

No. 04-1357

IN THE
Supreme Court of the United States

—————
TIMOTHY GIBLER,
Petitioner,

v.

JO ANNE B. BARNHART,
Commissioner of the Social Security Administration,
Respondent.

—————
**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

—————
PETITION FOR REHEARING

—————
STEVEN BRUCE *
PEOPLE WITH DISABILITIES
FOUNDATION
507 Polk Street, Second Floor
San Francisco, California 94102
(415) 931-3070

* Counsel of Record

Attorney for Petitioner

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. STATEMENT OF FACTS	2
III. REQUEST TO TAKE JUDICIAL NOTICE.....	3
IV. ARGUMENT	3-5
V. CONCLUSION	6
CERTIFICATION (RULE 44)	7
APPENDIX	B-i

TABLE OF AUTHORITIES

CASES	Page
<i>Matthews v. Eldridge</i> , 424 U.S. 319 (1976)	5
<i>Schweiker v. Chilicky</i> , 487 U.S. 412, 417 (1988) ..	3
UNITED STATES CODES	
42 U.S.C. § 421(m)(1)	2
42 U.S.C. § 423 (e)	3
42 U.S.C. § 423 (f)	3
42 U.S.C. § 423 (f), (g)	2
42 U.S.C. § 423 (f), (g) Pub. L. 98-460, §§ 2, 7, 98 Stat. 1794-1796, 1803-1804	3
42 U.S.C. § 423 (g)	3
42 U.S.C. § 423 (g)(2)	2
CONGRESSIONAL RECORDS	
130 Cong. Rec. 26000, 26145-26146 (1984); <i>see</i> <i>also id.</i> , at 6621; <i>id.</i> , at 13247	3

IN THE
Supreme Court of the United States

No. 04-1357

TIMOTHY GIBLER,
Petitioner,

v.

JO ANNE B. BARNHART,
Commissioner of the Social Security Administration,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITION FOR REHEARING

I. INTRODUCTION

This case involves an individual, Timothy Gibler on social security disability benefits since 1979 due to chronic schizophrenia, who was retroactively terminated from benefit checks and Medicare resulting in a loss of the ability to provide for the ordinary necessities of life; e.g., food, rent, and clothing. His check benefits and Medicare were restored, in major part, by an Administrative Law Judge's decision. This Petition for Rehearing is not meant to reargue that which is in the Petition for a Writ of Certiorari denied on June 6, 2005.

II. STATEMENT OF FACTS

Congress made it clear that disability beneficiaries will receive benefits pending appeals of the Social Security Administration's termination reviews in the Social Security Disability Benefits Reform Act of 1984, 42 U.S.C. § 423 (f), (g). These amendments came about because of numerous abuses. The reforms were intended to resolve constitutional due process issues so that anyone whether on Supplemental Security Income (Title XVI of the Social Security Act) or Social Security Insurance (Title II of the Social Security Act)¹ disability benefits could continue on benefits. Only those individuals on the Title II program after an Administrative Law Judge appeal decision could be charged with an overpayment of benefits if the final outcome was not in their favor. 42 U.S.C. § 423 (g) (2). Benefits paid Title XVI recipients are not counted as an overpayment if the outcome is not in their favor.

The Social Security Administration does not give beneficiaries check benefits and/or Medicare pending an appeal of an initial termination decision if they label the decision a work review as opposed to a medical review.

At the initial level the Social Security Administration has procedures in place to process reviews wherein an individual can receive benefits pending appeal by simply requesting them if the review is labeled a medical review. In this case where substantial psychiatric medical evidence² came to light in the review, the Social Security Administration, at the initial and reconsidered adjudication levels, refused to develop the medical evidence as it related to Petitioner's ability to work.³

¹ The program Petitioner Mr. Gibler is on.

² Petitioner was in a hospital psychiatric lock-up ward during this review. Petition for Writ of Certiorari, Appendix A, Ex. 20.

³ Also see 42 U.S.C. § 421(m)(1) (December 17, 1999, effective January 1, 2001.)

III. REQUEST TO TAKE JUDICIAL NOTICE

Petitioner hereby requests this Court take judicial notice of facts referenced in Congress' Government Accountability Office Report No. 04-656 to Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives of July 2004, a public record. The source of virtually all the facts is the Social Security Administration. (Petition for Rehearing, Appendix B, Ex. 1.)

IV. ARGUMENT

42 U.S.C. 423 §§ (e) Engaging in substantial gainful activity . . . , (f) Standard of review for termination of disability benefits , and (g) Continued payment of disability benefits during appeal . . . must be read together when interpreting Congress's intent in providing for interim benefits pending appeal of a termination adjudication at the initial level. Pub. L. 98-460, §§ 2, 7, 98 Stat. 1794-1796, 1803-1804, 42 U.S.C. §§ 423(f), (g). "In its final form, this legislation was enacted without a single opposing vote in either Chamber. See 130 Cong. Rec. 26000, 26145-26146 (1984); see also *id.*, at 6621; *id.*, at 13247." *Schweiker vs. Chilicky*, 487 U. S. 412, 417 (1988). Thus, Congress drew the line in resolution of due process abuses at whether or not someone would be charged with an overpayment after appeal.

