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# Termination of Disability Benefit Payments without a Prior Hearing Is Not Violative of Due Process.

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Although the right to control the use of one's property is both necessary and important, that right should not be selectively applied simply because one owner's business fronts on a public street and the other's business is located in a privately owned mall. The question arises as to why the owner of business property in a shopping mall should be able to lease or sell his location with a guaranteed exclusion of outside labor or consumer criticism while another owner is prevented by the Constitution from effecting the same scheme. Such distinctions ignore the traditional wisdom which deems first amendment rights to be the foundation of a free democracy and therefore worthy of special protection.

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## CONSTITUTIONAL LAW—Procedural Due Process—Termination of Disability Benefit Payments Without a Prior Hearing Is Not Violative of Due Process

*Mathews v. Eldridge,*

—— U.S. ——, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

George Eldridge, incapacitated due to back strain and chronic anxiety, and subsequently found to suffer from diabetes, was first awarded disability benefit payments under the Social Security Act in June 1968.[1] Except for one brief suspension, the payments continued uninterrupted until July 1972. Eldridge's medical condition was scheduled for an annual review in March 1972. At that time, the state vocational rehabilitation agency sent him a questionnaire regarding his continued eligibility for disability payments.[2] On

1. Benefits commence following a waiting period of five full calendar months. Therefore, the first payment received by the disability benefits claimant ordinarily corresponds to the beginning of the sixth month during which the disability exists. The "period of disability" is the minimum period of time during which the disability must exist for the applicant to be eligible to receive benefits, and is defined in section 216 of the Social Security Act. 42 U.S.C. § 416(i)(2)(A) (Supp. IV, 1974). "Disability" under the Act means "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ." *Id.* § 423(d)(1)(A) (1970); *see* HEW, DISABILITY EVALUATION UNDER SOCIAL SECURITY, A HANDBOOK FOR PHYSICIANS, at 65-70 (1970).

2. The initial determination of cessation of disability is rendered by the state vocational rehabilitation agency in all but six states under an agreement with the Social Security Administration. Mathews v. Eldridge, — U.S. —, —, 96 S. Ct. 893, 903 n.13,

the form he indicated that his condition was unimproved and listed the medical sources where he had recently received treatment. Two months later, he received a notice from the agency advising him that it had determined he was able to work, and that he had a reasonable time within which to submit information challenging this determination.

The Bureau of Disability Insurance (BDI) of the Social Security Administration subsequently approved the findings of the state agency. Eldridge was notified that his benefits would be terminated in July 1972, and that he had the right to request review of his case by the Social Security Administration. Electing to forego such administrative remedies, he brought the present action to challenge the constitutionality of the procedures employed by the Secretary of Health, Education, and Welfare in summarily terminating disability benefits. The United States District Court for the Western District of Virginia held that recipients of disability benefits must be afforded an evidentiary hearing in the nature of that required for welfare beneficiaries prior to termination of public assistance benefits. The Court of Appeals for the Fourth Circuit affirmed the holding, and the United States Supreme Court, on the Secretary's application, granted certiorari. Held—*Reversed.* The present administrative procedures fully comport with due process. An evidentiary hearing is not required prior to termination of disability benefits.[3]

The Social Security Act encompasses several distinct programs. The basic objectives of the Act are to prevent families from becoming impoverished due to an unexpected loss of earnings, to ease the burden of unforeseen medical costs on the aged, and to provide children the opportunity to grow up healthy and secure.[4] The disability insurance program, created by the 1956 amendments to Title II of the Social Security Act,[5] provides cash benefit payments to workers during periods of complete disability.[6] These income-loss benefits are made available "to those eligible (insured) workers who are unable to engage in any substantial gainful activity as a consequence of a medically determinable disease or impairment."[7]

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47 L. Ed. 2d 18, 33 n.13 (1976). Section 221(b) of the Social Security Act provides for the joint federal-state administration of the disability insurance program. 42 U.S.C. § 421(b) (1970).

3. Mathews v. Eldridge, — U.S. —, —, 96 S. Ct. 893, 910, 47 L. Ed. 2d 18, 42 (1976).

4. U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, SOCIAL SECURITY HANDBOOK 2 (5th ed. 1974). *See generally*, Smith, *Social Security Disability Insurance and Due Process for the Poor Man—Fantasy or Reality—Richardson v. Belcher*, 48 DENVER L.J. 405 (1972).

