U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 16-0690

CLARENCE W. JONES, JR. Claimant-Petitioner v. HUNTINGTON INGALLS, INCORPORATED (INGALLS OPERATIONS) Self-Insured Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 07/29/2021 DECISION and ORDER on MOTION for RECONSIDERATION

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Isaac H. Soileau, Jr., and Ryan A. Jurkovic (Soileau & Associates, LLC), New Orleans, Louisiana, for Claimant.

Traci Castille (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured Employer.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Amie Peters (Workers' Injury Law and Advocacy Group), Manchester, New Hampshire, for amicus.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.[1]

BUZZARD, Administrative Appeals Judge:

Claimant has filed a timely motion for reconsideration of the Benefits Review Board's decision in *Jones v. Huntington Ingalls, Inc. (Ingalls Operations)*, 51 BRBS 29 (2017). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. He contends the Board erred in holding he does not have the statutory right to choose his treating audiologist under Section 7(b) of the Longshore and Harbor Workers' Compensation Act (Act), 33 U.S.C. §907(b). He moves the Board to reverse. The Workers' Injury Law and Advocacy Group (WILAG)[2] and the Director, Office of Workers' Compensation Programs (Director) (collectively, with Claimant, "the moving parties"), respond in support. Employer responds, requesting the Board deny Claimant's motion. Claimant filed a reply brief.

In this claim for benefits for hearing loss, the Board affirmed the administrative law judge's denial of disability benefits but reversed the denial of medical benefits, holding the parties' stipulations establish Claimant suffered a work-related hearing loss and Employer accepted liability for medical benefits, including hearing aids. Analogizing audiologists to pharmacists pursuant to *Potter v. Elec. Boat Corp.*, 41 BRBS 69 (2007), it further held claimants do not have a right to choose their own audiologists under 33 U.S.C. §907(b) because "audiologists" are not specifically listed under the regulatory definition of the term

[1] Administrative Appeals Judge Greg J. Buzzard is substituted on this panel as Judge Ryan Gilligan is no longer a member of the Benefits Review Board. 20 C.F.R. §802.407(a).

[2] By Order dated February 6, 2018, the Board granted WILAG's motion to accept its amicus brief in this matter.

"physician" at Section 702.404, 20 C.F.R. §702.404.[3]

The moving parties argue the 1984 congressional amendment of Section 8(c)(13)(C) of the Longshore Act (Act), 33 U.S.C. §908(c)(13)(C) -- occurring after the agency last amended Section 702.404 of the regulations in 1977 -- supports their contention that the Act treats audiologists as physicians for the purposes of Section 7(b). They further contend the legislative history of that amendment confirms Congress intended to equate audiologists and physicians, and, in practice, claimants have long been given their choice of audiologists to provide medical care for hearing loss, regardless of the fact that the agency did not formally amend Section 702.404. The moving parties thus conclude the Board's interpretation of Section 702.404 as excluding a claimant's initial choice of an attending audiologist for the diagnosis and treatment of hearing loss contradicts the structure of the Act and congressional intent.

We agree and grant Claimant's motion for reconsideration and the relief requested. 20 C.F.R. §802.409. As a matter of statutory construction, audiologists are appropriately considered "physicians" within the meaning of Section 7(b) as the proper fulfillment of congressional intent. To the extent the regulatory history of Section 702.404 as tied to the administration of a separate workers' compensation program under the Federal Employees' Compensation Act ("FECA") suggests otherwise, as our dissenting colleague suggests, it cannot trump the congressional will expressed in Section 8(c)(13)(C) of the Longshore Act. *See, e.g., United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings

[3] Claimant sought authorization to be fitted with hearing aids by Dr. Holly McLain, Au.D., who diagnosed a hearing impairment, and was the only audiologist he chose to see in connection with his claim. Employer did not dispute that Claimant can be treated for his hearing loss by *an* audiologist under the Act, but argued he is not permitted to choose *which* audiologist provides his medical care. Emp. Br. at 19-21. Employer authorized him to be treated only by an audiologist of its choosing. JX 1 (accepting liability for hearing aids and authorizing a hearing aid fitting with Employer's chosen provider, Gulf Coast Audiology). The Board held the "selection of an audiologist" concerns the character and sufficiency of a medical service within the district director's scope of medical supervision pursuant to Section 702.407, 20 C.F.R. §702.407. *See* 33 U.S.C. §907(b), (c); 20 C.F.R. §702.401 *et seq.* It therefore remanded the case to the district director's office to address "the details of Claimant's audiological care." *Jones*, 51 BRBS at 32.

produces a substantive effect that is compatible with the rest of the law.").[4]

I. Statutory and Regulatory Background

A. Choice of physician under the Act

Since the inception of the Act, Section 7(a) has provided, in part, that employers shall furnish "medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. §907(a). Since 1972, Section 7(b) has provided, in turn, that the "employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this chapter as hereinafter provided." 33 U.S.C. §907(b); *see also* 20 C.F.R. §702.403.[5]

An employee's initial choice of physician plays a vital role in developing a claim with lasting implications for the treatment of his work injury. Once the "initial, free choice of attending physician" is selected, a claimant "may not thereafter change physicians without the prior written consent of the employer . . . or the district director" unless the "initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease." 20 C.F.R.

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[4] The Federal Employees' Compensation Act ("FECA") provides workers' compensation coverage to injured federal employees, paid by the federal government. 5 U.S.C. §8102. The Longshore Act provides workers' compensation coverage to injured maritime employees, paid by their private sector employers; it explicitly excludes federal employees from coverage. 33 U.S.C. §903(b).

[5] Medical care is defined broadly:

> Medical care shall include medical, surgical, and other attendance or treatment, nursing and hospital services, laboratory, X-ray and other technical services, medicines, crutches, or other apparatus and prosthetic devices, and any other medical service or supply, including the reasonable and necessary cost of travel incident thereto, which is recognized as appropriate by the medical profession for the care and treatment of the injury or disease.

20 C.F.R. §702.401(a).

§702.406(a).[6]

Physician choice in the worker's compensation arena "balance[s] two desirable values." 8 Lex K. Larson and Thomas A. Robinson, Larson's Workers' Compensation Law §94.02[2] (2018). The first involves "allowing an employee, as far as possible, to choose his or her own doctor" stemming from "the confidential nature of the doctor-patient relationship" and the "desirability of the patient's trusting the doctor." *Id.* The second value involves "achieving the maximum standards of rehabilitation by permitting the compensation system to exercise continuous control of the nature and quality of medical services from the time of injury." *Id.*

Prior to 1972, the Act required an injured employee to select a physician from a panel chosen by his employer. 33 U.S.C. §907(b) (1970); Act of Sept. 13, 1960, Pub. L. No. 86-757, 74 Stat. 900. The 1972 Amendment, however, permitted the injured worker to choose from a list of physicians authorized by the Department of Labor (Department). Congress made the change to keep "in line with modern practice" at the "recommendation of the National Commission [on State Workmen's Compensation Laws]." S. Rep. No. 92-1125 (92d Cong.), Sept. 13, 1972. Modern practice moved towards expanding patient choice to emphasize confidentiality and trust and away from employer control. The National Commission therefore recommended "the worker be permitted the initial choice of physician, either from among all licensed physicians in the State, or from a panel of physicians selected or approved by the workman's compensation agency." John F. Burton, Jr., *Workers' Compensation Resources*, 1972 Report of the National Commission on State Workmen's Compensation Laws, Ch. 4, http://workerscompresources.com/?page_id=28 (last viewed July 23, 2021). Congress implemented the recommendation in amending Section 7(b). 33 U.S.C. §907(b).[7]

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[6] An employer also "may" consent to a change in physician if "a showing of good cause for [the] change" is made. 20 C.F.R. §702.406(a). In certain circumstances, the district director may order a claimant to change physicians if doing so is "desirable or necessary in the interest of the employee" or the physician's fees are excessive. 33 U.S.C. §907(b); *see* 20 C.F.R. §702.406(b).

[7] In so recommending, the National Commission recognized the importance of employees accessing medical care at the earliest possible moment in a workers' compensation claim, i.e., "from the time of injury or detection of the disease." John F. Burton, Jr., *Workers' Compensation Resources*, 1972 Report of the National Commission on State Workmen's Compensation Laws, Introduction, http://workerscompresources.com/?page_id=28 (last viewed July 23, 2021).

