No. 12-1150

In the Supreme Court of the United States

BLACKWATER SECURITY CONSULTING, LLC, ET AL., PETITIONERS

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 NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Defense Base Act (DBA), 42 U.S.C. 1651 *et seq.*, applies provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, to employees working for United States contractors overseas. 42 U.S.C. 1651(a)(4). Under the LHWCA, employees are paid compensation for disability resulting from a covered injury. 33 U.S.C. 902(2) and (10), 903(a), 908. Compensation for permanent partial disability under Section 8(c)(21) of the LHWCA is based on the difference between the employee's "average weekly wage[]" at the time of injury and his "wage-earning capacity" after the injury, and is "payable during the continuance of partial disability." 33 U.S.C. 908(c)(21). The question presented is as follows:

Whether an administrative law judge has discretion to disregard the statutory formula and reduce a DBA compensation award to a nominal amount during the "continuance of partial disability."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the *Federal Reporter* but is reprinted in 503 Fed. Appx. 498. The decision and order of the Benefits Review Board of the United States Department of Labor (Pet. App. 5a-17a) is reported at 45 Ben. Rev. Bd. Serv. (MB) 5. The decisions and orders of the administrative law judge (Pet. App. 18a-21a, 22a-81a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2012. The petition for a writ of certiorari was filed on March 19, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Defense Base Act (DBA), 42 U.S.C. 1651 *et seq.*, establishes a federal workers' compensation system for, *inter alia*, employees injured or killed overseas while working under a government contract. 42 U.S.C. 1651(a)(4). The DBA subjects covered employees to provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, which provides compensation and medical benefits to employees and their survivors for disability or death resulting from a covered injury. 33 U.S.C. 903(a), 907, 908, 909.

"Disability" is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10). "Permanent partial disability" is one of four categories of disability. 33 U.S.C. 908(c); see 33 U.S.C. 908(a), (b) and (e). When a worker has a permanent partial disability and his injury does not fall within a specified list, the compensation award is governed by Section 8(c)(21) of the LHWCA. See 33 U.S.C. 908(c)(21). For such non-scheduled injuries, "the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability." *Ibid.* The resulting amount is subject to a weekly statutory cap. See 33 U.S.C. 906(b); *Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1354 (2012).

The statutory formula consists of two components: the employee's "average weekly wage[]" at the time of injury, and his "wage-earning capacity" after the injury. An injured employee's "average weekly wage[]" is calculated by dividing the employee's average annual earn-

ings by 52 weeks. 33 U.S.C. 910(d)(1). For a seven-day-a-week worker, the "average annual earnings" is governed by Section 10(c) of the LHWCA and must "reasonably represent [his] annual earning capacity" "at the time of the injury," taking into account several factors including the employee's actual wages or "other employment of such employee." 33 U.S.C. 910(c). The injured employee's post-injury "wage-earning capacity" is calculated under Section 8(h) of the LHWCA, using the claimant's "actual" post-injury "earnings if such actual earnings fairly and reasonably represent his wage-earning capacity." 33 U.S.C. 908(h).

2. Respondent Daniel Raymond (Raymond) provided personal security for the U.S. Ambassador in Afghanistan from August 2004 through March 2006. He returned to a similar position a few months later under a one-year employment contract with petitioner Blackwater Security Consulting, LLC (Blackwater). Under the new contract, Raymond worked seven days a week and earned approximately $500 per day. Before the expiration of his initial contract, Raymond signed a one-year contract extension that would have commenced following his return from scheduled leave. Raymond testified that he intended to continue working as an overseas security specialist for another three or four years. See Pet. App. 30a-31a, 72a.

On May 30, 2007, Raymond injured his back while undergoing work-related physical conditioning. That injury severely limited his ability to lift heavy objects, and he ultimately left Afghanistan in August 2007 after completing his one-year contract. Upon his return to the United States, Raymond was able to work in various security and weapons-related jobs, earning approxi-

mately $800 to $1000 per week. See Pet. App. 31a, 37a-38a, 57a-58a, 77a.

3. On January 7, 2008, Raymond filed a claim for compensation under the DBA. Pet. App. 7a.

a. An administrative law judge (ALJ) found that Raymond was entitled to disability compensation under the DBA and that, during the time period relevant here, he was permanently partially disabled. Pet. App. 28a.

