No. 00-29

In the Supreme Court of the United States

DONALD MARCUM, PETITIONER

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that an administrative law judge was not required to consult with a mental health expert before finding petitioner not disabled.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is unpublished, but the decision is noted at 205 F.3d 1341 (Table). The memorandum opinion, order and judgment of the district court (Pet. App. 36-45) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2000. The petition for rehearing was denied on April 6, 2000 (Pet. App. 46). The petition for a writ of certiorari was filed on July 5, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title II of the Social Security Act (the Act), 42 U.S.C. 401 *et seq.*, provides monthly benefits to disabled persons who have contributed to the program. 42 U.S.C. 401-433. The Act defines a "disability" as the "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." 42 U.S.C. 423(d)(1)(A). The Act authorizes the Commissioner of Social Security to promulgate regulations for determining eligibility under the program and for the procedural mechanisms for adjudicating disability claims. 42 U.S.C. 405(a).

a. The initial determination of eligibility is made by a state agency. 42 U.S.C. 421(a); 20 C.F.R. 404.1503. The state agency conducts a five-step evaluation process. 20 C.F.R. 404.1520-404.1576; *Sullivan* v. *Zebley*, 493 U.S. 521, 525-526 (1990). If the state agency concludes that the applicant is not disabled, the claimant may request a *de novo* reconsideration by the state agency. 20 C.F.R. 404.904, 404.907-404.922.

If the claim is denied after reconsideration, the claimant is entitled to a hearing before an administrative law judge (ALJ) within the Social Security Administration (SSA). 42 U.S.C. 405(b); 20 C.F.R. 404.929-404.961. If the ALJ denies the claim, the claimant may ask the SSA's Appeals Council for review. 20 C.F.R. 404.966-404.982. If the Appeals Council denies review, the ALJ decision becomes the final decision of the SSA. 20 C.F.R. 422.210(a). The claimant may then obtain judicial review of the ALJ's decision. 42 U.S.C. 405(g).

b. When a claimant avers a mental impairment, the state agency or ALJ evaluating the claim must complete a Psychiatric Review Technique Form (PRTF). 20 C.F.R. 404.1520a(d). Section 421(h) provides:

> An initial determination [made by a state agency], in any case where there is evidence which indicates the existence of a mental impairment, shall be made only if the Commissioner of Social Security has made every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment.

42 U.S.C. 421(h); see also 20 C.F.R. 404.1520a(d)(1) ("[a]t the initial and reconsideration levels the [PRTF] must be completed and signed by [the state] medical consultant"). For disability determinations made by the ALJ, the regulations provide that the ALJ "may complete the [PRTF] without the assistance of a medical advisor" or "may call a medical advisor for assistance in preparing the document." 20 C.F.R. 404.1520a(d)(1)(i) and (ii). The regulations further provide that, if "the issue of a mental impairment arises for the first time at the administrative law judge hearing level, the [ALJ] may decide to remand the case to the State agency for completion of the document and a new determination." 20 C.F.R. 404.1520a(d)(1)(iii).

2. Petitioner was 31 years old in 1993 when he sustained a back injury while working as a mechanic. Pet. App. 2. His injuries required surgical treatment, after which he received pain medication and physical therapy. *Ibid.* Since the accident, petitioner has seen several doctors, all of whom treated him for recurring back pain and numbness. *Id.* at 3-4. Petitioner also sought treatment for non-restorative sleep, for which

he began taking the prescription drug Amitriptyline. *Id.* at 4-5.

In December 1993, petitioner applied for disability benefits due to musculoskeletal problems. Pet. App. 41. He did not allege a mental disability. *Id.* at 7. The state agency denied petitioner's application for disability benefits. *Id.* at 5. Following a hearing, the ALJ on March 27, 1997, found that petitioner was not entitled to disability benefits because there were a significant number of jobs in the national economy petitioner could perform given his residual functional capacity. *Id.* at 18-29. On January 27, 1998, the Appeals Council denied review. *Id.* at 32-34.