B. Definition of physician under the Act and regulations

The Act does not define "attending physician" for the purposes of 33 U.S.C. §907(b). Nor does it define the term "physician" in any of the thirty-three other instances the term is used in four sections of the Act. *See* 33 U.S.C. §§907, 908(c)(13)(C), 919, 928. But Section 702.404 of the regulations, 20 C.F.R. §702.404, does define physician, broadly.

Originally promulgated in 1938 and administered by the United States Employees' Compensation Commission, one regulatory definition covered the term for both the FECA and the Longshore Act and its extension acts. 20 C.F.R. Ch. 1, Subch. A, Part 2, §2.1(b) (1938). The Department transferred administration of the Longshore Act and the FECA to the Office of Workers' Compensation Programs (OWCP) in 1974. OWCP, for a time, continued to model the Longshore Act's regulatory definition of physician on the FECA definition. Last revised in 1977 to incorporate changes to the FECA definition, the relevant part of the current Longshore regulation states:

> The term *physician* includes doctors of medicine (MD), surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. . . . Naturopaths, faith healers, and other practitioners of the healing arts which are not listed herein are not included within the term "physician" as used in this part.

20 C.F.R. §702.404.[8]

After the agency last amended Section 702.404, however, Congress amended the Longshore Act, equating certified audiologists with physicians for the diagnosis and treatment of hearing loss. 33 U.S.C. §908(c)(13)(C); *see* 20 CFR §702.401(a). As originally enacted in 1927, Section 8(c)(13) of the Act read "Loss of hearing: Compensation for loss of hearing of one ear, fifty-two weeks. Compensation for loss of hearing of both ears, two hundred weeks." 33 U.S.C. §908(c)(13) (Suppl. 7 1925); 69 P.L. 803, 44 Stat. 1424, 69 Cong. Ch. 509. In 1984, however, Congress amended the section to

[8] The FECA definition is now contained in that statute. Notably, it omits the final sentence of 20 C.F.R. §702.404: the sentence excluding naturopaths and faith healers from the term "physician" is no longer in the FECA definition. *Compare* 5 U.S.C. §8101(2) (1974) *with* 20 C.F.R. Ch. 1 Subch. B Pt. 2 Section 2.1(f) (1971). The Longshore regulatory definition has never been amended to conform to the change in the FECA definition.

grant special status to audiograms performed by certified audiologists and otolaryngologists. Amended Section 8(c)(13)(C) accords audiograms presumptive evidentiary weight regarding the amount of hearing loss sustained if: 1) they are "administered by a licensed or certified audiologist or a physician certified in otolaryngology[;]" 2) the results of the test are given to the injured employee at the time the test is administered; and 3) there are no contrary audiogram results from the same time period. 33 U.S.C. §908(c)(13)(C); *see also* 20 C.F.R. §702.441.

Beyond the amount of disability compensation owed to an employee under Section 8, such a diagnosis impacts the remainder of a claimant's rights under the Act, as an employee who establishes a work-related hearing loss based on an audiogram from either an audiologist or otolaryngologist is entitled to employer-paid medical care for that injury. 33 U.S.C. §907(a). Moreover, a diagnosis by audiogram from either specialist dictates *when* a claimant must file his claim for disability and medical benefits; the statutes of limitations at Sections 12 and 13 begin running when a claimant receives an audiogram "which indicates . . . a loss of hearing." 33 U.S.C. §908(c)(13)(D); *see* 33 U.S.C. §§912 (requirement to notify employer of an injury within 30 days), 913 (claim must be filed within one year of awareness of injury); *Vaughn v. Ingalls Shipbuilding, Inc.*, 28 BRBS 129 (1994) (en banc), *aff'g on recon.* 26 BRBS 27 (1992). Notably, audiologists and otolaryngologists are the only medical providers Congress named by specialty in the Act.[9]

The legislative history of amended Section 8(c)(13)(C) confirms the importance Congress placed on the medical expertise of audiologists. Both the Senate and the House Committees recognized the importance of audiograms in initially diagnosing and treating hearing loss. But while the Senate bill considered audiograms in general to have "special status" and be "conclusive evidence of hearing loss," the House version afforded audiograms presumptive weight only if a certified audiologist or physician, whom the House deemed "competent medical personnel[,]" administered it.

The Senate ceded to the House in committee:

> In requiring audiograms to be administered by certified audiologists or otolaryngologists, the conferees wish to assure that audiogram results are certified by competent medical personnel. In promulgating regulations under this section the conferees expect that the Department of Labor will

[9] Section 702.441(b)(1) of the regulations implements Section 8(c)(13)(C). Largely tracking the language of the statute, it requires a certified audiologist or otolaryngologist "ultimately interpret and certify" the results for an audiogram "to be acceptable under this subsection." 20 C.F.R. §702.441(b)(1).

> incorporate audiometric testing procedures consistent with those required by hearing conservation programs pursuant to the Occupational Safety and Health Act.

H.R. Conf. Rep. 98-1027, 98th Cong., 2nd Sess. 1984, 1984 U.S.C.C.A.N. 2771, 2778. Significantly, the Occupational Safety and Health Administration (OSHA), in turn, considers audiologists equal with otolaryngologists and other physicians for the treatment of hearing loss. *See* OSHA Std. Interp. 1910.95(G)(3) (2016) (2016 WL 6440727) (letter clarifying OSHA's position regarding the "term 'physician' as it pertains to OSHA's audiometric testing program") (OSHA Std. Interp.).[10]

The House also explained the significance of its amendment requiring the audiologist or otolaryngologist to provide a copy of the audiogram "to the employee at the time it was administered" under Section 8(c)(13)(C) for purposes of filing a claim and preventing further injury:

> [B]ecause of the presumptive effect which these amendments would give to audiograms [performed by certified audiologists or otolaryngologists], the Committee's bill further requires that a report on the audiogram must be provided to the employee at the time the audiogram was administered. Clearly, if that audiogram shows a hearing loss, the employee may want to file a claim for compensation against a previous employer. Further, he may want to undertake steps in his current employment to limit his exposure to noise, so as to prevent further detriment to his hearing.
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> Because of the credibility which is given to audiograms as an indication of the extent of hearing loss, the Committee believes that the period within which an employee must file a notice of injury (pursuant to Section 12(a) of the Act) and a claim for compensation (pursuant to Section 13 of the Act) should not begin to run until the employee has been provided a copy of the audiogram, with a clear, nontechnical report thereon. The Committee has

[10] Notably, the dissent argues the Occupational Safety and Health Administration's (OSHA) treatment of audiologists for purposes of hearing loss is irrelevant in interpreting whether audiologists should be considered physicians under the Act. Congressional statements in the legislative history of Section 8(c)(13)(C) fundamentally belie that argument by specifically directing the agency to adopt the OSHA testing procedures for the diagnosis of hearing loss.

further amended Section 8(c)(13)(C) of the Act to so stipulate.

H.R. Rep. 98-570, 98th Cong., 2nd Sess. 1984, 1984 U.S.C.C.A.N. 2734, 2742-2743.

C. OWCP's administration of the Act

As a result of the interplay between Sections 7(b) and 8(c)(13)(C), OWCP has long administered the Act by equating audiologists with physicians who specialize in otolaryngology for the treatment of hearing loss. As the Director notes, consistent with the statute and regulations, the Longshore Procedure Manual instructs that audiograms are presumptive evidence of the amount of hearing loss sustained if they are administered by a certified audiologist, physician, or a qualified technician under their supervision. DLHWC Proc. Manual 3-0401, para. 3(7)(1);[11] *see* 29 C.F.R. §1910.95(g)(3); Dir. Letter Br. at 2. As a result, the Director concludes, "[a]lthough 20 C.F.R. §702.404 was never formally amended to include audiologists as physicians, the fact that the Longshore Program has long accorded to their audiograms the same deference as those of physicians, indicates that the Director has considered audiologists' reliability and expertise to be the same as physicians." Dir. Letter Br. at 7, n.10.[12]

On this issue, the FECA and the Longshore Act notably diverge. Congress did not amend the FECA as it did the Longshore Act with regard to hearing loss claims. And although the FECA allows injured employees an initial choice of physician, it does not equate audiologists with physicians for the purposes of interpreting audiograms, nor afford presumptive status to audiograms conducted by audiologists or otolaryngologists, nor adopt the audiometric testing program promulgated by OSHA as the legislative history of

[11] https://www.dol.gov/owcp/dlhwc/lsproman/proman.htm#03-0401 (last viewed July 23, 2021).

