

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: YOUR HOME VISITING NURSE SERVICES, INC.

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

CASE NO: 97-1489 *C.2*

PLACE: Washington, D.C.

DATE: Wednesday, December 2, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 YOUR HOME VISITING NURSE :

4 SERVICES, INC. :

5 Petitioner :

6 v. : No. 97-1489

7 DONNA E. SHALALA, SECRETARY OF :

8 HEALTH & HUMAN SERVICES. :

9 - - - - -X

10 Washington, D.C.

11 Wednesday, December 2, 1998

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:05 a.m.

15 APPEARANCES:

16 DIANA L. GUSTIN, ESQ., Norris, Tennessee; on behalf of the
17 Petitioner.

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

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

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 97-1489, Your Home Visiting Nurse Services
5 v. Donna E. Shalala.

6 We'll wait just a minute.

7 Ms. Gustin.

8 ORAL ARGUMENT OF DIANA L. GUSTIN

9 ON BEHALF OF THE PETITIONER

10 MS. GUSTIN: Mr. Chief Justice, and may it
11 please the Court:

12 Petitioner is here today to complain about an
13 insurance company. In this case the insurance company is
14 a fiscal intermediary serving as the agent for the
15 Government, reviewing medicare cost reports, making
16 determinations about allowable cost, and also making
17 decisions about whether or not the cost report may be
18 reopened.

19 In this case, the petitioner, a home health
20 agency, discovered new and material evidence after the
21 initial period for requesting appeal, and therefore made a
22 request for a reopening of the cost report.

23 The intermediary, the insurance company, denied
24 the request to reopen, considered this a final
25 determination, and then we filed an appeal for review of

1 that final agency action at the Provider Reimbursement
2 Review Board.

3 The review board declined to accept the case,
4 stating it did not have jurisdiction to review the refusal
5 to reopen. The district court upheld the jurisdictional
6 decision of the board and the Sixth Circuit also upheld
7 the district court, which brings us here today.

8 We would like to begin with the statement that
9 there is a presumption that there will be judicial review
10 of final agency action, and this presumption is noted in
11 the Court's decision of *Bowen v. Michigan Academy of*
12 *Family Physicians*, where the Court's opinion started with
13 saying, we begin with a strong presumption that Congress
14 intends judicial review of administrative action.

15 QUESTION: Well, but you had one round of
16 judicial -- of administrative review here, didn't you,
17 with the right to appeal to the district court?

18 MS. GUSTIN: We had an opportunity, a chance to
19 make a request for an appeal, but based upon the
20 information that we had at that time, an appeal was not
21 sought, but when we discovered new and material evidence
22 which we believe shows that the intermediary violated its
23 own regulations, upon discovery of the new and material
24 evidence, we believe that gives us the right to request
25 the reopening, and if that reopening is unlawfully

1 withheld, we sought review, and so it's the review of the
2 refusal, which is final agency action, which we are
3 seeking.

4 QUESTION: Ms. Gustin, you know, there has to be
5 an end to litigation at some point, and I thought the
6 normal rule is, when there's a final judgment, you can
7 come back and say, you know, there are new circumstances,
8 but whether to open for that reason is discretionary.

9 The Administrative Procedure Act has an
10 exception for judicial review for matters committed to
11 agency discretion by law, and I have always thought that
12 it's committed to agency discretion whether to reopen a
13 closed case.

14 They always can, but I don't think anybody has a
15 right to it.

16 MS. GUSTIN: Well --

17 QUESTION: And if they decide not to, that's the
18 end of the matter.

19 MS. GUSTIN: Your Honor, in this Court's
20 decision in ICC v. Brotherhood of Locomotive Engineers,
21 which was decided in 1977, this Court held that a refusal
22 to reopen which was based upon new and material evidence
23 should have some sort of review, because otherwise --

24 QUESTION: Ms. Gustin, the statute in that case
25 provided for removal. I mean, for reopening.

1 MS. GUSTIN: That is --

2 QUESTION: Here, as I understand it, the statute
3 says nothing. The statute says, get your act together in
4 180 days. The Secretary then said, yeah, I'll provide for
5 reopening, but it's going to be just this one shot, no
6 review.

7 MS. GUSTIN: Well --

8 QUESTION: So how can you compare a case where
9 Congress said, you have a right to reopen, to a case where
10 Congress made no such provision.

11 MS. GUSTIN: Well, first of all, I think that
12 there is a statutory provision within the medicare statute
13 which requires reopening.

14 QUESTION: And which one is that?

15 MS. GUSTIN: And that would be section
16 1395x(v)(1)(A), clause (ii).

17 QUESTION: But that refers to reopening when the
18 year's books have finally been closed so that you could
19 tell what the actual charges were, and the Secretary gave
20 you that opportunity, didn't she?

21 MS. GUSTIN: Well, whether or not that refers to
22 just a year-end book-balancing I think has not been
23 decided by this Court, but in fact the Secretary uses that
24 reopening process for more than simply a year-end book-
25 balancing to compare estimated cost with actual cost, and

1 so we would say first of all to Justice Ginsburg's
2 question, there is statutory authority for a reopening
3 within that. Secondly --

4 QUESTION: But if we read the statute to say
5 what it does, it provides for the year-end adjustment, and
6 that's all it provides for, then you don't have any such
7 argument.

8 MS. GUSTIN: If you read the statute that way,
9 but I would impress upon the Court that in this case in
10 particular the Secretary used the reopening process beyond
11 that year-end book-balancing period, and the Secretary
12 routinely uses the reopening process beyond that simple
13 year-end --

14 QUESTION: The reopening process. What Justice
15 Ginsburg's suggesting is that there are two reopening
16 processes. One is the statutory requirement for
17 reopening, and the other is the normal discretion that any
18 agency has, but a nonreviewable discretion, to reopen a
19 closed matter if it thinks it to be a good idea.

