No. 02-763

# In the Supreme Court of the United States

JOANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

*v.*

PAULINE THOMAS

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

## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

The Third Circuit's decision in this case invalidates the Commissioner's longstanding construction of a central definitional provision of the Social Security Act. Respondent does not dispute that in so doing the Third Circuit created a square conflict with four other circuits. Instead, respondent defends the decision below on the merits. That defense, however, does not eliminate the need for this Court's review to restore uniformity to circuit law, does not undermine the decision's programmatic significance, and is unpersuasive on the merits.

### 1. The Decision Below Conflicts With The Decisions Of Four Other Circuits

The Third Circuit majority held that a claimant who has the physical and mental capacity to meet the demands of a previous job may nonetheless be "disabled" within the meaning of the Social Security Act, unless the previous job exists in significant numbers in the national economy. See Pet. App. 6a-8a. As the petition explains (at 18-20), and as the decision below acknowledges (Pet. App. 8a n.2, 14a), that holding conflicts with *Quang Van Han* v. *Bowen*, 882 F.2d

1453 (9th Cir. 1989); *Garcia* v. *Secretary of HHS*, 46 F.3d 552 (6th Cir. 1995); *Pass* v. *Chater*, 65 F.3d 1200 (4th Cir. 1995); and *Rater* v. *Chater*, 73 F.3d 796 (8th Cir. 1996). Those decisions upheld the Commissioner's contrary construction, concluding that a claimant's physical and mental ability to perform a former job precludes a finding of disability, without inquiry into whether the previous job exists in significant numbers in the national economy. In *Quang Van Han*, for example, the court of appeals observed:

> The Act sets out two requirements for disability: A claimant must (1) be "unable to do his previous work," and (2) be unable to "engage in any other kind of substantial gainful work which exists in the national economy." * * * Although the Act requires "other" work to exist in the United States, it places no such limitation on "previous" work; it is therefore reasonable to infer that the ability to perform previous work renders a claimant ineligible for benefits whether or not that work exists in the United States.

882 F.2d at 1457. Accord *Garcia*, 46 F.3d at 558 (upholding agency construction that the "existence of the previous work in the national economy * * * need not be considered"); *Pass*, 65 F.3d at 1207 ("The question of whether past work continues to exist is * * * not relevant."); *Rater*, 73 F.3d at 799 (statute "does not require a particular job to exist in significant numbers in the national economy in order to constitute past relevant work").

Respondent makes no effort to reconcile the decision below with the decisions of those other courts of appeals. Instead, she ignores the circuit conflict entirely. The circuit conflict, particularly in these circumstances, is by itself a sufficient reason to grant the petition for a writ of certiorari. "It is, and has been, the intent of the statute to provide a definition of disability which can be applied *with uniformity and consistency throughout the Nation*." S. Rep. No. 744, 90th Cong., 1st Sess. 49 (1967) (emphasis added). Absent

further review, the definition of disability will vary from circuit to circuit, with one construction prevailing in the Third Circuit, and another in the Fourth, Sixth, Eighth, and Ninth Circuits. A claimant's entitlement to benefits under the Act ought not depend on the happenstance of where the Commissioner's decision is reviewable.

**2. The Decision Below Is Programmatically Significant**

Attempting to minimize this case's significance, respondent asserts that it "does not impair the Commissioner's ability to make regulations nor does it invalidate the regulation under discussion in the instant case." Br. in Opp. 1. That is incorrect.

As an initial matter, the decision *does* invalidate the Commissioner's regulations. A claimant is not disabled under those regulations if she is physically and mentally capable of performing her past work, without regard to whether that past work exists in significant numbers in the national economy. The regulations thus provide that, at step four of the sequential evaluation process, the Commissioner will examine the claimant's "residual functional capacity and the physical and mental demands of the work [the claimant] ha[s] done in the past"; if the claimant "can still do this kind of work," the Commissioner will find that the claimant is "not disabled." 20 C.F.R. 404.1520(e), 416.920(e); see 20 C.F.R. 404.1520(f), 416.920(f) (claimant must be unable to "do any work [she] ha[s] done in the past *because* [the claimant] ha[s] a severe impairment[ ]") (emphasis added). The Commissioner does not ask whether there is other work the claimant can do, and whether that other work exists in significant numbers in the national economy, unless the impairment renders the claimant physically or mentally incapable of performing her former work. See 20 C.F.R. 404.1561, 416.961 ("[I]f your residual functional capacity is not enough to enable you to do any of your previous work, we must * * * decide if you can do any other work," which

"must exist in significant numbers in the national economy."). That, moreover, has been the Commissioner's position for decades, as reflected in early cases,[1] the Commissioner's previous regulations,[2] and Social Security Rulings,[3] which respondent nowhere distinguishes. See also Pet. App. 11a (acknowledging that "a literal reading of the regulation" supports the Commissioner's construction).

Respondent points out that, under the Commissioner's regulations, the physical and mental ability to perform past work does not matter unless the past work is "relevant." Br. in Opp. 4-5. The court of appeals, however, did not purport to rely on the "relevance" requirement, and the Commissioner's regulations make it clear that "relevance" is primarily a question of duration and recency—for how long and how long ago the job was held—not whether the particular past work exists in significant numbers in the national economy. See 20 C.F.R. 404.1565(a), 416.965(a); Br. in Opp. 5 (stressing "'recency' requirement"). In other words, past work can be

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[1] In *May* v. *Gardner*, 362 F.2d 616, 618 (6th Cir. 1966), for example, the court of appeals upheld the denial of disability benefits where the claimant "failed to establish" that he was "disabled from following his usual occupation as dispatcher in the mines," notwithstanding the fact that such work was no longer available. "We have * * * consistently held that, once the [Commissioner] finds * * * that the claimant is able to engage in a former trade or occupation, such a determination 'precludes the necessity of an administrative showing of gainful work which the [claimant] was capable of doing and the availability of any such work.'" *Ibid.*; see Pet. 3-4.

[2] The Commissioner's 1978 regulations, which formalized the five-step sequential evaluation process, similarly distinguished between past work (which need not exist in significant numbers in the national economy) and other work (which must exist in significant numbers in the national economy). See, *e.g.*, 20 C.F.R. 404.1503(e) and (f) (1979); 20 C.F.R. 404.1505(f) (1979); see also 20 C.F.R. 404.1502(b) (1961), discussed at p. 8, *infra*.

[3] See Pet. 8-9 (discussing Social Security Ruling (SSR) 82-40 (1982) (*available in* 1982 WL 31388, at *2)). SSR 82-40 explains: "The law does not qualify 'previous work' but does specify that 'other . . . work' must exist in significant numbers in the national economy."

"relevant" whether or not it exists in significant numbers in the national economy.[4] Even if there could be doubt about that interpretation of the regulations—and there is none—the Commissioner's construction of her regulations is entitled to deference. See *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001); *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997); *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994).[5]

In any event, the decision below unquestionably forecloses the Commissioner's longstanding construction of the statute. Declaring that the "statutory language is unambiguous," Pet. App. 8a, the court of appeals held that "a claimant's ability to perform 'previous work' is not disqualifying if that work no longer 'exists in the national economy'" in significant numbers, *ibid.* To the extent the Commissioner's interpretation is to the contrary, the court declared, "the regu-

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[4] Respondent's reliance on the agency's rationale for the "relevance" requirement, see Br. in Opp. 5-6, is equally misplaced. The 15-year rule for "relevance" merely establishes a presumption that makes claims resolution easier, because it eliminates the need to examine every job the claimant held during her potentially long life. As this Court recently explained, the Act's "complexity, the vast number of claims that it engenders, and the consequent need for agency expertise and administrative experience lead us to read the statute as delegating to the Agency considerable authority to fill in, through interpretation, matters of detail related to its administration." *Barnhart* v. *Walton*, 122 S. Ct. 1265, 1273 (2002).

[5] Respondent also asserts that she "can't *do* her former job because that job is no longer being *done* anywhere." Br. in Opp. 6. Under the Commissioner's regulations, however, the question is not job availability; it is the claimant's physical and mental capacity. See 20 C.F.R. 404.1520(e), 416.920(e) (Commissioner examines "residual functional capacity and the physical and mental demands of the work [the claimant] ha[s] done in the past" to see if the claimant "can still do this kind of work."); 20 C.F.R. 404.1560(b), 416.960(b) (Commissioner determines whether claimant "still ha[s] the residual functional capacity to do [that] past relevant work"). If the claimant has the physical and mental capacity to do her former work, the claimant is not disabled. Changes in the economy may render the claimant unemployed, but they do not render the claimant disabled. See pp. 8-9, *infra*.

lation and any Social Security rulings embodying that interpretation conflict with the statute and are * * * invalid." *Id.* at 11a n.4. Respondent thus errs in asserting that the decision below "does not impair the Commissioner's ability to make regulations." Br. in Opp. 1.

**3. The Third Circuit's Decision Is Incorrect**

The bulk of respondent's brief is directed not to whether this case warrants the Court's review, but to whether the Third Circuit's decision is correct. Echoing the decision below, respondent argues that, because "'*any other work*' must exist in substantial numbers in the economy so too must '*previous work*'." Br. in Opp. 7. For the reasons given in the petition (at 22-27), however, that does not follow from the Act's text. To the contrary, in the Act itself, the words "which exists in the national economy" immediately follow the phrase "any other kind of substantial gainful work." As a result, they are most naturally understood as modifying that phrase, not the more distant phrase "previous work." See *Quang Van Han*, 882 F.2d at 1457.

Further, as the petition also shows (at 22-24), the Third Circuit's grammatical analogy and its reliance on "common usage" are misplaced. The legislative history, moreover, supports the Commissioner's construction. See Pet. 27-28. And the court of appeals' and respondent's newfound claim of textual clarity is severely undermined by the fact that, in the more than three decades that have elapsed since Section 423(d)(2)(A) was enacted, four courts of appeals have upheld the Commissioner's construction and no court of appeals ever adopted the contrary construction until the decision in this case. Because the statutory text is at most ambiguous, the court of appeals erred in displacing the Commissioner's reasonable construction with its own. *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983) (review of regulations implementing Social Security Act "is limited to determining whether the regulations promulgated exceeded the [Commissioner's] statutory authority and whether they are arbitrary and capri-

cious"); *Bowen* v. *Yuckert*, 482 U.S. 137, 145 (1987) (same); see *Barnhart* v. *Walton*, 122 S. Ct. 1265, 1273 (2002).

Respondent declines to answer those arguments directly. Instead, she argues that there is no "good reason" for the Commissioner's construction as a matter of policy. Br. in Opp. 8. But the certiorari petition itself (at 25-27) offers several reasons, which petitioner largely ignores.

First, Congress and the Commissioner are entitled to rely on the claimant's physical and mental capacity to perform her past work as an efficient and accurate measure of her actual ability to engage in substantial gainful activity, without inquiring into whether that specific job still exists. As the petition explains:

> Congress required a showing of physical or mental inability to perform one's prior work not because that prior work is necessarily available, but rather because the ability to perform that job furnishes individualized proof that the individual *can* work. * * * Congress simply did not accept the * * * assumption that there are individuals capable of performing one and only one narrow type of work. As the dissenting judges observed below, "the point * * * is not that [a claimant] can actually be employed in her past job, but that she is able to do a certain *level* of work."

Pet. 25-26 (quoting Pet. App. 23a).

Second, there was good reason for Congress to require that "other work," but not "previous work," exist in significant numbers in the national economy. Any inquiry into whether the claimant can do "other work" is, by nature, hypothetical and potentially unbounded, since it looks to the claimant's ability to perform the myriad jobs she has not performed before. Congress reasonably chose to circumscribe the scope of that inquiry by narrowing the jobs that may be considered to those that exist in significant numbers in the national economy. The inquiry into whether the claimant can perform her past work, in contrast, is concrete,

historical, and inherently bounded by the types of jobs the claimant has actually held before. Congress thus had no reason to circumscribe the previous-job inquiry by requiring that a former job exist in significant numbers in the national economy.

Third, Congress wished to draw a clear distinction between the disability program and programs concerned with unemployment. Pet. 26-27. For that reason, Congress defined "disability" as the "inability to engage in any substantial gainful activity *by reason of* any medically determinable physical or mental impairment" of the requisite duration. 42 U.S.C. 423(d)(1)(A), 1382c(a)(3)(A) (emphasis added). The Commissioner's early regulations accordingly required that the "physical or mental impairment * * * be *the primary reason* for the individual's inability to engage in substantial gainful activity." 20 C.F.R. 404.1502(b) (1961) (emphasis added). If "an individual remains unemployed *for a reason or reasons not due to his physical or mental impairment but because of * * * technological changes in the industry in which he has worked*, or local or cyclical economic conditions," the regulations clarified, "such individual may not be considered under a disability." *Ibid.* (emphasis added); 20 C.F.R. 404.1502(b) (1969) (same). See *Massey* v. *Celebrezze*, 345 F.2d 146, 149 (6th Cir. 1965) (noting Congress's awareness of those requirements in 1960 legislative history, and ordering an award of benefits only after "emphasiz[ing] that" the claimant "was not unemployed because of * * * technological changes in the industry in which he had been employed"). Here, respondent's unemployment resulted from technological changes that, according to her, made her former job as an elevator operator obsolete, not from the onset of physical or mental impairments that prevent her from performing that prior work.

Contrary to respondent's submission, that result is not "absurd," and the Commissioner nowhere proposes "sending an applicant back in time to resume a job no longer available in the economy," Br. in Opp. 11. Instead, Congress reason-

ably concluded that claimants who are physically and mentally capable of performing their prior work are not disabled, because their ability to perform prior work is an individualized and accurate predictor of their ability to engage in substantial gainful activity. And Congress concluded that those who lose their prior jobs because of economic or technological changes, rather than because of the onset of a physical or mental impairment, should seek unemployment rather than disability benefits.

The court of appeals' construction, in any event, generates anomalies of its own. For example, because the court of appeals would require any previous work to exist in the national economy in significant numbers, it would permit an individual holding a rare or unusual job to quit her job and collect disability benefits—even if the claimant still can do that job, and her employer wants her to return. See Pet. 25. Respondent acknowledges as much. Br. in Opp. 12.

Respondent, however, argues (Br. in Opp. 12-13) that paying disability benefits to claimants who can work is not anomalous, because that could happen with respect to claimants who have impairments that are "listed" (or are equivalent to "listed" impairments). "Listed" impairments are, as an administrative matter, presumed to be sufficiently severe to preclude substantial gainful activity. See 20 C.F.R. 404.1520(d), 416.920(d). Because the "listings" are presumptions, on occasion they may cause benefits to be awarded to claimants who can work despite presumptively disabling conditions. Congress, however, specifically endorsed the use of listings and other presumptions, and their use promotes uniformity and administrability. See S. Rep. No. 744, *supra*, at 49 ("In most cases the decision that an individual is disabled can be made solely on the basis of an impairment, or impairments, which are of a level of severity presumed (under administrative rules) to be sufficient so that * * * it may be presumed that the person is unable to so engage [in substantial gainful activity] because of the impairment or impairments."). Indeed, the listings and other presumptions

are critical to the Commissioner's ability to resolve the millions of disability claims filed each year. See *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 804 (1999) ("presumptions" necessary "to produce" listings "grow out of the need to administer a large benefits system efficiently"); *Yuckert*, 482 U.S. at 153 (presumptions in sequential evaluation process "contribute to the uniformity and efficiency of disability determinations").

Respondent, by contrast, nowhere shows that Congress intended to award benefits to claimants who can, but choose not to, work in their former jobs, based not on the presumed severity of the claimants' medical condition, but on the rarity of their former positions. Nor would awarding benefits to such individuals serve administrative efficiency or uniformity. To the contrary, respondent's and the court of appeals' approach would unnecessarily complicate claims resolution. Under that approach, the Commissioner not only would have to determine whether the claimant is physically and mentally capable of performing her prior job, but also would have to conduct a potentially difficult inquiry into whether the prior job exists in significant numbers in the national economy. Given the millions of disability claims filed each year, that burden would be significant. See Pet. 28-29; Pet. App. 18a (Rendell, J., dissenting).

In any event, even setting aside programmatic concerns, there is no justification for judicial imposition of requirement in one circuit while the Commissioner follows a different rule in the rest.

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For the reasons stated above, and in the petition for a writ of certiorari, it is respectfully submitted that the petition should be granted.

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