

1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -X  
3   THE BLACK & DECKER DISABILITY :  
4   PLAN, :  
5                   Petitioner :  
6           v. : No. 02- 469  
7   KENNETH L. NORD :  
8   - - - - -X  
9                                   Washington, D. C.  
10                                  Monday, April 28, 2003  
11                   The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States at  
13   10: 03 a. m  
14   APPEARANCES:  
15   LEE T. PATERSON, ESQ., Los Angeles, California; on behalf  
16           of the Petitioner.  
17   LISA S. BLATT, ESQ., Assistant to the Solicitor General,  
18           Department of Justice, Washington, D. C. ; on behalf of  
19           the United States, as amicus curiae, supporting the  
20           Petitioner.  
21   LAWRENCE D. ROHLFING, ESQ., Santa Fe Springs, California;  
22           on behalf of the Respondent.  
23  
24  
25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	LEE T. PATERSON, ESQ.	
4	On behalf of the Petitioner	3
5	LISA S. BLATT, ESQ.	
6	On behalf of the United States,	
7	as amicus curiae, supporting the Petitioner	18
8	LAWRENCE D. ROHLFING, ESQ.	
9	On behalf of the Respondent	25
10	REBUTTAL ARGUMENT OF	
11	LEE T. PATERSON, ESQ.	
12	On behalf of the Petitioner	50
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
first this morning in No. 02-469, The Black & Decker  
Disability Plan v. Kenneth Nord.  
Mr. Paterson.

ORAL ARGUMENT OF LEE T. PATERSON  
ON BEHALF OF THE PETITIONER

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

The Ninth Circuit has adopted a treating  
physician rule in ERISA cases which requires the plan  
administrator to either accept the opinion of a treating  
physician or to reject that opinion by specific legitimate  
reasons based upon substantial evidence. The Ninth  
Circuit says that this rule gives special weight,  
deference, and a presumption to the opinions of treating  
physicians.

The failure to follow this rule has two effects.  
First, a finding that the plan administrator has a  
conflict of interest which mandates de novo review, and  
secondly, on de novo review, that the plan administrator's  
decision was not reasonable.

The Ninth Circuit's --

QUESTION: Now, the Secretary has adopted some

1 requirements of explanation of reasons where the  
2 physicians differ in their views. Has -- has the  
3 Secretary done something of the sort?

4 MR. PATERSON: The Secretary has adopted  
5 regulations, which were effective in January 1 of 2002,  
6 which require a plan administrator to obtain the opinion  
7 of an expert medical professional to -- to advise him  
8 regarding medical opinions and to be able to provide an  
9 expert medical opinion to the claimant if he requests it.  
10 That would not apply, of course, to this case since this  
11 claim was filed in 1997.

12 QUESTION: And is there a requirement to give  
13 reasons if there is a difference of views between the  
14 treating physician and the expert?

15 MR. PATERSON: No. There is no requirement to  
16 provide reasons to -- or between the two physicians'  
17 opinions. There has always been a requirement under ERISA  
18 and the regulations that a plan administrator explain the  
19 reasons for his denial of a claim.

20 QUESTION: And this claim was denied?

21 MR. PATERSON: This claim was denied.

22 QUESTION: Were the reasons given in this case?

23 MR. PATERSON: Yes, they were, Your Honor. They  
24 were given by the plan administrator in writing to the  
25 claimant. He told the claimant that he was, in fact,

1 denying the claim based on the opinion of Dr. Mitri.

2 He told them he was denying the claim because he  
3 did not meet the plan definition of total -- I'm sorry --  
4 complete inability to perform the job of a material  
5 planner.

6 He told them that part of the reason for denying  
7 the claim was the fact that the plan administrator had  
8 asked the claimant to please have his treating physicians  
9 comment on the opinion of Dr. Mitri. He did that twice.  
10 He did it in writing. And in neither case did the  
11 respondent respond with any -- from the treating  
12 physicians -- with any response from their -- the treating  
13 physicians.

14 And he also did it on the basis that Janmarie  
15 Forward's opinion, who was a human resource  
16 representative, was not -- did not change his opinion. So  
17 there were those --

18 QUESTION: And -- and under the Secretary's  
19 rules, if there is in fact a conflict of interest, it can  
20 be weighed in making that ultimate resolution by the  
21 court?

22 MR. PATERSON: No. There's -- there's nothing  
23 in the -- if you mean the Secretary of Labor's rules,  
24 there's nothing in the Secretary of Labor's rules which  
25 relates to any weighing of a conflict of interest by the

1 plan administrator. There is a -- a provision in the case  
2 of Firestone v. Bruch in which the Court in that case said  
3 that if the plan administrator --

4 QUESTION: This Court has suggested that a  
5 conflict of interest can be weighed.

6 MR. PATERSON: This Court said that in Firestone  
7 v. Bruch.

8 And -- but the question in that case that has  
9 been not -- it has not been decided in that case and which  
10 has created a conflict of interest of -- I'm sorry -- a  
11 conflict among the circuits is the question of what does  
12 it mean to weigh. Does it mean to weigh the conflict of  
13 interest, or does it mean to conflict of interest against  
14 the reasonableness of the decision?

15 The Second Circuit has said it means to weigh  
16 the conflict of interest as provided in Restatement 187,  
17 and after you weigh the conflict of interest, you then  
18 move on to the reasonableness of the decision.

19 The Ninth -- the Ninth and the Eleventh Circuits  
20 have said it means that you weigh the decision, and if you  
21 -- the conflict -- and if you find there is a conflict,  
22 then you find that the decision of the plan administrator  
23 is presumptively void.

24 And the remainder of the circuits have adopted  
25 something called the sliding scale test where you weigh

1 both the conflict and the -- the reasonableness of the  
2 decision at the same time.

3 This Court commented on that issue, I believe,  
4 in Rush v. Moran when the Court said, how can you give  
5 deference to the opinion of a treating physician -- I'm  
6 sorry -- of a plan administrator at the same time that you  
7 are looking for conflict of interest?

8 We would submit, if I may, Your Honor, that the  
9 way to do that is to first look for conflict of interest  
10 in -- in the -- the way that Restatement 187 does that.  
11 You first test for conflict of interest. If there's no  
12 conflict of interest, then this potential conflict of  
13 interest, what this Court called a potential conflict of  
14 interest, goes away. It is a nothing. It has no effect  
15 whatsoever.

16 QUESTION: You didn't tell us -- you didn't --

17 QUESTION: As to your case, what -- what  
18 difference does it really make? The Ninth Circuit in a  
19 portion of -- of its opinion which is not being reviewed  
20 here --

21 MR. PATERSON: I didn't mean to --

22 QUESTION: -- and -- and in Regula seems to set  
23 up a two-tier system or a dichotomy of an administrator  
24 who is a fiduciary and an administrator who's not. I  
25 should think -- tell me, maybe I'm incorrect -- that your

1 position is that the treating physician rule is an  
2 inappropriate approach in either instance.

3 MR. PATERSON: There's no question about that.  
4 I didn't mean to argue for a difference in -- in the  
5 standard of review. We haven't -- we haven't brought that  
6 to this Court on a petition. I merely meant to respond to  
7 Justice O'Connor's question.

8 QUESTION: But I take it your point is that in  
9 -- in either context, the treating physician rule is  
10 inappropriate.

11 MR. PATERSON: Absolutely. There's no question  
12 in our -- in our position to this Court that the treating  
13 physician rule is an inappropriate rule under either -- of  
14 any of those tests.

15 QUESTION: Am -- am I --

16 QUESTION: If you are correct in -- in that  
17 regard, it would go back to the Ninth Circuit and there  
18 would still remain the question on which you didn't seek  
19 review, and that is, just how do you handle this conflict  
20 of interest? I presume the Ninth Circuit would go back to  
21 where it was.