20 MS. GUSTIN: Well, I don't think that there --
21 that it's clearly stated that Congress wanted a -- an
22 unreviewable, completely insulated final agency action,
23 and I think that the decision in Michigan Academy talks at
24 great length about the fact that the presumption to
25 judicial review is so important that we cannot just think

1 that Congress meant something not to be reopened that it
2 requires --

3 QUESTION: But you can come back 10 years later,
4 even after you've gotten this review. Let's assume we
5 find for you here. Then you find something else, 10 years
6 later, and you come back again and you ask the Secretary
7 to reopen. She says, get out of here, it's 10 years
8 later. You have judicial review of that again, right?

9 MS. GUSTIN: I believe that is correct, Your
10 Honor.

11 QUESTION: Well --

12 MS. GUSTIN: As the Ninth Circuit held --

13 QUESTION: Life is too short for this kind of
14 thing.

15 MS. GUSTIN: First of all, in regard to the 10-
16 year time frame that you put on that, I think that that
17 would only apply in cases where there was fraud or abuse
18 alleged, because there's normally a 3-year time period to
19 request a reopening, and the Secretary --

20 QUESTION: Suppose the Secretary said, I'm going
21 to withdraw that regulation. Forget it. I'll stick with
22 what Congress wrote, there is no right to reopen, period.
23 You do it within 80 days, and if you don't have your act
24 together by then, it's tough luck.

25 MS. GUSTIN: Well, I think that having your act

1 together is really the problem here, because it wasn't a
2 matter of whether or not we had our act together. It was
3 a matter of information that the intermediary had or had
4 access to that we did not have access to, and this --

5 QUESTION: So perhaps Congress was mistaken in
6 making the period 180 days. But that was Congress'
7 period.

8 MS. GUSTIN: I think Congress was not mistaken,
9 but I think that Congress had the section that I
10 referenced earlier, 1395x(v)(1)(A), clause (ii), which
11 allows for corrective retroactive adjustments when a
12 provider is either underpaid or overpaid, and that's been
13 a part of the act from the beginning, but I think that
14 the --

15 QUESTION: Yes, but we already understand that
16 if that is -- has the narrow meaning that seems to have
17 been given to it by this Court it isn't across-the-board
18 reopening.

19 MS. GUSTIN: Well, in the Court's decision that
20 discussed that provision of the statute, whether or not
21 the book-balancing occurred at -- within the 180 days,
22 which would be the narrow meaning, was not really
23 discussed in terms of the time period for the retroactive
24 corrective adjustments, and to the contrary --

25 QUESTION: No, I'm focusing on what can be

1 covered, not the time, what can be covered by that
2 explicit statutory provision, and I thought that provision
3 was confined to the annual overlook of the month-by-month.

4 MS. GUSTIN: Well, I don't believe that that
5 provision should be confined to that and, indeed, it's not
6 in practicality.

7 As I stated in this case, beyond that 180-day
8 time period, this cost report was reopened, because we had
9 discovered that a nurse did not have an appropriate
10 license, so we reported that to the intermediary, and then
11 the costs for the visits had to be reduced, and so the
12 narrow view of the year-end book-balancing happening only
13 to do that balancing between interim payments and final
14 payments --

15 QUESTION: Who reopened in that case?

16 MS. GUSTIN: The intermediary reopened.

17 QUESTION: Yes, and I gather that's essentially
18 what your position is. The intermediary can reopen.

19 MS. GUSTIN: Yes.

20 QUESTION: The Secretary can reopen.

21 MS. GUSTIN: Yes.

22 QUESTION: It's only fair that you should be
23 allowed to.

24 MS. GUSTIN: Yes, because if we discover
25 wrongful acts that unfairly deprived us of reimbursement

1 to which we were entitled under the act, then we should
2 also be allowed to claim the recovery.

3 QUESTION: That's an argument in fairness and in
4 equity, but you have a statute to deal with.

5 MS. GUSTIN: Yes.

6 QUESTION: And regulations to deal with, and --

7 MS. GUSTIN: And we believe that the statute
8 itself at 139500 clearly states that Congress intended
9 that we have an appeal process after a final
10 determination, and that that language is clear, a final
11 determination, and it is only through the Secretary's
12 interpretation of that phrase to mean one, and only one
13 kind of a final determination, that she prohibits or
14 restricts our ability to obtain review.

15 And so we believe under the Chevron test the
16 plain meaning of the statute must govern first of all. A
17 final determination is what Congress said, and we have a
18 final determination, and indeed it makes sense that final
19 determinations of this nature should proceed --

20 QUESTION: My notion of a final determination is
21 a final decision on the merits of the claim. A final
22 decision was entered. It doesn't become unfinal because
23 you've moved to reopen it. You know, after a certain
24 amount of time a judgment becomes a final judgment.
25 Thinking of civil litigation, you can move, say under

1 60(b), but you still have a final judgment.

2 MS. GUSTIN: That's correct, Your Honor, but
3 under 60(b) courts have held in the Sixth Circuit that a
4 refusal to grant the relief sought under 60(b) when there
5 is no new and material evidence can be reviewed, but only
6 as to whether or not there was an abuse of discretion,
7 because otherwise --

8 QUESTION: Yeah, and it could be reviewed here,
9 too, if Congress -- Congress had provided for reopening
10 and said, and it's reviewable.

11 MS. GUSTIN: Well, I believe that Congress
12 provided for review by stating that a final determination
13 as to total program reimbursement can be reviewed if you
14 take the appropriate steps, and the refusal to reopen is a
15 final determination as to program reimbursement, so I
16 believe that we meet the definition under the statute
17 itself, and I believe that that's also where the
18 presumption to judicial review comes back, because the
19 statutory language I believe is clear.

20 But if you believe you must interpret the
21 language in the statute, then the burden is upon the
22 Secretary by clear and convincing proof to show that
23 Congress did not want judicial review, and there is no
24 language in the congressional history which states that
25 they considered whether or not there would be a reopening

1 process and that that should be totally and completely up
2 to the discretion of the insurance company employee.

