No. 21-60752

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HUNTINGTON INGALLS, INCORPORATED,

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; CLARENCE W. JONES, JR.,

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

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 28.2.3, the Director, OWCP, requests oral argument which he believes would assist the Court.

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This case arises from a claim for work-related hearing loss filed by Clarence W. Jones, Jr., under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (Longshore Act

or Act). Administrative Law Judge (ALJ) Lee J. Romero, Jr., denied the claim in a decision issued on June 29, 2016, which was filed by a Department of Labor (DOL) district director on July 5, 2016. The ALJ had jurisdiction to decide this case under Sections 19(c) and (d) of the Longshore Act. 33 U.S.C. § 919(c), (d).

Jones filed a motion for reconsideration on July 18, 2016. *See* 29 C.F.R. § 18.93 (providing ten-day period to request reconsideration of ALJ decision), 29 C.F.R. § 18.30(a)(2)(ii)(C) (extending time periods by three days where, as here, a party must react to a document served by mail). The ALJ denied reconsideration by an Order dated September 7, 2016, which was filed in the district director's office on September 9, 2016. On September 28, 2016, within the thirty-day period provided by Section 21(a) of the Longshore Act, Jones filed a Notice of Appeal with the Benefits Review Board (Board). 33 U.S.C § 921(a); *see also* 20 C.F.R. § 802.206(a) (timely motion for reconsideration to ALJ suspends thirty-day appeal period to Board). This appeal invoked the Board's review jurisdiction pursuant to Section 21(b)(3) of the Act. 33 U.S.C. § 921(b)(3).

The Board issued a Decision and Order affirming in part, and reversing in part, the ALJ's decision on October 10, 2017. Jones filed for reconsideration on November 8, 2017. *See* 20 C.F.R. § 802.407(a), (b) (providing thirty-day period to seek panel or *en banc* rehearing of Board decisions). The Board granted reconsideration and, on July 30, 2021, issued a decision affirming in part, and reversing in part, its previous decision. This was a "final order" under 33 U.S.C. § 921(c) as it resolved all outstanding issues on the case. *See Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406 (5th Cir. 1984) (*en banc*).

Huntington Ingalls, Inc. (Employer) filed a timely petition for review with the Court on September 28, 2021. *See* 33 U.S.C. § 921(c) (providing sixty-day period for seeking review after final decision of the Board). Jones's injury, within the meaning of Section 21(c), occurred in Mississippi. Thus, this Court has jurisdiction to review the Board's decisions.[1]

[1] Jones later filed a cross-petition for review, which this Court dismissed for lack of jurisdiction on January 26, 2022 (Doc. No. 00516180927).

STATEMENT OF THE ISSUE

Section 7(b) of the Longshore Act grants covered employees "the right to choose an attending physician . . . to provide medical care" for the treatment of their work-related injuries. 33 U.S.C. § 907(b). The Act does not define "physician." The regulation implementing Section 7(b) states that the term "includes" eight medical professions (including doctors, clinical psychologists, and optometrists), but does not include "[n]aturopaths, faith healers, and other practitioners of the healing arts which are not listed herein[.]" 20 C.F.R. § 702.404.

The narrow issue presented in this case is whether audiologists—who are not explicitly included or excluded from the regulatory definition—are "physicians" within the meaning of the statute and regulation such that Longshore Act claimants are permitted to choose their treating audiologist.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

LHWCA Section 7(b) – choice of physician

The Longshore Act "establishes a comprehensive federal workers' compensation program that provides longshoremen and their families with medical, disability, and survivor benefits for work-related injuries and death." *Howlett v. Birkdale Shipping Co.,* 512 U.S. 92, 96 (1994). As for medical benefits, an injured worker's employer is generally required to "furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a).

The physician who oversees that treatment is, at least initially, the claimant's choice under Section 7(b) of the Act which provides, in relevant part:

> The employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this Act as hereinafter provided.

33 U.S.C. § 907(b). The claimant's attending physician can be changed, but this generally requires the employer's approval or an

order by the DOL district director administering the claim. *Id.*; 20 C.F.R. §§ 702.406, 702.407(c).

The term "physician" is not defined in the Act. It is, however, defined in the Act's implementing regulations, which provide in relevant part:

> 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. The current version of Section 702.404 was promulgated in 1977. *See* 42 Fed. Reg. 45300-45304 (Sept. 9, 1977).

