

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**  
**FOR THE TENTH CIRCUIT**

**November 13, 2023**

**Christopher M. Wolpert**  
**Clerk of Court**

POWDERHORN COAL COMPANY;  
EAST COAST RISK MANAGEMENT,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS’  
COMPENSATION PROGRAMS,  
UNITED STATES DEPARTMENT OF  
LABOR; RALPH SALAZ (deceased),

Respondents.

No. 22-9586  
(Benefits No. 21-0406 BLA)  
(Benefits Review Board)

**ORDER AND JUDGMENT\***

Before **EID, CARSON, and ROSSMAN**, Circuit Judges.

Powderhorn Coal Company and East Coast Risk Management (Petitioners) seek review of a decision by the United States Department of Labor’s Benefits Review Board (the Board). The Director of the Office of Workers’ Compensation Programs (Director) moves to dismiss the petition for review for lack of jurisdiction.

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\* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties’ request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Because Petitioners fail to demonstrate the Board’s decision is a final order or falls within an exception to the final order rule, we grant the motion to dismiss and dismiss the appeal for lack of subject matter jurisdiction.

I. Background

Ralph Salaz sought benefits from Powderhorn Coal Company under the Black Lung Benefits Act (BLBA), 30 U.S.C. § 901, et. seq. A district director for the Office of Workers’ Compensation Programs issued a proposed decision and order finding that Mr. Salaz was entitled to benefits and that Powderhorn was the responsible operator liable to pay those benefits. Powderhorn contested the proposed decision and requested a hearing with an Administrative Law Judge (ALJ).

The ALJ found Powderhorn was not properly designated as the responsible operator for this claim and shifted liability for paying benefits to the Black Lung Disability Trust Fund. Because there was no longer a party contesting liability, the ALJ found Mr. Salaz was entitled to benefits under the BLBA.

The Director appealed to the Board, arguing the ALJ erred in finding Powderhorn was incorrectly named as the responsible operator and transferring liability for the payment of benefits to the Trust Fund. Powderhorn cross-appealed, arguing if the ALJ’s determination that the Trust Fund is liable for payment of benefits is not affirmed, then the case should be remanded for adjudication on the merits of Mr. Salaz’s entitlement to benefits.

The Board reversed the ALJ’s finding that the Trust Fund is liable for benefits and held that Powderhorn is the responsible operator. Because “the ALJ failed to

specifically address the merits of [Mr. Salaz’s] claim for benefits and awarded benefits as unchallenged,” the Board “remand[ed] the case for the ALJ to consider the contested issues that the parties have identified and determine if [Mr. Salaz] has established his entitlement to benefits.” R. at 6.

Petitioners filed a petition for review of the Board’s order. The Director subsequently filed a motion to dismiss the petition for review for lack of jurisdiction, arguing the Board’s order is not a final, appealable order. Petitioners filed a response objecting to the motion.

## II. Discussion

The judicial review provision of the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 921(c), as incorporated into the BLBA by 30 U.S.C. § 932(a), governs judicial review of the Board’s decision. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1475 (10th Cir. 1989); 20 C.F.R. § 802.410. It provides that “[a]ny person adversely affected or aggrieved by a *final order* of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred.” 33 U.S.C. § 921(c) (emphasis added).

There is a similar finality requirement in 28 U.S.C. § 1291, which gives the court of appeals jurisdiction to review “final decisions of the district courts.” We have explained that “[a] final decision is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *W. Energy All. v. Salazar*, 709 F.3d 1040, 1047 (10th Cir. 2013) (internal quotation marks omitted). We have further explained that “[t]he purpose of the finality requirement is to avoid

piecemeal review.” *Id.* (internal quotation marks omitted). And “[t]he required finality for reviewability of an order of the Board [under § 921(c)] follows, for the same reasons of policy, the contours of the finality requirement under [§ 1291].”

*Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 400 (5th Cir. 1984).

The Director contends the Board’s order is not a final, appealable order because the order did not end the litigation on the merits—it did not award or deny benefits to Mr. Salaz. Instead, the order remanded the case to the ALJ to determine that fundamental issue.

Petitioners first argue the Director did not timely file the motion to dismiss because it was not filed until 90 days after the notice of appeal, and this court’s rules state that a motion to dismiss for lack of jurisdiction “should be filed within 14 days after the notice of appeal is filed, unless good cause is shown,” 10th Cir. R. 27.3(A)(3)(a). Petitioners therefore argue the Director’s jurisdictional “argument has been waived.” Resp. to Mot. at 2.

We note the rule says “should,” not “must,” but we also agree the Director has not shown good cause for the delay in filing the motion to dismiss. Regardless, “[i]n every case and at each stage of the proceeding, we must satisfy ourselves that our jurisdiction is proper.” *Cotton Petroleum Corp. v. U.S. Dep’t of Interior*, 870 F.2d 1515, 1521 (10th Cir. 1989); *see also Kennedy v. Lubar*, 273 F.3d 1293, 1301 (10th Cir. 2001) (“We have routinely recognized our ability to raise the question of appellate jurisdiction *sua sponte*[.]”). Further, “we cannot rely on principles of

waiver to create appellate jurisdiction where it simply does not exist.” *Kennedy*, 273 F.3d at 1302. Because we have a duty to assure this court has jurisdiction, a party cannot waive a jurisdictional argument. Accordingly, Petitioners’ argument that the motion to dismiss for lack of jurisdiction was untimely is not a basis to deny the motion.

Petitioners next argue the Board’s order “is a final order regarding the responsible operator issue, or, alternatively, is an exception to the final order rule.” *Resp. to Mot.* at 2. We disagree with both propositions.

To support their contention that the Board’s order is a final order, Petitioners quote the following language from the order: “[w]e therefore reverse the ALJ’s finding that the Trust Fund is liable for benefits and hold that Powderhorn is the responsible operator.” *Id.* at 5 (quoting *R.* at 6). Although we agree the Board resolved the responsible operator issue, that did not end the litigation on the merits. Petitioners ignore and fail to address the next two sentences in the order. There, the Board explained:

Based on his erroneous responsible operator determination, the ALJ failed to specifically address the merits of [Mr. Salaz’s] claim for benefits and awarded benefits unchallenged. We therefore remand the case for the ALJ to consider the contested issues that the parties have identified and determine if [Mr. Salaz] has established his entitlement to benefits.

*R.* at 6. We conclude Petitioners have failed to show the Board’s order is a final order because on remand the ALJ must still decide the fundamental question of whether Mr. Salaz is entitled to benefits.

Finally, Petitioners ask us to review the Board’s order under an exception to the final order rule. Petitioners characterize this exception as one where “justice requires immediate review.” Resp. to Mot. at 5 (internal quotation marks omitted). Although Petitioners fail to adequately explain this exception, the exception they are discussing is “[t]he pragmatic finality doctrine—also referred to as the practical finality doctrine, the *Gillespie* doctrine, and the twilight zone doctrine.” *New Mexico v. Trujillo*, 813 F.3d 1308, 1317 (10th Cir. 2016). Under this exception, “[t]he inquiry is whether the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review.” *Id.* (internal quotation marks omitted). But “[w]e have been leery to apply the doctrine,” *id.*, and “[t]o the extent [it] is still recognized, it must be invoked only in truly unique instances, and not when the dispute can be adequately reviewed on appeal from a final judgment,” *id.* at 1318.

Petitioners argue “justice requires immediate review of this nonfinal order” because “there is a split in the circuits regarding how a year of employment is defined/calculated in making a responsible operator designation” and “[i]n order to resolve this, a decision on this issue must be made.” Resp. to Mot. at 5 (internal quotation marks omitted). But Petitioners fail to explain how waiting for appellate review of a final order would cause them any injustice. This is not a truly unique instance that would justify invoking an exception to the finality doctrine when the dispute can be adequately reviewed once the Board issues a final order.

As the Director explains, after the ALJ issues a decision after remand, Mr. Salaz, Petitioners, and/or the Director may appeal to the Board if aggrieved by any aspect of the ALJ's decision. *See* Mot. to Dismiss at 6-7. And the Director further explains, “[o]nce the Board issues a final order, any party may properly invoke this Court’s jurisdiction by filing a timely petition for review of that order.” *Id.* at 7 (citing § 921(c)). At that time, we can review all the Board’s decisions, including the one finding Powderhorn is the responsible operator liable for any benefits awarded on this claim. *See* 5 U.S.C. § 704 (“A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.”).

On a similar note, our case law has suggested the exception to finality Petitioners seek to invoke would not apply to the circumstances here when a private party is seeking review of a remand order versus an administrative agency seeking review. In *Zen Magnets, LLC v. Consumer Product Safety Commission*, 968 F.3d 1156, 1164-65 (10th Cir. 2020), we applied the exception to exercise jurisdiction over an agency’s appeal of a remand order explaining that “practical finality is particularly appropriate when an agency may be foreclosed from appellate review.” *See also Trujillo*, 813 F.3d at 1318 n.4 (“The [practical finality] doctrine has most often been applied in the administrative agency context because agencies may be barred from seeking district court (and thus circuit court) review of their own administrative decisions.” (internal quotation marks omitted)). But we rejected the private party’s argument that this court had jurisdiction over its cross-appeal from the

same nonfinal order. *See Zen Magnets*, 968 F.3d at 1165. We explained “the district court’s decision was not practically final for [the private party].” *Id.* (internal quotation marks omitted). We further explained although “a remand prevents a later appeal of the initial decision” for administrative agencies, “private parties can freely challenge the initial decision after the agency carries out the remand order.” *Id.* at 1165-66. So, we concluded the remand order would not prevent eventual appellate review of the private party’s arguments. *See id.* at 1166. The same holds true here. As we noted above, Petitioners will ultimately be able to seek appellate review of the Board’s initial decision on the responsible operator issue after the ALJ carries out the remand order and determines Mr. Salaz’s eligibility for benefits.

### III. Conclusion

For the foregoing reasons, we grant the Director’s motion to dismiss and dismiss this appeal for lack of jurisdiction.

Entered for the Court

Allison H. Eid  
Circuit Judge