3 We don't even have a governmental entity
4 reviewing the request to reopen. We have private
5 insurance companies that contract with the Government, and
6 we don't know anything about the individuals who are
7 making these decisions, so we would be leaving within the
8 discretion of one person decisions that could be worth
9 millions of dollars to hospitals. I don't think there's
10 anything in the Congressional Record to indicate that they
11 wanted that to be the case, and --

12 QUESTION: But you have the right to review
13 these decisions before it becomes final, do you not?

14 MS. GUSTIN: You -- based upon what you know at
15 that time, and I think it's important to understand that
16 my client and other providers should surely have the right
17 to rely upon the intermediary to act lawfully and to give
18 us the information that they are making the decision upon,
19 but when they don't give us the information, or give us
20 the wrong information, whether it is intentional or by
21 mistake, and we discover it later, that we should have a
22 right to request a reopening.

23 QUESTION: But think -- you know, this is a
24 tremendously complicated and extensive system, and these
25 matters have to come to an end sooner or later.

1 MS. GUSTIN: Exactly, and I think the 3-year
2 period within which you can request a reopening is an
3 appropriate time period to expect the provider to act,
4 unless, for example, there is fraud or intentional
5 wrongdoing, which I mentioned, and there's no time period
6 under the regulation for requesting reopening in that
7 case.

8 QUESTION: What if somebody else thinks 3 years
9 is not enough, and petitions the Secretary to make it a 6-
10 year reopening period, and the Secretary says no?

11 MS. GUSTIN: Well --

12 QUESTION: I assume that would be appealable on
13 your theory of the world. The Secretary has made a final
14 determination that she will not extend the 3-year period
15 to 6 years.

16 MS. GUSTIN: I think the Secretary has the right
17 to make rules that are considered reasonable, and whether
18 or not someone could make the argument that a 6-year
19 period was not a reasonable --

20 QUESTION: That's the argument.

21 MS. GUSTIN: -- interpretation of the statute.

22 QUESTION: This person is in good faith and
23 really thinks 3 years is unreasonable, wants 6 years, so
24 that person should have a right to appeal the Secretary's

25 MS. GUSTIN: That would be --

1 QUESTION: -- final determination --

2 MS. GUSTIN: I think that would be --

3 QUESTION: -- not to make it 6 years.

4 MS. GUSTIN: -- a different question than what
5 we're dealing with here --

6 QUESTION: I know it's a different question,
7 but --

8 MS. GUSTIN: -- and I think different points of
9 law apply to that, and that would be whether or not the 6-
10 year period was a reasonable interpretation of the
11 statute, as well --

12 QUESTION: No, that's not the point of law. The
13 point of law is whether it's a final determination.
14 That's the point of law at issue here. That's a final
15 determination just as this is.

16 MS. GUSTIN: But a final determination --

17 QUESTION: I will not extend it to 6 years.

18 MS. GUSTIN: But the final determination we're
19 referring to here is the one that's laid out in the
20 statute, which is as to the amount of total program
21 reimbursement covered by the cost report.

22 QUESTION: No, it isn't. No.

23 MS. GUSTIN: The 6-year --

24 QUESTION: The final determination at issue here
25 is whether she will reopen the determination she's already

1 made. That's the final determination. She says no.

2 MS. GUSTIN: The final --

3 QUESTION: She says no, I will not reopen.

4 MS. GUSTIN: Yes, and we say that the final
5 determination when she says she will not reopen is one
6 which goes to the total amount of program reimbursement,
7 which is what the statute defines --

8 QUESTION: No more so than in my hypothetical.
9 This person who wants 6 years has found something else
10 beyond the 3-year period which will affect the total
11 amount of reimbursement to which he was entitled.

12 MS. GUSTIN: Well, that case is not before the
13 Court, Your Honor --

14 (Laughter.)

15 MS. GUSTIN: -- and I really don't know how to
16 answer that in terms of how it applies to this argument.

17 QUESTION: Of course you know how to answer it.
18 You have to answer it that yes, it's reviewable because
19 it's a final determination.

20 MS. GUSTIN: Well then it's reviewable because
21 it's a final determination as to the total amount of
22 program reimbursement, but we have a regulation here.

23 This regulation concerning the 3-year time
24 period was before this Court most recently with regard to
25 the graduate medical education reaudit regulation, and

1 there the Secretary argued successfully and very strongly
2 that the 3-year period was what was important, but with
3 regard --

4 QUESTION: But then that again, I mean, that was
5 a case where the Secretary came back within 3 years.

6 MS. GUSTIN: Yes.

7 QUESTION: And I -- as far as I can see, you are
8 basically complaining about an asymmetrical statute where
9 the Secretary can reopen in 3 years and you can't, and --

10 MS. GUSTIN: Well, we're complaining --

11 QUESTION: -- I can understand that you think
12 that that's not fair.

13 What I have a hard time seeing is how you
14 make -- turn everything into a final determination, never
15 mind that we have had a final, the equivalent of a final
16 adjudication on the merits of the claim.

17 MS. GUSTIN: I think it's important, Your Honor,
18 to focus upon the abuse of discretion that is possible in
19 deciding whether or not a final determination can be more
20 than simply the first notice of program reimbursement
21 letter that you receive.

22 QUESTION: Maybe it could be, but the Secretary
23 says it isn't, right?

24 MS. GUSTIN: The Secretary --

25 QUESTION: All right. So that's the -- if it's

1 not a final determination within the meaning of 139500 --

2 MS. GUSTIN: Yes.

3 QUESTION: -- you're out of luck.

4 MS. GUSTIN: If the Secretary --

5 QUESTION: Unless you're going to go under
6 mandamus. Is that basically --

7 MS. GUSTIN: Well, Federal question
8 jurisdiction.

9 QUESTION: Federal question jurisdiction, you
10 have a statute that specifically says, no action shall
11 fall under Federal question jurisdiction unless you go
12 through 139500.

