ORAL ARGUMENT – 1-16-02
00-1067
TEXAS DPS V. JONES BROS.

GILBERT: This case again calls upon this court to reaffirm the Federal Sign, and Little Tex cases, and underscore the principle of law again that the route to the courthouse lies through the legislature. This is especially true in cases where the legislature has acted and provided a full administrative remedy along with judicial review of that remedy for a contract claim.

Under the facts and law of this case, the Dept. is entitled to a judgment dismissing the Jones Bros additional or new claims that they raise at the TC level and indeed entitled to an order accepting the SOAH courts and dept's final order in this case.

There are really three main issues I believe that this court is going to have to address today in rendering an opinion in this matter. The first is that in the light of sovereign immunity and legislative action, whether the breach of contract and declaratory judgment actions that Jones Bros brought at the TC should be permitted to proceed. The second issue is, was the correct standard of review used by the ALJ in rendering her opinion accepted by the dept? And the third and final issue is, indeed didn't the ALJ use either standard of review or both standards of review in reaching her final decision?

First of all, in light of sovereign immunity and legislative action, the contract claims statute that was enacted by the legislature in 1997 provides Jones Bros a full and complete administrative and judicial review process for their contract claims. The breach of contract and declaratory judgment claims along with their attorney's fee claim brought at the TC should not be permitted to stand and must be dismissed.

The Texas Transp Code, 201.112 provides a full remedy for a contractor dealing with the TxDOT. Indeed the statute itself sets out that the dept shall enact some preliminary or informal attempts to resolve the claim before proceeding to a contested case hearing. What the dept has enacted through the administrative code is that first of all any contract claim with the state will be attempted to be resolved on the district level through informal process with the district engineer or his representative. If that doesn't succeed then the contractor can request a contract claim committee hearing at TxDOT where three district engineers from across the state are brought in to hear the claim. And they get to attempt to resolve it again. Both sides present their case. If the contractor is dissatisfied with that second attempt they get a third attempt, and that's a contested case hearing before the State Office of Administrative Hearings (SOAH).

After a full, contested case hearing full discovery the ALJ then issues a proposed decision that the dept can accept and adopt as its own, or make modifications to. But again if the contractor is dissatisfied with that third attempt to resolve the claim they get to go to DC through a judicial review of the final decision. That is a full and complete administrative review

process. Much more so than this court approved I think in the Little Tex case under 2260. In fact, the TX Transportation Code predates 2260. And in the collective memory at least of our office and in reviewing I can represent that this procedure going all the way through DC to an appeal is a very rare procedure. Most all claims are resolved at the district level. It's the rare case that makes it past the SOAH for any substantial evidence review found in the TC.

O'NEILL: If a contractor wants to remove a DBE from the job, they have to apply to the BOP for their permission and approval. And whatever the BOP decides is binding on both the contractor and his sub that he wished to terminate correct?

GILBERT: That is true.

O'NEILL: And why isn't that more like the line of cases that says that their decision in order to be overturned has to be whatever the standard is - fraudulent, whatever, the stricter standard. Why wouldn't that line of cases apply because those seem to have the same characteristics of those cases, that it's an interested dept who makes that binding determination?

GILBERT: There are really two different reasons I believe that predicate that the higher standard - partiality, fraud, gross error, misconduct standard should be used in these cases. First of all, for the law reason. The respondent Jones Bros relies upon a line of cases I think in their brief starting with the Black Lake Pipe Line case and said that this is more of a satisfaction type argument looking at the contract and looking at the Black Lake case, and therefore, it should be a satisfaction or reasonable person test. But if you read the Black Lake Pipe Line case, it makes a distinguishing factor. It talks about State v. Martin Bros, City of San Antonio v. McKenzie Construction and a whole line of cases cited by the State in our brief. The distinguishing factor this court found in Black Lake Pipe Line was the fact that the decision of the engineer or architect was binding on all parties in that line of state cases: State v. Martin Bros, etc. And that's what happens with the BOP when they make a decision too.

O'NEILL: But let's say they make the decision to allow the DBE to be terminated. Can the contractor then decide, well no, I think I will give them another chance?

