IN THE SUPREME COURT OF THE UNITED STATES

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JO ANNE B. BARNHART, :

COMMISSIONER OF SOCIAL :

SECURITY, :

Petitioner :

v. : No. 00-1937

CLEVELAND B. WALTON. :

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Washington, D.C.

Wednesday, January 16, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

JEFFREY A. LAMKEN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

KATHRYN L. PRYOR, ESQ., Richmond, Virginia; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 00-1937, Jo Anne Barnhart v. Cleveland Walton.

Mr. Lamken.

ORAL ARGUMENT OF JEFFREY A. LAMKEN

ON BEHALF OF THE PETITIONER

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

Congress -- Congress designed the Social Security disability program to provide benefits to workers who suffered from long-term disabilities, individuals who were, in effect, forced into premature retirement by a severe impairment. Consistent with the program's origin --

QUESTION: Just a moment, Mr. Lamken.

Spectators are admonished. Do not talk until you get out of the courtroom. The Court remains in session.

Go ahead.

MR. LAMKEN: Consistent with the program's origin, purpose, and text, the Commissioner has for 45 years from the program's inception, in adjudicating tens of millions of claims, and throughout repeated amendments, adhered to a single and consistent, reasonable

construction of the definition of disability. To be disabled, a claimant must have an impairment that has lasted or can be expected to last at 12 -- at least 12 months at a disabling level of severity; that is, the impairment must preclude substantial gainful activity for the 12 months during which it must last.

QUESTION: Well, now, presumably though, as I understand it, the Commissioner could evaluate a claim and start benefits in less than 12 months.

MR. LAMKEN: Correct, Your Honor. That's -- that's because the statute allows the Commissioner to award benefits if the -- if the disabling impairment can be expected to last 12 months. So, for purposes --

QUESTION: And can disregard possibly periods of work during that period if the commission is satisfied that this is going to be a permanent impairment.

MR. LAMKEN: Yes. If the work does not evidence an ability to engage in substantial gainful activity. For example, the Commissioner has what are called unsuccessful work attempt regulations. If they do not evidence an ability to engage in substantial gainful activity, they may be disregarded and treated as not evidence of the individual's ability to engage in substantial gainful activity.

Under the court of appeals' view, however --

QUESTION: That seems sort of inconsistent with your view on the second question that trial work periods shouldn't begin until the end of the 12 months.

MR. LAMKEN: Your Honor, no. Our view is not that the trial work period does not begin until the end of 12 months. Our view is that the trial work period only begins if the -- if the claimant actually becomes entitled to benefits at some point, and that's true because the trial work period begins when the claimant becomes entitled to benefits. If the claimant never becomes entitled to benefits, he never receives a trial work period.

QUESTION: What -- what provision in the language of the statute says that you can't start a trial work period until the end of 12 months?

MR. LAMKEN: Again, it's not our position that you can't start a work period -- a trial work period until the end of 12 months.

QUESTION: Well, you say unless the benefits have started.

MR. LAMKEN: Right, unless they are entitled to benefits. And we would be relying on 422(c)(3), which appears on page 63a of the appendix to the petition for writ of certiorari. And it says that a period of trial work for any individual shall begin --

QUESTION: Just a moment, Mr. Lamken. Exactly where on 63a are you reading?

MR. LAMKEN: I'm sorry. It's at the bottom where it's numbered 3.

QUESTION: Yes.

MR. LAMKEN: And it says, a period of trial work for any individual shall begin with the month in which he becomes entitled to disability insurance benefits. If the individual never becomes entitled to insurance disability benefits, the individual also cannot, as a matter of logic, become entitled to a trial work period.

And that is also consistent with the -- with what the trial work period does. The trial work period precludes the Commissioner from considering -- from treating work as evidence that the disability has ceased. The statute in the preceding paragraph number 2 uses the word ceased. That means that if the individual isn't actually already entitled to benefits, there can be no trial -- there is no purpose in the trial work period. It's only there for determining whether or not the disability has ceased.

QUESTION: Of course, the difference is the other side says that he becomes entitled not when he is adjudicated to be entitled, but he becomes entitled when, in fact, all of the conditions exist for which the -- the

benefits are payable.

MR. LAMKEN: Yes, Your Honor.

QUESTION: Why aren't they right about that?

MR. LAMKEN: Because the statute provides that the individual is entitled to benefits if he has a disability which can be expected to last 12 months or has lasted 12 months. That's most naturally read as referring to the time of the adjudication. In other words, when statutes say if the following conditions are met, you're entitled to something and they use the present tense, as this statute does, they're normally understood as requiring those conditions to be met at the time of the adjudication.

QUESTION: Yes, but the -- the trial work statute itself says that any services rendered by an individual during a period of trial work shall be deemed not to have been rendered in determining whether his disability has ceased.

MR. LAMKEN: Right, in determining whether his disability has ceased. That means that for a person to have a -- to be entitled to a trial work period, he must have what is called a disability, and whether or not an individual has a disability is determined from the perspective of the adjudicator at the time of the adjudication.

QUESTION: But I thought you took the position in -- I thought you did not take the position in your brief that as a matter of law there had to be an adjudication. I thought you said that ordinarily that's the way it -- it works in practice, but that the real point you were making was that if the individual went back to work prior to the adjudication and therefore showed that in fact the disability or the incapacity and hence the -- the disability, as you see it, is not going to last, that that's the end of the matter. That would cut it off. I didn't think you took as a theoretical matter a position that there had to be an adjudication, merely that there ordinarily would be one.

MR. LAMKEN: I -- I think you've precisely described our position, Justice Souter. The answer is that if the individual produces evidence, such as by returning to work successfully for the period of 2 years, for example, in this case, and shows that he, in fact, was not incapacitated, he was able to work, the adjudicator can take that into account and decide that no, you're not entitled to disability benefits, and if you were never entitled to disability benefits, you also do not get a trial work period.

QUESTION: But -- but you would not allow him to come in and say long before I came in for an adjudication,

I was in fact disabled and entitled to benefits. You wouldn't allow him to say that.

MR. LAMKEN: No. We would not allow him to come back and say -- and say, in effect, that I was thought to be disabled for a period of 12 months reasonably but mistakenly because the statute requires that you can be expected -- present tense.