13 MS. GUSTIN: I believe that --

14 QUESTION: Doesn't it say that specifically?

15 MS. GUSTIN: It says that specifically, Your
16 Honor, but --

17 QUESTION: All right. So if we follow that,
18 you're out of luck, unless it's 139500, and you're not in
19 139500 unless it's a final determination. Am I right?

20 MS. GUSTIN: Well, there are alternative
21 arguments, which were presented, and I think that under
22 Federal question jurisdiction as an alternative, if you're
23 not allowed to use the 139500 administrative procedure --

24 QUESTION: Right.

25 MS. GUSTIN: -- in the normal route, and if you

1 have raised a claim that is collateral to the underlying
2 amounts of the benefit claim, then Federal question
3 jurisdiction is appropriate, as it was in Bowen v.
4 Michigan Academy.

5 QUESTION: But what do we do about the
6 statement, no action against the United States
7 Commissioner of Social Security or any officer or employee
8 shall be brought under section 1331?

9 MS. GUSTIN: On any claim.

10 QUESTION: To cover on any claim arising under
11 this title. Do you have a claim arising under this title?

12 MS. GUSTIN: Well, we believe that on any claim
13 is like a term of art, and that means a claim of benefits,
14 but if we claim that there is an abuse of discretion, if
15 we claim that the intermediary acted unlawfully, violated
16 its own regulations, that that is a collateral issue, just
17 like in Bowen v. Michigan Academy. The statute or the
18 regulation, I mean, which --

19 QUESTION: I have to decide, do you have a
20 claim, or are you trying to bring a claim under the title?
21 If I answer that question, I think you are, suppose
22 hypothetically -- yeah, you are. You're trying to bring a
23 claim. You're trying to get some money from them. That's
24 what it means.

25 If I believe that --

1 MS. GUSTIN: Uh-huh.

2 QUESTION: Then are you out of luck?

3 MS. GUSTIN: No.

4 QUESTION: Unless you have a final
5 determination, and they say you don't, but you say you do.

6 MS. GUSTIN: Yes.

7 QUESTION: And so for you to win on that, you
8 have to show not only are they wrong, they're just really
9 unreasonable. Is that right?

10 MS. GUSTIN: I -- that they're wrong, they're
11 unreasonable, and they're violating their own -- their own
12 regulations, and --

13 QUESTION: Right. Now -- now, to focus on that,
14 what is unreasonable about saying, these things have to
15 come to an end?

16 MS. GUSTIN: Well, there are two collateral
17 claims that were raised. One was the collateral claim
18 that their refusal to reopen and no judicial review is
19 unreasonable, all right.

20 Then the second collateral issue that was raised
21 was the fact that the owner's compensation is required to
22 be in accordance with comparable institutions, and that
23 they had, or had access to a salary survey which had a
24 salary range which was much higher than what they were
25 applying to the petitioner, and therefore they were not

1 applying owner's compensation in accordance with their own
2 regulation, and so that was a violation of that
3 regulation.

4 A collateral claim, too, asking for additional
5 owner's compensation, a claim that they didn't do it
6 right, and if they violated that regulation or other
7 regulations, or a regulation is found invalid, then we
8 believe that's a collateral claim, not about the --

9 QUESTION: I have trouble with your description
10 of that as a collateral claim. Your claim -- you have one
11 claim. That is, you're entitled to more reimbursement.
12 You have a number of reasons why the procedure should
13 allow you to do this.

14 MS. GUSTIN: Uh-huh.

15 QUESTION: But to slice up pieces of your
16 argument in support of your claim for reimbursement and
17 call each one of those a separate claim doesn't make a
18 whole lot of sense.

19 MS. GUSTIN: Well, there are arguments in the
20 alternative, Your Honor, because first and foremost we
21 believe that the statute itself allows us judicial review,
22 or some type of review process for abuse of discretion,
23 and we only turn to section 1331 for Federal question
24 jurisdiction and then posit the claim itself as collateral
25 to that normal appeals process as an alternative view, an

1 alternative way of looking at this, because we believe
2 there must be some kind of review, because Congress did
3 not prohibit review of this final agency action and,
4 indeed, when --

5 QUESTION: I think -- I think that's what
6 perhaps bothers some of us, is that in your view any time
7 you come in, whether it's, you know, 6 months after the
8 final order or 2 years after the final order, and say I
9 want a reopening, that becomes a new final order, and I
10 really don't think the presumption of review that you're
11 talking about extends that far.

12 MS. GUSTIN: I don't think that the broader
13 reading of any time you come in is applicable here, and I
14 don't think it's necessary to view this case in those
15 terms.

16 I think it's appropriate to have a reasonable
17 time period to limit the reopening, just like it's
18 appropriate for Congress to say, the dollar amount in
19 controversy for your claim must be \$10,000.

20 QUESTION: Yes, but there --

21 MS. GUSTIN: I think there's a procedural --

22 QUESTION: There Congress has said, you have to
23 have \$10,000 or whatever it is, but Congress has not
24 provided any period for reopening.

25 MS. GUSTIN: No, but I think the Secretary has

1 filled that gap with her regulation, and I think that's an
2 appropriate time period, and the Secretary uses that time
3 period and has relied upon it and convinced this Court
4 that millions of dollars can be recovered from hospitals
5 within that 3-year time period under the graduate medical
6 education regulation in Regions Hospital.

7 And I think that Congress wanted the providers
8 to stand on an even footing with the Secretary in regard
9 to these corrective retroactive adjustments, and that's
10 why the language in the statute says that providers or the
11 Secretary may have corrective retroactive adjustments when
12 the provider's payments have been excessive or when they
13 have been underpaid.

