U.S. Department of Labor

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

BRB No. 23-0140

ARTHUR GONZALEZ (DECEASED)
(IRMA WENDORF, purported successor-in-interest)

Claimant-Petitioner

v.

FENIX MARINE SERVICES, LIMITED f/k/a EAGLE MARINE SERVICES, LIMITED c/o BROADSPIRE

Self-Insured
Employer-Respondent

PORTS AMERICA

and

PORTS INSURANCE COMPANY

Employer/Carrier-
Respondents

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

Respondent

PUBLISHED

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DECISION and ORDER

Appeal of the Order Dismissing Claims and the Order Denying Motion for Reconsideration of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter (Law Office of Jeffrey M. Winter), San Diego, California, for Claimant.

William N. Brooks II (Law Offices of William N. Brooks), Long Beach, California, for Fenix Marine Services, Ltd. and Broadspire.

David Casserly (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

Irma Wendorf, purported successor-in-interest to Arthur Gonzalez (Decedent), appeals Administrative Law Judge (ALJ) Richard M. Clark's Order Dismissing Claims and Order Denying Motion for Reconsideration (2022-LHC-00700, 2022-LHC-00701) rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act).[1] We review the ALJ's dismissal of Claimant's claims under the abuse of discretion standard. *See*, *e.g.*, *Goforth v. Owens*, 766 F.2d 1533 (11th Cir. 1985); *Taylor v. B. Frank Joy*, *Co.*, 22 BRBS 408 (1989).

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Decedent sustained his injuries in California. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

In 2017, Decedent, Arthur Gonzalez,[2] filed two claims with the Office of Workers' Compensation Programs (OWCP) seeking benefits under the Act: one against Fenix Marine Services, Limited/Eagle Marine Services, Limited (FENIX or Employer) for an accepted industrial injury sustained on December 12, 2013, and a second against Ports America (PORTS) for alleged cumulative trauma sustained through August 20, 2015. The consolidated claims were forwarded to the Office of Administrative Law Judges (OALJ), where a formal hearing was scheduled for April 23, 2018. *See* OALJ Nos. 2017-LHC-01865, 2017-LHC-01866. Decedent, however, died on September 24, 2017. On February 21, 2018, Counsel informed the OALJ of Decedent's passing and requested the matter be remanded because Counsel needed "to contact the representative of [Decedent's] estate before" the case could proceed any further. ALJ Christopher Larsen issued an order dated February 28, 2018, remanding the case to the district director "for further proceedings" based on Counsel's request and "by reason of [Decedent's] death."

Counsel subsequently learned Decedent had no assets, no will, no pre-designated successor-in-interest/representative, and no spouse,[3] but he did have surviving siblings identified as Irma Wendorf, Rebekah Contreras, Delores Barcinas, Robert Gonzalez, and Joe Gonzalez. In April 2020, Decedent's siblings retained Counsel to pursue Decedent's *inter vivos* claims for benefits under the Act. In January 2021, the siblings, through Counsel, petitioned the California Workers' Compensation Appeals Board (WCAB) to have Ms. Wendorf, as trustee for her siblings, appointed Decedent's successor-in-interest and heir for purposes of securing "all sums incurred as a result" of Decedent's claims filed under the Act. The petition stated, in part, "[a]t the time of his death, [Decedent] was not married and had no issue. The only heirs to [Decedent's] estate are his surviving siblings." It also included a notarized Affidavit for Collection of Personal Property Pursuant to California Probate Code §13100-13116 (Small Estate Affidavit), attesting to the following: no proceeding has been conducted for administration of Decedent's estate; the current gross value of Decedent's "real and personal property in California" does not exceed the applicable statutory limit of $166,250;[4] and Decedent's siblings constitute his successors.

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[2] For purposes of this decision and order, Mr. Gonzalez will be referred to as "Decedent" and the parties bringing this appeal will be referred to as either "Decedent's siblings" or "the siblings."

[3] At that time, Counsel also believed Decedent had no children.