5. Act of Aug. 1, 1956, ch. 836, § 103, 70 Stat. 815.

6. 42 U.S.C. § 423(d)(1)(A) (1970). The Social Security disability benefits program is financed by pooling employee and employer payroll taxes. 26 U.S.C. §§ 3101(a), 3111(a) (Supp. IV, 1974); 42 U.S.C. § 401(b) (Supp. IV, 1974).

7. HEW, THE SOCIAL SECURITY DISABILITY PROGRAM, RESEARCH REPORT NO. 39, at 83 (1971).

The regulations under the Social Security disability program provide certain standards by which a determination of disability is made. An objective consideration of the claimant's symptoms and of any physical or mental abnormalities, demonstrable by medically acceptable clinical diagnostic techniques, is made by a medical examiner for the state agency.[8] The Secretary of Health, Education, and Welfare may, however, refute all of the examining physician's findings,[9] a procedure which renders the objectivity of the disability determination questionable. It is this arbitrary and subjective judgment on the Secretary's part to which Eldridge objected and the constitutionality of which the district court had previously questioned.[10] Two rather subjective tests are also employed to determine if disability benefits should be terminated. Under the first test, if the benefits recipient demonstrates the ability to engage in *any* substantial gainful employment, he is by statutory definition no longer disabled, and his benefits will be terminated.[11] Under the second test, the benefits may be discontinued summarily if the claimant, in the Secretary's judgment, "fails to comply" with requests for additional medical or other evidence, or otherwise fails to cooperate with the Social Security Administration, unless the claimant shows "good cause" for such failure.[12]

Reconsideration, hearing, and review of any determination adverse to the claimant may be requested under current procedures in the disability insurance program.[13] Eldridge, however, did not attempt to challenge the administrative review procedures available to disability benefit claimants. He acknowledged that such procedures would indeed be adequate if the benefits

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8. 42 U.S.C. §§ 421(a), 423(d)(3) (1970).

9. 20 C.F.R. § 404.1526 (1976) provides:

> The function of deciding whether or not an individual is under a disability is the responsibility of the Secretary. A statement by a physician that an individual is, or is not, "disabled" . . . shall not be determinative of the question of whether or not an individual is under a disability . . . .

42 U.S.C. § 425 (Supp. IV, 1974) further provides:

> If the Secretary, on the basis of information obtained by or submitted to him, believes that an individual entitled to benefits under section 423 . . . may have ceased to be under a disability, the Secretary may suspend the payment of benefits . . . until it is determined . . . whether or not such individual's disability has ceased or until the Secretary believes that such disability has not ceased . . . .

*See* Note, *Procedural Due Process and the Termination of Social Security Disability Benefits*, 46 S. CAL. L. REV. 1263, 1269 (1973).

10. Eldridge v. Weinberger, 361 F. Supp. 520, 521 (W.D. Va. 1973), *aff'd*, 493 F.2d 1230 (4th Cir. 1974), *rev'd sub nom.* Mathews v. Eldridge, — U.S. —, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

11. 42 U.S.C. § 423(d)(1)(A) (1970).

12. 20 C.F.R. § 404.1539(c) (1976).

13. *Id.* § 404.1522. Section 404.954(a) (1976) additionally allows "[a]ny party to a reconsidered determination, a decision of an Administrative Law Judge, or a decision of the Appeals Council . . . [to] petition for an extension of time for filing a request for hearing or review or for commencing a civil action in a district court . . . ."

were not terminated until *after* the evidentiary hearing stage of the administrative process.[14]

Under the Act, a final decision by the Secretary is also subject to judicial review which may be initiated by the filing of a civil action in a United States district court.[15] Forsaking administrative review, Eldridge instituted such legal proceedings. In his action, Eldridge relied exclusively upon the Supreme Court case of *Goldberg v. Kelly*[16] for his proposition that the Act's administrative review procedures would be adequate only if the benefit payments were not terminated until after the evidentiary hearing stage of the administrative proceeding. The *Goldberg* decision relied upon by Eldridge had established the right to an evidentiary hearing prior to termination of welfare benefits.[17]

It was stated in *Goldberg* that termination of benefit payments while an eligibility controversy was pending might well "deprive an *eligible* recipient of the very means by which to live while he waits."[18] Since he lacks independent financial resources, the welfare beneficiary finds himself in an immediately desperate situation.[19] The Court in *Goldberg* did not unqualifiedly require an evidentiary hearing in every case where governmental benefits might be administratively terminated,[20] and Eldridge did not suggest such a requirement. The significance of *Goldberg* lay in the Court's conclusion that only a pretermination evidentiary hearing satisfies the procedural due process requirements when welfare benefits, which are vital to the

14. Mathews v. Eldridge, — U.S. —, —, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18, 32 (1976).

15. 42 U.S.C. § 405(g) (1970). All levels of review prior to the district court are *de novo* proceedings; the district court is required to treat findings of fact in prior review actions as conclusive only if supported by substantial evidence as to the existence of a disability.