14 Congress gave us either situation, but the
15 Secretary's reading turns that system upside down and
16 makes it so that the Secretary only has that right,
17 because we have no right to correct the Secretary's action
18 if we cannot have review of a refusal, and therefore the
19 most abusive situations may go uncorrected if the
20 Secretary's system is allowed to stand.

21 Intermediary insurance company employees could
22 intentionally decide not to reopen because they don't like
23 the particular provider. They could have a system of
24 covering up information, and as long as they kept that
25 information hidden for 180 days, we'd have no recourse.

1 We talk about final --

2 QUESTION: What was the nature of the
3 reimbursement that you say you were entitled to and didn't
4 get? It was a little fuzzy to me.

5 MS. GUSTIN: The nature of the reimbursement was
6 owner's compensation. The owners who operate the home
7 health agency are entitled to compensation, and the
8 regulation says that the compensation should be in
9 accordance with comparable institutions.

10 QUESTION: And you made that claim initially and
11 were turned down.

12 MS. GUSTIN: I beg your pardon?

13 QUESTION: You made a claim for the owner's
14 compensation originally.

15 MS. GUSTIN: It was on the cost report. It was
16 claimed on the cost report.

17 QUESTION: Yes, and it was denied, and you
18 didn't appeal it.

19 MS. GUSTIN: And an adjustment was made, and no
20 appeal was taken.

21 QUESTION: It was not -- it wasn't denied in
22 full, denied in part. They gave you lower compensation.

23 MS. GUSTIN: Lower compensation.

24 QUESTION: You just claimed that the rate should
25 have been higher.

1 MS. GUSTIN: Yes, because it should have been
2 based upon the salary survey for chain operations, because
3 this was a chain operation. The salary survey that they
4 used was for one individual agency, and that range was,
5 like, 28 to 58 --

6 QUESTION: Well, you had -- you knew that there
7 were chain operations --

8 MS. GUSTIN: Yes.

9 QUESTION: -- and individual operations. Why,
10 when you were reduced in the amount you claim, didn't you
11 make that argument, we're like the chains?

12 MS. GUSTIN: Well, we had reported as a chain.
13 We did not know that the intermediary had the salary
14 survey for chain operations which established a salary
15 range between \$71,000 and \$98,000. That salary range was
16 not applied to these petitioners. Instead, a much lower
17 salary range for an individual agency was applied.

18 This information about the salary survey was
19 within the intermediary's knowledge. It was not within
20 our knowledge. They did not tell us that they had this
21 other salary survey and that it was being used against us,
22 and we believe that they should have, and that that was a
23 violation of the law because they should have told us
24 everything that they were basing their adjustment on, and
25 we have a right to rely upon the intermediary doing the

1 right thing, doing the --

2 QUESTION: Maybe you have a cause of action
3 against the intermediary.

4 MS. GUSTIN: Well, we don't have a --

5 QUESTION: That's the agency here.

6 MS. GUSTIN: I don't think we have a cause of
7 action against the intermediary because they're the agent
8 for the Government, and the cause of action is supposed to
9 be brought against the principal, because they're
10 responsible for what their agent does and, indeed, it's
11 the Government and their position that they don't have to
12 allow any type of review of the intermediary's action,
13 which keeps us from getting the appropriate amount of
14 compensation, and if we could prove this unlawful action,
15 then failing to reopen would be an abuse of discretion,
16 and then we would have the --

17 QUESTION: How did you find this out later
18 rather than earlier? Why couldn't you have found it out
19 sooner?

20 MS. GUSTIN: Well, the discovery process that
21 would be available would only happen if you filed a normal
22 appeal process and started down the normal route with
23 Provider Reimbursement Review Board, and then, even if we
24 had done that and asked the question, there's no guarantee
25 that they would have then told the truth, and --

1 QUESTION: But you didn't do it. You didn't do
2 it, so --

3 MS. GUSTIN: No, we didn't do it.

4 QUESTION: You're saying, we could have done it,
5 but we didn't do it, and now, later on, we want to do it.

6 MS. GUSTIN: No --

7 QUESTION: That's essentially --

8 MS. GUSTIN: We're saying, based upon the
9 information that we had, we --

10 QUESTION: But you could have gotten -- if you
11 appealed to the PRR, whatever --

12 MS. GUSTIN: PRRB.

13 QUESTION: You could have then had discovery,
14 and so --

15 MS. GUSTIN: And we may or may not have found
16 out the information then, because they may have said, no,
17 we don't have the survey --

18 QUESTION: But you said we're not going to
19 bother using the remedy that Congress did provide. That
20 is, in 180 days you can pursue this. You didn't --
21 because you said, well, maybe you would have failed. I
22 don't --

23 MS. GUSTIN: I think that your concern actually
24 shifts the whole question of finality into the other realm
25 in which all providers who were denied reimbursement for

1 any reason would have to file an appeal within 180 days,
2 or know that even if they discovered wrongful action on
3 the part of intermediary there's no recourse.

4 Even if the law was changed and if regulations
5 were determined invalid after the 180 days, there would
6 have been no recourse.

7 QUESTION: But you haven't given a reason why
8 you didn't have a perfectly adequate remedy for your case
9 within the 180 days. You said, well, before you got to
10 the board you would not have had discovery, but then you
11 would have had discovery.

12 MS. GUSTIN: We would have had discovery,
13 but --

14 QUESTION: In other words, she's saying, that is
15 not this case, the hypothetical that you --

16 MS. GUSTIN: Oh. But this case --

17 QUESTION: I'm turning the tables for once, you
18 know.

19 (Laughter.)

20 MS. GUSTIN: Yes. That is not this case, but
21 this case stands for more than just this case, because
22 every provider will be bound by the ruling that comes out
23 of this Court, and so I think it's important to understand
24 the ramifications of the decision that you make, and the
25 situation might not be like this case, and it might be

1 that the intermediary has intentionally covered up
2 evidence, and then on the 181st day comes out and
3 announces we hid this from you.

