability."

If the veteran goes to the VA -- I would like to use the gangrene example. I'll use the lung example if the Court wishes --

QUESTION: Gangrene's okay.

MR. HANNON: -- and says, I have diabetes, and as a result of diabetes I've developed an infection in my leg. What should be done here?

And the physicians at the VA Medical Hospital, in conjunction, in consultation with the veteran, make a decision, an informed decision, that they're going to amputate that leg, and they do so. There would be no claim for benefits available to the veteran because his earning capacity, his additional disability, would be determined by comparing his condition after the amputation of the leg with his condition before the treatment in the hospital.

QUESTION: Oh, I see, and the leg was not usable before anyway, is that the point?

MR. HANNON: The question would be whether he has an additional disability. If it is decided to remove

the leg because in the absence of that surgery he's going to die from poison, he doesn't have an additional disability as contemplated by Congress in the compensation scheme.

I would also suggest to the Court that the words "as a result of the surgical treatment" also make it clear that that is not a compensable condition. It's because the amputation of a leg did not occur as a result of surgery or treatment in a direct causal sense, as the Department would like the Court to apply, but as a matter of an informed choice by the veteran with his physician to contemplate the intended outcome of medical treatment. That is, the amputation of the leg.

We all agree that this statute does not apply to the intended outcomes of medical care and treatment.

QUESTION: Even if that intent is based on negligent advice? In other words, might there be a case in which you want to depend on negligence to get out of this particular analytical framework.

MR. HANNON: I think our no-fault reading of the statute necessarily includes that type of --

QUESTION: Just an --

MR. HANNON: -- negligent conduct.

QUESTION: -- argument. So, yeah.

MR. HANNON: It would necessarily include that.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: But you would still have to prove the negligence in order to prove, I suppose, that this was something other than the usual informed consent case. You say the reason it's not an informed consent case is that we got negligent advice.

MR. HANNON: Justice Souter, we reject even the informed consent analysis that is proposed by the Department here, because that is not what the language of Congress intends.

Informed consent -- in this case, in fact, before the hearing officer in Texas, after Mr. Gardner made his appeal, the hearing officer trotted out the informed consent form that had been signed by Mr. Gardner. Now, the terms of that informed consent form were as broad as the attorneys of the Department and the physicians could possibly make it. The position of the Department seems to be that anything that is contained within an informed consent form executed by a patient in a hospital with VA' medical personnel is not covered under the statute.

QUESTION: And what is your position? Your position is, I gather, that if the consequence is 100 percent sure, if you have a gangrenous leg removed, you will not have a leg, that's 100 percent sure. Therefore, that is intended.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

But if the VA tells you, what if the VA tells you there's a 50-50 chance that if you have this procedure you'll have this other side effect, is that intended?

MR. HANNON: Your Honor, I --

QUESTION: Is that an intended consequence?

MR. HANNON: I think that the difficult and close questions are not to be resolved by way of a regulation. The difficult and closed questions --

QUESTION: I don't care how they're -- I want to know what your answer to it is. I didn't ask how it should be resolved. What is your answer to it?

MR. HANNON: If it is a --

QUESTION: A 50 percent chance. Is that intended?

MR. HANNON: If it's an injury that results from surgery that creates an increased disability, that is the test, and in our view --

QUESTION: How does that translate into an answer to my question?

MR. HANNON: It would have to -- it would have to be framed in the context of specific facts of a particular veteran.

QUESTION: Why do you need to know anything more than what I've told you? He is told that if you have this operation, there's a 50-percent chance that you will have

this accompanying disability. Do you want the operation? He says, yes.

MR. HANNON: We would consider --

QUESTION: Is that an intended consequence?

MR. HANNON: And the consequence is an adverse --

QUESTION: Yes.

MR. HANNON: -- medical outcome?

QUESTION: Yes. Yes. It's an additional disability.

MR. HANNON: Congress intended to cover the adverse medical outcome of the surgery under the statute.

QUESTION: So it's only 100 -- what about 75 percent? There's a 75-percent -- is that intended?

MR. HANNON: Your Honor, our view is it's not a foreseeability standard, it is a simple causal relationship between the surgery and additional disability.

QUESTION: It's caused in all of these cases.

QUESTION: It says it's caused.