22 MR. PATERSON: I believe that that's correct,  
23 Your Honor. What would happen is we would go back to  
24 where we would have been if the treating physician rule  
25 didn't exist. The Ninth Circuit would be using its



1 presumptively void test, would look to see if the -- the  
2 claimant had produced any probative material evidence of a  
3 conflict of interest, which actually affected the decision  
4 as opposed to just a potential conflict of interest. If  
5 they found that, they would find that the decision of the  
6 plan administrator was presumptively void. If they didn't  
7 find that, then that issue would drop from the case and  
8 they would then test the -- the decision of a plan  
9 administrator based on abuse of discretion standard.

10 QUESTION: But their analysis would be different  
11 in one respect, I take it, and that is in -- in the case  
12 as they considered it first, the -- the refusal to follow  
13 a treating physician rule was taken itself as evidence of  
14 conflict. Is that correct?

15 MR. PATERSON: Yes. The Ninth Circuit held that  
16 the refusal to follow a treating -- the treating  
17 physician's opinion or to fail to rebut that opinion by  
18 specific legitimate reasons was a material probative  
19 evidence of a -- tending to prove an actual conflict of  
20 interest which -- which affected the --

21 QUESTION: So the result might be different.

22 MR. PATERSON: I -- we would certainly -- we  
23 certainly intend it to be different if -- if we can.

24 QUESTION: Did -- did they say presumptively  
25 void? I -- I had thought that what they -- what they said

1 was if they found an actual conflict, they simply would  
2 give no deference and would review de novo as though the  
3 question was up to them

4 MR. PATERSON: The -- the test in the literature  
5 is called the presumptively void test. I don't believe  
6 the Ninth Circuit calls it the presumptively void test.  
7 They -- they call it the Atwood test, the Atwood v.  
8 Newmont Gold test.

9 QUESTION: I don't care what they call it. I  
10 want to know what the consequence is. I thought the  
11 consequence held by the Ninth Circuit was that if they did  
12 find the actual conflict, they would give no deference to  
13 the plan administrator's decision and would review the  
14 question de novo as though it was up to them

15 MR. PATERSON: Yes, and in that sense it would  
16 -- they would be void. I think the presumptively void  
17 issue comes in this sense, Your Honor. When the -- if the  
18 claimant comes forward with material probative evidence of  
19 a conflict tending to show a conflict of interest under  
20 the Ninth Circuit's test, the Ninth Circuit says that  
21 there is a rebuttable presumption created and that the  
22 burden is then on the plan administrator to come forward  
23 with evidence and to rebut that material probative  
24 evidence that there is an actual conflict of interest.

25 QUESTION: But we take the case on the theory

1 that that's governing in this case? I mean, you didn't --

2 MR. PATERSON: Yes.

3 QUESTION: -- seek -- seek review of it. It's  
4 just the treating physician rule that you want us to talk  
5 about.

6 MR. PATERSON: That's correct. I -- I don't --  
7 I've been asked these questions, but we're not arguing the  
8 issue of standard --

9 QUESTION: It is difficult for me to get to the  
10 thing when I have a kind of basic confusion in my mind,  
11 which I have. I don't understand this conflict of  
12 interest thing from start to finish. That is to say, why  
13 -- why is it -- why is it any different to have a trustee  
14 in -- in this kind of a case who hires an insurance  
15 company to look to see whether the people are disabled or  
16 not than to have a trustee who hires an insurance company  
17 to run the whole plan?

18 And anyway, why is that different from a trustee  
19 who, say, runs a classical trust and has to decide -- call  
20 it a spendthrift trust -- whether to give the beneficiary  
21 \$1,000 this month and have less in the -- in the corpus or  
22 to give him \$800 this month and have more in the corpus,  
23 which might, by the way, grow to help other beneficiaries?

24 So I -- I don't understand it basically and I've  
25 read enough to know that I really don't.

1                   MR. PATERSON: Thank you, Justice Breyer. I --  
2 I hope that I can -- I can help.

3                   In section 187 of the Restatement of Trusts, it  
4 talks about a potential conflict of interest, the  
5 possibility of a conflict of interest. And this -- this  
6 Court talked about that in Firestone v. Bruch. That  
7 potential conflict of interest is not a conflict of  
8 interest. It's just the possibility. And any court  
9 reviewing any trustee, ERISA or not, if they thought there  
10 might be a conflict of interest, would look for that  
11 conflict of interest and see if there was --

12                  QUESTION: What could it consist of?

13                  MR. PATERSON: It might consist in an ERISA case  
14 of some direction from the president of the company to the  
15 trustee to cut back on benefit costs.

16                  QUESTION: I see. I see.

17                  MR. PATERSON: That would be -- then he would  
18 not be representing the -- the members of the plan and he  
19 would be breaching his fiduciary duty.

20                  QUESTION: What if there's no such directive,  
21 but the plan is set up in such a fashion that it's  
22 employer-funded and the higher the benefit costs are, the  
23 -- the more the employer pays, and hence the less profits  
24 the employer has?

25                  MR. PATERSON: That's -- I'm sorry.

1           QUESTION: Is that just a potential conflict of  
2 interest or is that an actual conflict of interest when  
3 the plan administrator is -- is an agent of the employer?

4           MR. PATERSON: Under this Court's rule -- or  
5 decision in Firestone and in -- under the Ninth Circuit's  
6 decision, that is only a potential conflict of interest.  
7 There has to be material probative evidence of an actual  
8 conflict of interest which affected his decision.

9           QUESTION: It's using conflict of interest in a  
10 -- in a strange sense, it seems to me.

11          MR. PATERSON: It -- well --

12          QUESTION: There's certainly a conflict of  
13 interest there. He's supposed to represent the employees,  
14 but he's an agent of the employer, and the more he gives  
15 to the employees, the less there is for the employer. I  
16 would call that a conflict of interest, but -- but that is  
17 not, for purposes of these cases, a conflict of interest.  
18 That is a potential conflict.

19          MR. PATERSON: That is a potential conflict of  
20 interest.

21          QUESTION: It seems to me they're not really  
22 talking about a conflict of interest. They're talking  
23 about -- what should I say? Evidence that -- that the  
24 trustee was not acting in the -- in the employees' best  
25 interest.

1                   MR. PATERSON: And I think that should be the --  
2 the criteria that the court has to look for in each of  
3 these cases to decide whether the trustee is actually  
4 conflicted or not.

5                   QUESTION: Can we get back to the question that  
6 you did raise? Why should there be a difference in the  
7 Social Security standard, which does apply this treating  
8 physician rule and disability? Both -- the question in  
9 both cases is whether this person is unable to work.

10                  MR. PATERSON: There is a -- I'm sorry.

11                  QUESTION: Yes.

12                  MR. PATERSON: There's a tremendous difference  
13 in the Social Security standard as formulated by the  
14 regulations of the Social Security Administration and the  
15 Ninth Circuit's treating physician rule in Social Security  
16 cases as formulated by the Ninth Circuit and ERISA cases.  
17 Perhaps I can point out a couple of those things.

18                  First, the Social Security Administration has a  
19 regulation, which it has adopted, which provides for a set  
20 of criteria to be reviewed by the administrative law  
21 judge. Those criteria include the -- looking at the  
22 physician's -- the treating physician's opinion,  
23 determining whether that opinion is well supported by  
24 clinical and laboratory diagnostic techniques, seeing if  
25 it's not inconsistent with other substantial evidence,

1 looking at the length of the treatment relationship and  
2 the frequency of the examination, and other criteria.

3           Once the administrative law judge goes through  
4 those criteria and determines each one of those positively  
5 towards the treating physician, he then may, or she may  
6 then, if they wish, provide conclusive weight to the  
7 opinion of the treating physician.

