

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: REGIONS HOSPITAL, Petitioner v. DONNA E.
SHALALA, SECRETARY OF HEALTH & HUMAN
SERVICES

CASE NO: 96-1375 c. 1

PLACE: Washington, D.C.

DATE: Monday, December 1, 1997

PAGES: 1-45

REVISED

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 REGIONS HOSPITAL, :

4 Petitioner :

5 v. : No. 96-1375

6 DONNA E. SHALALA, SECRETARY OF :

7 HEALTH & HUMAN SERVICES :

8 - - - - - X

9 Washington, D.C.

10 Monday, December 1, 1997

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:01 a.m.

14 APPEARANCES:

15 RONALD N. SUTTER, ESQ., Washington, D.C.; on behalf of
16 the Petitioner.

17 LISA S. BLATT, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of the Respondent.

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C O N T E N T S

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ORAL ARGUMENT OF

RONALD N. SUTTER, ESQ.

On behalf of the Petitioner

ORAL ARGUMENT OF

LISA S. BLATT, ESQ.

On behalf of the Respondent

PAGE

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1 P R O C E E D I N G S

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 96-1375, Regions Hospital v.
5 Donna Shalala.

6 Mr. Sutter.

7 ORAL ARGUMENT OF RONALD N. SUTTER

8 ON BEHALF OF THE PETITIONER

9 MR. SUTTER: Mr. Chief Justice, and may it
10 please the Court:

11 This case presents a straightforward question of
12 statutory construction. At issue is the meaning of 42
13 U.S.C. 1395ww(h)(2)(A), which is quoted on page 19 of
14 petitioner's opening brief.

15 As the Sixth Circuit correctly concluded in the
16 Toledo case, this is a simple statute. It directs the
17 Secretary to do one thing. It directs the Secretary to
18 determine an average, nothing more.

19 The numerator in this case is the amount
20 recognized as reasonable under this subchapter for GME
21 costs for 1984. The statute itself does not direct the
22 Secretary to determine the numerator, and the reason why
23 is clear from the words, under this subchapter.

24 The statute does not say, under this section, or
25 under this paragraph, but it says, under this subchapter,

1 and there was already a longstanding process in place for
2 determining the amount recognized as reasonable for each
3 year, including 1984.

4 QUESTION: Well, determine I think could quite
5 reasonably be read to mean, use some discretion, or
6 judgment. I mean, it seems to me if they just meant
7 calculate they would have said calculate.

8 MR. SUTTER: Well, I think when you're referring
9 to an average, determine and calculate are essentially
10 equivalent, and there are, Mr. Chief Justice, within
11 1395ww(h) other provisions where it's clear that Congress
12 did intend to confer significant authority on the
13 Secretary.

14 One such provision is 1395ww(h)(2)(E), which is
15 on page 3 of petitioner's appendix. I will use ellipses
16 here, but there it says, in the case of a hospital that
17 did not have an approved medical residency training
18 program, ellipses, during fiscal year 1984, the Secretary
19 shall, ellipses, provide for such approved FTE resident
20 amount as the Secretary determines to be appropriate.

21 Now, this is language that does clearly grant
22 the secretary discretion. Here we have activist language.
23 In (a), the provision we're dealing at -- with, the
24 Congress was telling the Secretary, divide A by B, divide
25 one number by another.

1 There is also, if --

2 QUESTION: Mr. Sutter --

3 QUESTION: The problem I have with this
4 provision is what it is that the word recognized modifies.
5 You win, it seems to me, if it is to be read, that the
6 average amount recognized as -- recognized as reasonable
7 under this subchapter. Does under this subchapter go with
8 recognized? If it does, I think your case is
9 strengthened.

10 But it could also be read, the average amount
11 recognized as reasonable under this subchapter. You
12 understand what I'm saying? If it has to have been
13 recognized under this subchapter, you're -- the text
14 obviously refers to a 19 -- to a prior determination.

15 MR. SUTTER: Right.

16 QUESTION: It has already been recognized.

17 MR. SUTTER: Right.

18 QUESTION: Under this subchapter.

19 But it could also be read as recognized as
20 reasonable under this subchapter, so that the
21 prepositional phrase, under this subchapter, goes with
22 reasonable.

23 Now, why is it that I should read it the first
24 way rather than the second?

25 MR. SUTTER: Well, there are a number of

1 reasons, but one is that there is one, and only one
2 statutory provision in the medicare subchapter that does
3 provide for recognizing an amount as reasonable, and that
4 is 42 U.S.C. 1395oo(a), which we have quoted at pages 11
5 and 12 of petitioner's appendix.
6 The relevant language is at the top of page 12,
7 which refers to a final determination, which we know as
8 the notice of program reimbursement for the NPR, as to the
9 amount of total program reimbursement due the provider for
10 the items and services for which payment may be made under
11 this subchapter for the period covered by such report.
12 The words that are used in the GME statute is,
13 amount recognized as reasonable under this subchapter.
14 Here in 1395oo(a) we have a specific amount, it is
15 recognized as reasonable -- that is, there's a final
16 determination of program reimbursement -- it is
17 specifically under this subchapter, and it's specifically
18 for a period.
19 This is a very important provision in the
20 medicare subchapter, and in fact is one that this Court
21 has seen before in the Bethesda Hospital Association case
22 decided in 1988.
23 QUESTION: Well, that -- I mean, that's all very
24 persuasive if you read the phrase as recognized under this
25 subchapter. I think you point out quite correctly to that

1 provision. That's the only provision it could refer to if
2 it's talking about something that has been recognized
3 under this subchapter.

4 But if it's just talking about something that
5 has been recognized as reasonable, or that will in the
6 future be recognized as reasonable, then it could refer to
7 a new determination and not one that has already been
8 made.

9 MR. SUTTER: Well, I do -- I think the timing
10 here would preclude that, because COBRA 9202(e), which we
11 have cited at page 6 of our reply brief, clearly reflects
12 that Congress intended these amounts to be established by
13 1987. That was well within the reopening period for 1984
14 in all cases. There's no reason why Congress would have
15 wanted to have two amounts.

