No. 15-1150

IN THE

Supreme Court of the United States

SONYA HUNTER,

Petitioner,

v.

CAROLYN W. COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY

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PETITIONER'S REPLY

The petition highlighted an acknowledged circuit conflict over a frequently recurring issue of federal law: whether a favorable Social Security disability decision by one Administrative Law Judge (ALJ) can constitute material new evidence that a previous adverse disability decision by a different ALJ was wrong, and thus warrant a remand to the Commissioner under sentence six of 42 U.S.C. § 405(g). Courts in the Ninth Circuit order such remands unless the decisions are easily reconcilable. Courts in the Sixth Circuit do not remand because that court determined that the second decision is not material evidence.

In the precedential opinion in this case, the Eleventh Circuit declared that "[t]he Sixth Circuit's position is correct, the Ninth Circuit's is wrong." Pet. App. 6a. It then went even further than the Sixth Circuit by eschewing the materiality inquiry altogether and holding that the second disability decision is not evidence *at all*. *Id*.

The government urges this Court to deny certiorari because "[t]he judgment of the court of appeals is correct, and there is no conflict among the circuits on the question presented by petitioner's case." BIO 5. But the government does not defend the sole basis for the decision below: the categorical holding that a subsequent favorable Social Security disability decision is not "evidence." Instead, the government argues that "[e]ven 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." *Id*. 6. The government bases that argument on

speculation that the two ALJ decisions in this case can perhaps be reconciled.

The government's refusal to defend the Eleventh Circuit's rule is itself a strong argument in favor of certiorari. The petition was not subtle in its attack on this rule, describing it as "manifestly" and "egregiously wrong." Pet. 19. Apparently the government does not disagree—yet that rule is now enshrined in a precedential opinion in the second-most populous circuit in the nation. And under that rule, all of the government's factual tap dancing is irrelevant because even if the two ALJ decisions cannot be reconciled with each other, the Eleventh Circuit would not treat the second one as evidence justifying a remand.

The government's attempt to reconcile the two ALJ decisions also fails on its own terms. As the Eleventh Circuit acknowledged, the decisions are "seemingly irreconcilable" because one judge determined that Hunter was not disabled on February 10, 2012, and another determined that she was disabled the very next day—even though her health had not materially changed overnight. Pet. App. 3a. The government cannot reconcile those two findings, and so the proper course is a remand to the Commissioner to determine whether the first ALJ decision should be revisited in light of the second.

I. The Circuits Are Divided Over The Question Presented.

The circuits are in open conflict over whether and when a district court should remand a case to the Commissioner after a second ALJ issues a favorable disability decision. Cases raising the question fall into three categories: (1) cases in which the two ALJ decisions are easily reconcilable—for example because they relate to periods of time separated by months or years, and the applicant's health worsened materially during the intervening time period; (2) cases in which it is unclear on the record before the court whether the two ALJ decisions are consistent or not; and (3) cases in which the two ALJ decisions clearly conflict. The Eleventh Circuit's rule—that decisions are not evidence at all—denies a remand in all three categories. The Sixth Circuit's rule—that subsequent decisions are not material evidence—has so far produced the same result. *See Allen v. Comm'r of Soc. Sec.*, 561 F.3d 646, 653 (6th Cir. 2009). On the other hand, the Ninth Circuit's rule, which it adopted at the government's urging—that courts should remand unless the ALJ decisions are easily reconcilable—denies a remand in the first category, but requires a remand in the other two. *Luna v. Astrue*, 623 F.3d 1032 (9th Cir. 2010). That is a clear circuit split, and the government does not dispute that the split will not abate without this Court's intervention.

The government's attempt to evade the split turns on its contention that the ALJ decisions in this case are easily reconcilable, so that the result would be the

same under the rule announced by the Ninth Circuit in *Luna*. BIO 8.

Even if the government is correct, the vehicle problem it is attempting to create is minor (like maybe a scratch on the bumper): there is no allegation that Hunter's arguments have not been preserved, or that the Court lacks jurisdiction. Thus, the government does not dispute that the Court can resolve an entrenched and growing circuit split by granting certiorari. Its point is only that the Eleventh Circuit might reach the same result on remand even under the correct legal rule. This argument faces a tall hurdle because if there is any ambiguity about whether the result would be different under the Ninth Circuit's rule, then the Court should grant certiorari, resolve the circuit split, and allow the lower courts to apply the correct rule in the first instance.

The government trips over that hurdle. Most importantly, the Eleventh Circuit itself rejected any distinction between this case and *Luna*, holding that "[l]ike this case, *Luna* involved a claimant's two successive applications for disability insurance benefits and *two seemingly irreconcilable ALJ decisions*." Pet. App. 5a (emphasis added). That clear statement in a precedential opinion ought to end this factual debate and establish that the case is a suitable vehicle to address the conflict with *Luna*.

A review of the record only confirms that the Eleventh Circuit's concession was correct. The government attempts to distinguish *Luna* on two grounds: that the second ALJ decision in this case addressed a "different time period," and also relied on

"some different evidence" than the first. BIO 8. Neither distinction is persuasive.