3. The district court affirmed the Commissioner's decision. Pet. App. 36-45.

4. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 1-14. The court rejected petitioner's argument that the ALJ erred by failing to have petitioner evaluated by a qualified mental health expert. The court observed that it had "recently left unanswered the question of whether an ALJ, confronted with a claim of a mental impairment raised for the first time at the hearing, has an obligation to consult with mental health experts before completing the PRTF." *Id.* at 8. The court further noted that "any such obligation would arise only 'if the claimant brings forth sufficient evidence to raise an inference that he suffers from a mental impairment.' " *Ibid.* (citing *Owen* v. *Chater*, No. 96-5571, 1997 WL 251918, at *4 (6th Cir. May 13, 1997) (per curiam)). The court concluded, however, that in this case "there was not sufficient evidence in the record to raise an inference that [petitioner] suffered from a mental impairment." *Id.* at *9. The

court accordingly affirmed the Commissioner's decision.[1]

ARGUMENT

1. Petitioner renews his contention (Pet. 7-12) that the ALJ should have sought a medical expert to evaluate petitioner's mental condition. Nothing in the statute or regulations, however, requires an ALJ to consult with a medical expert whenever a claimant alleges a disability based on a mental impairment. By its plain terms, 42 U.S.C. 421(h), which requires a mental health expert to review the evidence and assess a claimant's residual functional capacity, applies to decisions made by state agencies under 42 U.S.C. 421(a), and does not apply to decisions made by the ALJ under 42 U.S.C. 421(d).[2] Thus, Section 421(h) states in full:

> An initial determination under subsection (a), (c), (g), or (i) of this section that an individual is not under a disability, in any case where there is evidence which indicates the existence of a mental impairment, shall be made only if the Commissioner of Social Security has made every reasonable effort to ensure that a qualified psychiatrist or psycholo-

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[1] The court of appeals also rejected petitioner's contentions that the ALJ failed to find that petitioner's physical condition did not meet a listed impairment, Pet. App. 10-11; that the ALJ improperly rejected his complaints of pain, *id.* at 11-12; that the ALJ posed an inaccurate hypothetical question to the vocational expert, *id.* at 13; and that the ALJ improperly assessed his residual functional capacity, *id.* at 13-14. Petitioner does not challenge those rulings before this Court.

[2] Because petitioner did not allege a mental impairment when he applied for disability benefits, 42 U.S.C. 421(h) imposed no obligation on the state agency.

> gist has completed the medical portion of the case review and any applicable residual functional capacity assessment.

42 U.S.C. 421(h); accord 20 C.F.R. 404.1520a(d)(1) ("[a]t the initial and reconsideration levels the [PRTF] must be completed and signed by [the state] medical consultant"); see also *Plummer* v. *Apfel*, 186 F.3d 422, 433 (3d Cir. 1999) ("Because 42 U.S.C. § 421(d), which covers hearings before an ALJ, is excluded from § 421(h)'s purview, an ALJ is not required to employ the assistance of a qualified psychiatrist or psychologist in making an initial determination of mental impairment."). Moreover, the Commissioner's regulations provide that if "the issue of a mental impairment arises for the first time at the [ALJ] hearing level, the [ALJ] *may* decide to remand the case to the State agency for completion of the document and a new determination." 20 C.F.R. 404.1520a(d)(1)(iii) (emphasis added). Thus, the regulations imposed no duty on the ALJ to refer petitioner to a mental health expert.

In any event, Section 421(h) applies only "where there is evidence which indicates the existence of a mental impairment." 42 U.S.C. 421(h). Here, the court of appeals concluded that petitioner did not present sufficient evidence to indicate that he suffered a mental impairment. Pet. App. 9. As the ALJ explained (*id.* at 24), although petitioner at the hearing "complained of depression," petitioner had no "history of psychiatric hospitalization, ha[d] not reported receiving any counseling, and ha[d] not reported taking related medicines." Indeed, the only evidence of petitioner's alleged depression consists of a statement petitioner made to his orthopedic specialist that he was feeling depressed

(Pet. 10) and a brief statement at the hearing before the ALJ that he "stay[s] depressed a lot." Pet. App. 8.