16 QUESTION: Well, there's no reason it would want
17 two amounts, but there is a reason that it might want a
18 corrected amount, and suddenly a figure which in the past
19 has been used solely to calculate a reimbursement for 1
20 year is going to be the basis for reimbursement in effect
21 in perpetuity until the law gets changed, so I mean,
22 there's a -- there would be a good reason on Congress'
23 part to want to make sure that the ultimate figure was the
24 right one.

25 MR. SUTTER: Oh, I agree with you. They would.

1 QUESTION: So we're not talking -- I mean, it's
2 not as though -- but I guess my only point is, I don't see
3 that you get anywhere by saying Congress wouldn't have
4 wanted two figures. Congress wants one figure and it
5 wants the right figure.

6 MR. SUTTER: And I think there's every reason to
7 believe that we do have the right figure here. We have --

8 QUESTION: Let me ask you this. Going back to
9 Justice Scalia's question, on your reading, what is served
10 by having the modifier, as reasonable, in there at all,
11 because on your reading once the figure has been
12 recognized, that's it for all purposes, including future
13 calculation.

14 MR. SUTTER: I think that avoids a potential
15 question as to whether the lower cost or charges principle
16 applies. Under reasonable cost standards --

17 QUESTION: But -- may I interrupt you here?

18 MR. SUTTER: Sure.

19 QUESTION: In any given -- in the case of any
20 given hospital for the base year there has been, at least
21 in the past with respect to that year, that annual
22 reimbursement, only one figure recognized, isn't that so?
23 In other words, the Secretary didn't say, well, we'll
24 reimburse you either the A amount or the B amount,
25 depending on methodology.

1 reasonable MR. SUTTER: Well, there has been only one
2 figure recognized as reasonable, but in certain cases that
3 may not have been what was actually paid and the reason
4 why is that, under 42 U.S.C. 1395f(b), a hospital got paid
5 the lower of its reasonable cost or its customary charges.

6 Now, in almost all cases the reasonable costs
7 would be lower, but there could be cases where the intended
8 customary charges were lower, and to avoid any ambiguity
9 the words, as reasonable make clear that you're looking at
10 the amount that was recognized as reasonable -- as in the

11 case of -- QUESTION: Is that your interpretation of it, or
12 is there any basis for saying that what Congress had in
13 mind was that sometimes the hospital might charge even
14 less than what was reasonable? reopening period to be 6

15 years. MR. SUTTER: Well, that's in the statute.

16 That's 42 U.S.C. 1395f(b). mean that was a general period

17 for all years QUESTION: But you're giving that as a reason --

18 MR. SUTTER: Right. same regulation as the

19 Secretary QUESTION: -- for why the word reasonable is in
20 there. I understand that you wouldn't have any claim?

21 MR. SUTTER: Right. as we pointed out in footnote

22 5 of our QUESTION: And my question to you was, is that
23 just your interpretation? on of the statute, but you would

24 certainly MR. SUTTER: That's my interpretation. That's
25 why I think it's important to have the words, as there was

1 reasonable.

2 QUESTION: Do I understand you right that you
3 wouldn't be having any claim here if the Secretary had
4 made the reopening period 5 or 6 years instead of 3 years?
5 Is that right?

6 MR. SUTTER: Well, I think in this case, in
7 light of COBRA 9202(e), it is clear that Congress intended
8 the per-resident amount to be established by 1987, which
9 was well within the existing reopening period, and I think
10 prompt implementation was very important, just as in the
11 case of --

12 QUESTION: But if you would -- suppose there
13 hadn't been the 3-year. Suppose from the start the
14 Secretary had said, I want the reopening period to be 6
15 years.

16 MR. SUTTER: You mean that was a general period
17 for all years?

18 QUESTION: Just the same regulation as the
19 Secretary now has, except instead of saying 3, it says 6.
20 Then do I understand that you wouldn't have any claim?

21 MR. SUTTER: Well, as we pointed out in footnote
22 8 of our reply brief, the current reopening regulation is
23 a pretty broad construction of the statute, but you would
24 certainly have a very different case here.

25 Our case is based upon the fact that there was

1 an amount recognized as reasonable under this subchapter,
2 and the Secretary is not using that amount.

3 QUESTION: Yes, I understand that argument, but
4 I just wanted to be clear on two things. One, if the
5 Secretary made a longer period you wouldn't be contesting
6 that the amount that the Secretary ultimately arrived at
7 is an amount that is reasonable.

8 MR. SUTTER: We would -- yes. We would say
9 there needs to be uniformity, and whatever's the final
10 determination for 1984, that is the amount that would be
11 used for purposes of this average, that's correct.

12 QUESTION: Just following up on Justice
13 Ginsburg's question, you would agree the agency could have
14 repealed the 3-year window for examining the costs if it
15 had chosen to do so by regulation?

16 MR. SUTTER: Well, I don't think so in this case
17 because of COBRA 9202(e). That clearly reflected
18 Congress' intent that this would be established by 1987,
19 and in any event --

20 QUESTION: So the statute froze into place the
21 congressional -- pardon me, the administrative regulations
22 on re-audit?

23 MR. SUTTER: If it expected to be done by 1987,
24 which Congress made clear that it did, I think it would --
25 it did that, yes.

1 I mean, this is a rate system. It's not a
2 retrospective payment system like reasonable cost, and one
3 of the important things for a rate is that they be set in
4 advance so that everyone knows what the rate's going to be
5 and so that you have predictability.

6 QUESTION: May I ask you a question about one of
7 the phrases that troubles me? It's a hard statute to
8 follow, but you quoted to us from sections oo and so
9 forth. They were in the statute before 1986, I believe.

10 MR. SUTTER: Yes, that's correct.

11 QUESTION: And therefore the duty to make a
12 determination existed before the 1986 amendment. Now,
13 therefore, the word in the 1986 amendment that seems
14 interesting to me is the Secretary shall determine.

15 MR. SUTTER: Right.

16 QUESTION: In 1986 it imposed a new duty to make
17 a determination that did not previously exist.

18 MR. SUTTER: Determine the average.

19 QUESTION: Which sounds to me as though they may
20 have said you're not necessarily bound by what you would
21 have done under the preexisting statute.