4 QUESTION: You have to consider perhaps we
5 should have not take your case and waited for such a case.

6 MS. GUSTIN: Well, I believe that the facts in
7 our case are sufficient for this Court to decide, because
8 I think it is wrong for the intermediary to have a salary
9 survey that they know about that we do not know about and
10 not use it when they're required to do so under law.

11 I think that's certainly a strong enough case
12 for this Court, and the only way that we discovered this
13 is when we hired a CPA who had represented other clients
14 and had seen the salary survey used for those other
15 clients, so by independent means we discovered this.

16 The intermediary may never have told us. We may
17 never have been able to find out that they were doing
18 this, and I think that's the problem with the situation
19 here. The intermediary and its employees can do anything,
20 and as long as we don't know about it for 180 days, they
21 can violate any law, and if they refuse to reopen, there
22 is no recourse for the --

23 QUESTION: It's not a perfect world.

24 MS. GUSTIN: It's not a perfect world.

25 QUESTION: There has to be an end of litigation.

1 You could say in any case that new evidence comes up later
2 and we can start relitigating all over again.

3 MS. GUSTIN: But we're -- we're satisfied to do
4 this within the confines of the Secretary's regulation on
5 reopening, the 3-year period.

6 QUESTION: Thank you, Ms. Gustin.

7 MS. GUSTIN: Thank you.

8 QUESTION: Ms. Blatt, we'll hear from you.

9 ORAL ARGUMENT OF LISA A. BLATT

10 ON BEHALF OF THE RESPONDENT

11 MS. BLATT: Mr. Chief Justice, and may it please
12 the Court:

13 The Secretary has reasonably construed the
14 Medicare Act not to require administrative review of an
15 intermediary's decision refusing to reopen under the
16 Secretary's regulations. The text of section 1395oo(a)
17 gives providers a right to an evidentiary hearing before
18 the board if they are dissatisfied with the final
19 determination as to the amount of their total program
20 reimbursement.

21 That language refers to the intermediary's
22 annual substantive reimbursement determination --

23 QUESTION: So this perhaps presumably happens
24 about once a year?

25 MS. BLATT: Yes. For each cost period there is

1 an NP -- a notice of amount of program reimbursement,
2 which is referred to as the NPR, and it's clear that the
3 language -- both sides concede this, petitioner concedes
4 this, that that is a final determination as to the amount
5 of --

6 QUESTION: Now, the statutes don't refer to any
7 reopening right.

8 MS. BLATT: That's correct.

9 QUESTION: But the Secretary has nonetheless
10 promulgated a regulation allowing an application for
11 reopening.

12 MS. BLATT: That's correct.

13 QUESTION: Within 3 years.

14 MS. BLATT: That's correct.

15 QUESTION: And what provision of the statute
16 does the Secretary look to for authority to even have such
17 a regulation?

18 MS. BLATT: The Secretary has relied on her
19 general rule-making authority to promulgate that, which is
20 in section 1302 and 1395hh, and at least the D.C. Circuit
21 and the Ninth Circuit have held that the Secretary's
22 general rule-making authority is the statutory basis for
23 the reopening regulation.

24 QUESTION: -- reopening were granted within the
25 discretion referred to by the Secretary, would there be an

1 appeal right from that --

2 MS. BLATT: If there's a --

3 QUESTION: -- decision? If it's reopened and a
4 decision is made, then that would trigger some new appeal
5 right?

6 MS. BLATT: Yes, with respect to the matters
7 revised, so if there's a correction --

8 QUESTION: Uh-huh.

9 MS. BLATT: -- and obviously if the -- what
10 happened in the Regions case, if there was a request for
11 recoupment, then there's 180 days to challenge the actual
12 change.

13 QUESTION: What if there's no correction? What
14 if, in one of those rare cases where the Secretary reopens
15 in order not to -- not for her benefit, but for the
16 benefit of a claimant, she finds nonetheless against the
17 claimant, then would that determination be appealable?

18 MS. BLATT: The Secretary's position, as
19 reflected in the manual, and as in the regulation, is that
20 there has to be an actual correction or an adjustment to
21 the cost report. It's rare, but it does happen, where
22 there'll be a notice of reopening issued, a
23 reconsideration, and yet no change. It's been the
24 Secretary's --

25 QUESTION: Sort of a one-way appeal, where she

1 loses -- well, let's see. Where there's an adjustment --
2 where there is an adjustment -- if there's an adjustment
3 upward, no one would have an interest in appealing, right?

4 If there's an adjustment downward, the claimant
5 can appeal.

6 MS. BLATT: That's correct, although if there's
7 just a partial adjustment upward, the Secretary has
8 construed or has permitted an appeal in that situation.

9 QUESTION: A partial, I suppose.

10 MS. BLATT: A partial adjustment.

11 QUESTION: That way the claimant doesn't get
12 everything that he or she wants. Would that be a final
13 order?

14 MS. BLATT: The regulations give the providers a
15 right to challenge that as a new substantive reimbursement
16 determination, and it's actually a revised NPR that's
17 issued, and they can challenge the matters that got
18 revised, or that were revised.

19 QUESTION: I know you say they can challenge it,
20 but is it in your view a final order?

21 MS. BLATT: It's consistent with the language of
22 a final determination as to the amount of total program
23 reimbursement.

24 QUESTION: It's under oo? You think it comes
25 under --

1 MS. BLATT: Yes. Yes. It's under
2 oo(a)(1)(A)(i).

3 QUESTION: So that if there is a reopening, a
4 discretionary reopening, and there's an adjustment, the
5 order providing for the adjustment is a final
6 determination, but if there's no adjustment, it's not a
7 final determination.

8 MS. BLATT: That's correct. There's -- the
9 Secretary has rationally distinguished and said, if
10 there's just a mere refusal to alter or reconsider a prior
11 determination there's no right to an evidentiary hearing
12 before the board.

