

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JO ANNE B. BARNHART, :

4 COMMISSIONER OF SOCIAL :

5 SECURITY, :

6 Petitioner :

7 v. : No. 00-1937

8 CLEVELAND B. WALTON. :

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10 Washington, D.C.

11 Wednesday, January 16, 2002

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:06 a.m.

15 APPEARANCES:

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

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

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

2 (11:06 a.m.)

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

5 Mr. Lamken.

6 ORAL ARGUMENT OF JEFFREY A. LAMKEN

7 ON BEHALF OF THE PETITIONER

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

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

16 QUESTION: Just a moment, Mr. Lamken.

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

20 Go ahead.

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

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

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

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

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

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

25 Under the court of appeals' view, however --

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

4 MR. LAMKEN: Your Honor, no. Our view is not
5 that the trial work period does not begin until the end of
6 12 months. Our view is that the trial work period only
7 begins if the -- if the claimant actually becomes entitled
8 to benefits at some point, and that's true because the
9 trial work period begins when the claimant becomes
10 entitled to benefits. If the claimant never becomes
11 entitled to benefits, he never receives a trial work
12 period.

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

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

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

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

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

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

5 QUESTION: Yes.

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

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

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

1 benefits are payable.

2 MR. LAMKEN: Yes, Your Honor.

3 QUESTION: Why aren't they right about that?

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

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

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

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

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

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

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

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

8 Now, that is consistent with the way courts --

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

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

14 QUESTION: A difficult --

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

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

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

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

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

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

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

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

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

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

4 MR. LAMKEN: No, Your Honor.

5 QUESTION: No?

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

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

1 position.

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

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

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

10 QUESTION: Right.

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

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

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

19 QUESTION: Thank you.

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

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

8 QUESTION: Well, maybe. You know, once you
9 posit that -- that Congress didn't want to provide
10 compensation for short-term disability. But if -- if you
11 had to determine what Congress' intent was purely from
12 that language, I just don't think you get there.
13 Disability means an inability to gain -- to engage in any
14 substantial -- substantial gainful activity. It doesn't
15 say how long that disability has to -- it could be, you
16 know, a week-long inability. And then it goes on, by
17 reason of any mentally -- medically determinable physical
18 or mental impairment which can be expected to result in
19 death or which has lasted or can be expected to last for
20 12 months. All it requires is that the impairment be a
21 long-term impairment and if that produces even a week-
22 long inability to work, you're -- you're technically
23 within the language of that -- of that provision.

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

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

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

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

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

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

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

25 QUESTION: So, if you look just at the word

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

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

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

15 MR. LAMKEN: Pardon?

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

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

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

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

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

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

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

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

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

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

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

14 QUESTION: Right.

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

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

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

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

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

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

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

9 In addition, that -- that view is supported by
10 the repeated amendments to the statute that Congress --
11 repeated amendments to the definition of disability
12 against the backdrop of the Commissioner's now 45-year-
13 old settled construction. Years after the Commissioner
14 first adopted her construction of the statute in 1957, in
15 1965 Congress amended the statute, and when Congress did
16 so, it did not merely leave in place the Commissioner's
17 by-then settled construction, instead Congress reiterated
18 that construction in the committee reports that were
19 accompanying it -- accompanying the amendments and
20 described the act in precisely the same terms that the
21 Commissioner had through the regulations.

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

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

9 Under the court of appeals --

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

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

1 not able to engage in substantial gainful activity.

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

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

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

1 disparity in time of adjudication?

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

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

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

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

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

6 In this case there is evidence that the
7 individual was able to engage successfully in working for
8 2 solid years, and the Commissioner is not required to
9 ignore that probative, indeed dispositive evidence simply
10 because the Commissioner might have made a mistake had the
11 claim been adjudicated earlier.

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

18 MR. LAMKEN: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

11 MR. LAMKEN: Well --

12 QUESTION: -- nothing else.

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

16 QUESTION: Of course, you claim congressional
17 approval too.

18 MR. LAMKEN: Yes.

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

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

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

3 QUESTION: Mr. -- Ms. Pryor.

4 ORAL ARGUMENT OF KATHRYN L. PRYOR

5 ON BEHALF OF THE RESPONDENT

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

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

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

1 within 12 months of the onset of their disability.

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

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

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

10 MS. PRYOR: No, Your Honor.

11 QUESTION: All right. What about a week?

12 MS. PRYOR: The entitlement statute I believe
13 shows that a person must be under a disability during the
14 5-month waiting period. So, they must have a condition
15 which is severe enough to prevent substantial gainful
16 activity.

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

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

20 QUESTION: During the 5-month.

21 QUESTION: During the entire 5 months --

22 MS. PRYOR: Yes, Your Honor.

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

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

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

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

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

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

8 MS. PRYOR: 423(a), which is found at -- on page
9 64a and 65a. And that entitlement statute says that
10 you're entitled for each month, beginning with the first
11 month --

12 QUESTION: Where are you reading from on 64a?

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

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

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

21 QUESTION: Thank you.

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

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

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

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

13 MS. PRYOR: Yes, Your Honor.

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

17 MS. PRYOR: Yes, ma'am.

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

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

1 period beginning that month.