22 MR. SUTTER: Well, it said you shall determine
23 the average, and the amount recognized. In the normal
24 course the amount recognized for '84 will be done before
25 you actually determine the average, just because '84

1 preceded the first year subject to payment under the new
2 methodology by 2 years.

3 In petitioner's case, the first year was '86,
4 that they would be subject to payment under the new
5 methodology, and the base year would be '84.

6 QUESTION: Well, the old determination didn't do
7 it resident by resident, did it?

8 MR. SUTTER: No, no. It is a --

9 QUESTION: The '84 determination just gave you
10 the total figure.

11 MR. SUTTER: That's correct.

12 QUESTION: And what this says is, you figure how
13 much of that is attributable to each full-time equivalent
14 resident.

15 MR. SUTTER: No, it's the average --

16 QUESTION: Yes.

17 MR. SUTTER: -- for each resident, but what you
18 would have, when you have the NPR you would have with it
19 an audited cost report that would give you an aggregate
20 figure for GME.

21 QUESTION: Right.

22 MR. SUTTER: So you would take that figure,
23 whatever it is, and divide it by your number of
24 residents --

25 QUESTION: Right.

1 MR. SUTTER: -- and that's what you'd get as
2 your number.

3 QUESTION: But it's interesting that the term
4 which we're considering is not the amount recognized as
5 reasonable for each full-time -- each FTE. It's the
6 average amount recognized as reasonable, and the so-called
7 average amount has never been recognized. That is a
8 purely prospective determination, isn't it?

9 MR. SUTTER: Yes, that's correct, so the
10 Secretary shall determine the average, that's right.

11 QUESTION: Well, shall determine the average
12 amount, and that so-called average amount has never been
13 determined in the past.

14 MR. SUTTER: No, but the amount recognized as
15 reasonable under this subchapter is always determined
16 as -- in the normal course, and the language here is very
17 similar to the same language that we had in the
18 prospective payment system for operating costs in -- for
19 TEFRA.

20 QUESTION: Well, except that it didn't have the
21 modifier average on there. It was talking about a
22 different figure. It was talking -- as you have pointed
23 out earlier, it was talking about the numerator.

24 MR. SUTTER: But the Secretary was directed to
25 compute the average.

1 QUESTION: Yes.

2 MR. SUTTER: Because you see that there's an
3 average if you look at 42 U.S.C. 1395ww(a)(4), which
4 defines all of that in terms of average.

5 So the term that you're looking at, and looking
6 at what the target amount is, doesn't use the word
7 average, but it keys into an average when you look at
8 (a)(4), which requires that it's an average amount, in
9 that case per discharge, and in this case it's per
10 resident.

11 QUESTION: Mr. Sutter, I hope at some point you
12 will tell us -- because this has to affect the way you
13 look at this case. There's an enormous variation between
14 what the '84 figure would show and what the recalculation
15 shows.

16 MR. SUTTER: Right.

17 QUESTION: And it gives me, at least, the
18 impression that it's a pretty terrible system that would
19 carry forward such an enormous error, and if there's a way
20 to avoid that, I would like to.

21 MR. SUTTER: Okay. Well, essentially what
22 happened in this case is, a great portion of that is
23 attributable to the time that the physicians reported as
24 administrative time. That is, during '84 they completed
25 time studies, and one of the categories was for

1 administrative time that was always claimed and always
2 allowed as GME.

3 In the re-audit the intermediary applied a
4 default rule and said, well, your administrative time
5 could have been administrative time for GME, or it could
6 have been administrative time for operating purposes. We
7 must look -- we must see actual data from '84, or we're
8 just going to apply an ad hoc default rule, and that's
9 what occurred in this case.

10 That -- either directly or indirectly, that
11 accounts for about 90 percent of the differential here.

12 QUESTION: And your claim is that had that
13 been -- had that method of calculation been imposed in
14 1984 you would have had the facts and figures that would
15 have allocated more of that administrative time to GME.

16 MR. SUTTER: I believe that to be the case. I
17 would also say that during '84 itself no breakdown was
18 required, and --

19 QUESTION: Well, what factual development in the
20 record is there to show that you were hurt by this so-
21 called default rule, that you didn't have material that
22 you had at one time but had disposed of?

23 MR. SUTTER: Well, we -- in the record we
24 have -- there is the audit adjustment report which shows
25 that these are recharacterizations --

1 QUESTION: Yes.

2 MR. SUTTER: -- of costs. They're not -- they
3 weren't disallowances of costs. They were
4 recharacterizations of cost from GME to operating --

5 QUESTION: Yes, but my question was, what is
6 there in the record that shows you were injured, that you
7 could have produced something had it come up in 1988, but
8 you couldn't when it came up in 198 --

9 MR. SUTTER: We haven't really focused on that
10 because we're really focusing on the threshold question
11 here, which is, did the Secretary have the authority to
12 re-audit.

13 QUESTION: Well, then you don't really rely on
14 the fact that you were hurt by the Secretary's decision to
15 re-audit if it were justified on other grounds. In other
16 words, that had the -- the Secretary perhaps had
17 authority, but there was very -- it was -- came to you as
18 a surprise. You'd thrown your records away.

19 MR. SUTTER: Well, we haven't focused on the
20 individual facts because we are --

21 QUESTION: Well, I -- you can answer that
22 question yes or no, Mr. Sutter.

23 MR. SUTTER: Yes, I think that's correct, but we
24 are looking at whether the Secretary had the authority to
25 do the re-audit.

1 QUESTION: Because a large part of your brief,
2 and I thought it was a convincing argument when I first
3 examined it, was that hospitals have thrown away their
4 records for 1984 and they're prejudiced, but that seems to
5 be falling --

6 MR. SUTTER: Well, no they -- that did, in fact,
7 happen in this case. I mean, we had a total turnover of
8 the reimbursement department between 1984 and the time of
9 the re-audit, and there were records that had been
10 discarded. That did happen in the case, but I have not
11 been focusing on this, because we're really looking at the
12 threshold question, which is, did the Secretary have the
13 authority to do this.

