OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitioner, v. BRIAN ZEBLEY, ET AL.

CASE NO: 88-1377

PLACE: Washington. D.C.

DATE: November 28, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitioner

v. No. 88-1377

BRIAN ZEBLEY, ET AL.

Washington, D.C.

Tuesday, November 28, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

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

RICHARD P. WEISHAUPT, ESQ., Philadelphia, Pennsylvania; on behalf of the Respondents.

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PROCEEDINGS

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 88-1377, Louis W. Sullivan v. Brian Zebley.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE PETITIONER

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

The court of appeals, in this nationwide class action, invalidated the central regulatory requirement that has governed eligibility for children's disability benefits since the outset of the Supplemental Security Income program in 1974. The regulation at issue provides that in order to qualify for benefits a child must have an impairment or a combination of impairments that is included in the Listing of Impairments in the regulations, or is equal in severity to a listed impairment.

We submit that the court of appeals erred for four reasons in invalidating these regulations on their face. First, the regulation Respondents challenge is supported in a number of respects by the text and legislative history of the definition of disability in Title XVI.

Second, the regulation requiring that a children's

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impairment meet or equal a listed impairment was adopted in 1974 at the outset of the SSI program. It therefore represents a contemporaneous interpretation of the act by those charged with its initial implementation, and a consistent and long-standing interpretation of the act as well.

Third, Congress ratified this regulatory requirement that Respondents challenge in 1976, soon after the SSI program got underway. Specifically, in the 1976 unemployment compensation amendments, Congress directed the Secretary to publish the objective criteria that he was then developing internally to implement the regulation, and to use those criteria to determine disability. And the special Part B Listing of Impairments utilized for children were issued the following year, pursuant to that statutory directive and special delegation of legislative rule-making authority.

And fourth, the Secretary's regulatory approach adheres to the functional orientation of the Social Security Disability programs. The Part A Listing, which children can also qualify under, is principally applicable, or was designed for adults, and it identifies those impairments which the Secretary has determined would render an adult unable to work, which is itself obviously a functional predicate for the Listing.

The Part B Listing has the same thrust. In 1974, in fleshing out the statutory standard of comparable severity, the Secretary, after a two year study in the initial implementation of the SSI child's program, with the aid of physicians and other experts, identified those impairments that have an impact on a child's growth and development that is comparable to the effect that an impairment has on an adult's ability to work. Therefore, the Part B Listing carries forward the functional orientation of the act.

Furthermore, some of the specific listings under Part B require a further and explicit consideration of functional aspects. For example, and of particular relevance in this case, is -- are the mental impairment listings. For example, the mental retardation, under which Respondent Zebley and Respondent Raushi were evaluated, specifically provides for consideration of functional aspects.

I call the Court's attention in this respect to page 233 of the joint appendix, where the mental retardation listing is included. I am informed by the Department of Health and Human Services that 40 percent of the children who are found disabled are found disabled because of mental retardation. And Listing 12 -- 112.05 identifies the qualifying standards as, in the alternative,

achievement of only those developmental milestones generally acquired by children no more than one-half the child's chronological age, and IQ of 59 or less, or an IQ of 60 to 69, inclusive, and in addition a physical or other mental impairment imposing additional and significant restriction of function or developmental progression. This is at the bottom of the page. So, it seems to us particularly odd in this case that the claim would be leveled that the special Part B Listing is not faithful to the functional orientation of the act, both because functional standards are imbedded in the Listings themselves, as the Secretary specifically announced when the Part B Listing was adopted in 1976, and --

QUESTION: Mr. Kneedler --

MR. KNEEDLER: Yes.

QUESTION: Isn't a functional evaluation often a necessary predicate to making a medical diagnosis?

MR. KNEEDLER: Yes, and the way in which this program is implemented, in fact, provides for a functional assessment in many circumstances.

QUESTION: Well, if it makes it to the list. But, I guess you would acknowledge that there are children with impairments that aren't on any of the Secretary's lists.

MR. KNEEDLER: Well, there may be -- there may be children who aren't on the list, but that doesn't -- I

mean, there are two points about that. One is, of the -- if the impair -- if the specific impairment is not listed, if the specific criteria for the impairment are not listed, the child can still establish that he meets the level of severity set forth in the Listings by showing that he -- that his particular impairment equals a listed impairment. And in determining that, in matching something to the Listings, what the decision-maker has to do is look for the medical signs and findings and symptoms of the impairment. One of those findings are functional, would be the functional limitation imposed on the child as a result of his impairment. If those functional limitations match the level of severity in the Listing, he will be found eligible.