Now, that is consistent with the way courts --

QUESTION: You're hanging an awful lot on that -- on that can be expected I -- I must say.

MR. LAMKEN: Yes, Your Honor. But actually the contrary view would make -- creates a rather difficult type of adjudication --

QUESTION: A difficult --

MR. LAMKEN: -- to make and one that's entirely foreign to the law.

QUESTION: You got to look back 6 months and figure out whether 6 months ago he -- he could be expected to --

MR. LAMKEN: Not merely that. You would have to look back for the entire period covered by the application and decide if any moment during that period it could have been possible, reasonably but mistakenly thought, that his disability would last 6 months. That type of determination is entirely foreign to the law.

And it's also inconsistent with the purpose of the can be expected to last prong. That exists precisely because, as Justice O'Connor pointed out, the Commissioner needs to be able to adjudicate claims before 12 months goes by. And therefore when the adjudicator -- when the Commissioner decides claims before 12 months have gone by, you look at the can be expected to last prong.

QUESTION: So, the real significance of the present tense is that it kind of gives an opportunity for the application of a kind of best evidence rule.

MR. LAMKEN: Yes, yes, exactly. And that is consistent with the -- the -- excuse me -- the statute, which says that when you're deciding these claims, you look at all of the evidence in the file and you try and come up with all of the available evidence. You don't disregard evidence that is recently arriving merely because at some earlier time you would have made a mistake. And that is also -- I'm sorry.

Turning back to the question of disability, the Commissioner's construction of the term disability in our view is supported by the text of the act. The act imposes --

QUESTION: What kind of deference do we give here? At the time this claim was evaluated, the regulations hadn't been adopted.

MR. LAMKEN: That's correct, Your Honor.

QUESTION: So, we're into Skidmore rather than Chevron?

MR. LAMKEN: No, Your Honor.

QUESTION: No?

MR. LAMKEN: We believe that the Commissioner is entitled to Chevron deference regardless of when the claim was adjudicated. The purpose -- the reason this Court gives Chevron deference is when the -- the decision has the formality and uses the procedures that Congress meant the administrator to use when filling in gaps or when explaining the meaning of the statute. It does not matter that, in fact, that the administrator, or in this case the Commissioner, used those procedures after the claim was adjudicated because we know that after the thoroughness consideration and using the notice and comment procedures, the Commissioner came to the same conclusion, that in fact the best reading of the statute is the one that the Commissioner has adhered to for 45 years and through repeated amendments to the statute.

QUESTION: The -- the court of appeals here said that that simply wasn't consistent with the statute and it struck me that they had a very good argument just looking at the statute that you are kind of -- reduced to some fairly odd statutory construction to justify your

position.

MR. LAMKEN: No, Your Honor. Actually we believe that we have the far more reasonable understanding of the statute and certainly the one that's more consistent with Congress' intent. The statute --

QUESTION: Well, supposing we just say that we look to the statute itself for what Congress' intent was?

MR. LAMKEN: Focusing on the language of the statute.

QUESTION: Right.

MR. LAMKEN: The statute imposes two requirements. First, there must be an impairment.

QUESTION: Where do we find the statute in -- in the --

MR. LAMKEN: It's 423(d)(2)(A) and (d)(1)(A) which appear on pages 69 -- just the heading of (d)(1) appears on 69a -- and 70a of the appendix to the petition for a writ of certiorari.

QUESTION: Thank you.

MR. LAMKEN: Turning at page 70, it establishes two requirements that are interrelated. The first is that there must be an impairment, which has lasted or can be expected to last 12 months or result in death. Second, the impairment must be one that precludes substantial gainful activity, that is, it must be so severe that the

individual cannot engage in any work in the national economy. Given Congress' repeated intent not to provide benefits for short-term disabilities, it is most natural to read those two requirements together so that the impairment, which must last 12 months, is also an impairment which must preclude substantial gainful activity --

QUESTION: Well, maybe. You know, once you posit that -- that Congress didn't want to provide compensation for short-term disability. But if -- if you had to determine what Congress' intent was purely from that language, I just don't think you get there. Disability means an inability to gain -- to engage in any substantial -- substantial gainful activity. It doesn't say how long that disability has to -- it could be, you know, a week-long inability. And then it goes on, by reason of any mentally -- medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for 12 months. All it requires is that the impairment be a long-term impairment and if that produces even a week-long inability to work, you're -- you're technically within the language of that -- of that provision.

MR. LAMKEN: Justice Scalia, that might be one way of reading the statute, but it's not --

QUESTION: I think it's the only way to read the statute. I don't see how else you can read it.

MR. LAMKEN: We disagree, Your Honor. We believe that you read the two requirements together sensibly so that they overlap. And in fact --

QUESTION: It is my understanding of your position is you're saying that impairment, given the context of the statute, means a constantly, continuously disabling impairment, and disabling means that you are not equipped to engage in substantial -- whatever SGA stands -- substantial gainful activity. So that the word impairment means a disabling impairment.

MR. LAMKEN: In effect, we're arguing, yes, that the type of impairment that Congress was referring to is an impairment that prevents substantial gainful activity because that's the type of impairment that is referenced in the statute.

QUESTION: And if it isn't -- if it doesn't prevent substantial gainful activity, then it isn't an impairment within the meaning of the section.

MR. LAMKEN: It is not the type of impairment that you must have for 12 months. That's correct, Your Honor. That is a correct characterization of our -- our position. I think if --

QUESTION: So, if you look just at the word

impairment and what it means, you get back to the inability to do substantial gainful employment for that interval of time.

MR. LAMKEN: Your Honor, one way you could -- you could put your emphasis on the word impairment. The Commissioner has traditionally placed the emphasis on the word severe in 423(d)(2)(A) or inability to engage in substantial gainful activity in (d)(1)(A), but that would be one way of achieving the same result that the Commissioner has. And that is actually supported by the text of the definition of impairment which makes it clear that --

QUESTION: I don't know why you don't emphasize the word which.

MR. LAMKEN: Pardon?

QUESTION: I don't know why you don't focus on the word which. Does which refer to both inability and impairment or just one of them?