14 QUESTION: Is the reason you're not focusing on
15 it because -- is the reason, is one reason you're not
16 focusing on it -- one reason because you conceded it out
17 of the case, and I take it the other reason is because
18 they've actually promulgated a rule that states, as an
19 equitable solution to the problem of the nonexistence of
20 records, we are allowing providers to furnish
21 documentation from cost reporting periods subsequent to
22 the base period.

23 Now, am I wrong? I've looked at that. I tried
24 to find it. You did mention it in your brief.

25 MR. SUTTER: Right.

1 QUESTION: I wanted to know what HHS had done
2 about people who'd thrown their records away, and my law
3 clerk found this rule.

4 MR. SUTTER: Yes.

5 QUESTION: Which says, they're aware of the
6 problem and they're going to be fair about it.

7 MR. SUTTER: We --

8 QUESTION: Now -- so is there any answer to
9 this?

10 MR. SUTTER: Yes.

11 QUESTION: What? What's the answer?

12 MR. SUTTER: There's two answers. First of all,
13 even where that applies, it's not fair, and secondly it
14 doesn't apply here. Let me go to the first.

15 They allow a 3-week current time study for 1990,
16 but it's skewed to the Secretary's favor. You get the
17 lower two numbers. You get what was in the 80 -- 1984
18 NPR, or you get the figure in the time study.

19 It's also a figure for 1990, which is unrelated
20 to what we're looking for, which is what was recognized
21 for 1984. It was not available to the hospital here
22 because this hospital did have time records from 1984, or
23 it had summaries. The problem wasn't the time records, it
24 was -- the problem was that they were reinterpreted by the
25 Secretary.

1 QUESTION: But I also have a later sentence in
2 this same thing which, it says, we understand that all
3 this stuff is at best persuasive, so if the intermediary
4 believes any of the changes or modifications distort the
5 reliability of the data, it says we'll look at the whole
6 thing. That's how I read it.

7 In other words, they're aware of the problem,
8 they will look at it, and they'll deal with it
9 appropriately, and I looked at that, and I saw that you
10 yourselves had given up any challenge to the question --

11 MR. SUTTER: Well, they -- yes.

12 QUESTION: -- of the fairness of the give-back
13 of the \$4 million.

14 MR. SUTTER: Well, they had a choice. They
15 could have proceeded with that. It would have been
16 difficult because the personnel had turned over and
17 records had been lost.

18 I think if they had proceeded, that they may
19 very well -- I think, in fact, they probably would have
20 won, because really the issue they had here is, I think,
21 the same as an issue in another case called Good Samaritan
22 Hospital, which is 873 F.Supp. at 1089-1092, which
23 involved this administrative time, and that that ruled
24 against the Secretary and the Secretary did not appeal.

25 But they elected not to take that route. They

1 elected to get at what I would suggest is the heart of the
2 matter, which is, did the Secretary have the authority to
3 re-audit, and if the Secretary didn't have the authority
4 that really ends the matter.

5 As far as -- I don't see that it's necessary to
6 apply any presumption here, but if there is a presumption
7 that is to be applied, I would suggest the presumption is
8 in favor of the final and binding determination that's
9 made for 1984.

10 QUESTION: Isn't there some difference between a
11 regulation which perhaps deals with private actors in
12 the -- in a private field, say like an FTC regulation of
13 competition, and a regulation issued by the Secretary
14 which basically just determines how Government money is
15 going to be spent? I mean, don't we give more latitude to
16 the latter, usually?

17 MR. SUTTER: Well, perhaps, but I think we have
18 clear language here, and I think we also have the fact
19 that there was already a final and binding determination,
20 and there is a presumption in favor of issue preclusion,
21 and there's nothing to overcome that presumption here.

22 QUESTION: Well, where does the presumption in
23 favor of issue preclusion come from?

24 MR. SUTTER: The -- well, the Court has
25 established that in cases such as Astoria Federal, and

1 here we have a final and binding determination for 1984.
2 Hospitals were told they were free to discard their
3 records.

4 QUESTION: Well, but this is not a
5 redetermination for the same purpose.

6 MR. SUTTER: Well, it still said final and
7 binding. It was unqualified. It said final and binding,
8 and --

9 QUESTION: But up until the change that was made
10 to take this as a base year, final and binding meant, we
11 do it on a year-by-year basis, so that's -- final and
12 binding for purposes of that year, once a 3-year reopening
13 passes is one thing.

14 To say final and binding forever is something
15 that could come into play only after the '86 act, am I
16 right, because before then final and binding referred only
17 to the year-by-year determination.

18 MR. SUTTER: Well, it was the same thing that
19 was done for PPS in TEFRA. There, Congress established
20 an -- a rate for the future based upon a -- an amount
21 recognized under the subchapter for a base year, and the
22 Secretary used the same amount, and it's important --

23 QUESTION: Yes, but that's not answering my
24 question, that I -- there was a change, was there not,
25 that up until then --

1 MR. SUTTER: But 1986, Justice Ginsburg, was
2 within the reopening period for this year. I mean, we --
3 the -- in some cases the NPR had not even been issued as
4 of the date that this statute was enacted. In other --

5 QUESTION: So you don't quarrel with any -- if
6 all this had been done within the 3 years, you would have
7 no quarrel with it.

8 MR. SUTTER: I am -- yes. I mean, there's --
9 there has to be uniformity. It's really the same argument
10 that I made in the PPS context for Georgetown II, and
11 that --

12 QUESTION: So what you're saying is, the
13 Secretary got it wrong. She's got 3 years to get it
14 right, and if she doesn't, too bad, it gets rejected into
15 the future until Congress changes it. That's the essence
16 of your argument.

17 MR. SUTTER: I'm saying once that period has
18 passed you are not going to get an accurate result, and
19 I'm also saying that these results were accurate because
20 they were audited determinations, done by experienced
21 intermediaries, and they were done at a time when there
22 was reason to be careful because this was the year to be
23 used for the --

24 QUESTION: But all that's another case. It's
25 not the one that we have, right? For purposes of this

1 argument you have accepted, I thought, that the second
2 determination by the Secretary was a reasonable
3 determination.