2 QUESTION: That's 9 months.

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

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

15 MS. PRYOR: He returned to substantial -- well,
16 he returned to any work in May of 1995, and he would be
17 entitled to a 9-month trial work period plus the
18 additional 3 months, and then for any months during that
19 36-month entitlement -- re-entitlement period during which
20 he could not work.

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

24 MS. PRYOR: Yes, Your Honor.

25 QUESTION: And the end -- the minimum end would

1 be when?

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

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

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

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

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

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

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

7 MS. PRYOR: Yes, Your Honor.

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

17 Now, what is your response to that?

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

21 QUESTION: We do that all the time.

22 (Laughter.)

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

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

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

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

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

25 MS. PRYOR: I'm sorry.

1 QUESTION: The -- I asked Mr. Lamken are you
2 saying, in effect, that the word impairment means a
3 disabling impairment. Because I think you would agree too
4 that if you had a condition that severely disabled you for
5 1 week, excruciating back pain -- you couldn't do anything
6 -- but that impairment continued at a less severe level
7 well beyond a year -- it didn't impede you from
8 substantial gainful activity -- you would not be disabled.
9 And yet, if you read the statute literally, you would be.

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

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

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

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

6 But I believe the entitlement statute answers
7 that question by saying you must -- you must have a -- an
8 impairment which is at the disabling level for those 5
9 months. If it continues at the disabling level beyond the
10 5 months, you're entitled to benefits for those months.

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

15 MS. PRYOR: That's correct.

16 QUESTION: That's --

17 MS. PRYOR: Yes.

18 QUESTION: What about -- what about (f)(3) --
19 what am I talking about? I'm talking about section
20 423(f)(3) which says that a --

21 QUESTION: What page?

22 QUESTION: Where are you reading from?

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

24 (Laughter.)

25 QUESTION: Page 76a.

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

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

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

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

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

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

10 QUESTION: I understand.

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

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

16 MS. PRYOR: Well, the impairment --

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

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

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

1 MS. PRYOR: I don't --

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

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

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

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

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

1 condition had not medically --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MS. PRYOR: The 12 --

17 QUESTION: Has anyone argued this before this
18 case?

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

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

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

8 QUESTION: That refers to question 2. Right?

9 MS. PRYOR: Yes, Your Honor.

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

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

16 QUESTION: But that's not the case with question
17 1.

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

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

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

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

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

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

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

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

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

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

18 QUESTION: That's what I asked.

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

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

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

5 MS. PRYOR: No, that's okay.

6 QUESTION: But what's the response to that?

7 MS. PRYOR: No, sir. I would -- I would -- you
8 must be entitled to benefits to be entitled to a trial
9 work period. However, I don't think that finding that the
10 12-month duration requirement applies to the inability to
11 engage in -- in substantial gainful activity means that we
12 lose on entitlement. The entitlement --

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

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

18 QUESTION: Yes, because --

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

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

6 QUESTION: That -- that's --

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

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

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

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

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

22 QUESTION: Yes, never entitled.

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

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

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

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

7 QUESTION: That that is because?

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

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

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

21 MS. PRYOR: Thank you.

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

24 MS. PRYOR: Yes, Your Honor.

25 QUESTION: That's your position.

1 MS. PRYOR: That is my position.

2 QUESTION: It doesn't require a decision maker.

3 MS. PRYOR: Thank you.

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

13 MS. PRYOR: Yes, Your Honor.

14 QUESTION: Okay.

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

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

1 other work.

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

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

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

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

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

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

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

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

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

10 QUESTION: Impairment I should say.

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

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

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

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

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

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

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

25 Accordingly, the Commissioner's unlawful and

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

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

7 QUESTION: Thank you, Ms. Pryor.

8 Mr. Lamken, you have 4 minutes remaining.

9 REBUTTAL ARGUMENT OF JEFFREY A. LAMKEN

10 ON BEHALF OF THE PETITIONER

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

1 Congress had in mind.

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

12 I'd like to also turn to mention for a moment
13 the legislative history. The legislative history upon
14 which respondent relies is for a separate program enacted
15 2 years before the disability program at issue here. The
16 disability program issued in 1956. When Congress enacted
17 it, it clearly understood that the inability to engage in
18 substantial gainful activity, the disability itself, was
19 going to have to last the requisite duration and not
20 merely the medical -- not merely the medical condition.
21 And when Congress changed the duration from long,
22 continued, and indefinite, which was the original term, to
23 12 months, it specifically understood that the 12-month
24 period applied to the impairment at a disabling level of
25 severity.

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

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

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

24 If there are no further questions.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lamken.

1 The case is submitted.

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

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