MR. LAMKEN: I think as a grammatical matter, Justice Stevens, we have to confess that the word which refers to the impairment because one would not ordinarily expect the substantial gainful activity to result in death or the inability -- better still, the inability to engage in substantial gainful activity to result in death. But focusing back --

QUESTION: One would not expect the inability to be expected to last -- to result in death where it lasted for a continuous period of 12 months? I don't know why.

MR. LAMKEN: Well, Justice Stevens, we'd be perfectly willing to accept that if that were your view, but for purposes of this case, we -- we have -- for grammatical purposes, we believe that the phrase, which can be expected to result in death, modifies the impairment not the inability to engage in substantial gainful activity.

QUESTION: So, you don't think it means both of which can be expected. It just means one of which can be expected. You're willing to accept that anyway.

QUESTION: Where is the definition of impairment? I'm trying to find --

MR. LAMKEN: It's on page 71a, Justice Scalia, after the numeral 3 of the joint -- of the appendix to the petition for writ of certiorari. It says: for purposes of this subsection, a physical or mental impairment is an impairment -- it's somewhat circular, we confess -- that results from an anatomical, physiological, or psychological abnormality that is medically demonstrable.

That makes it clear that the impairment isn't necessarily just the underlying medical condition, but it says that it's the -- an impairment that results from the

anatomical, physiological, or psychological abnormality. So, in a sense the impairment can be viewed not merely as the medical condition but the result of that condition such as in the case of a mental impairment, inability to focus.

QUESTION: I'm not sure that's necessarily a very precise reading of that section. It says, impairment results from anatomical, physiological, or psychological abnormalities. In other words, the results from is the abnormalities.

MR. LAMKEN: The impairment is what results from the abnormalities. The impairment is what the abnormalities produce.

QUESTION: Right.

MR. LAMKEN: So, if the condition is, in this case schizophrenia, the impairment would be the inability to focus, the inability to think clearly, the impairment of the cognitive functions is another way of putting it.

Your Honor, what -- I believe that the problem with the court of appeals' approach of severing the two requirements of an impairment -- the fact that the impairment must last 12 months and that the impairment must be one that is of disabling severity -- is that it does not -- it does not eliminate an ambiguity but creates one. Even if we were to severe those two entirely and to

say that the only the -- that only the impairment must last 12 months, it's clear that the impairment must be of disabling severity for some period of time because it would be absurd to suggest you're entitled to benefits for a minute or a second or actually, Justice Scalia, with all due respect, in my view for the week that you suggest.

Given that there is an implied duration of some time for the severity, that it must be severe enough to preclude substantial gainful activity for some period of time, it is up to the Commissioner to choose the period which makes the most sense, is most consistent with the statutory structure and Congress' intent.

There are other indicia of -- of the structure of the statute that make it clear that Congress was not contemplating short-term disabilities such as a week. For example, the statute does not terminate benefits just at the moment when you are able to return to work. Benefits, instead, continue for an additional 2 months following that. If the statute is, as the Commissioner supposes, a long-term disability statute, that makes sense because those 2 months of additional payments give you a time to transition back to work, to get ready to work to find a job.

If in fact the statute is, as the court of appeals has construed it, a short-term disability statute

where benefits are payable when you're out only for a week, as Justice Scalia suggested, that would mean that an individual who is out of work for a week, because of a chronic condition like asthma, anxiety, arthritis, and numerous ones that last a year or more, would be entitled to 2 months of benefits plus the one week for which they are briefly out. It's hard to believe that that was the type of statute that Congress had envisioned.

In addition, that -- that view is supported by the repeated amendments to the statute that Congress -- repeated amendments to the definition of disability against the backdrop of the Commissioner's now 45-year-old settled construction. Years after the Commissioner first adopted her construction of the statute in 1957, in 1965 Congress amended the statute, and when Congress did so, it did not merely leave in place the Commissioner's by-then settled construction, instead Congress reiterated that construction in the committee reports that were accompanying it -- accompanying the amendments and described the act in precisely the same terms that the Commissioner had through the regulations.

Congress, in fact, rejected a proposal -- actually a bill -- from the House of Representatives that would have shortened the duration requirement instead of to 12 months to 6 months, and the stated reason for

rejecting that 6-month period was a disability -- it would not be sufficient to preclude the payment of benefits for short-term disabilities. Instead, as the committee reports stated, it was necessary to require that the individual be under a disability for a period of more -- of longer than 6 months. Instead, Congress meant to require that the individual be completely and totally disabled throughout a continuous period of 12 months.

Under the court of appeals --

QUESTION: Well, but actually not because you can have these -- not the trial work, but the unsuccessful work episodes. So, you're able to --

MR. LAMKEN: That -- that is part of the definition of substantial gainful activity. It's -- I'm being somewhat imprecise when I say you're unable to work. What you have to be able to do is engage in substantial gainful activity, and if you return to work for a brief period of time, for less than 6 months generally under the Commissioner's regulations, and then your impairment comes back and prevents you continuing that, the Commissioner will not treat that as evidence to obtain -- evidence of your ability to engage in substantial gainful activity. In fact, it's evidence of the opposite because you tried to go back heroically, but your impairment prevented you from successfully doing that. So, it's clear that you're

not able to engage in substantial gainful activity.

QUESTION: So, the term substantial modifies -- is directed to the length of the activity not the daily intensity of the activity.

MR. LAMKEN: It -- it -- the substantiality does modify the intensity of the activity, but in terms of determining what kind of evidence shows that you're able to engage in that activity, the Commissioner has legislative authority to determine whether work -- whether certain types of work attempts evidence your ability to engage in substantial gainful activity. And using that, the Commissioner said there were just certain things that should not count, such as unsuccessful work attempts, work attempts generally that are terminated within 6 months of -- within 6 months' of when they begin.

QUESTION: Mr. Lamken, this case is unusual on the facts because he came very close to making the 1-year limit, and there is the anomaly that they -- the person is approved for receiving disability benefits in month 8 and then will be able to go on for 2 months past the time the disability ceases. And yet, this person, through no fault of his own -- it's kind of haphazard, by chance the one who will make it and -- because it's based on a prediction, and the one who maybe -- maybe the Social Security office is backlogged. What is the reason for the

disparity in time of adjudication?