4 MR. SUTTER: No, we've not accepted that. We
5 simply have elected instead to pursue the threshold
6 question.

7 QUESTION: Counsel, I --

8 MR. SUTTER: Which is, did the --

9 QUESTION: I also have a question, and your time
10 is running out, and I did want to ask it. I take it that
11 what happened after this new statute was passed is that
12 some costs were reclassified --

13 MR. SUTTER: Right.

14 QUESTION: -- from education to operating.

15 MR. SUTTER: That's correct.

16 QUESTION: And I think there is a regulation --
17 tell me if that's right -- that hospitals can request an
18 upward adjustment in the hospital-specific rate if a re-
19 audit results in the reclassification of costs as
20 operating costs.

21 MR. SUTTER: Right.

22 QUESTION: So in theory, even though this
23 disastrous thing happened, the hospital can ask for an
24 upward adjustment in the rate.

25 MR. SUTTER: They can ask, but that doesn't

1 really help. It doesn't help because the Secretary's not
2 changing the Federal rate, which is the primary component
3 of payment under PPS.

4 It's also not helping in many cases because the
5 hospitals have to have documentation from 1982, which many
6 of them no longer have.

7 QUESTION: Well, they may not have it, but
8 weren't they put on notice by the Secretary that there
9 would indeed be this recalculation, so can any hospital at
10 this point claim that they were surprised to find that
11 they would like to look at old records which they tossed
12 out?

13 MR. SUTTER: No, they weren't put on notice.
14 The proposed rule indicated that there might be some re-
15 audits in unspecified circumstances, but it nowhere
16 suggested that there could be a re-audit after the 3-year
17 period had expired.

18 QUESTION: But it didn't suggest otherwise. I
19 mean, I --

20 MR. SUTTER: Yes, it did.

21 QUESTION: How did it suggest otherwise?

22 MR. SUTTER: At page 36,592 it reiterated the
23 normal 3-year reopening period and said that there would
24 be a special exception to make conforming amendments for
25 purposes of the hospital-specific rate, but there --

1 but -- and it also said to the extent there's a re-audit
2 those will be begun quickly, before any final rule is
3 issued, so there was absolutely nothing in there that
4 suggested that there would be some sort of audit done
5 after expiration of the 3-year period.

6 QUESTION: I'm sorry, I'm mixed up now. I
7 thought that the language I read you says to the hospital
8 during the re-audit, hospital, if you don't have old
9 records, give us last year's records. If you don't have
10 last year's records, give us yesterday's records.

11 MR. SUTTER: But that wouldn't apply to this
12 hospital, because it did have the '84 time records.

13 QUESTION: So you had all the old records.

14 MR. SUTTER: No, no, no. We didn't have --
15 well, we had the time records.

16 QUESTION: Right.

17 MR. SUTTER: And the time --

18 QUESTION: I -- all right. Explain this
19 particular thing.

20 MR. SUTTER: Right.

21 QUESTION: I thought if there is one piece of
22 paper missing from 1984, the reg says, you don't have
23 that, you've thrown it away, whatever it is, give us your
24 most recent one.

25 MR. SUTTER: That's not how it was applied.

1 QUESTION: That's not --

2 MR. SUTTER: If you had the time records, then
3 that's what they used. It was the same time records that
4 had been around in '84, the time that had been claimed as
5 administrative time and had been -- that had been claimed
6 as GME, and that had been allowed as GME, and the re-
7 audit conducted 6 years later, the intermediary said,
8 well, we're -- it's not based upon new evidence. They
9 just said, we're going to apply an ad hoc default rule,
10 and also you cannot do a current time study because there
11 are the records from 1984.

12 QUESTION: Thank you, Mr. Sutter.

13 Ms. Blatt, we'll hear from you.

14 ORAL ARGUMENT OF LISA S. BLATT

15 ON BEHALF OF THE RESPONDENT

16 MS. BLATT: Mr. Chief Justice, and may it please
17 the Court:

18 The GME amendment ties future reimbursements for
19 graduate medical education expenses to 1984 costs. To
20 implement that new payment system, the Secretary adopted a
21 regulation to ensure an accurate computation of those base
22 year costs. This regulation was designed to prevent
23 mistakes from being cemented and perpetuated into all
24 future medicare reimbursements.

25 QUESTION: Well, he could have done that by re-

1 auditing any ones he was doubtful about within the period.
2 He had some time before the period expired, didn't he, the
3 3-year re-audit period?

4 MS. BLATT: That's correct, and to the extent
5 that the 3-year period expired, the Secretary can no
6 longer recoup that money, but what's at issue here is the
7 implementation of the statute in which, if there are
8 errors that the Secretary cannot recoup, the Secretary
9 does not want to prevent them from being forever enshrined
10 into all payments.

11 QUESTION: No, but my point is, they didn't have
12 to be forever enshrined. He had time to do any re-audits
13 that were necessary.

14 MS. BLATT: Well --

15 QUESTION: Didn't he? Without adopting this new
16 regulation. He could have gone back and reexamined the
17 1984 year.

18 MS. BLATT: That's correct, Justice Scalia, and
19 if the Secretary had --

20 QUESTION: Moved quickly.

21 MS. BLATT: Had promulgated the rule earlier,
22 then you would have had the re-audit within the 3-year
23 window, and you would have been able to recoup the money,
24 but this regulation by and large for most hospitals missed
25 that 3-year window.

1 QUESTION: Okay. So we don't have to interpret
2 the statute the way you suggest in order to prevent what
3 would otherwise have been an inevitable enshrinement of
4 past mistakes. It wasn't inevitable.

5 MS. BLATT: No, Justice Scalia, but the issue is
6 whether the language is consistent with what the Secretary
7 did.

8 QUESTION: I understand.

9 MS. BLATT: And in this case the statute directs
10 the Secretary to determine an average amount recognized as
11 reasonable under the act for GME costs per resident.

12 QUESTION: Why is the word recognized in there?
13 Your colleague had some difficulty explaining the phrase,
14 as reasonable, but why is the word recognized -- why
15 didn't it just say, the average amount reasonable under
16 this subchapter for direct graduate -- why is the word
17 recognized there?