8           The Ninth Circuit's rule is completely different  
9 than that. The Ninth Circuit's rule says that if a person  
10 is a treating physician, then the plan administrator  
11 either has to accept that rule -- that -- that opinion or  
12 has to rebut it. A treating physician under the Ninth  
13 Circuit rule could be a -- somebody at a local well care  
14 center and you walk in and get a shot. That makes you a  
15 treating physician. Now you have an opinion which you --  
16 which, under the Ninth Circuit's rule, gives you a -- a  
17 presumptive weight.

18           QUESTION: But I take it, you would not be happy  
19 with -- if we said, well, the Ninth Circuit went too far,  
20 but it should be set up just like the Social Security  
21 because, as I understand it, this employee did get Social  
22 Security disability.

23           MR. PATERSON: Well, we don't know that for a  
24 fact, Your Honor. There is a statement in the -- in the  
25 statement of facts by the respondent in their opposition

1 brief. There is no evidence in front of this Court. The  
2 first time I ever knew about that was when I read the  
3 respondent's brief. If that is true, he should file -- he  
4 should refile with the administrator and attempt to use  
5 that evidence to get his claim reopened. But there is no  
6 evidence that I'm aware of in front of this Court on that  
7 issue.

8 QUESTION: So that's -- that is open to him to  
9 refile and say, look, I've got Social Security?

10 MR. PATERSON: Yes. He may go back to the --  
11 the plan administrator -- this case is still open because  
12 it's on appeal -- and tell the plan administrator I have  
13 this new evidence. It shows that I have been disabled  
14 since July the 15th of 1997 and I would like you to  
15 consider that evidence. And the plan administrator will  
16 do that.

17 QUESTION: I suppose there's something to be  
18 said for the proposition that if you have this private  
19 system, you don't necessarily want to bring in all the  
20 bureaucratic trappings of the Social Security review  
21 process.

22 MR. PATERSON: Well, I think that's absolutely  
23 right, because one of the congressional purposes in ERISA  
24 is to encourage employers to adopt voluntary disability  
25 plans. And the Social Security administrative regulations



1    were -- are regulations which have been adopted by the  
2    Social Security Administration. In this case, the  
3    Department of Labor which is the correlative to the Social  
4    Security Administration for ERISA plans is opposed to the  
5    ERISA, or to this --

6                    QUESTION: But -- but you -- you would  
7    acknowledge that the Social Security determination is  
8    evidence for the plan administrator to consider even  
9    though it's using a -- a mandated standard of respect for  
10   the treating physician's determination which does not  
11   exist under the plan?

12                   MR. PATERSON: I think it is evidence. I think  
13   the first thing the plan administrator would do is to look  
14   at the medical opinions which were submitted along with  
15   that report and look at the actual decision of the  
16   administrative law judge.

17                   QUESTION: But he'd make -- make the same  
18   decision. I mean, if he didn't believe the treating  
19   physician and didn't have to believe the treating  
20   physician, as the Social Security Administrator has to, to  
21   a greater degree anyway, he'd come out the same way. I  
22   just don't see how it's evidence in a -- in a proceeding  
23   that does not give the same weight to the treating  
24   physician.

25                   MR. PATERSON: It might or might not be. But it

1 if -- if it is -- if it does show that there's a  
2 difference in the condition of the -- of the claimant, it  
3 should be presented to the plan administrator to give him  
4 a chance to make the decision.

5 QUESTION: It's a different record before the  
6 Social -- the ALJ.

7 MR. PATERSON: That's correct.

8 QUESTION: It's later in time.

9 MR. PATERSON: With the permission of the Court,  
10 I'd like to reserve the remainder of my time.

11 QUESTION: Very well, Mr. Paterson.

12 MS. BLATT, we'll hear from you.

13 ORAL ARGUMENT OF LISA S. BLATT

14 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE,

15 SUPPORTING THE PETITIONER .

16 QUESTION: Ms. Blatt, did the Secretary consider  
17 adopting a rule like CA9 has imposed?

18 MS. BLATT: No, Justice O'Connor. What the  
19 Secretary has done has -- is -- has not opposed -- imposed  
20 a treating physician requirement or otherwise constrained  
21 plan administrators in the way --

22 QUESTION: Yes. I know the Secretary has not.  
23 Did the Secretary consider alternatives?

24 MS. BLATT: They didn't consider a treating  
25 physician rule, but what the Department of Labor did do

1 was impose a series of requirements to ensure fair and  
2 accurate decisionmaking. So plans must conduct a full and  
3 fair review of a claim, and they have to consider all  
4 evidence submitted by the claimant. And before making any  
5 medical judgments, they have to consult with a health care  
6 professional with the relevant training and experience.

7 QUESTION: The question was when they did that,  
8 did they even think of the treating physician rule? Did  
9 anybody say to the Department, maybe we should have one?  
10 No, I don't think we will.

11 MS. BLATT: No. There's no evidence that they  
12 considered it. But they did overhaul their regulations  
13 for 2002 and did impose a lot of requirements, and they  
14 took a very different approach. They didn't do anything  
15 that constrained plan administrators in weighing evidence.  
16 Instead, they said, you have to consider all the relevant  
17 evidence and make an independent judgment. And then they  
18 finally required that the specific reasons have to be  
19 given for any denial in a manner that's calculated to be  
20 understood by the claimant. And in the Department's view,  
21 what that means is it has to be in sufficient detail to  
22 permit meaningful judicial review for an abuse of  
23 discretion.

24 But the Ninth Circuit takes a very different and  
25 categorical approach that singles out treating physician

1 evidence and has a requirement that reasons have to be  
2 given if the administrator is not going to defer to that  
3 evidence.

4 QUESTION: Maybe the Ninth Circuit was trying to  
5 spark for ERISA the same thing that the courts did for  
6 Social Security. The Social Security -- whatever the rule  
7 is, the treating physician rule -- that started with the  
8 courts and then the -- the Commissioner said, okay, we'll  
9 adopt it as part of our regulations. But didn't it begin  
10 with the courts?

11 MS. BLATT: It began with the courts, and they  
12 -- most of them did impose some requirement and some  
13 outright rejected it because they thought Congress had  
14 entrusted the ALJ as the finder of fact with the  
15 responsibility to weigh conflicting evidence. And the  
16 Commissioner, in order to bring uniformity in this massive  
17 nationwide Government program, adopted a less aggressive,  
18 deferential rule in its regulations.

19 But the Department of Labor has not adopted any  
20 such rule. Rather, the Department of Labor's regulations  
21 are consistent with the background presumption that the  
22 trier of fact has the responsibility in each particular  
23 case to weigh conflicting evidence based on her judgment  
24 of the relative merits of the evidence. And -- but the  
25 Department of Labor, as I said, has a very different set

1 of requirements that don't -- that leave -- that are  
2 consistent with that background rule and don't constrain  
3 plan administrators.

4 QUESTION: Does the -- do the Department  
5 regulations have some sort of a threshold test for whether  
6 there's a conflict of interest or is that just not  
7 addressed?

8 MS. BLATT: No. The Department of --  
9 regulations don't speak to the question of a conflict at  
10 all. What this Court said in Firestone was that a  
11 conflict must be weighed as a factor in determining  
12 whether there's been an abuse of discretion.

13 QUESTION: And Firestone, as I recall, just  
14 recognized that the plan administrator can wear two hats,  
15 be employer some times and -- and a fiduciary at others.

16 MS. BLATT: That's right. But under Firestone,  
17 if the employer both funds the plan and administers the  
18 plan, we think that's the type of conflict that can be  
19 considered as a factor in whether there's been an abuse of  
20 discretion.