[12] Replying to public inquiry regarding what credentials qualify a person to perform the duties specifically ascribed to physicians in 29 C.F.R. §1910.95, the Department instructed "the standard is clear in stating duties that must be performed only by individuals that meet certain professional qualifications (i.e., as audiologists, otolaryngologists and/or other physicians)." OSHA Std. Interp.

Section 8(c)(13)(C) indicates Congress instructed the Department to do.[13]

II. Reading Section 7(b) in conjunction with Amended Section 8(c)(13)(C) establishes Congress intended claimants to have their initial choice of treating audiologists.

Whether claimants have the right to choose a treating audiologist to provide medical care under 33 U.S.C. §907(b) is a matter of statutory construction. The fundamental purpose of statutory construction is to discern the intent of Congress in enacting a particular statute or provision. *See Mallard v. United States Dist. Court*, 490 U.S. 296, 300-301 (1989). Thus, every exercise must begin with the words of the text. *Id*. If the language is plain, the intent is clear, and the statute must be enforced according to its terms. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010).

But if the meaning is not clear on its face, it can be best understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or

[13] Our dissenting colleague's reliance on the regulatory definition of "physician" under the Black Lung Benefits Act (Black Lung Act) to interpret the definition under the Longshore Act is equally misplaced. While the Longshore Act and Black Lung Act share certain statutory features common to workers' compensation systems, the programs are otherwise fundamentally distinct. *See* 30 U.S.C. §932(a) (incorporating aspects of the Longshore Act into the Black Lung Act). Unlike the Longshore Act, which covers a variety of work-related injuries and illnesses, including hearing loss, and operates much like a traditional workers' compensation program, the Black Lung Act provides compensation and medical services for one specific respiratory condition: totally disabling pneumoconiosis, or resulting death, from coal mine dust inhalation. *See* 30 U.S.C. §922(a). Due to the specialized nature of the disease, the program operates under a distinct set of medical and evidentiary standards, such as entitling each miner to a Department-sponsored "complete pulmonary evaluation" and setting forth with particularity the types of medical tests that can substantiate a claim and qualifications of medical personnel who can interpret those tests. *See, e.g.*, 30 U.S.C §923(b) (complete pulmonary evaluation); 20 C.F.R. §718.201 (technical requirements for x-ray readings; requires "physician" interpreting an x-ray to set forth her radiological qualifications). Unsurprisingly, the Black Lung Act and its regulations do not contain any references to audiologists; its regulations rationally require that a miner's totally disabling respiratory disease be treated by, or under the supervision of, a medical doctor or osteopath. *See* 20 C.F.R. §725.702 (definition of physician for treatment purposes). This in no way undermines a longshore worker's right to choose his own audiologist to treat hearing loss under the Longshore Act or informs our understanding of the statute and implementing regulations.

ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). This is because "our duty, after all, is to construe statutes, not isolated provisions." *King v. Burwell*, 576 U.S. 473, 486 (2015) (internal quotations and citation omitted).

The statutory language, in isolation, is ambiguous. Section 7(b) does not answer whether Congress intended audiologists to be treated as physicians and the term "physician" is not defined elsewhere in the Act. But Congress unequivocally equated physicians and audiologists in the diagnosis of hearing loss by the plain language of Section 8(c)(13)(C), establishing a clear link between the professions:

> The meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases. *Noscitur a sociis* means literally 'it is known from its associates' and means practically that a word may be defined by an accompanying word and that, ordinarily, the coupling of words denotes an intention they should be understood in the same general sense.

2A SUTHERLAND STATUTORY CONSTRUCTION §47.16 (7th ed. 2007) (citations omitted).

Reading the term "physician" to include audiologists for purposes of Section 7(b) best harmonizes the Act. It would be inconsistent for Congress to equate the two professions for diagnosing hearing loss in one section -- triggering statutes of limitations in two others -- but to permit a claimant to choose only an otolaryngologist to provide medical care in yet another. Such a contradictory interpretation should be rejected: "it is a 'cardinal rule that a statute is to be read as a whole,' in order not to render portions of it inconsistent or devoid of meaning." *Matter of Glenn*, 900 F.3d 187, 190 (5th Cir. 2018) (citing *Zyler v. Dep't of Agric. (In re Supreme Beef Processors, Inc.)*, 468 F.3d 248, 253 (5th Cir. 2006) (en banc) (additional citations omitted)). Instead, each part or section

should be construed in connection with every other part or section to produce a harmonious whole. *Bilski v. Kappos*, 561 U.S. 593 (2010).[14]

Moreover, reading them together fulfills the purposes of both sections as demonstrated by legislative history. Section 7(b)'s objective to allow greater patient choice applies to otolaryngologists as doctors of medicine; the identical reasoning applies with equal force to audiologists who are qualified by their education, training, and state licensure to perform the same diagnostic tests and provide the same corrective treatment for hearing loss. Given they are subject to the same need for confidentiality and trust, and in light of the special status afforded audiologists Congress repeatedly noted in amending Section 8(c)(13)(C), the legislative history establishes Congress intended audiologists to be included as "attending physician[s]" under Section 7(b). *Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 568 (2005) (legislative history may be used to illuminate otherwise ambiguous terms in the statute).

Conversely, reading the term "physician" to exclude audiologists in Section 7(b) would lead to inconsistent, impractical, and costly results. As the Director points out, if claimants are denied the right to choose their own audiologist, "they nevertheless remain fully entitled to choose an otolaryngologist to diagnose, evaluate, measure and treat hearing loss because otolaryngologists, as doctors of medicine, are expressly defined as physicians by Section 702.404." Dir. Letter Br. at 6. Moreover, "that physician will, in all likelihood, refer claimant to an audiologist for an audiogram and fitting of hearing aids," which will force employers "to pay for services rendered from both the otolaryngologist and the

[14] The dissent's creation of a complete distinction between diagnosing and treating hearing loss does not reflect the reality of the Longshore program, is not shared by the program's administrator, and is counter to the regulations Congress instructed the agency to adopt. As the Director notes, under the OSHA testing requirements that Congress identified, "audiologists' duties go beyond the administration of testing; rather, they include conducting, reviewing and interpreting testing results, determining the existence of hearing impairment, and making referrals for medical exams." Dir. Letter Br. at 5 (citing OSHA Std. Interp.). Indeed, testing responsibilities include core decisions on treatment. *Id*. Thus, contrary to our dissenting colleague's view that "how much hearing loss someone has is a very different question from how [that] hearing loss should be treated" the OSHA interpretation specifically states: "[t]he audiometric testing program involves several other responsibilities . . . that go beyond the administration of the *testing*." OSHA Std. Interp.

audiologist, thereby increasing the overall cost of medical care for which the employer is liable to pay." *Id.*[15]

It strains credulity to believe Congress would intend such an impracticable result, undermining a central objective of the Act. *See, e.g., Sheridan v. U.S.*, 487 U.S. 392, 402 n.7 (1988) (courts should strive to avoid attributing unreasonable designs to Congress, "particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading."); *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 282 (1980) (the Act is designed to accommodate "employees' interest in receiving a prompt and certain recovery for their industrial injuries as well as . . . the employers' interest in having their contingent liabilities identified as precisely and early as possible.").

After examining the language of the Act, its overall framework, and its legislative history, we conclude Congress intended to equate audiologists with physicians for the purposes of Section 7(b). No more is required: "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law of the land and must be given effect." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984). We therefore see no reason to disturb OWCP's longstanding practice of allowing claimants their initial choice of treating audiologist. *See, e.g., N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974) ("In addition to the importance of legislative history, a court may accord great

[15] Our dissenting colleague argues we have created a "false issue" and invaded the "realm of the policymakers" by addressing the practical effect that *changing* the longstanding treatment of audiologists through judicial interpretation would have on the administration of the Longshore program. We have done neither. Rather, we have simply acknowledged the agency's representation of that effect *as contained in its brief before us* in interpreting the statute the agency administers and the regulation it drafted. Dir. Letter Br. at 6. Casting aside that perspective to impose her own view of the proper administration of the Act, in our judgment, represents a far greater danger to the rulemaking process. *Kisor v. Wilkie, Secretary of Veterans Affairs*, 139 S.Ct. 2400 (2019) (courts should defer to any agency's interpretation of its own regulation, provided it is neither plainly erroneous nor inconsistent with the statute it administers).

weight to the longstanding interpretation placed on a statute by an agency charged with its administration."[16]

III. The agency's interpretation of Section 702.404 of the regulations is permissible as consistent with congressional intent.