LHWCA Section 8(c)(13) – hearing loss and audiologists

While hearing loss was compensable under the Act long before 1984, audiologists and audiograms were not specifically addressed in the statute until it was amended that year.[2] That 1984 amendment, codified at 33 U.S.C. § 908(c)(13)(C), provides that an

[2] An audiogram is a record of an individual's thresholds of hearing for various sound frequencies. *Dorland's Illustrated Medical Dictionary* 178 (32nd ed. 2012).

audiogram "shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if" (among other conditions) it "was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology[.]" 33 U.S.C. § 908(c)(13)(C).[3]

II. Summary of Relevant Proceedings Below

There are no factual disputes before the Court. Employer stipulated before the ALJ that Jones is entitled to hearing aids, and reaffirmed that stipulation to the Benefits Review Board. *See* CX 12, Tr. 8, RE 10, 49. The only remaining dispute is legal: whether Jones is entitled to choose, in the first instance, the audiologist who will fit those hearing aids. That issue was addressed only in the two Board decisions below.[4]

[3] The other conditions are that the audiogram's results are given to the injured employee at the time the test is administered and that there are no contrary audiogram results from the same time. *Id.*

[4] The ALJ did not address the issue because he ruled that Jones was not entitled to hearing aids despite the stipulation. RE 37-38, 43. That ruling was reversed by the Board, RE 49-50, and Employer does not challenge that aspect of the Board's decision here.

A. The Board's 2017 Decision (RE 46-55)

In its initial decision, the Board held that Longshore Act claimants do not have the right to choose their own audiologists. In support, the Board quoted Section 702.404 and noted that "[a]udiologists are not among those defined as a 'physician'" by that regulation. RE 52. And it found this case to be on all fours with *Potter v. Electric Boat Corp.*, 41 Ben. Rev. Bd. Serv. 69, 2007 WL 1920459 (BRB 2007), where it had held that claimants do not have the right to select their own pharmacy or pharmacist under Section 7 as implemented by Section 702.404. RE 52-53.

The Board accordingly remanded the case to the district director to address, in the first instance, "the details of [Jones's] audiological care." *Id.* 53.[5]

[5] As a general matter, the Secretary of Labor (through his designees, the district directors) is charged with the duty to actively supervise injured employees' medical care. 33 U.S.C. § 907(b); 20 C.F.R. § 702.407. This includes determining "the necessity, character and sufficiency of any medical care furnished or to be furnished the employee[.]" 20 C.F.R. § 702.407(b). Objections to a district director's determinations on these issues are referred to ALJs (if a bona fide factual dispute exists) or appealed directly to the Board (if there is no factual dispute). See *Potter*, 41 Ben. Rev. Bd. Serv. at 72 (collecting cases); RE 51 (same).

B. The Board's 2021 Decision on Reconsideration (RE 58-90)

Jones timely sought reconsideration of the Board's holding that he did not have the right to choose his treating audiologist. RE 59. The Board ordered the Director to file in response to Jones's reconsideration request. The Director and an *amicus*, the Workers' Injury Law and Advocacy Group, filed briefs in support of Jones. The Board granted reconsideration in a 2-1 decision. After examining the statute, implementing regulation, legislative history, and OWCP's administration of the Act, the Board concluded that audiologists are appropriately considered physicians within the meaning of Section 7(b), reversing its prior holding to the contrary.

The majority opinion (RE 58-76)

The Board majority first concluded that, as a matter of statutory construction, audiologists are appropriately considered physicians within the meaning of Section 7(b). The majority reasoned that if a statute's meaning is not clear on its face, it can be best understood by looking at the statutory scheme as a whole. RE 67-68 (citations omitted). Here, the majority concluded that considering audiologists as physicians for treatment of hearing loss was consistent with the 1984 Amendments to Section 8(c)(13)(C),

and confirmed the importance Congress placed on the medical expertise of audiologists. RE 64, 68-69. The Board majority found particular significance in Congress's instruction in the statute's text that audiograms "shall be presumptive evidence of the amount of hearing loss sustained . . . only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology[.]" 33 U.S.C. § 908(c)(13)(C)(i). The majority was impressed by the fact that audiologists and otolaryngologists are the only medical providers Congress named by specialty in the Act. *Id*.

The majority then determined that the legislative history of amended section 8(c)(13)(C) underscored congressional recognition of the medical expertise of audiologists in the field of hearing loss. That is, the majority noted that the Senate ceded to the House version of the amendment which accorded audiograms presumptive weight only if administered by an otolaryngologist or audiologist, instead of according special status to audiograms in general. The majority also noted that the congressional conference committee expected that DOL's regulations promulgated under this section would incorporate audiometric testing procedures consistent with

those required by hearing conservation programs pursuant to the Occupational Safety and Health Act, and that in turn, OSHA considers audiologists equal with otolaryngologists and other physicians for the treatment of hearing loss. RE 64-66. The majority panel noted that OWCP, similarly, has long administered the Act by equating audiologists with otolaryngologists for the treatment of hearing loss. RE 66-67.

Thus, because Congress unequivocally equated physicians and audiologists in the diagnosis of hearing loss by the plain language of Section 8(c)(13)(C), the majority concluded that it would be inconsistent to permit a claimant to choose only an otolaryngologist to provide medical care for hearing loss under Section 7(b). And the majority emphasized that reading both sections together to find audiologists to be physicians fulfills the purposes of both sections. That is, Section 8(c)(13)(C) clearly equates audiologists with otolaryngologist (who are doctors) for purposes of diagnosing hearing loss, and Section 7(b)'s objective of allowing greater patient choice applies to audiologists who are qualified by their education and training to perform the same diagnostic tests, provide the same corrective treatment for hearing

loss, and who are subject to the same need for confidentiality and trust as are otolaryngologists (who, again, are doctors indisputably within the statutory and regulatory definition of "physician." RE 67-71.

With regard to Section 702.404, the majority agreed with the Director that the list of certain medical practitioners in the regulation's first sentence is not intended to be exclusive because, as a general matter, the word "includes" is a term of enlargement, not of limitation. Examining the plain text of the regulation, the majority held that audiologists are like the medical professionals listed in the regulatory definition of "physician" in the regulation (podiatrists, clinical psychologists, optometrists, and chiropractors) and unlike the professions excluded in the last clause of the regulation (naturopaths, faith healers) because audiologists engage in conventional medical treatment.[6] RE 71-74.

[6] 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).

The dissenting opinion (RE 77-90)

Chief Administrative Appeals Judge Boggs dissented. In Judge Boggs's view, Section 8(c)(13)(C) uses the terms "physician" and "audiologist" disjunctively and treats an audiologist as being an alternative for a physician for the limited purpose of administering and interpreting audiograms, but not for treating a claimant's hearing loss. RE 79. Judge Boggs agreed that the term "physician" is not defined in the Act, leaving a gap for DOL to fill by regulation, but in her view, Section 702.404's list of "physicians" is exclusive, and that list does not include audiologists. RE 81-82. The judge focused on the last clause of Section 702.404 which, she concluded, limited the regulatory definition of "physician" by excluding "other practitioners of the healing arts." Therefore, Judge Boggs reasoned that the regulatory definition is not expansive and, thus, cannot be read to include audiologists.

SUMMARY OF THE ARGUMENT

Longshore Act claimants are entitled to choose their treating audiologist. Section 7(b) gives Longshore Act claimants the right to choose their treating "physician." The Board correctly held that audiologists are physicians for this purpose. While the Act does not define "physician," the implementing regulation has long rejected the notion that the term is limited to Doctors of Medicine and Doctors of Osteopathy. And, while that regulation does not explicitly address audiologists, the most reasonable construction of that provision its that audiologists should be treated as physicians. The petition for review should be denied.

ARGUMENT

I. Standard of Review

This Court reviews Board decisions for errors of law and to determine whether the Board adhered to its standard of review. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 224 (5th Cir. 2001). On questions of law, including the meaning of the statutory and regulatory provisions at issue in this appeal, this Court exercises *de novo* review over the Board. *MMR Constructors, Inc. v. Director, OWCP*, 954 F.3d 259, 262 (5th Cir. 2020). While the Board's interpretations of the Act and its implementing regulations are not entitled to this Court's deference, the Director's interpretations are entitled to deference in certain situations.

The Director's interpretation of ambiguous provisions in the Act are generally entitled to *Chevron* deference when expressed in a regulation resulting from notice-and-comment rulemaking, and *Skidmore* deference when expressed in less formal contexts. *See Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 134

(1995) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

The Director's interpretation of an ambiguous provision in the Act's implementing regulations is entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997), if the reviewing court determines, after exhausting all of the available tools of construction, that the provision is genuinely ambiguous. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415, 204 L. Ed. 2d 841 (2019) (citation omitted).

II. Treating audiologists as physicians for purposes of Section 7(b) is consistent with the text, structure, and purpose of the Act.

Section 7(b) gives Longshore Act claimants "the right to choose an attending physician" to treat their work-related injuries. 33 U.S.C. § 907(b). While the Act does not define the term "physician," Employer argues that the decision below is contrary to Section 7(b)'s plain language. In its view, the analysis is simple: (1) "physician" means a Doctor of Medicine (MD) or a Doctor of Osteopathic Medicine (DO); (2) audiologists are neither medical doctors nor osteopaths; ergo, (3) audiologists are not physicians. Opening Brief (OB) 15. This argument fails because its major premise is false.

It may be true, as Employer suggests, that the word "physician" is most commonly used in everyday speech to mean an MD or DO. But that is not the only meaning of the word. Indeed, the very dictionary Employer relies on offers "[a] person who heals or exerts a healing influence" – which easily encompasses audiologists – as an alternate definition of the word.[7] More importantly, statutory construction is not simply a matter of mechanically applying the first dictionary definition to every undefined term. Those terms must be understood with reference to their legal context. *See generally, Yates v. U.S.*, 574 U.S. 528, 537 (2015). And the relevant context here supports not only the conclusion that Section 7(b) extends beyond MDs and DOs, but that it makes particular sense to treat audiologists as falling within its ambit.

As an initial matter, the regulation implementing Section 7(b) has explicitly rejected the view that only MDs and DOs are "physicians" for over 40 years. 20 C.F.R. § 702.404 ("The term physician includes doctors of medicine (MD), surgeons, podiatrists,

[7] https://www.ahdictionary.com/word/search.html?q=physician (last visited Feb. 16, 2022), *cited in* OB 15.

dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law."); *see* 42 Fed. Reg. 45300, 45303 (Sept. 9, 1977) (original promulgation).[8] Petitioner does not challenge the validity of this regulation and, to our knowledge, it has never been challenged elsewhere.

The regulation is a reasonable interpretation of the statute's undefined reference to "physician." Notably, the regulation is similar to two federal benefits statutes that do explicitly define the term "physician" and do not limit that term's meaning to only MDs and DOs. Both the Federal Employees Compensation Act and the Social Security Act define "physician" as including, among other professions, optometrists and chiropractors. *See* 5 U.S.C. § 8101(2) (FECA); 42 U.S.C. § 1395x(r) (SSA). Indeed, given the absence of an explicit definition of "physician" in the Longshore Act, it would be reasonable to interpret the term with reference to its FECA and SSA definitions even in the absence of a regulation like Section 702.404.

[8] While the regulation does not explicitly include or exclude audiologists from its definition of "physician," it is best understood as including audiologists. *See infra* at 21-29.

Moreover, another Longshore Act provision supports including audiologists within the scope of Section 7(b). Since 1984, Congress has explicitly recognized the special status of audiologists in evaluating hearing loss in Longshore claims. *See* 33 U.S.C. § 908(c)(13)(C) (treating audiologists as equivalent to "a physician who is certified in otolaryngology" for the purpose of evaluating hearing loss). And treating audiologists as physician for purposes of Section 7(b) directly advances one of that provision's goals by enabling greater patient choice.

Treating audiologists as physicians for purposes of Section 7(b)'s employee-choice rule also serves the purposes of the Act more generally. The Longshore Act is designed to ensure the prompt payment of compensation to injured workers, without the burdens and delays of litigation. *Pallas Shipping v. Duris*, 461 U.S. 529, 539 (1983).[9] Interpreting the term "physician" in Section 7(b) to exclude audiologists in Section 7(b) would frustrate these goals by adding unnecessary cost and delay to the medical-treatment process. If, as

[9] *See also Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 636 (1983); *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 279 (1980).

the Board majority observed, employees cannot chose their own audiologist, they can turn to an otolaryngologist to diagnose, evaluate, measure and treat their hearing loss.[10] RE 69. That otolaryngologist may well refer the patient to an audiologist for an audiogram and fitting of hearing aids. This additional step adds not only delay for claimants, but additional costs for the employers ultimately responsible for their medical care.

Against these considerations, Employer points to Section 7(c), which distinguishes "physician" from "other health care providers[.]" 33 U.S.C. § 907(c). Employer argues that, if Congress intended Section 7(b)'s definition of "physician" to encompass other health care providers such as audiologists, then Section 7(c)'s reference to "other health care providers" would be superfluous. OB 16. But this argument misconstrues the decision below. The Board majority did not hold (and the Director did not and does not argue) that *all* health care providers are section 7(b) physicians; only that audiologists are.

[10] As medical or osteopathic doctors, otolaryngologists satisfy even the narrowest possible construction of Section 7(b).

In sum, the most that can be said for Employer's argument that only MDs and DOs are "physicians" for Longshore Act purposes is that Section 7(b) is ambiguous on that score. But that does nothing for its cause, as the implementing regulation squarely rejects the notion. Moreover, the larger context of the Act suggests that it would be reasonable to treat audiologists as covered by Section 7(b).

III. The regulatory definition of "physician" is best interpreted as including audiologists.

The central question in this appeal is whether the Department's regulatory definition of "physician" includes audiologists. This question turns on an analysis of the first and last sentences of Section 702.404. The first provides that "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 last provides that "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."

In Employer's view, the regulation unambiguously limits "physician" to the eight professions listed in the first sentence. OB 17. But the first sentence states that the definition "includes" those professions, not that it is "limited to" or "comprised of" them. This Court has "has held that '[t]he word 'includes' is usually a term of enlargement, and not of limitation.'" *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 527 (5th Cir. 2005) (quoting *Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968). Section 702.404's use of "including" indicates that the definition of "physician" includes professions similar to the eight listed ones. *See Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 534 (5th Cir. 2016) ("Under the principle of noscitur a sociis, 'a word is known by the company it keeps.'").

Not only is the first sentence's use of "includes" most naturally read as a term of enlargement, the inclusion of the listed professions supports the conclusion that audiologists fall within the scope of that enlargement. As the Board majority pointed out, "what an audiologist does with respect to a person's hearing is similar to what an optometrist does with respect to a person's vision[.]"

RE 73-74.[11] Moreover, audiologists' expertise in diagnosing hearing loss injuries under the Longshore Act was recognized as equivalent to the expertise of medical or osteopathic doctors who specialize in otolaryngology by Congress in section 8(c)(13(C). *See supra* at 19.

Nor does the last sentence of section 702.404 compel a different result. Employer argues that audiologists (and, implicitly, every profession other than the eight explicitly listed in the first sentence) are excluded by the last sentence of the regulation. OB 19. That might be a plausible theory if the last sentence simply excluded "other practitioners of the healing arts not listed [in the first sentence]" from the definition of "physician." But the regulation only excludes "*[n]aturopaths, faith healers*, and other practitioners

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[11] *Compare* Dictionary of Occupational Titles (DOL 1991) § 076.101-010 (an audiologist's duties include "[a]dminister[ing] and interpret[ing a] variety of tests . . . to determine type and degree of hearing impairment" and [p]lan[ning] and implement[ing] prevention, habilitation, or rehabilitation services, including hearing aid selection and orientation[.]") *with id.* § 079.101-018 (noting that an optometrist "performs various tests to determine visual acuity and perception and to diagnose diseases and other abnormalities, such as glaucoma and color blindness" and "[p]rescribes eyeglasses, contact lenses, and other vision aids or therapeutic procedures to correct or conserve vision.") (available at https://www.dol.gov/agencies/oalj/PUBLIC/DOT/REFERENCES/DOT01B)

of the healing arts" from the definition of "physician." 20 C.F.R. § 702.404 (emphasis added).

As this Court has explained, "the canon of *ejusdem generis* instructs that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." *Magee*, 833 F.3d at 534 (citation and internal quotation marks omitted). Thus, Section 702.404's final limiting sentence is most naturally read as restricting the scope of the excluded "other practitioners of the healing arts" to practitioners similar to naturopaths and faith healers. And, as the Board pointed out, audiologists are "utterly antithetical to both." RE 73.

It is of course true that the term "practitioners of the healing arts" is not, as a general matter, necessarily limited to practitioners outside the medical mainstream. As the dissenting Board member pointed out, a prior version of Section 702.404 (effective between 1973 and 1977) identified several of the professions now explicitly identified as "physicians" as "practitioners of the healing arts." RE 82. But the conclusion Employer would draw from this fact – that the term "practitioner of the healing arts" refers to every

medical profession aside from the eight explicitly listed ones – simply does not follow. Moreover, that reading would render the terms "Naturopaths" and "faith healers" in the regulation completely redundant, violating "one of the most basic interpretive canons[:]" the rule against surplusage. *Corley v. United States*, 556 U.S. 303, 314 (2009).

Turning back to the first section of Section 702.404, Employer also quotes the dissenting Board member, who cited *H.B. Zachry Co. v. Quinones*, 206 F.3d 474 (5th Cir. 2000), for the proposition that "the term 'includes' is not expansive if the provision also contains a limitation" (here, section 702.404's last sentence). OB 18 (quoting RE 81-82). But that case involved a statute that used the term "including" in two places – once by itself and once as part of the phrase "including (but not limited to)[.]" 206 F.3d at 477 (discussing 33 U.S.C. § 902(13)). The court sensibly concluded that "it is illogical to assume[,]" as one party had argued, "that Congress intended both to be construed as 'including but not limited to'[.]'" 206 F.3d at 479. Indeed, it was the only way to give effect to Congress's decision to use different language in different sections of the provision. No such conflicting language exists within section

702.404. *H.B. Zachry* therefore does nothing to undermine the general rule that "includes" is a term of expansion rather than limitation.

Employer also maintains that the Board's holding in this case conflicts with its own precedent in *Potter* and *Jefferson v. Marine Terminals Corp.*, 55 Ben. Rev. Bd. Serv. 21, 2021 WL 6196959 (BRB 2021), in which the Board held that a claimant may not choose his pharmacist (*Potter*) or physical therapist (*Jefferson*) because these two professions are not listed in Section 702.404's regulatory definition of "physician." OB 20. But the Board reasonably explained why it treated the audiologist at issue here differently than the pharmacist in *Potter* or the physical therapist in *Jefferson*: Congress explicitly recognized the special status of audiologists in evaluating hearing loss in Longshore Act claims, *see* 33 U.S.C. § 908(c)(13)(C), and audiologists are particularly similar to optometrists, one of the professions explicitly listed in Section 702.404. RE 73.

Employer also posits that, had Congress actually wanted to ensure that audiologists were covered by Section 7(b), it would have done so in 1984 when it first introduced audiologists into the

statute with Section (8)(c)(13)(C). OB 24. As the Board majority observed, however, "not every silence is pregnant." RE 75 (quoting *Burns v. U.S.*, 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. U.S.*, 553 U.S. 708 (2008). It is equally likely that, at the time of the 1984 Amendments, Congress was aware of Section 702.404's inclusive regulatory definition of physician and determined that there was no need to explicitly reference audiologists in the text of Section 7(b).

Finally, Employer argues that the Director's interpretation of Section 702.404 is not entitled to *Auer* deference. OB 26-29. This point is irrelevant. *Auer* deference applies only if a reviewing court, after "exhaust[ing] all the traditional tools of construction," determines that a regulation is "genuinely ambiguous[.]" *Kisor*, 139 S. Ct. 2400, 2415, 204 L. Ed. 2d 841 (2019) (citation and internal quotation marks omitted).

While Section 702.404 does not explicitly address whether audiologists are "physicians" for purposes of the Longshore Act's physician-choice provision, it is not genuinely ambiguous. As

explained above, a number of factors – including Congress's treatment of audiologists as equivalent to otolaryngologists in Section 8(c)(13)(C), the similarity between audiologists and the professions explicitly included by Section 702.404, and their dissimilarity with the professions excluded by that rule – lead to the conclusion that the regulatory definition includes audiologists. No deference is necessary to reach this conclusion—it follows from applying the ordinary rules of construction to the regulatory language.

CONCLUSION

The Court should affirm the ruling below that Longshore Act claimants are permitted their initial choice of audiologist pursuant to Section 7(b) of the Act.

Respectfully submitted,

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of Workers' Compensation Programs

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2022, I electronically filed the foregoing Response through the appellate copies CM/ECF system, and that all participants in the case are registered users of, and will be served through, the CM/ECF system.

/s/Sarah M. Hurley
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CERTIFICATE OF COMPLIANCE

I certify that:

1. Pursuant to Fed. R. App. P. 32(a)(5), (6) and (7)(B) and (C), this brief has been prepared using Microsoft Word, fourteen-point proportionally spaced typeface (Bookman Old Style), and that, exclusive of the certificates of compliance and service, the brief contains 4839 words;

2. Pursuant to Fifth Circuit Rule 25.2.1, the text of the electronic brief filed with the Court is identical to the text in the paper copies; and

3. The brief was scanned for viruses through Microsoft Defender, and no virus was detected; and

4. Pursuant to Fifth Circuit Rule 25.2.13, the brief does not include relevant personal identifiers.

/s/Sarah M. Hurley
SARAH M. HURLEY