No. 05-58

In the Supreme Court of the United States

MAXANN C. FINK AND IDA J. ROCHESTER,
PETITIONERS

v.

JO ANNE B. BARNHART, COMMISSIONER
OF SOCIAL SECURITY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held any procedural errors committed by the Administrative Law Judge in considering petitioners' Social Security disability claims were harmless error.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 82-84) is not published in the Federal Reporter but is reprinted in 123 Fed. Appx. 146. The orders and judgments of the district courts (Pet. App. 49-50, 81) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2005. A petition for rehearing en banc was denied on April 6, 2005 (Pet. App. 85). The petition for a writ of certiorari was filed on July 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners sought disability benefits under Title II of the Social Security Act, 42 U.S.C. 423, and supplemental security income (SSI) under Title XVI of the Social Security Act, 42 U.S.C. 1381 *et seq*. At issue here is the role of treating physicians in the consideration of disability claims by the Social Security Administration (SSA).

1. Petitioner Maxann C. Fink sought disability and SSI benefits for back and neck problems associated with ruptured disks. Pet. App. 20. The administrative law judge (ALJ) denied these benefits, finding that "there are jobs existing in significant numbers in the national economy that [petitioner Fink] is capable of performing and has been capable of performing since her alleged onset date." *Id.* at 16. The Appeals Council denied petitioner Fink's request for review, and the ALJ's decision became the SSA's final decision. *Id.* at 17-19.

Petitioner Fink sought judicial review in the District Court for the Eastern District of Louisiana. In a comprehensive report recommending that the district court grant SSA's motion for summary judgment (Pet. App. 20-48), the magistrate judge concluded that substantial evidence supported the ALJ's decision. The magistrate rejected petitioner Fink's claims that SSA erred (1) by failing to recontact her treating physician before ordering a consultative examination, (2) by ordering a consultative examination without soliciting the treating physician to perform the examination, (3) by providing the consultative examination report to the medical expert without recontacting the treating physician, and (4) by rejecting the findings of the treating physician without attempting to recontact them. *Id.* at 37-38.

Upon review of the administrative record, the magistrate judge concluded that SSA had "complied with the regulations in contacting the health care providers identified by Fink." Pet. App. 41. The magistrate judge further concluded that SSA's decision to request a consultative examination with someone other than her treating physician was not an abuse of discretion, given that her treating physician had "failed to respond to the Commissioner's initial request for a statement of [petitioner] Fink's ability to perform work-related physical activities." *Id.* at 43. Although the magistrate judge concluded that SSA should have made a follow-up request to petitioner Fink's treating physician, the magistrate judge concluded that that lone procedural error did not cast doubt on the ALJ's decision, given that petitioner Fink had obtained additional information from her treating physicians and had furnished that information to the medical expert in advance of the hearing before the ALJ. *Id.* at 42, 43-44, 46. Finally, the magistrate judge sustained the ALJ's rejection of the opinions of the treating physicians on the ground that the ALJ had reliable medical evidence from the consulting physician, who had examined petitioner Fink, that controverted the opinions of the treating physicians. *Id.* at 47-48.

The district court adopted the magistrate judge's report and recommendation as its opinion, and it granted SSA's motion for summary judgment. Pet. App. 49-50.

2. Petitioner Ida J. Rochester sought SSI benefits based on an alleged disability due to mental illness, Pet. App. 51, specifically "chronic panic attacks and paranoia." *Id.* at 53. The ALJ denied petitioner Rochester's request for benefits. *Id.* at 58. The ALJ found that,

although petitioner Rochester suffered from panic attacks, she did not suffer from a disabling mental or physical impairment within the meaning of the SSI regulations, and that there were jobs existing in significant numbers in the economy that petitioner Rochester remains capable of performing. *Id.* at 55-57. The Appeals Council, after vacating an initial denial of review in order to consider additional arguments, denied petitioner Rochester's request for review, and the ALJ's decision became the SSA's final decision. *Id.* at 60-62.

Petitioner Rochester sought judicial review in the District Court for the Eastern District of Louisiana. In a comprehensive report (Pet. App. 63-72), the magistrate judge recommended affirmance of the ALJ's decision. In so doing, the magistrate judge rejected, *inter alia*, petitioner Rochester's contentions that the ALJ erred (1) in rejecting the findings of the treating psychiatrists without recontacting them and without giving appropriate weight to the treating relationship, (2) in substituting his medical assessment for that of the treating psychiatrists; and (3) in ordering a consultative examination without attempting to have it performed by a treating psychiatrist. See *id.* at 72-73.