Mr. Gibler's Fifth Amendment violations as described in his Petition for a Writ of Certiorari occur when very low level agency representatives at local social security field offices terminate benefits while conducting so called "work" reviews. The abusive consequences of due process violations are of a degree of severity to justify this petition as evidenced by the Government Accountability Office (GAO) findings that the rules low level claims representatives use are not the same as the law and regulations used by the administrative

law judges.⁴ According to the Social Security Administration's own records, 63% of all cases in 2003 were reversed by administrative law judges⁵ and in 2003 it took on average 344 days to obtain a hearing.⁶ An emergency Order to preserve the status quo and subsequent emergency Order on the merits in the United States Court of Appeals underscore the grave situation in which Mr. Gibler was placed by Respondent.⁷

In essence, the Government Accountability Office found that the Social Security Administration's progression eliminating these inconsistencies has resulted in the Government Accountability Office including federal disability programs on its list of "high risk government programs." The Social Security Administration has been unsuccessful in its partially implemented unification initiative.⁸

⁴ Government Accountability Office Report No. 04-656 to Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives. (July 2004). Appendix B, Petition for Rehearing, Ex. 1. The GAO's report reveals systemic differences in adjudication of claims at these two levels. GAO Report, pp. 11, 14, (Appendix B, Ex. 1, pp. 6a, 7a, 8a). Adjudicators follow only on an internal manual, Program Operations Manual System (POMS), whereas Administrative Law Judges rely on law and regulation. *Id.*, p. 14, 15. FN 18 (9a). The GAO finds the social security administration does not identify the areas of inconsistencies between these two adjudication levels. *Id.*, pp. 23-24 (12a, 13a). The Social Security Administration expressed concerns including that this GAO report did not fully discuss progress the agency achieved in reducing inconsistency between its adjudication levels. *Id.*, p. 34, *et seq.* (14a, 15a)

⁵ *Id.*, p. 7 (5a)

⁶ *Id.*, p. 12, FN. 14. (7a)

⁷ Petition for Certiorari, Appendix A, Ex. 9.

⁸ Social Security Administration's unification process began in 1994. GAO Report, pp.1-2, (Appendix B, Ex. 1, p. 3a)

Traditional notions of due process require continuing benefits when people lose the ability to provide for the necessities of life prior to a judicial hearing.⁹

This petition asks this Court to align the Social Security Administration's termination procedures so that a beneficiary's due process rights are not violated by a termination of benefits before a judicial due process hearing. Although the Social Security Administration interim benefits are afforded pending appeals of "medical" reviews, the Social Security Administration does not afford continuing benefits pending appeals of "work" reviews. Congress' passage of its 1984 reform measures have been abused by Respondent's practice of terminating essential benefits required for survival before a judicial due process hearing.

There are no medical professionals, attorneys or judges in or utilized by the field offices where social security "claims representatives" make initial adjudications to terminate an individual's sole means of support *before* having an opportunity for a judicial hearing. In the present case the Administrative Law Judge took medical evidence of disability into account in reversing the lower level adjudication, as any other administrative law judge should have done.¹⁰ The field offices do not rely on law or regulation but on the Social Security Administration's internal rules, Program Operations Manual System (30,000 pages)¹¹ required to be followed by the Agency's low/first level adjudicators.

⁹ *Mathews v. Eldridge*, 424 U.S. 319 (1976) applied to people with modest income and was overruled by Congress by the 1984 reform amendments to the Social Security Act.

¹⁰ Appendix A to Petition for Certiorari, Appendix A, Ex. 17.

¹¹ GAO Report, p. 15. FN 18, (Appendix B, Ex. 1, p. 9a)

V. CONCLUSION

Based on the foregoing, Petitioner requests that his Petition for Rehearing be granted.

Respectfully submitted,

STEVEN BRUCE *
PEOPLE WITH DISABILITIES
FOUNDATION
507 Polk Street, Second Floor
San Francisco, California 94102
(415) 931-3070

Attorney for Petitioner

* Counsel of Record

Certification of Counsel (Rule 44)

I certify that the Petition for Rehearing is presented in good faith and not for delay. The grounds not covered heretofore include congressional findings in a July 2004 Government Accountability Office report (Appendix B, Ex. 1 of Petition for Rehearing) that Respondent applies different rules in its internal manual, Program Operations Manual System (POMS) than in law and regulations used at the Social Security Administration's Office of Hearings and Appeals where administrative law judges issue written decisions after hearings.

Dated: June 30, 2005

/s/ _____
Steven Bruce
Counsel for Petitioner