No. 22-79

In the Supreme Court of the United States

KIMBERLY MEDDERS, PETITIONER

v.

SOCIAL SECURITY ADMINISTRATION

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

BRIEF FOR RESPONDENT IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
LEWIS S. YELIN
WEILI J. SHAW
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner was entitled to remand to the agency under 42 U.S.C. 405(g), which provides that a 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."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the Federal Reporter but is available at 2022 WL 222719. The opinion of the district court (Pet. App. 9a-28a) is not published in the Federal Supplement but is available at 2021 WL 1171640.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2022. A petition for rehearing was denied on April 26, 2022 (Pet. App. 65a). The petition for a writ of certiorari was filed on July 25, 2022. 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 a final decision on a Social Security claim:

> The 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, and it 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.

Ibid.

STATEMENT

1. The Social Security Act, 42 U.S.C. 301 *et seq.*, authorizes the Social Security Administration (SSA) to make payments to persons who are "under a disability." 42 U.S.C. 423(a)(1)(E); see 42 U.S.C. 423(d).[1] The agency relies on a five-step inquiry to determine whether an individual is eligible for disability benefits. See 42 U.S.C. 405(b)(1); 20 C.F.R. 404.1520. The agency begins by determining whether the claimant is currently performing substantial gainful activity. If so, she is not disabled. See 20 C.F.R. 404.1520(a)(4)(i) and (b). At steps two and three, the agency asks whether the claimant has a severe impairment (if not, she is not disabled) and then whether an impairment found to be severe meets or equals an impairment listed in SSA regulations (if so, she is disabled). See 20 C.F.R.

[1] For ease of reference, this brief cites the statutory and regulatory provisions governing disability insurance benefits. The provisions governing supplemental security income, another type of benefit administered by SSA, are similar in relevant respects. See 42 U.S.C. 1381 *et seq.*; 20 C.F.R. Pt. 416.

404.1520(a)(4)(ii) and (iii), (c), and (d). If the claim is not resolved at the first three steps of the process, the agency proceeds at steps four and five to determine whether the claimant has sufficient residual functional capacity to perform her past relevant work or, if not, whether she can adjust to other types of work in light of her residual functional capacity and age, education, and work experience. See 20 C.F.R. 404.1520(a)(4)(iv) and (v) and (e)-(g), 404.1545, 404.1560.

The agency treats applications for disability benefits that address different time periods as separate claims that present different issues. SSA, *HALLEX: Hearings, Appeals, and Litigation Law Manual* I-2-4-40(J)(2).[2] The denial of an application for benefits is typically res judicata for the 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); *HALLEX* I-2-4-40(J)(2).

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. See *ibid.* Once an administrative law judge (ALJ) makes a hearing decision, however, the Appeals Council will consider new evidence only if, among other criteria, a claimant shows good cause for not submitting it earlier and the new evidence relates to the period on or before the date of the ALJ's decision. See 20 C.F.R. 404.970(a)(5) and (b).

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[2] https://www.ssa.gov/OP_Home/hallex/I-02/I-2-4-40.html (last updated Aug. 13, 2020).

Judicial review of the agency's final decision on a benefits claim is governed by 42 U.S.C. 405(g). That provision identifies circumstances in which remand to the agency may be appropriate. Sentence four of Section 405(g) authorizes the district court to review the merits of a final agency decision and "affirm[], modify[], or revers[e]" that decision "with or without remanding the cause for a rehearing." *Ibid.*

In contrast, sentence six authorizes the district court to remand to the agency without addressing the merits. The court may, on the agency's motion for good cause before it files its answer, "remand the case to the [SSA] for further action." 42 U.S.C. 405(g). Alternatively, and as relevant here, the court "may at any time order additional evidence to be taken before the [agency], 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." *Ibid.*

2. Petitioner filed her first claim for disability insurance benefits and supplemental security income in March 2017, alleging a disability onset date of September 9, 2016. Pet. App. 2a. Following a hearing, on March 22, 2019, an ALJ issued a decision holding that petitioner was not disabled during the period from the alleged onset date to the date of the ALJ decision. *Ibid.*; see *id.* at 34a-59a. The Appeals Council denied review, which meant that the ALJ's decision was the final agency decision on petitioner's claim. *Id.* at 3a; see 20 C.F.R. 404.981. Petitioner sought review of the denial in district court. Pet. App. 3a.

Meanwhile, petitioner filed a second application for benefits. Pet. 8. On August 26, 2020, the agency issued a notice to petitioner informing her of its determination

that she satisfied the medical requirements for disability. Pet. App. 60a. Although petitioner had again asserted an onset date of September 9, 2016, the agency concluded based on the evidence that her "disability did not begin until 06/01/2019"—that is, more than two months after the ALJ decision finding that she was not disabled. *Id.* at 63a.