The magistrate judge reasoned that the ALJ did not need to recontact petitioner Rochester's treating psychiatrists before rejecting their opinion because the ALJ had available other medical opinion evidence—that of the consulting psychiatrist—which was "based on personal examination or treatment of the claimant." Pet. App. 73 (citing *Newton* v. *Apfel*, 209 F.3d 448 (5th Cir. 2000)) (emphasis omitted); see also Pet. App. 69-70 (indicating petitioner Rochester submitted to the ALJ additional information from her treating physician). The magistrate judge further concluded that the ALJ did not

err in giving greater weight to the consulting psychiatrist's opinion than to that of the treating psychiatrists, given that the latter was based largely on petitioner Rochester's self-reports, which the evidence demonstrated were unreliable. *Id.* at 73-75; see *id.* at 65 (noting consulting psychiatrist's observation that many of the notes in petitioner Rochester's medical records indicated that "she was lazy and did not particularly care to work and that she was certainly seeking being placed on SSI benefits"). In addition, the magistrate judge concluded that no regulations required SSA to use the treating physician as the only consulting physician. *Id.* at 77-78.

The district court adopted the magistrate judge's report and recommendation as its opinion, and it affirmed the denial of benefits. Pet. App. 81.

3. The Fifth Circuit consolidated petitioners' appeals and affirmed in a short, unpublished per curiam. Pet. App. 82-84.

Petitioner Fink argued that SSA had violated 20 C.F.R. 404.1512(e)(1) and (f) by ordering a consultative examination "without first recontacting the treating physicians for an explanation of any perceived discrepancies in the medical records." Pet. App. 83. Both petitioners argued that SSA violated 20 C.F.R. 404.1519h by "failing to appoint a treating physician to perform" the consultative examination. *Ibid.* Finally, both petitioners contended that the ALJs violated 20 C.F.R. 404.1512(e) and 404.1527(d)(2) by "failing to 1) recontact the treating physicians and 2) consider the necessary regulatory factors when declining to afford controlling weight to the treating physicians' opinions." *Ibid.*

The court of appeals rejected petitioners' contentions. Because petitioners Fink and Rochester "were

afforded the opportunity to supplement their respective records with additional medical reports from their treating physicians," the court held "that any procedural errors committed by the Commissioner were harmless and did not affect [petitioners'] substantial rights." Pet. App. 84 (citing *Morris* v. *Bowen*, 864 F.2d 333 (5th Cir. 1988)). The court of appeals further held that the ALJs did not err in declining to give controlling weight to the treating physicians' opinions. *Ibid.* The court distinguished its decision in *Newton*, *supra*, where it held that the ALJ had improperly rejected the opinion of the treating physician in the absence of contradictory evidence from physicians who had examined or treated the claimant and without requesting additional information from the claimant's treating physician. 209 F.3d at 460. The court here explained that, unlike in *Newton*, "the records for both Fink and Rochester contained 'other medical opinion evidence based on personal examination' in the form of [consultative examination] reports." Pet. App. 84 (quoting *Newton*, 209 F.3d at 453).

ARGUMENT

The per curiam decision of the court of appeals is unpublished and establishes no precedent that will control any future cases. Moreover, the decision is correct and does not conflict with any decision of this Court or that of any other court of appeals. The petition for a writ of certiorari therefore should be denied.

1. Based on the facts of these respective cases, the court of appeals concluded that the ALJs did not err in rejecting the opinions of petitioners' treating physicians, and that any procedural error in failing to recontact the treating physicians or in failing to engage those physicians for the consultative examination was harmless be-

cause both petitioners were afforded the opportunity to provide additional information from those physicians. That factbound decision is correct and does not warrant further review.

a. Petitioners' principal argument (Pet. 8-24) appears to be that the statute, 42 U.S.C. 423(d)(5)(B), and SSA regulations impose mandatory duties upon an ALJ with respect to obtaining and considering evidence from treating physicians, and that any failure to comply strictly with those purported duties, regardless of the factual circumstances, requires a remand to the agency for a rehearing. The plain text of the statute and of the regulations refutes that argument.

