No. 02-763

IN THE
Supreme Court of the United States

JOANNE B. BARNHART,
Commissioner of Social Security,

Petitioner,

v.

PAULINE THOMAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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OPENING STATEMENT

The matter before this Court may indeed touch upon many and differing aspects of statutory construction, Congressional law drafting, administrative prerogative, judicial deference, rules of grammar and usage and the medical, vocational and technological reasons for non-employment. Indeed, Petitioner's submissions advance all of these issues in a tidal wave of rationale intended to overwhelm reason in the service of a specific agency agenda. But while the above aspects are indeed **involved** in the discussion herein, the case before this Court isn't **about** any of them. Plainly put, the Petitioner would have this Court find that disability can be denied, indeed **must** be denied, in the circumstance where the only job an individual can physically perform is no longer in existence. Petitioner would have this Court find that Congress defined "*substantial gainful activity*" as work existing in significant numbers in the National Economy **unless** that work was previously performed by the applicant. If the applicant performed any job at some time prior to claiming disability, that performance must forever negate the sensible reality that it must continue to exist in order to be performed again.

The decision of the Third Circuit declares that Petitioner's desired result is absurd and that such absurdity is not compelled by any prior decision of this Court, any statute or regulation, any legitimate programmatic objective, any cogent public policy, any desirable social utility or societal result or any articulated Congressional intention. The Third Circuit's decision, recognizing the inherent unreasonableness of the Commissioner's position in the implementation of a social welfare/entitlement program, methodically dissected the statute to discover what possible Congressional intent would justify the patent unreality of denying disability on the basis of the ability to perform a non-existent job. The Court could find no such intention, stated or implied, evident in the statute. The dissenting judges in the Third Circuit offered no plausible reason.

Petitioner's brief, with its ponderous "Disability Freeze Manual", its appeal for deference in its odd construction of a straight forward statute, its carefully constructed dichotomy between unemployment and disability programs and between the fourth and the fifth steps of the sequential evaluation, nevertheless offers no hint of why Congress would desire, let alone authorize, let alone compel such a result. There is no statutory basis to design a policy based on an admitted fiction and such fiction cannot claim this Court's deference since it is manifestly arbitrary and at odds with the plain intent of the statute.

BACKGROUND:

THE STATUTE, THE SEQUENTIAL EVALUATION AND THE SOCIAL SECURITY RULINGS

In identical language both Title II and Title XVI of the Social Security Act define "disability" as an:

> 42 U.S.C. Section 423(d)(1)(A) *inability to* ***engage*** *in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months* (Petitioner's Appendix 55a).

Here, before any further statutory conditions are imposed, Congress sets forth the two overriding elements of a disability award. First, an applicant must show that he suffers a physical or mental impairment that is medically determinable. Next, he must show that by reason of that impairment he is unable to **engage** in substantial gainful activity. Petitioner argues that it is this physical or mental impairment which must constitute the primary reason for the individual's inability to engage in substantial gainful activity and thus, the Third Circuit's decision would disrupt this important underlying philosophy. But the Third

Circuit's decision does not disturb this principle and Respondent's argument does not take issue with it. While the statute demands that disability be awarded "by reason of that impairment" it is nowhere suggested by the Commissioner that medical issues are the exclusive criteria by which disability is determined. Yet, in page after page, Petitioner seems to argue, without specificity, that somehow the Third Circuit's opinion undermines the principle that medical issues be the primary reason for determining disability. The issue in this case has thereby been blurred to the point of non-recognition. Thus, certain legal realities, obvious as they may be, must first be set forth.

A. The statute's insistence that applicants be disabled by "reason of that impairment" has been translated into the regulatory scheme by the Commissioner's 1978 adoption of the "sequential evaluation" procedure, endorsed by this Court, universally accepted in the legal community and altogether unchallenged in this litigation. This mandated step-by step approach to disability determination institutionalizes the two basic requirements set forth in the above cited statutory definition of disability. Every disability claim is thus governed by a process which insists that while medical factors are of "predominant importance" they are not the exclusive criteria in the calculus of disability. Medical factors remain the indispensable first cause, without which the determination process cannot continue. Respondent does not argue and the Third Circuit's decision does not suggest, that medical factors play a less predominant role in that process. Indeed, nothing in the Circuit's decision impacts this issue in any discernable way. By the same token, Petitioner cannot and does not argue that these medical factors alone constitute the entirety of the process. The sequential evaluation process, a cogent, utilitarian protocol propounded by the Commissioner and unchallenged by the Respondent, blends medical and non-medical factors in alternating steps which emphasize "the impairment" as the first and foremost factor. Thus, any discussion of the impact of the Third Circuit's decision on

the calculation of disability must recognize that to a large degree technological changes and issues of unemployability versus disability have been essentially eliminated by the operation of the sequential evaluation. The debate, if there is one, between medical and non-medical criteria has been resolved by the mandated first three steps of that sequential evaluation.

Step one (20 CFR 404.1520(b); Appendix 58a) reasonably requires that regardless of the state of an applicant's health, a claimant cannot be determined to be disabled if he is performing substantial gainful work. One cannot work for a living and claim disability at the same time. Thus, while it is certain that people with severe disabilities work, that work eliminates them from the statutory and thus the regulatory definition of disability. Here, vocational issues would seem to trump any discussion of medical impairments by ending the determination process before any medical evidence is considered. The regulation faithfully follows the statutory mandate that an applicant first demonstrate the "*inability to engage in substantial gainful activity*". But it is important to note that neither the statute nor the regulation emphasize either vocational or medical criteria at step one. Rather, it is an appreciation of societal reality, common sense and programmatic relevance that denies disability to a working individual:

> regardless of your medical condition or your age, education and work experience (20 CFR 404.1520(b); Appendix 58a).

Congress specifically withheld disability payments from workers because to do otherwise would flaunt the plain reality that illness, handicap and advanced age or illiteracy can serve only as factors for the "*inability*" to work. The performance of that work itself negates all other considerations, medical or otherwise.

Step two (20 CFR 404.1521; Appendix 59a) establishes medical factors as the indispensable starting point of any disability determination by insisting that claimants suffer a "severe impairment" significantly limiting the ability to perform work activities. Step two eliminates any possibility that an able bodied applicant can claim disability for non-medical factors such as unemployment, technological obsolescence, advanced age, limited education or the non-availability of jobs in the region of his residence. None of these factors can be considered at step two and thus the pristine concentration on medical factors which limit abilities to perform activities associated with work are the sole consideration.

Step three (20 CFR 404.1525; Appendix 61a-64a) introduces the concept of presumptive disability through medical equivalence of an impairment with the severity requirements of one of the Commissioner's "Listing of Impairments" compiled at Appendix 1, Subpart P of 20 CFR, Part 4. Step three, while further highlighting the pre-eminence of the medical impairment, effectively ends any discussion that medical factors constitute the sole criteria for a disability determination. If medical factors were exclusively important, the sequential evaluation process would necessarily end at step three with a finding of presumptive disability or a finding of presumptive non-disability. The fact that the Commissioner promulgates two additional steps following step three institutionalizes the agency's recognition that once a severe impairment has been identified, non-medical criteria will also impact on the final disability determination.

In sum, the first three steps of the Commissioner's sequential analysis (1) anchor the process in the realities of the work-place (2) render medical factors as the predominant element of primary importance but (3) reject the notion that medical factors alone can decide the issue of disability in most cases. These are the Commissioner's ideas and they competently effectuate the Congressional

intent that disability not be confused with unemployment, that technological changes not supersede medical factors but that medical issues alone not enjoy exclusive importance. The Third Circuit's decision does not impact on any of these first three steps and its effect does not challenge any of the broad outlines reviewed above.

B. The Commissioner's fourth and fifth steps of the sequential evaluation are based on the final part of the statute:

> *An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives or whether a specific job vacancy exists for him or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual) "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.* (42 U.S.C. Section 423(d)(2) (See Petitioner's Appendix 55a-56a).