Upon receiving notice of the agency's determination on her second application, petitioner filed a motion in district court to remand the case concerning her first application to the agency. Pet. App. 10a-11a. Petitioner contended that the favorable determination on her subsequent claim was newly discovered evidence that warranted a remand under sentence six of Section 405(g). *Id.* at 16a. The court denied the motion to remand and affirmed SSA's decision on the merits, concluding that the decision was supported by substantial evidence and rejecting petitioner's other claims of error. *Id.* at 17a, 20a, 25a, 26a, 27a.

The Eleventh Circuit affirmed in an unpublished, per curiam opinion. Pet. App. 1a-8a. The court affirmed the denial of petitioner's motion to remand, observing that under *Hunter* v. *Social Security Administration*, 808 F.3d 818 (11th Cir. 2015), cert. denied, 579 U.S. 918 (2016), "a subsequent favorable disability decision is not newly discovered evidence" for purposes of a remand under sentence six of Section 405(g). Pet. App. 7a. The court explained that "there was no inconsistency in finding that two successive ALJ decisions were supported by substantial evidence—a deferential standard—even when those decisions reached opposing conclusions." *Ibid.* The court noted that, "[n]onetheless, the evidence supporting a subsequent favorable decision may constitute new and material evidence under § 405(g)," but that

petitioner had not cited any such evidence. *Ibid.* The court also upheld the district court's affirmance of the agency's decision on the merits. *Id.* at 6a.

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision from another circuit. This Court previously denied review in *Hunter* v. *Social Security Administration*, 808 F.3d 818 (11th Cir. 2015), the published decision that formed the basis for the unpublished decision in this case. See *Hunter* v. *Colvin*, 579 U.S. 918 (2016). Even on petitioner's telling, the alleged circuit conflict has not deepened since then. Review of the unpublished decision in this case is unwarranted.

1. The court of appeals correctly held that the agency's favorable decision on petitioner's second claim for disability benefits was not, by itself, "new evidence which is material" to petitioner's first claim. 42 U.S.C. 405(g). Even assuming an agency decision could, in certain circumstances, qualify as new "evidence" within the meaning of sentence six, petitioner has not shown that the agency's second determination was "material" to its first. *Ibid.*

Evidence is material only if it is "probative" and "relevant to the claimant's condition during the time period for which benefits were denied," and there is "a reasonable possibility that the new evidence would have influenced the [Commissioner] to decide claimant's application differently." *Tirado* v. *Bowen*, 842 F.2d 595, 597 (2d Cir. 1988); see, *e.g.*, *Szubak* v. *Secretary of Health & Human Servs.*, 745 F.2d 831, 833 (3d Cir. 1984) (per curiam) (observing that Section 405(g) requires that "the new evidence relate to the time period for which benefits were denied, and that it not concern evidence of a

later-acquired disability or of the subsequent deterioration of the previously non-disabling condition"); *Hinchey* v. *Shalala*, 29 F.3d 428, 433 (8th Cir. 1994).

Here, the agency's second determination found petitioner disabled for a later time period than the one covered by her initial application, with over two months separating the two periods. See pp. 4-5, *supra*. In both applications, petitioner claimed that she became disabled on September 9, 2016. Pet. App. 2a, 63a. In denying the first application, the agency found that petitioner was not disabled as of March 22, 2019. Then, in its favorable finding on the second application, the agency explicitly rejected petitioner's alleged onset date and found that her "disability did not begin until" June 1, 2019, more than two months after the prior finding of no disability. *Id.* at 63a. The agency's second determination thus does not call the first into question—it implicitly confirms it. Although the agency's first determination was likely res judicata for the period covered by petitioner's first application, nothing would have prevented the agency from finding an onset date of March 23, 2019 for the second application if the evidence warranted it. Petitioner does not explain what purpose could be served by a remand for the agency to reconsider her first application in light of its later, affirmative finding that she did not become disabled until more than two months after the period relevant to that first application.

Nor does petitioner identify any evidence underlying her second application that might cast doubt on the agency's initial determination. See Pet. App. 27a ("Medders identifies no evidence underlying the August 26, 2020 SSA notice that was not considered in the course of adjudicating her first applications for DIB and

SSI."). She points only to the decision itself—a decision that, on its face, implicitly reaffirms the initial denial.

Petitioner attempts to invert the burden, contending (Pet. 24) that a court should grant remand anytime the SSA issues a later, favorable decision unless *the agency* identifies "evidence in the available record explaining the divergent agency decisions." But the statute places the burden on the movant (here, petitioner) to make a "showing" that "there is new evidence which is material." 42 U.S.C. 405(g). The statute does not require the agency to show a lack of materiality or that the relevant agency decisions are consistent. Inverting the burden as petitioner suggests would conflict with Congress's "unmistakably clear" intent in sentence six of Section 405(g) "to limit the power of district courts to order remands for 'new evidence' in Social Security cases," including remands "undertaken because the judge disagrees with the outcome of the case even though he would have to sustain it under the 'substantial evidence rule.'" *Melkonyan* v. *Sullivan*, 501 U.S. 89, 100 (1991) (quoting Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 307, 94 Stat. 458 and S. Rep. No. 408, 96th Cong., 1st Sess. 58-59 (1979)).

