No. 98-1864

In the Supreme Court of the United States

DEBORAH KATZ PUESCHEL, PETITIONER

v.

RODNEY E. SLATER, SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly rejected petitioner's claim under the Rehabilitation Act because the uncontradicted record, including her own physician's statements, shows that she is unable to perform her job as an air traffic controller.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) and the decision of the district court (Pet. App. 6a-18a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1999. The petition for a writ of certiorari was filed on May 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was an air traffic control specialist employed by the Federal Aviation Administration (FAA). Petitioner suffers from respiratory impairments, including asthma and sarcoidosis, conditions which she alleges are made worse by stress. Pet. App.

2a. From 1991 to 1994, for medical reasons, petitioner was assigned only day shifts, beginning at 6 a.m., 7 a.m., or 8 a.m., with her shifts for the period of April 1993 to April 1994 set at 6 a.m. to 4 p.m. *Id.* at 15a; see also C.A. App. 391. In November of 1993, the team of FAA and union representatives that set work schedules proposed that, as of April 1994, petitioner change to an 8 a.m. to 6 p.m. shift. Pet. App. 2a, 15a; see also C.A. App. 252-253. Petitioner objected to that change, which she asserted would be more stressful and would thus worsen her medical condition. Pet. 4. On April 5, 1994, asserting that the stress of the dispute over her shift prevented her from working at all, petitioner went on leave. C.A. App. 385; Pet. App. 2a. The next day, her physician, Dr. Turrisi, submitted a note stating: "[d]ue to physical & mental problems at the patient's [e]mployment she is NOT released for ANY work at this time & until further notice." Pet. App. 34a. On the basis of that physician's report, petitioner sought workers' compensation benefits under the Federal Employees Compensation Act, 5 U.S.C. 8101 *et seq.*, but the Office of Workers' Compensation Programs of the Department of Labor (OWCP) denied her claim. See C.A. App. 383-386. Petitioner has not returned to work since she went on leave in April 1994. Pet. App. 2a.[1]

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[1] We have been advised that, on September 9, 1998, the FAA notified petitioner that it planned to remove her from her position as an air traffic controller. On September 23, 1998, OWCP notified petitioner that it had approved workers' compensation benefits for her retroactively to April 5, 1994, based on a disability claim that she had submitted *before* the April 1994 incident. Petitioner was removed from her air traffic controller position effective January 15, 1999, but she continues to be eligible for workers' compensation benefits.

2. Petitioner brought an action in district court against the Secretary of Transportation in which she alleged that the FAA had violated her rights under the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, by, among other things, its failure to allow her to retain her 6 a.m. to 4 p.m. shift. The district court, characterizing the claim as "frivolous," Pet. App. 15a, granted summary judgment to the Secretary. *Id.* at 15a-18a.

In its oral opinion, the court assumed "that [petitioner's] medical condition constitutes a handicap under the [Rehabilitation Act.]" Pet. App. 16a. The court concluded, however, that petitioner is not qualified for her position, a prerequisite for her to bring a claim under the Act, "because her physician stated in April 1994 that she's not been qualified to work and she's not returned to the position." *Id.* at 17a. The court explained that petitioner, contending that she was unable to work, had applied for workers' compensation benefits, "and she can't have it both ways. That's not right. And beyond that, not being right, it's not permissible at law." *Ibid.* The court further held that the offer of an 8 a.m. to 6 p.m. shift was "a reasonable accommodation on its face, because her own doctor has testified here that it was something she could do," and there is no "medical proof that [a 6 a.m. to 4 p.m. shift] was absolutely necessary to continue her employment." *Ibid.* Moreover, the court concluded, petitioner "completely on her own stopped the interactive process by refusing to talk with those who were making the decisions," and, thus, she "bears the consequence * * * of the failure of the interactive process to result in * * * an accommodation that is reasonable." *Ibid.*[2]

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[2] Petitioner also raised several claims under Title VII, of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, based on matters

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-5a. The court noted that petitioner's physician had written in 1994 that she was unable to work and she has not since given notice that she is available for work. *Id.* at 5a. "The evidence establishes," the court concluded, "that at the time [petitioner] brought the action and throughout the litigation, her illness precluded her from working as an air traffic controller." *Id.* at 5a. The court therefore rejected petitioner's Rehabilitation Act claim because, "[i]n short, she is not 'otherwise qualified for employment.'" *Ibid.* (quoting *Doe* v. *University of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995)); 29 C.F.R. 1614.203(a)(6).

ARGUMENT

Petitioner asserts (Pet. 7-11) that the court of appeals' decision should be reversed and the case remanded in light of *Cleveland* v. *Policy Management Systems Corp.*, 119 S. Ct. 1597 (1999), which was pending in this Court when she filed her petition and has since been decided. Nothing in *Cleveland*, however, calls into question the reasoning or result of the court of appeals in this case. Petitioner otherwise raises only factual disputes that do not warrant this Court's review.

1. In *Cleveland*, this Court held that an application for Social Security Disability Insurance (SSDI) benefits does not create an estoppel or "special legal presumption" against the applicant when she seeks to argue, in

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such as the alleged destruction of certain personnel records and the assignment of a particular person as her supervisor. The district court granted summary judgment to the Secretary on each of those claims, and the court of appeals affirmed. Pet. App. 2a-4a, 10a-16a, 18a. Petitioner does not renew those claims in this Court.

support of a claim under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111(8), that she is able to perform the essential functions of her job with or without a reasonable accommodation. 119 S. Ct. at 1603. "Nonetheless," the Court concluded, "in some cases an earlier SSDI claim may turn out genuinely to conflict with an ADA claim. * * * [W]e hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation." *Ibid.*

Petitioner incorrectly suggests that the court of appeals here diverged from the analysis that this Court adopted in *Cleveland* and held that petitioner's Rehabilitation Act claim was barred either because she applied for workers' compensation benefits (Pet. 7-9) or because of statements she made in support of her application (Pet. 9-11).[3] The court of appeals did not apply estoppel or any special presumption based on petitioner's application or any statements that she made in support of that application. Rather, consistent with *Cleveland*, 119 S. Ct. at 1603-1604, the court of appeals applied ordinary summary judgment principles. It examined the evidence of record in the Rehabilitation Act case and found it undisputed that petitioner has been unable to work as an air traffic controller since April of 1994. Pet. App. 5a.[4]

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[3] The Rehabilitation Act operates under the same standards that apply under the ADA. See 42 U.S.C. 12111-12117, 12201-12204, 12210; 29 U.S.C. 791(g), 794(d).

[4] The district court remarked that petitioner's claim that she is qualified for her position as an air traffic controller is contrary to the position she took before the Department of Labor and that "she can't have it both ways. That's not right. And beyond that, not being right, it's not permissible at law." Pet. App. 17a. That

In its discussion, the court of appeals relied on the April 1994 statement by petitioner's own doctor that she is unable to work due to her medical condition, a statement that the court of appeals found "uncontradicted" by other evidence in the record. Pet. App. 5a. The court of appeals did not give preclusive effect or special weight to that representation or to any other representations made by petitioner in the workers' compensation claim. Rather, the court concluded that, absent any other explanation in the record, the medical report establishes that petitioner is unable to work as an air traffic controller and thus is not otherwise qualified to perform her prior position. As a result, the court denied her claim. *Ibid.* That reasoning is consistent with this Court's holding in *Cleveland* that an ADA claimant must explain statements that appear to negate an essential element of her claim. See 119 S. Ct. at 1603.

2. Whether the court of appeals erred in holding that the medical evidence conclusively shows that petitioner cannot perform her job is a fact-bound question that does not merit this Court's review. At any rate, petitioner fails to make a persuasive case that the court was mistaken. She reproduces in the petition's appendix three statements made by her doctor, but those statements do not suggest that she has been able to perform as an air traffic controller at any time since

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aspect of the district court's reasoning is inconsistent with this Court's opinion in *Cleveland*, but the court of appeals did not adopt or endorse that rationale in its opinion. Indeed, that rationale was not even critical to the conclusion of the district court: its principal reason for rejecting petitioner's claim was that petitioner had unilaterally caused the breakdown of discussions over a reasonable accommodation (*ibid.*), a rationale which the court of appeals also did not address.

April 1994. Pet. App. 30a-31a, 32a-33a, 34a. Dr. Turrisi's original handwritten note of April 6, 1994, states that "[s]he is NOT released for ANY work at this time & until further notice." Pet. App. 34a. His report of November 1, 1995, explains that her disorders are "totally unpredictable. On this basis the patient would be medically disqualified from an aviation medical examiner's perspective for an active position as an air traffic controller." *Id.* at 32a. Even in his testimony of July 7, 1997, Dr. Turrisi states that "she's probably capable of air traffic control work right now except for the fact that [I] believe she's still on some medication that would be disqualifying." *Id.* at 31a. Those statements contradict petitioner's claim in the district court and court of appeals that she could perform her job if she worked a 6 a.m. to 4 p.m. shift.

Indeed, in this Court, petitioner hardly seems to dispute that she cannot perform her job as an air traffic controller. See Pet. 9-10. She argues instead that Dr. Turrisi testified that "she's certainly capable of administrative work," Pet. App. 31a, and that the FAA was therefore obligated to offer her an administrative position in lieu of her prior air traffic controller's position. See Pet. 10.

That reassignment claim, however, is wholly unrelated to the *Cleveland* issue on which petitioner purports to base her petition for certiorari. Moreover, the claim involves no issue of general importance but only the application of settled law to the specific facts of petitioner's case.[5] In any event, the claim is not properly

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[5] Regulations under the Rehabilitation Act give an employee the right to seek a transfer to a different position for which she is qualified, but only if such a position is vacant. See 29 C.F.R. 1614.203(g). As we explain in the text following this note, peti-

before this Court because petitioner did not raise it in the court of appeals and that court did not pass on it. See *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Indeed, to the best of our knowledge, petitioner did not previously make any request for reassignment to an administrative position, either to the FAA, the Office of Workers' Compensation Programs, or the district court. Nor are we aware of any evidence in the record showing that there is any open, available administrative position to which she could be transferred. Petitioner offers only the stray remark of Dr. Turrisi to establish that there is any genuine issue of fact over a possible reassignment. Thus, petitioner's claim does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1999

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tioner does not identify any evidence in the record showing that such a position exists.