No. 14-3519

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SEXTET MINING CORPORATION,

Petitioner

v.

MARY WHITFIELD
(Widow of NEEDHAM WHITFIELD)

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

The Director believes oral argument is unnecessary, but requests an opportunity to present argument if scheduled.

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DEPARTMENT OF LABOR,

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

This case involves a 2012 claim for automatic survivor's benefits filed by Mary Whitfield pursuant to the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944 (2006 & Supp. V 2011).[1] On May 14, 2013, Administrative Law Judge

[1] Unless otherwise noted, all references to the BLBA are to the 2011 edition of Title 30.

Alice M. Craft (the ALJ) issued a decision awarding Mrs. Whitfield benefits and ordering the former employer of her deceased husband, Sextet Mining Corporation (Sextet), to pay them. Petitioner's Appendix (PA) 21-26. Sextet appealed this decision to the United States Department of Labor Benefits Review Board (the Board) on June 13, 2013, Certified Case Record (CCR) 53-56, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On March 31, 2014, the Board affirmed the award. PA 9-17. Sextet petitioned this Court for review on May 31, 2014. PA 7-8. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. The injury, within the meaning of Section 21(c), arose in Kentucky, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUES

Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010) ("the ACA"), entitled "EQUITY FOR CERTAIN ELIGIBLE SURVIVORS," amended the BLBA by restoring automatic entitlement to federal black lung benefits to eligible survivors of miners who were awarded benefits

during their lifetimes. Mrs. Whitfield is a beneficiary of this amendment. When her husband died in 2012, she automatically became entitled to derivative benefits because her husband had obtained a lifetime award of benefits against Sextet. Because she was automatically entitled, and because Sextet had been determined to be the responsible operator in her husband's claim (and had been paying his BLBA benefits),[2] the district director expedited her survivor's claim against Sextet by issuing a proposed decision and order (PDO) recommending an award two weeks after she filed her claim.

20 C.F.R. § 725.418(a) (2012)[3] authorizes the district director to issue a PDO "at any time" "if its issuance will expedite the adjudication of the claim." Subsection (d), however, additionally provides that an operator may not be finally designated as the responsible operator unless it has received notice of the claim and an opportunity to submit evidence in accordance with Sections 725.407 and 725.410.

Three issues are presented:

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[2] The responsible operator is the employer, typically a coal company, which has been determined to be liable for the payment of benefits. 20 C.F.R. § 725.101(a)(26); *see Arkansas Coals, Inc. v. Lawson*, 739 F.3d 309, 313 (6th Cir. 2014) (outlining process for identifying responsible operator).

[3] On September 25, 2013, Section 718.418 was revised to implement the ACA's reinstatement of automatic entitlement. 78 Fed. Reg. 59102, 59117 (Sep. 25, 2013). **Unless otherwise noted, references in this brief to Section 725.418 are to the 2012 version.**

1. Did the district director violate Section 725.418 by expediting Mrs. Whitfield's claim for derivative benefits when Mrs. Whitfield was automatically entitled to benefits and Sextet had been previously designated the responsible operator, and was paying monthly benefits, in the miner's claim?

2. Was Sextet prejudiced by any procedural lapse when it was given ample opportunity to submit supporting evidence to the district director and the ALJ, but chose not to?

3. Assuming a procedural lapse and some prejudice, is the proper remedy to remand to the district director to provide the omitted procedures, namely, notice of the claim under Section 725.407 and an opportunity to submit evidence under Section 725.410?

STATEMENT OF THE CASE

An administrative law judge awarded Needham Whitfield (the miner) federal black lung benefits payable by Sextet in January 2008.[4] PA 68. He died on August 10, 2012, PA 64, and ten days later, Sextet terminated the payment of his benefits. PA 62. Mrs. Whitfield, his 84 year-old widow who depended on the monthly black lung benefits, promptly applied for derivative black lung benefits as his eligible survivor. PA 60-61.

[4] The Benefits Review Board dismissed Sextet's appeal as abandoned in August 2008. PA 66.

On September 18, 2012, the district director issued a proposed decision and order (PDO) finding Mrs. Whitfield automatically entitled to benefits pursuant to 30 U.S.C. § 932(l) and ordering Sextet to pay survivor benefits.[5] PA 53-57. The PDO granted Sextet thirty days in which to "request revision or request a hearing" before an administrative law judge, and also kept the record open for 30 days "unless extended for good cause" for Sextet to submit evidence. PA 53.

Sextet did not respond, and the district director issued a second document, entitled "Responsible Operator Agrees to Pay Award of Benefits" ("Agreement to Pay"), on October 25, 2012. PA 45. Like the PDO, the Agreement to Pay indicated that it would go into effect in 30 days unless a party requested revision or sought a hearing. PA 44.