MR. LAMKEN: In fact, Your Honor, there were two adjudications in this case in a very short period of time within the filing of benefits. The benefit claim was filed in March and April and in the -- there was an initial adjudication on May 18th, basically just over 30 days after the April application was filed. In that adjudication, a licensed psychiatrist determined that Mr. Walton was, in fact, able to engage in substantial gainful activity and that his impairment was not severe enough. He sought reconsiderations in June, and there -- a decision was issued in August.

These are very short time frames, and they are not atypical. Typically these types of claims are processed in less than 90 days for the initial adjudication.

Now, regrettably there will be occasions, as in all areas of law, where the outcome is affected by the timing of the decision. And that is true because sometimes evidence develops in the interim which would allow one person to prevail where, if the adjudication had happened earlier, they would not have known about that evidence and the result would have been different.

But the fact that some individuals may get a windfall and become entitled to benefits based on an

erroneous prediction of expectation does not mean that the Commissioner is required to reach an erroneous result when adjudicating a claim where he has actual evidence that the individual is able to engage in substantial gainful activity, as occurred here.

In this case there is evidence that the individual was able to engage successfully in working for 2 solid years, and the Commissioner is not required to ignore that probative, indeed dispositive evidence simply because the Commissioner might have made a mistake had the claim been adjudicated earlier.

QUESTION: Mr. Lamken, you said -- one of the things you said is if the Fourth Circuit view prevailed, there would be a large increase in the number of people who qualified for disability benefits. This Fourth Circuit decision has been in effect now what? Over a year?

MR. LAMKEN: Yes, Your Honor.

QUESTION: Is there any report of any swell in the approved applications in the Fourth Circuit?

MR. LAMKEN: Your Honor, I have -- do not have any information regarding that.

But the -- one of the major concerns about this is it substantially increases the number of people who have disabilities because no longer do you have to have an

impairment which precludes you from working for a substantial period of time, but merely an -- a medical condition that last 12 months. When one considers the number of medical conditions that persist for 12 months that are capable of disabling somebody for a short period of time, it clearly would have the effect of establishing a short-term benefits program that Congress did not intend to create.

In fact, we are advised that approximately 38 percent of all Americans have an impairment -- a medical condition which is chronic in the sense that it will last 12 months that is capable of preventing them from working for short periods of time. And -- when construing the definition of disability, it is less plausible to believe that Congress intended to pull in so many Americans and to make all of their periods of absence of work on account of conditions like asthma, angina, arthritis, bad backs, and the like which -- and turn them into disabilities.

QUESTION: If we want to say -- and I take it you want us to say -- that if the agency has followed a consistent and well-settled interpretation policy over a long course of time, it's entitled to special deference, is that just Chevron, or is there some other case that tells us this? What's the best case authority is what I'm --

MR. LAMKEN: Your Honor, we believe this is a -- a classic case of Chevron deference.

QUESTION: Is there another case other than Chevron that -- that talks about the length of time that the administration has --

MR. LAMKEN: Oh, well, that would be classically -- if you're -- if what you're referring to is Mead or Skidmore deference, yes. But even --

QUESTION: So, it's Skidmore or Chevron, and nothing --

MR. LAMKEN: Well --

QUESTION: -- nothing else.

MR. LAMKEN: Those are the two standards of deference with which I'm familiar, and in fact we believe that we'd win under either one.

QUESTION: Of course, you claim congressional approval too.

MR. LAMKEN: Yes.

QUESTION: I don't know whether that falls in, technically, a deference category, but it gets you to the same point.

MR. LAMKEN: Well, it -- it certainly adds weight to the agency's view and it may make it so that there is only one reasonable construction of a statute that's ambiguous.

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

QUESTION: Mr. -- Ms. Pryor.

ORAL ARGUMENT OF KATHRYN L. PRYOR

ON BEHALF OF THE RESPONDENT

MS. PRYOR: Mr. Chief Justice, and may it please the Court:

This case is governed by the plain language of the statutes, the language of the disability definition, which is the primary focus of the first issue presented, and the language of the trial work period and entitlement statutes, which are the primary focus of the second issue presented.

The plain language of the statutes and the early legislative history demonstrate that from the inception of the disability program, Congress has balanced its desire to restrict payment of benefits to only those with long-term severe impairments with its intention to encourage disabled persons to try to work. The Commissioner's policy, in sharp contrast, ignores the work incentive prong of Congress' careful balancing act, focusing only on the desire to restrict payment of benefits even to those who suffer with clearly disabling impairments if they manage to attempt to work with great courage and determination and, despite continuing severe impairment,

within 12 months of the onset of their disability.

QUESTION: Ms. Pryor, what -- what time limit do you pick? I mean, suppose the person has a disability that indeed is expected to last more than 12 months but it only has caused him to black out and be incapable of working for 1 minute.

MS. PRYOR: Your Honor, I believe that --

QUESTION: Does that 1-minute blackout entitle him to come under the program?

MS. PRYOR: No, Your Honor.

QUESTION: All right. What about a week?

MS. PRYOR: The entitlement statute I believe shows that a person must be under a disability during the 5-month waiting period. So, they must have a condition which is severe enough to prevent substantial gainful activity.

QUESTION: Excuse me. I just didn't hear you. During the time of --

MS. PRYOR: During the 5-month waiting period.

QUESTION: During the 5-month.

QUESTION: During the entire 5 months --

MS. PRYOR: Yes, Your Honor.

QUESTION: -- the disability must -- must continue.

MS. PRYOR: Yes, Your Honor. And if -- and if

it continues beyond that, then they would then be entitled to benefits.

QUESTION: What establishes that? What establishes the 5 months as -- as --

MS. PRYOR: The entitlement statute, Your Honor, which is set out at 423(a) --

QUESTION: What -- what's the section? 423(a).

MS. PRYOR: 423(a), which is found at -- on page 64a and 65a. And that entitlement statute says that you're entitled for each month, beginning with the first month --

QUESTION: Where are you reading from on 64a?

MS. PRYOR: I'm sorry. I'm reading at page 65a after it says that every individual who is insured and meets these criteria shall be entitled to a disability insurance benefit --

QUESTION: What part of the page? What part of the page 65a?