[4] Section 13101(g)(1) sets the dollar amount for a Small Estate at $166,250 when "the decedent dies prior to April 1, 2022." Based on Counsel's representation, the entirety of Decedent's estate would be any accrued benefits payable under the Act. The present record does not contain evidence regarding Decedent's average weekly wage (AWW).

Based on these representations, WCAB appointed Ms. Wendorf as "Guardian ad Litem" for Decedent by order dated March 11, 2021.

On June 2, 2021, Ms. Wendorf requested an informal conference with OWCP, asserting Decedent is "owed past due benefits – TTD [temporary total disability] from 2/21/15 to date of death, 9/24/17" on his pending Longshore claims, which she intends to pursue as his "appointed" successor-in-interest. FENIX objected to the informal conference request and asked OWCP to dismiss the claims under Rule 25(a)(1) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 25(a)(1). OWCP, noting it lacked authority to dismiss the claims, forwarded the case to the OALJ, where it was reassigned to ALJ Clark (the ALJ) and given new OALJ Nos. 2022-LHC-00700 and 2022-LHC-00701. FENIX, joined by PORTS, filed a motion to dismiss the claims because: (1) Decedent's estate did not timely substitute a representative within ninety days after service of a statement noting his death as Rule 25(a)(1) requires; and (2) even if the late substitution was excused, Decedent's estate did not demonstrate that Irma Wendorf was an appropriate successor-in-interest or representative.[5] Decedent's siblings opposed the motion and submitted exhibits, including Ms. Wendorf's June 28, 2022 declaration. In her declaration, Ms. Wendorf acknowledged for the first time in these proceedings that Decedent had two biological children[6] but that he had "relinquished any and all of his rights" while they were infants, and they were later adopted by other adults.

In his order dated August 18, 2022, the ALJ initially found Rule 25(a)(1) applicable because neither the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges (OALJ Rules), nor any other relevant authority, addresses the substitution of a claimant under the Act following his death. ALJ Order dated Aug. 18, 2022 (ALJ Order I), at 2. Applying Rule 25(a)(1), he found it reasonable to

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Though unlikely, the total amount of accrued total disability benefits (approximately 135 weeks' worth) could potentially exceed the statutory value for using a Small Estate Affidavit (e.g., Decedent's total benefits would exceed the dollar threshold if his AWW results in weekly benefits of $1,232 or greater.).

[5] FENIX asserted that the WCAB order is too vague to document Ms. Wendorf's purported legal status as Decedent's successor-in-interest because it did not cite the law under which Ms. Wendorf was named "Guardian ad Litem" or whether the WCAB judge consulted or applied the California Probate Code in reaching this determination.

[6] Ms. Wendorf's June 2022 declaration did not identify the names of either of Decedent's children.

waive the ninety-day time requirement for Decedent's Counsel to substitute a proper party[7] and therefore denied FENIX/PORTS motion to dismiss as "currently postured."[8] *Id.* Nevertheless, he found Ms. Wendorf did not present sufficient evidence to prove she and Decedent's other siblings are the appropriate successors-in-interest under California state law, Cal. Civ. Proc. Code §377.32. *Id.* at 4. Because the existing record contained "unexplained and conflicting evidence" on the successor-in-interest issue, the ALJ ordered Counsel to file additional documents to support Decedent's siblings' position that they are his successors-in-interest over his natural-born children. *Id.* Counsel for Decedent's siblings and FENIX each filed responsive pleadings.

On November 18, 2022, the ALJ again found the evidence inadequate to support the Decedent's siblings' requested substitution of Ms. Wendorf as Decedent's successor-in-interest and, thus, issued an Order Dismissing Claims. ALJ Order dated Nov. 18, 2022 (ALJ Order II) at 7. In granting FENIX/PORTS motion to dismiss, the ALJ concluded the siblings did not timely establish a proper successor under Rule 25(a)(1). *Id.* at 6. Despite having more than four years to investigate the matter, the ALJ found Decedent's Counsel, who subsequently became the siblings' Counsel, did not obtain and submit information from the California family court about Decedent's adopted-out son, Sonny Villaneuva,[9] whom the ALJ determined might constitute "the correct successor."[10] *Id.* Given

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[7] The ALJ's "waiver" finding necessarily suggests more than ninety days had elapsed since there was service of a statement noting Decedent's death. However, he made no specific findings as to what triggered the Rule 25(a)(1) ninety-day timeframe to begin or when it expired. Presumably, as FENIX/PORTS argue, the ALJ believed the clock began ticking in February 2018, when Decedent's Counsel first informed the OALJ of his death.