Sextet responded to the Agreement to Pay. PA 31-41. It raised a litany of irrelevant defenses, such as preserving its right to examine the (now-deceased) miner and claiming that he was not a coal miner or even had pneumoconiosis. PA 33-34. It also disagreed that it was the responsible operator, despite its prior stipulation to the contrary in the miner's claim and the fact that it actually paid the miner's benefits. PA 38. In addition, Sextet submitted no evidence to the district

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[5] Sextet had agreed in the miner's claim that it was the responsible operator, DX 1, 1-181, 1-212, and in addition to paying the miner's ongoing monthly benefits at the time of his death, had paid over $100,000 in back benefits, those benefits owed beginning September, 2001, the month in which the miner filed his claim. PA 88; 20 C.F.R. § 725.503(b).

director to support any of its contentions, and therefore failed to take advantage of the record being left open. Instead, it requested that the district director forward the claim to the Office of Administrative Law Judges (OALJ) for conducting "further discovery" and a hearing. PA 40.

The district director accordingly transferred the claim to the OALJ in January 2013. DX 18. In doing so, the district director certified that the Black Lung Disability Trust Fund had commenced paying monthly black lung benefits as of August 2012 to Mrs. Whitfield, who had since moved to a retirement home.[6] *Id*. The district director also identified the plethora of irrelevant (and previously-resolved) issues that Sextet was now contesting. *Id*.

For the next three months, Sextet did nothing, propounding no discovery. On April 5, 2013, ALJ Alice M. Craft, recognizing that there were no material facts in dispute, ordered Sextet to show cause "why the benefits should not be awarded under the automatic survivor entitlement provision of the black lung benefits act." PA 27-28. Sextet responded, but the ALJ rejected its argument that the district director denied it procedural due process by using a PDO to first notify it of Mrs. Whitfield's claim. The ALJ further found Mrs. Whitfield automatically

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[6] The Black Lung Disability Trust Fund, as described more fully *infra* page 9, begins paying a claimant benefits following an initial favorable determination (a PDO) if the responsible operator rejects the recommendation and requests a formal hearing. 26 U.S.C. § 9501(d)(1)(A)(i); 20 C.F.R. §§ 725.419(a); .420(a); .522(a).

entitled to benefits under Section 932(l) and awarded benefits payable by Sextet. PA 21-26.

The Benefits Review Board affirmed. PA 9. It rejected Sextet's argument that it was denied due process. The Board explained that the PDO and the subsequently-issued Agreement to Pay

> afforded employer the opportunity to controvert the claim, and to request a hearing. Moreover, employer's current counsel received notice of the claim and, on November 21, 2012, exercised employer's rights to controvert the claim and requested a hearing. Thus, [] the Proposed Decision and Order constituted actual notice of the claim, and afforded employer a fair opportunity to defend against it…

PA 13.

Agreeing with the Director, the Board further upheld the expediting of Mrs. Whitfield's automatic entitlement claim. It observed that the then-applicable regulation "specifically allowed the district director to bypass the normal adjudication process and issue a proposed decision and order 'at any time during the adjudication' if the district director determined that its issuance would 'expedite the adjudication of the claim.'" PA 14, quoting 20 C.F.R. § 725.418(a)(2). In addition, it noted that recently-promulgated section 725.418(a)(3) expressly permitted accelerated claim procedures in automatic entitlement cases by allowing the issuance "at any time" of a PDO recommending an award and first notifying the employer of its liability for survivor's benefits in

that document. *Id*. The Board thus found the district director's actions here proper.

The Board also found no prejudice to Sextet by the truncated procedures. It ruled that Sextet was given notice of the claim and its potential liability, and was afforded, and exercised, an opportunity to contest the claim before the ALJ (who decides the claim *de novo*) and the Board. Furthermore, the Board noted that there was no material factual issue in dispute, including Sextet's designation as the responsible operator liable for benefits. PA 11, 15.

Finally, the Board rejected Sextet's attack on the constitutionality of Section 932(l), citing this Court's decision in *Vision Processing, LLC v. Groves*, 705 F.3d 551 (6th Cir. 2013). PA 15. The Board thus affirmed the award of benefits.

Sextet's petition for review to this Court followed.

STATEMENT OF THE FACTS

Factual Background

The facts relevant to this claim are primarily procedural in nature and set forth in the statement of the case.

The facts establishing Mrs. Whitfield's underlying automatic entitlement are not in dispute. Her husband was awarded federal black lung benefits during his lifetime, and she is eligible to receive automatic derivative benefits as his surviving widow. It is also undisputed that Sextet is the responsible operator, namely, the

employer liable for the payment of benefits because it most recently employed the miner for more than one year, ending in 1991, and is financially capable of paying benefits. *See* 20 C.F.R. §§ 725.491, .494, .495.