MR. HANNON: If it is an intended outcome that doesn't create an additional disability, which is what we've hypothesized here --

QUESTION: I am trying to find out what you mean by intended. Is the only thing you mean by intended that

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

you are 100 percent sure that this will happen? If you remove a lung, you'll be short of breath. If you remove the leg, you will not have a leg. Is that the only thing you are willing to acknowledge is an intended consequence of the operation on the part of the patient?

MR. HANNON: That's essentially correct.

QUESTION: 100 percent. 75 percent won't do.

MR. HANNON: Your Honor, again, I will not accept the notion that foreseeability is a proper test of the clear language of the statute.

QUESTION: You start throwing around words like "intended," it seems to me you've gotten yourself into foreseeability, at least where -- where the consequences are told to the --

MR. HANNON: The classic example that was set forth by General Hines himself at the origin of this statute in 1924 was a circumstance where a veteran goes into a VA hospital to submit himself to a spinal tap for the purposes of conducting a diagnostic test.

Both today and in 1924, there is a risk, a hazard, in the very words of General Hines, that that veteran may be paralyzed as a result of that spinal tap, through absolutely no fault of medical personnel. That was an example that was not only cited by General Hines, but it was also cited by other Senators during the 1924

consideration of this statute.

That says that the words of Congress mean that the adverse outcomes of surgical treatment -- Your Honor, I do not care how predictable they are, the adverse outcomes of medical treatment under the statute are contemplated as being covered and compensable, and in the case of Mr. Gardner --

QUESTION: You care how foreseeable they are. I thought we've established, if it's 100 percent, you will not allow them to be -- shortness of breath. You will not allow that to be compensated.

MR. HANNON: Your Honor, I do not consider "intended" to have a foreseeability concept to it.

Mr. Gardner went into this surgery with the expectation that his neurological pain would go away. It was the intended consequence of the surgery that that would occur. Instead of that occurring, Mr. Gardner suffered a spinal cord injury which is permanent. No amount of surgery is going to bring back to Mr. Gardner the use of his legs, in this case.

That was not an intended outcome of the surgery. It was undeniably an outcome of the surgery. The Department has admitted it in its supplemental memorandum before the Court of Veterans Affairs.

Mr. DuMont is incorrect when he suggests to the

Court that this is a foreseeable outcome in the case of Mr. Gardner. It is not. It is an adverse outcome, and for them to suggest to Mr. Gardner that his spinal cord injury constitutes a usual and foreseeable outcome of this type of surgery is simply inappropriate.

QUESTION: Mr. Hannon, would it be easier for you, and perhaps for us, if we drew this distinction, the distinction between the consequences, simply as a straight matter of factual causation, of appropriate medical procedures and, on the other hand, the imposition of inappropriate medical procedures?

In your case, you're not claiming that it was inappropriate to have disk surgery. What you're claiming is that there was a consequence of the disk surgery, and you should not be required to prove fault in order to establish how that consequence occurred in the course of what, in the abstract at least, was a perfectly appropriate procedure, some disk surgery.

Whereas, some of the questions that are being presented to you, and some of the hypotheticals that are being raised, are hypotheticals about procedures which are not warranted at all. If I've got a scratch in my leg, it is not an appropriate procedure simply to amputate my leg. If I have gangrene which cannot be controlled, it is.

Wouldn't you be on easier ground if you said,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

look, the only case that I'm worried about here, and the only case which perhaps the regs were intended to address, is the case in which the procedure is appropriate, but something goes wrong in the course of it, there is a consequence, whether it be unexpected, merely, or negligent in fact, and we don't have to prove fault in order to get compensation for that consequence?

Would that be a satisfactory position for you, and would it be a possible reading of the reg?

MR. HANNON: Justice Souter, I think that Your Honor's articulation of the outcome is exactly what the words of Congress said, that if there is an injury as a result of the surgery and it meets the standard for compensation as an additional disability, it matters not what was intended or foreseeable. The point of the matter is that it is a hazard, and I must say that --

QUESTION: Well, let me ask you, then, do you think the regulation addresses the case of the procedure which is totally inappropriate, the procedure which is totally the result of negligence? I scratch my leg, and the VA says we'll have to take it off. Does the reg address that -- I'm sorry, the statute address that?