Our dissenting colleague's examination of the regulatory history of 20 C.F.R. §702.404 does not compel a different result. When a regulation implements a statute, the regulation must be construed in light of the statute, *see Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1047 (5th Cir. 1973), but where a regulation conflicts with a statute, the statute controls. *See Legal Environmental Assistance Found., Inc. v. U.S. EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997). Section 702.404 has not been revised since the 1984 Amendments to the Act, and the FECA does not contain any corollaries to the status of audiologists afforded by the Longshore Act in those amendments. If the Longshore regulation, or OWCP's administration of it, did not account for these differences, the Department's interpretation would conflict with the statute and be unenforceable. *Id.*

But the regulation's language does not contradict the statute, and the Department has applied it consistently with congressional intent after the amendment to Section 8(c)(13)(C). The Department's interpretation therefore is permissible, and it is under no obligation to revise the regulation as the dissent suggests. *United States v. Larionoff*, 425 U.S. 864, 863 (1976) (every regulation and rule must be consistent with the terms and provisions of the statute); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-214 (1976) (the power to enforce regulations extends only to enforcement that effects the will of Congress as expressed in a statute). Regardless, it is also the best interpretation of the regulation.

As noted, the first sentence of the regulatory definition states, "The term *physician* includes doctors of medicine (MD), surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 20 C.F.R. §702.404. The final sentence states, "Naturopaths, faith healers, and other practitioners of the healing arts which are not listed herein are not included within the term 'physician' as used in this subpart." *Id.*

[16] That Congress afforded special status to audiologists and equated their diagnoses to those of otolaryngologists distinguishes this case from the Board's previous treatment of pharmacists under *Potter v. Elec. Boat Corp.*, 41 BRBS 69 (2007). In addition to performing fundamentally different roles with regard to diagnosis and treatment, Congress did not afford in the Act the same status to pharmacists it did to audiologists. 33 U.S.C. §908(c)(13)(C).

As the Director argues, plain language usage of the term "includes" establishes the list of medical professionals contained in the first sentence "is not intended to be exclusive of other professionals than those expressly enumerated." Dir. Letter Br. at 4 (citing *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 527 (5th 2005) ("The word 'includes' is usually a term of enlargement, and not of limitation. This largely tracks earlier Supreme Court expressions that 'the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.'")). Thus, while the list of "physicians" in the regulation gives an idea of scope, the list is inclusive, not exclusive. *See, e.g.*, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 912-913 (5th Cir. 1983).[17]

For similar reasons, the professions excluded from the definition in the last clause of the regulation -- including the undefined term "other practitioners of the healing arts" -- cannot be viewed as an exhaustive list, but can be viewed only as an illustrative one. Our task is to determine to which illustrative group audiologists more closely belong.[18]

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[17] Contrary to the dissent's view, the Longshore Procedure Manual definition of "physician" neither resolves whether the list is exhaustive or illustrative, nor constitutes an "official pronouncement formally . . . list[ing] as physicians only the professions specified in the first sentence of the regulation." The manual merely parrots the regulatory definition of "physician" and offers no insights beyond what we can already glean from the text of the Act and regulations.

[18] The dissent argues the Department made contemporary statements at the time it amended the regulation that "are consistent with the first sentence of the definition being exclusive, and are incompatible with the Director's interpretation adopted by the majority today" -- but it neither identifies those statements nor attempts to explain the alleged incompatibility. Moreover, the dissent's citation to *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000), to attempt to establish that the term "includes" is never expansive "if the provision also contains a limitation" is unavailing. The *Quinones* court interpreted the specific language of 33 U.S.C. §902(13). It concluded that because the first use of the word "including" did not also state "including but not limited to," as the second occurrence in the same statutory provision did, it was incorrect to ascribe the same meaning to the two phrases. *Id.*, 206 F.3d at 479, 34 BRBS at 27(CRT) ("Both occurrences of the term "including" were added to §902(13) in the 1984 amendments to the LHWCA, and it is illogical to assume that Congress intended both to be construed as 'including but not limited to' but only chose to modify the second occurrence of the term with a parenthetical."). The interpretation of that specific language in that context neither provides a general principle of construction nor aids our task here.

We agree with the moving parties it is more reasonable to classify audiologists with the examples of "physicians" listed in the first clause rather than to exclude them with the examples of "practitioners of the healing arts" in the last clause. *See, e.g., Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (a statutory phrase does "not stand alone, but gathers meaning from the words around it."). While it is true that "practitioners of the healing arts" can take on many definitions in many different contexts, *see* dissenting opinion at n.36, here they are characterized by two very specific examples: "naturopaths" and "faith healers." A "naturopath" is a practitioner of naturopathy which is "a theory of disease and system of therapy based on the supposition that diseases can be cured by natural agencies without the use of drugs." *The New Shorter Oxford English Dictionary* 1890 (3d ed. 1993). A faith healer "act[s] by faith and prayer, not drugs or other conventional medicine." *Id.* at 908.

Audiologists are utterly antithetical to both. Audiologists are licensed by the States, their duties overlap with those of otolaryngologists -- who are doctors of medicine -- and they engage in conventional medical treatment. The Dictionary of Occupational Titles identifies the duties of audiologists as:

> Administers and interprets variety of tests, such as air and bone conduction, and speech reception and discrimination tests, to determine type and degree of hearing impairment, site of damage, and effects on comprehension and speech. Evaluates test results in relation to behavioral, social, educational, and medical information obtained from patients, families, teachers, SPEECH PATHOLOGISTS (profess. & kin.) 076.107-010 and other professionals to determine communication problems related to hearing disability. Plans and implements prevention, habilitation, or rehabilitation services, including hearing aid selection and orientation, counseling, auditory training, lip reading, language habilitation, speech conservation, and other treatment programs developed in consultation with SPEECH PATHOLOGIST (profess. & kin.) and other professionals. . . .

Dictionary of Occupational Titles, www.occupationalinfo.org (Code 076.101-010 – Audiologist) (last viewed July 23, 2021). As WILAG argues, what an audiologist does with respect to a person's hearing is similar to what an optometrist does with respect to a

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Indeed, if the agency intended the list of physicians in the first clause of Section 702.404 to be "exhaustive," as the dissent suggests, there would be no need for the list of professions specifically excluded in the last clause -- the initial exhaustive list would render the second list superfluous. An interpretation that reads out language from a regulation should be avoided. *United States v. Menasche,* 348 U.S. 528, 538 (1955) (recognizing a "cardinal principle of statutory construction is to save and not destroy").

person's vision, and optometrists are specifically listed in Section 702.404. WILAG Br. at 4. [19]

Viewing the regulation in light of the statute, as we must, *Hodgson*, 475 F.2d at 1047, and gathering meaning from the types of medical professions specifically included and excluded by its plain text, *Jarecki*, 367 U.S. at 307, we conclude the Department's longstanding interpretation of Section 702.404 is permissible.[20]

[19] The dissent's attempt to distinguish audiologists from otolaryngologists based on their inability to surgically install cochlear implants is unavailing. As a legal matter, the argument ignores that Congress equated the two professions in the Act and the Department's illustrative list of health care providers in the regulatory definition of "physician" is not dependent on surgical credentials; as a practical matter, it ignores the significant overlap in the duties of audiologists and otolaryngologists in treating hearing loss. With respect to cochlear implants in particular, audiologists are not the "implant surgeons" but nevertheless "play a primary role in a collaborative, interprofessional team in the assessment and (re)habilitation of persons with cochlear implants" including "determining an individual's [implant] candidacy," "developing a comprehensive plan of care," "consulting with the surgeon regarding audiometric qualifications that may affect the choice of electrode array," and "providing intraoperative monitoring/electrophysiological testing during cochlear implantation." *See* American Speech-Language Hearing Association Cochlear Implants Roles and Responsibilities of Audiologists, www.asha.org/Practice-Portal/Professional-Issues/Cochlear-Implants/ (last viewed July 23, 2021). That an audiologist may ultimately decide to refer a claimant to a medical doctor for a surgical implant is not a basis for concluding the claimant cannot choose to see the audiologist in the first instance.