To determine the amount of compensation due, the ALJ first calculated Raymond's average weekly wage under Section 10(c). Pet. App. 72a-74a (citing 33 U.S.C. 910(c)). No one "dispute[d] the exclusive use of [Raymond's] overseas wages earned from [Blackwater]" as the basis for the calculation; the parties differed only on whether the ALJ should include Raymond's post-injury overseas employment. *Id.* at 73a. Agreeing with Blackwater, the ALJ concluded that only Raymond's pre-injury employment should be used in the calculation, and he found that Raymond's average weekly wage was $2897.95. *Id.* at 73a-74a. Second, the ALJ calculated Raymond's present wage-earning capacity under Section 8(h). *Id.* at 75a-76a (citing 33 U.S.C. 908(h)). The ALJ concluded that Raymond's actual wages in 2008 and 2009 were "reflective of [his] post-injury wage-earning capacity" and that his post-injury earning capacity was therefore $798.83 per week in 2008, and $985.51 per week in 2009 and thereafter. *Ibid.* Finally, using those figures, the ALJ calculated the amount of compensation due under Section 8(c)(21)—*i.e.*, 66-2/3 percent of the difference between Raymond's average weekly wage and his post-injury earning capacity—resulting in a compensation rate of $1400.11 per week for 2008 and $1275.60 per week for 2009 and thereafter. *Id.* at 76a. Because both figures exceeded the statutory

maximum, see 33 U.S.C. 906(b), the ALJ reduced the compensation award to the maximum weekly rate of $1114.44. Pet. App. 23a, 76a.

The ALJ then concluded that Raymond "should not receive permanent partial disability benefits indefinitely at the higher war zone overseas rate." Pet. App. 77a. Instead, the ALJ determined that Raymond's permanent partial disability payments would be reduced after August 31, 2011—the date on which a typical one-year contract would have terminated if Raymond had returned to the United States after three or four years as he had testified. *Id.* at 77a-78a & n.21. Thereafter, Raymond would receive only "de minimis" compensation of $1 per week. *Id.* at 8a, 78a.

b. The Director of the Office of Workers' Compensation Programs (Director) filed a motion for reconsideration. Pet. App. 19a.[1] The Director argued that the ALJ's ordered reduction in payments for permanent partial disability was inconsistent with the Act, which required that the computed amount of weekly compensation be paid "during the continuance of partial disability," 33 U.S.C. 908(c)(21). See Pet. App. 19a. The ALJ denied the motion as untimely or, in the alternative, for lack of standing. *Id.* at 18a-21a.

c. Raymond and the Director appealed; petitioners did not cross-appeal. Pet. App. 6a. No one challenged the ALJ's findings with respect to Raymond's average weekly wage at the time of injury or his post-injury earning capacity. *Id.* at 11a, 15a. Instead, the parties focused on whether the ALJ erred in reducing the compensation award to a nominal amount after August 2011.

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[1] The Director is charged with administering the DBA and is authorized to appear as a litigant in DBA proceedings. See *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 519 U.S. 248, 262-270 (1997).

Id. at 9a. The Benefits Review Board (Board) concluded that the ALJ did err in that respect, finding "no legal support in the Act or case law for the [ALJ's] finding that he may limit the duration of claimant's award of permanent partial disability benefits." *Id.* at 13a-14a. To the contrary, the Board explained, "Section 8(c)(21) provides that compensation is 'payable during the continuance of partial disability.'" *Id.* at 14a (quoting 33 U.S.C. 908(c)(21)). The Board recognized that a nominal award may be appropriate "when there is no present diminution of wage-earning capacity but there is the potential for it, due to the claimant's injury, in the future." *Id.* at 16a (citing *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121 (1997)). Finding that not to be the case here, and concluding that the ALJ "effectively" and erroneously "applied a second average weekly wage," the Board vacated the ALJ's de minimis award and modified the judgment to reflect Raymond's continued entitlement to benefits at the determined rate. *Id.* at 15a-17a.

4. The court of appeals affirmed in an unpublished, memorandum opinion. Pet. App. 1a-4a. The court explained that Section 8(c)(21) "unambiguously provides that an ALJ shall award two-thirds of the difference between a claimant's average weekly wages at the time of injury and his post-injury wage-earning capacity," *id.* at 3a (quoting 33 U.S.C. 908(c)(21)), and that "[n]othing in the statutory scheme allows for an ALJ to disregard or modify" that statutory formula, *ibid.* The court also explained that it had "repeatedly held that the LHWCA does not grant an ALJ any discretion to re-calibrate a claimant's average weekly wages at the time of injury based on future events that would have changed that wage regardless of injury." *Ibid.* Noting that "[t]he

LHWCA and the DBA embody legislative choices," the court "interpret[ed] and appl[ied] the LHWCA and the DBA as written" and concluded that the Board "was correct." *Id.* at 4a.