MR. HANNON: Yes, because it refers to treatment. I would suggest that --

QUESTION: We've got to -- the statute is all or

nothing. Is the distinction that I'm making a legitimate distinction?

MR. HANNON: I think the statute on its plain language would cover the circumstance that Your Honor posits here, because we're talking about hospitalization, medical or surgical treatment, and if the question is whether the misdiagnosis constitutes one of those predicates, the Veterans Administration, the Department, is obligated under the statutory requirement that they broadly construe the acts of Congress to apply that analysis to the benefit of the veteran. In fact, under their own regulations they're required to.

So in the situation that Your Honor has hypothesized, there would undoubtedly be compensation under 1151.

QUESTION: Does it help you to say that your reliance in some instances on foreseeability and intent are relevant to determining whether or not there's an additional disability?

That is to say, in the hypothetical of removal of a lung with shortness of breath, we know, as a matter of foreseeability, that the person is always going to be disabled because of the bad lung, and it is intended, and it is foreseeable, that there would be shortness of breath, but we compare that with what's intended and

foreseeable if he had the poor lung, so, to that extent, intent and foreseeability do bear on whether or not there's an additional disability.

MR. HANNON: Your Honor, I really think it's much simpler and ought to be much simpler, and the reason why I think it ought to be much simpler is the entire compensation scheme for veterans presupposes that the veteran is entitled to benefits by virtue of his or her status --

QUESTION: Yes.

MR. HANNON: -- as a veteran, and a nexus in the case of service-connected benefits, a nexus between service and a disability.

In this case, Congress concluded that when a veteran, service-connected or otherwise, walks into a Veterans Administration hospital, Congress is essentially saying, you're in the Army now, and as Justice Stevens indicated earlier on, that means that any hazards that the veteran, by virtue of his status of being in the hospital, gets exposed to in that hospital that result in an additional disability, are going to be covered. Therefore --

QUESTION: But what do the words "additional disability" mean, additional to what?

MR. HANNON: There are -- there are interpretive

regulations that the Department has enacted that are not at issue in this case that Mr. DuMont and I agree do apply. One of those regulations indicates that in comparing the condition of the veteran after the surgery -- excuse me. In determining the answer to Your Honor's question, the condition of the veteran after the surgery as compared to the condition of the veteran before the surgery. That's common sense --

QUESTION: And that imports some notions of foreseeability, I take it. I'm simply trying to say that your answers to Justice Scalia earlier with reference to intent and what we foresee really does have a bearing on whether or not there is an additional disability, but it has nothing to do with whether or not there's an injury.

MR. HANNON: I would very much like to adopt some type of a regulation that provides foreseeability to solve some of these unexpected medical problems that we're talking about here, but it's -- I don't see it being in the statute, Your Honor. I think --

QUESTION: Did you say that there were regulations defining additional disability and that you had no disagreement with the Veterans Administration about those?

MR. HANNON: In 358, my recollection is, Your Honor, that there is a regulation that directs the hearing

officer, in determining whether there is an additional disability, to make a simple comparison between the condition of the veteran after the exposure to the predicate event, in this case surgery, and the condition of the veteran before the predicate event. That is, when he went in, the condition the veteran was in when he went in.

In the case of our diabetic, the hypothetical is that the diabetic goes into the hospital with poison in the system and requires the amputation of a leg. The situation involving the removal of a lung is obviously, again, a situation where the condition of the veteran before hospitalization is obviously a more diminished condition in terms of earning capacity as opposed to the intended outcome of the surgery, and that is the removal of a lung.

QUESTION: Well, Mr. Hannon, how about a back problem caused by a disk, and before surgery the person is so disabled because of the pain that he's not able to carry on his normal work, and as a result of the surgery, he still has pain, and a difficulty with the left foot, and can't do the normal work. No recovery. I mean, it's the same disability, right? You'd accept that?

MR. HANNON: I don't believe there's any additional disability in Your Honor's hypothesis.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Right.

MR. HANNON: I can contemplate a situation which would require the analysis of not just the additional disability language but also require an analysis of the as-a-result-of language. Is the condition after surgery indeed as a result of the surgery?

QUESTION: Didn't the Veterans Board here decide in this case that the causation requirement was not met with respect to the left calf and the ankle?

MR. HANNON: Your Honor, in their brief to the Court --

QUESTION: Didn't the board decide that?