21 QUESTION: So Firestone was using conflict of  
22 interest in -- in a different sense from the sense in  
23 which it was used here.

24 MS. BLATT: The courts have differed widely, in  
25 the wake of Firestone, of what this Court meant in

1 Firestone. The majority of the lower courts have not  
2 taken the Ninth Circuit's approach. They have said it's  
3 still an abuse of discretion review, but there's a more  
4 searching inquiry into whether there's been an abuse of  
5 discretion if the plan administrator is operating under a  
6 conflict.

7 Now, that is not --

8 QUESTION: By which it means not evidence that  
9 he was instructed to -- to keep down costs, but the mere  
10 fact that the employer is both the funder of the plan and  
11 responsible for administration of the plan.

12 MS. BLATT: That's correct.

13 QUESTION: That alone is a conflict.

14 MS. BLATT: That's the type of conflict that can  
15 be considered as a factor in conducting whether there's an  
16 abuse of discretion.

17 Now, however that plays out in a given case, our  
18 point is that you shouldn't have a special rule that's  
19 limited to treating physician evidence. And we think it's  
20 inappropriate under ERISA for three reasons, and I think  
21 I've already said two of them --

22 QUESTION: What does treating physician evidence  
23 have to do with a conflict? That's -- that's what I  
24 really don't understand.

25 MS. BLATT: Nothing.

1                   QUESTION: How does it show a conflict at all?

2                   MS. BLATT: Nothing. If there was some failure  
3 to defer or inadequate explanation -- first of all,  
4 there's something wrong with the treating physician rule.  
5 But even if there was some inadequate explanation such  
6 that the court could not conduct meaningful judicial  
7 review, the standard consequence of that, Justice Scalia,  
8 is a remand back to the administrator for further  
9 explanation, not a de novo standard of review.

10                  But that's not the question presented in this  
11 case. It's rather the propriety of a judge-made rule that  
12 singles out treating physician evidence and elevates that  
13 evidence over other evidence.

14                  Now, again, it's inconsistent with the  
15 background presumption about the trier of fact -- the  
16 responsibility of the trier of fact to weigh conflicting  
17 evidence. We think it's in significant tension with the  
18 regulations that the Department of Labor did promulgate  
19 which do not constrain plan administrators.

20                  And finally, the third reason, is that ERISA  
21 leaves to employers, private employers, the decision  
22 whether to provide benefits and, if so, the discretion to  
23 devise the form and structure of plans. And a judge-made  
24 rule is inconsistent with these discretionary and  
25 voluntary aspects of ERISA because it tells plan

1 administrators across the board how to weigh conflicting  
2 evidence in claims arising under varying and separate  
3 plans.

4 QUESTION: Would it be relevant evidence, as Mr.  
5 Paterson suggested it would be, that this man now has  
6 Social Security disability benefits?

7 MS. BLATT: The regulations require the plan  
8 administrator to consider all evidence submitted by the  
9 claimant, and it -- it would be relevant if -- depending  
10 on what it said. But this Court in Cleveland has  
11 explained that the Commissioner of Social Security applies  
12 a variety of evidentiary presumptions, not only the  
13 treating physician rule but the most prominent one is the  
14 listing of impairments such that the Social Security  
15 Administration may make a finding of disability even  
16 though the person in fact may be able to perform the  
17 essential functions of the job when judged under different  
18 legal settings. And I think the issue in -- in Cleveland  
19 was whether there was reasonable accommodation, and the  
20 Commissioner doesn't consider that when -- when she makes  
21 her determinations under the Social Security  
22 Administration. But it's just -- it's one piece of  
23 evidence that would be before the administrator.

24 And if there are no further questions, we would  
25 ask that the judgment of the Ninth Circuit be reversed.



1 QUESTION: Thank you, Ms. Blatt.

2 Mr. Rohlfi ng, we'll hear from you.

3 ORAL ARGUMENT OF LAWRENCE D. ROHLFING

4 ON BEHALF OF THE RESPONDENT

5 MR. ROHLFING: Thank you, Mr. Chief Justice, and  
6 may it please the Court:

7 In answer to Judge -- Justice Scalia's question  
8 about conflict of interest, the lower courts, in the wake  
9 of Firestone Tire & Rubber Company v. Bruch, have grossly  
10 confused the concept of conflict of interest, dollar-for-  
11 dollar conflict of interest, with actual bias. And that's  
12 the problem with the Ninth Circuit's approach, the  
13 Eleventh Circuit's approach and the other circuits'  
14 approach, is when we have evidence of conflict of  
15 interest, the courts are requiring evidence of actual  
16 bias. And I don't believe that that's the standard that  
17 this Court intended in the Firestone Tire & Rubber case.

18 Now, the other --

19 QUESTION: In Firestone -- is -- is it a  
20 conflict of interest if I set up a trust for my children  
21 to pay their college education, and then I have to make  
22 decisions. Suppose I hire a trustee and that -- or I hire  
23 somebody to run it, and I'm going to put more in if they  
24 need more, less, if they need less. So the trustee has to  
25 say whether to pay for the \$80 a month or a week or

1    whatever, a day's spending money or not, and the more he  
2    pays, the more I'm going to have to put in. Is -- is that  
3    considered, under -- under traditional trust law, a  
4    conflict of interest?

5               MR. ROHLFING: Only if the trustee's continued  
6    employment is -- is contingent upon your satisfaction.

7               QUESTION: But if it is, if -- if I say you're a  
8    trustee, I can fire you when I want, then the courts, just  
9    in that -- like Scott on Trusts and so forth, would say  
10   that's a conflict of interest?

11              MR. ROHLFING: Because you retain too much  
12   control over the -- the disposition of the trust corpus.  
13   In these voluntary plans, a plan administrator really has  
14   a choice. The plan administrator can elect to retain  
15   control --

16              QUESTION: No, I understand that. I'm just  
17   trying to figure out what classical trust law would have  
18   been. So you're saying it's the same. It should be  
19   treated the same.

20              MR. ROHLFING: The more egregious case, Your  
21   Honor, would be the facts of -- that would be similar to  
22   the facts of this case is if the balance of the trust  
23   reverted to the trustee if they didn't spend all the money  
24   on your children's education. That would be an even more  
25   egregious --

1           QUESTION: And then -- then classical trust law,  
2 Scott on Trusts, says that's a conflict of interest and --  
3 and what happens? Then courts review it all if you set up  
4 a trust like that?

5           MR. ROHLFING: Well, Scott on Trusts, the  
6 Restatement of Trusts, all refer to those decisions as  
7 voidable at the election of the beneficiary, and the court  
8 would review that decision de novo.

9           QUESTION: Mr. Rohlfig, the -- the petitioner  
10 didn't raise any question about the -- the conflict of  
11 interest. And so we're here on the petition which raises  
12 only the treating physician rule, and as Justice Kennedy  
13 pointed out, you could have the treating physician rule  
14 when you have a separation of the trustee and the -- the  
15 company. So if you could get down to the treating  
16 physician rule, I think it would be helpful --

17          MR. ROHLFING: Yes.

18          QUESTION: -- since it's the only question  
19 that's raised.

20          MR. ROHLFING: Yes, Your Honor.

21               The Ninth Circuit did articulate the Ninth  
22 Circuit rule in the context of conflict of interest. So I  
23 think it's important to keep that focus in mind.

24               But the treating physician rule that was  
25 articulated by the Ninth Circuit in both this case and in

1 the Nord -- and in the Regula case was not a weighted  
2 rule. There was not a thumb on the scale as petitioner  
3 has put it. Rather the rule that the --

4 QUESTION: Well, why -- why isn't it a thumb on  
5 the scales when it requires substantial evidence to -- to  
6 rebut? That sounds like a thumb to me.