Moreover, the fact that petitioner was taking Amitriptyline for his "nerves" or to help him sleep (Pet. 10) is not sufficient to establish that petitioner was suffering from a disabling mental impairment.[3]

The Commissioner's regulations provide that, when a claimant alleges a disability due to a mental condition, "[t]he existence of a medically determinable impairment of the required duration must be established by medical evidence consisting of clinical signs, symptoms and/or laboratory or psychological test findings." 20 C.F.R. Pt. 404, Subpt. P, App. 1, Sec. 12.00(B); *Moon* v. *Sullivan*, 923 F.2d 1175, 1182 (6th Cir. 1990) (A claimant alleging a mental impairment must "establish that a mental disorder reaches the level of severity to be considered disabling."); *Foster* v. *Bowen*, 853 F.2d

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[3] The court of appeals stated (Pet. App. 9 n.2) that it declined to address petitioner's argument that his sleep disorder is a mental impairment because petitioner had not alleged that he suffered from that type of mental impairment at the administrative level. In *Sims* v. *Apfel*, 120 S. Ct. 2080, 2086 (2000), this Court held that a social security claimant who *has* exhausted his administrative remedies "need not also exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues." Petitioner does not contend, however, that the court of appeals' failure to address his claim of sleep disorder was error under *Sims*. Nor is the Question Presented in the petition (Pet. i) suggestive of any such claim. See Sup. Ct. R. 14.1(a). In any event, the court of appeals stated that it would not be "inclined to require consultation whenever a claimant reported problems sleeping" and that petitioner's "argument presents a speculative claim of mental impairment." Pet. App. 9 n.2. Moreover, as explained in the text, evidence that petitioner had difficulty sleeping in itself does not establish that petitioner suffered a mental impairment that rendered him disabled.

483, 488 (6th Cir. 1988) (finding no evidence the claimant was disabled because of a mental condition where physician prescribed Valium for claimant's nerves and nothing in physician's records suggested claimant was disabled because of a mental condition). Here, petitioner "had no history of psychiatric hospitalization, counseling, or psychiatric medication." Pet. App. 7. The court of appeals therefore correctly concluded (*id.* at 9) that "there was not sufficient evidence in the record to raise an inference that [petitioner] suffered from a mental impairment." That factbound determination, which appears in an unpublished opinion, plainly does not warrant this Court's review.

2. Petitioner also argues (Pet. 12-14) that this Court's review is warranted to resolve a conflict among the courts of appeals. That is incorrect.

The decision below assumed (Pet. App. 8) that, under the court of appeals' own previous decision in *Owen* v. *Chater*, *supra*, at *4, the ALJ *would* have been required by Section 421(h) and the Commissioner's regulations to consult with a mental health expert had petitioner presented sufficient evidence of a mental impairment. Indeed, petitioner concedes (Pet. 8-9) that the Sixth Circuit's decision in *Owen* comports with the decisions of other courts of appeals. Thus, petitioner does not quarrel with the legal standard applied by the decision below, but instead contends (Pet. 13) that other courts of appeals would have concluded that on the facts of this case petitioner had presented sufficient evidence of a mental impairment to trigger the ALJ's duty to consult with a mental health expert. That factbound assertion does not warrant this Court's review.

In any event, the court of appeals correctly found that the decisions upon which petitioner relies (Pet. 12-13) are "distinguishable because they involved significant evidence" of a mental impairment. Pet. App. 9. Thus, in *Montgomery* v. *Shalala*, 30 F.3d 98, 100 (8th Cir. 1994), the claimant had a decade-long history of depression, was treated for depression, and had attempted suicide. Similarly, in *Andrade* v. *Secretary of HHS*, 985 F.2d 1045, 1048 (10th Cir. 1993), the claimant's physician, who had treated the claimant for depression and suicidal thoughts, had found that the claimant was "totally mentally disabled." And finally, in *Stambaugh* v. *Sullivan*, 929 F.2d 292, 294-295 (7th Cir. 1991), the claimant had a history of alcohol abuse and committed suicide shortly after the ALJ's decision. Thus, there is no basis for concluding that those courts of appeals would have held that petitioner here presented sufficient evidence that he suffered from a mental impairment.[4]

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[4] Petitioner also errs in contending (Pet. 11-12) that the Sixth Circuit's decision conflicts with its earlier unpublished decision in *DeVoll* v. *Commissioner*, No. 95-1166, 1996 WL 560424 (Oct. 1, 1996). In contrast to the present case, the claimant in *DeVoll* "entertained thoughts of, and once attempted, suicide," *id.* at *1; a physician had prescribed therapy and antidepressants, *id.* at *3; and a psychologist had concluded that the claimant "needed two to five years of psychological intervention," *id.* at *1. In any event, an intra-circuit conflict would not warrant this Court's review. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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