IN THE SUPREME COURT OF THE UNITED STATES

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THE BLACK & DECKER DISABILITY :

PLAN, :

Petitioner :

v. : No. 02-469

KENNETH L. NORD :

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Washington, D.C.

Monday, April 28, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

LEE T. PATERSON, ESQ., Los Angeles, California; on behalf of the Petitioner.

LISA S. BLATT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

LAWRENCE D. ROHLFING, ESQ., Santa Fe Springs, California; on behalf of the Respondent.

C O N T E N T S

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

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

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

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

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

QUESTION: And this claim was denied?

MR. PATERSON: This claim was denied.

QUESTION: Were the reasons given in this case?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Am -- am I --

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

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

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

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

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

QUESTION: So the result might be different.

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

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

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

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

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

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

QUESTION: But we take the case on the theory

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

MR. PATERSON: Yes.

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

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

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

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

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

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

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

QUESTION: What could it consist of?

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

QUESTION: I see. I see.

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

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

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

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

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

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

MR. PATERSON: It -- well --

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

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

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

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

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

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

QUESTION: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. PATERSON: That's correct.

QUESTION: It's later in time.

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

QUESTION: Very well, Mr. Paterson.

Ms. Blatt, we'll hear from you.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE, SUPPORTING THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Now, that is not --

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

MS. BLATT: That's correct.

QUESTION: That alone is a conflict.

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

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

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

MS. BLATT: Nothing.

QUESTION: How does it show a conflict at all?

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

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

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

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

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

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

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

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

QUESTION: Thank you, Ms. Blatt.

Mr. Rohlfing, we'll hear from you.

ORAL ARGUMENT OF LAWRENCE D. ROHLFING

ON BEHALF OF THE RESPONDENT

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

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

Now, the other --

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

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

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

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

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

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

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

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

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

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

MR. ROHLFING: Yes.

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

MR. ROHLFING: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

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

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

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

QUESTION: But rule 56 judgments, summary

judgment, that is purely a question of law.

MR. ROHLFING: Correct.

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

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

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

MR. ROHLFING: Yes.

QUESTION: What is your position on that?

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

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

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

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

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

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

statement of reasons?

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

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

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

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

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

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

MR. ROHLFING: Mitri.

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

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

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

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

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

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

MR. ROHLFING: Yes.

QUESTION: -- the plaintiff would win. Right?

MR. ROHLFING: That's correct.

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

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

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

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

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

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

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

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

QUESTION: Well, I'm confused too.

(Laughter.)

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

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

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

MR. ROHLFING: I think --

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

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

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

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

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

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

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

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

MR. ROHLFING: Yes, it does.

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

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

rejecting the treating physician's opinion.

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

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

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

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

the existence and presence of that embolism.

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

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

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

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

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

QUESTION: Mr. Rohlfing, why are we getting juries into it when I thought the genesis of this was the Ninth Circuit said, in Social Security the courts created this treating physician rule?

MR. ROHLFING: That's correct.

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

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

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

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

MR. ROHLFING: I was speaking more generally

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

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

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

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

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

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

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

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

MR. ROHLFING: But it is --

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

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

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

MR. ROHLFING: Yours and mine.

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

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

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

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

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

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

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

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

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

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

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

MR. ROHLFING: The question appears in the record.

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

MR. ROHLFING: Thank you, Mr. Paterson.

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

QUESTION: 36 and 37 of?

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

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

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

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

MR. ROHLFING: Significantly interferes.

QUESTION: Yes, all right.

MR. ROHLFING: Well --

QUESTION: I mean, I'd give the same answer. You -- it seems to me you -- you had a hypothesis that doesn't help your case.

MR. ROHLFING: In -- in asking a -- a question of a vocational expert or a human resources specialist, assuming the person suffers from moderate pain, could they perform their job, then we've left it up to the witness to answer the question, what does moderate mean? And so what I did was define moderate.

QUESTION: But you didn't ask moderate. You didn't ask just moderate pain. You said, moderate pain that would interfere with his ability to perform intense interpersonal communications.

MR. ROHLFING: But not preclude.

QUESTION: So it wasn't moderate pain in the abstract. It was moderate pain in a quite concrete context that would -- moderate pain that would interfere with his ability to do his job.

MR. ROHLFING: Yes, Justice Ginsburg -- in my experience if you don't define the terms of art in -- in questions to vocational specialists, you're not going to get the answers that are helpful.

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

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

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

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

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

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

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

QUESTION: Thank you, Mr. Rohlfing.

Mr. Paterson, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF LEE T. PATERSON

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

The employers sent the respondent to another

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

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

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

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

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

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

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

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Paterson.

The case is submitted.

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