7 MR. ROHLFING: It -- it doesn't require  
8 rebuttal, Your Honor. It requires rejection for  
9 substantial reasons.

10 QUESTION: Well, whatever term you want to use  
11 it, unless you've got substantial evidence to override the  
12 treating physician's opinion, the treating physician's  
13 opinion is supposed to control, and that sounds like a  
14 thumb.

15 MR. ROHLFING: I think that this Court's  
16 jurisprudence and the jurisprudence of other courts in  
17 other contexts have stated that concepts of abuse of  
18 discretion, arbitrary and capricious, and substantial  
19 evidence, are really very similar concepts and there are  
20 very fine, thin lines between those concepts.

21 For instance, a decision that was made without  
22 the support of substantial evidence, I would submit, would  
23 be an abuse of discretion. If no reasonable person would  
24 conclude, as the plan administrator did conclude, i.e., it  
25 lacked substantial evidentiary support, that would be an

1 abuse of discretion. The court would readily reverse that  
2 type of determination.

3 And that's exactly what the Ninth Circuit said  
4 in -- in reviewing the record as a whole, as this Court's  
5 jurisprudence in *Universal Camera*, for instance --

6 QUESTION: Is it clear that that's what the  
7 Ninth Circuit means by substantial evidence? I mean,  
8 that's what substantial evidence means in administrative  
9 law under the Administrative Procedure Act. It means just  
10 that minimal amount of evidence that's necessary to get a  
11 case to the jury in a -- in a civil trial. But is that  
12 what the Ninth Circuit means by -- or do they mean  
13 substantial evidence? You know what I mean?

14 (Laughter.)

15 MR. ROHLFING: Well, unfortunately, the -- the  
16 court didn't bold-face or italicize its -- its use of the  
17 term, substantial evidence.

18 QUESTION: Yes. I'm under the impression that  
19 they mean substantial evidence.

20 MR. ROHLFING: I think the -- the court in  
21 reviewing a rule 56 motion practice, reviews the decision  
22 of the district court de novo, and it's entitled to  
23 substitute its own judgment. The parties at the district  
24 court agreed --

25 QUESTION: But rule 56 judgments, summary

1 judgment, that is purely a question of law.

2 MR. ROHLFING: Correct.

3 QUESTION: So the -- the fact that it is  
4 reviewed de novo doesn't have much bearing on this sort of  
5 a case, it seems to me.

6 MR. ROHLFING: Well, the -- once the Ninth  
7 Circuit concluded that the district court had erred in  
8 rejecting the procedural treating physician rule, the need  
9 to articulate specific and legitimate reasons, and had  
10 concluded that Black & Decker operated under a conflict of  
11 interest, and Black & Decker represented to the Ninth  
12 Circuit that it not -- it need not even consider  
13 plaintiff's evidence, the Ninth Circuit exercised its  
14 discretion to reverse and pay the case. And that is a  
15 question that petitioner clearly did not seek cert on.

16 QUESTION: But what about the treating physician  
17 rule itself, which he clearly did seek cert on?

18 MR. ROHLFING: Yes.

19 QUESTION: What is your position on that?

20 MR. ROHLFING: Your Honor, section 1133 of the  
21 -- of the statute and the regulations that were in effect  
22 when Mr. Nord filed his claim required the statement of  
23 specific reasons in order to reject a claim.

24 QUESTION: This -- we're now talking about an  
25 ERISA claim, not a Social Security claim.

1                   MR. ROHLFING: An ERISA claim. The statute and  
2 the regulations require a statement of specific reasons.  
3 And the lower courts have described the statement of  
4 specific reasons as encouraging a meaningful dialogue  
5 between the person claiming benefits and the plan  
6 administrator. And it would seem that a mere statement of  
7 conclusion, we've accepted Dr. Mitri and we've rejected  
8 your physicians, is not a meaningful dialogue. It's  
9 not --

10                  QUESTION: I don't even think they have to say  
11 that. The reasons for rejecting the claim is we're  
12 rejecting the claim because you are not disabled or  
13 because your disability does not -- you know. Isn't that  
14 the reason for rejecting the claim? It isn't a  
15 requirement that they -- that they review the evidence in  
16 the case.

17                  MR. ROHLFING: Well, they are required to review  
18 the evidence. That's the petitioner's position.

19                  QUESTION: Yes, but do they have to give a  
20 statement? I mean, you know, the Administrative Procedure  
21 Act requires a -- a statement of -- of reasons for the --  
22 in some detail. But I don't know that this requirement is  
23 anything -- I am rejecting your claim because you filed it  
24 too late. I am rejecting your claim because in my  
25 judgment you are not disabled. Why isn't that an adequate

1 statement of reasons?

2 MR. ROHLFING: Well, too late would be a -- a  
3 specific reason for rejecting a claim

4 QUESTION: Well, but you wouldn't have to review  
5 the evidence of why it's too late. Well, you know, so and  
6 so said he got it then. So and so said you got it earlier  
7 than that. We believe so and so. You didn't have to say  
8 that. You say we're rejecting it because in our view you  
9 filed it late. And it seems to me it's the same thing  
10 with a disability. We're -- we're rejecting it because we  
11 do not -- we do not believe that -- that the disability  
12 you have claimed in fact exists.

13 MR. ROHLFING: And the problem with -- with that  
14 particular analysis, Your Honor, is that we don't know  
15 whether Black & Decker in this particular case put the  
16 same thumb that it's complaining about the Ninth Circuit  
17 put on the scale, that they didn't put the thumb on the  
18 scale for Dr. Mitri. And for all of the reasons that  
19 petitioner and its eight private amici have argued and  
20 also the Solicitor General's office has argued, putting  
21 the thumb on the scale and not weighing evidence evenly  
22 would be just as bad if it was done the other side  
23 silently.

24 QUESTION: But I don't understand what that has  
25 to do with the question that's -- that's presented to us.



1 Case A, that there's a treating physician who's a longtime  
2 personal physician and his opinion is given to the  
3 administrator. Case B, the employee says, you know, I'm  
4 going to see a back specialist and he goes to a back  
5 specialist who's never seen the man before. Should there  
6 be a difference in those two? I mean, that's -- that's  
7 what you're here to argue.

8 And -- and Dr. -- was it Dimitri or Mitri?

9 MR. ROHLFING: Mitri.

10 QUESTION: Mitri was a specialist in this area.  
11 The treating physician was not. It -- it seems to me that  
12 it's -- it's perfectly plausible to say that we give the  
13 specialist even greater weight. So what -- the treating  
14 physician rule, it seems to me, quite arbitrary.

15 MR. ROHLFING: It -- it is arbitrary if it's  
16 simply putting weight on the scale. But the Ninth Circuit  
17 cast the treating physician rule as merely a statement of  
18 -- of specific reasons that are legitimate under the  
19 statute and that are supported by substantial evidence in  
20 the evidentiary record before the Court.

21 But the -- the treating physician rule doesn't  
22 distinguish between -- strike that. I'm sorry. The --  
23 the treating physician rule does distinguish between  
24 physicians that have different levels of probative  
25 evidence. The physician with more information, the long-

1 time treating physician, has a greater source of  
2 information upon which to express an opinion than does the  
3 one-time consultative examiner.

4 And that's really illustrated in the facts of  
5 this case where Dr. Mitri stated that Mr. Nord should be  
6 able to perform a certain level of work. And his  
7 intentional use of the word should implies that most  
8 people or a substantial number of people with this level  
9 of impairment can engage in this level of activity, in  
10 this case sedentary work interrupted by standing and  
11 walking.