Here, Congress specifically stipulates that it is not sufficient to establish disability merely by demonstrating an inability to perform prior work activity but that the claimant must additionally show an inability to perform any other job "*which exists in the national economy in significant numbers*". This last section of the statute gives rise to the Commissioner's differing standards of proof necessary to establish disability at the fourth step (past relevant work) and the fifth step (other work). The Third Circuit's decision recognizes this differing standard where, at the fourth step,

the burden remains with the claimant to prove that he is "*unable to do his previous work*" but at the fifth step that burden shifts to the Commissioner who must prove that the claimant can engage in another ("*any other*") "*kind of substantial gainful activity which exists in the national economy*". Here again, while these differing standards represent the Commissioner's own interpretation of the statutory requirements, that interpretation nonetheless clearly finds its basis in the text and tenor of the statute itself which uses the words "*not only*" to show that the fourth step remains part of the claimant's burden. These words seem to justify the proposition that in order to qualify for disability a claimant must at least show that he is unable to engage in any of the jobs in his employment history. Nevertheless, once this inability is demonstrated, the burden understandably shifts so that the Commissioner is now charged with identifying a new area of work within the claimant's residual functional capacity. This shift in responsibility is clearly evidenced by the introduction of new elements, the Commissioner calls them "vocational factors", into the statutory scheme. Having eliminated the claimant's past work at step four, it is incumbent upon the Commissioner to "consider" the claimant's vocational profile, his "age, education and work experience" before announcing that a claimant's reduced capacity can accommodate a new line of work. These factors are simply not factors at the fourth step and are thus unmentioned by the statute in connection with past work. If the claimant held the job in the relevant past it is safely assumed that these vocational factors still apply since "age" and "education" levels didn't preclude his prior performance and his "work experience" includes the very job or jobs discussed in step four. Thus, identification of and division between steps four and five are clearly presaged in this statute's text, the shift in burdens is discernable from the statute's tone and syntax and the introduction of vocational issues is a demonstrably necessary amendment at step five to ensure that the Commissioner doesn't identify a new job within the claimant's **physical ability** but well outside his

educational grasp, his accumulated skill sets or his age related capacity to gain, hold, and sustain.

All of the above is absolutely undisputed in the decision of the Third Circuit. The entirety of the Commissioner's elaborate, sequential determination process is entirely unchallenged by any part of that decision or by any argument of the Respondent. The plain meaning and intent of the statute is mirrored admirably and cogently in the Commissioner's protocol, including its balance between the primary medical requirements and the subsidiary necessity to develop a method of measuring those elements against the backdrop of the vocational realities evident in the work-place. Even the regulatory identification of the statutory "*previous work*" as "**past relevant work**" (20 CFR 404.1560(b); (Petitioner's Appendix 68a-69a) seems to represent the Commissioner's acknowledgement that once the medical factors have been satisfied in order to reach step four, the statute will not allow reality and relevance to be marginalized for the sake of academic concerns or bureaucratic convenience. The statute is clear and unambiguous. The Commissioner's regulatory scheme follows the statute in lockstep. The Third Circuit disputes none of it.

It is not until 1982 that the Commissioner begins to read her own regulation as allowing for the disengagement between Agency policy and the realities of the work-place. With the publication of Social Security Ruling 82-40, which discusses past work performed in a foreign country, the Commissioner's policy decision is introduced to emphasize capacity to perform a past job regardless of where or if that job exists. While the petitioner's brief claims that Commissioner's policy interpretation is of longstanding duration, the text of this ruling leaves doubt as to that assertion:

> In answer to questions about the relevance of past work performed in a foreign country, a view

> commonly expressed is that a foreign job is not "relevant" unless substantially similar work can be found in the U.S. economy. Such a view, however, creates some problems. It interposes a requirement that similar work must be found in the U.S. economy and the condition for determining a claimant able to do past relevant work performed in a foreign country. This elevates an element of the fifth step of the sequential evaluation process, availability of work in the national economy, to the fourth step which only deals with the claimant's ability to do his or her past work. The law does not qualify "previous work" but does specify that "other . . . work" must exist in significant numbers in the national economy. The legislative history of the statutory provisions also does not qualify "previous work", but clearly indicates that the provisions were enacted to provide guidelines to "re-emphasize the predominant importance of medical factors in the disability determination". (Social Security Ruling 82-40 reprinted in 1975-1982 West's Social Security Reporting Service, page 846 (1983) hereinafter SSR 82-40).

Here, for the first time, the Commissioner's policy is revealed which translates the statutory provisions emphasizing medical factors into the theory that at step four past work may be unavailable in the national economy but still disqualify a disability application. While the ruling itself claims that the "legislative history of the statutory provisions also does not qualify previous work" this factor and indeed the Commissioner's entire policy had evidently never been revealed to the Commissioner's adjudicators who had expressed the common view that "a foreign job is not relevant unless substantially similar work can be found in the U.S. economy". Further evident is the practice among adjudicators to search for vocational factors before denying a claim at step four. Thus, the ruling refers to "the practice

of verifying or supplementing a claimant's description of his or her past jobs with available information about work in the U.S. economy". Two things seem clear from this ruling issued May 14, 1982. First, prior to its publication the common view of social security adjudicators was to find work performed in a foreign country as not relevant and thus disqualifying such work from consideration at step four notwithstanding the fact that the claimant might enjoy the capacity to perform the work. Since the work was in a foreign country it was unavailable and thus not relevant. Second, it was the practice of those social security adjudicators to gather vocational information in search of similar or compatible jobs which might be available in the U.S. economy, thus introducing "vocational factors" at step four. Evidently, no one told social security adjudicator's about the Commissioner's longstanding interpretation prior to the publication of this ruling. SSR 82-40 put an end to this practice by introducing a new policy which devotes a literal reading to the regulation at 404.1560(b)(Appendix 68A-69A) which requires only that a claimant retain the capacity to "**do your past work**". While this policy seemed to reflect a new reading of the statute and indeed the Commissioner's own regulation, even this new extreme interpretation fails to offer any clear-cut position with regard to a job that simply no longer exists. The same SSR 82-40 which introduces the Commissioner's novel policy interpretation contains in its rationale:

> An individual is found to be under a disability only if his or her physical or mental impairment is the primary reason for inability to engage in substantial gainful work activity. Factors including change of residence from one geographical area to another, lack of job openings, employers' hiring practices are not pertinent to the decision (SSR 82-40 in West's supra. page 846).

Given an opportunity to extend the "not pertinent" factors covered in its new policy directive, the Commissioner opted

not to include the disappearance and consequent non-existence of the past job.

Further rulings in 1982 cast doubt upon the Commissioner's current argument that the non-existence of a prior job is immaterial to a step four determination. Social Security Ruling 82-61 furnishes two such examples. This ruling injects current vocational realities back into the step four determination process by offering two methods by which the Commissioner may find a claimant capable of past relevant work. The first and most familiar is a finding that the claimant can perform the actual demands and job duties of a job as she previously performed it. The second option offers the Commissioner a method by which to deny benefits at the fourth step even if the claimant's physical capacity will not allow resumption of a past job as was previously performed:

> A former job performed in by the claimant may have involved functional demands in job duties significant in excess of those generally required for the job by other employers throughout the national economy. Under this test, if the claimant cannot perform the excessive functional demands and/or job duties actually required in the former job but **can perform the functional demands and job duties as generally required by employers throughout the economy**, the claimant should be found to be "not disabled" (SSR 81-61 in West's supra. page 838).

This second test allows the Commissioner to consider **current vocational realities at step four** by looking at the way jobs are actually performed currently in the economy "as generally required" by employers. Here for the convenience of the Commissioner, vocational realities in the form of current job expectations are allowed to invade the fourth step of the sequential evaluation in order to deny benefits at the fourth step even if the claimant satisfies the

regulation by proving an inability "to do **your** past relevant work". The ruling clearly shows that the Commissioner does not always insist on a literal interpretation of each word in her own regulation. Thus, for the purpose of the instant case, the Commissioner insists that the regulation absolutely requires respondent to show that she cannot **do** her past work. Yet, if a claimant shows that he cannot do his past work as he performed it, ("**your past work**)" the Commissioner may nevertheless deny disability at the fourth step by utilizing current vocational realities to show that the job the applicant used to do is **currently** performed at a different, less demanding, exertional or skill level.

