No. 15-1150

In the Supreme Court of the United States

SONYA HUNTER, PETITIONER

v.

CAROLYN W. COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the sixth sentence of 42 U.S.C. 405(g), a district court reviewing the denial of a claim for disability benefits may "order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." The question presented is whether a favorable agency decision on a subsequent claim, standing alone, is a basis for remand under this provision, where the decision addresses a different time period and relies on different evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-8a) is reported at 808 F.3d 818. The opinions of the district court (Pet. 9a-34a, 35a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2015. The petition for a writ of certiorari was filed on March 14, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Sentence six of 42 U.S.C. 405(g) provides that on judicial review of the denial of a Social Security claim, the district court

> may at any time order additional evidence to be taken before the Commissioner of Social Security,

> but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.

42 U.S.C. 405(g).

STATEMENT

1. a. The Social Security Act, 42 U.S.C. 301 *et seq.*, authorizes the Social Security Administration (SSA) to make payments to an insured individual who is "under a disability." 42 U.S.C. 423(a)(1)(E); see 42 U.S.C. 423(d). An individual's entitlement to disability benefits is determined through an administrative process. See 42 U.S.C. 405(b)(1). Under the SSA's five-step sequential-evaluation process for determining eligibility, see 20 C.F.R. 404.1520(a), the agency determines whether the claimant is currently gainfully employed, and, if not, whether the claimant's physical or mental impairments are medically severe and alone establish that the claimant is or is not disabled. See 20 C.F.R. 404.1520(a)(4)(i)-(iii). If the claim is not resolved at those first three steps of the sequential-evaluation process, the decision-maker proceeds to determine whether the claimant has sufficient residual functional capacity to perform her past relevant work or, at the final step, other types of work. See 20 C.F.R. 404.1520(a)(4)(iv)-(v), 404.1545, 404.1560.

Applications for disability benefits that address different time periods are separate claims that present different issues. SSA, *Hearings, Appeals, and Litigation Law Manual* I–2–4-40(J)(2).[1] The denial of an application for benefits is typically res judicata for the

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[1] https://www.ssa.gov/OP_Home/hallex/I-02/I-2-4-40.html (last updated Mar. 8, 2013).

period covered by that claim, but it does not preclude the claimant from filing a subsequent claim covering a later time period, even if the claimant alleges the same or similar disabling conditions. See 20 C.F.R. 404.957(c)(1).

A claimant generally has the burden of producing evidence to establish her disability during the period for which she seeks benefits. See 20 C.F.R. 404.1512(a). The SSA allows a claimant to submit additional evidence to the decision-maker at each level of the administrative review and appeal process, but once an administrative law judge (ALJ) makes a hearing decision, the evidence must relate to the period on or before the date of that decision. See 20 C.F.R. 404.970(b), 404.976(b), 404.1512(a).

b. Judicial review of the SSA's final decision on a benefits claim is governed by 42 U.S.C. 405(g). While sentence four of Section 405(g) allows the district court to review the merits of a final agency decision, sentence six authorizes the court to remand without addressing the merits of the final agency decision.

Sentence six provides that the court "may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." 42 U.S.C. 405(g). Such a remand may be ordered "only upon a showing that there is new evidence" that was not before the agency when the claim was initially resolved, and that "might have changed

the outcome of the prior proceeding." *Melkonyan* v. *Sullivan*, 501 U.S. 89, 98 (1991).[2]

2. Petitioner filed her first claim for disability-insurance benefits in May 2010, alleging that she had been disabled since March 2009. Pet. App. 41a-42a. In December 2011, petitioner had a hearing before an ALJ. *Id.* at 42a. Based on her analysis of the evidence in the administrative record, the ALJ issued a decision on February 10, 2012, concluding that petitioner was not disabled within the meaning of the Act. *Id.* at 41a-84a. The Social Security Appeals Council denied review. Pet. 4.

In January 2013, petitioner filed a new application for disability benefits, alleging a period of disability that began on February 11, 2012 (the day after the ALJ's adverse decision on her prior claim). Pet. App. 85a-86a. The ALJ determined that petitioner established disability during the period covered by her second application, but concluded that there was no basis to reopen petitioner's first application. *Id.* at 86a, 98a. The ALJ's disability finding was based in part on additional medical evidence that was not relied upon by the first ALJ. See *id.* at 39a-40a, 92a-93a (referring to a recent MRI); *id.* at 92a (evidence of thyroid condition); *id.* at 93a-94a (cardiologist's opinion).

3. a. Petitioner sought judicial review of the denial of her first claim. She argued (as relevant here) that the ALJ's favorable decision on her second claim was,

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[2] The first clause of sentence six authorizes the SSA to request a remand under a different standard: the district court "may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security." 42 U.S.C. 405(g).

in itself, material new evidence that warranted a remand of her first claim pursuant to sentence six of Section 405(g). Pet. App. 33a.

The district court denied the motion to remand, explaining that although petitioner had submitted the new favorable decision, she "otherwise [did] not include any new evidence" to support her motion. Pet. App. 33a. The court denied petitioner's motion for reconsideration, noting that the ALJ who reviewed petitioner's second claim had relied on at least some evidence that was not presented to the ALJ who reviewed petitioner's first claim. *Id.* at 39a-40a.

b. A unanimous panel of the Eleventh Circuit affirmed. Pet. App. 1a-8a. The court concluded that "a subsequent favorable decision itself, as opposed to the evidence supporting the subsequent decision, does not constitute new and material evidence under § 405(g)." *Id.* at 5a (quoting *Allen* v. *Commissioner*, 561 F.3d 646 (6th Cir. 2009)). The court rejected what it understood to be a contrary holding of the Ninth Circuit in *Luna* v. *Astrue,* 623 F.3d 1032 (2010). Pet. App. 4a-6a.