[20] Our dissenting colleague argues that because audiologists are not considered physicians pursuant to the FECA they similarly should not be considered physicians under the Longshore Act. We are not persuaded. While the Acts contain some similarities, they differ in the way Congress directed the treatment of hearing loss claims, and in the statutory definition of "physician" in the FECA as compared to the regulatory definition of "physician" in the Longshore Act. This understandably has led to different administration of the programs. We are neither persuaded nor bound by decisions from the Employees' Compensation Appeals Board interpreting a different federal statute.

We hold an audiologist is a "physician" such that Claimant is permitted his initial choice of audiologist pursuant to Section 7(b) of the Act as a matter of statutory construction.[21] We reverse the Board's prior holding to the contrary in *Jones*, 51 BRBS 29, and we vacate the order remanding the case to the district director. In all other respects,

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Similarly, we are unpersuaded by the dissent's argument that Congress could have explicitly included audiologists in the statutory definition of "physician" or that the agency was required to subsequently revise its regulation after Congress amended the Act. That knife cuts both ways: the term could have similarly been specifically excluded by either body -- "not every silence is pregnant." *Burns v. United States*, 501 U.S. 129, 136 (1991) (cautioning against drawing sweeping inferences from "silence" when such inferences are contrary to "other textual and contextual evidence of congressional intent."), *modified on other grounds by Irizarry v. United States*, 553 U.S. 708 (2008). Finally, it is not our grand task to establish "a reasonable basis for ascertaining which professionals, beyond those explicitly listed in the regulation, have physician status" as the dissent claims. It is instead our very limited task to address the dispute before us. And when looking at the Longshore Act, its overall framework, and its legislative history, we conclude Congress intended claimants to have their choice of treating audiologist under Section 7(b).

[21] Claimant must seek prior authorization for his initial, free choice of audiologist. 33 U.S.C. §907(d)(1); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981) (Miller, J., dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983).

we affirm the Board's prior decision. 20 C.F.R. §802.409. [22]

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to reverse the Board's prior

[22] We disagree with our dissenting colleague that this issue is improvidently before the Board on the basis that Claimant's specific choice of Dr. McLain is *per se* unreasonable because she is located more than 25 miles from his home. This case presents a threshold legal question of whether Claimant has a statutory right to select his attending audiologist, as Employer agreed to provide Claimant hearing aids but demanded he be treated by an audiologist only of its choosing. As we have held, Claimant, not Employer, is entitled to make his initial, free choice of attending audiologist to provide medical care. The separate question of whether Claimant can be ordered to change audiologists is within the purview of the district director, not the Board, in the first instance, based on a determination that doing so is "desirable or in the interest of the employee" or the provider's charges are excessive. 33 U.S.C. §907(b); *see* 20 C.F.R. 702.406(b). Even assuming Claimant's decision to seek medical care more than 25 miles from his home can form the basis of an order to change attending physicians, the regulation the dissent cites for that proposition contemplates consideration of additional factors such as "availability, the employee's condition and the method and means of transportation" and "other pertinent factors." 20 C.F.R. §702.403. As the Board is not empowered to fact-find or order a change in attending physician in the first instance, we decline to address whether grounds exist for the district director to issue such an order in this claim.

holding that Claimant is not entitled to a free choice of audiologist.[23] I would affirm that decision because the language of the regulation defining "physician," and the regulation's history, are unambiguous.

When addressing the meaning of a statute or regulation, courts must begin with the plain language. If the language is clear, the inquiry ends. *Mallard v. United States Dist. Court*, 490 U.S. 296, 300-301 (1989); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-844 (1984). If the statutory language is ambiguous, and an executive branch agency, acting within authority granted by Congress, has issued a reasonable implementing regulation, the court should look to that regulation for clarification. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005); *Chevron*, 467 U.S. at 865-866. If the regulation is ambiguous, the court may defer to the Department's interpretation of the language in question, provided it is neither plainly erroneous nor inconsistent with the statute or the regulation. *Kisor v. Wilkie, Secretary of Veterans Affairs*, 139 S.Ct. 2400 (2019); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Chevron*, 467 U.S. at 844; *Thornton v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 111 (2010).

Section 7(b) of the Act, 33 U.S.C. §907(b), at issue in this case, provides in pertinent part: "The employee shall have the right to choose *an attending physician* authorized by

[23] Section 702.403 of the regulations, 20 C.F.R §702.403, provides, generally, that the physician of choice is to be located within 25 miles of the claimant's home or the place of injury. The office of the audiologist Claimant presents as his choice in this case is approximately 100 miles from his home. It is improvident to have this case before us because there is no evidence of record or fact-finding that is a reasonable distance to travel under the regulation. Nevertheless, the case is here on reconsideration and in need of resolution.

the Secretary *to provide medical care* under this chapter as hereinafter provided."[24] 33 U.S.C. §907(b) (emphasis added). The Act does not define the term "physician," making it ambiguous in and of itself, but uses the term multiple times in four sections. 33 U.S.C. §§907, 908(c)(13)(C), 919, 928.[25] To adhere to the rule of statutory construction requiring consideration of the language of a statute in context, the majority relies heavily on the identification of "audiologist[s]," along with "physician[s] who [are] certified in otolaryngology," in Section 8(c)(13)(C) of the Act, 33 U.S.C. §908(c)(13)(C), to statutorily define "physicians" as including audiologists. This, they say, is the most practical, least costly, and best interpretation of the statute. While this is a "beautiful hypothesis," it is slain "by an ugly fact[:]"[26] the words of the statute do not support the theory.

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[24] Prior to 1972, the Act authorized an injured employee to select a physician from a panel of physicians chosen by his employer. 33 U.S.C. §907(b) (1970); Act of Sept. 13, 1960, Pub. L. No. 86-757, 74 Stat. 900. The 1972 Amendment permitted the injured worker to choose from a list of physicians authorized by the Department. The change was made to keep "in line with modern practice" and at the "recommendation of the National Commission." S. Rep. No. 92-1125 (92d Cong.), Sept. 13, 1972; *see also* John F. Burton, Jr., *Workers' Compensation Resources*, 1972 Report of the National Commission on State Workmen's Compensation Laws, Ch. 4, http://workerscompresources.com/?page_id=28 (last viewed July 23, 2021). Interestingly, Section 7(c) of the Act, 33 U.S.C. §907(c), which the majority does not address, requires the Department to generate "a list of physicians and health care providers" who are not authorized to treat injured workers. As claimants are entitled to choose their "physician," Section 7(c) indicates "physicians" are distinct from other "health care providers." Audiologists, because they do not fall under the definition of "physician," 20 C.F.R. §702.404, would fall in the "health care provider" category. *See* discussion, *infra*.

[25] None of the sections sheds light on how "physician" is to be defined. Section 7 is at issue here, and Section 8(c)(13)(C) will be discussed, *infra*. Sections 19(h) and 28(b) address potential effects of evaluations by "physicians." 33 U.S.C. §919(h) (refusal to be examined by a "physician" may result in suspension of compensation); 33 U.S.C. §928(b) (an employer may avoid liability for an attorney's fee if it agrees to pay benefits based on an evaluation by a physician chosen by the district director).

[26] Paraphrasing the quote by English biologist Thomas H. Huxley, Presidential Address at the British Association, "Biogenesis and Abiogenesis" (1870); later published in *Collected Essays*, Vol. 8, p.229 (at p.244: "the great tragedy of Science–the slaying of a beautiful hypothesis by an ugly fact"); https://mathcs.clarku.edu/huxley/CE8/B-Ab.html (last viewed July 23, 2021).

Section 8(c)(13)(C) states:

> An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

33 U.S.C. §908(c)(13)(C);[27] *see also* 20 C.F.R. §702.441(b)(1).[28] While Section 8(c)(13)(C) uses "audiologist" in the same sentence as "physician who is certified in otolaryngology," it does not define the term "physician." However, far from treating audiologists as physicians, Section 8(c)(13)(C) uses "physician" and "audiologist" disjunctively, with the audiologist being an alternative to a physician certified in otolaryngology, and then only for the limited purpose of administering and interpreting audiograms (i.e., administering a specific test to determine the amount of hearing loss, if any). If either professional conducts the audiogram, one element for considering an audiogram to be "presumptive evidence" of the claimant's hearing loss is met.[29] The section's plain words belie the majority's contention that it addresses care and treatment. *See also* 20 C.F.R. §702.441(b)(1). Neither subsection (C), nor Section 8(c)(13) as a whole, concerns the type of medical professional a claimant may choose to *treat* his hearing loss.