A rule of automatic remand would also undermine principles of administrative res judicata. As noted, under SSA regulations and guidance, which petitioner does not challenge, the ALJ's decision denying petitioner's first application likely had res judicata effect for the period covered by that application. See 20 C.F.R. 404.957(c)(1); *HALLEX* I-2-4-40(J)(2). Petitioner's approach would, again, effectively reverse that principle. Rather than a prior decision controlling subsequent adjudications, a subsequent adjudication regarding a later period would undermine the finality of

the earlier decision. That result would disrupt the orderly administration of a program that adjudicates millions of claims each year.

2. Petitioner contends that the decision below conflicts with the Ninth Circuit's decision in *Luna* v. *Astrue*, 623 F.3d 1032 (2010), which she characterizes as having held that "a subsequent favorable SSA decision is 'evidence' for § 405(g) sentence-six purposes." Pet. 11 (citation omitted). Petitioner's allegation of a conflict is misplaced.[3]

In *Luna*, the agency denied the claimant's initial application for benefits, but then granted her second application with an onset date of "the day after her first application was denied." 623 F.3d at 1033. On judicial review of the initial application, "the parties agreed that the case should be remanded to the agency to reconcile the denial of benefits based on Luna's first application with the grant of benefits based on her second application," and their only dispute was "on the terms of the remand." *Id.* at 1034. The claimant "argue[d] that the proper remedy [wa]s a remand with an order requiring the payment of benefits for the time period relevant to her first benefits application," *id.* at 1033, whereas the agency contended that a remand for further proceedings was appropriate, *id.* at 1034. The court of appeals sided with the agency and affirmed the district court's remand for further proceedings. *Id.* at 1035.

Although petitioner contends (Pet. 12) that the Ninth Circuit's decision rested on the "new evidence" clause

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[3] Petitioner acknowledges that every other circuit to address the issue has adopted the same position as the decision below. See Pet. 13-14, 16 n.3 (noting published decision from the Sixth Circuit and unpublished decisions from the First, Second, Third, and Fourth Circuits).

of sentence six of Section 405(g), the actual basis for its decision is unclear. As discussed, sentence six contemplates two different types of remand: a remand on motion of the Commissioner for "good cause," and a remand on motion of either party for consideration of "new evidence which is material." 42 U.S.C. 405(g); see *Melkonyan*, 501 U.S. at 100 & n.2 (distinguishing between the two types of remand). Only the latter requires new "evidence." 42 U.S.C. 405(g). Perhaps because the agency agreed that remand was appropriate in *Luna*, the court in that case failed to distinguish between the two clauses. See 623 F.3d at 1034 (misquoting 42 U.S.C. 405(g) by running the two clauses together with an ellipsis). As a result, it is unclear how the Ninth Circuit would resolve the question presented here if it was squarely confronted with a case in which the agency did not consent to remand.

Even assuming *Luna* addressed the permissibility of remand in the absence of an agreement by the agency, it would not help petitioner. Contrary to petitioner's contention, the *Luna* court did not hold that "subsequent favorable disability decisions" are themselves new "'evidence' that can support a remand" under sentence six. Pet. 12 (citation omitted). Instead, the court remanded in light of "[t]he 'reasonable possibility' that the subsequent grant of benefits *was based on* new evidence not considered by the ALJ as part of the first application." *Luna*, 623 F.3d at 1035 (emphasis added; citation omitted).

That rationale in *Luna* was erroneous. "[T]he clear language of § 405(g) * * * requires a '*showing that there is new evidence* which is material,'" and does not authorize remand based on the mere "*possibility* of new and material evidence." *Allen* v. *Commissioner*, 561

F.3d 646, 653 (6th Cir. 2009) (quoting 42 U.S.C. 405(g)). But regardless, the court's holding is different than a holding that the agency decision itself constitutes new evidence.

The aspects of the subsequent agency decision that prompted the *Luna* court to posit the possible presence of new, material evidence are also absent here, suggesting that petitioner could not prevail even in the Ninth Circuit. In *Luna*, not only did the agency agree that remand was appropriate, but its determination on claimant's second application found an onset date of "one day after the date Luna was found not to be disabled based on her first application." 623 F.3d at 1034; see *ibid.* (noting that "in certain circumstances, an award based on an onset date coming in immediate proximity to an earlier denial of benefits is worthy of further administrative scrutiny") (citation omitted). In this case, in contrast, the agency's favorable determination on the second application specifically rejected petitioner's proffered onset date and found that she did not become disabled until over two months after the ALJ had rejected a finding of disability on her first application. Pet. App. 2a, 63a. The agency's notice of its second determination thus does not on its face suggest that additional, material evidence exists for the period relevant to the initial benefits application.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
LEWIS S. YELIN
WEILI J. SHAW
Attorneys

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