No. 17-843

In the Supreme Court of the United States

MARIA JORDAN, 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 FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in dismissing for lack of subject-matter jurisdiction a petition for review of an interlocutory decision of the Benefits Review Board of the United States Department of Labor.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is unreported. The order of the Benefits Review Board of the United States Department of Labor (Pet. App. 39-41) is not published but is available at 2017 WL 1787608. The order of the administrative law judge (Pet. App. 42-78) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2017. A petition for rehearing was denied on September 13, 2017 (Pet. App. 12-13). The petition for a writ of certiorari was filed on December 12, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner suffered an injury while employed overseas by respondent DynCorp International LLC (DynCorp),

a government contractor. After returning to the United States, petitioner sought and received workers' compensation benefits under the Defense Base Act (DBA), 42 U.S.C. 1651 *et seq.* Petitioner later brought claims against DynCorp for retaliation in violation of the DBA and against DynCorp and respondent Continental Insurance Company (Continental) for additional benefits. During discovery on those claims, an administrative law judge (ALJ) determined that e-mails sought by petitioner were privileged. Petitioner filed a motion challenging that decision and seeking to disqualify the ALJ. The ALJ denied the motion. Pet. App. 42-78. Petitioner appealed to the Benefits Review Board of the United States Department of Labor (BRB), which declined to review the order because it was interlocutory. *Id.* at 39-40. Petitioner sought review of the BRB order in the court of appeals, which dismissed for lack of jurisdiction. *Id.* at 1.

1. a. Petitioner was injured in Erbil, Iraq, while employed by DynCorp under a contract with the Department of State. See U.S. Dep't of Labor, No. 2015-LDA-00030, at 64 (Nov. 29, 2017), https://www.oalj.dol.gov/decisions/ALJ/LDA/2015/JORDAN_MARIA-FE_M_v_DYNCORP_INTERNATIONA_2015LDA00030_(NOV_29_2017)_082637_CADEC_PD.PDF (11/29/17 ALJ Order).[1] After returning to the United States, she sought and received benefits under the DBA, which establishes a federal workers' compensation system for, *inter alia*, employees injured or killed overseas while working under a government contract. *Id.* at 65; see 42 U.S.C.

[1] The 11/29/17 ALJ Order, which denied petitioner's claims on the merits, was issued after the court of appeals order that petitioner asks this Court to review. Petitioner has appealed the 11/29/17 ALJ Order to the BRB. BRB No. 18-0128 (filed Dec. 20, 2017).

1651(a)(4); see also, *e.g.*, *Director, Office of Workers' Comp. Programs* v. *Rasmussen*, 440 U.S. 29, 31 (1979) (explaining that the DBA incorporates provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*).

Petitioner's medical condition improved, but DynCorp did not offer her further work under the contract. See 11/29/17 ALJ Order at 64-68. Petitioner then filed a claim with the Labor Department's Office of Workers' Compensation Programs (OWCP), alleging that DynCorp had unlawfully retaliated against her for exercising her DBA rights, in violation of 33 U.S.C. 948a. See 11/29/17 ALJ Order at 1-3. Petitioner also filed a claim against DynCorp and Continental for additional disability compensation benefits. *Id.* at 1-2. OWCP referred her discrimination claim to a Labor Department ALJ, who subsequently joined the benefits claim to that proceeding. *Ibid.*

b. In litigating her claims before the ALJ, petitioner repeatedly sought disclosure of e-mails that DynCorp contended were protected by the attorney-client privilege. See Pet. App. 44-47. The ALJ reviewed the e-mails *in camera* and determined that they were privileged. *Id.* at 45-46. Petitioner filed multiple appeals to the BRB, see 33 U.S.C. 921(b)(3) (authorizing appeals to BRB), in which she challenged the ALJ's privilege determination and other interlocutory decisions, see Pet. App. 40 n.1 (citing 12 such appeals). The BRB declined to review the interlocutory appeals, explaining that petitioner's challenges "may be reviewed on appeal from a final decision." BRB No. 15-0518, 2016 WL 1403226, at *1 (Mar. 7, 2016); accord, *e.g.*, BRB No. 16-0486, 2016 WL 8315620, at *1 & n.2 (June 28, 2016) (dismissing interlocutory appeals and collecting similar dismissals).

In 2016, petitioner sought review of one of the BRB's orders in the court of appeals under 33 U.S.C. 921(c), which provides jurisdiction for the court of appeals to review a "final order of the" BRB. The court of appeals dismissed the petition for review for lack of jurisdiction. Pet. App. 6. After petitioner moved for clarification, the court issued an order citing *AFIA/CIGNA Worldwide* v. *Felkner*, 930 F.2d 1111 (5th Cir.), cert. denied, 502 U.S. 906 (1991), which held that judicial review in DBA cases must begin in the district court under 42 U.S.C. 1653(b), not in the court of appeals under 33 U.S.C. 921(c). Pet. App. 8. The court of appeals further stated that "additionally, the order complained of is neither final nor appealable." *Id.* at 9.

2. a. On February 16, 2017, the ALJ ruled on a motion in which petitioner again sought disclosure of the e-mails that the ALJ had previously found privileged, Pet. App. 44-45, and contended that the ALJ should be disqualified, *id.* at 47-69. The ALJ denied petitioner's request to disclose the e-mails, noting that he had addressed the issue many times before. *Id.* at 47. The ALJ also denied the motion for disqualification, explaining that petitioner's allegations amounted to disagreements with his legal rulings, not personal bias requiring disqualification. *Id.* at 75-77.

b. Petitioner appealed the ALJ's order to the BRB. Pet. App. 39. The BRB dismissed the appeal "[f]or the reasons repeatedly expressed in the Board's prior orders," namely that "there [wa]s no basis for the Board to engage in piecemeal review of the administrative law judge's interlocutory orders." *Id.* at 40; see *id.* at 40 n.1.

c. Petitioner sought review of the BRB's order in the court of appeals. Respondents filed a joint motion to dismiss for lack of jurisdiction, arguing that circuit

precedent requires appeals of BRB orders in DBA cases to be initiated in the district court, see Resps. C.A. Mot. to Dismiss 8-9 (citing *Felkner*, 930 F.2d at 1116), and that the court of appeals lacked jurisdiction regardless because the BRB order at issue was not a "final order" under 33 U.S.C. 921(c), see Resps. C.A. Mot. to Dismiss 9-13. The court of appeals issued an unpublished per curiam order granting the "motion of the private respondents to dismiss the petition for review for want of jurisdiction." Pet. App. 1. The court subsequently denied a petition for rehearing. *Id.* at 12-13.

ARGUMENT

Petitioner contends (Pet. 31-39) that the court of appeals erred and implicated a circuit conflict by dismissing her petition for review for want of jurisdiction. Those contentions are mistaken. Although the courts of appeals disagree about where a final BRB order in a DBA case should initially be reviewed, there is no disagreement that a BRB order may only be reviewed in the court of appeals if it is "final." 33 U.S.C. 921(c). Because the BRB order challenged here was not final, the court of appeals correctly determined that it did not have jurisdiction. Petitioner's remaining contentions lack merit and do not warrant this Court's review.

1. The court of appeals correctly determined that it lacked jurisdiction to review the BRB order challenged here because it was not "final." 33 U.S.C. 921(c).

a. "Finality as a condition of review is an historic characteristic of federal appellate procedure." *Flanagan* v. *United States*, 465 U.S. 259, 263 (1984) (citation omitted). The principal federal appellate jurisdiction statute, 28 U.S.C. 1291, authorizes courts of appeals to review "final decisions of the district courts." Under that statute, a decision is "final" if it "ends the litigation

on the merits and leaves nothing for the court to do but execute the judgment." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373 (1981) (citation omitted); accord, *e.g.*, *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009). Every court of appeals to analyze 33 U.S.C. 921(c) has concluded that its grant of jurisdiction to review a "final order of the" BRB should be interpreted in parallel with the grant of appellate jurisdiction over "final decisions of the district courts" in 28 U.S.C. 1291. See, *e.g.*, *Director, OWCP* v. *Bath Iron Works Corp.*, 853 F.2d 11, 13 (1st Cir. 1988); *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399, 401 (5th Cir.) (en banc), cert. denied, 469 U.S. 818 (1984); *National Steel & Shipbuilding Co.* v. *Director, OWCP*, 626 F.2d 106, 107-108 (9th Cir. 1980); *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, 590 F.2d 1267, 1268 (4th Cir. 1978) (per curiam).

Applying that settled understanding, the BRB order at issue here was not "final," because it did not "end[] the litigation on the merits." *Firestone*, 449 U.S. at 373 (citations omitted). The BRB merely declined to exercise interlocutory review of the ALJ's resolution of a discovery dispute and a disqualification motion. See Pet. App. 39-78. There was accordingly no "final" BRB order for the court of appeals to review, 33 U.S.C. 921(c), and the court correctly determined that it lacked jurisdiction, Pet. App. 1.

b. Under the collateral-order doctrine, courts of appeals may review a "'small class' of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final'" for purposes of 28 U.S.C. 1291. *Mohawk*, 558 U.S. at 106 (quoting *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-546 (1949)). The

"small category" of reviewable collateral orders "includes only decisions that" [1] "are conclusive," [2] "resolve important questions separate from the merits," and [3] "are effectively unreviewable on appeal from the final judgment in the underlying action." *Ibid.* (citation omitted). Courts of appeals interpreting 33 U.S.C. 921(c)'s grant of jurisdiction to review "final" orders of the BRB have applied the same criteria in determining whether a BRB decision is reviewable as a collateral order. See, *e.g.*, *Bath Iron Works*, 853 F.2d at 13 n.4; *Redden* v. *Director, OWCP*, 825 F.2d 337, 338 (11th Cir. 1987) (per curiam); *National Steel & Shipbuilding*, 626 F.2d at 108.

The BRB order at issue here is not a reviewable collateral order for at least two independent reasons. First, the BRB order did not "conclusive[ly]" resolve any disputed legal questions. *Mohawk*, 558 U.S. at 106. To the contrary, the BRB declined to reach any conclusion on the disputed legal issues because the challenged ALJ decisions were interlocutory. See Pet. App. 40.

Second, the decisions petitioner appealed to the BRB can be effectively reviewed "on appeal from the final judgment." *Mohawk*, 558 U.S. at 106 (citation omitted). This Court held in *Mohawk* that a decision on whether a document is subject to the attorney-client privilege cannot be reviewed as a collateral order because "post-judgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." *Id.* at 109. Likewise the Court has never suggested that an order denying disqualification of a judge is an appealable collateral order, see *id.* at 116-117 (Thomas, J., concurring in part and concurring in the judgment) (recounting history of collateral-order doctrine), and the Court has held that decisions on attorney-

disqualification motions are not appealable collateral orders because they can effectively be reviewed on appeal after a final judgment, see *Firestone*, 449 U.S. at 377-378. Moreover, it is well-settled in the courts of appeals that the "denial of a motion to disqualify" a judge "is not a final order nor one that should be treated as such under" the collateral-order doctrine. *United States* v. *Washington*, 573 F.2d 1121, 1122 (9th Cir. 1978) (Kennedy, J.); accord *Rosen* v. *Sugarman*, 357 F.2d 794, 796 (2d Cir. 1966) (Friendly, J.); see also, *e.g.*, *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 960-961 (5th Cir.), cert. denied, 449 U.S. 888 (1980).

Petitioner identifies no conflicting authority. The court of appeals correctly determined that it lacked jurisdiction to review the BRB order because it was not "final" under 33 U.S.C. 921(c).

c. Petitioner correctly observes (Pet. 22-24) that courts of appeals disagree about whether a final BRB order on a DBA claim may be reviewed initially in the court of appeals under 33 U.S.C. 921(c), as petitioner contends and four circuits have held, or must first be reviewed in the district court under 42 U.S.C. 1653(b), as the Fifth Circuit and three others have held.[2] This

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[2] Compare *Truczinskas* v. *Director, OWCP*, 699 F.3d 672, 675 (1st Cir. 2012) (initial review proper in court of appeals); *Service Employees Int'l, Inc.* v. *Director, OWCP*, 595 F.3d 447, 452 (2d Cir. 2010) (same); *Pearce* v. *Director, OWCP*, 647 F.2d 716, 720 (7th Cir. 1981) (same); *Pearce* v. *Director, OWCP*, 603 F.2d 763, 769-771 (9th Cir. 1979) (same), with *ITT Base Servs.* v. *Hickson*, 155 F.3d 1272, 1275 (11th Cir. 1998) (initial review proper in district court); *Lee* v. *Boeing Co.*, 123 F.3d 801, 805 (4th Cir. 1997) (same); *AFIA/CIGNA Worldwide* v. *Felkner*, 930 F.2d 1111, 1116 (5th Cir.) (same), cert. denied, 502 U.S. 906 (1991); and *Home Indem. Co.* v. *Stillwell*, 597 F.2d 87, 88-89 (6th Cir.) (same), cert. denied, 444 U.S. 869 (1979).

petition for a writ of certiorari is not an appropriate vehicle for addressing that conflict, however, because even if petitioner were correct that review of a BRB order may take place directly in the court of appeals under 33 U.S.C. 921(c), that provision limits the court of appeals' jurisdiction to review of "final order[s] of the" BRB. There is no circuit conflict on that question, and—as explained above—the BRB order at issue here was not final.[3]

2. Petitioner makes a wide range of other arguments, but none has merit.

Invoking Article III, the Supremacy Clause, the Due Process Clause, the Tenth Amendment, and other sources of law, petitioner contends (Pet. 33-38) that the court of appeals had an obligation to further explain its decision dismissing the petition for review for lack of jurisdiction. As an initial matter, this Court "reviews judgments, not opinions," *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), and the judgment was correct for the reasons explained above. In any event, the basis for the judgment is clear. The court of appeals granted the "motion of private respondents to dismiss the petition for review for want of jurisdiction," Pet. App. 1, and that motion argued that the court lacked jurisdiction because the BRB order was not "final" and because jurisdiction was proper in the district court, Resps. C.A. Mot. to Dismiss 8-13. As petitioner recognizes (Pet. 9), those are the same reasons that the court of appeals gave for dismissing her earlier, similar petition for review. See Pet. App. 6-9.

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[3] Moreover, circuits that require review of BRB orders in DBA cases to be initiated in district courts agree that such orders are reviewable only if they are final. See, *e.g.*, *Hickson*, 155 F.3d at 1275 n.5; *Felkner*, 930 F.2d at 1115.

Moreover, the judgment could be affirmed on any ground presented below, see *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994), including the dispositive ground that the court of appeals lacked jurisdiction because the BRB order was not "final," 33 U.S.C. 921(c).

Petitioner's additional assertions of legal violations and misconduct by the ALJ and others (Pet. 13-22, 28, 33-35, 38) amount largely to disagreements on the merits of questions that are not properly before this Court. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2018