MR. HANNON: The board -- the board in its decision concluded in the alternative, that the --

QUESTION: Could you say yes or no?

MR. HANNON: -- post operative condition --

QUESTION: I mean, this is getting kind of tangled up.

MR. HANNON: Yes.

QUESTION: I thought the board made a decision on causation and said, no causation as to left calf and ankle. Yes or no.

MR. HANNON: They did.

QUESTION: Okay, and what's left is the left foot problem, and as to that, the board said there was

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

causation there, but it was a common, foreseeable result.

MR. HANNON: It was -- that's correct, essentially, a usual after-result. Without proof of negligence, he can't recover for that.

But subsequently, Your Honor, when I argued on behalf of Mr. Gardner as an amicus before the Court of Veterans' Appeals, that very finding raised the question as to whether this issue was factually ripe for a decision by that court, and it was argued by me that there was plenty of evidence in the record that indicated that Mr. Gardner's condition was as a result of the surgery.

There indeed had been a medical examination by the surgeon that concluded that his condition, both conditions that Your Honor referred to, were as a result of the surgery, and counsel on behalf of the Department before the Court of Veterans' Appeals acknowledged the case is ripe for a decision, it turns only on the regulation, and that Mr. Gardner is, indeed, 100 percent disabled as a result of the surgery, and that is the record of the case.

We have mentioned this in our brief, and Mr. DuMont is not familiar with those oral presentations at that level of the case.

QUESTION: You talk about some sort of oral presentations to the Court of Veterans' Appeals.

MR. HANNON: Yes, Your Honor.

QUESTION: And did they deal with the question of causation?

MR. HANNON: In their opinion in this case, they did not. They dealt exclusively with the fault issue as to the Federal circuit.

QUESTION: From what I gather your description of the representations were, it doesn't sound as though they dealt with the question of causation, either.

MR. HANNON: They did not.

QUESTION: Okay.

MR. HANNON: In fact, one of the issues that the Court of Veterans' Appeals asked the VA to address was the significance of the surgeon's examination in which the surgeon's opinion was that the condition was as a result of surgery, and while that issue was addressed, it did not inform the decision of the Court of Veterans' Appeals, and I take it, quite frankly, that the Department would not have asked this Court to hear the case if there were a factual obstacle to reaching this particular decision.

In our view, there is no question that Mr. Gardner is permanently disabled as a result of this surgery, and therefore ultimately his entitlement to the compensation will depend upon this Court's decision about the regulation.

QUESTION: His case is easier in one respect if you take -- than the one I'm going to put. If you take the instance of the leg that comes off, if the veteran could walk into the hospital to have the operation and he then loses the leg, obviously there's an additional disability there.

And yet, if the testimony, if the conclusion were that he would have died without the removal of the leg, you would not claim that he should be compensated for disability, whereas if the conclusion were that he would have been perfectly fine if the leg had been left on, you would claim for disability.

So you're claiming something more than the mere factual foreseeability of the consequence of the operation. You're assuming something about the appropriateness of what was done to him, aren't you?

MR. HANNON: I'm assuming, Your Honor, that there's evidence that the additional disability was incurred "as a result of" surgery.

QUESTION: Well, it's as a result of it factually. He couldn't walk because he lost his leg. There's clear factual causation, but if, in fact, it were accepted as a conclusion that he would have died without the loss of -- without the amputation, you would not claim that that was a compensable injury.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. HANNON: Your Honor, I think the language as --

QUESTION: Would you? Would you? You wouldn't be claiming that that was a compensable consequence, would you?

MR. HANNON: I would not, and it's because it's not as a result of the surgery.

QUESTION: And it's also not an additional disability, if he's going to die anyway --

MR. HANNON: But it's --

QUESTION: -- whereas in the case where the amputation is improperly performed, he's worse off than he would have been if there had been no operation.

MR. HANNON: I really --

QUESTION: One it's an additional disability, the other it's not.

MR. HANNON: I really do think that all of the potential cases that can be hypothesized are amenable to a decision under the plain language of the statute. The hard case, the truly hard case is taken care of by another mechanism that is available here, and that is, the Board of Veterans' Appeals would have to simply make a factual determination, as we're discussing here, as to whether the veteran's condition meets these predicates for compensation.