18 MS. BLATT: Well, the word recognized under the
19 act, to us the most natural reading of that language is,
20 it's the costs that are regarded by the statute,
21 acknowledged or regarded or deemed by the statute as
22 allowable, and we think the actual -- actually, two
23 points.

24 This statute does not say the Secretary shall
25 determine an average amount previously determined. It

1 doesn't use the word determined. It says, recognized.
2 Nor does it refer to section 139500, which refers to a
3 fiscal intermediary's determination. Nor does it say, the
4 amount previously reimbursed.

5 QUESTION: Can I just --

6 MS. BLATT: It says recognized as reasonable.

7 QUESTION: May I just interrupt on that first
8 point? You said, does not say the amount already
9 recognized, but the reason for that it seems to me might
10 be that there's a -- the 3-year period hadn't run yet, so
11 some of the -- some of them had to be in the future.

12 MS. BLATT: That's correct. Some of them, you
13 hadn't even -- you might not have even had a notice of
14 program reimbursement --

15 QUESTION: Correct.

16 MS. BLATT: -- by April of 1986.

17 QUESTION: That's a good point.

18 MS. BLATT: But the point, Justice Stevens, is
19 that recognized as reasonable in our reading of the
20 statute refers to the substantive standard of allowability
21 under the act during the base year. It's simply silent as
22 to the process by which the Secretary should make the
23 determination of the per-resident average, and the
24 Secretary had longstanding --

25 QUESTION: But do you think it's fair to assume

1 that Congress thought there might be one amount that would
2 be determined in the 3-year period for the 1984
3 reimbursement and still a different amount based on 1984
4 for this permanent program? Is it reasonable to think
5 Congress thought there would be two 1984 determinations,
6 both of which would be reasonable?

7 MS. BLATT: No. I think what Congress wanted
8 was the actual -- the payment system to be based on an
9 accurate amount, and there is only one accurate amount,
10 and the problem was, when the Secretary promulgated her
11 regulation, at least proposed in 1988, she realized that
12 substantial overpayments had been made for this
13 educational program, and she cited many examples.

14 The Secretary was also concerned that there had
15 been inconsistent treatment in the costs, and they had not
16 been given sufficient scrutiny, and to prevent those
17 costs, or those errors, rather, from being perpetuated
18 into all future reimbursements, she felt it was
19 important -- I guess it was he at the time -- to --

20 QUESTION: Well, I'm not questioning the
21 reasonableness of her judgment and all that. I'm just
22 trying to sit -- if I'm sitting in Congress in 1986, what
23 did I expect to happen under this language? Did I expect
24 her to make two different determinations of reasonableness
25 for 1984 for this particular hospital.

1 MS. BLATT: I don't think the statute speaks to
2 this at all, Justice Stevens. I think it's completely
3 silent as to the process. It's clear that Congress wanted
4 an accurate amount, and it wanted the per-resident average
5 to be reasonable, and we read that as reasonable under the
6 substantive standards that were in effect during the base
7 year, and the Secretary read that language to permit her
8 to calculate the per-resident average based on an accurate
9 amount.

10 I just don't think the -- neither the
11 legislative history nor the text addresses this, and
12 presumably Congress was also aware that the Secretary
13 could amend her regulations, and that's what she did here.

14 QUESTION: Ms. Blatt, would you help me out on
15 one thing? I thought I understood how the 3-year period
16 works, and now I'm not so sure I do.

17 I thought that at the end of the -- whatever the
18 fiscal year is involved here, the hospital in effect would
19 submit the equivalent of a bill with whatever supporting
20 documents it has to submit, and the bill would either get
21 paid or they would fight it out then and there, but that
22 even after the bill was paid there was a 3-year period
23 during which the Secretary might reopen and do a re-audit.
24 Is that basically how it does work?

25 Or, conversely, is the 3-year period simply the

1 period within which, to put it as I was doing it, the bill
2 has to be paid?

3 Which is it?

4 MS. BLATT: No, I think the former description
5 was accurate.

6 QUESTION: Okay.

7 MS. BLATT: You get a -- excuse me. The
8 hospital periodically gets paid throughout the year as it
9 incurs the cost. There's a year-end book-balancing just
10 based on what the hospital claims as its cost.

11 QUESTION: Okay.

12 MS. BLATT: Then sometimes 2 and sometimes even
13 3 years later there's a notice of program reimbursement.

14 QUESTION: All right. Now, the reason I -- the
15 reason the question interests me goes back to Justice
16 Stevens' question.

17 If that's the way it works, at the time this
18 statute was passed, would it not normally have been the
19 case that all hospitals would at least have been paid in
20 the first instance and, as an implication of that, their
21 back-up, their figures, their costs would have been
22 recognized in the first instance as reasonable, but they
23 would, nonetheless, have been subject to a re-audit within
24 3 years.

25 MS. BLATT: You're correct in that the amount of

1 money had been reimbursed, but you use the word recognized
2 as having the same meaning --

3 QUESTION: I was saying --

4 MS. BLATT: -- as a determination, and we don't
5 read it --

6 QUESTION: -- the reimbursement implies a
7 recognition. Is that a misuse of the term?

8 MS. BLATT: It could be -- that could be one
9 reading of the word recognized, but equally in fact we
10 think a more persuasive reading of the word recognized is
11 recognized by the statute, not determined by a fiscal
12 intermediary.

13 Congress could have easily have said, come up
14 with an amount previously reimbursed, or previously
15 determined, or it could have said, previously determined
16 under the Secretary's existing regulations, or determined
17 under 139500, which refers to a fiscal intermediary's
18 determination of the amount of reimbursement due. It just
19 said, recognized as reasonable.

20 QUESTION: But it uses that phrase many other
21 times, or at least several other times in the statute for
22 the very purpose that Justice Souter is describing. I
23 mean, I don't know that you can say that other language is
24 more natural for this purpose in other places.