QUESTION: If -- if it were an adult being considered for disability benefits, steps 4 and 5 of the evaluation appear to catch some severe impairments that aren't on the Listings for adults.

MR. KNEEDLER: Well, the principal thrust of steps 4 and 5, step 4 is if the person can do his past work he is not disabled, and that would -- we'll put that to one side. But step 5, what step 5 provides for is the determination of whether the individual can do other work that exists in the national economy, taking into account his residual functional capacity and --

QUESTION: I understand, but would you agree with me that those steps, for adults, appear to pick up some people who aren't on the lists?

MR. KNEEDLER: It may pick up some people, but this gets to the point I was going to make. The reason that a -- that an adult would be found disabled at step 5 would typically be, not because of the severity of his impairment standing alone, but because he, in addition, has an adverse non-medical factor, a -- an adverse vocational factor. He is of advanced age, he is of poor education or he has poor job training.

Congress specifically provided, in paragraph (B) of the statutory provision here, for those vocational factors to be considered in the case of an adult. It did not include a similar list of non-medical factors for children.

QUESTION: Well, what is it that the Secretary has done, beyond Part B Listing, to ensure that children's impairments, of comparable severity to an adult, are handled properly?

MR. KNEEDLER: Well, what the -- what the -- it is the Part B Listing --

QUESTION: I mean, it sounds like all the Secretary has done is to make the Part B Listing, which admittedly doesn't include some major diseases, as I understand it,

things like Down syndrome and cystic fibrosis and heaven knows what all.

MR. KNEEDLER: As to that, Justice O'Connor, I -- the Respondents and some of the amici, I think, have a misapprehension about the way the Listing works. The Listing is not a listing of diseases. It is a listing of mental and physical impairments. The statutory term is mental and physical impairment. And what the Listings do is go body system by body system and identify impairments to the body system. For example, the ability to move a limb, or the -- or mental impairments, cognitive or emotional, or other -- other disorders. What the Listings do is identify impairments in the body system. Any one impairment might be due to a variety of different diseases.

For example, Down syndrome, as we point out in our brief, Down syndrome children are typically quite mentally retarded, and the experience, as we point out in our supplemental brief, with Down syndrome is most Down syndrome children are found disabled because they meet the mental retardation listing. And if the Down syndrome child would have other disorders associated with that, such as a digestive problem or something of that sort, then you would look to that body system listing to see whether the effect of the impairment on that body system

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renders him disabled.

So, the fact that a particular disease is not listed as such under the Listings is really beside the point. And again, the statutory definition of disability for an adult refers to an individual who has a physical or mental impairment, that he is unable to engage in substantial gainful activity by reason of a physical or mental impairment, which is the effect on the body's ability to perform, not the medical diagnosis of a particular disease.

And for children, I -- in further response to Justice O'Connor's question, for children the statutory standard in the parenthetical at the end of the statute --of the statutory definition of disability is for a child with a mental or physical impairment of comparable severity. In other words, for adults the standard of disability is defined in terms of -- the ultimate question is ability to work. Is the adult unable to perform substantial gainful activity by reason of his impairment. In other words, the ultimate question is that by -- unable to work by reason of impairment, the disability to work.

For children, though, the statutory standard is the impairment of comparable severity. That phrase does not focus on the end result of whether the child can work. The phrase comparable severity instead focuses on the

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severity of the impairment.

QUESTION: So, under your view, the phrase, with reference to adults, unable to engage in any substantial gainful activity, is just irrelevant with respect to the child?

MR. KNEEDLER: It is not irrelevant in terms of --

QUESTION: Are you reading it out of the statute as to the child?

MR. KNEEDLER: No. In terms of measuring, in terms of ascertaining what the phrase comparable severity means, what the Secretary did was to look at what is comparable in children to performing substantial gainful activity in adults. And as we point out in our brief, in the preamble to the '77 regulations, what the Secretary has explained is that in children the primary life activity isn't work, as it is for adults, but it's development and growth. And therefore the Secretary identified in the -- in the special Listing for children the impairments that have an effect on development and growth in children that is comparable to the effect on the ability to perform substantial gainful activity in adults.

QUESTION: And under your interpretation that's a functional analysis that is comparable to the functional analysis that you engage in in determining substantial gainful -- substantial gainful activity standard?