If the Board of Veterans' Appeals in the hard case makes a determination that there is no injury entitled to compensation for factual reasons as opposed to a regulation such as this, which across the board cuts out a whole group of cases, then that factual determination is subject to overturn by the Court of Veterans' Appeals only on a clearly erroneous standard, so there is deference to the Board of Veterans' Appeals in the tough case on a factual basis.

QUESTION: Well, I mean, you can't talk about factual bases without talking about the law. I mean, what we're arguing about here is, what facts are relevant? Is the fact that it's 25 percent chance of this occurring, is that a relevant fact?

MR. HANNON: Justice Scalia --

QUESTION: I don't think it's any answer to say, you know, in the hard case we can -- you know, you can handle it by the factual determinations.

MR. HANNON: Well, here's my answer. What Your Honor is inviting is, Your Honor is inviting a regulation like the current regulation, which was not in place, by the way, at the time of Mr. Gardner's surgery, and the current regulation says that the foreseeable consequences of medical care and treatment, properly administered, would not entitle the veteran to compensation without a

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

showing of fault.

Now, to my mind, we're talking about foreseeability in a medical context, and that determination is an unreasonable one, makes no sense to me, and cannot possibly inform the decision of the Veterans' Administration how to handle a case on an individual basis.

The Office of General Counsel opinion which led to that regulation dealt with exposure to HIV virus by virtue of receiving a blood transfusion. The conclusion of the Office of General Counsel was that if the veteran received a blood transfusion before it was known that you could contract HIV, that was considered unforeseeable and an accident, and you get compensation.

On the other hand, the veterans who were exposed to HIV, contracted it, and died during the time period when the VA knew that that was a possibility, aren't entitled to compensation under 1151, and unless the literal language of the statute isn't followed by the VA on a case-by-case basis, regulations such as this, and their changing nature over the 70 years that we've seen them, are going to essentially deny veterans the benefits that Congress said they should have.

Different veterans with the same condition at different points in time in the history of the

administration of this statute would be granted benefits or denied benefits, depending upon the particular interpretation that the VA had of the statute at that particular point in time.

Congress has not authorized the Veterans Administration to make such policy choices. Rather, Congress has said that they must make rules and regulations consistent with the laws, and the Court of Veterans' Appeals has a mandate to strike down those regulations which are inconsistent with the laws, and this regulation is inconsistent with the laws, and the hard cases are taken care of by the factual deference that the Court owes to the Board of Veterans' Appeals.

QUESTION: Mr. Hannon, do you agree with the Government that at the time the statute was passed there were very few cases of nonservice-connected disability, whereas today there are a great many in the veterans' hospitals?

MR. HANNON: There's no evidence one way or the other.

QUESTION: Thank you, Mr. Hannon.

Mr. DuMont, you have 7 minutes remaining.

REBUTTAL ARGUMENT OF EDWARD C. DuMONT

ON BEHALF OF THE PETITIONER

MR. DuMONT: Thank you, Your Honor.

To return just briefly, Justice Ginsburg, to your question about -- and perhaps this is also your question, Justice Stevens, about numbers, what I can tell you is, on page 35 of our brief at note 20 we point out that in 1933, when the statute, after all, had just been repealed, there were 66,000 admissions to VA hospitals for nonservice-connected conditions, whereas in 1934, when Senator Steiwer was arguing for reenactment of this provision, what he said was, there might be 65 or 67 people who were affected by reenacting section 213.

That has two significances. One is, there were quite a few people out there who presumably had some bad consequence of care who were not getting benefits, and one might have thought that they would bring this to the attention of Congress if that was wrong, and the second is that there were simply not very many people who were being granted benefits under this statute when Congress reenacted it in 1934, and that gives us some idea of what scope they had in mind when they reenacted it.

Justice Stevens, you had asked about why one shouldn't interpret the statute --

QUESTION: Mr. DuMont, before you get off the veterans who didn't complain to Congress that this statute should have been cured, once this problem surfaced at two judicial levels, was there any attempt on the part of the

Veterans Administration to get a clarifying amendment to the statute?

MR. DuMONT: I believe there was an attempt to get the statute amended. I don't believe it eventuated in anything.

QUESTION: In response to the Federal circuit decision.

MR. DuMONT: I believe that the VA made a legislative proposal, but certainly nothing was enacted.