The year 1982 also saw the publication of Social Security Ruling 82-62 which defined what the Commissioner's regulations call "past **relevant** work" and the meaning of the regulatory "fifteen year rule":

> We consider that your work experience applies (i.e., is relevant) when it was done within the last fifteen years, lasted long enough for you to learn to do it, and was substantial gainful activity. Except for purposes of determining whether disability criteria of sections 404.1562 and 416.962 of the regulations are met, work performed fifteen years or more prior to the time of adjudication of the claim (or fifteen years or more prior to the date the Title II Disability insured status requirement was last met, if earlier) is ordinarily not considered relevant (SSR 82-62 at West's pages 809-810).

Past work must be relevant according to the regulations. According to the ruling, this "relevance" means that the abilities and skills necessary to perform the job must be useable in today's job market. Thus the ruling includes a recency requirement which recognizes that:

> A gradual change occurs in most jobs in our national economy so that after fifteen years it is

> no longer realistic to expect that skills (or proficiencies) and abilities required in these jobs continue to apply. The fifteen year guide is intended to insure that remote work experience which could not reasonably be expected to be of **current relevance** is not applied (SSR 82-62, reported in West's page 810).

Here, the Commissioner comes back to reality by insisting that work experience must "reasonably be expected to be of current relevance" in order to be applied at the fourth step of the sequential evaluation. This appreciation of vocational factors and existential reality led the Commissioner to its new three pronged test for the denial of benefits at step four:

> A decision that an individual is not disabled, if based on sections 404.1520(e) and 416.920(e) of the regulations, must contain adequate rationale and findings dealing with all of the first four steps of the sequential evaluation process. In finding that an individual has the capacity to perform a past relevant job, the determination or decision must contain among the findings the following specific findings of fact:
> 1. A finding of fact as to the individual's RFC (residual functional capacity).
> 2. A finding of fact as to the physical and mental demands of the past job/occupation.
> 3. A finding of fact that the individual's RFC would permit **a return to his or her past job or occupation** (SSR 82-62 at West's page 813).

This insistence on the relevance of past work by finding that a claimant's current capacity would permit a **return** to that past work directly contradicts any argument that it is and has always been the Commissioner's official policy that the non-existence of a job or its disappearance from the national economy is immaterial at step four. One can never

return to a job that is no longer in existence just as one cannot "do" a past job which no longer needs doing or no longer finds an economic need to be done. It is difficult to imagine a more irrelevant past job than one that has been virtually eliminated from the national economy. This ruling implies a fundamental principle that denying disability on the basis of a theoretical capacity which can neither be practically verified nor usefully employed, serves no governmental purpose and enjoys no rational basis.

These three rulings, issued within a few months of each other, set forth the Commissioner's policy reading of the statute and the regulations with regard to past relevant work. Those policy constructions simply reiterate that while medical factors remain primary, vocational considerations can be and must be considered, past work must be relevant and that relevance contemplates the capacity to **return** to past work and to actually perform that job. But in the instant litigation the Commissioner now claims that it has always been the Agency's policy construction that the existence of a prior job at the fourth step is immaterial. Her own rulings seem to state otherwise. The difference between the Commissioner's claimed policy construction and the construction which seems evident in her rulings is nowhere more dramatically visible than in the instant case. Here, under the Commissioner's own statistical analysis there aren't any jobs available to respondent existing in the national economy other than the elevator operator job. Respondent merely desires to introduce evidence which will show that the elevator operator job cannot be considered past relevant work because its disappearance would not "permit a return" to this occupation and hence she cannot "do" that job. The Commissioner argues, in apparent contradiction to the plain meaning of her own rulings, that vocational factors can never be considered at the fourth step of the sequential evaluation even if the vocational factor under investigation is the continued existence of the past job itself.

Given the above cited background and the tension between the Commissioner's stated policy in the instant litigation and the policy suggested by the 1982 rulings, it is difficult to understand the Commissioner's insistence that its position in this litigation is of "longstanding duration" or that it is somehow entitled to the deference afforded administrative regulations in the interpretation of an ambiguous Congressional statute. The statute is not ambiguous. The regulation need not be read as ambiguous unless it is read in an extreme, literal and irrational fashion. It is only the Commissioner's differing policy interpretations which lead to an ambiguity in how the regulation should be effectuated with regard to past relevant work.

SUMMARY OF ARGUMENT

A. The Third Circuit's construction of the statute at 42 U.S.C. § 423(d) is superior to that of the Commissioner because it is the only construction which harmonizes the intent, result and plain meaning of the statute's defining provision at (1)(A) with its effectuating/describing provision at (2)(A). The Third Circuit's construction is the logical manner in which to link the remedial character of the Social Security Act with the realities of the work-place which need the remedy. The statute is not ambiguous unless the two provisional paragraphs are read in contradiction. Congress has clearly spoken to the heart of the matter with the intention to mandate that disability determinations for severely impaired individuals be conducted in relation to the realities of the work-place.

B. The Commissioner's scientific, statistical study into the availability and existence of jobs for persons of differing ages, schooling, skills and physical capacities yields the empirical result that no jobs exist in significant numbers which can accommodate Respondent's residual capacity and vocational profile. The only job identified by the Commissioner is Respondent's previous job which does not

exist any longer. Thus, Petitioner's preferred method of statutory construction leaves the Respondent without a remedy. The Commissioner's own analysis suggests that she cannot return to the work-force except as an elevator operator. But the Commissioner will not accept evidence that this job can no longer be performed.

C. While other Circuits have upheld the Commissioner's policy understanding with regard to past work, these cases deal with differing fact patterns which do not contemplate the complete disappearance of a past job from every region in the economy while they afford a reflexive deference to the Commissioner's position without investigation of whether that position is endorsed by the statute.

D. The Commissioner's construction of the statute creates bad public policy. It discourages severely impaired persons from attempting a return to the work-force. It affords no remedies to the specific persons intended for remedy under the statute and the Social Security Act itself. It challenges reality by withholding the intended statutory cure from the societal illness for which it was created. It rewards those without a past job at the expense of those who have contributed to the disability system over a lifetime. The Third Circuit's construction imposes no new burdens on the Commissioner and re-injects the realities of the work-place into the calculus of disability.

ARGUMENT

THE SEQUENTIAL EVALUATION OF DISABILITY MUST MOVE TO ITS FINAL STEP IF THE APPLICANT OFFERS CONVINCING VOCATIONAL EVIDENCE THAT A PRIOR JOB NO LONGER EXISTS IN SIGNIFICANT NUMBERS IN THE NATIONAL ECONOMY