[8] The ALJ found no evidence that Counsel or the purported successor-in-interest to Decedent's estate, Ms. Wendorf, "acted in bad faith" or that FENIX/PORTS were unduly prejudiced.

[9] The ALJ acknowledged that although he previously excused Decedent's Counsel's delay in substituting a party, "this delay cannot be excused indefinitely." ALJ Order II at 6. He further noted Counsel was provided additional time to remedy previously identified issues with the substitution request, "yet [he] did not appear to investigate that in fact Sonny appears to be a party." *Id.*

[10] Relying on Section 6451 of the California Probate Code, the ALJ concluded Decedent's biological son, Sonny Villanueva, supersedes Decedent's siblings in the intestate line of succession. ALJ Order II at 5.

FENIX/PORTS "right to defend the claim against a proper successor party" and have the entire matter resolved "without a potential heir waiting in the wings," the ALJ decided against remanding the case to OWCP until a proper party was located and dismissed both claims. *Id.* at 6-7.

On January 17, 2023, the ALJ denied the siblings' motion for reconsideration.[11] Order on Recon. He first reiterated the dismissal was based on his finding that Decedent's siblings were not successors-in-interest and on his observation that Counsel had made no attempt to locate the potential, appropriate successor-in-interest. *Id.* The ALJ then found the siblings failed to meet their burden to establish their successorship because they presented no new evidence which was previously unavailable and did not demonstrate any error of law, mistake in fact, or intervening change in controlling law warranting reconsideration. *Id.*

On appeal, Decedent's siblings challenge the ALJ's dismissal of Decedent's claims. FENIX responds, urging affirmance of the ALJ's Order Dismissing Claims.[12] The Director, Office of Workers' Compensation Programs (the Director), responds, requesting the Benefits Review Board affirm the ALJ's finding that Decedent's son is the proper representative of his estate but vacate the dismissal of Decedent's claims and remand the case for the ALJ to analyze which of the parties, FENIX or Decedent's siblings, should be tasked with locating Decedent's son. Decedent's siblings replied to FENIX's and the Director's responses separately.

Parties' Contentions

Decedent's siblings contend the ALJ improperly applied Rule 25(a)(1) in dismissing Decedent's claims and erred in interpreting and applying California state law to this case. First, they assert it is improper as a matter of law for the ALJ to dismiss the claims under Rule 25(a)(1) because a prerequisite for dismissal pursuant to that provision, service of a statement of death prepared by Decedent's representative or successor, had not yet occurred. Second, citing Section 6451(a) of the California Probate Code, Cal. Prob. Code, they contend California intestate law supports their conclusion that Decedent's siblings, and not Mr. Villanueva, are his appropriate successors-in-interest, thereby entitling them

[11] The ALJ indicated the siblings filed an untimely motion for reconsideration, but he nonetheless considered its merits because neither FENIX nor PORTS made a timeliness objection, and it involved "uncommon" issues whose resolution would "allow the parties to file a substantive appeal should they choose to do so." Order on Recon. at 3.

[12] PORTS has not filed any pleadings in this appeal.

to pursue Decedent's claims under the Act on behalf of his estate. They maintain that because Mr. Villanueva has not invoked his potential rights, he is not available as a successor-in-interest under Section 6402, Cal. Prob. Code §6402. Given these factors, and because Decedent's parents predeceased him, the siblings maintain they are the appropriate successors-in-interest under Cal. Prob. Code §6402(c).

