No. 22-1027

In the Supreme Court of the United States

THE DUTRA GROUP, INC., ET AL., PETITIONERS

v.

KELLY ZARADNIK, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq*., gives parties 30 days to appeal an order of an administrative law judge (ALJ) to the Benefits Review Board, and 60 days to seek review of a Board decision in the courts of appeals. 33 U.S.C. 921(b)(2) and (c). The questions presented are:

1. Whether the court of appeals correctly concluded that a stipulation the private parties filed with the ALJ did not qualify as a notice of appeal to the Board seeking review of the ALJ's subsequent order approving that stipulation.

2. Whether the court of appeals would have had jurisdiction over the case if petitioners had appealed the ALJ's order directly to the court of appeals within 60 days.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is available at 2023 WL 332750. The decision of the Benefits Review Board of the United States Department of Labor (Pet. App. 6a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 2023. The petition for a writ of certiorari was filed on April 19, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. 901 *et seq.*,

establishes a workers' compensation scheme for certain maritime workers. See 33 U.S.C. 902(3). Administrative Law Judges (ALJs) in the Department of Labor adjudicate Longshore Act claims. 33 U.S.C. 919(d). An ALJ's order becomes final 30 days after it is filed "in the office of the [district director] * * * unless proceedings for the suspension or setting aside of such order are instituted" with the Benefits Review Board (Board). 33 U.S.C. 921(a).[1]

The Board is "authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest." 33 U.S.C. 921(b)(3). The Board has promulgated regulations governing the procedures for such appeals. Those regulations provide that notices of appeal "must be filed within 30 days from the date upon which a decision or order has been filed" with the district director. 20 C.F.R. 802.205(a). Failure to file within that time "shall foreclose all rights to review by the Board with respect to the case or matter in question," and the Board will "summarily dismiss[]" such untimely appeals "for lack of jurisdiction." 20 C.F.R. 802.205(c).

For purposes of the 30-day time limit, notices are considered to be filed when mailed to or received by the Board. 20 C.F.R. 802.207(a)(1) and (b). The regulations also provide the Board with discretion to treat a notice of appeal erroneously "submitted to any other agency

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[1] Although the statute identifies the official responsible for filing compensation orders as the "Deputy Commissioner," the title of the position is now "District Director." See 20 C.F.R. 701.301(a)(7) ("The term District Director is substituted for the term Deputy Commissioner used in the statute. This substitution is for administrative purposes only and in no way affects the power or authority of the position as established in the statute.") (emphasis omitted).

or subdivision of the Department of Labor or of the U.S. Government or any State government" as if it was filed with the Board "as of the date it was received by the other governmental unit if the Board finds that it is in the interest of justice to do so." 20 C.F.R. 802.207(a)(2).

The form and required contents of a notice of appeal are governed by 20 C.F.R. 802.208. Subsection (a) identifies various information that "shall" be contained in a notice of appeal. 20 C.F.R. 802.208(a). But subsection (b) broadly provides that "Paragraph (a) of this section notwithstanding, any written communication which reasonably permits identification of the decision from which an appeal is sought and the parties affected or aggrieved thereby, shall be sufficient notice for purposes of § 802.205." 20 C.F.R. 802.208(b).

The Board's decisions are appealable to the federal court of appeals for the circuit in which the injury occurred. 33 U.S.C. 921(c). A petition for review must be filed with the court within 60 days of the Board's decision. *Ibid.*

2. Respondent Kelly Zaradnik claimed benefits under the Longshore Act for injuries to her hip, back, and lungs sustained over the course of her employment as a pile driver. Pet. App. 60a. In August 2015, the ALJ found that Zaradnik was temporarily (but not permanently) totally disabled, and that her injuries were caused, at least in part, by her employment with petitioner The Dutra Group.[2] *Id.* at 58a-159a. On reconsideration, the ALJ considered and rejected a number of arguments by petitioners. *Id.* at 172a-188a. Both petitioners and Zaradnik timely appealed to the Board.

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[2] The Dutra Group's insurer is also a petitioner in this case. See Pet. ii. This brief refers to both the employer and the insurer as petitioners throughout.

The Board issued a decision affirming the ALJ's decision in most respects, including the finding that Zaradnik's injuries were caused by her work for The Dutra Group. Pet. App. 31a-57a. But the Board vacated the finding that Zaradnik's disability was temporary rather than permanent and remanded the case to the ALJ for further consideration of that issue. *Id.* at 53a. Petitioners moved for reconsideration en banc, which the Board denied. *Id.* at 162a-171a.

Petitioners sought review in the Ninth Circuit, which dismissed the appeal because the Board's order remanding the case to the ALJ was not a final order. Pet. App. 29a-30a.

After the case was returned to the ALJ, the private parties asked the ALJ to approve stipulations resolving the remaining issues pending before him. Pet. App. 23a-28a. The request explained that "[i]t is the parties' understanding that the Trial level issues need to be resolved before the [Nin]th Circuit can take up the causation appeal." *Id.* at 24a. The parties stipulated that Zaradnik was permanently and totally disabled as of January 28, 2012. *Id.* at 24a-25a. And the parties "acknowledge[d] that [petitioners] may now proceed on the causation issue to the [Nin]th Circuit." *Id.* at 24a.

On March 12, 2021, the ALJ issued an order approving the stipulations. Pet. App. 12a-13a. The ALJ also cancelled the scheduled hearing "[b]ecause these stipulations dispose of the issues * * * on remand from the Benefits Review Board." *Id.* at 12a.

The ALJ's order approving the stipulation was filed in the office of the district director and served on the parties on March 17, 2021. Pet. App. 14a-20a. The service sheet informed the parties that "[a]ny notice of appeal must be sent by mail or otherwise presented to the

Clerk of the Benefits Review Board in Washington, D.C., within 30 days from the date upon which the decision and order * * * has been filed in the Office of the District Director." *Id.* at 16a. No notice of appeal was filed with the Board within 30 days, or at any time thereafter.

On May 28, 2021, 72 days after the ALJ's order was filed by the district director, petitioners filed an unopposed motion with the Board, asking the Board to declare that its prior decision and the decision denying reconsideration were now final orders that could be appealed to the court of appeals. See Pet. App. 7a-8a.[3]

The Board held that it lacked jurisdiction over the matter and denied the motion. Pet. App. 6a-10a. The Board concluded that the parties' stipulation before the ALJ regarding the appeal was insufficient to confer jurisdiction, because "an agreement between the parties does not give the Board authority or discretion to bypass statutory rules of procedure." *Id.* at 8a (citing *Hamer* v. *Neighborhood Hous. Servs.*, 138 S. Ct. 13 (2017)). The Board noted that, under 33 U.S.C. 921(a), it "obtains jurisdiction if an aggrieved party files an appeal within 30 days of the date that the district director files the administrative law judge's decision or order." Pet. App. 8a. The Board also relied on 20 C.F.R. 802.205(c), noting that it "foreclose[s] all rights to review by the Board with respect to the case or matter in question" in the event of an untimely appeal. Pet. App. 9a.

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[3] The motion (which is not included in petitioners' appendix) is dated May 28, 2021, C.A. E.R. 49, while the Board's decision states that the motion was filed on June 1, 2021, Pet. App. 7a. The four-day difference has no effect on the resolution of the questions presented.

Applying those provisions, the Board held that "the administrative law judge's order, and the non-final orders preceding it, became final as of April 16, 2021," 30 days after the district director filed the last order. Pet. App. 9a (citing 33 U.S.C. 921(a); 20 C.F.R. 802.205(c)). Because petitioners "did not file a timely notice of appeal, or any document that could be perceived as a timely notice of appeal," the Board concluded that it "lack[ed] jurisdiction to address the [ALJ's] order, and by extension the prior non-final orders," and that it could not "issue a decision or order declaring the prior decision 'final.'" *Ibid.* The Board therefore denied petitioners' motion. *Ibid.* Petitioners requested reconsideration, which the Board denied. *Id.* at 160a-161a.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-5a. The court held that the Board correctly determined that it lacked jurisdiction to grant petitioners' motion seeking to render its prior order final. *Id.* at 2a. The court explained that, under Section 921(a), "a party 'has a thirty-day period within which an appeal' to the Board 'must be taken, or it is lost.'" *Ibid.* (citation omitted). Because petitioners "did not take any action before the Board until after the 30-day deadline for a Board appeal had expired," the Board lacked jurisdiction over the motion. *Id.* at 3a.

The court of appeals considered and rejected petitioners' argument that the Board should have treated the joint stipulation filed with the ALJ as a notice of appeal to the Board under 20 C.F.R. 802.208(b). Pet. App. 4a-5a. The court explained that "although the joint stipulation discussed [petitioners'] intent to proceed to the Ninth Circuit, it said nothing about any intent to appeal to the Board." *Id.* at 5a.

The court of appeals also noted that its precedent allows "[a] party aggrieved by an earlier Board order after remand to an ALJ" to "bypass Board review and file a petition for review in the court of appeals within 60 days from the ALJ's final order on remand." Pet. App. 3a (citing *National Steel & Shipbuilding Co.* v. *Director, OWCP*, 703 F.2d 417, 419 n.3 (9th Cir. 1983)). But the court recognized that petitioners had not attempted to pursue that route. *Id.* at 4a. Rather, petitioners "waited until both deadlines had passed" to file its motion with the Board and, under those circumstances, the Board lacked jurisdiction. *Ibid.*

ARGUMENT

Petitioners seek review of the court of appeals' unpublished decision holding that the joint stipulation filed with the ALJ did not constitute a notice of appeal to the Board. That fact-bound holding is correct and does not conflict with any decision of this Court or any other court of appeals. And petitioners' acknowledgement that the issue arises only infrequently underscores that it is not of sufficient importance to warrant further review.

Petitioners also seek to challenge the court of appeals' statement that circuit precedent would have allowed petitioners to appeal the ALJ's order approving the private parties' stipulations directly to the court of appeals. That issue is not presented in this case because no party attempted such a direct appeal. In any event, there is no square conflict among the courts of appeals on the question. The petition for a writ of certiorari should be denied.

1. Petitioners contend (Pet. 9-23) that the court of appeals incorrectly construed Section 802.208(b) in holding that a joint stipulation filed with the ALJ was

not sufficient to constitute a notice of appeal to the Board. That contention is unfounded and further review is unwarranted.

a. The stipulation that petitioners would treat as a notice of appeal to the Board states: "The parties acknowledge that [petitioners] may now proceed on the causation issue to the [Nin]th Circuit." Pet. App. 24a. Such a stipulation does not qualify as a timely notice of appeal, including under the Board's lenient rules. It preceded the ALJ's issuance of an order on remand, it was not filed with the Board, and it says "nothing about any intent to appeal to the Board." *Id.* at 5a. Rather, the stipulation is a simple acknowledgement by both petitioners and Zaradnik of petitioners' ability to file a future appeal to the Ninth Circuit following the ALJ's entry of the requested order. As the Board correctly held, petitioners failed to file "any document that could be perceived as a timely notice of appeal." *Id.* at 9a.

Petitioners argue (Pet. 13) that the court of appeals erred in requiring them to "identify the Board as the agency to which the appeal is being taken," as the regulations do not include that requirement. See 20 C.F.R. 802.208(b) (deeming sufficient "any written communication which reasonably permits identification of the decision from which an appeal is sought and the parties affected or aggrieved thereby"). But the stipulation at issue is not merely silent on the body to which petitioners could then proceed following the ALJ's entry of the requested order. The stipulation specifically identifies the Ninth Circuit as the relevant body, and states that "the previously filed appeals can proceed" upon issuance of the order. Pet. App. 25a; see *id.* at 24a (stating that "[i]t is the parties' understanding that the Trial level issues need to be resolved before the [Nin]th

Circuit can take up the causation appeal"). Given those statements, and the existing Ninth Circuit precedent permitting direct appeals of ALJ orders on remand, neither the Board nor the court of appeals erred in declining to treat the stipulation as a notice of appeal *to the Board*. See *id.* at 3a-4a.

Petitioners rely (Pet. 17-18) on *Aetna Casualty & Surety Co.* v. *Director, OWCP*, 97 F.3d 815 (5th Cir. 1996), for the proposition that rules governing the notice and content of notices of appeal should be interpreted liberally. That decision interpreted a separate regulation—20 C.F.R. 802.206(f)—which requires dismissal of notices of appeal filed before a party files a timely motion for reconsideration and mandates a "new notice of appeal" after such a motion is resolved. After holding that the petitioner in that case had failed to file a new notice of appeal following the ALJ's decision on reconsideration, the *Aetna* court went on to "speculate that, given the liberal rules governing what will suffice to constitute an effective notice of appeal to the [Board]," the new notice of appeal would not need to be very different from the premature notice, so long as "an intent to file the notice anew is clearly manifested." 97 F.3d at 820. Nothing in the court's reasoning supports the proposition that a joint stipulation filed prior to a decision by the ALJ and explicitly contemplating an appeal to a body other than the Board should qualify as a notice of appeal to the Board. Indeed, the *Aetna* decision is consistent with the court of appeals' holding here, because petitioners' intent that the stipulation serve as a notice of appeal was not "clearly manifested." *Ibid.*

Petitioners suggest (Pet. 18-19) that the court of appeals improperly denied them the benefit of Section

802.208(b)'s permissive notice rules because they are not claimants. But nothing in the court's decision indicates that it would have reached the opposite conclusion if the parties' roles were reversed. And petitioners cite no decision of the Board or any court treating a stipulation like the one here as an effective notice of appeal by either an employer or a claimant.

Finally, contrary to petitioners' speculation (Pet. 20), there is no indication that the court of appeals "pulled" the requirement that a notice of appeal must "identify the agency * * * to which its appeal is being taken" from Federal Rule of Appellate Procedure 3(c) (governing appeals from a federal district court). The court's analysis focused on the common-sense proposition that if the stipulation was meant to serve as a notice of appeal to the Board, the stipulation would have mentioned the Board. See Pet. App. 5a. And indeed, the court relied on Board precedent holding that a motion directed to an administrative law judge did "not evince an intent to seek Board review." *Porter* v. *Kwajalein Servs., Inc.*, 31 Ben. Rev. Bd. Serv. (MB) 112 (1997); see Pet. App. 5a. Petitioners' reliance (Pet. 20-22) on *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988), and *Foman* v. *Davis*, 371 U.S. 178 (1962), both of which interpret Rule 3(c), is therefore misplaced.

b. The court of appeals' application of Section 802.208(b) does not conflict with any decision of this Court or of another court of appeals. To the contrary, petitioners candidly acknowledge (Pet. 10) that the opinion below "addresses an issue of first impression interpreting 20 C.F.R. § 802.208(b)." And petitioners acknowledge the rarity of disputes over the meaning of this rule. See Pet. 10 n.5 (noting that "a Lexis search of

20 C.F.R. § 802.208 in all federal courts returns three (3) results other than the case at hand").

Petitioners ultimately raise only the narrow question of whether the court of appeals correctly applied Section 802.208(b) to the specific language of the stipulation at issue here. That fact-bound issue does not present a matter of sufficient general importance to justify further review.

2. Petitioners also contend (Pet. 23-33) that the court of appeals' statement that petitioners could have appealed the ALJ's order on remand directly to that court is inconsistent with the statute and in conflict with decisions from three other courts of appeals. But that statement is dicta, as no party attempted a direct appeal to the court in this case. Nor is there any square conflict between the court of appeals' statement and decisions of other circuits.

a. As described above, the Longshore Act provides for Board review of ALJ decisions, see 33 U.S.C. 921(b), and judicial review in the court of appeals for "[a]ny person adversely affected or aggrieved by a final order of the Board" within 60 days after the Board's decision is issued, 33 U.S.C. 921(c). No part of Section 921, or any other section of the Longshore Act, provides for direct review of ALJ orders by courts of appeals.