Legal Background

Substantive law

Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), entitled "EQUITY FOR CERTAIN ELIGIBLE SURVIVORS," restored automatic entitlement to federal black lung benefits to eligible survivors of miners who were awarded benefits during their lifetime. Subsection (b) struck a clause in 30 U.S.C. § 932(l), which had limited automatic entitlement to claims filed before 1982, to ensure that there would be a "CONTINUATION OF BENEFITS" to such eligible survivors.[7] Pub. L. No. 111-148 § 1556(b) (2010) (capitalization in original); *Vision Processing, LLC v. Groves*, 705 F.3d 551, 554-55 (6th Cir. 2013).

As noted previously, no one disputes that Mrs. Whitfield is automatically entitled to benefits based on her deceased husband's award.

Congress created the Black Lung Disability Trust Fund, which is financed by an excise tax on the sale of coal, "to provide a more effective means of

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[7] The text of Section 932(l) now provides: "[I]n no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this title at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner."

transferring the responsibility for the payment of benefits from the Federal government to the coal industry." 20 C.F.R. § 725.490(a); 26 U.S.C. § 9501. It was Congress's intent, however, to "ensure that individual coal operators rather than the trust fund bear liability for claims arising out of such operators' mines to the maximum extent feasible." *Director, OWCP v. Oglebay Norton Co.*, 877 F.2d 1300, 1304 (6th Cir. 1989) (quoting S.Rep. No. 209, 95th Cong., 1st Sess. 9 (1977), *reprinted in* House Comm. On Educ. and Labor, 96 Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977, 612 (Comm. Print 1979)).

A miner's lifetime benefits terminate the month before his death, 20 C.F.R. § 725.203(b)(1), and survivor benefits, like miner's benefits, commence after a PDO recommending an award is issued. 20 C.F.R. § 725.420(a). The Trust Fund begins paying a claimant benefits following a favorable PDO, *supra* n.6, and the responsible operator must reimburse the Trust Fund, with interest, for interim benefits paid following an award by an administrative law judge, Benefits Review Board, or court of appeals. 20 C.F.R. §§ 725.522(a); .530(b).

Procedural background

The development of the factual record and factual determinations regarding employer liability take place first before the district director, and then before the administrative law judge (ALJ). 20 C.F.R. Part 725, Subparts E and F.

Importantly, an ALJ is not bound by a district director's factual findings, but rather, adjudicates the claim *de novo*. 20 C.F.R. §§ 725.419(a); .455(a); *Arkansas Coals Inc. v. Lawson*, 739 F.3d 309, 313 (6th Cir. 2014).

Relevant district director proceedings[8]

The district director is authorized to "take such action as is necessary to develop, process, and make determinations with respect to the claim." 20 C.F.R. § 725.401. A proposed decision and order (PDO) represents the conclusion of district director proceedings and "purports to resolve a claim on the basis of the evidence submitted to or obtained by the district director." 20 C.F.R. § 725.418(a).[9] The PDO may be issued "at any time during the adjudication of any

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[8] Because Mrs. Whitfield's underlying entitlement to benefits is not disputed, we will not discuss the district director's powers regarding the development of medical and other evidence addressing the merits of a claim.

[9] Section 725.418 was promulgated in 2000, 65 Fed. Reg. 79920, 80076-77 (December 20, 2000), ten years before the ACA's reinstatement of automatic entitlement. It was revised in September 2013 to implement the ACA's reinstatement of automatic entitlement. 78 Fed. Reg. 59102, 59117 (Sep. 25, 2013).

Revised Section 725.418 provides in relevant part:

> (a) A proposed decision and order may be issued by the district director at any time during the adjudication of any claim if: . . .
>
> * * *
>
> > (3) The district director determines that the claimant is a survivor who is entitled to benefits under 30 U.S.C. 932(l). In such cases, the

claim if: (1) Issuance is authorized or required by this part; or, (2) The district director determines that its issuance will expedite the adjudication of the claim." 20 C.F.R. § 725.418(a)(1), (2). Subsection (d) also provides that "[n]o operator may be finally designated as the responsible operator unless it has received notification of its potential liability pursuant to § 725.407, and the opportunity to submit additional evidence pursuant to § 725.410." 20 C.F.R. § 725.418(d).