The statutory provision upon which petitioners rely, 42 U.S.C. 423(d)(5)(B), states merely that the Commissioner "shall make *every reasonable effort* to obtain from the individual's treating physician (or other treating health care provider) all medical evidence, including diagnostic tests, necessary in order to properly make such determination, *prior to evaluating* medical evidence obtained from any other source on a consultative basis." 42 U.S.C. 423(d)(5)(B) (emphasis added). The Commissioner's regulations define "every reasonable effort" as meaning "that we will make an initial request for evidence from your medical source and * * * if the evidence has not been received, we will make one followup request to obtain the medical evidence necessary to make a determination." 20 C.F.R. 404.1512(d)(1). That definition defeats petitioners' claim that "every reasonable effort" means that the Commissioner "must try every reasonable means to base its determination on the findings and opinions of the treating physicians until it can be fairly said that it would be un-

reasonable to ask it to make further effort." Pet. 11 (emphasis omitted).

Moreover, contrary to petitioners' contentions (*e.g.*, Pet. 19), neither Section 423(d)(5)(B) nor the regulations impose a mandatory duty to recontact the treating physician in all circumstances. The regulations accord the Commissioner a measure of discretion over the decision to recontact, providing that "[w]e may not seek additional evidence or clarification from a medical source when we know from past experience that the source either cannot or will not provide the necessary findings." 20 C.F.R. 404.1512(e)(2). Indeed, the recontacting provision, 20 C.F.R. 404.1512(e)(1), applies only when, in the judgment of the finder of fact, "the report from your medical source contains a conflict or ambiguity that must be resolved, the report does not contain all the necessary information, or does not appear to be based on medically acceptable clinical and laboratory diagnostic techniques."

The lack of an inflexible requirement is also evident in 20 C.F.R. 404.1519h, the provision concerning the use of the treating physician in a consultative examination. That provision provides that "[w]hen in our judgment your treating source is qualified, equipped, and willing to perform the additional examination or tests for the fee schedule payment, and generally furnishes complete and timely reports, your treating source will be the preferred source to do the purchased examination." This language expressly endows the Commissioner with substantial discretion in making a decision that will necessarily differ from case to case depending on the facts; it does not create (as petitioner suggests, *e.g*, Pet. 15) a mandatory requirement that the treating physician be employed for the consultative examination.

Petitioners also err in arguing (Pet. 15) that 20 C.F.R. 404.1527(d)(2) imposes a mandatory duty to make findings on each factor set forth therein when considering what weight to give the opinion of the treating physician. That section specifies factors for the ALJ to consider, but the ultimate duty imposed by the regulation is only that the ALJ "give good reasons" in determining the weight to be accorded to the treating physician's opinion. See 20 C.F.R. 404.1527(d)(2). The sufficiency of the reasons given is obviously fact-bound and will necessarily vary from case to case.[1]

b. In any event, the first question presented by the petition is simply whether the court below erred in concluding that any procedural error committed by SSA in failing to comply with 20 C.F.R. 404.1527(d)(2) was harmless error. Pet. ii. But the court of appeals did not even apply a harmless error analysis to that claim of petitioners; instead, it held that the ALJs had complied with Section 404.1527(d)(2). The court of appeals stated: "we hold that the ALJs did not commit error when declining to afford controlling weight to the treating physi-

[1] Petitioners appear to assume that 20 C.F.R. 404.1527(d)(2) is an implementation of Section 423(d)(5)(B). That is incorrect. Section 423(d)(5)(B) pertains to evidence gathering. Section 404.1527(d)(2) pertains to how the Commissioner weighs evidence. The two are different. The Senate Finance Committee, in its consideration of the provision that became Section 423(d)(5)(B) (Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 9, 98 Stat. 1804), indicated in its report that it did "not intend to alter in any way the relative weight which the Secretary places on reports received from treating physicians and from consultative examinations." S. Rep. No. 466, 98th Cong., 2d Sess. 26 (1984). The Committee further noted: "Nor is it intended that the Secretary shall be precluded from obtaining consultative examinations when the Secretary finds it necessary to secure additional information or to resolve conflicting evidence." *Ibid.*

cians' opinions." Pet. App. 84. Even assuming the court of appeals' harmless-error holding applies to petitioners' Section 404.1527(d)(2) claim, that factbound decision is correct. Petitioners in this case have not contended, and could not reasonably contend, that the ALJs in these cases did not give "good reasons" for their findings regarding the treating physicians' opinions, including reliance on medical evidence from examining physicians that controverted the opinions of the treating physicians. Pet. App. 47-48 (magistrate judge's recommendations regarding petitioner Fink); *id.* at 73-75 (same as to petitioner Rochester).