ARGUMENT

The court of appeals held that neither the DBA nor the LHWCA affords an ALJ discretion to reduce or terminate an award for permanent partial disability while that disability persists. That decision is correct and does not conflict with any decision of this Court or any other court of appeals. Many of petitioners' arguments, moreover, were not presented below and are not properly before the Court. Review of the court of appeals' unpublished decision is not warranted.

1. The court of appeals held (Pet. App. 3a-4a) that the ALJ had no discretion to reduce Raymond's compensation award to a de minimis amount after August 2011, because Raymond would remain disabled after that date. That decision is correct.

The statutory formula for computing compensation for permanent partial disability under Section 8(c)(21) is clear and unambiguous: compensation must be paid (subject to a weekly statutory cap) at two-thirds of the difference between an employee's average weekly wage at the time of injury and his post-injury wage-earning capacity, for "the continuance of partial disability." 33 U.S.C. 908(c)(21); see Pet. App. 3a. The ALJ calculated Raymond's average weekly wage to be $2897.95. *Id.* at 73a. That finding was not contested before the Board. *Id.* at 11a, 15a. The ALJ then calculated Raymond's post-injury wage-earning capacity as $985.51 per week after January 1, 2009. *Id.* at 76a. That too was not contested on appeal. *Id.* at 11a. Two-thirds of the difference between those two figures was determined to be

$1275.60, *id.* at 76a, but the ALJ reduced that amount to $1114.44 per week based on the statutory cap, *id.* at 23a, 74a (citing 33 U.S.C. 906(b)). Again, no one disputed that finding.

The only question before the Board was whether the ALJ had discretion to effectively terminate payment of disability benefits by reducing the award to nominal compensation of $1 per week after August 2011 based on Raymond's testimony that he anticipated returning to the United States in three or four years. As the Board and the court of appeals held, the ALJ had no statutory authority to do so. Pet. App. 3a-4a, 11a-16a. The LHWCA makes clear that a claimant "shall" be paid the compensation computed according to the formula set forth above "during the continuance of partial disability." 33 U.S.C. 908(c)(21). Accordingly, the determined amount is payable weekly "for as long as the disability should last, which is to say in the case of permanent disabilities, indefinitely." *Keenan* v. *Director, OWCP*, 392 F.3d 1041, 1043 (9th Cir. 2004); see *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 297 (1995) (*Rambo I*). To the extent "a change in conditions" occurs at a later date, the statute provides for modification of the compensation award. 33 U.S.C. 922; see *Rambo I*, 515 U.S. at 297.

The ALJ did not find that Raymond's "partial disability" would not continue after August 2011. To the contrary, the private parties stipulated and the ALJ found that his "partial disability" became "permanent" after November 29, 2007. Pet. App. 56a. The ALJ nevertheless reduced the compensation award to a nominal amount after August 2011 based on Raymond's testimony that he planned to return to the United States within three or four years, and because Raymond's "post-injury

wages are remarkably similar to what he testified he had earned for several years prior to working in Afghanistan." *Id.* at 77a. The ALJ identified no statutory authority for cutting off Raymond's compensation while his disability persisted. And, as the court of appeals explained, "[n]othing in the statutory scheme allows * * * an ALJ to disregard or modify th[e] formula." *Id.* at 3a. The Act simply does not authorize the termination or reduction of a compensation award "during the continuance of partial disability" on the rationale advanced by the ALJ—or for any other reason. 33 U.S.C. 908(c)(21).

2. Petitioners' arguments to the contrary (Pet. 16-26) are without merit.

a. As an initial matter, petitioners primarily challenge a decision the court of appeals did not render. This case has little to do with the proper calculation of "pre-injury and post-injury wages." Pet. 16. Petitioners did not challenge the ALJ's calculation of Raymond's pre-injury or post-injury wages before the Board, and the Board did not address those issues. See Pet. App. 11a, 15a. Petitioners also did not challenge the ALJ's calculation of Raymond's post-injury wages before the court of appeals, and the court likewise did not opine on that question. This Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks and citation omitted). The Court should adhere to that rule here.