It was the decision of the Third Circuit that the Commissioner's construction of the statute at 42 U.S.C. § 423(d) contradicted the plain meaning of that statute by interpreting it to mean that Congress intended to deny disability to a claimant with the physical capacity to perform a job which no longer existed. The Court reasoned that such a result was an undeniable absurdity and wondered what purpose could be served by such a Congressional intent. The question was asked squarely, first at oral argument before the panel and later before the entire Court. No reasonable answer was elicited. Petitioner's position, as manifested in her brief, outlines the Commissioner's historical insistence on the primacy of medical factors. It trumpets the deference due and owing to the interpretations of administrative agencies and most particularly to those entrusted with administering the Social Security Act. It focuses on the undisputed statutory delineation of the fourth and fifth steps of the sequential evaluation and the difference between past work and other work. It points to other Circuit Court decisions which it claims to have supported its policy. It interposes a competing grammatical construction of the statute, for which it claims superior textual fidelity and effective legal precedent. Finally, it complains of unspecified additional burdens on the adjudication of such claims and introduces the specter of masses of people quitting jobs in order to collect disability. But the Respondent, the Third Circuit Court of Appeals, and now this Court continue to await an answer to the original, troubling question of why Congress would intend to deny disability to claimants who manifest the physical capabilities to perform a job that has been

consigned to an historical curiosity. Petitioner's arguments seem to be framed to take advantage of this Court's decision in *Chevron U.S.A. Inc. v. National Resources Defendant Counsel Inc.*, 467 U.S. 837 (1984), by introducing a statutory ambiguity where none exists so as to benefit from the deference accorded administrative constructions of ambiguous statutes. Burdened with a fundamentally unreasonably inflexible policy, Petitioner's strategy is to create doubt where none exists. Petitioner's argument even invents a "longstanding construction" of the statute (a construction which has nothing to do with the actual issue before this Court) in order to further align its position with the majority in Chevron. But Petitioner's arguments blur the real controversy before the Court. Petitioner's historical interpretation placing primacy on the medical factors of disability is not at issue because it is not disputed by the Respondent or the Third Circuit. The hoped-for deference under *Chevron* cannot be extended because the statute is not ambiguous and in any case, the Commissioner's arbitrary construction would manifestly contradict the very purpose of the statute. The Commissioner's insistence that a different burden apply between past work and other work is not challenged save for the meager expectation that both categories of work actually exist in the national economy. The Commissioner's citations to other Circuits neglect to point out that none of those cases deal with the disappearance of a real, economically viable, full time job from the national economy. The Petitioner's alternative grammatical construction parses the sense out of the statute by adding phrases and factors, adverbs and adjectives not contemplated or necessary to the understanding of the plain reading of the law. The Petitioner's argument that additional burdens will be placed on its already overtaxed system leaves those burdens to the Court's imagination without even hinting as to what they might entail. Finally, Petitioner's interesting scenario in which workers will quit their jobs in order to collect disability ignores the fact that it (1) ordinarily requires approximately a year and a half of unpaid idle waiting before a claimant can be adjudicated

disabled; (2) disability invariably pays less money than even a minimum wage job; (3) people may actually enjoy working; (4) the vast majority of workers are not employed in unique jobs which do not exist in significant numbers in the economy (and those who do may not know it); and (5) the Commissioner doesn't ever award benefits at step four because even where a claimant proves an inability to return to past work, the Commissioner may deny disability at step 5 by identifying a different job within the claimant's capacity which exists in the economy in significant number. In short, the Commissioner's construction puts its own convenience, mistrust of the very workers who fund the system, and bureaucratic prerogatives ahead of the readily understandable and plainly apparent meaning and purpose of the statute, a statute which defines disability as *"an inability to* ***engage*** *in substantial gainful activity"*. The Congressional intent could hardly be drafted more clearly. Denial of benefits is inexorably linked to the capacity to re-enter the competitive work-place:

> The subcommittee believes . . . it is desirable that disability determinations be carried out in as realistic a manner as possible and that theoretical capacity in a severely impaired individual can be somewhat meaningless if it cannot be translated into an ability to complete in the open market (1960 House Report, quoted in 43 Fed. Reg. 55350).

In the case at bar, Petitioner claims that administrative prerogatives, Agency burdens, longstanding interpretations and programmatic necessities justify the surreal notion that the meaningless capacity to do that which can no longer be done constitutes the Congressional intent for the wise administration of the disability insurance program.

A. THE COMMISSIONER'S CONSTRUCTION CONTRADICTS THE CLEAR AND UNAMBIGUOUS STATUTORY PROVISIONS

The Third Circuit was faced with a two part statute at 42 U.S.C. § 423(d). Subsection (1)(A) defines disability as an "*inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . .*" Since the word "engage" evokes actual action in, or involvement with an activity, the statutory definition of disability would logically appear to deal with an inability to actually perform work activity. There is no other reasonable connotation possible and indeed the Commissioner offers no other way of understanding or defining the word "engage".

The second part of the statute was read by the Third Circuit to modify the first part. Thus, a disability claimant must demonstrate that he is unable to "***do*** *his previous work*". Any and every dictionary will define the infinitive "to do" as "to perform", "to execute", "to carry out the requirements of", "to produce by creative effort", "to bring about", "to effect", "to deal with", "to play the role of". These are terms of current action and involvement having nothing to do with passive theoretical capacity. In order to have accommodated the Commissioner's current construction, the statute would have been drafted as follows:

> An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he no longer *has the capacity to meet the requirements of his previous work* and cannot, considering his age, education and work experience, engage in *any substantial gainful work* which exists in the national economy . . .

This text would reflect the Commissioner's construction of our statute. With regard to previous work, the above

construction deals with capacity and job requirements rather than the actual performance of the job. With regard to other work, the above construction eliminates the words "other kind of", leaving the phrase to read "engage in any substantial gainful work which exists in the national economy". The elimination of the phrase "other kind of" would make it clear that Congress intended "past work" to be a different kind of work than "other work" because past work need not exist in significant numbers in the national economy.

The fact that Congress didn't draft the statute in the above matter moved the Third Circuit to consider the second part of the statute in conjunction with the first, disallowing any interpretation of the second part which contradicted the first. Thus, the statute was seen as remedying a specific situation wherein medical factors had rendered an individual currently incapable of work. Congress reasonably perceived work to be substantial and gainful, meaning that actual work needed to be done and at least minimum wage had to be paid. The job also had to exist not as a theoretical option, but as an existing occupation in which one can be "*engaged*". The Third Circuit reasoned that subsection (2)(A) was to be understood in concert with subsection (1)(A) and that any construction of part (2)(A) which differed from the requirement in subsection (1)(A) to demonstrate an inability "*to engage*" could not possibly stand. Utilizing this understanding as background and comprehending that words such as "do" and "engage" evoke actual current action rather than theoretical capacity, the Third Circuit read the term "*any other kind of substantial gainful work which exists in the national economy*" to include previous work as well. The Court's "Oliver Twist" and "Tiger" examples (Petitioner's Appendix 8-a) reasonably elucidate how the term "*any other kind*" must be seen as linking previous work and other work as two "kinds of work" that must exist in the national economy. Reading the statute in any other form leads to three distinct problems. First, an alternative reading would ignore or contradict the

"*inability to engage*" provisions of subsection (1)(A). Second, any alternative reading would have to accommodate the statute's use of the term "*any other kind*" instead of the more economical "any". Third, an alternative reading would have to provide a thoughtful and rational reason why Congress would intentionally wish to disqualify a former worker on the basis of an inchoate, theoretical capability to fulfill the requirements of a past job rather than an effective capacity to resume an existing job. Respondent returns to that question not only because it still awaits an answer from the Petitioner, but also because the Commissioner's construction of subsection (2)(A) is so unrealistic, so contradictory to the definition of disability in subsection (1)(A) and compels such a manifestly ludicrous result so as to be in total disharmony with the meaning and purpose of the Social Security Act itself. The Act was intended as remedial legislation, creating an insurance program by which able-bodied workers paid premiums from their paychecks so as to provide monthly benefits should a future illness preclude the ability to perform an actual job. Benefits are not denied to those with a theoretical ability to do a job which used to exist just as Social Security taxes are not paid by those who have the capacity to work but don't. The Third Circuit's reading ensures the statute's grammatical integrity by reading each word as necessary, thereby preserving the purpose of the disability program itself. There is absolutely nothing ambiguous about the statute because each word can be identified as serving an explanatory purpose. Under the Commissioner's construction, the words *"any other kind of"* serve no purpose. Under the Commissioner's construction, the words "*do*" and "*engage*" are to be read not as what they mean but as what the Commissioner wants them to mean.

In support of its position, the Commissioner invokes the "rule of the last antecedent" in which a limiting clause should merely modify the phrase it immediately follows (Petitioner's brief 26). In support of this "rule" petitioner cites this Court's ruling in *FTC v. Mandel Bros.*, 359 U.S. 385,

389 & n.4 (1959). But in *Mandel*, the Court utilized this construction to further the objective of the statute itself without suggesting that it had created a rule with any future precedential value:

> We think it would be a partial mutilation of this Act to construe it so that "invoice" provisions were inapplicable to r etail sales . . . in the second place only by construing "invoice" to include retail sales slips can the full protection of the Act be accorded consumers (*Mandel*, 779 S. Ct. 819 at 822-823).