The majority also contends the enactment of Section 8(c)(13) requires defining audiologists as physicians for purposes of the provision on freedom of choice of a physician from a purposive perspective. They say it would be incongruous for a claimant not to be

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[27] Subsections (A) and (B) of Section 8(c)(13) address the amount of compensation due an employee with hearing loss, subsection (D) addresses the time for filing a claim for benefits for hearing loss, and subsection (E) requires the American Medical Association *Guides to the Evaluation of Permanent Impairment* be used to calculate the amount of hearing loss.

[28] Section 8(c)(13)(C) of the Act and Section 702.441(b)(1) of the regulations were added in 1984 and 1985, respectively.

[29] The Act does not mandate this test be the initial evaluation diagnosing hearing loss or be the result of a claimant's request for hearing testing. A "presumptive" audiogram could have been initiated by an employer.

able to go directly to the audiologist who certified his hearing test (for purposes of determining the amount of hearing loss) and obtain hearing aids, since that is the "most likely" treatment.[30] However, that judgment is not compelled by the statute or the regulations. How much hearing loss someone has is a very different question from how a hearing loss should be treated. It is not axiomatic that someone whose hearing is tested should be provided hearing aids, and the fact Congress placed faith in the judgment of audiologists to determine the amount of hearing loss does not equate to faith in audiologists to prescribe care.[31] The majority thus creates a false issue in order to impose its desired solution. In so doing, it intrudes into the realm of the policymakers, an area not properly within the adjudicatory jurisdiction of this Board, and abrogates the requirements of the rulemaking and legislative processes which are placed on those policymakers.[32] *See Dodd v. United States*, 545 U.S. 353, 359 (2005) (court cannot amend statutes); *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009) (policy arguments under the Act are best addressed by Congress, not courts). We are charged with interpreting the law as required for adjudication, not enacting or administering it. I turn now to our proper task.

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[30] The majority implicitly concedes hearing aids are not always the appropriate treatment.

[31] A test result establishing hearing loss does not compel the conclusion hearing aids should be provided as treatment. And, it does not compel the conclusion an audiologist who conducted the test should determine treatment. Congress simply did not speak to treatment when it enacted the testing provision. It spoke only to testing. Contrary to the majority, it is not at all unreasonable to think that Congress might want a medical doctor (rather than an audiologist) to consider the hearing test results along with other information before settling on a treatment decision. An audiologist is not, as the majority states, trained to provide the same treatment as a medical physician; for example, an audiologist could not prescribe or provide a cochlear implant, which might be the recommended care for a particular patient.

[32] The majority's approach puts employers in the position of having to pay for, without having coordination and referral by a physician (i.e. a member of a listed profession), examinations and treatment provided by audiologists as well as any treatments for which they refer. This will occur without the Congress's having ever said the program should operate in this manner, any noticed public discussion of the merits of the approach, and any Department justification of its decision in response to public comment.

As Congress did not define "physician" in the Act, it left a gap, making the statute ambiguous in this respect, and expressly authorized the Department to fill that gap, 33 U.S.C. §939(a). The Department has done so at 20 C.F.R. §702.404. *See Chevron*, 467 U.S. at 843-844 ("regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"). To determine whether an audiologist is a "physician" under the Act such that a claimant is entitled to his free choice under Section 7(b), we must look to the regulatory definition.

Section 702.404 states in full:

> The term *physician* includes doctors of medicine (MD), surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings. Physicians defined in this part may interpret their own X-rays. All physicians in these categories are authorized by the Director to render medical care under the Act. Naturopaths, faith healers, and other practitioners of the healing arts which are not listed herein are not included within the term "physician" as used in this part.

20 C.F.R. §702.404. As is evident, the regulation lists medical professionals who are included as "physicians," and "audiologists" have not been so specified.[33] The majority, nevertheless, concludes audiologists are "physicians" under the Act – a leap worthy of a grand jeté by Baryshnikov in his heyday – by a stretch of statutory construction and by agreement with the Director's unsupported interpretation of the regulation. Both cursory and in-depth reviews using the traditional tools of construction reveal Section 702.404 is not ambiguous, and unambiguous language needs no "interpreting." The "traditional tools" of construction, of course, require careful consideration of "the text, structure, history, and purpose of a regulation." *Kisor*, 139 S.Ct. at 2415.

The text and structure establish the regulation is not ambiguous. Although the first sentence of the definition contains the term "includes," the section does not permit us to expand the list to encompass other, unlisted, professionals as "physicians" because the last sentence of the regulation contains an exclusionary clause. The last sentence of Section 702.404 specifically limits the term "physician" to those professionals specified in the first

[33] As WILAG acknowledges, except for this list, the term "physician" has been left undefined. *See* WILAG Br. at 1-2.

sentence and excludes "[n]aturopaths, faith healers, and *other practitioners of the healing arts which are not listed herein*[.]" 20 C.F.R. §702.404 (emphasis added). As it contains a limitation affecting "other practitioners of the healing arts," the last sentence of Section 702.404 establishes the enumerated list of "included" "physicians" is exclusive. *See H.B. Zachry Co. v. Quinones,* 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000) (the term "includes" is not expansive if the provision also contains a limitation).[34] To disregard this exclusionary sentence or to interpret it as has the majority, is to disregard the history of the definition and change its meaning.

The regulation's history supports both concluding it is not ambiguous and rejecting the majority's interpretation. Since 1938, the Longshore Act, its extension acts, and the Federal Employees' Compensation Act (FECA) have shared a common regulatory definition of "physician." Originally, the regulation limited "physician" to "surgeons and osteopathic practitioners within the scope of their practice as defined by State law." 20 C.F.R. Ch. 1 Subch. A Section 2.1(b) (1938); *see also* 5 U.S.C. §8101(2) (1970); 20 C.F.R. Ch. 1 Subch. B Section 2.1(b) (1970). In 1971, that definition was amended to explain: "[c]hiropractors, naturopaths, podiatrists (chiropodists), psychologists, optometrists, faith healers, and other practitioners of the healing arts are not recognized as physicians as used in this part." 20 C.F.R. Ch. 1 Subch. B Pt. 2 Section 2.1(f) (1971); 36 Fed. Reg. 8936-8939 (May 15, 1971); *see also* 20 C.F.R. §702.404 (1973) (promulgated in final form: 38 Fed. Reg. 2650 (Jan. 26, 1973)). FECA's statutory definition was expanded in 1974 to provide:

> 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist, and subject to regulation by the Secretary.

5 U.S.C. §8101(2) (1974); 5 U.S.C. §8101(2) (2018) (FECA statutory definition remains current); 20 C.F.R. §10.401(a) (1975); 40 Fed. Reg. 6876, 6889 (Feb. 14, 1975). In response, the Department revised the Longshore regulation's definition, stating "the Secretary has been guided by the definition given to that term under the [FECA]" and will continue to "conform the definition of physician as it is used under the Act to that of the [FECA]." 41 Fed. Reg. 34294 (Aug. 13, 1976); *see also* 42 Fed. Reg. 45301 (Sept. 9, 1977) ("since the Secretary has always been guided by the terms of the FECA in defining

[34] Contrary to the majority's statement in footnote 18, the final, exclusionary clause of the definition is the very reason the term "includes" in the first sentence is not expansive.

'physician' for Longshoremen's Act purposes, . . . Section 702.404 has been revised to ensure conformity of interpretation under the two statutes."). Therefore, the change was expressly made for the purpose of conforming the Longshore Act regulatory definition of physician to the FECA definition.