16. 397 U.S. 254 (1970).

17. A pretermination "evidentiary hearing" as prescribed by the Court in *Goldberg* must include: (1) timely notice, which adequately details the basis for the proposed termination; (2) an opportunity to confront adverse witnesses and to present one's arguments and evidence orally; (3) the right to counsel, where desired; (4) an impartial decision maker; (5) a decision based only upon the legal rules and evidence introduced at the hearing; (6) a statement of the reasons underlying the decision and the evidence relied on. *Id.* at 260, 267-71.

18. *Id.* at 264.

19. *Id.* at 264.

20. *Id.* at 263 n.10, *citing* R.A. Holman & Co. v. SEC, 299 F.2d 127, 131 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 911 (1962) (termination of exemption from stock registration requirement) which stated:

> In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing . . . .

*Accord*, Fahey v. Mallonee, 332 U.S. 245, 250 (1947) (appointment of conservator by savings and loan association); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 315 (1908) (seizure of unfit foodstuffs).

beneficiary's existence, are discontinued.[21] Eldridge contended that, by analogy, disability benefit recipients also deserved this constitutional protection.[22]

The majority in *Goldberg* endorsed the view that procedural due process must be afforded a welfare benefits recipient to the extent that he may be " 'condemned to suffer grievous loss.' "[23] The extent to which due process must be provided depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.[24] The specific dictates of due process require consideration of yet another factor: the risk of erroneous deprivation of the individual's interest as a result of current administrative procedures.[25] Eldridge's claim to a predeprivation hearing as a matter of constitutional right rested essentially on the contention that full relief cannot be obtained at a postdeprivation hearing. As the result of an erroneous termination of his disability benefits prior to commencement of the present litigation, Eldridge lost his home through foreclosure, was forced to sell most of his furniture, and he and his wife had to share their bed with their children.[26]

The United States Supreme Court, despite having consistently held that some form of hearing must be had before there is a final deprivation of a property interest,[27] appears to have ignored the statutorily-created property interest in the present case. Social Security disability payments represent money which the employee has earned during his employment, as well as that which his employer has paid for his benefit into a common fund under the Social Security Act.[28] The Court has recognized the interest of an individual in continued receipt of disability benefit payments as a property interest created by statute and protected by the fifth amendment,[29] but this line of reasoning appears to have been disregarded in the present case. Disability benefit payments, even more than welfare assistance, are an

21. Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

22. Mathews v. Eldridge, — U.S. —, —, 96 S. Ct. 893, 898, 47 L. Ed. 2d 18, 27 (1976).

23. Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970), *citing* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

24. *Id.* at 262-63.

25. Mathews v. Eldridge, — U.S. —, —, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33 (1976).

26. *Id.* at —, 96 S. Ct. at 910, 47 L. Ed. 2d at 42 (Brennan, J., dissenting).

27. Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974); Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931); *see* Dent v. West Virginia, 129 U.S. 114, 124 (1889).

28. 102 CONG. REC. 15,110 (1956) reflects the legislative intent behind the Social Security Administration's income-maintenance feature on the occasion of the institution of the disability insurance program: "Social Security is not a handout; . . . it is not relief. It is an earned right based upon the contributions and earnings of the individual . . . ."

29. *See* Richardson v. Belcher, 404 U.S. 78, 80-81 (1971); Richardson v. Perales, 402 U.S. 389, 401-02 (1971). *But see* Flemming v. Nestor, 363 U.S. 603, 611 (1960).