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MR. KNEEDLER: Right. For example, the Part A Listing for adults identifies impairments that the Secretary has determined would render an adult unable to work. And that is itself a functional -- even though -- even though the measurement of the severity of the impairment could be described as a medical measurement, and that is the way in which it's typically referred to, it does take into account functional impacts. The measurement of severity, in other words, is done in terms of its functional impact. For an adult, the ability to work. For a child, the level of severity is measured in these other ways, in terms of the child's ability --

QUESTION: It is still not clear to me, if you don't read it, that phrase, any substantial gainful activity, out of the statute, why is it that you require a hearing as to an adult, or an individualized determination, whereas you don't with the child. Or is that misstating the issue?

MR. KNEEDLER: I think it -- yes, I think it -- I hesitate -- yes, I think it is misstating the issue. Children, there is an individualized determination for children. Children are in a position to show that they have an impairment, their own medical condition, based on their individualized showing of what their impairment is, that is included in the Listings, or, if not included in

the Listings, that it is equal in severity to a listed impairment. And that is the individualized determination.

What the Secretary has done in the Listings, though, is to say -- the statutory phrase comparable severity is very general, and what Congress -- what the Secretary did, pursuant to Congressional authority, is to try to give content to that standard of comparable severity.

QUESTION: Would there be a case where a 17-and-a-half-year-old could not obtain benefits, but then upon reaching 18 he could?

MR. KNEEDLER: It's possible, but -- it's possible that he might, but it seems -- there are two reasons for that. One is that the over 18, the touchstone of the disability program is ability to work, and thus at age 18 the decision-maker would look at the child's ability to work. And in looking at that question, not simply -- not only look at the severity of the impairment, but other non-medical, the vocational factors. A child, the child may have no significant education --

QUESTION: But if the disease -- if the disease and the impairment is the same --

MR. KNEEDLER: If the impairment is the same, yes, but what --

QUESTION: How is it that at age 17 and a half you don't obtain the benefit and at 18 plus you do? How --

how can you say that, based on that result, the -- there is comparability?

MR. KNEEDLER: Well, the reason, there is comparability in the severity of the impairment. In the hypothetical you gave me, the severity of the impairment is the same in the two examples. The statutory standard is comparable severity, which, you look at the severity of the two impairments. For the hypothetical person you are describing, it would often be the case, I think, that the reason the person would become disabled at age 18 is because you then take into account the additional non-medical factors, the vocational factors. There is age, education, and work experience.

QUESTION: But I thought you said that you have to take that into account anyway, because you are not reading that out of the statute as to children.

MR. KNEEDLER: No, well, what I said was you don't read it out of the statute in the sense that, in deciding what is comparable severity. The touchstone is comparable severity to an impairment that would render an adult disabled. In the example that you are giving, and I think in most of the cases involving adults who are found disabled at step 5, it isn't the impairment alone that renders them disabled. It is the impairment plus an adverse vocational factor.

QUESTION: Mr. Kneedler, I -- this -- this exchange is bringing out what has puzzled me. You say it is an impairment comparable to one that would render an adult disabled. But what you have just demonstrated is that that is not an absolute. It depends on the adult. Which adult are you using for your comparability analysis here? An adult who has a lot of skills, or an adult who has little skills?

MR. KNEEDLER: I think your question highlights the difficulties with Respondents position.

QUESTION: Are you using a middle aged adult as your standard, or an elderly adult?

MR. KNEEDLER: The comparable, the touchstone is the Part A Listings, which would render adults generally disabled. In other words, it would render an adult disabled on medical grounds alone --

QUESTION: Alone.

MR. KNEEDLER: -- excluding a functional assessment. The -- an adult who might be found disabled not on the basis of impairment alone, but on the basis of his advanced age or inadequate job training or education, that is not a person -- his impairment -- his impairment may not be of comparable severity, would not be. Because the Listings are intended to match comparable severity of children's disability, or children's impairments and

adults. It is when you go beyond that, and typically the adult would be found disabled for some other reason. So it is not -- it is not an impairment that you could confidently conclude in that situation would render an adult disabled, on the basis of the impairment alone.

QUESTION: I think I understand.

QUESTION: Mr. -- let me just clear up one thing in my mind, Mr. Kneedler. In step 5, in the adult situation, as you describe it, you often rely on non-medical factors, that are -- poor job training or age or something like that. But is it not possible, in step five for adults, that the determination could be based entirely on medical factors, none of which itself was sufficient under the Listings on -- in step 3.

MR. KNEEDLER: It's -- it's conceivable. I mean, the progression -- the progression would contemplate that that should happen. But the way the Listings and step 5 interact, step -- the Listings are intended to identify those impairments that would enable you to conclude that the person is disabled solely because of his --

QUESTION: Correct.

MR. KNEEDLER: -- his impairment. The latter steps are designed to factor in the age, education and work experience.