25 It doesn't say -- it says, recognized under this

1 chapter, this subchapter. It doesn't use, recognized as
2 reasonable, but --

3 MS. BLATT: That's correct, Justice Scalia, but
4 the D.C. Circuit in Tulane cited two cases, two instances
5 in which the statute does use the term, recognized as
6 reasonable. It's just that there it had a word previously
7 in one instance and it had a to be in another instance,
8 which we think simply highlights the flexibility and the
9 ambiguity in this term.

10 It just says, recognized as -- an amount
11 recognized as reasonable. It doesn't say an amount that
12 was, an amount that is, an amount to be, an amount
13 previously, and it's more of a -- it's silent as to the
14 process by which the Secretary would make this
15 determination.

16 QUESTION: I was going to say, I suppose for the
17 purposes of your case it doesn't matter whether my reading
18 is the better one or your reading is the better one.
19 There's at least some kind of a reasonable disagreement,
20 and in that circumstance the Secretary supposedly can cast
21 the determinative vote by the way she interprets it.

22 MS. BLATT: Thank you, Justice Souter. I mean,
23 we're -- that would -- we're clearly asking for deference
24 here. You don't have to agree, but we happen to think
25 that it is the better reading of the statute.

1 QUESTION: Well, what about the argument, Ms.
2 Blatt, that's made that if the Secretary can wait this
3 long, till '90, '91, to go around doing what she should
4 have done in the first place, she could do the same thing
5 in '93?

6 I believe Mr. Sutter said that this second
7 thought reordering could go on forever, so what's there to
8 stop her, on your reading, from saying, yes, I came up
9 with a lower figure in '90 or '91, but I could get it down
10 even lower and find more misallocations?

11 MS. BLATT: Well, Justice Ginsburg, several
12 responses. First of all, we don't think the statute
13 addresses this, but it might well be irrational or
14 arbitrary if the Secretary subjected hospitals to
15 perpetual re-audits. There would also have to be an
16 articulated reason for doing it.

17 I mean, what the Secretary did here is said we
18 want to make a one-time -- clear-the-slate, one-time
19 determination of this average-per-resident amount, and she
20 promulgated a rule to do that. I don't know any reason
21 why the Secretary would do it again, maybe if there was
22 fraud, and then she wouldn't even need to promulgate a
23 regulation.

24 QUESTION: Yes, but you're suggesting there's
25 something magical about a one-time adjustment. The other

1 side might argue, well, the first determination they paid
2 on was a one-time, thought-to-be-final adjustment. If you
3 can have a second one-time adjustment, why not a third and
4 a fourth?

5 MS. BLATT: Again, that first -- when it was
6 paid originally in 1984, Justice Stevens, the only risk
7 associated with errors was the amount of reimbursement
8 that provider was due in 1984. When the statute got
9 amended to base all future payments on an equal cost --

10 QUESTION: Well, the amendment was in '86, and
11 there was still -- the final determination of
12 reasonableness just on how much you're going to pay this
13 hospital was still subject to change.

14 MS. BLATT: That's true, and the price that the
15 Secretary paid for not acting quickly is, she cannot go
16 back and recoup the money. I mean, that did not hurt the
17 hospitals. What the Secretary's trying to do is to
18 prevent future --

19 QUESTION: Well then, I'm just not sure why that
20 argument wouldn't allow her in 1999 to say, well, I can't
21 recover anything earlier than 1995, say, but I can still
22 change the basic rules for the future.

23 MS. BLATT: And if she doesn't have a good
24 reason, it would be arbitrary.

25 QUESTION: Well, there's a good reason why. She

1 didn't realize there were a lot of misallocations. She
2 made a lot of mistakes before, which is the same reason
3 she has here.

4 MS. BLATT: But Justice Stevens --

5 QUESTION: Imperfect knowledge.

6 MS. BLATT: But Justice Stevens, the Secretary
7 went into this round to make this per-resident
8 determination knowing the point of it, and it would -- I
9 just can't imagine a situation where the Secretary would
10 say, okay, I need to do this every 2 years, but if she did
11 articulate a reason it would be judged based on the
12 information the Secretary had in front of her, and whether
13 that was reasonable.

14 I'd like to just briefly address two things that
15 petitioner said about whether hospitals were on notice of
16 the need to retain records. The same page that petitioner
17 quotes, which was 53 Federal Register 36,592, says three
18 extremely important things to hospitals, and this was
19 within the time, within the 4-year period under any kind
20 of scenario in which you -- the hospitals were permitted
21 to discard physician allocation --

22 QUESTION: Do you have a page citation for
23 this --

24 MS. BLATT: Yes. It was 50 --

25 QUESTION: -- in the petitioner's brief?

1 MS. BLATT: Well, he just said it a minute ago
2 in his argument, that --

3 QUESTION: I see.

4 MS. BLATT: So it's not cited in the brief.
5 It's what the district court in Samaritan Health Systems
6 relied on to say hospitals had notice. It cites this
7 Federal Register cite.

8 But the three things were very simple. The
9 Secretary warned hospitals that a re-audit would be
10 conducted to exclude misclassified and unallowable cost.
11 It said -- and most critically it said, appropriate
12 supporting documentation -- the fiscal intermediaries
13 would look at -- would ask for appropriate supporting
14 documentation where costs seemed questionable, and 3),
15 equally importantly it said, we can't -- the Secretary
16 indicated that she could not guarantee any time frame in
17 which this re-audit activity would be completed because of
18 budgetary constraints on contractors.

19 QUESTION: What was the date of this Federal
20 Register?

21 MS. BLATT: I think September 21, 1988. Let me
22 check on that. Yes, September 21, 1988, and under
23 petitioner's year, his -- its cost year ended December
24 '88. The --

25 QUESTION: Did it say these were going to be

1 general re-audits, or just in -- claimed it was just in a
2 few circumstances?

3 MS. BLATT: It said, where costs seemed
4 questionable.

5 QUESTION: Where costs seemed questionable?

6 MS. BLATT: Yes. I mean, I read it as quite
7 general. It said, as indicated. So that was clear
8 notice, and it's also -- we think the Secretary reasonably
9 believed that hospitals would have retained records, and
10 certainly this case doesn't involve an as-applied
11 challenge where a hospital has presented evidence that it
12 discarded records, and on that -- that's on that issue,
13 although petitioner has said there's -- that the hospital
14 was prejudiced.