To be sure, the court of appeals did apply a harmless error analysis to petitioners' separate contentions (1) that there was error at the prehearing stage because SSA ordered a consultative examination without recontacting the treating physician, 20 C.F.R. 404.1512(e)(1) and (f), and failed to employ the treating physicians for the consultative examinations under Section 404.1519h, and (2) that the ALJs erred in failing to recontact the treating physicians under Section 404.1512(e) and (f). See Pet. App. 83-84. But to the extent the first question presented encompasses those claims, they do not warrant review either. The court of appeals properly concluded that, on the particular facts presented in these two cases, any procedural errors at the prehearing stage were harmless because both petitioners had a subsequent opportunity to present supplemental medical reports from their treating physicians to the ALJs. *Id.* at 84. The court's harmless error analysis was thus case-specific and factbound. Tellingly, petitioners do not assert that the court of appeals' factual assessment was in error or that there was substantial evidence of disability overlooked by the ALJs because of the alleged proce-

dural errors at the initial, pre-ALJ stages of the administrative review process.

For similar reasons, a failure by an ALJ to recontact a treating physician before considering a consultative examination that was ordered at a prehearing stage should not furnish a basis for setting aside the ALJ's decision. The contrary rule petitioners propose would in effect impose an exclusionary rule on ALJ proceedings, requiring the ALJ to ignore probative evidence in the record on the ground that SSA erred in requesting it in the first place. Petitioners cite no authority for such an extraordinary rule in administrative hearings. Because the ALJ conducts a de novo hearing and review based on all the evidence of record, procedural errors committed at the initial, more informal stages of the review process therefore should not ordinarily furnish a basis for challenging the ALJ's decision.

Furthermore, contrary to the contention raised by the second question framed in the petition (Pet. App. ii, 24-25), the court of appeals' holding does not purport to shift the task of obtaining additional information to the claimant. In these cases, additional information in fact *was* submitted by treating physicians to the ALJ. See *id.* at 42, 43-44, 46, 69-70; pp. 3, 4-5, *supra*. Petitioners thus were not prejudiced by the ALJ's alleged failure to request that same information.[2] Petitioners do not claim that there was still more information that could have

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[2] As such, contrary to petitioners' contention (Pet. 24-26), the decision below does not conflict with decisions in the Tenth Circuit suggesting that the ALJ bears the responsibility of seeking additional information, where necessary, from the treating physician. See *Robinson* v. *Barnhart*, 366 F.3d 1078, 1084 (2004); *White* v. *Barnhart*, 287 F.3d 903, 908 (2001).

been obtained if the ALJ had recontacted the treating physicians directly.

2. Petitioners contend (Pet. 6-7) that the court of appeals' holding that any procedural error was harmless conflicts with decisions of other courts of appeals. Petitioners are mistaken.

Only one of the decisions relied upon by petitioners discusses the possible applicability of "harmless error" principles. That decision, *Wilson* v. *Commissioner of Social Security*, 378 F.3d 541 (6th Cir. 2004), is not contrary to the decision below. In *Wilson*, the ALJ had rejected the opinion of the treating physician without articulating any "good reasons" for doing so. *Id.* at 545. Although the Sixth Circuit concluded, on the facts of that case, that the ALJ's failure to provide reasons for rejecting the treating physician's opinion was not "harmless error," *id.* at 546, the Sixth Circuit expressly noted that "[t]hat is not to say that a violation of the procedural requirement of § 1527(d)(2) could never constitute harmless error." *Id.* at 547. Moreover, the Sixth Circuit indicated that one possible example of harmless error could be a situation "where the Commissioner has met the goal of § 1527(d)(2)—the provision of the procedural safeguard of reasons—even though she has not complied with the terms of the regulation." *Ibid.*

That decision is not inconsistent with the decision below. Here, unlike in *Wilson*, the ALJs did provide good reasons for rejecting the treating physicians' opinions. There is nothing in *Wilson* that would preclude the Sixth Circuit from reaching the same conclusion as the Fifth Circuit in this case in the circumstances presented here. See 378 F.3d at 547. In contrast, the government's "harmless error" contention in *Wilson* was

merely that "the ALJ 'could' have relied on evidence in the record." *Id.* at 546.

Moreover, there is good reason to believe that the outcome of *Wilson* would have been the same in the Fifth Circuit as it was in the Sixth. In *Wilson*, the Sixth Circuit relied upon the Fifth Circuit's decision in *Newton*, *supra*, for the proposition that "courts have remanded the Commissioner's decisions when they have failed to articulate 'good reasons' for not crediting the opinion of a treating source, as § 1527(d)(2) requires." *Wilson*, 378 F.3d at 545 (citing *Newton*, 209 F.3d at 456). The decision below did not retreat from *Newton*, but merely distinguished it on the ground that in *Newton*—as was apparently the case in *Wilson* as well—the record did not contain any medical opinion evidence that was based on a personal examination of the claimant other than the opinion of the treating physician.