In the instant case, utilization of the "rule of the last antecedent" would frustrate, rather than further the objectives of the statute by creating a contradiction between defining and describing provisions.

Next, Petitioner argues that only the Commissioner's construction preserves both the primacy of medical factors in the disability equation and the difference in evidentiary expectations between past work and other work. This is demonstrably inaccurate. The issue of previous work occurs at the fourth step of the sequential evaluation which cannot be reached unless and until the claimant satisfies the burden of demonstrating a severe impairment which significantly limits her ability to perform work related functions. It is this second step of the sequential evaluation which satisfies the Congressional intention that medical factors assume primacy so as to insure that disability will neither be confused with, nor take the place of, unemployment insurance. Moreover, the Commissioner does not demonstrate with any clarity how the delineation between the fourth and fifth steps of the sequential evaluation enforces the primacy of medical factors. If medical factors are to be the primary ingredient in a disability determination, why is this not the case at step five where even the Commissioner doesn't deny disability on the basis of the capacity to perform a non-existent job? If a claimant

must be denied benefits at step four solely on the basis of her theoretical capacity to perform a non-existent job, how does this irrational result enhance the doctrine of the primacy of medical factors?

The same lack of explanation is apparent in the Commissioner's insistence that only the Agency's construction preserves the evidentiary difference between the fourth and the fifth steps of the sequential evaluation. This assertion is unexplained because there is no logical basis for it. The difference between the fourth and fifth steps of the sequential evaluation has nothing to do with the existence of the former job. The vocational factors added at the fifth step of the sequential evaluation are introduced by the statute at the fifth step (other work) because they are irrelevant at the fourth step (previous work). Thus, it is clear that Congress quite correctly assumed that since a claimant's age, education and acquired working skills did not prevent the performance of a past job while that job was being performed by the claimant, there is no reason to consider these factors at step four of the sequential evaluation. While the claimant might be a few years older, that factor would rarely, if ever, pose any hurdle to the resumption of the same job. An education level that accommodated a certain job prior to the disability claim would naturally be sufficient to resume that job after the denial of that claim. Any work related skills which were utilized in the performance of a past job remained within the skill set of the claimant following denial of the claim. These "vocational factors" are not the criteria by which to determine physical and mental capacity to resume a past job. It is only when the burden shifts to the Commissioner to identify a **different** job that the issues of age, education and prior work experience tether the Commissioner to a realistic appraisal of what a claimant is vocationally capable of performing. Here again, the statute emphasizes the reality of the work place as the decisor of disability. While the Commissioner protests that the Third Circuit's decision blurs the line between the fourth and the fifth steps, between past work

and other work, there is nothing in the Third Circuit's decision to suggest such a result. The burden remains with the claimant at the fourth step of the sequential evaluation. The Third Circuit's decision does not change that reality. The issues of age, education and prior work experience remain irrelevant to the determination at the fourth step. The Third Circuit's decision does not change that reality either. The only innovation to be found in the decision of the Third Circuit is the rejection of the Commissioner's policy interpretation in favor of the existential reality that since Congress cannot send a social security applicant back in time, it would not deny disability to severely impaired claimants whose jobs are obsolete. The Congress did not intend and the statute does not compel a social security claimant to be denied benefits in the event that a past job ceases to exist in the national economy. Pauline Thomas brought this litigation because she was denied the opportunity to bring vocational evidence which would prove that her past job as an elevator operator had ceased to exist in significant numbers in the national economy. The Commissioner denied her that opportunity by stating as a matter of law that the non-existence of a prior job has no material evidentiary relevance to the step four determination. This extreme, irrational detachment of the disability insurance program from its "policy holders" is the only change mandated by the Third Circuit's decision. The Third Circuit has read the statute in its unambiguous, plain, sensible form, without administrative agendas and without bureaucratic rationalizations.

For these reasons, the Petitioner's reliance on *Chevron* is misplaced. The plain reading of the statute is clear because Congress has openly and directly spoken to the only question at issue before the Court. Disability means an "*inability to engage in any substantial gainful activity*" by reason of medical impairments. The Commissioner's Administrative Law Judge declared Respondent to suffer those medical impairments at step two of the sequential evaluation (hypertension, cardiac arrythmia, cervical and

lumbar strain/sprain and a transient ischemic attack, Appendix 44a). Respondent is unable to "*engage*" in her previous job because that job does not exist in significant numbers in the national economy. The Commissioner's policy won't allow Respondent's case to reach step five where benefits can be awarded.

Yet, even in the event that the Court detects some modicum of ambiguity in its reading of the statute, *Chevron* deference to the Commissioner's interpretation is inappropriate because that interpretation is simply not a permissible reading of the statute. The Congressional intent simply cannot be seen as promoting such an unrealistic, theoretical and academic approach. Disability determinations cannot ignore the realities of the marketplace. Theoretical capabilities do not pay bills. "Engaging" in real jobs pay bills. The disability remedy was intended for those who can't actually work today, in real time. The statute cannot be read as proposing a contradiction between its defining and effectuating provisions. The Commissioner's position is extreme, far exceeding the bounds of reason, statutory authority and the fundamental remedial purpose of the Social Security Act. It is an arbitrary abuse to identify a past job as justification for the denial of benefits while at the same time acknowledging the certitude that the claimant can never resume working at that past job. Even if the statute's meaning was found to be less than crystal clear, what is crystal clear is that the Commissioner's intended result cannot pretend to serve any possible intention of the Congress.

Finally, the Third Circuit's grammatical construction of the statute which logically includes "*previous work*" as a "*kind of substantial gainful work which exists in the national economy*" constitutes not only proper english usage but provides the only avenue by which to harmonize sections (1)(A) and (2)(A) of the statute. The Third Circuit's delightfully apt examples of Oliver Twist as included within

the subset of the novels of Charles Dickens and the tiger as included in the family of large cats, drive home the inevitable reality that previous work is just one *kind of substantial work* which *exists in significant numbers*. The Petitioner's ponderous, clumsy, competing examples distort the plain grammatical integrity of the statutory syntax. Thus, "any other large animal which can climb higher than a tiger" cannot be another "kind of tiger" and "any other Victorian novel published after Oliver Twist" cannot be another "kind of Oliver Twist". In our statute, "previous work" **is** a "kind of work", whereas Petitioner's example definitively excludes any possibility that item number one (previous work, Oliver Twist, Tiger) could ever constitute a related subcategory of the descriptive phrase itself.

B. THE COMMISSIONER'S POSITION AFFORDS RESPONDENT NO REMEDIES

On January 16, 1998, the day that the Commissioner's Administrative Law Judge issued his decision denying benefits, (Appendix E, 38a-45a), Respondent was 56 years of age, was educated only through 11th grade and had held unskilled jobs throughout her working life. Under the Commissioner's construction, respondent was precluded from offering evidence that her past job as an elevator operator no longer existed in significant numbers in the national economy because the Commissioner's construction had rendered such a factor immaterial at step four. But had the respondent been permitted the opportunity to offer such evidence and had the Commissioner's ALJ accepted it as proof, the matter would have advanced to the fifth and final step of the sequential evaluation wherein the burden would shift to the Commissioner.