"earned right" based upon past contributions and earnings of the individual.[30] The Court's denial of a predeprivation hearing to disability benefit recipients is all the more troubling in view of a long line of previous decisions holding that a predeprivation hearing is required as a matter of right.[31] Although the potential deprivation in these cases did not pose an immediately desperate situation, the Court nevertheless required a prior hearing. Except for "extraordinary situations" where some valid governmental interest is at stake which justifies postponement, the opportunity for a hearing required by due process must be had before one may be deprived of a property interest.[32]

It is fundamental to due process that the opportunity to be heard be at a meaningful time and in a meaningful manner.[33] On an issue of such crucial import as welfare benefits termination, the Supreme Court held that the right to be heard means the right to appear in person before the welfare agency charged with the termination.[34] The very essence of a hearing demands that each party to a controversy calling for resolution of adjudicative facts have the opportunity to meet the evidence and the argument on the other side.[35] Moreover, in *Goldberg*, the Court held that the opportunity to be heard must accommodate the capacities and circumstances of those who are to be heard.[36] For example, written submissions were found to be an unrealistic alternative for the majority of welfare recipients since they lack the educational attainment required to rebut effectively administrative decisions adverse to them.[37] Disability beneficiaries are statistically on par

30. Belcher v. Richardson, 317 F. Supp. 1294, 1298 (S.D.W. Va. 1970), *rev'd*, 404 U.S. 78 (1971).

31. Fuentes v. Shevin, 407 U.S. 67, 80-84 (1972) (repossession of goods under conditional sales contract); Bell v. Burson, 402 U.S. 535, 539-43 (1971) (revocation of driver's license); Sniadach v. Family Finance Corp., 395 U.S. 337, 339-42 (1969) (garnishment of wages); Greene v. McElroy, 360 U.S. 474, 502 (1959) (revocation of security clearance); Slochower v. Board of Higher Educ., 350 U.S. 551, 555-59 (1956) (discharge from public employment); Bratton v. Chandler, 260 U.S. 110, 114 (1922) (refusal to grant license). *But see* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 605-08 (1975) (garnishment statute held invalid in absence of early hearing prior to deprivation); Mitchell v. W.T. Grant Co., 416 U.S. 600, 611-20 (1974) (sequestration statute allowing repossession of goods upon the buyer's default held constitutional where writ is served before impartial decision maker and prompt postdeprivation hearing is provided). Different results in the *North Georgia* and *Mitchell* cases have suggested to one writer "the presence of competing private interests [affecting] the requisite procedural safeguards." Note, 89 HARV. L. REV. 610, 615-16 (1976).

32. Sniadach v. Family Finance Corp., 395 U.S. 337, 339 (1969).

33. Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Grannis v. Ordean, 234 U.S. 385, 394 (1914). *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.01, at 157 (3d ed. 1972).

34. Goldberg v. Kelly, 397 U.S. 254, 269 (1970).

35. Londoner v. City and County of Denver, 210 U.S. 373, 386 (1908).

36. Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970).

37. *Id.* at 269.

with welfare recipients as to educational attainment,[38] yet in *Eldridge* this fact was curiously ignored. Under existing law, a welfare recipient may confront those administrators who would deprive him of his very means of existence and discover the reasons which underlie a proposed termination of his benefits. A disability recipient, however, at the time of the *Eldridge* decision, was not even permitted to personally examine the medical reports on which his termination presumably was based.[39] The disabled claimant must, even now, resort either to an administrative "paper hearing," which utilizes standard-form questionnaires, or to costly legal action.[40]

The Secretary's chief objection to allowing a pretermination hearing for recipients of disability benefits lay in the anticipated administrative burden and other fiscal considerations associated with requiring an evidentiary hearing upon demand in all cases prior to termination.[41] The dissenting opinion in *Eldridge*[42] adopted the reasoning propounded earlier in the dissent in *Richardson v. Wright*.[43] In *Wright*, Justice Brennan offered a cogent argument, complete with mathematical formulations based on the Secretary's own statistics, to rebut the notion of excessive cost should such hearings be granted as a matter of constitutional right.[44] The provision which allows the Social Security Administration to recoup any payments made erroneously to disability recipients, subsequently determined able to work, directs the Secretary to require a refund from the beneficiary or to decrease proportionately any future benefits to which the disabled party may be entitled.[45] A pretermination hearing necessarily imposes certain costs in

38. HEW, THE SOCIAL SECURITY DISABILITY PROGRAM, RESEARCH REPORT NO. 39, Table 2.8 at 101 (1971). The disability study sample revealed that only 26 percent of those polled had received some high school education, while 42 percent of the general population had attained the same level. *Id.* at 9.