Third, the siblings contend the ALJ's order requiring their Counsel to locate Mr. Villanueva creates an unethical conflict of interest because it requires him to violate his duty of loyalty to them by trying to locate a party with an interest adverse to theirs. They maintain Counsel's fiduciary relationship to Decedent ended upon his death, and it is not the judge's role to invoke Mr. Villanueva's rights or encourage Counsel to violate his duty of loyalty to his existing clients, particularly given that Mr. Villanueva has not timely asserted a right to *inter vivos* or death benefits under the Act. In short, Decedent's siblings assert that because they are under no legal obligation to locate Mr. Villanueva, and Mr. Villanueva has not timely invoked his rights under Section 6451(a), the ALJ's dismissal of Decedent's claims for accrued benefits is improper. Under these circumstances, they maintain Section 6402(c) confirms they are the appropriate successors-in-interest and are entitled to pursue Decedent's claims under the Act on behalf of his estate.

Employer FENIX asserts the ALJ's dismissal of the claims pursuant to Rule 25(a)(1) is in accordance with applicable law. Citing 29 C.F.R. §18.10(a),[13] which incorporates certain Federal Rules of Civil Procedure for use in Longshore Act claims before the OALJ, Employer states the ALJ properly found Rule 25(a)(1) applicable in this case because neither the Act, its implementing regulations, nor the OALJ Rules address the substitution of parties in an existing claim under the Act upon the claimant's death. It maintains the ALJ "bent over backwards" in affording Decedent's siblings more than four years to present evidence to substantiate their claim as the proper parties to pursue Decedent's claims, so their failure to do so supports the ALJ's decision to dismiss Decedent's claims. Employer asserts the ALJ properly applied the California Probate Code to the evidence submitted,[14] which establishes Sonny Villanueva is the proper party to pursue Decedent's claims under the Act.

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[13] Section 18.10(a) of the OALJ Rules states, in pertinent part, "[t]he Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order." 29 C.F.R. §18.10(a).

[14] As Employer states, Decedent's siblings' contention – that Section 6451(a) is inapplicable because Decedent never recognized Mr. Villanueva as his issue – is flawed. The veracity of that fact has no legal bearing on whether the parent-child relationship between them survived after the adoption. Under Section 6451, the only relevant facts are

The Director asserts the ALJ correctly found Decedent's biological son may be the proper beneficiary of his estate and, therefore, may be entitled to any accrued compensation for Decedent's temporary total disability between February 21, 2015, and his death. He maintains that none of the siblings' contrary arguments warrants a different result, as their position is not supported by California law.[15] The Director, however, argues the siblings correctly contend the ninety day deadline for filing a motion for substitution does not begin to run under Rule 25(a)(1) until a statement of death has been served on the proper successor – in this case, Decedent's biological son, Sonny Villanueva. He states because no party has found or served Mr. Villanueva, as Ninth Circuit law mandates,[16] the time limit of Rule 25(a)(1) cannot yet apply. Moreover, because Ninth Circuit law indicates the burden of finding and serving the substituted party should be placed on the party best suited to identify the proper parties, *Gilmore v. Lockard*, 936 F.3d 857, 866-867 (9th Cir. 2019), the Director maintains the ALJ should have first made that determination instead of automatically placing that burden on Decedent's siblings. For these reasons, the Director asks the Board to affirm the ALJ's finding that Mr. Villanueva is the proper representative

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whether Decedent and Mr. Villanueva "lived together at any time as parent and child" and whether the adoption was by the spouse of either of Sonny Villanueva's natural parents. The siblings' evidence, notably Ms. Wendorf's September 6, 2022 declaration stating Decedent, his then wife, Lorraine Salazar, and their son, "Sonny shared a residence in Long Beach/Wilmington area of California" and Lorraine's subsequent husband "Paul legally adopted Sonny," potentially satisfies those requirements. Declaration of Irma Wendorf dated Sept. 6, 2022, at 2.

[15] The Director states there is no suggestion that Mr. Villanueva ever had notice of Decedent's claims, death, or "estate," particularly considering the "estate" never went through probate, and the WCAB order was based on incorrect information.