At step five the Agency is permitted to make use of its own decision making grid, the "Medical-Vocational Guidelines" contained at 20 CFR 404 Subpart P, Appendix 2. These rules take administrative notice of the existence of jobs in the national economy which can be performed by

persons of differing ages, educational backgrounds, skill levels and exertional capacities. At step five, the ALJ would have no option but to compare his own findings with the schematic matrix contained in Appendix 2. According to that grid, Respondent, of advanced age, limited education, a history of unskilled work and limited to light exertional capacity by her medical impairments, must be adjudicated "disabled" and awarded benefits pursuant to Rule 202.01 of Table 2. This disability finding, authorized, indeed mandated, by the medical-vocational rules, is based on the non-existence in significant numbers of jobs in the national economy for persons so situated. Of course, the reverse is also true. When the rules direct a finding of non-disability it is precisely because the Agency's research has scientifically determined the existence of jobs in substantial numbers for similarly situated individuals. Thus when a vocational rule is invoked to direct a finding, the Commissioner is taking administrative notice of its own statistical data indicating the existence or non-existence in significant numbers in the national economy for jobs available to broad segments of the population:

> The existence of jobs in the national economy is reflected in the "Decisions" shown in the rules; i.e., promulgating the rules, the administrative notice has been taken of the numbers of unskilled jobs that exist throughout the national economy at various functional levels (sedentary, light, medium, heavy and very heavy) as supported by the "Dictionary of Occupational Titles" and the "Occupational Outlook Handbook" published by the Department of Labor; the "County Business Patterns" and "Census Surveys" published by the Bureau of the Census and occupational surveys of light and sedentary jobs prepared for the Social Security Administration by various State employment agencies. Thus, when all factors coincide with the

> criteria of a rule, the existence of such jobs is established (20 CFR Part 404, Subpart P, Appendix 2, 202.00(b)).

The Commissioner's own data prove that at step five there are no jobs existing in significant numbers in the national economy which could be performed by Respondent. Under the Commissioner's construction, Respondent wasn't allowed to reach step five because she was found not disabled at step four by reason of her ability to perform the job of elevator operator. But taking steps four and five together as an overview provides this Court with the frankly frightening reality that the Commissioner's position states that the only job which Pauline Thomas can perform in the entirety of the American economy is the job of elevator operation and this job no longer exists. Thus, the Commissioner's construction, which precludes Respondent from offering material proof of that fact, leaves her with no remedies whatsoever. Respondent has been denied disability even though she satisfied the step two medical threshold of proving that a severe medical impairment is the reason for her unemployment and the Commissioner's statistical data prove that there are no jobs in significant numbers existing in the national economy which she can perform. Respondent's one remaining option, proving that the job she used to do has vanished from the national economy, has been rendered immaterial by the Commissioner's policy construction of the statute and the regulations. The Commissioner's position is absolutely rigid, leaving no alternative method of resolution even when its own preferred method leads to an absurd result. Here, there can be no question that the Commissioner's resolution of Pauline Thomas' disability claim is both unfair and absurd. It is unfair because Pauline Thomas has worked all of her life and has thus contributed to the Unemployment and Social Security systems with every paycheck. Due to her cardiovascular and orthopedic impairments, she will not qualify even for the temporary security of unemployment insurance because she cannot present herself

as able-bodied and capable of sustaining employment. She cannot qualify for disability because it is the Commissioner's policy to deny disability to those who manifest an inchoate capacity to perform their past jobs even though those jobs have disappeared from the economy. Petitioner has advanced a policy which is the product of a most irrational construction of a remedial social welfare statute and the most extreme reading of an otherwise innocuous regulation. Petitioner constructs the remedial statute as intending no remedies. This policy mutilates the plain intent of the statute which is to deliver benefits to those whose physical impairments conspire with their vocational profile to render them medically/vocationally unemployable in the national economy. And while ordinarily a claimant denied disability has the option to return to the work-force in some diminished role, here the Commissioner's own statistical science reflects the economic reality that there is no such role remaining for Pauline Thomas. This result is specifically contradicted by the plain meaning of the statute, for the Commissioner leaves Pauline Thomas no alternatives. The Commissioner knows that the result is absurd and must acknowledge that Respondent is disabled at step five. But the Commissioner will not permit respondent to get to step five. The Third Circuit's decision remedies the situation by affording Respondent the ability to present vocational evidence that will get her to step five. The Third Circuit merely mandates that realities be recognized in the interpretation of the statute so as to afford an alternative method of resolution to the Commissioner's preferred method which leads to irreparable frustration. Respondent does not challenge the legitimacy of the Commissioner's sequential evaluation. Respondent does not challenge the statute or a rational reading of the past work regulation. It is merely the interpretive policy which is being challenged. That policy mandates the absurd result while offering no compelling reason to disengage the system from the vocational realities within which it operates and no realistic alternative to those denied disability while at the same time being denied access to the work-place.

C. THE DECISIONS OF OTHER CIRCUITS CAN BE DISTINGUISHED FROM THE DECISION OF THE THIRD CIRCUIT

The Petitioner cites the opinion of the Sixth Circuit in *May v. Gardner*, 362 F 2d. 616 (6th Cir. 1966) as presenting issues congruent with the instant case. It does not. The Court in *May* dealt with the factual pattern wherein a coal miner lost his arm and thereafter re-entered the work-force as a "mine dispatcher", a far less physically challenging job. The mine later closed down and the claimant filed for disability. Yet, mine dispatcher jobs existed in significant numbers elsewhere in the economy. Claimant did not wish to leave his ancestral home in order to relocate to an area wherein mine dispatcher jobs were available. There was no argument that the job had simply vanished from the national economy, it had just vanished from the general region in which the claimant lived. This scenario had no chance of success simply because the statute itself dealt directly with the fact pattern:

> *For the purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country* (Appendix 56a).

Predictably, the Court in *May* appropriately enforced the statutory mandate:

> Appellee asserts that there is no available work as a dispatcher in the mines; that he is unable to find any "substantial gainful activity" at or near his home in Kodak, Kentucky, counsel for appellee pressed upon us with convincing eloquence the plight of appellee and other persons similarly situated who do not wish to leave their homes in the Kentucky mountains and

> seek work elsewhere; yet were unable to find employment at home (*May* at 618).
>
> . . . we have also consistently held that once the Secretary finds some substantial evidence that the claimant is able to engage in a former trade or occupation, such a determination "precludes the necessity of an administrative showing of gainful work which the appellant was capable of doing and the availability of any such work" (citations omitted).

This case is distinguishable on two crucial points. First, there was no argument that the job as a mine dispatcher ceased to exist in the national economy, only that the mine nearest to the claimant's home had shut down and the claimant did not wish to leave his home in the Kentucky mountains to seek work elsewhere. Second, the Court in *May* held that once the Secretary found claimant capable of performing past work it "precludes the necessity of an **administrative showing** of gainful work which the appellant was capable of doing and the availability of any such work". In the instant case, the decision of the Third Circuit does not contemplate the necessity of an "administrative showing" of availability of past relevant work. Such an "administrative showing" would shift the burden to the Commissioner at the fourth step of the sequential evaluation. Instead, the decision of the Third Circuit mandates the materiality of evidence produced by the claimant that her past relevant work is no longer relevant because it had vanished from the national economy. Thus, the Court in *May* does not deal with the issue before this Court. In *May*, the claimant refused to move to a region in the country wherein he could ply his skills as a mine dispatcher. In the instant case, Respondent wishes to proffer evidence that her former job had disappeared from the entirety of the national economy. In *May* claimant argued for a shift in the evidentiary burden to the Commissioner in the event that a past job had ceased to exist in the region

of his residence. In the instant case, Respondent wishes to bring a vocational expert before the Commissioner's Administrative Law Judge to give sworn testimony that her former job has ceased to exist in significant numbers anywhere in the national economy.