15 The petitioner did challenge this re-audit for 3
16 years, but then withdrew all of its challenges in 1994,
17 and we think that is quite significant.

18 And moreover, the -- it wasn't a default rule
19 applied to the disallowance. There was a \$4 million
20 difference, and the reason that was so significant was,
21 most of this did result from the fact that petitioner had
22 records from 1984, and those records showed that
23 administrative costs had been paid when they weren't
24 related to educational.

25 QUESTION: In this case, or in the run-of-the-

1 mind case, does the misallocation indicate that the
2 Government actually paid too much even under the old
3 program, or would the Government come out just the same
4 either way, and it just affects the GME program because of
5 misallocation?

6 MS. BLATT: I'm not sure how to answer that
7 question. The -- if the costs were misallocated --

8 QUESTION: But I'm glad you understood it,
9 because it's hard to put --

10 (Laughter.)

11 MS. BLATT: Yes. If -- but let me --

12 QUESTION: It's hard -- in other words, was the
13 Government prejudiced for reasons other than the GME
14 program, or was it just under the GME program that it is
15 paying too much or paying too little, depending on who
16 wins here?

17 MS. BLATT: The 1984 -- the problem in 1984 was
18 that the Government paid too much. It's -- if you talk
19 about reclass --

20 QUESTION: Even without reference to the GME
21 program?

22 MS. BLATT: No. I think it's -- if the costs
23 were counted as educational, but they should have been
24 operating, and there were caps on operating costs in
25 effect during that year, and they were paid on a pass-

1 through reasonable cost basis, and so the Government paid
2 too much.

3 QUESTION: So the Government paid too much even
4 under the 1984 scheme?

5 MS. BLATT: Oh, yes.

6 QUESTION: All right.

7 MS. BLATT: Yes. I'm -- yes, definitely, and
8 the interesting thing about that is, the complaints about
9 the hospital-specific rate and the Federal rate all could
10 have been lodged had the Secretary originally caught these
11 errors in 1984, or had promulgated a rule within the 3-
12 year window. You would still have problems about what to
13 do about prior year classification, and we think the
14 Secretary quite reasonably allowed hospitals to not only
15 increase their rates for operating costs, but one thing --
16 and in conclusion, I'd like to point this out.

17 The regulation actually allowed hospitals to
18 increase their GME amounts, and our records reflect that
19 approximately 30 percent of hospitals raised their
20 amounts. Obviously, more often than not the amounts went
21 down, but there were a significant number of hospitals
22 where the costs went up.

23 If there are no more questions --

24 QUESTION: I would like just to be clear in my
25 own mind. What petitioner said in his brief, in his reply

1 brief on page 15, he says there was a re-audit, and then
2 he says that they changed the classification of certain
3 fixed costs, the administrative costs, from education
4 costs to operating costs, not because of new evidence but
5 because petitioner no longer had audit documentation.

6 Now, I -- I may -- I'm not certain what he had
7 in mind by that, but if he actually meant physical pieces
8 of paper, which does seem like a problem, I was concerned
9 about that. Am I right in thinking that isn't the
10 problem, because if there are pieces of paper or other
11 kinds of evidence that are no longer around, the Secretary
12 will permit the hospital to introduce --

13 MS. BLATT: Yes.

14 QUESTION: -- other evidence, later evidence, or
15 anything that --

16 MS. BLATT: That's correct, and ironically,
17 Justice Breyer, the petitioner did present subsequent year
18 data, I think we pointed out in our brief, because the
19 time records did not break -- this is the very same issue
20 we're talking about.

21 This petitioner had time records in 1984 which
22 are very detailed documents, but because the petitioner on
23 the face of the time records did not break down the costs
24 between teaching medical students versus teaching
25 residents, they were allowed to use a new time study, and

1 that's why there was a settlement in this case and the
2 petitioner actually got an increase in the per-resident
3 average.

4 So petitioner used that equitable relief in this
5 case, even though -- and that's not because petitioner
6 threw away records. It's because petitioner never had the
7 records to begin with. There's just simply nothing in the
8 record, at least that we could draw any conclusion that
9 there were records thrown away.

10 QUESTION: Thank you, Ms. Blatt.

11 QUESTION: Ms. Blatt, I have one more question.
12 Do you have any response to the point, which seems to me a
13 fairly substantial one, made by the petitioner that in the
14 same legislation that enacted this provision Congress
15 instructed the Secretary to report back by December 31,
16 1987 on whether there should be any revisions to provide
17 greater uniformity in the approved FTE resident amounts?

18 Now, how could she possibly have done that by
19 December 31, 1987, unless everything -- unless she had
20 made these determinations by 1987? I mean, isn't that a
21 pretty clear indication that Congress expected this stuff
22 to be done by '87?

23 MS. BLATT: Well, it might, Justice Scalia, but
24 it would -- it certainly goes against petitioner's reading
25 of the statute, which is that Congress assumed the

1 Secretary had a 3-year window under these regulations,
2 which would have been in 1989, and there's simply no way
3 that could have been done under this reporting
4 requirement.

5 But this statute is a reporting requirement, and
6 there were several reporting requirements imposed on the
7 Secretary in this very bill, but even if you read this
8 reporting requirement as a mandate for the Secretary to do
9 something by a date certain, I don't think you should read
10 in a congressional intent that the Secretary lacks the
11 power to act beyond that statutory deadline.

12 And one more point. The -- it would have been
13 extremely difficult for the Secretary to have promulgated
14 and finalized a rule, made an evaluation, and reported to
15 the Secretary by December of '87 under -- in all events.

16 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Blatt.

17 The case is submitted.

18 (Whereupon, at 10:51 a.m., the case in the
19 above-entitled matter was submitted.)
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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:

REGIONS HOSPITAL, Petitioner v. DONNA E. SHALALA, SECRETARY OF HEALTH & HUMAN SERVICES

CASE NO: 96-1375

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

BY Don Mari Federico-----

(REPORTER)