QUESTION: Yes, but they also, it seems to me, factor

in the possibility that there is a combination of three or four factors, none of which in itself is sufficient to meet the standards on the step 3 list. And I am not quite sure how you take care of that problem in the non-adult situation, where you have these categories, which I see -- 12 categories, or whatever they are, and perhaps the child would not satisfy any one standard, but conceivably a combination of just being short on three or four of them, would be comparable to the step 5 problem.

MR. KNEEDLER: But, the combination of the impairments can also be considered, in fact is required to be considered, at step 3 of the Listing as well. In other words, if a child has two impairments, no one of which meets or equals the Listing standing alone, then the decision-maker has to look at those impairments in combination and look at their effect --

QUESTION: What regulation, what part of the regulation requires that?

MR. KNEEDLER: Well, there are -- in particular, I am referring to SSR 83-19, which is included at page 239 of the joint appendix. And also, that interprets a regulation, which is cite, to the Court, 20 C.F.R. 416.926, which is medical equivalence. And that -- paragraph A of that regulation says, and this is not in the record, but it says if you have more than one

impairment, and none of them meets or equals a listed impairment, we will review the symptoms, signs and laboratory findings about your impairments to determine whether the combination of your impairments is medically equal to any listed impairment. So the regulation requires that --

QUESTION: Medically equal to any listed impairment. But see, my hypothesis is that none of them would be medically equal to the particular standard --

MR. KNEEDLER: No, but what that means is medically --

QUESTION: -- for the skeletal system, or the mental system, whatever it is. But you nevertheless -- it seems to me -- well, maybe I just --

MR. KNEEDLER: Well, the way it works is you -- the ultimate inquiry is whether the combination of your impairments rises to the level of severity of impairments set forth in the Listings in general terms --

QUESTION: Well, my hypothesis is that it wouldn't. It wouldn't meet any one of the separate standards.

MR. KNEEDLER: Well, but what --

QUESTION: Does it then follow that child could never be termed permanently disabled?

MR. KNEEDLER: No, what -- if it doesn't -- what the decision-maker does is look at the combination of

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impairments and compare it to the impairment that is most similar. You look at what expression of impairments predominates, is it mental retardation with maybe secondary physical problems or vice versa. Depending on which one predominates, you look at that listing, and then you take into account additional functional limitations imposed by the second -- the additional or the multiple impairments and see whether they rise to the level of impairment severity set forth in the Listing.

Because, again, the statutory touchstone is comparable severity, the severity of the impairment, not residual functional capacity, what the individual can do despite his impairment. So the Listings specifically do take into account the concern you are raising, of multiple impairments.

QUESTION: Mr. Kneedler, the Respondents say that the Secretary has interpreted Regulation 83-19, or applied it, in such a way that it just doesn't consider functional impairment. And I understood from your brief the Secretary is considering changing it or clarifying it or something?

MR. KNEEDLER: Clarifying it. Let me -- let me explain that --

QUESTION: Which indicates to me maybe there is a problem there.

MR. KNEEDLER: Well, I think it is a problem in Respondents' misconstruction. Respondents' allegation is not as to the Secretary's practice. As I understand their argument in the citations in the brief, it is entirely based on what they perceive to be the language of the regulation, which they say precludes consideration of functional impair -- functional limitations resulting from an impairment, in deciding whether something equals the Listings.

The Secretary does not construe his own interpretive ruling in that way, and under Udall v. Tallman the Secretary's interpretation of SSR 83-19 is entitled to very substantial deference. And, after all, 83-19 is itself an interpretive ruling that interprets the regulation, which does provide for an equivalency determination.

But beyond that, I mean, several factors point out that Respondents are incorrect in assuming that the Secretary has read his own regulation to bar consideration of functional impact. For -- we discuss both these things in the supplemental brief that we filed last Wednesday. In the typescript version, in footnote 6, we cite the -- a passage from the physicians' training manual, which is sent out to the physicians in the field who are specifically charged with making a determination of

whether a child's impairment equals the Listing. And this instruction pertains to adults, but the point I am going to make pertains to children as well.

It says medical equivalency permits a physician to arrive at a judgment that the findings, although not exactly mis -- matching the listed criteria, have the same effect as a listed impairment with regard to inability to perform work-related activities. For a child the concept would be that, in deciding equivalency, you can see whether the child's impairment, although not listed, has the same impact on his ability to perform the sorts of functions to which that body system relates as a listed impairment.

And the other point I would make, that we also point out in our supplemental brief, is that the -- Secretary, through SSA, undertook a study of the child's disability program this year. And the preliminary results of that study, requested by the Senate Finance Committee in its consideration of pending legislation, evaluated and discovered certain areas where the Secretary thought that there -- that there should be additional attention to making sure that adjudicators are fully complying with the Listings.

And one of the areas in which the study described areas in the men -- area of mental impairments, was that

as to those that were found not to equal the Listing, erroneously, they were almost exclusively based on the failure to consider how all documented impairments combined to affect the child's overall functional capacity. So the Secretary, in evaluating decisionmaking by lower -- by -- in the sample of cases that were obtained, specifically reaffirmed the idea that this -- that the equivalency concept is not construed or applied.

QUESTION: Where is that statement you have just quoted?

MR. KNEEDLER: This is at page 7 of the typescript version of our -- of our supplemental brief, I am sorry, that we filed on November 22. That quotation --

QUESTION: Well, so that may show that other people are misinterpreting the regulation as well, but I suppose it shows, at least, the Secretary doesn't --

MR. KNEEDLER: Well, the error rate for mental impairments was only 10 percent. Now, one hopes that it could be brought down from that, but in the review of the cases the Secretary determined that 90 percent of the denials were correctly decided. Now, it -- I don't think there is any indication that adjudicators generally, and Respondents haven't pointed to any, that adjudicators generally believe that functional -- functionally related consequences can't be taken into account in the equals

area.

If there are no further questions, I would like to reserve the balance of my time for rebuttal.

QUESTION: Very well, Mr. Kneedler.

Mr. Weishaupt.

ORAL ARGUMENT OF RICHARD P. WEISHAUPT

ON BEHALF OF THE RESPONDENTS

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

The question presented in this case is whether the admittedly --

QUESTION: If -- you wind on the side -- if you wind that up on the side --

MR. WEISHAUPT: Thank you.

The question in this case is simply whether the admittedly disparate treatment afforded children is consistent with the language passed by Congress. Congress, as Mr. Kneedler correctly pointed out, required that children were to be treated in such a way that if they had an impairment or combination of impairments of comparable severity to that which would disable an adult, then they would be found disabled.

It is our belief, and it is adequate -- amply supported by the record, that that is simply not the case, that the Secretary frequently has a great deal of

difficulty dealing with children who have impairments that combine a number of different factors, or that are not on the list -- on the very short list that the Secretary has.

QUESTION: Well, Mr. Weishaupt, the -- Mr. Kneedler says that the equivalence determination takes care of that.

MR. WEISHAUPT: Yes.

QUESTION: And I think you better address yourself to that, that the Secretary's interpretation is that the equivalence determination allows consideration of the functional impact of even multiple conditions.

MR. WEISHAUPT: The Secretary's interpretation, as promulgated by Ruling 83-19, which is the only thing on paper that addresses the question of equivalence, quite simply states that functional consequences are not to be determined. To quote briefly from that ruling, at joint appendix page 240, "The functional consequences of impairments, irrespective of their nature or extent, cannot justify a determination of equivalence." And that, quite frankly, is at the heart of this case. The Secretary does not have an adequate means with which to address the difficult cases.

Yes, it is true that many retarded children do quality for disability benefits because their retardation meets the Listing. But the problem is those children who

have a combination of impairments, or who have a rare disease, that simply does not come on the Listing or that have an atypical amount of functional loss.

The Secretary's argument seems to be, at least insofar as the Listings incorporate function, it seems to be that the Listings represent the Secretary's estimate of the typical impact of an impairment upon the typical case. But that is not the way that the Social Security Act is supposed to function. The Social Security Act is supposed to function in order to make case-by-case determinations of each individual, not only looking at that child as an individual and matching his findings up with the Listings, but also to determine how those impairments actually affect that particular child, what that child can do and what that child cannot do.

I think a good illustration of the problems that the Secretary has with more rare diseases is found in the Wilkinson case, which is -- which is cited in both our briefs. In that case the child there suffered from a rare liver disorder that meant that he swelled up at night, that he ran fevers three or four times a week, that he constantly cried, he couldn't leave the house; he was allergic to all standard food. But the, that particular rare liver disease was not on the Listing. He was also, as a result of the toxic chemicals that were thrown off by

his liver, slightly retarded. The Secretary's defense of that case was that the closest listing was the mental retardation listing, and since his retardation didn't yield him an IQ of under 69, that he simply was not disabled. There is no doubt that an adult in that case would get a very different examination.

QUESTION: If the Secretary took out the language there, in that Regulation 83-19, so that a medical -- a medical equivalency determination also looked to functional impairment, would there be anything left of your case?

MR. WEISHAUPT: That would go a long way toward resolving the problems that we have with the Secretary's approach. The remaining problem would be that the Listings for children are modeled to reflect exactly the same degree of impairment that is used for adults, in that process that is used for adults. The problem with that is that for -- the Listings do not represent the inability to perform substantial gainful activity, they represent a much higher cut, a cut that allows the Secretary to make presumptive determinations for the people who are so impaired that there is just no question that they can't perform substantial gainful activity.

In fact, the Secretary, with an express delegation of authority from Congress, has set the Listings at the level

that is used for determining disability among disabled widows. Disabled widows are found to be disabled if they cannot perform any gainful activity, which, according to the legislative history of that provision, is to be a much more stringent test than the test used for workers both in the Title II program, and in the SSI Title XVI program that was modeled on that Title II program.

A number of courts, including the court in Willowford v. Harris, have criticized the mechanical results that sometimes occur from using a Listings-only approach for widows. But whatever may be the shortcomings of that approach for widows, Congress clearly did not say that children shall be found disabled if they have an impairment of comparable severity to that which would render a widow disabled under the standard in the Act. And those were the two standards of disability that were in the Act at the time of original passage. On the one hand you had the inability to engage in substantial gainful activity, which was the test for workers, and then there was also the test for disabled widows, which was the inability to perform any gainful activity under regulations promulgated by the Secretary to so determine.

Congress meant to help children. All of the brief legislative history of the original SSI Act showed that there was grave concern for what Congress called among the

most disadvantaged of young children -- of all Americans. And the Secretary's approach of conflating the process for children and adults -- I am sorry, for children and disabled widows, into one test, which is seen throughout his regulations and clarifying rulings, is simply inconsistent with the plain meaning of the statute.

Mr. Kneedler made the suggestion that many of the adults who qualify at step 5 do so because they have adverse vocational factors: they are approaching advanced age, they are poorly educated. That is true. However, 20, fully 25 percent of all the qualifying adults, according to the Secretary's figures, quality because they -- at that step 5, because they have either a medical or a medical/vocational set of problems that renders them disabled. It is very clear from the Secretary's regulations and the cases in this Court, that a person with no adverse vocational factors, a young person, well educated, with job training, could quality as disabled even if he or she did not meet the Listings.

That is what the City of New York case was all about, where apparently there was some subregulatory documents that gave the impression that if a younger worker had a mental impairment that left him extremely disturbed, but he did not meet all of the criteria of the Listing, Social Security was assuming that the fact that he didn't meet

the Listing meant that he must therefore be able to perform substantial gainful activity. That position was renounced by the Secretary after being criticized in the district court and in the court of appeals. And in this Court, the Secretary only addressed himself to the question of remedy.

QUESTION: The Secretary explains that, Counsel, by saying that for an adult like that, a young adult like that, the statute provides a clear criterion: the ability to work. It provides no such criterion for a child. And therefore you have to resort, the Secretary says, to comparable severity, which is what the statute says, which in turn forces you to look to particular functional disabilities and see if the child has them.

MR. WEISHAUPT: Yes, but the Secretary does not take a functional approach. Rather, he takes a -- an approach that compares the child's listings to one -- problems to one of 57 Listings.

QUESTION: I don't know how we resolve that. You say he doesn't, and he say -- he says he does, and points to language that -- obviously allows them to use functional considerations. How are we to resolve that dispute?

MR. WEISHAUPT: I think by looking carefully at the wording that actually exists in Ruling 83-19, which states that functional impairments cannot be looked at in order

to arrive at a conclusion that someone has a impairment that rises to Listing level, which in and of itself is a more difficult test than an adult would ever be put through. But even putting that aside, Justice Scalia, the Secretary does not allow a child with atypical symptomatology to show that even though he doesn't meet A, B and C, that his impairments are so severe in A and B that he should be found to be disabled.

That is why we find the Secretary's practice of awarding benefits on children's eighteenth birthday, because when they reach 18, then they can be looked at with a -- in a holistic functional approach, and then they can be awarded benefits.

QUESTION: Once again, there is just a flat disagreement as to what -- I guess what the fact is on that. Mr. Kneedler has just told us quite the opposite of what you said. That if the child has A, B -- A, B and C, no single one of which rises to the proper level, the combination of the three nonetheless, on the basis of the functional results of the three, would suffice.