In addressing the interplay of these two provisions in the context of automatic entitlement claims, the Director has explained:

> The Department notes that current § 725.418(a)(2) [2012] allows the district director to by-pass the normal adjudication process and issue a proposed decision and order at any time if the "district director determines that its issuance will expedite the adjudication of the claim." 20 CFR 725.418(a)(2) (2011). Based on this provision, after enactment of the ACA, the Department began issuing proposed decisions and orders upon receipt of a survivor's claim governed by amended Section 422(l)
>
> * * *

> district director may designate the responsible operator in the proposed decision and order regardless of whether the requirements of paragraph (d) of this section have been met.
>
> * * *
>
> (d) Except as provided in paragraph (a)(3) of this section, no operator may be finally designated as the responsible operator unless it has received notification of its potential liability pursuant to § 725.407, and the opportunity to submit additional evidence pursuant to § 725.410.

20 C.F.R. § 725.418 (2014).

> Current § 725.418(d) states that a district director cannot identify an operator as responsible for the claim in the proposed decision and order without first providing the operator notice of the claim and the opportunity to submit evidence challenging the claimant's entitlement and liability. Based on the exception created by current § 725.418(a)(2), the Director has not applied this paragraph in claims awarded under amended Section 422(l).

77 Fed. Reg. 19456, 19469 (Mar. 30, 2012).[10]

Following issuance of the PDO, "any party may, in writing, request a revision of the proposed decision and order or a hearing." 20 C.F.R. § 725.419(a). If there is a timely request for revision, the district director "may amend the proposed decision and order, as circumstances require, and serve the revised proposed decision and order on all parties or take such other action as is appropriate." 20 C.F.R. § 725.419(c) (2012).

So long as the claim has not yet been referred to the Office of Administrative Law Judges, the district director may change, identify, and notify a new employer as potentially liable and "take such further action on the claim as may be appropriate." 20 C.F.R. § 725.407(d) (2012). However, once so referred,

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[10] Although not directly challenged by Sextet, Pet. Brf. 13, this published rationale, coming six months before the district director's action here, provided Sextet fair notice of the change in procedure. *See Howmet Corp. v. EPA*, 614 F.3d 544, 554 (D.C. Cir. 2010) ("published agency guidance may provide fair notice of an agency's interpretation of its own regulations"); *Wisconsin Resources Protection Council v. Flambeau Min. Co.*, 727 F.3d 700, 708 (7th Cir. 2013) (same).

the district director may not notify *additional* operators of their potential liability. *Id*. (emphasis added).

Administrative Law Judge proceedings

Consistent with the broad mandate afforded by the Administrative Procedure Act, as incorporated into the BLBA by 33 U.S.C. § 919(d) and 30 U.S.C. § 932(a), and subject to certain limitations on the submission of medical evidence not relevant here, 20 C.F.R. § 718.414(a), the ALJ is granted broad discretion in both pre-hearing procedures and the conduct of the hearing. 20 C.F.R. § 725.455. As noted earlier, the ALJ is not bound by the findings of the district director. *Id.*

SUMMARY OF THE ARGUMENT

Monthly black lung benefits payable on a living miner's award end with the miner's death. By virtue of the ACA amendments to the BLBA, an eligible survivor of an awarded miner (typically, his widow) is now automatically entitled to benefits, but she will not receive a monthly benefits check until the district director issues a proposed decision and order (PDO) recommending an award. For a widow who depends on these benefits, their termination – coming on top of her husband's death – works a real hardship, and reinstatement of entitlement brings a measure of financial security.

In addition to their practical significance, automatic entitlement to benefits should be just that – automatic. As this case amply illustrates, there are few, if any, valid defenses to a widow's claim for automatic entitlement. Given these twin considerations, and in accordance with 20 C.F.R. § 725.418, the Director expedites automatic entitlement cases to put widows back into pay status promptly. After the PDO issues, the Trust Fund steps in and pays benefits if an employer declines to pay and chooses to litigate the claim. And only after the employer loses before the ALJ is it legally obligated to begin paying benefits and reimburse the Trust Fund.

Sextet challenges this salutary and fair process. It nitpicks that by expediting procedures, the district director does not provide the same notices and timeframes called for in an original claim process where medical and other facts must be ascertained and liability determined for the first time – where entitlement is far from certain, let alone "automatic." But under the circumstances here, these full-blown procedures would only cause undue delay in the widow's receipt of her monthly payments without providing any offsetting benefit in claims adjudication.

Sextet received adequate notice and was given an opportunity to submit evidence and defend itself both before the district director and the ALJ. It thus suffered no prejudice from the acceleration of the claim. In fact, Sextet mounted no defense (other than to argue – ironically – that it was not given a chance to defend). And it did not defend on the merits because it has no defense: when the

miner died, it had paid his benefits since 2001 and was continuing to make ongoing monthly payments, which were being augmented on account of his dependent spouse (Mrs. Whitfield). In short, there was, and is, no dispute regarding Mrs. Whitfield's right to benefits and Sextet's liability to pay them. For that reason, even if there was a procedural lapse and some prejudice, remand to provide the omitted procedures – the only appropriate remedy – is unnecessary.

Finally, Sextet argues that this Court erred in upholding the ACA's reinstatement of automatic entitlement in *Vision Processing, LLC v. Groves*. The decision, however, is published, and therefore binding precedent.

This Court should affirm the award of benefits.

ARGUMENT

A. Standard of review

This appeal presents questions of law over which the Court exercises plenary review. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998). In deciding such questions, the Director's interpretation of the BLBA is entitled to deference. *Arkansas Coals Inc.*, 739 F.3d at 314. When that interpretation "is contained in a regulation or other form intended to have the force of law, it is entitled to substantial deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)." *Navistar, Inc. v. Forester*, -- F.3d --, 2014 WL 4473331 (6th Cir. 2014). The Court will likewise "defer to an agency's interpretation of its own regulation,

advanced in a legal brief, unless that interpretation is plainly erroneous or inconsistent with the regulation." *Arkansas Coals Inc.*, 739 F.3d at 314; *Cumberland River Coal Co. v. Banks,* 690 F.3d 477, 485 (6th Cir. 2012).[11]

B. Section 725.418 permits the expedited procedure used here.

Sextet argues the district director violated Section 725.418 by issuing the proposed decision and order (PDO) before giving it notice of the survivor's claim and an opportunity to submit evidence as provided by Sections 725.407 and 725.414. Subsection (a) of Section 718.418, however, allows the district director to issue a PDO "at any time" if it will "expedite" claim adjudication. Such acceleration was proper here given Mrs. Whitfield's right to automatic entitlement and Sextet's prior designation as the responsible operator in the miner's claim.

Sextet nonetheless argues that subsection (d) of Section 725.418 must take precedence over the subsection (a) acceleration clause based on the rule of statutory construction that a specific provision trumps a general one. Pet. Brf. at 12. But subsection (d) does not mandate pre-PDO notice of the claim and an opportunity to submit evidence in each and every claim filed, especially where the claim is for survivor's automatic entitlement and the employer has already received

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[11] Although this Court may defer to the Director's regulatory interpretations expressed in legal briefs, the Director also published the views herein in a notice of proposed rulemaking in March 2012. *See* 77 Fed. Reg. 19469. Moreover, the Director issued internal guidance in May 2010 (less than two months after the ACA's enactment) directing the procedures used here. BLBA Bulletin No. 10-07 (attached).

the benefit of these procedures in the miner's claim. *See* DX 1-595, 616 (providing Sextet with notice of the miner's claim and an opportunity to submit additional evidence). Moreover, Sextet forgets that this rule of statutory construction is not an end in itself, but only an aid to assist in ascertaining statutory intent. *See Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*, 758 F.3d 777, 782 (6th Cir. 2014) ("'As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve'" internal citations omitted). And on that score, Congress certainly did not want employers to pointlessly drag out proceedings and delay the payment of benefits to entitled survivors. Its intent was just the opposite.

In reinstating automatic entitlement for eligible survivors, Congress sought "Equity for Certain Eligible Survivors" by insisting on a "*continuation* of [the miner's lifetime] benefits" on behalf of those survivors. Pub. L. No. 111-148 § 1556(b) (emphasis added); *B & G. Constr.Co., Inc. v. Director, OWCP*, 662 F.3d 233, 250-51 (3d Cir. 2011); *Rothwell v. Heritage Coal Co.*, No. 14-0044 BLA (Ben. Rev. Bd. September 03, 2014) (published). But the regulatory scheme in place in 2012 (when Mrs. Whitfield's claim was filed and initially decided) was promulgated 10 years before Congress reinstated automatic entitlement. It permitted a disruption in the payment of benefits to a widow largely because at that time a survivor was required to prove entitlement in her own right, which meant

proving that the miner's death was due to pneumoconiosis, even if the miner had previously proved his total disability due to pneumoconiosis. 20 C.F.R. § 718.205 (2012). The miner's cause of death, a complicated medical issue, was typically disputed, required the development of a complete medical record, and the survivor was rarely successful (hence the need for congressional action.). Thus, providing initial notice of a survivor's claim and time to develop and submit medical evidence were consistent with the complex evidentiary issues at stake. (And necessary if the miner had never been awarded benefits.) Utilizing these same extensive procedures in automatic entitlement claims, however, would clearly frustrate Congress' goal in amending the BLBA: to provide prompt and uninterrupted benefits to survivors. 77 Fed. Reg. 19456, 19469.

Moreover, the full panoply of claim procedures is simply unnecessary when only a survivor's automatic entitlement is at issue. The miner's physical condition and cause of death are irrelevant, *Consolidation Coal Co. v. Maynes*, 739 F.3d 323, 327 (6th Cir. 2014), so medical evidence need not be developed. "Nor is there any compelling need to notify the operator of its potential liability or allow it to develop liability evidence before the proposed decision and order is issued. The operator will have received notification of its liability in the miner's claim, and provided a chance to challenge its liability under the same criteria applicable in the survivor's claim. *See generally* 20 CFR §§ 725.408-725.419; 725.494 (2011)." 77

Fed. Reg. 19469. (Again, prior to the miner's death, Sextet was paying his monthly benefits, as augmented by his dependent spouse (Mrs. Whitfield)). Thus, there was no reason for the district director to prolong adjudication of the claim by issuing a notice of claim, and every reason to issue the PDO as soon as possible so that Mrs. Whitfield could continue to receive the benefits she was entitled to. Conversely, if Sextet believed that the PDO had been issued prematurely and intended to defend itself before the district director, it could have requested revision of the PDO or submitted evidence within 30 days or asked that the record remain open for an even longer period. PA 53; 20 C.F.R. § 725.423 (permitting extensions of time for good cause shown).

Lastly, Sextet ignores principles of deference just as important as rules of statutory construction. This Court defers to the Director's interpretation of an ambiguous regulation if reasonable and consistent with the regulation. *See Arkansas Coals Inc.*, 739 F.3d at 314; *see also Wolf Creek Collieries v. Robinson*, 872 F.2d 1274, 1267 (6th Cir. 1989) (deferring to Director's interpretation of ambiguous regulation when consistent with statute). To the extent there is some ambiguity or tension in the interplay between subsections (a) and (d) in automatic entitlement claims,[12] the Director's decision to utilize the subsection (a) exception

[12] On the one hand, immediate issuance of a PDO following an eligible survivor's automatic entitlement claim under subsection (a) does not provide the employer with the subsection (d) notice of the claim and opportunity to submit evidence in

– because it better fulfills Congress's intent in reinstating automatic entitlement – is permissible, reasonable and consistent not only with Section 725.418, but also with the ACA amendments and the subsequent revision of Section 725.418. The Court should accordingly defer to the Director's reading.

C. The expedited procedure did not prejudice Sextet.

Sextet further contends that the Director's failure to give it notice of the claim and an opportunity to submit evidence before issuance of the PDO deprived it of a "substantial right," and therefore the Trust Fund must assume the payment of benefits. Pet. Brf. 13-17. Sextet, however, suffered no prejudice from the expedited procedure, and accordingly, remand to the district director to supply the omitted procedures is unnecessary.[13]

It is certainly true that an agency is expected to follow its own procedural rules and not doing so "may result in a violation of an individual's constitutional right to due process." *Wilson v. Commissioner of Social Security*, 378 F.3d 541, 545 (6th Cir. 2004); *Lee v. Rios*, 360 Fed. Appx. 625, 629 (6th Cir. 2010). But

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that claim. On the other hand, mandating these procedures means that the PDO cannot issue "at any time" to "expedite the adjudication" in accordance with subsection (a). As the Department has observed, "[t]hese procedural steps [notice of the claim and opportunity to submit evidence] take time to complete" and "can be, and often are, enlarged at a party's request." 77 Fed. Reg. 19456, 19469 (March 30, 2012).

[13] In Argument D, *infra*, we explain that remand, rather than relieving Sextet of liability, is the appropriate remedy, assuming a procedural violation and prejudice exist.

even if an agency "neglects to follow a procedural rule[, if] its failure inflicts no significant injury on the party entitled to the observance of the rule . . . the error should be considered harmless." *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1360 (6th Cir. 1975); *see Rabbers v. Comm'r Soc Sec.Admin.*, 582 F.3d 647, 654 (6th Cir. 2009) (observing that court reviews agency decision for harmless error and requiring party affected by agency procedural lapse to show prejudice); *Wilson*, 378 F.3d at 547 (violation of procedural requirement may constitute harmless error). Similarly, a party that "'complains about the *course* of administrative proceedings . . . must demonstrate that the adjudication was infected by 'some prejudicial fundamentally unfair element.'" *Energy West Min. Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (emphasis in original) *quoting Betty B. Coal Co. v. Director, OWCP*, 194 F.3d 491, 501 (4th Cir. 1999).[14]

Sextet studiously avoids any attempt at showing the district director's proceedings harmed its defense. Pet. Brf. 16 ("It does not matter what Sextet's chances of escaping liability were. . . "). In fact, no prejudice occurred. The PDO

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[14] Sextet is not alleging a "core" due process violation, such as a complete failure, or excessive delay, in providing notice of a claim. *Oliver*, 555 F.3d at 1219; *see also Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000) (failure to preserve the evidentiary record core violation). Core violations so impair a party's ability to mount a meaningful defense before being deprived of property that the party never receives its fair day in court. As a result, no actual prejudice need be established. *Holdman*, 202 F.3d at 883-84; *Oliver*, 555 F.3d at 1219. As detailed above, however, Sextet is unable to establish a core violation because none occurred.

notified Sextet of the claim within two weeks of its filing, and granted it thirty days to request a revision or a hearing before an administrative law judge. PA 53. More importantly, the PDO informed Sextet that the record would "remain open for thirty days" and that this time period for submitting evidence could be extended for "good cause." *Id.* Moreover, the Agreement to Pay, issued about five weeks later, reiterated Sextet's right to request a formal hearing. PA 46. And when Sextet did, the district director transferred the claim to the ALJ for *de novo* review and decision, while indicating that Sextet was disputing its status as the responsible operator. Before the ALJ, Sextet likewise had ample opportunity – over three months – to submit evidence. But again, it did not do so. In sum, Sextet was promptly notified of the claim and was given an opportunity to contest its liability and develop evidence to defend itself. Sextet was therefore not prejudiced by the expedited procedures. It simply chose not to take advantage of them.

D. Even if there was a procedural lapse and some prejudice, the appropriate remedy is to remand to provide the omitted procedures, not to hold the Trust Fund liable.

Sextet argues that the remedy for the improper notice is to dismiss it as the responsible operator and transfer liability to the Trust Fund. Pet. Brf. 17-18. There is, however, no support for this drastic solution. If the Court finds a procedural lapse and some prejudice, the proper remedy is simply to remand the case to provide notice and give Sextet another opportunity to defend itself.

Sextet's sole authority for transferring liability to the Trust Fund is 20 C.F.R. § 725.407(d). That section, however, precludes the district director from naming *additional* responsible operators of their potential liability after a case has been transferred to the ALJ.[15] It does not prevent remand for further proceedings against the *same* responsible operator. Section 725.407(d) thus provides no support for relieving Sextet of liability.

Nor should the Court foist liability on the Trust Fund simply because it is a convenient source of payment. Congress established the Trust Fund to pay benefits "when *no* responsible operator is identified" and intended that "individual coal operators rather than the trust fund bear the liability for claims arising out of such operators' mines to the maximum extent feasible." *Director, OWCP v. Oglebay Norton Co.*, 877 F.2d 1300, 1304 (6th Cir. 1989) (emphasis added) (internal quotations omitted). The *Oglebay* court accordingly refused to disregard a responsible operator identification that "was inefficiently reached" because the operator would not be "substantially prejudiced in defending this matter on the merits" on remand. *Id.* The Third Circuit likewise refused to shift liability to the Trust Fund even though an operator was designated as liable 23 years after a claim was filed. *C & K Coal Co. v. Taylor*, 165 F.3d 254 (3d Cir. 1999). It reasoned that

[15] Section 725.407(d) provides in relevant part: "The district director may not notify additional operators of their liability after a case has been referred to the Office of Administrative Law Judges."

this "remedy for the asserted due process challenge violation [must be viewed] through our perception of the Trust Fund's purpose and nature" and held that shifting liability "where no demonstrable prejudice has occurred would run counter to Congressional intent." *Id.* at 258. *Accord Midland Coal Co. v. Director, OWCP*, 120 F.3d 64, 66 (7th Cir. 1997) (refusing to transfer liability where alleged procedural irregularities could be corrected on remand).

Finally, even the cases Sextet cites do not go so far as to absolve it of liability. Instead, even if a party has been prejudiced by an agency's failure to follow its own procedures, this Court has remanded for the correct procedures to be utilized. *Wilson*, 378 F.3d at 547-48 (remanding for ALJ to give "good reasons" for rejecting treating doctor's opinion); *Lee*, 360 Fed. Appx. at 629 (remanding for new parole hearing before three commissioners). Should this Court find that the district director was required to give Sextet notice of the claim and an opportunity to submit evidence before the PDO, it should remand the claim and order the district director to do so. But there is no basis for holding the Trust Fund liable.