Because the professions listed in the exclusionary sentence were considered "practitioners of the healing arts" in 1973, and four of those professions moved into the first sentence to be included in the definition of "physician" in 1977 solely based on the FECA statutory change, it is obvious the term "practitioners of the healing arts" is not limited to faith-based or alternative medicine practitioners as the majority and the Director state.[35] If the majority's limited definition of "practitioners of the healing arts" were correct, professions could not have been moved, without additional explanation, from one sentence to the other as the Department evolved the definition. Nothing indicates the professions were moved because they were "antithetical" to naturopaths and faith healers, and nothing indicates the continued exclusion of faith healers and naturopaths was intended to limit the scope of the phrase "other practitioners of the healing arts."[36] Interpreting the

[35] The term "healing arts" includes the practice of a variety of medicines, including clinical medicine, covering a variety of systems, such as osteopathy, pediatrics, orthopedics, surgery dentistry, and general medicine. *Roget's Int'l Thesaurus*, 3d ed., 686 (healing arts) (1962). In the broadest sense, "healing arts" may include interactions among alternative, traditional, and natural means to heal and manage pain and diseases. en.citizendium.org/wiki/Healing_arts (last viewed July 23, 2021); *Education Centers*, "What Are "Healing Arts?" http://www.educationcenters.com/faq/careers/healing-arts-careers/what-are-'healing-arts'-844.php (last viewed July 23, 2021). The term "practitioners of the healing arts" is broad and is not limited to those in alternative medicines but also includes those holding doctor of medicine or osteopathy degrees. *See, e.g.*, Patient Protection and Affordable Care Act, 42 U.S.C. §1396d(a)(13)(C) (2010); Ga. Code Ann. §§26-4-130(a)(2), 40-2-74; Miss. Admin. Code 30-20-3002:1.6; 23 Va. Code Ann. §10-210-2060 ("physicians, surgeons, and other practitioners of the healing arts"); Vt. Admin. Code §4-5-5:1 ("physicians, dentists or other practitioners of the healing arts"); Wy. Rules & Reg. 059.0001.12.

The Department never suggested, when making the regulatory revision, that in characterizing certain professions as physicians by moving them into the first sentence of the definition at Section 702.404 it was changing its view as to other professions in the second sentence. And its stated motives clearly indicate the contrary.

[36] To the extent the Director alleges audiologists are not "practitioners of the healing arts" because "practitioners of the healing arts" are like naturopaths who are characterized as lacking medical training, this also is belied by the Department's use of the term "practitioners of the healing arts" in related regulations. In defining "physician" for purposes of the Black Lung Benefits Act (which was modeled on the Longshore Act and incorporates many of its provisions), 30 U.S.C. §901 *et seq*., the Department's regulation provides:

> The term "physician" includes only doctors of medicine (MD) and doctors of osteopathy (DO) within the scope of their practices as defined by State law. No treatment or medical services performed by *any other practitioner of the healing arts* is authorized by this part unless such treatment or service is authorized and supervised both by a physician as defined in this section and by OWCP.

20 C.F.R. §725.702 (emphasis added); *see Northcross v. Bd. of Ed. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (similar language in two acts with common raison d'etre should be interpreted *pari passu*).

Further, the rationale that audiologists are "physicians" because they are akin to the regulation's listed professionals, and "antithetical" to the excluded professionals, is not a satisfactory basis for the Board to expand the regulation by fiat. And if it were, the criteria touted as demonstrating likeness to the listed professions have not been shown to constitute a rational basis for adding them as physicians. Moreover, even the touted criteria are not met by all licensed audiologists in fact. Though the Director asserts physician status is warranted because audiologists are licensed by the state, have duties that overlap those of otolaryngologists, engage in conventional medical treatment, and hold doctoral degrees, many licensed audiologists do not hold doctoral degrees. An examination of state licensure requirements for audiologists reveals many states permit those with Masters' Degrees to be grandfathered into licensure, *see, e.g.*, Miss. Admin. Code 15-19-60: 10.4.2; Ark. Code Ann. §17-100-302 (2017); N.C. Gen. Stat. §90-295(b), and others allow licensure with only a Master's Degree outright, *see, e.g.*, S.C. Code Ann. §§40-67-30, 40-67-220 (2014); S.D. Codified Laws Ann. §36-24-17.3 (2019); Va. Code Ann. §54.1-2603. *See also* American Speech Language Hearing Association State by State Licensure Information, www.asha.org/advocacy/state/ (last viewed July 23, 2021). Therefore, it is not rational to apply the doctrine of *ejusdem generis* merely because it seems audiologists "are like" the listed professionals. The Board has previously determined pharmacists, who also must obtain doctorate degrees, are not "physicians" under the Act. *Potter, et al. v. Elec. Boat Corp.*, 41 BRBS 69 (2007).

phrase as being limited to professionals who are similar to "faith healers" and "naturopaths" merely because those professions were the only ones not moved to the first sentence of the regulation changes the meaning of the phrase and the interpretation of the overall regulation in a manner inconsistent with the stated meaning and purpose of the regulation when adopted. Consequently, "practitioners of the healing arts" are not different in character or "utterly antithetical" from those professions listed in the first sentence as physicians. *See* n.35, *supra*.

As this history bears out, the Longshore Act has been linked to the FECA since its enactment. Such ties make relevant the FECA's narrow interpretation of the term "physician." *In the Matter of Herbert H. Lester*, 9 ECAB 684, 685 (1958) ("physician" "does not encompass all those who hold themselves out as practitioners of the healing arts"); *In the Matter of Sammie M. Venable*, 4 ECAB 244, 245 (1951) (Christian Science practitioners are not "physicians;" definition is exclusive; "Director has no authority to broaden this meaning through administrative interpretation"); *see also In the Matter of Samuel C. Ivy*, 15 ECAB 388 (1964). Audiologists are not physicians under the FECA. *S.E.*, ECAB Docket No. 17-1601 (issued Jan. 19, 2018); *J.B.*, ECAB Docket No. 17-1274 (issued Oct. 5, 2017); *J.K.*, ECAB Docket No. 17-0321 (issued April 24, 2017); *In the Matter of Leon Thomas*, 52 ECAB 202 (2001). As the Longshore Act's regulatory definition of "physician" has historically conformed to the FECA's, it is apparent from the plain language and the history of the regulation that Section 702.404 is unambiguous, and the plain language of an unambiguous regulation applies to the legal question at issue. *Kisor*, 139 S.Ct. at 2415.

Audiologists, as professionals, may perform a much broader range of duties than administering audiograms and interpreting results, such as ordering, dispensing, and adjusting hearing aids and, depending upon their state of licensure, offering other forms of treatment. *See* Dictionary of Occupational Titles, www.occupationalinfo.org (Code 076.101-010 – audiologist) (last viewed July 23, 2021). If an audiologist is deemed a "physician" under the Act, such that a claimant may choose the audiologist as his treating "physician" under Section 7(b), the services the audiologist could render would go beyond even the testing and interpretive services contemplated only for purposes of establishing presumptive evidence of hearing loss in Sections 8(c)(13)(C) and 702.441. To expand the definition of "physician" under the Act to include audiologists *for diagnostic and treatment purposes*, is unwarranted and inappropriately creates a statutory definition that does not exist. *See Aqua Products, Inc. v. Matal*, 872 F.3d 1290, 1322 (Fed. Cir. 2017) (agency cannot rewrite clear statutory terms).

To the extent the majority's agreement with the Director amounts to deference, it is not necessary or warranted in this case. *Kisor*, 139 S.Ct. at 2415. Even if the language of Section 702.404 could be considered ambiguous, deference is unwarranted. *Kisor* advises, before affording *Auer* deference, the court must look not only to the reasonableness of the agency's interpretation but also to whether the context and character of the agency's opinion warrants such weight. *Id.* at 2416 ("And let there be no mistake: That is a requirement an agency can fail."). That is, is the interpretation the agency's official position or is it an ad hoc statement? Does the interpretation implicate the agency's expertise? And, finally, does the interpretation "reflect a 'fair and considered judgment' [and not] merely [a] 'convenient litigating position'" or a new/surprise interpretation? *Id.* at 2416-2417.

In this case, we have multiple statements from the Department to address. We have the Director's litigating position asserting the OWCP and parties in general have long interpreted Section 702.404 as giving claimants their choice of audiologists[37] and the Occupational Safety and Health Administration (OSHA) considers audiologists to be physicians.[38] The Director offers no real support for these bald assertions. To the contrary,

[37] The only support the majority cites is the section of the OWCP Manual relating to Section 8(c)(13)(C); however, the language cited does not characterize audiologists as physicians but merely addresses presumptive audiograms. DLHWC Proc. Manual 3-0401, para. 3(7)(1).