MS. PRYOR: I'm sorry. The beginning, right after D.

QUESTION: Thank you.

MS. PRYOR: Shall be entitled to a disability insurance benefit for each month beginning with the first month after his waiting period. So -- and the -- and the waiting period is defined on page 69a at 2 as the waiting

period means the earliest period of 5 consecutive calendar months throughout which an individual has been under a disability.

So, I believe that the entitlement statute does require that the person be under a disability, be -- have both the impairment and an impairment at such level of severity throughout those 5 months. Beyond the 5 months, they are entitled to a benefit for each month beginning with the first month they satisfy all criteria of entitlement.

QUESTION: So, that would be the sixth month every time. If that's --

MS. PRYOR: Yes, Your Honor.

QUESTION: And if you started in -- in month 6 -- let's take this case. The man did engage in substantial gainful activity for 2 years. Is that right?

MS. PRYOR: Yes, ma'am.

QUESTION: So, it starts 6 months after he has been disabled and it continues until when?

MS. PRYOR: Your Honor, because the trial work period statute dictates that a person is entitled to a trial work period beginning in the first month he's entitled to benefits, he would be entitled to benefits beginning in April 1995, which is when he met all criteria of entitlement, and he would be entitled to a trial work

period beginning that month.

QUESTION: That's 9 months.

MS. PRYOR: And -- yes, Your Honor. It would continue for 9 months once he started working and would continue -- then he would get the -- once they determined at the end of the trial work period, if they've concluded that his work was continuing and showed he was now able to engage in substantial gainful activity, he could be cut off after those 2 -- 2 additional months. He would be subject to a 36-month re-entitlement period for benefits during any of those months.

QUESTION: But in this -- in this case, when he -- if he -- he starts at month 6, how many months actually would he be getting disability benefits?

MS. PRYOR: He returned to substantial -- well, he returned to any work in May of 1995, and he would be entitled to a 9-month trial work period plus the additional 3 months, and then for any months during that 36-month entitlement -- re-entitlement period during which he could not work.

QUESTION: But just -- just -- if you could just give me the -- the time frame. We know the starting -- the start is -- is it April?

MS. PRYOR: Yes, Your Honor.

QUESTION: And the end -- the minimum end would

be when?

MS. PRYOR: It would be -- his actual work started end of May/June, then 9 months, plus additional 3 months, so approximately 14 months I believe.

QUESTION: So, some considerable time after he has been restored to substantial gainful activity.

MS. PRYOR: Yes, Your Honor. After he -- because that gainful activity is covered by a trial work period. There is no evidence in this case that Mr. Walton's condition ever medically improved. Therefore, his -- his return to work is protected by the trial work period and that work itself cannot be considered as evidence that his disability --

QUESTION: But once the period is over, making substantial gainful activity, even though, as you say, his impairment continued, he would not be disabled.

MS. PRYOR: That's correct. Once his trial work period had ended, he would -- he could be cut off subject to the re-entitlement period.

QUESTION: So -- so the basic statutory problem -- I think -- I see where -- you're debating whether you become entitled after 5 months or 12 months, and that seems to turn on the language in 70a. And the Government is reading that -- basically there are many ways of doing it, but they're reading it to say a disability is an

inability by reason to -- to engage in any substantial gainful activity by reason of an impairment, which can be expected to result in death or has lasted, you know, for a -- which can be expected to result in death or which has lasted or can be expected to last. And at this point, they read into it the words: at that level of severity.

MS. PRYOR: Yes, Your Honor.

QUESTION: And my problem is, to be absolutely frank, I think you could read it at that level of severity or you don't have to read it at that level of severity. And the Government -- the Social Security Administration has read it the Government's way for 40 years, and nobody has done a thing about it. And indeed, Congress has passed some laws that seem to think that's right. And it would be a major change to jump from 12 months to 5 months. So, there we are.

Now, what is your response to that?

MS. PRYOR: Well, Your Honor, my response is that that requires this Court to read language into the -- into the definition.

QUESTION: We do that all the time.

(Laughter.)

QUESTION: Language -- of course, you can't read -- you can't -- if a statute refers to a bear, you can't call it a fish, but if a statute refers to an animal, you

certainly can read in that it doesn't mean fleas. I mean, that's common. The statute -- it doesn't say which level of severity. It doesn't say it, and so you have to make some assumption.

MS. PRYOR: Your Honor, I believe that the -- reading the plain language of the statute -- and the Commissioner has conceded this point that the phrase, which can be expected to result in death and which has lasted or can be expected to last for at least 12 months, refers to the impairment, not to the inability to engage in substantial gainful activity. And I think that's the only logical reading of that, which is what the Fourth Circuit found because otherwise you're saying that the inability to engage in substantial gainful activity can -- can result in death, and that really doesn't make any sense.

To read -- read it as the Commissioner would have you do is -- it seems to me is contrary to the most fundamental rule of statutory construction, that Congress must be assumed to mean what it says in the statute and that when the language of the statute is clear and unambiguous, it should be enforced according to its terms.

QUESTION: Ms. Pryor, I think you heard -- Ms. Pryor?

MS. PRYOR: I'm sorry.

QUESTION: The -- I asked Mr. Lamken are you saying, in effect, that the word impairment means a disabling impairment. Because I think you would agree too that if you had a condition that severely disabled you for 1 week, excruciating back pain -- you couldn't do anything -- but that impairment continued at a less severe level well beyond a year -- it didn't impede you from substantial gainful activity -- you would not be disabled. And yet, if you read the statute literally, you would be.

MS. PRYOR: Your Honor, I believe the entitlement provisions answer that question. The impairment is defined at page 71a as only being -- resulting from anatomical, physiological, or psychological abnormalities. It does not contain an element of inability to engage in substantial gainful activity. The severity requirement, on the other hand, does, and that -- but that has no durational requirement.

QUESTION: The case I gave you it says a condition that can be disabling. It was severe for a short period of time.