E. This Court correctly held in *Vision Processing, LLC v. Groves* that the ACA reinstated automatic entitlement.

Sextet last offers a "protest" against this Court's decision in *Vision Processing, LLC v. Groves*, 705 F.3d 551 (6th Cir. 2013). It claims that the ACA's reinstatement of automatic entitlement violates due process, is an illegal taking,

and violates substantive due process. *Vision Processing*, however, directly addressed and rejected these contentions. *Id*. at 556-58. In addition, *Vision Processing* rejected Sextet's statutory interpretation that the ACA merely relieved a survivor of the burden of having to file certain paperwork, *i.e.*, a claim, and did not provide the substantive right of automatic entitlement. *Id*. at 558-59; *see also Consolidation Coal Co. v. Maynes*, 739 F.3d 323, 328-29 (6th Cir. 2014) (affirming Section 932(l)'s right to automatic entitlement as applied to subsequent survivor's claim). "A three-judge panel cannot overrule a prior panel's published decision without an intervening United States Supreme Court decision or a contrary decision by this court sitting en banc." *Hobart Corp. v. Waste Management of Ohio, Inc.*, 758 F.3d 757, 773 n. 12 (6th Cir. 2014). Because there have been no such rulings, *Vision Processing* is binding, and this Court must reject Sextet's protest.

CONCLUSION

The Director respectfully requests that the Court affirm the ALJ's award of benefits against Sextet.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief is proportionally-spaced, using Microsoft Word, Times New Roman, 14 point, and contains 6,246 words.

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2014, the foregoing Brief for the Federal Respondent was served electronically on:

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ADDENDUM

BLBA Bulletin No. 10-07, May 11, 2010: Automatic Entitlement of Eligible Survivors in New Claims with Responsible Operator Liability (First Time Filings)

U.S. Department of Labor

Office of Workers' Compensation Programs
Division of Coal Mine Workers' Compensation
Washington, D.C. 20210

BLBA BULLETIN NO. 10-07

Issue Date: May 11, 2010

Expiration Date: Indefinite

Subject: Automatic Entitlement of Eligible Survivors in New Claims with Responsible Operator Liability (First Time Filings)

Background: This is one of a series of Bulletins dealing with actions to be taken in various types of claims affected by the Patient Protection and Affordable Care Act of 2010, which includes several provisions in Section 1556 that amend the Black Lung Benefits Act. This Bulletin is concerned with Section 1556 (b) of the PPACA, which allows an eligible survivor who meets certain filing requirements to be entitled to benefits based on an award made to the miner. Under the Black Lung Benefits Amendments of 1981, a survivor of a miner who was awarded benefits could obtain benefits only by proving that the miner's death was due to pneumoconiosis. The PPACA removes this requirement for those survivors' claims that are filed after January 1, 2005, and are pending on or after the date of enactment. The date of enactment and the effective date of the changes is March 23, 2010, the date the President signed the PPACA into law.

The relevant sentence of 30 USC 932(l) now reads: "In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner."

References: 20 CFR 725.212; 30 USC 932(l).

Purpose: To provide guidance for District Office staff in adjudicating survivors' claims filed on or after March 23, 2010, that meet the following criteria: a responsible operator (RO), whether insured or self-insured, is liable for payment of benefits; the miner's claim had been filed on or after January 1, 1982, had been awarded, and the award is now final; and the survivor had not previously filed a claim.

Applicability: Appropriate DCMWC Personnel.

Action:

1. Upon receipt of a first-time survivor's claim based upon a miner's claim that had been awarded, the DD shall promptly issue a Proposed Decision and Order - Award of Benefits pursuant to 20 CFR 725.418(a)(2), which authorizes issuance of a PDO "at any time during the adjudication of [a] claim if ... [t]he district director determines that its issuance will expedite the adjudication of the claim."

2. The Proposed Decision and Order – Award of Benefits shall include the following language: "This claim is subject to **Section 1556 – Equity For Certain Eligible Survivors** of the **Patient Protection and Affordable Care Act of 2010, which applies to claims filed after January 1, 2005 that are pending on or after the PPACA's March 23, 2010 enactment date.** Subsection (b) of Section 1556, entitled Continuation of Benefits, amends 30 USC 932(l) of the Black Lung Benefits Act. That section, as amended, states that '[i]n no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner.' Consequently, under amended 30 USC 932(l), an eligible survivor of a miner who was awarded benefits is entitled to benefits without having to prove that the miner's death was due to pneumoconiosis."

3. The PDO must include appeal rights for the liable party. The PDO will not be held in abeyance for any reason. If the RO appeals the PDO and refuses to initiate benefit payments, the DD will follow the standard procedures for referring the claim to the Office of Administrative Law Judges and initiating interim benefits from the Black Lung Disability Trust Fund.

4. The changes in procedure described in this Bulletin are effective immediately.

5. This Bulletin does not apply to survivors' claims based on an award to a miner who had filed his claim prior to enactment of the 1981 Amendments. The standard procedures for awarding such cases should be followed.

Please contact Michael McClaran in BSRP at mcclaran.michael@dol.gov if you have any questions.

Disposition: Retain this Bulletin until further notice or its incorporation into the Black Lung Benefits Procedure Manual.

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