[38] The majority and the Director make much of an OSHA hearing conservation program interpretive letter issued in 2016. OSHA Standard Interpretation, 1910.95(G)(3) (D.O.L.) (May 10, 2016). However, that interpretation, issued long after Congress enacted the Longshore Act provision giving presumptive credit to an audiologist's testing, has no bearing on this issue. Section 8(c)(13)(C), on which the majority bases its decision, makes no reference to the OSHA program, so no aspect of it is incorporated into the Longshore Act. Even if one were to consider the conference report language referencing the OSHA program, it relates only to the OSHA program's "audiometric *testing* procedures." H.R. Conf. Rep. 98-1027, 98th Cong., 2nd Sess. 1984, 1984 U.S.C.C.A.N. 2771, 2778 (emphasis added), and nothing in that program, 29 C.F.R. §1910.95, allows an injured employee to select his own audiologist for diagnosis or treatment of a hearing loss. The OSHA program does not use the term "audiologist" as a synonym for "physician." Rather, under the OSHA program, although physicians or, alternatively, audiologists may conduct hearing testing and interpret audiometric results, 29 C.F.R. §1910.95(g)(3), (7)(iii), (9), only a "physician" may determine the cause of an injured employee's hearing loss, 29 C.F.R. §1910.95(g)(8)(ii). This specifically establishes the two professions are not synonymous for the purposes the majority's interpretation requires.

we have the Department's official pronouncements formally issued in promulgating the regulation and the OWCP Procedure Manual. DLHWC Proc. Manual Parts 1-10; *see* 20 C.F.R. §701.201; 76 Fed. Reg. 37898-01 (2011). The OWCP Procedure Manual, specifically addressing the regulatory section at issue here, lists as physicians only the professions specified in the first sentence of the regulation. Audiologists are not among them. DLHWC Proc. Manual 5-0100, para. 3(2),[39] para. 4(1).[40]

We also have the Department's statements which were contemporaneous (1976-1977) with the regulatory change. These explanations formally recorded and conveyed the Department's intentions at the time it amended the regulatory definition to conform with the FECA definition, *see* discussion, *supra*. As such, they are consistent with the first sentence of the definition being exclusive, and are incompatible with the Director's

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[39] https://www.dol.gov/agencies/owcp/dlhwc/lsProMan/ProMan#05-0100 (last viewed July 23, 2021).

[40] "Physician" is defined as:

> 1. This term includes doctors of medicine (MDs); surgeons, podiatrists, dentists, clinical psychologists, optometrists, and osteopathic practitioners within the scope of their practice as defined by state law. Physicians defined in this part may interpret their own x-ray. (See 20 C.F.R. section 702.404.)
> 2. Although the term "physician" also includes chiropractors, payment for their services is limited, by regulation, to charges for physical examinations, related laboratory tests, x-rays made or required by the chiropractor to diagnose a subluxation of the spinal column, and treatment consisting of manual manipulation of the spine to correct a subluxation which is demonstrated by x-ray. For example, the Board has held that an employer was not liable for biofeedback treatment and physical therapy provided by a chiropractor based upon the plain language of 20 C.F.R. section 702.404 which limits the reimbursable services of a chiropractor. (*See Nell Bang v. Ingalls Shipbuilding, Inc.*, 32 BRBS 183 (1998))
> 3. All licensed physicians in the foregoing categories are authorized by the Director, OWCP, to render care under the Act, unless included on the Secretary's list of physicians and health care providers not authorized to render medical care or provide medical services. (See PM 5-600.)
> 4. Naturopaths, faith healers, and other practitioners of the healing arts not listed herein are not included within the term "physician" under the LHWCA.

interpretation that audiologists are physicians. *See Kisor*, 139 S.Ct. at 2418; 42 Fed. Reg. at 45301; 41 Fed. Reg. at 34294; *see also Levesque v. Block*, 723 F.2d 175, 181 (1st Cir. 1983) (contemporary statements by the agency are highly relevant in characterizing its actions); *Torch Operating Co. v. Babbitt*, 172 F. Supp. 2d 113, 122 (D.D.C. 2001) (meaning of regulation may be determined by "indications of the Secretary's intent at the time of the regulation's promulgation"); *see also In re Whyte*, 164 B.R. 976, 984 (Bankr. N.D. Ind. 1993) (contemporaneous conditions may be considered when addressing meaning of an ambiguous statute). Accordingly, to the extent the majority has done so, there is no proper basis for according deference to the Director's litigating position. *Kisor*, 139 S.Ct. at 2416.

As discussed, the interpretation the majority imposes is at odds with the language of the regulation, the manner in which the regulation has been revised, and the Department's express understanding of the regulation as evidenced by its official contemporaneous explanations during promulgation. In short, when the tools of regulatory interpretation are properly applied, the list in the first sentence must be understood as exclusive and at odds with the majority's position. Having concluded Section 702.404 is not ambiguous, I also disagree with the majority's remaining reasons for reversing the Board's prior decision.

The language Congress enacted with respect to audiologists is clear and specific. It relates only to a presumption applied to testing and does not make audiologists physicians for purposes of the freedom of choice provision. Had Congress intended to include audiologists as "physicians" because of Section 8(c)(13)(C), it certainly could have said so. It did not. Similarly, the Department could have amended the regulation following the 1984 Amendments to the Act, as it amended other regulatory sections in response to the Congressional amendments, and it did not.[41] Although the majority says we should not read any significance into the absence of an amendment to the definition, the Department has amended Parts 701 and 702 of the Longshore regulations no less than 14 times since 1977, with the most recent effective date being in 2018.[42] Despite numerous opportunities, the Department has, as yet, made no change to Section 702.404. Therefore, while

[41] As it did with chiropractors when the Section 702.404 was amended in 1977, the Department could have amended the section following the 1984 Amendments to the Act to accept audiologists in a full or limited capacity. *See* 20 C.F.R. §702.404 (reimbursable chiropractic services limited to "manual manipulation of the spine to correct a subluxation").

[42] In Subpart D of the regulations – Medical Care and Supervision – except for three sections, 20 C.F.R. §§702.404, 702.411, 702.412, all other sections were amended in 1985 or later. 20 C.F.R. §702.401 *et seq*.

otolaryngologists and audiologists are specified in narrow statutory and regulatory provisions related to hearing testing, there is no evidence Congress or the Department intended for them, consequentially, to be treated as the same in *all* respects of their professional practice, as the majority supposes.

Finally, the majority has not established a reasonable basis for ascertaining which professionals, beyond those explicitly listed in the regulation, have physician status. To merely select a few features and based thereon state that one professional is akin to those listed and another is not, or to assume one professional's educational background is sufficient to place him on the list, presumes too much. The majority sets forth no reasonable basis for ascertaining which professionals, beyond those explicitly listed in the regulation, have physician status. The result is that the majority would push the envelope of our authority and, effectively, modify the regulation arbitrarily to add audiologists by fiat as "physicians." In doing so, the majority adopts an administrative interpretation of the regulation which obscures the standard for determining who is a "physician" under the Act. This is not to say the regulation could not be amended to add audiologists (or other medical professionals) as "physicians," through a proper public process, but that process has not occurred.

In sum, Congress did not define, purport to define, or elucidate on the term "physician" in the Act, and the scope of Section 8(c)(13)(C) addressing audiologists, upon which the majority relies, is narrow. Section 8(c)(13)(C) specifies what constitutes presumptive evidence of the extent of a claimant's hearing loss – an entirely different purpose than Section 7(b)'s provision allowing a claimant his choice of physician to treat his injury. The Department issued regulations to define "physician." In light of the absence of "audiologists" from the list of identified "physicians" in the regulatory definition, the history of the promulgation and subsequent modification of Section 702.404 (which establishes chiropractors, psychologists, optometrists, and podiatrists are both "physicians" and "practitioners of the healing arts" so that the majority's construction of the limiting language of the regulation cannot be accepted), the Department's contemporaneous stated understanding that the language of Section 702.404 conforms to the FECA definition of "physician," and the clear limitation set forth in the last sentence of Section 702.404, the regulatory definition is certain and does not conflict with the Act. The majority's interpretation is inconsistent with the regulation as written.

Therefore, unless and until the Department amends the regulation properly, or Congress amends the Act, I would hold audiologists are not "physicians" under the Act, and I would affirm the Board's original decision.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge