No. 03-1288

In the Supreme Court of the United States

ROBERT HOLMES, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

HOWARD M. RADZELY
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor of Labor

MICHAEL P. DOYLE
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction under Section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 921(c), to review a final decision of the Department of Labor's Benefits Review Board, where petitioner filed his petition for review more than 60 days after the Board's decision became final.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

In the Supreme Court of the United States

No. 03-1288

ROBERT HOLMES, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not published in the Federal Reporter but is *reprinted in* 66 Fed. Appx. 491. The decisions of the Benefits Review Board (Pet. App. 11a-15a, 16a-19a, 20a-36a) and the administrative law judge (Pet. App. 37a-52a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2003. A petition for rehearing was denied on December 9, 2003. Pet. App. 53a-54a. The petition for a writ of certiorari was filed on March 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, provides compensation for work-related injuries that result in the disability or death of covered employees engaged in maritime work. 33 U.S.C. 902(3), 903. Contested LHWCA claims are initially resolved by administrative law judges (ALJs), 33 U.S.C. 919(d), whose decisions are subject to review by the Benefits Review Board (BRB), 33 U.S.C. 921(b)(3). The BRB, which is comprised of five permanent members and up to four temporary members, 33 U.S.C. 921(b)(1) and (5), typically assigns appeals to three-member panels for disposition, 20 C.F.R. 801.301(b), 802.407(a).

Once a BRB panel renders a decision, an aggrieved party may seek BRB panel and/or en banc reconsideration by filing a motion within 30 days of the decision. 20 C.F.R. 802.407(a) and (b). In addition, any permanent BRB member may sua sponte call for en banc reconsideration of a panel's decision, which is granted upon the affirmative vote of three permanent members. 20 C.F.R. 802.407(c) and (d). Finally, an aggrieved party may seek review in the appropriate court of appeals by filing a petition for review within 60 days of the BRB's final decision. 33 U.S.C. 921(c). The timely filing of a motion for reconsideration with the BRB, however, tolls the time for filing a petition for review. 20 C.F.R. 802.406.

Since 1996, Congress has provided in successive appropriations laws that ALJ decisions appealed to the BRB automatically become final for purposes of judicial review if the BRB does not act upon them within one year of the appeal date. See, *e.g.*, Department of Labor Appropriations Act, 2002, Pub. L. No. 107-116, 115

Stat. 2177, 2185; *Ramey* v. *Stevedoring Servs. of America*, 134 F.3d 954, 957 (9th Cir. 1998). For example, Public Law No. 106-554, which covered the time period at issue here, provided:

> That no funds made available by this Act may be used by the Secretary of Labor to review a decision under the [LHWCA] that has been appealed and that has been pending before the Benefits Review Board for more than 12 months: *Provided further*, That any such decision pending a review by the Benefits Review Board for more than 1 year shall be considered affirmed by the Benefits Review Board on the 1-year anniversary of the filing of the appeal, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals.

Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-10.

2. Petitioner, Robert Holmes, filed a claim for disability benefits under the LHWCA due to an alleged work-related psychological impairment. Pet. App. 47a-48a. Following an evidentiary hearing, an ALJ entered an order denying petitioner's claim on February 3, 2000. *Id.* at 5a, 37a. Petitioner filed a timely appeal with the BRB on March 7, 2000. *Id.* at 5a.

On March 16, 2001, a three-member panel of the BRB entered a decision vacating the ALJ's decision and remanding the matter for further proceedings. Pet. App. 20a-34a. On April 4, 2001, however, the panel vacated its March 16 decision. *Id.* at 16a-17a. It explained that the decision should have been issued on or before March 6, 2001, but was not issued until March 16, 2001, because of a clerical error. *Ibid.* Consequently, the panel explained, the ALJ's decision became the

BRB's final decision as of March 7, 2001, by virtue of Public Law No. 106-554's one-year review deadline. *Ibid.* The panel advised that "any party aggrieved by the administrative law judge's decision may appeal the decision within 60 days of [March 7]" pursuant to 33 U.S.C. 921(c). Pet. App. 17a n.2.

Petitioner filed a motion for reconsideration with the BRB on April 9, 2001.[1] Pet. App. 66a. He argued that "equitable relief should be invoked to relieve [him] of the drastic consequences of a filing error by the Clerk of the [BRB]." *Ibid.* In addition, petitioner asked the BRB to reconsider the March 7 automatic affirmance according to the "established rules regarding a Petition for Reconsideration." *Id.* at 67a.

The BRB denied the motion on May 7, 2001. Pet. App. 11a-13a. It explained that the BRB does not have "equitable powers" and that Public Law No. 106-554 contained no provision authorizing the BRB to review an ALJ decision beyond the statutory one-year deadline. *Id.* at 12a-13a. The BRB thus concluded that it was "without authority to review the [ALJ]'s findings of fact and conclusions of law by way of a motion for reconsideration." *Id.* at 13a.

3. Petitioner filed a petition for review on June 8, 2001, which the court of appeals dismissed for lack of jurisdiction in an unpublished, per curiam opinion. Pet. App. 1a-10a. The court reasoned that the 60-day time limit for filing a petition for review commenced on

---

[1] In a petition for rehearing filed with the court of appeals, petitioner argued that he filed his motion for reconsideration with the BRB on April 6, 2001. Pet. App. 58a-61a. The court of appeals, however, determined that the motion for reconsideration was filed with the BRB on April 9, and petitioner concedes in his petition for a writ of certiorari that he filed the motion on April 9. Pet. 4, 9; Pet. App. 66a.

March 7, the date on which the ALJ's decision became the BRB's final decision by operation of law. *Id.* at 8a. The court also determined that petitioner's April 9 motion for reconsideration did not toll the petition-filing deadline, because that motion was not filed within 30 days of March 7, 2001, and was therefore untimely. *Id.* at 9a. Finally, the court rejected petitioner's contention that the BRB's March 16 order was a sua sponte reconsideration of the March 7 automatic affirmance. *Id.* at 8a & n.3. Because petitioner did not seek judicial review within 60 days of March 7, the court concluded, the appeal was untimely and had to be dismissed. *Id.* at 8a-10a.

ARGUMENT

The court of appeals held in an unpublished decision that it lacked jurisdiction because petitioner filed his petition for review beyond the time limit prescribed in Section 21(c) of the LHWCA, 33 U.S.C. 921(c). That fact-bound decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly held that it lacked jurisdiction over this action because petitioner failed to timely file his petition for review. As the court of appeals explained, petitioner had "60 days from March 7, 2001, or until May 6, 2001, to petition [the court of appeals] for review of the ALJ's decision." Pet. App. 8a. Petitioner, however, "did not file his petition for review * * * until June 8, 2001," and the petition for review was, therefore, not timely filed. *Ibid.* As the court of appeals determined, moreover, petitioner's April 9 motion for reconsideration did not toll the time for filing a petition for review, because it was filed with the BRB more than 30 days after March 7. See *id.* at 9a; 20

C.F.R. 802.406, 802.407(a) (motion for reconsideration filed within 30 days of the BRB's final decision tolls the time for filing a petition for review in the court of appeals).[2] Under these circumstances, the court of appeals properly dismissed the petition for review because it lacked jurisdiction. See *Adkins* v. *Director, OWCP*, 889 F.2d 1360, 1361 (4th Cir. 1989) (holding that Section 21(c) of the LHWCA is a jurisdictional provision).

Petitioner contends that the BRB's March 16 decision "necessarily constituted a *de facto* reconsideration and modification" of the March 7 automatic affirmance "as permitted by 20 C.F.R. § 802.407." Pet. 4. Under that view, the March 16 decision tolled the time for filing a petition for review, and a new 60-day filing period began on April 4, the date on which the BRB vacated the March 16 decision. That filing period, in turn, was tolled on April 9, when petitioner filed his motion for reconsideration with the BRB. A new filing period then began on May 7, the date on which the BRB denied the motion for reconsideration. Because the petition for review was filed in the court of appeals within 60 days of May 7, petitioner contends that the court of appeals had jurisdiction.

---

[2] In *Dailey* v. *Director, OWCP*, 936 F.2d 241, 242 (6th Cir. 1991), the court of appeals held that the regulatory 30-day time limit for filing a motion for reconsideration is not jurisdictional; thus, the BRB has the discretionary authority to extend the filing time and consider an otherwise untimely motion on its merits. *Dailey*, however, did not involve a circumstance under which an ALJ decision became the BRB's final decision by operation of law. In any event, *Dailey* has no application here because petitioner does not contend that the BRB abused its discretion by refusing to consider the motion for reconsideration on its merits.

This convoluted argument fails because the BRB's March 16 decision cannot be characterized as a "de facto" or sua sponte reconsideration of the March 7 automatic affirmance. As the court of appeals noted (Pet. App. 8a n.3), the BRB panel did not view its March 16 decision as a reconsideration order. Rather, the panel clearly intended to issue its decision prior to March 7 and within the one-year time frame for reviewing ALJ decisions. *Id.* at 16a-17a. Once the panel realized that the ALJ decision had become final by operation of law on March 7, it vacated the March 16 decision on the ground that it lacked authority to review ALJ decisions that are pending for more than one year. *Id.* at 11a-13a, 16a-17a. These facts show that the panel had no intention of reconsidering the March 7 decision.

Moreover, it is far from clear that the BRB even possessed authority to issue a sua sponte reconsideration order. Although the BRB's rules allow panels to act on reconsideration *motions*, 20 C.F.R. 802.407(a), and allow any permanent BRB member to seek en banc reconsideration sua sponte, 20 C.F.R. 802.407(c), nothing in the rules allows a panel to reconsider a final decision sua sponte.[3] That omission from a detailed procedural scheme suggests that a panel is not authorized to reconsider a decision absent the filing of an appropriate motion. In any event, that ambiguity regarding the BRB's reconsideration authority—which neither the court of appeals nor the BRB had occasion to address—counsels against further review of the court of appeals' fact-bound jurisdictional ruling.

---

[3] The government is unaware of any BRB decisions addressing whether a panel has authority to reconsider its orders sua sponte.

2. There is no merit to petitioner's contention (Pet. 6-9) that the decision below conflicts with *Ramey* v. *Stevedoring Services of America*, 134 F.3d 954 (9th Cir. 1998). In *Ramey*, the Ninth Circuit held that a timely filed motion for reconsideration tolls the time for filing a petition for review in the court of appeals, even in cases where an ALJ's decision becomes the BRB's final decision by operation of law. *Id.* at 959 (construing Public Law No. 106-554's predecessor, Public Law No. 104-134, 110 Stat. 1321). It was undisputed in *Ramey* that petitioners filed timely motions for reconsideration with the BRB. 134 F.3d at 957. Here, in contrast, the court of appeals determined that petitioner's motion for reconsideration was not timely filed. *Ramey* is therefore inapposite, and the court of appeals correctly distinguished it on that ground. Pet. App. 9a.

3. Finally, petitioner contends (Pet. 9-11) that the decision below conflicts with various decisions from this Court. Petitioner is incorrect.

a. Petitioner first alleges a conflict with *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978). *Hill*, however, had nothing to do with jurisdiction under the LHWCA, but instead concerned the effect of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, on the construction of a dam that threatened an endangered species' habitat. 437 U.S. at 171-172. In the course of resolving that issue, this Court applied the longstanding canon of statutory construction disfavoring implied repeals of statutes by appropriations acts. *Id.* at 189-190. Petitioner argues that the court of appeals violated that principle by construing Public Law No. 106-554 as impliedly repealing the regulations that govern reconsideration of BRB decisions.

Petitioner misconstrues the decision below. The court of appeals did not suggest that Public Law No.

106-554 repealed the BRB's regulations governing reconsideration of its own decisions. Instead, the court properly concluded, based upon Public Law No. 106-554's plain language, that the BRB's March 16 order had no legal effect because the ALJ's decision had become final on March 7. Pet. App. 8a. That conclusion was consistent with appellate decisions construing Public Law No. 106-554's predecessor. See *Burton* v. *Stevedoring Servs. of Am.*, 196 F.3d 1070, 1072-1074 (9th Cir. 1999) (BRB decision remanding matter to ALJ was a "nullity" where BRB issued the decision outside Public Law No. 104-134's prescribed time frame); *Director, OWCP* v. *Sun Ship, Inc.*, 150 F.3d 288, 291-292 (3d Cir. 1998) (same). No conflict with *Hill* exists, and consequently further review is not warranted.

b. Petitioner similarly errs in contending (Pet. 10) that the decision below conflicts with *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), and *Bowman* v. *Loperena*, 311 U.S. 262 (1940). Both cases are inapposite.

Locomotive Engineers stands for the proposition that, when an administrative tribunal reopens a case and issues a new decision upon reconsideration of a previously entered order, the new decision is subject to review on its merits. 482 U.S. at 278. That proposition does not apply here because the BRB did not reopen the case and issue a new decision after the ALJ decision was rendered final on March 7. Although the BRB panel did issue a decision on March 16 purporting to reverse the ALJ's decision, it promptly vacated that March 16 decision once it realized that the ALJ's decision had been rendered final by operation of law. Pet. App. 16a-17a. Thus, the BRB's March 16 decision did not "reopen" the case in the sense contemplated by the Court in *Locomotive Engineers*.

In *Bowman*, the Court applied the rule that, when a lower court entertains an untimely petition for rehearing on its merits, the time for filing an appeal does not begin to run until the court rules on the rehearing petition. *Bowman*, 311 U.S. at 266 ("where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof"); see *Director, OWCP* v. *Hileman*, 897 F.2d 1277, 1279 (4th Cir. 1990) (holding that the rule in *Bowman* applies to BRB proceedings). That rule has no application in this case because the BRB did not entertain petitioner's motion for reconsideration on its merits; rather, it found that it lacked authority to do so. Pet. App. 13a. Thus, there is no conflict with *Bowman*, and further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

HOWARD M. RADZELY
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor of Labor

MICHAEL P. DOYLE
Attorney
Department of Labor

MAY 2004