First, the two ALJ decisions here address adjacent time periods, which is the same as *Luna*. Here, the second ALJ found Hunter to be disabled starting the day after her previous application was denied. *Cf.* *Luna*, 623 F.3d at 1034 ("The Notice of Award indicates that the Commissioner found Luna disabled . . . one day after the date Luna was found not to be disabled based on her first application."). As the petition explains, Hunter's health did not suddenly deteriorate overnight, and so in this case the temporal proximity between the two decisions raises questions about whether she actually was disabled during at least part of the period for which she was denied benefits. Pet. 21-22. That is exactly the possible inconsistency that the government conceded warranted a remand in *Luna*.

Second, the government argues that the latter ALJ relied on "some different evidence" than the former. BIO 8. According to the government, this renders the second decision immaterial to the first application if the new evidence relates to Hunter's health only during the subsequent time period. *Id*. 6.

None of the evidence the government cites, however, clearly reconciles the two ALJ decisions. Specifically, none of the evidence explains how Hunter could have been disabled on February 11, 2012, but not on February 10. The second ALJ never so held—and the government does not deny the tremendous overlap between the two applications: both allege the same disabilities, and the vast majority of the evidence

supporting the second application was also presented in support of the first.

The three pieces of evidence the government identifies as new do not show that Hunter's condition worsened materially. First, the government points to a "recent MRI" showing "moderate" and "mild" compression in the spine. Pet. App. 93a. The date of that MRI is not in the record, and so we do not know when it was taken, and therefore whether the conditions it showed existed prior to February 11, 2012. But in any event, the second ALJ only cited this evidence as proof that Hunter experiences neck pain—which the first ALJ also found. *Id*. 47a, 60a. Second, the government cites lab tests confirming a thyroid condition, which the second ALJ noted was "chronic" and warranted "ongoing Levothyroxine treatment." Pet. App. 92a. But Hunter had that condition and was taking the same medication for it during her first hearing. *See id*. 47a (stating that she was taking Synthroid, which is the brand name for levothyroxine). The first ALJ did not deem that ailment severe, but that is because the first ALJ erred in downplaying the severity of Hunter's impairment—not because the condition got materially worse on February 11. Moreover, like the MRI, the date of the lab tests is not in the record, and so the government cannot say with any confidence that the condition they depict did not exist on February 10. Finally, the government points to the opinion of a cardiologist that Hunter is "'unable to work' due to fibromyalgia, arthritis, and prior neck surgeries." Pet. App. 94a. The second ALJ entitled this opinion to "partial weight," finding that it was "[s]omewhat consistent with the record as a whole." *Id*.

But petitioner had these conditions during her first application; both ALJs found that she had severe fibromyalgia and complications from her surgeries. To the extent the cardiologist's opinion supports Hunter's claim that her impairments were so severe that she could not work, the same was true during the period of her first application.

At a minimum, then, the two ALJ decisions are not "easily reconcilable" on the basis of the record before the Court. In the Ninth Circuit, that is enough for a remand. *See Luna*, 623 F.3d at 1035. This case thus squarely implicates an acknowledged circuit split, which the Court should resolve.[1]

Additionally, courts in the Fourth and the Fifth Circuits have rejected the Eleventh Circuit's conclusion that subsequent disability decisions are not evidence. *See Bird v. Comm'r of Soc. Sec. Admin.*, 699 F.3d 337, 343 (4th Cir. 2012) (remanding under sentence four of 42 U.S.C. § 405(g) when the Veterans Administration had found the applicant disabled); *Latham v. Shalala*, 36 F.3d 482, 483 (5th Cir. 1994) (remanding under sentence six). These circuit courts have recognized that, per the Commissioner's own regulations, disability determinations by other

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[1] The government argues that courts in the Ninth Circuit have misinterpreted *Luna* to "authoriz[e] a remand anytime a subsequent favorable agency decision is issued." BIO 8. To the extent that courts are taking the Ninth Circuit's rule and running with it, that favors of certiorari because the results in such cases contrast starkly with those in the Sixth and Eleventh Circuits.

agencies are not only evidence, but are entitled to substantial weight. District courts have applied these precedential holdings to conclude that subsequent decisions by the Social Security Administration itself are likewise material evidence warranting a sentence six remand. *See, e.g.*, *Woodall v. Colvin*, No. 5:12-CV-357-D, 2013 WL 4068142, at *6 (E.D.N.C. Aug. 12, 2013); *Domingue v. Astrue*, No. CIV.A. 12-1870, 2013 WL 1290269, at *1-*2 (E.D. La. Mar. 7, 2013), *report and recommendation adopted*, 2013 WL 1290231 (E.D. La. Mar. 28, 2013).

The government blows past these decisions in a single paragraph, noting only that *Bird* did not involve a sentence six remand, and *Latham* involved a Veterans Affairs decision referring to a time period that overlapped the period for which Social Security benefits were denied. BIO 9. These distinctions are irrelevant. The key point for the circuit split is that the Eleventh Circuit holds that disability decisions are not evidence; the Fourth and Fifth Circuits hold that they are. *See, e.g.*, *Brunson v. Colvin*, No. 5:11-CV-591-FL, 2013 WL 3761305, at *2 (E.D.N.C. July 16, 2013) (noting that *Bird* is "inconsistent with" the Sixth Circuit's decision in *Allen*, and further explaining that "[w]hile *Bird* involved a remand under sentence four of § 405(g), the reasoning used by the Fourth Circuit in describing an agency decision as evidence itself is a compelling basis for treating the decision by the Social Security Administration as evidence itself here.").

It is also immaterial that *Bird* did not involve a sentence six remand because the court remanded the case to the ALJ with instructions "to review all the

evidence in the record to determine whether Bird was disabled at any time," which is essentially the same inquiry required in a sentence six remand. 699 F.3d at 345. A sentence-six remand was inappropriate because the applicant had not shown "good cause" for failing to produce the favorable decisions earlier. *Id*. at 345 n.6. Hunter, however, has "good cause" because the second ALJ decision did not exist during her first hearing.

It is similarly irrelevant that the Veterans Administration decision in *Latham* involved an overlapping time period. The overlap only matters because it proves that the two administrative decisions are inconsistent. But as explained above, temporal overlap is not the only way to prove inconsistency; close temporal proximity is good enough in the absence of intervening deterioration in the applicant's health.

II. The Question Presented Is Important.

The government does not seriously dispute the importance of the question presented to claimants and to the disability benefits system as a whole. Indeed, the government acknowledges that the Social Security disability system "adjudicates millions of claims each year," which is why the question arises so frequently. BIO 7. The government argues that adopting Hunter's rule would disrupt the "orderly administration" of that system—but it is odd to describe as "orderly" a system where the two most populous circuits in the country disagree over the proper way to adjudicate claims. *Id*.

Aside from the circuit split, the petition showed that the Eleventh Circuit's rule inevitably makes disability determinations look arbitrary because it

allows conflicting decisions to stand without administrative clarification. Pet. 18. What is more, that arbitrariness hurts vulnerable citizens who are disabled, poor, and unable to make ends meet. *Id*. 17-18.

III. The Decision Below Is Still Manifestly Wrong.

The government focuses on the merits (BIO 5-7)—but in light of the circuit split, its defense of the decision below—or more accurately, of the Sixth Circuit's rule—only favors certiorari because if the government is correct, then the Eleventh Circuit still applied the wrong rule, and courts in the Ninth Circuit have applied a *different* wrong rule to reach the wrong result in dozens of cases.

The government also does not address the principal reasons why the decision below is incorrect. Evidence is "material" within the meaning of 42 U.S.C. § 405(g) if it creates a "reasonable possibility" that the result would be different—a standard that does not rise even to a probability. *See* Pet. 20. Hunter argues that because the second ALJ decision in this case cannot easily be reconciled with the first, it constitutes material evidence of her disability during at least part of the period covered by the first application. The government responds that it might be possible to reconcile the two ALJ decisions, citing the "different timeframe and administrative record." For the reasons explained in Part I, *supra*, that is wrong. Indeed, the government itself has repeatedly agreed that a remand is appropriate in cases like this one, including in court

and in its manual for administrative appeals. *See* Pet. 20-21.

The government observes that the second ALJ declined to reopen the first application. BIO 7. According to the government, this may mean that the evidence presented to the second ALJ was not material to the first application. *Id*. 7 n.3. That inference is strained. First, to the best of our knowledge, the second ALJ was not asked to review the first decision, and so the fact that he did not, sua sponte, order the proceedings reopened says little about whether his decision either constituted or relied upon new evidence material to the first application. Second, the government's argument proves too much because reopening for good cause is always available in any case in which a sentence six remand is requested—but it would gut sentence six if courts denied remands every time an ALJ declined to reopen an application. Third, to the extent that the two ALJ decisions are based on similar administrative records (contrary to the government's assertion that the records are very different), it makes sense that the second ALJ would not reopen the first application based on new evidence. That does not mean that the second ALJ decision itself, however, is immaterial: to the extent that decision highlights errors in the first ALJ decision, it would be highly material. And finally, the second ALJ may have erred in refusing to reopen the first application. That decision does not bind this Court or a district court deciding whether to remand under sentence six.

The government attacks a straw man when it argues that "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." BIO 6. Hunter never urged an "automatic" remand rule—and the Court can rule in her favor without adopting one. Instead, the rule that Hunter urges the Court to adopt is the same one that the Ninth Circuit adopted in *Luna*: when two ALJ decisions are not "easily reconcilable on the record before the court," then a court reviewing one of those decisions should remand to the Commissioner to resolve the tension under sentence six. 623 F.3d at 1035.

When, as here, an applicant receives conflicting disability determinations relating to adjacent days, with no evidence in the record suggesting an overnight change to her health, a remand is the only reasonable result. Contrary to the government's suggestion (BIO 7), a remand would not frustrate the statutory scheme, but would instead provide an efficient mechanism for ensuring that administrative decisions are consistent and accurate, and for preserving an appropriate division of labor between the Commissioner and the courts.

CONCLUSION

The split is real and the question presented is important. Certiorari should be granted.

Respectfully submitted,

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