Petitioners' claim that the decision below conflicts with decisions in other circuits is similarly without merit. Although petitioners do cite cases (*e.g.*, Pet. 6-7) in which other courts of appeals have remanded for reconsideration on the grounds that the ALJ failed to give "good reasons" for rejecting a treating physician's opinion or failed to seek additional information from a treating physician, none of those decisions holds that such a procedural error could never be harmless. Any such rigid rule would be inconsistent with the generally applicable principle of administrative law that a reviewing court should set aside an agency decision only if any errors the court identifies were prejudicial. See, *e.g.*, 5 U.S.C. 706 (reviewing court shall take "due account" of the "rule of prejudicial error"). Rather, the cases on which petitioners rely were factbound resolutions based on the application of legal principles that do not conflict

with those applied by the decision below.[3] Indeed, like other circuits, the Fifth Circuit has vacated and remanded cases on similar grounds. See, *e.g.*, *Newton*, 209 F.3d at 460 (remanding to the ALJ for further consideration after concluding that the ALJ "improperly rejected the opinions of [the claimant's] treating physician without contradictory evidence from physicians who had examined or treated [the claimant] and without request-

[3] See *Robinson*, 366 F.3d at 1083-1084 (remanding where the ALJ failed to give "any explanation" for how he assessed the weight of the treating physician's opinion, failed to seek additional information from that physician after the ALJ concluded that the physician's information was inadequate, and rejected the treating physician's opinion in favor of the opinion of a physician who had not examined the claimant); *O'Donnell* v. *Barnhart*, 318 F.3d 811, 816, 818 (8th Cir. 2003) (remanding for the ALJ to seek additional information from the treating physician where the ALJ gave "no weight" to the physician's opinion after finding that the physician's treatment notes were "conclusory," and where the claimant's treating physician had additional relevant information to submit); *Bowman* v. *Barnhart*, 310 F.3d 1080, 1085 (8th Cir. 2002) (remanding to the ALJ to seek additional information from the treating physician where the ALJ rejected the treating physician's opinion in favor of the opinion of a physician who had not examined the claimant); *Clark* v. *Commissioner of Soc. Sec.*, 143 F.3d 115, 118-119 (2d Cir. 1998) (remanding to the district court to reconsider the claimant's contention that the ALJ should have sought additional information from the treating physician before rejecting his opinion based on a lack of clinical or objective support in his records); *Goatcher* v. *United States Dep't of Health & Human Servs.*, 52 F.3d 288, 290 (10th Cir. 1995) (remanding where the ALJ gave "short shrift" to the treating physician's opinion and failed to give "specific, legitimate reasons" for doing so). See also *White*, 287 F.3d at 907-908 (holding that the ALJ did not err in rejecting the treating physician's opinion in favor of that of a consulting physician who had examined the claimant, noting that the ALJ gave good reasons for doing so, and holding that the ALJ did not err in failing to recontact the treating physician where the information that the treating physician provided was "not so incomplete that it could not be considered").

ing additional information from the treating physician"). The published decision in *Newton*, not the unpublished decision in this case, constitutes the relevant Fifth Circuit precedent on this issue. There is no reason to believe that the Fifth Circuit will not continue to vacate and remand when there are prejudicial procedural errors, just as it did in *Newton* and as other courts of appeals have done.

3. Finally, petitioners broadly assert (Pet. 5) that SSA routinely ignores the regulations relating to treating physicians. SSA processes literally millions of disability claims each year;[4] roughly 100,000 claims are resolved each year by the Appeals Council.[5] That errors occur in particular cases is regrettable, but inevitable as a practical matter. The Appeals Council sits to correct such errors and, as petitioners acknowledge, it has done so in cases with respect to the same types of errors alleged here. Pet. 18 ("Counsel for petitioners has obtained a number of remands from the Appeals Council for failure to comply with 20 CFR 404.1512(e)(1)."). In any event, as the magistrate judges' opinions in these cases make clear, there is substantial evidence demonstrating that petitioners were not disabled within the meaning of the Social Security Act.

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[4] See 70 Fed. Reg. 43,590 (2005) ("Currently, more than two and a half million individuals apply for Social Security and SSI benefits based on disability each year.").

[5] See SSA, *Annual Statistical Supplement, 2005* (Dec. 2005) <http://www.socialsecurity.gov/policy/docs/statcomps/supplement/2005/2f8-2f11.html#table2.f11>.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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