13 QUESTION: No, but we're assuming -- I'm
14 assuming there has been a 3-week evidentiary hearing, a
15 lot of findings of fact, and everything else, but the net
16 result is, no adjustment.

17 MS. BLATT: Right. It's --

18 QUESTION: That's not a final determination.

19 MS. BLATT: It wouldn't be an evidentiary
20 hearing. It's just before the intermediary. The
21 intermediary would review it, and then not make --

22 QUESTION: Right. Okay. Yes.

23 MS. BLATT: That has been the Secretary's
24 position thus far. I mean, that's not what happened in
25 this case. There's no --

1 QUESTION: Of course, that is not this case, you
2 would --

3 QUESTION: No.

4 QUESTION: -- have to say, right.

5 (Laughter.)

6 MS. BLATT: There's no question that there is
7 not a -- that there was no reopening here.

8 QUESTION: Do you think the Secretary could
9 issue a regulation authorizing review in that situation?

10 MS. BLATT: In this case, or --

11 QUESTION: Well, either the no-adjustment case
12 or this case, either one.

13 MS. BLATT: I think it's possible. I don't
14 think the most --

15 QUESTION: Would it be consistent with the
16 statute?

17 MS. BLATT: Yes. I think it's not the most
18 natural reading, to read a mere refusal to reconsider a
19 prior determination a new final determination as to the
20 total amount, but I think the statute's ambiguous, and the
21 Secretary could articulate a reasonable rationale to
22 justify that result.

23 The question here, of course, is whether the
24 Secretary reasonably construed the statute not to require
25 a full-blown evidentiary hearing, and we think that

1 language supports that for two -- basically two reasons,
2 and that is because it is the Secretary's regulations, not
3 the Medicare Act itself, that provides the opportunity to
4 seek reopening, and we think it does further the interest
5 of administrative finality.

6 And this Court reached a quite similar
7 conclusion in the Califano v. Sanders case, when the Court
8 held that there was no judicial review for refusals to
9 reopen social security benefit determinations, and the
10 Court said that for two reasons.

11 One was the opportunity to reopen was afforded
12 solely by the Secretary's regulations and not the Social
13 Security Act, and a contrary reading would frustrate
14 Congress' intent to impose a specific time limit on the
15 review of the initial decision.

16 And this complaint about an anomaly with
17 reopening under the Medicare Act is no different under the
18 Social Security Act. The claimants are permitted the
19 opportunity to seek reopening, and it may or may not get
20 granted but there's no right of review and, of course, the
21 Commissioner of Social Security can institute reopening,
22 and if there's a change in the benefits, then only the
23 claimant will get review.

24 QUESTION: Ms. Blatt, what would happen under
25 the current regulations if the Secretary reopens and says,

1 we reimbursed them too much and we want to recoup part of
2 it, and then the provider says, well, you also underpaid
3 us, so we want to offset the underpayment against the
4 excess payment. Did the Secretary allow that kind of a
5 defensive set-off if the Secretary initiates the
6 reopening?

7 MS. BLATT: Reopening is what's known in the --
8 it's issue-specific, and so if it's on that issue, I
9 imagine -- I'm not positive of this -- that there is that
10 kind of give-and-take.

11 QUESTION: But if it's on a discrete issue --

12 MS. BLATT: If it's not on the same issue, then
13 they need to formally request a reopening on that issue,
14 and then the intermediary would consider it based on the
15 criteria.

16 QUESTION: And if it says no --

17 MS. BLATT: If it says no, it's not reviewable,
18 no, and the review process would be issue-specific, and
19 only if there was an adjustment would that be subject
20 to --

21 QUESTION: How do you respond to the essential
22 fairness argument that's made that the Secretary has given
23 herself 3 years to reopen and if she loses she can get
24 review, but the providers get this nonreviewable order
25 that they're stuck with.

1 MS. BLATT: Right. In addition to this being no
2 different than the Social Security Act, which, by the way,
3 I think is quite significant and governs all medicare
4 beneficiaries on whose behalf these hospitals are
5 providing the services as well as physicians who provide
6 services, they're governed by the same regime --

7 QUESTION: They reopen only the issue there and
8 not the whole determination? I mean, I -- it's bad enough
9 as Justice Ginsburg describes it, but it really gets
10 unfair when you say the Secretary does reopen, but only
11 reopens for this one issue, and even though you may have
12 things on the other side, you can't bring them in. That
13 is really unfair.

14 MS. BLATT: They can bring them in, and they can
15 request reopening --

16 QUESTION: Yes, but she --

17 MS. BLATT: -- as 3 years --

18 QUESTION: But she can say no, and there's no
19 review for it.

20 MS. BLATT: That's right, and I don't think
21 there would be any difference under the Social Security
22 Act.

23 QUESTION: That's also an issue-by-issue thing.

24 MS. BLATT: Yes. It's -- the way the -- the way
25 the process works, you're only entitled to an

1 administrative hearing before an ALJ if there's an actual
2 change in the benefits, and there's no review if there's
3 simply a denial.

4 The other reason why, that there's not an
5 irrational balance is that this is a \$120-billion program,
6 and there are, as we said in our acquiescence to the
7 petition in this case, a backlog of 10,000 cases before
8 the board, and it takes over 3 years just to get a hearing
9 on initial challenges to -- on challenges to the initial
10 NPR's, and it's just -- it would be an enormous
11 administrative as well as financial burden on the system
12 to open this up to any refusal to reconsider a prior
13 determination.

14 Presumably the petitioner's argument would
15 extend to refusals to reconsider, refusals to reopen, and
16 so forth and so on. You'd have 3 years after any kind of
17 decision, and that would be a new final determination
18 under that reading, and the Secretary has rationally cut
19 it off.

20 QUESTION: And as I recall you also make the
21 fairness argument that the Secretary gives herself 3
22 years, but the Secretary needs 3 years --

23 (Laughter.)

24 QUESTION: -- more than an individual applicant
25 does because she has a few more things to do.

1 MS. BLATT: The simple truth of the matter is,
2 the Secretary administers this program -- there are 38
3 intermediaries -- and has no access to the hospital's
4 records.

5 The hospital, on the other hand, are by and
6 large very sophisticated entities, and they're actually
7 very good about appealing within the 180 days. They have
8 6 months to appeal.

9 This case is particularly instructive, because
10 here the petitioner protested the \$50,000 that's at issue
11 here on the cost report. This was a red flag that the
12 provider was going to appeal, and as far as we could tell,
13 there is no reason why the provider did not appeal.

14 As far as the way the petitioner's brief was
15 structured is, the petitioner did appeal cost years prior
16 to 1989 --

17 QUESTION: You're talking about the brief before
18 the board, or the brief here.

19 MS. BLATT: I think it's the brief -- the blue
20 brief on the merits in this Court --

21 QUESTION: In this Court.

22 MS. BLATT: -- says the petitioner discovered
23 the salary survey in the course of appealing prior years,
24 and in all events the petitioner appealed in 1987, it
25 appealed 4 or 5 years after 1989, and could have sought

1 discovery. There's no reason to presume bad faith on the
2 intermediary with respect to production.

3 And again, like I said, there's just no reason
4 that the provider didn't appeal in this case.

5 If I could also turn to clause (ii), if I could
6 refer to it that way, and that's 1395x(v)(1)(A)(ii), which
7 this Court referred to as clause (ii) in the Good
8 Samaritan case, we think that that -- that this decision
9 squarely forecloses any argument that clause (ii) is the
10 basis for reopening and requires a reopening procedure.

11 What the Court held in Good Samaritan was that
12 clause (ii) is ambiguous, and it upheld the Secretary's
13 narrow reading as a year-end, and the Court several times
14 referred to it as a year-end book-balancing accounting
15 reconciliation, and that's -- that would reconcile the
16 amounts paid to the provider during the year that were
17 simply estimates, pre-audit, periodic payments with the
18 amount that the NPR determined to be allowable.

19 And that's -- actually, if you look at the NPR
20 in this case, it shows that reconciliation, and I think
21 it's on page -- I think it's -- it's page 36 of the joint
22 appendix, so this is how the Secretary administers the
23 program. This is how the regulations work.

24 A reopening procedure is something entirely
25 distinct from that. It's a substantive redetermination,

1 or at least a request to redetermine what had been
2 reimbursable.

3 If I could also address the issue that these are
4 private insurance companies, these are intermediaries
5 making the decision, these are the Secretary's agents and
6 they do act under her close oversight and supervision, and
7 we think it's also significant that intermediaries are
8 nominated by the providers themselves, and if there's some
9 suspicion that the intermediary is biased or unfair the
10 provider is always free to request a change in the
11 intermediary, or not nominate the intermediary.

12 There's simply no allegation in this case that
13 intermediaries act distinctively with bad faith with
14 respect to reopening as opposed to any other initial
15 decision and, of course, the provider and all hospitals
16 have the opportunity to challenge the initial underlying
17 determination within the 6-month time period.

18 Then if I could also address the question of
19 Section 1331 jurisdiction, in addition to the plain
20 language of section 405(h), the third sentence, which
21 forecloses any action arising under the Medicare Act, this
22 Court in Heckler v. Ringer and again in Weinberger v.
23 Salfi made clear that the Court was not going to look at
24 procedural labels or substantive labels, but would look at
25 whether the standing and substantive basis for the claim

1 arises under the Medicare Act.

2 And so I'm not sure the provider -- the provider
3 in this case talks about a collateral challenge. That's
4 not from any decision -- that doesn't come from any
5 decision of this Court.

6 The only exception, of course, is the Michigan
7 Academy decision and that was dealing -- a far cry from
8 this situation. There was no review whatsoever of the
9 Secretary's regulations under part B, and part A, which
10 involves this case as well, now, as part B, providers are
11 free to raise any kind of challenge before the board and
12 under the part A and part B beneficiary side, the
13 administrative law judge, and in the courts.

14 They can bring both amount challenges to their
15 benefits, as well as any kind of facial challenge to a
16 regulation, and so we just don't think the Michigan
17 Academy exception or distinction has any relevance to this
18 case, when there was a full right of review.

19 And again, I would also remind the Court about
20 the Sanders decision where, under the Social Security Act,
21 there is no right of review, and the Court made clear in
22 that case that 1331 was -- excuse me, that section 405(h)
23 barred jurisdiction, Federal question jurisdiction under
24 section 1331.

25 Then if I could just finally address mandamus,

1 the mandamus aspect of this, which the petitioner also
2 relies on, we think mandamus is barred by the second
3 sentence of section 405(h), but in all events there is no
4 basis for seeking mandamus relief in this case.

5 The two challenges are, of course, the refusal
6 to reopen, and then the underlying complaint about the
7 owner's compensation. Both of those require discretion on
8 the part of the intermediary.

9 The regulations are in the manual. It's plain
10 on its face that the decision whether to reopen is
11 discretionary, and certainly the question about whether
12 costs are reasonable and allowable under the statute also
13 requires the exercise of discretion.

14 And as to the underlying claim about entitlement
15 to reimbursement, certainly there's no question that the
16 petitioner failed to exhaust its administrative remedies
17 by not appealing within the time frame.

18 If there are no further questions, that
19 completes my argument.

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

21 The case is submitted.

22 (Whereupon, at 11:52 a.m., the case in the
23 above-entitled matter was submitted.)
24
25

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:

YOUR HOME VISITING NURSE SERVICES, INC. Petitioner v. DONNA E. SHALALA, SECRETARY OF HEALTH & HUMAN SERVICES.
CASE NO: 97-1489

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

BY Donna Marie Fedele

(REPORTER)