MS. PRYOR: I believe that the entitlement statute requires that it be disabling for at least 5 months, the -- the waiting period. If it is disabling beyond the 5 months, then the person should be entitled to benefits for those months while it remains severe. At the

point that it no longer remains severe, as defined by the act, then that person could be cut off, or if they return to -- to work and their condition has not improved, they would be entitled to a trial work period and to benefits during that, at the end of which they could be cut off.

But I believe the entitlement statute answers that question by saying you must -- you must have a -- an impairment which is at the disabling level for those 5 months. If it continues at the disabling level beyond the 5 months, you're entitled to benefits for those months.

QUESTION: So, for the 12 months, it doesn't matter what the level of severity is, but for the 5 months, you must be unable to engage in substantial gainful --

MS. PRYOR: That's correct.

QUESTION: That's --

MS. PRYOR: Yes.

QUESTION: What about -- what about (f)(3) -- what am I talking about? I'm talking about section 423(f)(3) which says that a --

QUESTION: What page?

QUESTION: Where are you reading from?

QUESTION: I'm reading from my own copy of --

(Laughter.)

QUESTION: Page 76a.

QUESTION: It says that a person who has been getting benefits may be determined not to be entitled to benefits on the basis of a finding that the physical or mental impairment, on the basis of which such benefits are provided, has ceased, does not exist, or is not disabling only if such finding is supported by. And then you go down to (3). Substantial evidence which demonstrates that as determined on the basis of new or improved diagnostic techniques, the individual's impairment or combination of impairments is not as disabling as it was considered to be at the time of the most recent prior decision the he or she was under a disability, and that therefore the individual is able to engage in substantial gainful activity.

That seems to imply that the disability consists of a continuous inability to engage in substantial gainful activity, not just a sporadic one.

MS. PRYOR: I believe what this was referring to you, Your Honor, is that the medical improvement must -- or in this case the new or improved diagnostic techniques, must result in that person's then -- their condition no longer being of such severity as to prevent substantial gainful activity.

QUESTION: Yes, but all -- all it requires -- and that therefore the individual is able to engage in

substantial gainful activity. That implies that so long as he can engage in some substantial gainful activity, it's -- it wouldn't matter if he were disabled sporadically for a day here or a day there. So, it implies that it has to be a continuous inability to engage in substantial gainful activity.

MS. PRYOR: Your Honor, I believe that this whole section refers to termination of disability benefits --

QUESTION: I understand.

MS. PRYOR: -- for somebody who's already --

QUESTION: I understand. It refers to termination. But -- but what would apply to termination gives you some indication of -- of what -- what the initial condition is -- is expected to be.

MS. PRYOR: Well, the impairment --

QUESTION: Namely, a condition of continuous inability to -- to work.

MS. PRYOR: There is a severity requirement which is part of the -- the definition, yes. And I -- I would not disagree with that.

QUESTION: But -- yes, but -- but you say that that severity requirement has nothing to do with duration, and this termination provision suggests that it does have something to do with duration --

MS. PRYOR: I don't --

QUESTION: -- because if you can engage in any substantial gainful activity, you're terminated, assuming that there's been the improvement in the condition.

MS. PRYOR: Your Honor, once there is improvement and -- and you are now able to engage in substantial gainful activity, I would agree that you could be terminated. It's just that from the outset you do not have to have an impairment that -- that is known to be at that level of severity for 12 months. A person could have an impairment at that level of severity for 6 months, and in the sixth month, after the waiting period has expired, they become entitled to benefits. And they -- they continue to be entitled to benefits as long as they have an impairment which is at that level of severity. Once it's improved, they could be terminated.

QUESTION: I think you're right. I guess it doesn't get you --

QUESTION: What if 1 week after the 5 month period a person goes back to work? Would that mean they just got benefits for a week?

MS. PRYOR: No, Your Honor. If they went back to work and unless their condition had medically improved -- if their condition had medically improved, then yes, I think they could be terminated at that point. If their

condition had not medically --

QUESTION: And the test of medical improvement would be the ability to go back to work which they could not do before.

MS. PRYOR: Their ability to go back -- the fact that they had gone back to work would then be protected by a trial work period, and -- and would be -- that -- the fact that they were working would not be able to be considered as evidence that they were no longer disabled. However, if they had, in fact, medically improved, they could be terminated during that trial work period.

QUESTION: May I also ask you? I know you think it not legally significant, but do you disagree with the Government's position that they have consistently interpreted the statute in this way for 40 years?

MS. PRYOR: I would agree that they have consistently interpreted the statute in this way.

QUESTION: And -- and would you agree that they correctly describe the legislative deliberations in 1956 I think it was? But you just say they're totally irrelevant.

MS. PRYOR: Well, Your Honor, I would -- I have referred to the legislative history in 1954, which is when that definition of disability was first defined, and in that instance, the 1954 Senate report delineated two

aspects of disability evaluation, a medically determinable impairment of serious proportions which is expected to be of long continued and indefinite duration and a present inability to engage in substantial gainful activity by reason of that impairment.

And they went on to say that they wanted to be assured -- assured that only long-lasting impairments were covered and that that provision was not inconsistent with efforts towards rehabilitation because it, quote, refers only to the duration of the impairment and does not require prediction of continued inability to work. End quote.

Those -- that's the first time Congress defined what disability is. And it seems to me from the very beginning, they make clear that they wanted to encourage people to work, and -- and they did that by requiring that the impairment be expected to last 12 months, but not requiring that the inability to engage in substantial gainful activity lasts 12 months.

I believe Congress' judgment is expressed unambiguously in the statutory language and is -- and that's confirmed by the legislative history and that it must not be disturbed simply because the Commissioner's longstanding policy is at variance with -- with that purpose.

I would acknowledge that legislative history can be read both ways, but it seems to me that the contemporaneous legislative history, when Congress first considered the definition of disability, should be given more weight and more weight even than that is the express language of the statute.

QUESTION: One other thing I just wonder about in a case like this. Has this point been raised before by litigants such as your client?

MS. PRYOR: Yes, Your Honor. Well, the -- the issue of entitlement to a trial work period and entitlement to benefits has been decided by five courts of appeals.

QUESTION: The trial work period, but -- but I mean the 12 months versus 5 months as the --

MS. PRYOR: The 12 --

QUESTION: Has anyone argued this before this case?