12 QUESTION: So you are now saying, it seems to  
13 me, the opposite of what you were contending earlier.  
14 You're saying that substantial evidence means more than  
15 just the amount of evidence that would enable a jury to  
16 find a particular fact. Because if that's all that  
17 substantial evidence meant, you wouldn't need a -- a  
18 treating physician rule. That rule would exist for any  
19 physician that the -- that the plaintiff brought in. If  
20 he brought in a non-treating physician and there were no  
21 substantial evidence on the other side in the -- in the  
22 Administrative Procedure Act sense of substantial  
23 evidence --

24 MR. ROHLFING: Yes.

25 QUESTION: -- the plaintiff would win. Right?

1                   MR. ROHLFING: That's correct.

2                   QUESTION: So the treating physician rule is a  
3 -- is a useless rule. You should call it the any  
4 physician rule. If the plaintiff comes in with some  
5 evidence and there's no evidence on the other side, the  
6 plaintiff wins. That's certainly not what the Ninth  
7 Circuit means. And -- and as you were just describing it,  
8 it's not what the Ninth Circuit means.

9                   It means that if you have a treating physician,  
10 you need substantial evidence on the other side before  
11 we're going to -- we're -- we're going to let you overturn  
12 the treating physician's determination. Isn't that really  
13 what's going on here?

14                  MR. ROHLFING: I think the Ninth Circuit did use  
15 the -- the phrase that the opinion of Dr. Mitri was  
16 overwhelmed by the other substantial evidence of record.  
17 So you're right.

18                  QUESTION: Well, but -- but that characterizes  
19 it on a very fact-specific basis. It also referred to the  
20 -- is it -- Regula case in which it -- it said there is  
21 the treating physician rule. I think you have to defend  
22 that rule as a rule, if applicable, in the generality of  
23 cases.

24                  MR. ROHLFING: The general application of the  
25 treating physician rule that's reflected in both the --

1 this case and in the Regula case is that the court used  
2 the rule only at the conflict-of-interest level of  
3 inquiry. It didn't instruct -- in Regula, it did not  
4 instruct the lower court to weigh the evidence in any  
5 particular manner. Rather, it instructed the lower court  
6 to allow Delta Air Lines in that case to come forward with  
7 evidence that the conflict of -- conflict of interest did  
8 not infect its decisionmaking process. Again, it allowed  
9 rebuttal evidence of actual bias rather than the pure  
10 conflict of interest that the Ninth Circuit found to  
11 exist.

12 QUESTION: Well, what is the connection between  
13 the treating physician rule and the concept of actual  
14 bias? The -- the two don't seem to have a lot in common  
15 so far as I can see.

16 MR. ROHLFING: I think that the courts are  
17 confused below, Your Honor.

18 QUESTION: Well, I'm confused too.

19 (Laughter.)

20 MR. ROHLFING: The courts have created this  
21 hybrid animal that's asking whether conflict of interest  
22 exists and then using actual bias to -- to animate its --  
23 its decisionmaking process. And that's the problem.

24 QUESTION: I think I can explain the confusion.  
25 It doesn't make any sense, but I think I can explain it.

1 The Ninth Circuit is simply saying, look it, any  
2 reasonable person would give the treating physician's  
3 opinion substantial weight over somebody who's not the  
4 treating physician, and if the plan administrator does not  
5 do that, and since he's presumably a reasonable person, he  
6 must be biased. Isn't that what's going on? The Ninth  
7 Circuit has simply said, obviously the treating physician  
8 wins in the -- in the usual case. And any plan  
9 administrator who says he doesn't win must be biased.

10 MR. ROHLFING: I think --

11 QUESTION: And that's not true in my view.

12 MR. ROHLFING: I think what the Ninth Circuit is  
13 saying is that when we have expert opinion and all else  
14 being equal, given the fiduciary status of the plan  
15 administrator, that the treating physician should receive  
16 .001 percent and tip the scale slightly in favor. It's  
17 the fiduciary status. It's the conflict of interest  
18 analysis that really animates the court's inquiry into --  
19 into this --

20 QUESTION: So -- so why doesn't this just --

21 QUESTION: What -- what if you have a -- a  
22 treating physician who presents a paragraph to the plan  
23 administrator saying, you know, I've treated this fellow  
24 for 6 months and I think he's incapacitated? Then you  
25 have an expert, you know, another physician weighs in on

1 the other side and puts in about six or seven paragraphs.  
2 I put him through some tests, this and that, and I think  
3 he is -- he's not disabled. How does that come out in  
4 your view under the treating physician rule?

5 MR. ROHLFING: Well, the question then would be  
6 whether the -- the tests that the independent medical  
7 examiner, the one-time examining physician, either  
8 mirrored the test results of the treating physician or  
9 provided an independent clinical basis. And under the  
10 mature treating physician rule, every court has held that  
11 independent clinical findings that are divergent from  
12 those of the treating physician is always a basis for  
13 rejecting the treating physician's opinion.

14 But that's not the facts of this case. Dr.  
15 Mitri agreed --

16 QUESTION: Well, does -- does the Ninth Circuit  
17 recognize that the treating physician rule can be rebutted  
18 in that manner?

19 MR. ROHLFING: Yes, it does.

20 QUESTION: You say other courts have. Does the  
21 Ninth Circuit?

22 MR. ROHLFING: In the -- in the treating  
23 physician rule that exists in the Ninth Circuit in a  
24 Social Security context, it is absolutely clear that  
25 independent clinical findings are an independent basis for

1 rejecting the treating physician's opinion.  
2 QUESTION: But it can't be rejected in this  
3 fashion. The treating physician who's a general  
4 practitioner doesn't know anything in particular. Not a  
5 specialist with the brain, he says this man has a brain  
6 embolism. That's all he says. Doesn't say anything else.  
7 Doesn't give any more details. And somebody -- and -- and  
8 the -- the employer goes to a brain specialist and the  
9 brain specialist says, again, nothing more than this  
10 patient does not have a brain embolism. That would not  
11 suffice in the Ninth Circuit, would it? You would have to  
12 take the opinion of the attending -- of the treating  
13 physician.

14 MR. ROHLFING: If there's no objective test  
15 result from any physician, an MRI or a CAT-scan?

16 QUESTION: Both of them -- both of them have  
17 come in with conclusory statements. Why shouldn't I  
18 believe the conclusory statement of the expert who  
19 examined the person rather than the -- the general  
20 practitioner? What the Ninth Circuit says is, you have to  
21 believe the -- the treating physician.

22 MR. ROHLFING: I don't believe that any  
23 reasonable person would accept a -- an intern's -- or a  
24 general practitioner's opinion that the person suffers  
25 from a brain embolism without an objective test showing

1 the existence and presence of that embolism

2 QUESTION: Well, then what purpose does the  
3 Ninth Circuit rule say? The Ninth Circuit says the  
4 treating physician is employed to cure and has a greater  
5 opportunity to know and observe the patient as an  
6 individual. I mean, that's -- that's its rule.

7 MR. ROHLFING: That's -- that's the test.

8 QUESTION: Well, given the confusion about it,  
9 why isn't it the -- sorry.

10 QUESTION: And we don't in -- in the law of  
11 evidence -- I'm trying to think of an analogy where we  
12 have some special rule for a particular kind of -- of  
13 person. We have expert testimony generally, but -- but  
14 this is not so confined. I've never seen a rule like  
15 this.

16 MR. ROHLFING: Well, it really depends on how  
17 you view juries would -- would review divergent expert  
18 witness opinion. If you assume that -- that a jury would  
19 not tend to give a source of evidence more weight than a  
20 evidentiary source that had a less -- lesser pool of  
21 evidence or information, less probative information, then  
22 I think that you're right. But I don't think that that's  
23 what juries do. I think juries look at it in a reasonable  
24 fashion and think an expert with more percipient  
25 information is going to get more weight. And --



1                   QUESTION: Mr. Rohl f i n g, why are we getting  
2 juries into it when I thought the genesis of this was the  
3 Ninth Circuit said, in Social Security the courts created  
4 this treating physician rule?