ARGUMENT

The judgment of the court of appeals is correct, and there is no conflict among the circuits on the question presented by petitioner's case. The petition should be denied.

1. The court of appeals correctly ruled that the agency's favorable decision on petitioner's second claim for disability benefits was not, in itself, material new evidence that warranted a remand of the decision denying her first claim. A sentence six remand is appropriate only "when the district court learns of evidence not in existence or available to the claimant at the time of the administrative proceeding that

might have changed the outcome of that proceeding." *Sullivan* v. *Finkelstein*, 496 U.S. 617, 626 (1990).

Here, the agency's favorable decision on petitioner's second claim for disability benefits did not justify a remand. Under SSA regulations, the ALJ's decision denying her first application had res judicata effect for the period covered by that first application. See pp. 2-3, *supra*. Even if the second agency decision may be considered "evidence" in some sense, it was not, standing alone, material to the outcome of the first claim. A contrary rule, automatically requiring a remand whenever an ALJ issues a favorable decision for a subsequent period, would significantly undermine the res judicata effect of the first decision.

The determination that petitioner was disabled at a later point in time thus does not on its own create a reasonable possibility that the agency would have found her disabled during the earlier period. In addition, the second decision here not only addressed a different period of time than the first, but also rested on a different administrative record. See Pet. App. 39a. In a case where a claimant presents new evidence in support of a second claim, the determination of that later claim is even less probative of disability during the prior period. The different timeframe and administrative record make it unlikely that the second decision itself would have changed the outcome of the prior proceeding.

Petitioner does not contend that any of the additional evidence she submitted in the second proceeding would justify a remand, and indeed she did not submit any such additional evidence for the record before the court in this case. Instead, she contends that the mere fact of the second decision itself requires a

remand. But allowing petitioner to secure a remand based on the second decision alone, on the ground that it might have been based on new evidence that might have changed the result in the initial proceeding, would effectively eliminate petitioner's burden of demonstrating that she had good cause for failing to incorporate any such new evidence into the record in her prior proceeding. It would also be contrary to the "unmistakably clear" intent of Section 405(g) "to limit the power of district courts to order remands for 'new evidence' in Social Security cases." *Melkonyan* v. *Sullivan*, 501 U.S. 89, 100 (1991). Tellingly, the second ALJ, who ruled for petitioner on her second claim, explicitly found no basis to reopen petitioner's first application. See Pet. App. 86a ("The undersigned does not find a basis for reopening the claimant's prior Title II application (20 C.F.R 404.988).").[3] Petitioner sought to circumvent that ruling by asking the court to remand based on the mere existence of that ALJ's decision on the second claim. Such a result would disrupt the orderly administration of a program that adjudicates millions of claims each year.

2. a. Although the petition alleges a conflict with the Ninth Circuit's decision in *Luna* v. *Astrue,* 623 F.3d 1032 (2010), the remand order in *Luna* reflected the particular facts of that case. In *Luna*, the Ninth Circuit emphasized that it could not determine whether the second decision could be reconciled with the first because it was unclear whether the second decision rested on different evidence than was considered in the first. *Id.* at 1035. Because of that uncertainty,

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[3] The SSA may reopen final agency decisions within four years for good cause, 20 C.F.R. 404.988(b), including when "[n]ew and material evidence is furnished" to the agency, 20 C.F.R. 404.989(a)(1).

the Ninth Circuit concluded that a "remand for further factual proceedings was an appropriate remedy." *Ibid.*

Whatever the merits of the Ninth Circuit's decision in *Luna*, it does not conflict with the result in petitioner's case. The Ninth Circuit in *Luna* distinguished its earlier decision in *Bruton* v. *Massanari*, 268 F.3d 824 (2001), which held that a sentence six remand was unwarranted because the "second application involved different medical evidence, a different time period, and a different age classification." *Luna*, 623 F.3d at 1035 (quoting *Bruton*, 268 F.3d at 827). Here, as in *Bruton*, it is undisputed that the second ALJ's decision addressed a different time period and relied on some different evidence. A remand based on the second decision alone therefore would not be warranted even under *Luna*.

To the extent that non-precedential decisions of the Ninth Circuit and district courts have read *Luna* as authorizing a remand anytime a subsequent favorable agency decision is issued, that misreading of *Luna* does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). Such a rule would also contravene Section 405(g), which was amended (as this Court has recognized) to add the good cause requirement because "Congress believed courts were often remanding Social Security cases without good reason." *Melkonyan*, 501 U.S. at 101. As noted, see p. 6, *supra*, automatically remanding a case to an agency on the ground that a subsequent decision itself constitutes material new evidence would effectively eliminate the claimant's statutory obligation to show good

cause for failing to incorporate underlying new evidence in the original record. See *Allen*, 561 F.3d at 653 ("To the extent that Allen argues that remand is appropriate based on the *possibility* of new and material evidence, this contradicts the clear language of § 405(g) that requires a '*showing that there is new evidence* which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.'").

b. Petitioner also alleges (Pet. 12) a conflict with what she characterizes as the "closely related" decisions in *Bird* v. *Commissioner*, 699 F.3d 337 (4th Cir. 2012), and *Latham* v. *Shalala*, 36 F.3d 482 (5th Cir. 1994), but no such conflict exists. *Bird* did not involve a sentence six remand. 699 F.3d at 345-346 n.6. And while *Latham* involved a sentence six remand, part of the reason that the Veterans Affairs' (VA) finding of disability in that case justified a remand was that the VA decision met "the timing element of materiality" because it "relate[d] to the time period for which benefits were denied." 36 F.3d at 483. Petitioner's successive claims related to different periods of time.

There is thus no circuit conflict on the question presented by this case. Any tension among the court of appeals' decisions has minimal practical impact. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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