39. The disability benefits recipient, however, was entitled to have a personal representative of his choice examine all medical evidence. Mathews v. Eldridge, — U.S. —, —, 96 S. Ct. 893, 904 n.18, 47 L. Ed. 2d 18, 35 n.18 (1976). This curious limitation, as set forth in section 7314 of the BDI Claims Manual, has been deleted since the case was decided. Interview with Robert Donato, Social Security Administration, Operations Supervisor, in San Antonio, Texas, July 16, 1976.

40. *See* 20 C.F.R. §§ 404.954, .1522 (1976).

41. The most obvious burden would be "the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision." Mathews v. Eldridge, — U.S. —, —, 96 S. Ct. 893, 909, 47 L. Ed. 2d 18, 40 (1976).

42. *Id.* at —, 96 S. Ct. at 910, 47 L. Ed. 2d at 42 (1976) (Brennan, J., dissenting). The majority in *Eldridge* was "concerned by the prospective expense of pretermination hearings which the government had said would cost the Social Security Administration about $20 million annually." Wall St. Journal, Feb. 25, 1976, at 4, col. 2.

43. 405 U.S. 208, 226 (1972) (Brennan, J., dissenting).

44. *Id.* at 223-25 (Brennan, J., dissenting).

45. 42 U.S.C. § 404(a)(1) (1970). No such provision allowing recovery of overpayment to welfare beneficiaries, subsequently determined ineligible for benefits, exists. The Court in *Goldberg* acknowledged that overpaid welfare recipients are likely to be judgment-proof. Goldberg v. Kelly, 397 U.S. 254, 266 (1970).

time, effort, and expense. These costs, however, are ordinary ones and do not outweigh the constitutional right to such a hearing. Procedural due process is intended to protect the particular interests of the party whose possessions are on the verge of being taken;[46] it is not intended to promote efficiency in government or to accommodate all possible interests.

The Court's position in *Eldridge* runs counter to the trend of what has been called a "due process explosion" in the requiring of evidentiary hearings of the type propounded in *Goldberg*.[47] The Secretary's contention in *Richardson v. Wright* that allowing a pretermination evidentiary hearing for disability beneficiaries would necessitate "massive restructuring of the existing administrative adjudicative process"[48] seems unfounded, since a posttermination hearing is already provided under existing review procedures. It is reasonable to assume, as did Justice Brennan, that "the only 'restructuring' necessary would be a change in the timing of the hearings."[49]

In contrast to welfare recipients, disability beneficiaries are not by statutory definition dependent on benefit payments for their existence, but they are by definition "unable to engage in any substantial gainful activity."[50] To terminate erroneously a disabled worker's benefits may result in a loss as grievous as that which concerned the Court in the case of welfare beneficiaries.[51] The majority in *Goldberg* argued that a prehearing termination of benefits to a welfare recipient could cause a deprivation of essential food, clothing, housing, and medical care.[52] No less severe is the hardship forced upon the recipient of disability benefits, since his payments generally furnish the greater part of his income while he is out of work.[53] The assurance of full retroactive relief to a disability recipient who ultimately prevails in his action is of little comfort when his means of existence are threatened during the interim period. In that sense, his plight is not unlike

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46. Goldberg v. Kelly, 397 U.S. 254, 264-66 (1970).
47. *See* Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1268 (1975).
48. Richardson v. Wright, 405 U.S. 203, 223 (1972) (Brennan, J., dissenting).
49. *Id.* at 223.
50. 42 U.S.C. § 423(d)(1)(A) (1970).
51. A survey of 1,460 disabled workers revealed that 68.8 percent were heads of household and the chief source of income for their families. HEW, SOCIAL SECURITY DISABILITY PROGRAM, RESEARCH REPORT No. 39, Table 4.3 at 135 (1971). The average income reported by 1,364 disability recipients surveyed at random was $3,322 annually, where 79.4 percent had an annual income of $5,000 or less. *Id.* Table 4.10 at 140. The main source of income for 55.7 percent of 771 disabled workers surveyed during the period of their impairment was benefits paid under the Social Security disability insurance program. *Id.* Table 4.11 at 141.
52. Goldberg v. Kelly, 397 U.S. 254, 264 (1970).
53. HEW, THE SOCIAL SECURITY DISABILITY PROGRAM, RESEARCH REPORT No. 39, at 84 (1971) noted that: "[e]ach disability group [in the survey] is characterized by low income, limited assets, and somewhat restricted sources of economic support."