Petitioner similarly refers to *Quang Van Han v. Bowen*, 882 F2d. 1453 (9th Cir. 1989). This is the case of a Vietnam refuge who had worked in a herbal medicine store in Vietnam. The Court found both the claimant's and the Commissioner's interpretation of the statute to be reasonable and mutually exclusive. Therefore, the Court granted *Chevron* deference to the Commissioner's interpretation on the basis of the explicit ruling at SSR 82-40 which considers work in a foreign country to be relevant. This case can be distinguished on a number of grounds. First, the Third Circuit disagreed that the Commissioner's interpretation was "consistent with standard usage" (Appendix 8a, n.2). Second, the issue of work in a foreign country reflects policy issues far beyond those contemplated here. It may be entirely reasonable for the Commissioner to preclude aliens from entering the United States in order to seek benefits on the basis of job requirements which cannot be adequately ascertained or reliably confirmed. Third, it is apparent that the Court in *Quang* assumed that comparable positions in foreign countries contemplated more taxing exertional duties. This last assumption led the Court to maintain that the claimant retained the right to "make a showing that his prior work in a foreign country was less physically or mentally grueling than sedentary work in the United States". Thus, the Court did indeed allow a claimant to offer proof of vocational factors at the fourth step of the sequential evaluation, an opportunity which is being specifically denied by the Commissioner in the instant case. It would seem that the claimant's argument in *Quang* challenged the validity of the Social Security Ruling at 82-40 without reference to the competing interpretations implied at SSR 82-61 and openly articulated at 82-62. Certainly, the Court in *Quang* did not appreciate the

contradictory nature of those two rulings and in fact did not mention either one. Thus, while the Court found that SSR 82-40 was not inconsistent with the regulation it interpreted and found the statute to be silent on the issue of past work on foreign soil, the Court nevertheless allowed the claimant the opportunity to introduce vocational factors at step four of the sequential evaluation:

> If the claimant can show that his previous work in a foreign country was less physically or mentally grueling than sedentary work in the United States, he may be able to argue that Ruling 82-40 as applied to him would conflict with the Social Security Act or the five step evaluation process (*Quang* at 1457-1458).

Here, Respondent is willing and able to introduce vocational factors at the fourth step of the sequential evaluation, namely vocational expert testimony that the job simply has evaporated from the national economy. The Commissioner's position denies that opportunity while the Court in *Quang* afforded that opportunity.

Petitioner also cites the Sixth Circuit case of *Garcia v. Secretary of HHS*, 46 F3d 552 (6th Cir. 1995). This is a case of a Puerto Rican native with a limited ability to speak and understand english who previously worked as a car salesman on the island of Puerto Rico before relocating to the continental United States where he worked as a laborer and a welder. While Garcia's residual functional capacity would not allow resumption of his past work as a laborer and a welder, the Commissioner's Administrative Law Judge found that he demonstrated the capacity to resume work as a car salesman. Garcia argued that his lack of fluency in the english language rendered his prospects as a car salesman bleak. The Court found against Garcia by agreeing with the Commissioner that "the determination of disability is predominantly a medical one". This case can be distinguished on two grounds.

First, given the fact that Garcia's physical capacity allowed him to resume work as a car salesman and given the fact that the job of car salesman continues to exist in significant numbers in the national economy, Garcia's voluntary removal from the island of Puerto Rico caused his unemployment. All Garcia need do is move back to Puerto Rico, another "region" of the United States, and his unemployment is easily remedied. Respondent has no such option in the instant case. Second, the Court's decision contains a footnote which leaves open the possibility that it might have decided the matter differently in the instant case:

> Even if we accepted Garcia's construction of the statute, that actual past work must be available in the national economy, we are not convinced that Garcia could clear that hurdle. The claimant bears the burden of proving entitlement to disability benefits, including proof of inability to perform past work (citations omitted). Therefore, Garcia would bear the burden of proving that his actual past work does not exist in significant numbers in the national economy. The Secretary has construed "national economy" to include non-contiguous areas of the United States such as Puerto Rico (citations omitted). Garcia has presented no proof that jobs as a Spanish speaking car salesman appear in insignificant numbers in the national economy, including Puerto Rico. Thus, Garcia would likely lose even under his proposed construction (*Garcia* at 559, n.7).

If Garcia *had* presented such proof, the Court intimates that its decision might have been different. Here, Respondent wishes to present the proof but the Commissioner refuses to listen.

The last two cases of interest to the Commissioner are *Rater v. Chater*, 73 F3d. 796 (8th Cir. 1996) and *Pass v. Chater*, 65 F3d. 1200 (4th Cir. 1995). Both cases were acknowledged by the Third Circuit to run contrary to its opinion but both were rejected for relying primarily on the Commissioner's regulations and rulings without the slightest investigation into whether the controlling statute permitted the interpretations contained therein. In *Pass*, a former tobacco farmer and share cropper held a job as a "gate guard" for five months at a construction site until the construction had been completed and his job terminated. The Court relied entirely on the Commissioner's construction as articulated in the regulations. Absolutely no thought was devoted to the possibility that those regulations and rulings rendered the statute incongruous or mandated an absurd result. The same is true regarding the Court in *Rater* which actually disregarded unchallenged evidence that the claimant's job had certainly ceased to exist in significant numbers in the national economy. In *Rater*, the Firestone Tire Company responded to safety concerns at its rubber plant by inventing a job called an "incinerator operator/watcher". This job entailed sitting on a chair and watching the incinerator for the sole purpose of pressing a button and shutting it off should a problem arise. It is difficult to imagine a less taxing job in the world economy, much less the national economy. Rater's job ended after 11 months when Firestone restructured the plant and alleviated the safety concerns. The Administrative Law Judge heard uncontradicted vocational testimony to the effect that the claimant's prior job was "very unusual", and more specifically that "I don't think there would be 10 people in Nebraska that did it". Notwithstanding unchallenged and uncontradicted vocational evidence that the claimant's job no longer existed in significant numbers in the national economy, the *Rater* Court upheld the denial of benefits at step four by simply referring to SSR 82-61 as foreclosing the debate. The Court never questioned whether the Commissioner's policy interpretations contained in the ruling were proper or an

appropriate construction of the actual text of the statute. Congressional intent was not discussed.

As she did before the Third Circuit, Respondent points to the dicta in the decision of the Seventh Circuit in *Kolman v. Sullivan*, 925 F2d 212 (7th Cir. 1991). The *Kolman* Court lucidly articulated two persuasive elements quoted in the Third Circuit's decision (Appendix 13a). First, the Court declared a proposition which is obvious to everyone except the Commissioner. The fact that a claimant can perform a past job that no longer exists cannot possibly provide a rational ground for denying benefits. Second, the drafting of the regulation, which leaves in doubt the rudimentary requirement that a past job exist must, simply reflects an assumption on the part of the drafter that jobs that existed in the past 15 years continue to exist today. Since this is an altogether reasonable assumption, the regulation can stand unchallenged. But the Commissioner's interpretation of that regulation forecloses the possibility that the drafter's assumption can be "dramatically falsified":

> It is true that the regulations explicitly require an inquiry into whether a significant number of jobs exist in the national economy only if the applicant cannot do his past work, and from this government asks us to inter that the past work need not exist at all. The applicant might have been an ice-cutter before the invention of the invention of the refrigerator. This particular example is ruled out by a requirement in the Regulation that for past work to count, the applicant must have done it within 15 years preceding the application. But if the work disappeared within that time, the fact that he could perform it if it did exist does not appeal to us as being either a rational ground for denying benefits or one intended by the Regulations. The failure of the Regulations to require that the job constituting the applicant's past work exists in

> significant numbers probably just reflects an assumption that jobs that existed 5 or 10 or 15 years ago still exist. But if the assumption is dramatically falsified in a particular case, the Administrative Law Judge is required to move onto the next stage and inquire whether some other job that the applicant can perform exists in significant numbers today somewhere in the national economy (*Kolman* at 213)

No further amplification is necessary. The *Kolman* Court clarifies Respondent's position completely. The *Kolman* Court articulates the Third Circuit's attitude admirably. The Social Security Act was not enacted in order to create a fantasy world in which mythical jobs can be resumed by real flesh and blood people as a means of denying benefits which would otherwise be paid under the same medical and vocational facts. The Commissioner's interpretation of this regulation and its construction of the statute to insure an extreme and unreasonable result frustrates the intent of the Act and renders meaningless the statutory language defining disability. Excepting *Kolman*, the above cited cases either deal with differing fact patters which do not contemplate the non-existence of a past job from every region in the economy or reflexively create an automatic *Chevron* deference not contemplated by the Court itself or robotically follow the Commissioner's interpretations without any investigation as to whether the statute permits those interpretations.