GILBERT: I think that's up to the contractor at that point. He's gotten permission from the BOP to indeed discharge the DBE if he so chooses to do if he's reached the satisfaction with the BOP office that he can do so. But again if the contractor then decides, no, I'm going to give them another chance, I think that he's fully permitted to do so. I don't think the dept at that point would alter his decision unless the district engineer for other reasons other than what the contractor may have found may find that discharge should indeed be carried through.

BAKER: Does the fact that TxDOT conceded during the hearing that the subcontractor was incompetent change the analysis?

GILBERT: I don't think so at all. What we have to look at is what was before the BOP...

BAKER: Well isn't that the factor that they are supposed to be deciding when a regular contractor says, I want to terminate, and that's whether they are unwilling or unable and wouldn't incompetency be included within unable to perform?

GILBERT: I think it would be.

BAKER: So in this case rather than applying the reasonableness test and applying the one you want, which is the higher standard, Jones gets no effect from your concession during the trial where you say you get a fair trial with a full remedy?

GILBERT: I think the benefit did go to Jones Bros in the sense that both eventually at the end of this time period, I think in Sept. when AK Concrete was discharged, I think by that time everybody recognized that they weren't doing a proper job. But the issue here was in June 1995...

BAKER: But that's also what caused their damages they say. If you had said, we concede in June that the contractor is incompetent, then all the changes could have been made and no additional damages incurred. Would you agree with that?

GILBERT: Not totally. I think that the incompetency again went to the time when we had the full time period we were looking at all the way through Sept. I don't think the dept made any concession that the contractor was incompetent to the fact of holding up the project or being unable or unwilling to perform in June of 1995 when the BOP made its decision.

BAKER: Well did y'all disagree that whatever that contractor did was not any good and had to be corrected? It seems to me the record showed that everybody agreed as they went along that what was being done by that company was not any good.

GILBERT: I certainly concede that they weren't the best contractor anybody has ever dealt with on a project like this. But their work was still being accepted by the dept and by Jones Bros. They were still being paid for their work on the project during this time period. They were still meeting the standards that the inspector set out there. They were slower than they perhaps should have been. They weren't doing as a good job as maybe some other contractor would have had, but their work was still being accepted and judged by the inspectors as being acceptable and approved for payment by TxDOT and by Jones Bros, who requested that those payments be made.

O'NEILL: What sort of internal procedures are there if the contractor applies to the BOP to have the DBE removed and that request is denied? Can they continue to apply? Is there anything that keeps them from continuing to make this request? Just submitting adequate proof.

GILBERT: There is nothing in the administrative code in 1995 that would have indeed barred Jones Bros from resubmitting with additional material a request that the contractor, DBE, be discharged.

O'NEILL: And they did not do that is that right?

GILBERT: They chose not to do so apparently. No other request was ever made to the BOP office following their decision in late June 1995 by Jones Bros that they were still having problems or still needing to discharge the subcontractor.

With that option left open to them they could have taken it, and perhaps should have taken it, if they felt the contractor was incompetent that they weren't getting the work done.

HANKINSON: What type of federal regulations affect the way the BOP handles this type of complaint about a subcontractor?

GILBERT: The dept in these type cases governed by the Code of Federal Regulations that have been adopted by the USDOT under 49 CFR Part 26. It's a whole line of regulations that go into what a contractor dealing with DBE must do _____ with the state. The state is required to set up a separate and independent office within the DOT that has a direct reporting responsibility to the executive director. And the executive director then oversees almost personally what goes on in the DBE program.

HANKINSON: Does it in anyway impact the way the BOP would handle this kind of complaint - standards that have to be applied in determining whether or not to terminate the relationship with a disadvantaged business?

GILBERT: There is nothing that specifically in the CFR's that directs how the dept should oversee the program for a discharge or termination other than to make sure that a DBE program is indeed being complied with, the administration and nondiscrimination function of that program is being complied with. And that's why the BOP office has set up a standard of trying to monitor it by saying, the burdens on you contractor, show us how this subcontractor is unable or unwilling to _____. Because whatever the dept does in this regard is reviewed by the Fed DOT to ascertain that the dept is indeed promoting the disadvantaged business enterprise function that's required for the state to receive the federal funds that we do for our highway construction projects.

The other thing that raises an issue here is the declaratory judgment actions and the contract actions brought. I hope that after Federal Sign and Little-Tex that those are pretty well decided issues. And that the additional claims or issues that have attempted to be brought here by Jones Bros must be recognized as not being valid.

The split remand that we have from the Austin CA, is indeed a burdensome function I think on both parties. Because essentially we have to go back to the SOAH court on the decision of the SOAH judge and see what standard of law was applied, and then we have to go back to the DC to determine if they can plead sufficient facts.

I think clearly that after the decisions of this court in Federal Sign and Little-Tex, that the remand to the TC must indeed be reversed and rendered. At most this case should be sent back to remand for the SOAH judge for a determination. But I'm not even sure that's required. If this court will look at the decision that was offered by the ALJ and accepted by the dept., they will find that in her findings of fact and conclusions of law, Judge _____ specifically found that the DBE on the project decision to not allow them to be replaced was both reasonable and not based on partiality, fraud, misconduct or gross error. So it seems like the ALJ even though she found that the correct standard of law review should be the partiality gross error of standard. She indeed included within her decision and decision-making and within her opinion that it was also a reasonable act of the business opportunity program office to make the decision that it did. That, indeed, should justify the decision of the dept, which they accepted as being the reasonable course of action in this case.

The line of cases that talk about that standard of review, again between State v. Martin Bros., not only is there a legal justification for why the higher standard should be used, but the dept. also believes that there's a public policy issue here, that this court has prior recognized in cases such as State v. Martin Bros. Indeed in the entire line of cases that the state has cited, it is an employee of the TxDOT acting under the contract who makes a decision as to whether the work is satisfactory or unsatisfactory to the dept. And his decision is indeed binding on both the dept and the contractor. That's in the entire line of cases that run from the 1940's up until the 1980's where a series of cases involving TxDOT came up.

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RESPONDENT

HEARNE: This case was an interesting case to try. What's happened to it since it was tried has been rather fantastic. It was tried under the act by which the highway dept and TxDOT acts. There was no evidence offered by the state in the trial of this case that the contractor, that is the subcontractor employed by Jones Bros, had performed the contract properly, skillfully, or any other way. Jones Bros after finding that the contractor was diverting water up a hill that had to be changed completely underneath the highway, they couldn't read their transits and levels...

O'NEILL: Well why didn't Jones Bros submit this to the BOP in June?

HEARNE: Because they kept trying to give the subcontractor an opportunity to remedy the errors.

O'NEILL: But if the BOP doesn't have the information in front of it, the facts and the allegations to show that they are unwilling or unable to perform, how can we say that their decision is unreasonable?

HEARNE: The BOP had all that before it because the BOP asked for the cancelled checks that our client, Jones Bros, paid the subcontractor. And they asked for a letter from our client to the subcontractor stating the reasons for the discharge. Anything else that they would have asked for

would have been given, but that's all they asked for. So the contractor, Jones Bros, thought that they were doing everything the dept was requiring and asking for. We never got any ruling from Ms. Gonzalez, who was with the BOP, as to what they wanted to see, what they wanted to review. She just flat denied their appeal to have the right to discharge this subcontractor.

The fact that the work done by the subcontractor was substandard is not even contested by the state in this case. But we kept with that subcontractor till finally the state itself discharged the subcontractor because it claimed it was trying to bribe one of the state's inspectors. At that time, Jones Bros was unable to get the bidder who had bid on doing the work and finishing the work for the subcontractor to do the work because too much time had expired. Jones Bros had to go in there, finish the work themselves and do the work, and that's what the case is about.

O'NEILL: You will also agree that the ALJ also applied a reasonableness standard correct?

HEARNE: I believe that's right.

O'NEILL: So even if we were to adopt your standard, the ALJ applied it, and is your argument then simply a no evidence to support argument?

HEARNE: There is no evidence to support a reasonableness finding because that's not the finding that the ALJ used.

O'NEILL: But you would agree that the ALJ found reasonableness under the standard you're advocating here?

HEARNE: I don't know whether she did or didn't, because her decision is difficult to understand.

O'NEILL: Well finding of Fact 53 says, BOP's decision on this project was reasonable. And conclusion of law No. 5 says, its decision was reasonable. So apparently a reasonableness finding was made, which I would understand would leave you with the argument that there is just no evidence to support that finding.

HEARNE: There is no evidence to support a finding that we were unreasonable in discharging or attempting to discharge the subcontractor.

O'NEILL: But the reasonableness we're to look at was BOP's reasonableness in making the decision to deny your request to discharge the DBE. And that's the standard we're arguing about here is what standard the hearing examiner should have applied. And I understand the CA reversed saying that the reasonableness standard should apply. But apparently the judge did apply alternatively a reasonableness standard.

HEARNE: We don't agree with that. That was our point. The ALJ applied the wrong standard.

O'NEILL: But they did find reasonableness though specifically as a factual and a legal matter.

HEARNE: That was one of the basis for our appeal. She couldn't find that it was reasonable, and then on the other hand find that that was not the test that she applied, which is what she said. The test that she applied was the one that does not apply in this case...

O'NEILL: I don't know how we can say there was no reasonableness standard applied when the ALJ specifically found reasonableness as a matter of fact and law.

HEARNE: But then look at the result that we were faced with by the examining judge. That doesn't add up. That doesn't match that particular citation that she quoted. Because we don't think that was applied. Had that been applied, we wouldn't be up here today I don't believe.

O'NEILL: So basically we have to review the record for no evidence to support reasonableness?

HEARNE: I think that's right. And in this case, the contractor, Jones Bros, we think did everything that it could after being turned down by Cynthia Gonzalez with the BOP. It couldn't get a subcontractor to bid on the job within the ambit that had originally been established, so it went ahead and completed the job on its own and then sought the compensation that it said it was entitled to by going back to the department.

Now the case law that has come out since this case was tried, and they don't raise that in the argument this morning, I don't think that case law applies to this case. And if it does in the way they might suggest, I think it's unconstitutional.

HANKINSON: Why do you think the case law does not apply?

HEARNE: What case law?

HANKINSON: The case law that this court has decided regarding waiver by conduct in the contract area that you claim should support the CA's decision to remand the breach of contract and declaratory judgment action?

HEARNE: Because I don't think you have those facts in this case. I don't think you've got the facts to support a waiver in this case of the requirement.

HANKINSON: The waiver of what requirement?

HEARNE: The one you just talked about. You said why don't we take the position that the case law in this area applies, and we say we don't think it's applicable in this case.

HANKINSON: Couldn't hear the question from Hankinson.

HEARNE: Because of the facts of the case. Because first of all, the administrative law judge used the wrong standard in applying what she thought the law was. And we say that that I think infringed upon the question you asked. I think Jones Bros did everything it could. It applied to the dept for permission to change, and that was absolutely, flatly denied without any reason or basis given by Ms. Gonzalez. Had they at that time done what they did later, and what they did later was fire the subcontractor themselves because of the attempted bribe, we wouldn't be here today.

BAKER: You're answering Justice Hankinson's question with facts about the procedure that was employed and the outcome through the ALJ and through the dept. Is that right?

HEARNE: Yes.

BAKER: Her question is, why doesn't purportedly or more recent cases apply to the contract and declaratory action causes of action that you raised for the first time in DC? Why aren't those barred by sovereign immunity? I don't think you've answered that question.

HEARNE: Because I think this is a case that clearly calls for sovereign immunity because of the conduct of the highway dept in refusing to grant our client the right to change subcontractor. I don't think the more recent cases completely eradicate...

BAKER: But basically you're advocating that a waiver by conduct should apply?

HEARNE: Well if that's what you want to call it.

BAKER: I think that's the theory we've named it.

HEARNE: If that's what you want to call it I think that's right. But I can't imagine a more egregious case than this in which the contractor goes to the owner and asks for permission to change a subcontractor and he just...

BAKER: Isn't this case analogous to applying art. 2260 in another agency and applying the statute that says, the administrative process is the sole and exclusive remedy of adjusting contractual disputes?

HEARNE: If the administrative process is properly exercised, I think the answer to that question is yes.

BAKER: My next question is, if you engage in the administrative process your real

complaint is that they made a wrong decision, which you also have the right to appeal. And so when you argue about you don't think that was the right decision, I think that's a valid argument whether we agree with it or not in the context of you were inside that process. But the question that you were arguing about is, what about claims that are outside of that process in answering Justice Hankinson's question.

HEARNE: Well I thought our claim was within that process. I think it was improperly handled by the ALJ, and that was what we appealed.

The case is interesting because I'm not sure of any situation precisely like this in the past, and that may be the reason the court granted the application for review. But imagine the situation of the contractor here that he is in. He goes out there and he employs a DBE who's to do 46% of the work in excess of the state requirement for disabled. And they do their best to do the job and this subcontractor simply cannot do it. The contractor comes in to the state and asks for consent to discharge the subcontractor and to hire somebody, who at that time he had a bid from, that could have performed the work within the budget prescribed the contract. That was denied. Ms. Gonzalez gave no reason for it. She did not make a real good witness, and she just said that I told them what I wanted. And she admitted what she wanted were the two things I pointed out to the court. They were provided to them. And there was no other action taken by the BOP.

The contractor here is in a bind. He's got to go out and complete the work. It was not completed by a substandard/subcontractor. And that seems to be undisputed. Matter of fact, the entire case presented in this case by the contractor is not disputed. All the state says is, that what we did wrong was we should have tried a different method to contest the action of the BOP. I don't know what else we could have done that we didn't do that got us up here. And I'm hoping that the court in granting the application for writ of error in this case would like to find and hold eventually that this is not the case that is going to authorize this court to say that from now on out whatever the DOT does is going to be fine because that's final.

I think that if that right is taken away from the contractors to challenge the results of its appeal to the board to the DOT, I think that's unconstitutional. And I don't think this court intended to do that when it granted the application. What the court was thinking of, I was hoping that they would use this case as the case before it to resole this dispute about just what the DOT can do, and what it cannot do. And if there were ever a situation in my opinion that demonstrates what it should not have done it's this case. Because the ALJ in this case flat held that the wrong procedure or standard was applied in judging the conduct of our client.

One of our weak points is the attorney's fees. I will concede that, because we can't find any case that has upheld the right to recover attorney's fees. I think this is a good case for this court to step in and write an opinion as to just how this law should apply. The argument of the state is, that under the law that was enacted after this case occurred, and it's retroactive, that everything now is final with the dept. I don't think that is good law. I hope the court will not subscribe to that.

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REBUTTAL

GILBERT: Jones Bros lost, and that's really their complaint before this court today. After a 3-day contested case hearing, where the ALJ heard all of Jones Bros witnesses and witnesses from TxDOT, they lost.

HECHT: But it's hard to understand why if the state fired the guy themselves.

GILBERT: But the state fired the guy for different reasons.

HECHT: Well I understand, but it seems to me it would be more hurtful to try to pump water up hill than it does to bribe an inspector, or at least as bad.

GILBERT: Well one costs more money I guess. The real issue I think here that we need to look at is, what was before the BOP office in June 1995, and what had happened to bring it to their attention? First of all, please understand that what Jones Bros did was fire AK concrete, the subcontractor, before they ever even contacted the BOP office.

They had written them one letter in late May 1997 saying we don't think you're doing a good job.

HECHT: Is the dept's true interests in that decision to make sure that the state remains in compliance with the federal funding mechanisms?

GILBERT: That is certainly one of the primary reasons.

HECHT: What other interests does it have?

GILBERT: It has other interests to indeed promote it it itself. I think as the legislature has passed a recent statute, also advocating the use of DBE's along with the federal regulations that we are required to abide by. It also is something the dept. wants to make sure that there's consistency on the job, that you don't have a constant change or turnover of subcontractors or contractors within a project. Because whenever you change a subcontractor or contractor it sets the project back.

Here the ALJ made what I think was a reasonable and rational ruling in that she awarded some relief to the contractor in this case. She found that the liquidated damages that were imposed against them should be returned to them. And that was the order that was adopted by the dept. But the additional money, the additional work that Jones Bros claims that they suffered, the $139,000 or so that they want, the ALJ found that that should not be returned to them.

Under all the evidence that was before her, that was her ruling, and I think that

that is supported substantially by the record before the ALJ, and particularly when you consider that the standard of review that this court or any court...

OWEN: Have you looked at any other jurisdictions to see how they have resolved this? I couldn't find the cases in the last few days. But it seems to me I've read some cases in other jurisdictions that say where a governmental entity is the contracting party, and they are also put in charge of judging whether there's been a breach or not - there is something wrong with that. That there's got to be some - it's got to be a lesser standard than - they're are not treated as a court would be treated. In other words, when they are a contracting party and they are also put in the role of overseeing and making a final decision on breach or not, there's got to be a different rule. You don't treat them _____. Have you seen law like that from other jurisdictions?

GILBERT: There is apparently very little law especially dealing with DBE's and their termination and what standards are going to be applied.

OWEN: But not specifically DBE's, but governmental entities who are in this situation.

GILBERT: I've not found any law that really speaks to what I think the issues are before this court today. I did find a couple of cases that talked about a DBE. I think one out of Florida that comes to mind, and it just basically said, the state DOT in Florida looked at it as a good faith basis. Is there a good faith basis for terminating the contractor, the subcontractor?

Remember the state is overseeing what's going on between a contractor and a sub in that position. And in such it is not only answering to the federal gov't but also to the state legislature. And also is trying to facilitate the construction project that's going on at the time to make sure it's being completed in a proper or timely manner.

It doesn't serve the dept's interest to make a contractor keep an incompetent subcontractor on the job.

OWEN: What's the standard that the BOP ought to be applying in deciding that the contractor be terminated?

GILBERT: There is now some administrative procedures in effect that came along after this case, that I think gives some factors that the DBE is kind of judged by. At least to some extent. What I think Ms. Gonzalez testified to at the hearing was that she needed something to show her that the subcontractor was unable or unwilling to perform.

OWEN: What are those rulings?

GILBERT: Essentially under the Texas Administrative Code, I believe under the transportation part, around 9.56 or so, it doesn't lay it out in great detail, but it does at least apply some procedures when dealing with the DBE. There were at the time of this action though in June

1995, no administrative procedures were in place.

OWEN: Just out of curiosity. What is the standard now when the BOP is trying to decide do we let this contractor terminate a DBE or not? What are the guidelines that they are supposed to follow?

GILBERT: Essentially, I think they are looking again still and it's a hazy standard, but it's still to their satisfaction that they are unable or unwilling to perform. Enough evidence to show that the contractor is not performing or unable to perform. And here in that case the information that was provided to the BOP was totally deficient. They asked for additional information. They made a determination. And Jones Bros could have indeed contested that termination with additional facts, that the ALJ found apparently what BOP did in June 1995 was reasonable.

O'NEILL: Let's say that the BOP makes the determination that the DBE can be terminated. The DBE then - let's say they disagree with that. Where do they go?

GILBERT: Under the administrative procedures that are adopted by the DOT, state and federal, they have a right to I think I contest within the federal scheme their termination...

O'NEILL: What does that look like? They then go to federal court?

GILBERT: I believe they can go to federal court. But I believe that there is some administrative procedure in effect at least with the dept if they believe that there is some discriminatory reason for the discharge. Otherwise, they have a central contract right just like any subcontractor.

O'NEILL: If they are able to prove under the federal regulations that the BOP did not act reasonably or acted in breach of the higher standard what happens then? Is the federal funding for the project taken away? What relief is afforded the DBE?

GILBERT: I think the DBE under the administrative procedures, if there's a discriminatory reason, I think that they are entitled to some sort of relief. What that is, I do not know.

O'NEILL: The focus of my question is, independent of the relief to the DBE monetarily what's the mechanism for taking away the federal funding? That appears to be the whole reasoning behind this _____.

GILBERT: If the federal gov't comes in and looks at the DBE for _____ and finds that the state is not administering it in a correct fashion, yes federal funds are subject to being forfeited on that particular project and perhaps other projects in the future.

O'NEILL: And is the federal gov't then required to bring suit in federal DC, or how do

they...

GILBERT: I don't think there is any suit mechanism. I think it's just in the mechanism of the appropriations of the money through the DOT.

BAKER: In answer to some questions from Justice O'Neill there was a discussion about what the ALJ said on using the reasonableness standard. And Mr. Hearn said that we should do a no evidence review. Do you agree, or can you articulate what you think is the standard of review by the DC or the appellate court of the ALJ's reasonable standard decision, aside from whatever criteria that may exist that you said in response to Justice Owen's question?

GILBERT: I believe the level of review is set out in the administrative procedures act, 2001.174, which is a substantial evidence review. Even if the evidence preponderates against the decision made by the ALJ, if there is substantial evidence to support that, more than a mere scintilla, then a decision of the the ALJ has to be affirmed. And should be in this case.