5                   MR. ROHLFING: That' s correct.

6                   QUESTION: And the Commissioner liked it so  
7 much, the Commissioner embraced it as her own. And so now  
8 we're going to do the same thing for ERISA.

9                   And that' s why when you complicate it with this  
10 bias or conflict, there' s no conflict in the Social  
11 Security. And as I read -- that' s -- that' s a piece of  
12 this decision, but as I understood it, what the Ninth  
13 Circuit was saying, as far as the treating physician rule,  
14 is it was a good idea in Social Security and it' s equally  
15 good here.

16                  MR. ROHLFING: That' s exactly what the court  
17 decided, Justice Ginsburg. And I think that your analysis  
18 is correct. The court looked at the treating physician  
19 rule and -- and said it -- it creates tools for the courts  
20 to use engaging the reasonableness of administrative  
21 decisions in that context.

22                  QUESTION: But then -- then you started to talk  
23 about juries and in the Social Security context, it' s a  
24 guide for the ALJ, not a jury.

25                  MR. ROHLFING: I was speaking more generally

1 with Justice Kennedy. I apologize for bringing in an  
2 inapt analogy.

3 But I do think that the -- the logic and  
4 fundamental underpinnings of the treating physician rule  
5 engaging any expert witness testimony is that the broader  
6 panoply of information available to, in this case, a  
7 treating physician justifies, all else being equal, all  
8 else -- assuming the same set of objective tests, that the  
9 physician with the greater source of information is  
10 entitled to slightly more weight.

11 QUESTION: Since the Secretary of Labor doesn't  
12 agree with you, why isn't it better for courts to leave  
13 that kind of a decision to the Secretary of Labor?

14 MR. ROHLFING: The Solicitor General argues in  
15 -- in its brief that -- the Government's brief, that it  
16 has primary jurisdiction to develop the regulations and  
17 flesh out the body of ERISA law. But this Court has long  
18 held that development of the body of Federal common law is  
19 within the jurisdiction of the courts.

20 QUESTION: Well, I'm -- I'm not suggesting a --  
21 a primary jurisdiction rule. What I'm suggesting is that  
22 the -- the Labor Department is a lot closer to the  
23 situation at the trial level than an appellate court,  
24 including this one. And I -- I simply would have thought  
25 that the -- that the Department of Labor was in a better

1 position just to make a practical assessment of either the  
2 need for the rule or the probable value of the rule than  
3 -- than a court is likely to do. And -- and when that  
4 kind of expert judgment is available, why isn't it simply  
5 sensible for a court in a common law capacity to say,  
6 we're going to leave it to the -- to the party -- to the  
7 -- to the agency that is in a better position to make the  
8 judgment?

9 MR. ROHLFING: Well, Justice Souter, the -- the  
10 problem with that is that the -- the Secretary of Labor  
11 has not even addressed the conflict of -- of interest  
12 issue and that is the --

13 QUESTION: But the conflict of interest issue,  
14 you just told us, is not the reason for adopting the rule  
15 here.

16 MR. ROHLFING: But it is --

17 QUESTION: It has a -- it is -- it is being  
18 given significance in the conflict issue, but I thought  
19 that was not the reason the rule -- I'm going back to your  
20 answer to your question to Justice Ginsburg. That isn't  
21 the reason the rule was developed in Social Security, and  
22 that wasn't the reason the rule has been adopted here.

23 MR. ROHLFING: It isn't the reason the rule --  
24 it is the -- the focal point of the rule in the ERISA  
25 context.

1                   QUESTION: Whose money is at stake in the Social  
2 Security cases?

3                   MR. ROHLFING: Yours and mine.

4                   QUESTION: The Government's money, really. And  
5 if the Government wants to be particularly generous to the  
6 claimant, I guess the Government can be if it wants to  
7 adopt a rule that's very favorable to claimants, which it  
8 has done in the Social Security field.

9                   But it's not the Government's money at stake in  
10 -- in this case and -- and in all of these ERISA cases.  
11 It's either the trust's money or the employer's money, and  
12 it's supposed to be dispensed according to the agreement  
13 that the parties have entered into. It seems to me it's a  
14 different situation, and I don't think the Government has  
15 as much leeway in deciding to be generous as it -- as it  
16 does in the Social Security field. I just don't see --  
17 don't see the parallel between the two at all.

18                  MR. ROHLFING: The parallel between the two  
19 exists on what questions are asked and what answers are  
20 given. The structure is -- is far different. Congress  
21 enacted Social Security as social policy. Black & Decker  
22 adopted its disability plan to attract employees as part  
23 of an employment package. And there -- although it's  
24 Black & Decker's money, it has still promised benefits  
25 under certain circumstances and then has, for -- for

1 reasons that we still aren't -- don't know, concluded that  
2 despite the -- the clear opinions of the treating  
3 physicians and the ambiguous opinion of the independent  
4 medical examiner, concluded that Mr. Nord did not sustain  
5 his burden of proof, and despite the clear evidence from  
6 the human resources specialist that Mr. Nord could not  
7 perform his usual and customary work --

8           QUESTION: Why was it so clear? First of all,  
9 if you take the treating physician -- was given an  
10 opportunity to comment on the expert's opinion, on Dr.  
11 Mitri's opinion. Here it is. Not one word from either  
12 the treating physician or the -- what is it? The  
13 orthopedist who was -- who was called in by the treating  
14 physician. So the expert stands out there all alone with  
15 no comment on it.

16           And then as far as the human resources person is  
17 concerned, it was Mr. Nord's counsel, was it not, that  
18 wrote up that evaluation for her to answer yes or no,  
19 right?

20           MR. ROHLFING: Yes, Justice Ginsburg. I wrote  
21 those interrogatories because I read Dr. Mitri's opinion  
22 when he said Mr. Nord could only lift 15 pounds, and I  
23 looked at the human resources specialist's statement of  
24 bona fide occupational job qualifications that the  
25 occupation required lifting 20 pounds and a number of

1 other factors, including the recognition of Dr. Mitri that  
2 Mr. Nord suffered from a significant pain syndrome. I  
3 believed that -- that Ms. Forward would answer those  
4 questions all in the negative, that no, Mr. Nord could not  
5 perform his usual and customary occupation. She didn't  
6 answer the questions all in that manner. But she did  
7 answer the last question in the negative, that Mr. Nord  
8 could not perform the work of a material planner with the  
9 pain that he was enduring.

10 QUESTION: Well, I think -- I think if you gave  
11 anybody that question, somebody is in terrible pain, can  
12 they relate to others -- it's not as though this was some  
13 kind of a neutral evaluation form. It was a loaded  
14 question that you asked her.

15 MR. ROHLFING: Well, the -- the question wasn't  
16 framed, though, as terrible pain. It was occasional  
17 moderate pain, Your Honor.

18 QUESTION: Let's find the question. Where is  
19 it?

20 MR. ROHLFING: The question appears in the  
21 record.

22 MR. PATERSON: It's at L36-L37.

23 MR. ROHLFING: Thank you, Mr. Paterson.

24 L36 and 37. The -- the sixth question that was  
25 asked of Ms. Forward --

1 QUESTION: 36 and 37 of?

2 MR. ROHLFING: Yes, in the large petition  
3 lodging. I can read the question in full.

4 Dr. Mitri describes Kenneth Nord as suffering  
5 from degenerative disc disease and a chronic myofascial  
6 pain syndrome. You have indicated in your employer's  
7 statement provided to Metropolitan that the work of a  
8 material planner requires continuous interpersonal  
9 relationships and frequent exposure to stressful job  
10 situations. Assume that Kenneth Nord would have a  
11 moderate pain that would interfere with his ability to  
12 perform intense interpersonal communications or to act  
13 appropriately under stress occasionally, up to one-third  
14 during the day. Could an individual of those limitations  
15 perform the work of a material planner?

16 And the answer marked is no. And Ms. Forward  
17 signed that.

18 QUESTION: As I understand that question, it --  
19 it asks him assuming he can't do his job for one-third of  
20 the day, can he do his job? What -- what answer would you  
21 expect? I mean, if -- if you just said assuming he had  
22 moderate pain, could he do his job, then -- then your  
23 answer would mean something, but you asked, assuming he  
24 has moderate pain that prevents him from doing his job a  
25 third of the day.

1           MR. ROHLFING: Significantly interferes.

2           QUESTION: Yes, all right.

3           MR. ROHLFING: Well --

4           QUESTION: I mean, I'd give the same answer.

5   You -- it seems to me you -- you had a hypothesis that

6   doesn't help your case.

7           MR. ROHLFING: In -- in asking a -- a question

8   of a vocational expert or a human resources specialist,

9   assuming the person suffers from moderate pain, could they

10  perform their job, then we've left it up to the witness to

11  answer the question, what does moderate mean? And so what

12  I did was define moderate.

13           QUESTION: But you didn't ask moderate. You

14  didn't ask just moderate pain. You said, moderate pain

15  that would interfere with his ability to perform intense

16  interpersonal communications.

17           MR. ROHLFING: But not preclude.

18           QUESTION: So it wasn't moderate pain in the

19  abstract. It was moderate pain in a quite concrete

20  context that would -- moderate pain that would interfere

21  with his ability to do his job.

22           MR. ROHLFING: Yes, Justice Ginsburg -- in my

23  experience if you don't define the terms of art in -- in

24  questions to vocational specialists, you're not going to

25  get the answers that are helpful.



1                   QUESTION: You didn't -- you didn't leave it  
2 available for her to say, I don't think that moderate pain  
3 would interfere with his ability to conduct interpersonal  
4 relationships. That was not available for her to say.

5                   MR. ROHLFING: That was certainly available to  
6 Black & Decker to solicit that type of information. She  
7 was -- she was a Kwikset employee, a wholly owned  
8 subsidiary of Black & Decker Corporation. They didn't ask  
9 --

10                  QUESTION: Well, we're not examining their  
11 evidence. We're examining yours. The issue is what does  
12 your evidence prove. It doesn't seem to me it proves  
13 much.

14                  QUESTION: Perhaps you could address why your --  
15 the -- the treating physician didn't comment at all on the  
16 experts.

17                  MR. ROHLFING: The treating physicians didn't  
18 comment on the -- the opinions of Dr. Mitri because I  
19 didn't ask them to. I read Dr. Mitri's report as  
20 supporting the proposition of disability. His lifting  
21 limitations were less than the lifting required of the  
22 job. The standing and walking that he needed was not  
23 permitted in the facial job description. And I made a --  
24 and I actually argued affirmatively to the Ninth Circuit  
25 that Dr. Mitri's opinion, properly read in the context of

1 the -- the employer's statement that Ms. Forward had  
2 filled out before at the request of Metropolitan, actually  
3 supported the proposition of disability rather than  
4 supporting the proposition of no disability that had been  
5 advocated.

6 And I would hasten to point out that this plan  
7 does not contain an accommodation clause. It doesn't say  
8 if you can perform your job with accommodation, then  
9 you're not disabled. It doesn't say that. And if we're  
10 going to use contract analysis in -- in determining the  
11 effect of the plan language on the ultimate issue of  
12 disability, the failure to include accommodation as an  
13 affirmative prong of the -- the inquiry in the issue of  
14 disability is fatal to Black & Decker's case because the  
15 only reason that Ms. Forward's answers to the first four  
16 questions could be supported is if Black & Decker  
17 accommodated it.

18 QUESTION: Thank you, Mr. Rohlfing.

19 Mr. Paterson, you have 3 minutes remaining.

20 REBUTTAL ARGUMENT OF LEE T. PATERSON

21 ON BEHALF OF THE PETITIONER

22 MR. PATERSON: Thank you, Mr. Chief Justice.

23 The Ninth Circuit's treating physician rule is a  
24 categorical rule based upon the assumption that a treating  
25 physician's opinion is superior to other medical opinions

1 in the record. In the Regula case, at page 1139, the  
2 Ninth Circuit got to the issue of -- of the treating  
3 physician rule prior to the time it even began to discuss  
4 the conflict of interest. And it held the treating  
5 physician rule requires deference, as it applies under  
6 ERISA, and that the treating -- the plan administrator in  
7 the Ninth Circuit must defer unless there are -- he has  
8 good enough reasons not to defer.

9 The court then later on in its opinion addressed  
10 the issue of conflict of interest.

11 This Court in -- last year in Ragsdale v.  
12 Wolverine when -- stated that categorical generalizations  
13 failed to hold true that the justification for the  
14 categorical rule disappears. In the facts of this case,  
15 that categorical justification disappears both in the  
16 individual facts of the case and as a general proposition  
17 for all other cases.

18 In the facts of this case, respondent went to  
19 Dr. Hartman, his internist, with back problems. Dr.  
20 Hartman referred him to two specialists, Dr. Zandpour and  
21 Dr. Ali, both of whom examined him, tested him, and  
22 diagnosed his condition. Both Dr. Ali and Dr. Zandpour,  
23 based upon the tests they conducted, provided a diagnosis  
24 of mild degenerative changes of the lower lumbar spine.

25 The employers sent the respondent to another

1 specialist, Dr. Mitri, a neurologist, who agreed with the  
2 opinions of Dr. Zandpour and Dr. Ali, but also looked at  
3 the job duties of respondent. Dr. Mitri opined that he  
4 could perform the duties of a material planner if he was  
5 allowed to stand up and walk periodically.

6 Just focusing on these four physicians'  
7 opinions, it's clear that the opinions with the most  
8 weight are the three specialists, Dr. Zandpour, Dr. Ali,  
9 and Dr. Mitri, not the treating physician, Dr. Hartman.  
10 However, the Ninth Circuit's rule requires the plan  
11 administrator to give deference, special weight, and a  
12 presumption in favor of Dr. Hartman's opinion even though  
13 he referred respondent to specialists for evaluation and  
14 even though he has no apparent expertise in back injuries  
15 or back pain.

16 In the facts of this case, the categorical  
17 generalization is not true.

18 In addition, the amicus, American Medical  
19 Association, has brought before this Court its statistics  
20 published in its own publication, the Journal of the  
21 American Medical Association. Those statistics state that  
22 39 percent of treating physicians misrepresent symptoms,  
23 diagnosis, and severity of illness when their patients  
24 submit insurance claims. There's no justification for a  
25 categorical rule that treating physicians' opinions are

1 entitled to special weight, deference, and a presumption  
2 in ERISA disability benefit determinations when the  
3 professional organization of the treating physicians  
4 admits that treating physicians often make  
5 misrepresentations when their patients are filing  
6 insurance claims.

7           There's no support for a categorical rule that  
8 treating physicians' opinions are more reliable than other  
9 medical opinions either in the facts of this case or in  
10 the -- the ERISA context in general. In every case, the  
11 ERISA plan administrator should weigh not only the source  
12 of the opinion, but also the experience, the testing, the  
13 treatment, and the credentials of the -- of the physician.

14           We respectfully submit that this Court should  
15 reject the Ninth Circuit's treating physician rule and  
16 remand this case back to the Ninth Circuit.

17           CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
18 Paterson.

19           The case is submitted.

20           (Whereupon, at 11:01 a.m., the case in the  
21 above-entitled matter was submitted.)

22

23

24

25