MS. PRYOR: Well, yes, Your Honor. The -- the Massachusetts case of White v. Finch considered this issue.

The Alexander case, I will acknowledge, the Tenth Circuit case in 1971, went the other direction, and -- and they did find that -- that the 12 months applies to the impairment at that level of severity.

But that -- the Tenth Circuit case of Walker v. -- the Walker case in the Tenth Circuit has essentially -- it does not explicitly refer to Alexander, but it clearly finds that a person is entitled to -- to benefits and to a trial work period even though they do return to substantial gainful activity within -- after the 5-month waiting period but within 12 months of onset. So --

QUESTION: That refers to question 2. Right?

MS. PRYOR: Yes, Your Honor.

QUESTION: And on question 2, if I understand you correctly, there is substantial agreement in the courts of appeals that you're correct?

MS. PRYOR: Yes, Your Honor. The five courts of appeals have -- or four others, other than -- and the Walton case have -- have gone consistent --

QUESTION: But that's not the case with question 1.

MS. PRYOR: Question 1 has been ruled on differently by different courts.

QUESTION: Well, question 2 hinges on question -- if you lose on question 1, you lose on question 2, don't you?

MS. PRYOR: No, Your Honor, I don't believe we do. It's a tougher call. There's no question, but even if you find that the inability to engage in substantial

gainful activity must last 12 months, the language of the entitlement statute and the -- the prospective standard required by the entitlement statute, together with the expectancy language of the disability definition, I believe together require that benefits be paid and that a trial work period be available in this case.

QUESTION: Do you agree with the Government's estimate that -- that if -- if you win in this case, the difference in -- in payouts under this program is going to be something like $8 billion a year? Is it -- is it that excessive?

MS. PRYOR: No, Your Honor, I don't agree with that. I believe those are completely unsubstantiated figures and that, one, this isn't probably the proper forum for that. I believe that should properly be addressed to Congress. But secondly, I think that that -- those figures are based on a number of flawed assumptions.

Number one, Mr. Walton has never suggested that he is entitled to indefinite payment of benefits while engaged in substantial gainful activity. Once his trial work period ends, that work can then be considered and his benefits would be cut off. In addition, someone whose condition has medically improved, unlike Mr. Walton, could be terminated from benefits prior to that, even before -- even during the trial work period.

Secondly, the Government seems to assume that all those cases which have been denied on durational grounds in the past would be approved under the Fourth Circuit's ruling. That is far from the case. A person must still have an impairment which is expected to last 12 months and that impairment must still meet the severity requirement.

Third, there have been acquiescence rulings in effect for several years, applying the McDonald case in the Seventh Circuit since 1988, the Walker case in the Tenth Circuit since 1992, the Newton case in the Eighth Circuit since 1998, and the Salamalekis case in the Sixth Circuit since late 2000.

QUESTION: Can I ask you before -- can I just ask you quickly if you're -- simply repeating these, which I -- is that on question 2, am I right in thinking we don't reach question 2 if you lose on question 1?

QUESTION: That's what I asked.

MS. PRYOR: No, Your Honor, I don't believe that is the case.

QUESTION: And that's what I didn't understand. That's what I thought maybe you answered. But why would we reach it because how -- if you're not entitled -- if you lose question 1, the person never became entitled to Social Security, and the statute says a period of trial

work shall begin with the month in which he becomes entitled to Social Security. So, what is exactly -- maybe -- I don't mean to have you repeat yourself if I just missed it.

MS. PRYOR: No, that's okay.

QUESTION: But what's the response to that?

MS. PRYOR: No, sir. I would -- I would -- you must be entitled to benefits to be entitled to a trial work period. However, I don't think that finding that the 12-month duration requirement applies to the inability to engage in -- in substantial gainful activity means that we lose on entitlement. The entitlement --

QUESTION: That's what -- but what I didn't understand is if you lose on question 1 and your client therefore is not entitled to Social Security, isn't that the end of the case? We don't have to reach question 2.

MS. PRYOR: That's what I disagree on.

QUESTION: Yes, because --

MS. PRYOR: But the definition of disability isn't the final part of that because the person can -- if the entitlement statute requires a prospective consideration of the criteria of entitlement, every person who's insured, has not attained retirement age, has filed an application, is under a disability shall be entitled to disability insurance benefits for each month beginning

with the first month after his waiting period. At that time if you look at the requirements of entitlement at the time of his application in April 1995, he was entitled beginning that month because he met all other requirements --

QUESTION: That -- that's --

MS. PRYOR: -- and he had a disability even if you look at disability as an expectation --

QUESTION: Well, but if you lose on question 1, he didn't have a disability.

MS. PRYOR: If he -- even if there was at that time an expectation that his inability to engage in substantial gainful activity must last 12 months.

QUESTION: I'm going have to -- you're going to have to write -- somebody is going to have to write this. So -- so suppose the first conclusion is your client never became entitled to Social Security. Never. You have a lot of different reasons why he did, but suppose every one of them is rejected, which maybe they wouldn't be, but assume that. Then do we reach question 2?

MS. PRYOR: If he's never entitled --

QUESTION: Yes, never entitled.

MS. PRYOR: -- then I agree he is not entitled to a trial work period.

QUESTION: All right. So, we have to decide,

for whatever theories you may have, whether he is or is not entitled.

MS. PRYOR: My only difference with what you're saying, Your Honor, is that he can be entitled even if you find the duration applies to the inability to engage in substantial gainful activity.

QUESTION: That that is because?

MS. PRYOR: And that is because the entitlement statute is a prospective standard from the point of application, and the --

QUESTION: Oh, yes, of course. It could turn out that your client, even though he hasn't been disabled at a level of severity for 12 months, nonetheless is a person that when they decided it I guess, the person -- it could have been after 8 months, and the decider could have said, oh, but it can be -- it will be expected to last at this level of severity.

QUESTION: Well, I guess you take the position that it doesn't have to be decided, that the statute itself says --

MS. PRYOR: Thank you.

QUESTION: -- the person is entitled at the end of the 5 months.

MS. PRYOR: Yes, Your Honor.

QUESTION: That's your position.

MS. PRYOR: That is my position.

QUESTION: It doesn't require a decision maker.