Justice Stevens, you asked about the sort of you're-in-the-Army-now hypothetical, as Mr. Hannon put it. We think the case of somebody who's in the Army is really quite different from somebody who's in the hospital.

Congress has made the choice explicitly in a statute to say that anyone -- in the line of duty has been interpreted very broadly to mean anything that happens to you while you are physically in the service. In the hospital, we don't think Congress would have had any reason to adopt the same kind of view and, in fact, that's pointed up by the anomaly that respondent's position creates.

If you have a veteran with exactly the same condition who goes to a private hospital and receives exactly the same care, has exactly the same result, he will not be entitled to any benefits under 1151 because it

wasn't VA care, and it's odd that Congress would have had in mind having very different benefits regimes for veterans who are really in very much the same position, unless you think they had in mind something --

QUESTION: The veteran in a private hospital wouldn't fit into the hypothetical of being similar to being someone in the service.

MR. DuMONT: But again, the question is --

QUESTION: I'm not quite sure I understand the thrust of your argument.

MR. DuMONT: Well, again, the question is, what is it that Congress would reasonably be thought to have taken responsibility for, and I think they would have taken responsibility for a range of circumstances that are much the same as those that would have given rise to recovery in the private hospital setting.

Again, you can make that -- you can see that even more clearly by the fact that many of these people, especially in the early days, were entitled to care only on a space-available basis, so you might very well have had a veteran with a nonservice-connected disability who was turned away from a VA hospital only because there was no space, went to a private hospital, he not only has to pay for his care now, he doesn't get these disability benefits, when in fact the care he received was identical

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

and was perfectly proper in both cases. We think that's quite anomalous.

QUESTION: Mr. DuMont, I was asking you earlier about just the law in general, and I guess we sort of came to the conclusion that you really don't have to establish a separate negligence rule, that it would be enough if you had a rule that any reasonably anticipable consequence, if that is a word, would not be triggered, this compensation.

How does that -- how would such a rule apply to this case? How was this case decided by the courts below? Was it decided only on the basis that there was no negligence and therefore no compensation, or was there a finding of both no negligence and also that the consequences were an anticipable result of the operation?

MR. DuMONT: As Justice O'Connor pointed out, there were really three sort of claimed additional disabilities, two of them the board quite clearly found bore no factual relationship to the surgery. The third one, which was the left foot, they simply said that there was no negligence. That's the way they disposed of the case, and they didn't ever reach the question of --

QUESTION: So to win the case up here we have to agree with you that there is simply a no-negligence test.

MR. DuMONT: Well, I don't think so. I think you could articulate the rule exactly the way you did, and

it might have to be remanded back to the Board of Veterans' Appeals for further factual findings to see how that test would be applied here, although I think the natural assumption would be that if there was no negligence then what they said was, look, this was a common, foreseeable result of this surgery, and if that's true, then we win under both bases.

QUESTION: Mr. Hannon, I -- Mr. DuMont, I thought the Board of Veterans Appeals said that the foot problems were a common, foreseeable result of the surgery.

MR. DuMONT: That's correct. They said they were a common, foreseeable result of the surgery, and there was no indication of any kind of fault on the part of VA. They're really two sides of the same coin, I think.

So one could either read their opinion to have made a definitive finding on that issue and we win hands-down, or one could read it to leave open some room for foreseeability analysis that hasn't taken place and remand it back, but I'm quite confident what the result would be based on their opinion.

Just, in quick closing, we think that the discussion with Mr. Hannon has clearly demonstrated our fundamental point here, which is that the language of the statute does not, on its face, resolve this question. The

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

as-a-result-of language, the injury language, leave plenty of room for interpretation.

And when we get down to questions like, is it 100 percent, or 75 percent, or 50 percent, or 5 percent where one draws a foreseeability line, that is classically the kind of decision that ought to be left in the hands of the administrative agency that has been committed by Congress with the task of interpreting the statute and administering it, and I think that the VA has done a perfectly reasonable job here, the courts below failed to defer, and this Court should correct that error.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. DuMont. The case is submitted.

(Whereupon, at 11:04 a.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

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:

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS, Petitioner v. FRED P. GARDNER

CASE NO.:93-1128

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

BY Ann Marie Federico

(REPORTER)