[16] The Director cites *Gilmore v. Lockard*, 936 F.3d 857, 865 (9th Cir. 2019), for the proposition that under Rule 25(a), "nonparty successors or representatives of the deceased party must be personally served – or, at a minimum, identified – in order to trigger the 90-day period." Decedent's siblings maintain the Director's interpretation of *Gilmore* is distinguishable because it did not involve intestate succession or adoption, and they are not actual parties to the underlying action in this case. We reject the siblings' position as *Gilmore* directly pertains to their application for substitution in this case under Rule 25(a) even though it does not involve intestate succession. Moreover, contrary to their position, Decedent's siblings bear the burden of establishing that the affidavits in support of their request for substitution are in accordance with law, most notably Cal. Prob. Code §§6402(a), 6451(a).

of Decedent's estate under California state law but remand the case for the ALJ to analyze which of the private parties, FENIX/PORTS or Decedent's siblings, should bear the responsibility of locating and informing him.

Applicable Law

Sections 8(d)(3), 33 U.S.C. §908(d)(3),[17] and 19(f), 33 U.S.C. §919(f),[18] of the Act respectively provide that "an award for disability" and "an award of benefits" may be made "after the death of the injured employee." *See, e.g., Andrews v. Alabama Dry Dock & Shipbuilding Co.*, 17 BRBS 209, 211 (1985), *aff'd sub nom. Alabama Dry Dock & Shipbuilding Co. v. Director, OWCP*, 804 F.2d 1558, 1561 (11th Cir. 1986); *Wilson v. Vecco Concrete Constr. Co.*, 16 BRBS 22, 25 (1983).[19] Therefore, claims under the Act may continue following the death of the injured employee and are not abated. *Id.* In this

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[17] Section 8(d)(3) of the Act states:

> An award for disability may be made after the death of the injured employee. Except where compensation is payable under subsection (c)(21) if there be no survivors as prescribed in this section, then the compensation payable under this subsection shall be paid to the special fund established under section 944(a) of this title.

As the Director notes, the present case involves Decedent's entitlement to total disability benefits under Section 8(c)(21) rather than any potential schedule award. Under such circumstances, any compensation payable would go to Decedent's estate and not to the Special Fund.

[18] Section 19(f) of the Act, entitled "Awards after death of employee," states:

> An award of compensation for disability may be made after the death of an injured employee.

[19] In *Wilson*, the Board held:

> While the unmatured portion of an award abates at death, an employee acquires a vested right to unpaid benefit installments. Upon his death without dependents, the right to these unpaid installments passes to his estate.

Wilson v. Vecco Concrete Constr. Co., 16 BRBS 22, 25 (1983).

regard, the Board has held an employee has a vested interest in benefits which accrued during his lifetime and after his death, his estate is entitled to the accrued benefits, regardless of when the award is entered. *Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72, 73 (1994); *Hamilton v. Ingalls Shipbuilding, Inc.*, 28 BRBS 125, 128 (1994) (Decision on Remand); *Clemon v. ADDSCO Industries*, 28 BRBS 104, 111-112 (1994); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27, 36, *modified on other grounds on recon.*, 28 BRBS 156 (1994); *Wilson*, 16 BRBS at 25. Thus, a substitution of parties upon a decedent's death is both warranted and necessary to proceed with any pending claims for accrued benefits.

As the ALJ found in this case, however, neither the Act, its implementing regulations, nor the OALJ Rules explicitly address the substitution of parties in an existing claim under the Act upon an employee's death.[20] For this reason, the ALJ relied on Rule 25(a)(1) to address the substitution issue in this case, and no party disputes its applicability.

Rule 25(a)(1) provides the requirements for substituting an individual for a party who dies when a claim is not yet extinguished:

> If a party dies and the claim is not extinguished, the court may order substitution of the proper party. ***A motion for substitution may be made by any party or by the decedent's successor or representative***. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

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[20] Both the Act and the Board's regulations have provisions indicating substitution of a party is permitted under certain circumstances, though neither applies to the facts of this case. Section 11 of the Act permits the appointment of "a guardian or other representative" by a court of competent jurisdiction "to receive compensation payable" and "to exercise the powers granted to or perform the duties required" of "***any person who is mentally incompetent or a minor***." 33 U.S.C. §911 (emphasis added). The Board's regulation provides:

> An appeal may be dismissed on the death of a party ***only if the record affirmatively shows that there is no person who wishes to continue the action*** and whose rights may be prejudiced by dismissal.