MS. PRYOR: Thank you.

QUESTION: But if -- but if -- if we determine that in fact the disability level must be as the Government claims, then in a case in which the determination is made before the 12-month period and at that time the person is back working at a substantial level so that the determination is properly made that the person never qualified, then there would be no reason, in a case like that, ever to proceed to the second question. Isn't that correct?

MS. PRYOR: Yes, Your Honor.

QUESTION: Okay.

QUESTION: May I ask this one question? I just want to be sure I haven't missed something in the argument. You agree, as I understand it, there is a severity requirement in the impairment. And what is the severity requirement?

MS. PRYOR: Your Honor, that is set out in (d)(2) of 423, which is -- it's found at page 70a. And that provides that an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he's not only able -- unable to do his past work but can't do

other work.

The equivalent of that or even a higher standard of that is meeting a listing of impairments, which my client did, and he -- he met the listing --

QUESTION: If I understand you, you're saying that the -- that the severity requirement is an inability to engage in substantial work.

MS. PRYOR: Well, but -- yes. And considering you can't do your past work or other work considering age, education, and work experience.

But another part of that is meeting a listing, which is a higher level, and the listings are defined as those impairments which are presumed to be -- prevent someone from being able to engage in any gainful activity, not just substantial gainful activity. My client was found twice by the administrative law judge as being -- having a listing-level impairment. So, by definition, he met the severity requirement and he met that at the time of both hearings, the second of which was more than 2 and a half years after its onset date.

QUESTION: It seems to me that I -- I really have trouble understanding if there's a severity requirement measured by inability to work for a period of time, why that severity requirement wouldn't continue for the entire period under the statutory definition of

impairment. That's what I'm having trouble understanding.

MS. PRYOR: Well, first of all, Your Honor, the severity requirement does not have a durational element to it. There's nothing in that --

QUESTION: It doesn't say so, but the -- but the disability has a durational requirement and it's not a disability unless it's severe enough.

MS. PRYOR: Well, the impairment has a durational --

QUESTION: Impairment I should say.

MS. PRYOR: And -- and there is a separate severity requirement, but I don't believe that the statute says that -- that it must last at that level of severity for 12 months. Once you no longer have a severe impairment, I would agree that you can -- your benefits can be terminated. But it does not require that -- that at the outset there must be an expectation that it will persist at that level of severity for the entire 12 months.

And I believe that the legislative history gives the reason for that. Congress wanted to balance its desire to restrict payment of benefits with its desire to encourage people to try to go back to work. The Commissioner's policy has the opposite effect. It tells people stay home for 12 months or at least until your case

is adjudicated, before you try to work. I believe that's a clear disincentive for people like my client who are -- who are attempting to work despite the fact that their impairment remains severe.

QUESTION: Does the record tell us what's happened to the respondent in the interim?

MS. PRYOR: Your Honor, he -- this is not in the record, but he subsequently reapplied and is on disability benefits based on the subsequent application.

There is no question in this case that Cleveland Walton would have been paid disability benefits long ago had he merely stayed home until after his hearing and not tried to work. Instead, he has been penalized for his courage and his motivation in trying to work despite his continuing listing-level impairment.

The Commissioner's policy violates the express language of the statute. It is contrary to the legislative history of the disability program and to longstanding agency regulations. And it has been repeatedly rejected by courts of appeals and district courts throughout the Nation. The Commissioner's policy is also contrary to sound public policy concerns which are are reflected both in the legislative history and in the case law.

Accordingly, the Commissioner's unlawful and

ill-advised policy should be rejected so that other highly motivated disabled persons like Cleveland Walton will not be penalized in the future for their good faith efforts to work.

I'd be happy to address any other questions you might have.

QUESTION: Thank you, Ms. Pryor.

Mr. Lamken, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF JEFFREY A. LAMKEN

ON BEHALF OF THE PETITIONER

MR. LAMKEN: I would like to begin by addressing the 5-month trial work -- excuse me -- the 5-month waiting period. And it's important to emphasize that for a very large and important component of the Social Security program, the SSI program, the Supplemental Security Income disability program, there is no 5-month waiting period. So, for anyone who's applying for SSI disability income, they -- that person, under respondent's and the court of appeals' interpretation, would be entitled to benefits for a very brief period of inability to work so long as the underlying medical condition, such as asthma or arthritis, can be expected to last or has lasted 12 months. It is in view of the structure of the act, including the continuation of the payments for 2 months after the disability ceases, hard to believe that that was what

Congress had in mind.

Second, I should emphasize that the 5-month waiting period isn't part of the definition of disability. What it is is it operates like a deductible. It provides a period of time during which the individual bears the burden of their disability themselves and saves the Government the -- saves the Government money that would have to be paid for that individual. But it does not determine what is a disability. It only determines what period of disability will be paid for and compensated by the Government.

I'd like to also turn to mention for a moment the legislative history. The legislative history upon which respondent relies is for a separate program enacted 2 years before the disability program at issue here. The disability program issued in 1956. When Congress enacted it, it clearly understood that the inability to engage in substantial gainful activity, the disability itself, was going to have to last the requisite duration and not merely the medical -- not merely the medical condition. And when Congress changed the duration from long, continued, and indefinite, which was the original term, to 12 months, it specifically understood that the 12-month period applied to the impairment at a disabling level of severity.

And the -- the Senate report, which is quoted on page 36 of our brief, makes that lucid. It states that the act, as amended, would provide for disability benefits for an insured worker who has been or can be expected to be totally disabled throughout a continuous period of 12 calendar months, and a 6-month period was rejected specifically because it would provide benefits for short-term disabilities.

Finally, in terms of incentives, the incentive to return to work before there is an actual disability is properly addressed by the Commissioner's unsuccessful work attempt regulations.

In addition, the court of appeals' construction is an overbroad response that actually deters returning to work because it would provide benefits not merely to those like Mr. Walton who have a long-term impairment that briefly disables them and then heroically return to work, but also those who have a long-term impairment that briefly disables them and do not actually return to work. The vast majority of applicants who seek benefits do not return to work, and those -- and those individuals would receive benefits despite an ability to return to work and their failure to do so.

If there are no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lamken.

The case is submitted.

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)