With respect to Raymond's post-injury wage-earning capacity, petitioners now contend (Pet. 22) that the court of appeals (and the Board) precluded the ALJ from considering "the temporary and unusual nature of

war-zone employment when considering section 8(h) post-injury loss of wage earning capacity." But the ALJ exercised the discretion that Section 8(h) affords him: he found that Raymond's actual post-injury wages fairly and reasonably represented his wage-earning capacity. Pet. App. 76a.[2] The Board then *affirmed* the ALJ's computation of Raymond's wage-earning capacity, which was unchallenged on appeal (Pet. App. 11a), and petitioners again declined to challenge that calculation in the court of appeals (Pet. C.A. Br. 18-58). In short, the ALJ, the Board, and the court of appeals all failed to consider or rely on "the temporary and unusual nature of war-zone employment" to ascertain Raymond's "post-injury loss of wage earning capacity" because petitioners never asked them to. And, even in this Court, petitioners argue only that the ALJ had "discretion" to consider those circumstances (Pet. 22)—not that he was required to do so or that he refused to do so here. The court of appeals did not shut off discretionary authority the ALJ never exercised.

Petitioners' focus (Pet. 20-22, 26-27) on Raymond's pre-injury average weekly wage fares no better. Before the ALJ, petitioners argued that Raymond's "average annual earnings" were $137,450.00—and the ALJ *agreed*. Pet. App. 72a-73a. Petitioners did not challenge that finding before the Board. *Id.* at 11a, 15a; see Pet. C.A. Br. 53 n.19 (acknowledging that they did not raise the argument before the Board). Before the court of appeals, petitioners did argue, in the alternative, that the court should remand for the ALJ "to address the temporary nature of [war-zone] employment through a

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[2] In doing so, the ALJ rejected petitioners' contention that he should consider "suitable alternative employment which pays more than what [Raymond] already earns." Pet. App. 66a, 76a.

reduction in the pre-injury average weekly wage calculation." *Id.* at 17; see *id.* at 53-57. The court of appeals, however, held only that an ALJ cannot "re-calibrate a claimant's average weekly wages at the time of injury based on *future* events." Pet. App. 3a (emphasis added). It did not decide whether or when an ALJ may use pre-injury domestic wages to calculate the average weekly wage of a worker injured overseas.

Petitioners' heavy reliance (Pet. 20-22, 26-29) on the Board's previous (and now vacated) decision in *K.S.* v. *Service Employees International, Inc.*, 43 Ben. Rev. Bd. Serv. (MB) 18 (2009), aff'd, 43 Ben. Rev. Bd. Serv. (MB) 136 (2009) (en banc), rev'd and remanded, No. 11-1065, 2013 WL 943840 (S.D. Tex. Mar. 11, 2013), is therefore misplaced. *K.S.* addressed whether, and under what circumstances, an ALJ may consider pre-injury domestic wages in addition to pre-injury overseas wages in determining the employee's average weekly wage at the time of injury. That question was not presented here. As the ALJ explained, unlike the employer in *K.S.*, petitioners did not "dispute[] the exclusive use of [Raymond's] overseas wages earned from [Blackwater]." Pet. App. 73a.

b. Petitioners' assertion that the decision below confines an ALJ's authority to an "automated formula" (Pet. 20) or precludes an ALJ from considering "the temporary and unusual nature of war-zone employment" (Pet. 22) is overstated. The ALJ indisputably was called upon to exercise judgment and discretion in computing Raymond's average weekly wage at the time of injury and his post-injury wage-earning capacity. Once he arrived at those figures, however, he did not have discretion to reduce the compensation award to a nominal amount while Raymond's disability persisted. That was

the basis for the decision below, and petitioners barely address it.

Petitioners first suggest (Pet. 19) that because the ALJ could exercise judgment in calculating the average weekly wage at the time of injury and the post-injury wage-earning capacity, Congress must have intended to afford the ALJ discretion to arrive at a "compensation rate" that is itself "reasonable and fair." Petitioners, however, offer no statutory support for that assertion. For the assertedly "discretionary" pre-injury wage calculation, petitioners rely on Section 10(c), which provides that the "average annual earnings of the injured employee * * * shall reasonably represent the annual earning capacity of the injured employee." 33 U.S.C. 910(c). And for the assertedly "discretionary" post-injury wage calculation, petitioners point to Section 8(h), which provides a means of calculating post-injury earning capacity if "the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity." 33 U.S.C. 908(h). In marked contrast, the compensation rate is dictated by a mathematical statutory formula that, on its face, provides the ALJ no *additional* range of authority or discretion. See 33 U.S.C. 908(c)(21).

Petitioners next contend (Pet. 12-16) that applying the statutory language as written would be "incongruous." That is incorrect. The LHWCA, unlike a tort system, balances fairness with ease of administration in a way that maximizes overall social benefit. The fact that the prescribed statutory formula may lead "to seemingly unjust results in particular cases does not give judges a license to disregard it." *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 283-284 (1980); see Pet. App. 4a. That is true regardless of

whether the calculation favors the employer, *e.g., Keenan*, 392 F.3d at 1045-1046 (rejecting consideration of future event that would have increased compensation), or the employee, *e.g.*, *New Haven Terminal Corp.* v. *Lake*, 337 F.3d 261, 266-267 (2d Cir. 2003) (rejecting consideration of future event that would have decreased compensation). The statutory formula, moreover, already accommodates employers by awarding only two-thirds of the difference between the employee's average weekly wage and his post-injury earning capacity, 33 U.S.C. 908(c)(21), and by imposing a weekly statutory cap, 33 U.S.C. 906(b).

Petitioners also contend (Pet. 26) that the statutory scheme does not adequately account for the unique nature of temporary overseas war-zone employment and that ALJs should be able to modify the statutory formula to account for such unforeseen circumstances. That the DBA would apply to war-zone and other temporary employment, however, was not unforeseen. The DBA was enacted against the backdrop of World War II. See Act of Aug. 16, 1941, ch. 357, 55 Stat. 622; Act of Dec. 2, 1942 (1942 Act), ch. 668, § 301, 56 Stat. 1035. The DBA expressly covers employment at military bases acquired from foreign governments after 1940, 42 U.S.C. 1651(a)(1), and on overseas lands used for military or naval purposes, 42 U.S.C. 1651(a)(2)—including war zones. See 42 U.S.C. 1651(a)(3) and (b)(1) (defining covered employment to include "public work," such as "service contracts and projects in connection with the national defense or with war activities"); 1942 Act § 101(a)(3), 56 Stat. 1029 (covering some DBA employees under the War Hazards Compensation Act for inju-

ries resulting from a "war-risk hazard").[3] War, of course, is temporary in nature. And Congress expressly covered other temporary employment, such as overseas "public work" projects. 42 U.S.C. 1651(a)(3) and (b)(1). In any event, if modification of the statutory formula is needed to address the DBA, that change should come from Congress. See Pet. App. 4a.

3. Contrary to petitioners' assertion (Pet. 32-34), the court of appeals' unpublished decision does not conflict with any decision of this Court. And, as petitioners acknowledge (Pet. 31), it does not conflict with any decision of another court of appeals. Further review is not warranted.

Petitioners contend (Pet. 32-34) that the decision below conflicts with this Court's decision in *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121 (1997) (*Rambo II*). That is incorrect. In *Rambo II*, this Court held that an ALJ could issue a continuing de minimis award when no loss in earning capacity presently exists, but there is a significant potential that an employee's injury may result in a future loss of earning capacity and, thus, disability. *Id.* at 138. As the Board explained (Pet. App. 14a-15a), that decision has no application here because the ALJ found that Raymond was *currently* disabled and that a loss in earning capacity *presently* existed. The ALJ reduced Raymond's compensation award after August 2011 to a nominal amount of $1 per week based on Raymond's testimony that he planned to return to the United States in three or four years. *Id.* at 77a-78a.

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[3] To the extent petitioners rely on the War Hazards Compensation Act (Pet. 9-10), that reliance is misplaced. As petitioners later concede (Pet. 10), Raymond's injury is not covered by that Act. See 42 U.S.C. 1704-1705, 1711(b) (providing for government reimbursement only when the employee's injury results from a "war-risk hazard").

Rambo II does not contemplate a nominal award in those circumstances.

Petitioners acknowledge (Pet. 31) that the decision below does not conflict with any decision of another court of appeals. They nevertheless contend (Pet. 27-31) that it conflicts with the district court's decision in *K.S.* A conflict between an unpublished court of appeals' decision and a district court decision does not warrant this Court's review. Cf. Sup. Ct. R. 10(a). In any event, no such conflict exists. The district court in *K.S.* did not address the applicability of Section 8(c)(21) to DBA employees. It addressed only the ALJ's authority to consider pre-injury domestic earnings in calculating an overseas employee's average weekly wage under Section 10(c). *K.S.*, 2013 WL 943840, at *1. As discussed above (see p. 11, *supra*), the court of appeals did not decide that issue in this case.[4]

[4] Petitioners also rely (Pet. 24-25) on two Board decisions involving former professional football players. As the Board itself explained (Pet. App. 9a n.4), any statements regarding "two-tiered" awards in those cases were dicta because the claimants did not challenge the ALJ's reduction in their compensation based on their expected retirement dates.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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