MR. WEISHAUPT: The Secretary will allow an equivalence finding to be made in the circumstances where a child has a combination of impairments that together yield the signs, symptoms and laboratory data that are necessary to meet one of the Listings. So, in other

words, if the child with the rare liver disorder also had an IQ of 69 or below, yes, he would be found to meet the listings. And if -- and he would be found to meet the Listings.

However, in a situation where the -- where the combination of impairments can't provide the kind of test scores that are necessary because they are so disparate -- we cite -- one of the amici cites in their brief, a child with severe hypertension, asthma and obesity, and there is just no link up of, in terms of the symptoms. Each set of symptoms is distinct, and they don't cross over into other listings. That child has no where to turn, because the Secretary clearly states in that ruling, 83-19, that it is forbidden to make an overall assessment of function and try to figure out what level of function is suggested by a Listing and --

QUESTION: Does the record give any indication of how often that occurs, that three different kinds of symptoms that you just referred to?

MR. WEISHAUPT: No, although the brief of the AMA and the American Academy --

QUESTION: Is that the record? I mean, does it rely on the record?

MR. WEISHAUPT: No, it relies on their knowledge to state that children frequently suffer from a wider array

of disabilities, and frequently have more combinations. However, the class of children, if you will, who suffer from that wide array is probably not large in absolute terms, but it is significant for those children who are denied SSI benefits.

The SSI children's program only awards benefits to a quarter of a million children, and approximately 100,000 claims are made each year, 50,000 of which are turned down, and 50,000 of which are granted. Of that 50,000 that are turned down, some number, the record does not reflect what, of those children suffer from a combination of impairments, like the cases cited in the amicus briefs, that defy evaluation under the Secretary's approach.

For many children the Listings approach works adequately. But it is those children who don't, who need a case by case adjudication, for which we claim that it is important for the Secretary to have a system with the flexibility to provide that, just as he has a system to provide that kind of flexibility for adults.

QUESTION: Did any of the Plaintiffs in this case have the sort of situation that you are talking about, with the three different kinds of symptoms?

MR. WEISHAUPT: No, although Joseph Love suffered from a combination of mental retardation and emotional disorders, failed third grade three times, eventually was

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found to be so disturbed that he could not even be in a classroom with other emotionally disturbed children. He was found not to be disabled because one of the criteria in the Secretary's mental health listings for children looks at self-care skills. And since Joseph helped his mother with the dishes once in a while, that was found to be adequate self-care skills so that he didn't rise to that level. But the fact that he couldn't even achieve an education in a forum particularly designed for his particular needs was irrelevance under the Secretary's formula.

We are not saying that all of these determinations are easy, but that is why the Secretary is delegated authority to make individualized determinations. And we submit that as long as the standard is one of comparable severity, that he can't do it in a way that is so markedly different and markedly inferior from that for adults.

QUESTION: But when the Secretary found that his ability to help his mother entered into the equation, isn't that the very functional kind of analysis that you insist ought to be made?

MR. WEISHAUPT: Yes, but it is only used in that case to deny. What was not done was to determine whether there were other functional deficits in other areas that were significant enough to outweigh the fact that he could do

the dishes, even though he couldn't even interact with other children. So, when -- and in fact, Joseph Love was subsequently found to be disabled, when his symptoms dipped, although there is still a question of that period when he was helping his mother wash the dishes, whether he was disabled.

So what we are saying is that we -- the Secretary violates the statute by not being able to allow his adjudicators to look at overall function. Not necessarily that looking at function is automatically going to qualify someone as disabled, but rather that one needs to look at the overall function, just as one does for adults, to avoid mechanical results. To avoid assuming that because the typical effects of a particular impairment are as they are in the Listings, that they may not actually take place or affect an individual in quite that typical way. That a child may not respond to medicine the same way that another child does, that he may experience pain, that he may have a whole plethora of functional problems that are fair game for adults to attempt to use to show that they are disabled.

Unless there are further questions, I will conclude my remarks. Thank you.

QUESTION: Thank you, Mr. Weishaupt.

Mr. Kneedler, you have five minutes remaining.

REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE PETITIONER

MR. KNEEDLER: Thank you, Mr. Chief Justice. I do have several things I wanted to say.

First of all, this class action was brought as a facial challenge to the requirement that a child show that his impairment meets or equals the Listing. As we have shown, that requirement was established in 1974, it was ratified by Congress in 1976, and it has been in place ever since. Particular disagreements about the way the Listing might be applied in a particular case, and whether one child should be granted or denied under that -- under the Listing, are simply not properly before the Court in a class action. And, for example, the particular way in which the equivalency concept might be applied in this case, or one situation or another, is not before the Court. But with reference to the equivalency --

QUESTION: Why isn't it before the Court, if there are members of the class who would fit the description of your adversary? Why isn't -- why isn't a class representative entitled to make those arguments? I'm not quite -- I don't quite understand.