The Ninth Circuit has nevertheless held that, in certain circumstances, a party may appeal an ALJ's decision on remand from the Board directly to the court of appeals. *National Steel & Shipbuilding Co.* v. *Director, OWCP*, 703 F.2d 417, 418-419 (1983). In the 1983 decision in *National Steel*, the claimant sustained an eye injury, and the ALJ initially awarded him compensation for permanent partial disability for loss of vision and temporary partial disability for lost wages. *Id.* at 418.

The Board affirmed the permanent partial disability award but vacated and remanded the award for temporary disability benefits for further consideration by the ALJ. *Ibid.* On remand, the ALJ found that the claimant was not entitled to temporary disability benefits. *Ibid.* Neither the claimant nor the employer appealed that decision to the Board. *Ibid.* The employer, however, filed a petition for review with the court of appeals, seeking review of the earlier award for permanent disability. *Ibid.*

The Ninth Circuit held that it had jurisdiction to hear the appeal, reasoning that "requiring an appeal to the [Board regarding the award for permanent disability] would have been futile" because it would necessarily result in "a summary affirmance adhering to a previous ruling in the same case," which "may properly be viewed as a purely ministerial act." *National Steel*, 703 F.2d at 418. The court noted, however, that counsel "would be well advised to appeal again to the Board" even in such circumstances because doing so "would eliminate the necessity of demonstrating * * * that an appeal to the Board would have been a futile act," and thereby avoid the risk that the petition would be "dismissed for lack of jurisdiction." *Id.* at 419 n.3.

b. Petitioners contend (Pet. 24-28) that the Ninth Circuit's holding in *National Steel* is incorrect. But that issue is not properly presented in this case. The court of appeals mentioned the possibility of a direct appeal under *National Steel* only as a course petitioners failed to pursue. See Pet. App. 3a (observing that, under *National Steel*, petitioners "could have filed a timely petition for review in this court directly from the ALJ's order on remand but did not do that"); *id.* at 4a (noting that, "[r]ather than filing an appeal to the Board within

30 days of the ALJ's decision [under 33 U.S.C. 921(b)] or petitioning for review in this court within 60 days [under *National Steel*, petitioners] waited until both deadlines had passed to file its motion asking the Board to deem its 2016 order 'final'"). Because the court of appeals' comments about the potential availability of a direct appeal of an ALJ decision to the court were dicta, this petition would not be an appropriate vehicle to address that issue.

c. In any event, petitioners' contention (Pet. 28-33) that the circuits are divided on the issue is overstated. Petitioners assert that *National Steel* conflicts with decisions of three other courts of appeals, *RMK-BRJ* v. *Brittain*, 832 F.2d 565 (11th Cir. 1987); *Elliot Coal Mining Co.* v. *Director, OWCP*, 956 F.2d 448, 450 (3d Cir. 1992) (per curiam); and *Aubrey* v. *Director, OWCP*, 916 F.2d 451, 452-453 (8th Cir. 1990) (per curiam). But each of those cases is distinguishable from *National Steel.*

In *RMK-BRJ*, the Eleventh Circuit held that "[t]he law does not provide for a direct appeal from an ALJ's order to the court of appeals." 832 F.2d at 566. But it did so after expressly rejecting a futility argument, noting that it was "unable to determine how the Board would have ruled or what issues it might have considered on appeal" from the ALJ's order on remand. *Ibid.*

In *Elliot Coal*, the Third Circuit expressly distinguished *National Steel* and held that the court lacked jurisdiction where one party had "appeal[ed] to the Benefits Review Board" the day before that party also filed a petition for review in the court. 956 F.2d at 449. The court noted that in *National Steel*, by contrast, neither party had appealed to the Board and thus there was no "threat of confusion from concurrent jurisdiction." *Ibid.* (quoting *National Steel*, 703 F.2d at 418-

419). Only after drawing that distinction did the Third Circuit state that "[e]ven if *National Steel* were not distinguishable, [the court] would decline to follow it." *Id.* at 450.

Finally, in *Aubrey*, the Eighth Circuit merely noted that "[e]ven if [it] were to adopt the Ninth Circuit's position," in *National Steel*, it could not conclude that "the circumstances of this case rendered a second appeal to the [Board] futile," because the ALJ was authorized to make new findings of fact and conclusions of law on remand. 916 F.2d at 452-453.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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