D. POLICY CONSIDERATIONS DO NOT SUPPORT THE COMMISSIONER'S CONSTRUCTION OF THE STATUTE

The Petitioner's brief asserts that construction of the statute serves certain "sound purposes in the administration of the disability program". It is difficult to appreciate any purpose being served by the Commissioner's construction, let alone a sound one.

First, the Petitioner asserts that "the ability to perform a former job is a reliable and administrable measure of the capacity to work, whether or not that particular job exists in significant numbers in the national economy". Petitioner explains this principle by advising:

> A claimant's previous job is specific, concrete and identifiable, and the ability to perform its demands is therefore a direct and individualized measure of actual capacity. The previous working inquiry is, moreover, bounded by the historical fact of what the claimant has done in the past. "Other" work, in contrast, is by definition work the claimant has not done, and analysis of that issue is more removed from concrete empirical proof (Petitioner's brief at 42).

While it is satisfying to read the Commissioner's emphasis on "empirical proof", Respondent respectfully reminds the Court that the entirety of this case rests on the Commissioner's denial of the relevance and materiality of such empirical proof. The Commissioner's position is simply that Respondent is foreclosed from bringing "empirical proof" of the disappearance of her former job from the national economy. The Commissioner's position is that any "empirical proof" of such disappearance is irrelevant because the Commissioner prefers the academic, theoretical capacity to perform a job even in the extreme instance where the Commissioner was satisfied that the job no longer existed anywhere in the United States. This case is all about the denial of "empirical proof" in favor of administrative convenience. Moreover, the Petitioner's assertion that a prior job provides a "concrete, accurate measure of capacity" must lead to the question, capacity to do what? It certainly cannot be the capacity to perform work which exists in significant numbers in the national economy. Rule 202.01 of Table 2 in Appendix 2 to Subpart P of the Commissioner's Regulations No. 4 absolutely guarantees that Pauline Thomas will be found disabled at the fifth step

of the sequential evaluation precisely because the Commissioner's statistical reality, as evidenced in that Rule, "empirically proves" that there are no jobs for Pauline Thomas anywhere in the national economy. Here, the Commissioner's ALJ grasped onto step four with white knuckled ferocity precisely because the "empirical" reality would compel him to award benefits at step five. Respondent respectfully submits that the Commissioner's own sequential evaluation never awards benefits to any social security disability claimant at step four. It is legally impossible to collect disability benefits simply by proving an inability to perform a past job. The Commissioner reserves the right at step five to identify a job within the claimant's capacity which actually does exist in significant numbers in the national economy. Thus, the Petitioner's "empirical proof" argument is contradicted by her position in this case and the inevitable result that she desires. If, as is the case here, the only job in the national economy within the physical capacity of Pauline Thomas is a job that does not exist, "empirical reality" should suggest that Ms. Thomas is disabled. If the ability to do a prior job is a "concrete accurate measure of capacity" to do another job which exists in significant numbers in the national economy, "empirical reality" would dictate that the sequential evaluation move to the fifth step so that the Commissioner may identify the job indicated by the claimant's "measure of capacity". If this "measure of capacity" argument is serious and not just a convenient strategy, there would be no harm in advancing the sequential evaluation to the fifth step in the rare circumstance that a claimant offered convincing proof of the disappearance of her prior job at the fourth step.

The Petitioner also complains that the Third Circuit introduces a "broader inquiry" into an already overburdened disability determination process. But Petitioner hasn't identified these extra burdens placed upon the Commissioner's adjudication process by the decision of the Third Circuit. The Third Circuit does not change the

scheme of the sequential evaluation. At the fourth step, the burden rests and remains with the claimant. It is the claimant which must bring proof sufficient to convince the Commissioner's ALJ of the disappearance of her prior job. And still the Commissioner need not award disability unless it is satisfied that no other job existing in significant numbers can fit the claimant's residual capacity.

The Petitioner goes so far as to suggest that the decision of the Third Circuit gives license to able-bodied workers "to quit their jobs and collect disability benefits" if they were "lucky" enough to work in jobs that do not exist in significant numbers in the national economy. While this is certainly a remote possibility, it assumes that workers with peculiar jobs know they have peculiar jobs. It assumes that these same workers will suffer impairments with the requisite severity to pass muster before an ALJ at step two of the sequential evaluation. It assumes that persons will be willing to quit their jobs and wait the 18 months that it typically takes between the filing of an application and the payment of benefits, a wait that is complicated by the fact that the claimant sits at home without an income while the claim is adjudicated. It assumes that persons with peculiar jobs who know they have peculiar jobs and are willing to wait a year and a half for their plan to hatch will be the same persons who prefer idleness to working and who won't mind collecting far less than the minimum wage when their plan ultimately comes to fruition. Apparently, the Commissioner's mistrust of the very workers that fund the system that she administers extends to the outer-reaches of absurdity.

While Petitioner's stated policy considerations are either self-serving, cynical, inaccurate or unspecific, Respondent's policy considerations are much more to the point. First, the Court is respectfully reminded that the same statutory definition of a disability exists both for Title II and Title XVI of the Social Security Act. The same definition of disability is also apparent in Sections 404 and Sections

416 of 20 CFR. The Commissioner uses identical regulatory provisions to define and award disability for disability insurance benefits and supplemental security income. Thus, under the Commissioner's construction those who have never worked one day in the United States, those who have never contributed a dime to the Social Security system or to any part of the United States Treasury are given a decided advantage in the determination of their disabilities. While it is true that under any understanding of the statute, those who have worked will have the additional hurdle of "past relevant work" to climb, that hurdle can be rationally justified because the ability to actually perform a past job contradicts the statutory definition of disability. Under the Commissioner's construction the step four hurdle offers only penalties and no rewards. Under the Commissioner's construction two persons with the same severe impairments, of the same age and education, with equal physical capacities would be treated differently. If Pauline Thomas never worked, she would have been awarded SSI disability because her case would have reached the fifth step of the sequential evaluation. In the same vein, the Commissioner's construction penalizes those with severe impairments who lack the capacity to perform their prior jobs but nevertheless re-enter the work-place at marginal, low paying, transient positions. This is invariably the fact pattern in these cases. In *May* the claimant was penalized for attempting to re-enter the job market as a mine dispatcher after losing his right arm as a miner. Had he applied for disability instead of attempting to work, he would have been found disabled because the Commissioner wouldn't be able to deny benefits on the basis of past relevant work as a miner. In *Pass*, the claimant couldn't resume tobacco farming or share cropping after his injuries. Had he not taken the temporary, five month gate keeping job at a construction site, he would have collected benefits. The same is true for *Rater's* 11 month "incinerator watching". Regretfully, the same is true for Pauline Thomas and the few months that she operated that elevator. The Commissioner's policy is bad public policy because it discourages injured or fragile people from

attempting to go back to work. The Commissioner's policy tells these people to "give up and go on disability now".

Lastly, the Respondent reasserts that the Third Circuit's decision injures no party, causes no programmatic disruption, adds no administrative burden, transfers no authority, fosters no new initiative, harms no important governmental prerogative and limits no administrative power. Instead, the decision of the Third Circuit restores the disability program's credibility and programmatic integrity by replacing tortured construction with plain english usage, by preferring common sense to insensitive convention and by rescuing the disability program from an unfeeling bureaucracy which would detach the program from the people it was designed to serve and the problems it was meant to remedy. It is respectfully submitted that the Commissioner of Social Security can survive handsomely in a world where claimants are permitted an opportunity to offer evidence asserting statistical reality. Instead, the Commissioner asks this Court to elevate a strained statutory construction to a place of honor and legal standing that it does not deserve. At its most cogent, the Commissioner's interpretation still only manages to be the next best thing to reality itself but it is not real. Whether or not this Court appreciates the argument, there is a real value in preventing tomorrow's headlines from announcing to the working tax-payers of America that it is now perfectly legal to deny disability even if the only job in the world they can do is no longer in existence.

CONCLUSION

The judgement of the Third Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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