MR. KNEEDLER: Well, the question -- this suit was brought to challenge the requirement that a child must meet or equal the Listings --

QUESTION: I understand.

MR. KNEEDLER: -- not what -- not what the content of the Listings themselves was. And this is a suit to challenge the meet or equals requirement which has been in the regulations for a long time.

QUESTION: Well, but if there are members of the class, I gather -- I don't have the definition of the class in front, it would include this person in the -- Wilkinson case, or whatever it was that he referred to, why can't the argument be made that that requirement is invalid as applied to some members of the class?

MR. KNEEDLER: Well, we just can't tell on this record, on the basis of the record of this, of a hypothetical member of a class who might have one disorder or not, first of all whether he would be found disabled. I mean, as I have explained, if the severity of his impairment is equal in severity to one that is listed, he would be found disabled.

QUESTION: Well, I understand if it is equal to one that is listed, but looking at page 240 of the regulation, where you called our attention to paragraph 3 on 239, it seems to me that there would be people who would have -- it would be people under 18, who would have total disability but not meet one of the standards.

MR. KNEEDLER: Well --

QUESTION: Because you specifically say the functional consequence of the impairments (i.e., RFC) irrespective of their nature or extent, cannot justify a determination of equivalence.

MR. KNEEDLER: And I think the parenthetical is -- explains what this sentence is about. What the Secretary is saying is we don't decide children's cases on the basis of the residual functional capacity. In other words, what a child can do despite his impairment. That is what you do for an adult. For an adult you look at the impairment itself. It's really two sides of the same coin. Instead of looking at what he still has left, you look at what has been taken away from him by virtue of his impairment. You match that impair -- that impairment to the Listings. And in deciding whether the impairment is severe enough --

QUESTION: You match one of the impairments to the -- you match to one --

MR. KNEEDLER: You match the combined effect of the impairments, as --

QUESTION: To only one of the Listings.

MR. KNEEDLER: To the one that is most near, most nearly applicable.

QUESTION: Yeah.

MR. KNEEDLER: And that is not to say that you disregard the other aspects, but you check to see whether

the child's impairment has -- whether his impairment has a similar functional impact on him that the listed impairment has on a child who has that impairment.

QUESTION: Mr. Kneedler, what is necessary here to hold a regulation facially invalid? Is it enough to show that in some instances it --

MR. KNEEDLER: Not at all. It has to be -- it has to be the content of the regulation has to be, as we have explained, manifestly contrary to the Act, that the Secretary can't even proceed in this manner. And that, if the regulation is misapplied in a particular case, that is not a proper subject for a class action lawsuit such as this. This --

QUESTION: Well, but what if the regulation, as applied in particular cases, in some cases, would be inadequate to satisfy the --

MR. KNEEDLER: Well then a claimant who wants to make that claim could make that in his own individual suit.

QUESTION: Well, I know, but would it justify a facial --

MR. KNEEDLER: Not at all. Not at all. And we're here --

QUESTION: Even, even though the regulation should be different to respond to the statute in a few cases.

MR. KNEEDLER: That's right. And, for example, if

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the Court were to conclude, contrary to our interpretation and contrary to Respondents' own best interests, that the 83-19 does not allow for consideration of functional impact, the proper course would be -- would be to invalidate that ruling in a proper case. As we say, we don't think that's here, but --

QUESTION: But if the regulation -- Mr. Kneedler, you are treating this as though the question whether a regulation can be stricken on its face is the same as whether a law can be stricken on its face as unconstitutional, and the test there is whether in any of its applications it could be constitutional. Surely the test for regulation is not whether in any of its applications it can be valid.

MR. KNEEDLER: No, but as Respondents --

QUESTION: It has to be valid in all of its applications as written, at least.

MR. KNEEDLER: Yes.

QUESTION: Or it has to be, at least theoretically -- on its face it must theoretically be able to lead to the right result in all cases, isn't that right?

MR. KNEEDLER: Right. And the -- theoretically it can here, because the only regulatory requirement at issue is whether the child can meet or equals -- equal the Listings. That is theoretically possible of meeting the

statutory standard of comparable severity. If, in a particular case, the Listings themselves are inadequately applied, then that is something to be taken up elsewhere. But as to the regulation being challenged, that -- it's valid in all its applications.

Thank you.

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

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

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BRIAN ZEBLEY, ET AL.

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BY Lyona M. Mayo

(REPORTER)