20 C.F.R. §802.402(b) (emphasis added); *see also M.M.[McKenzie] v. Universal Maritime APM Terminals*, 42 BRBS 54, 55 (2008). Despite the inapplicability of these provisions to the instant case, they clearly indicate substitution is an appropriate means, in certain situations, to assist in the resolution of a dispute arising under the Act. Moreover, the Board's regulation strongly indicates that substitution of a party is preferable to dismissing an appeal due to the death of a party.

Fed. R. Civ. P. 25(a)(1) (emphasis added). The Ninth Circuit has held that Rule 25(a) "requires two affirmative steps in order to trigger the running of the 90-day period." *Gilmore*, 936 F.3d at 865 (quoting *Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir. 1994)). The court stated:

> First, a party must formally suggest the death of the party upon the record. Second, the suggesting party must serve other parties *and* nonparty successors or representatives of the deceased with a suggestion of death in the same manner as required for service of the motion to substitute.

Gilmore, 936 F.3d at 865 (emphasis added) (citations omitted) (quoting *Barlow*, 39 F.3d at 233). The court further stated that service is required even in situations where the successors or representatives of the decedent's estate "were not easily ascertainable." *Gilmore*, 936 F.3d at 865-867. The Ninth Circuit, therefore, concluded Rule 25(a) should be interpreted "judiciously" so that "where a party files a suggestion of death, it must do so in a manner ***that puts all interested parties and nonparties on notice*** of their claims in order to trigger the 90-day window." *Id.* at 866-867 (emphasis added). Moreover, as the Director states, the court held that where the party filing the suggestion of death has not yet confirmed the proper party for substitution, the burden of finding and serving the substituted party should be on the party "better suited . . . to identify the proper parties." *Id.* at 867.

The ALJ next turned to California state law to determine the veracity of the Decedent's siblings' representation that they are, pursuant to the California Probate Code, Decedent's successors-in-interest for purposes of a Rule 25(a)(1) substitution. Specifically, the ALJ applied Section 6402 and Section 6451, Cal. Prob. Code §§6402, 6451, to ascertain Decedent's intestate line of succession. Section 6402 delineates the order of succession when a person dies without a will. In situations where there is no surviving spouse, the entire estate passes first to the decedent's surviving issue, then to the decedent's parents, and "if there is no surviving issue or parent, to the issue of the parents." Cal. Prob. Code §6402(a), (b), (c). Under Section 6451, an adoption severs the parent/child relationship unless "[t]he natural parent and the adopted person lived together at any time as parent and child" and "[t]he adoption was by the spouse of either of the natural parents." *Id.* §6451(a).

ALJ's Consideration of the Evidence Under Rule 25(a)

In his August 2022 order, the ALJ apparently found Counsel's February 21, 2018 letter adequate to start the Rule 25(a)(1) 90-day deadline for substitution. *See supra* note 10. Because Counsel had not located Decedent's adopted-out son in "more than four years"

since his death, the ALJ dismissed Decedent's claims because his estate "has not timely established a proper successor party under Federal Rule 25." ALJ Order II at 7; *see also* ALJ Order dated January 17, 2023, at 10. The body of Counsel's February 21, 2018 letter, which Counsel sent to the OALJ and the attorneys for FENIX and PORTS, stated:

> This letter is to inform you that Mr. Gonzalez has passed away. It is requested that this matter be remanded.
>
> I need to contact the representative of Mr. Gonzalez' estate before we can proceed further.
>
> Thank you for your attention to this matter.

Feb. 21, 2018 Letter. Although the letter clearly denotes Decedent's passing, it did not identify any interested parties or put "all interested parties and nonparties on notice of their claims." *Gilmore*, 936 F.3d at 866-867. Rather, it stated only that Counsel needed "to contact the representative of [Decedent's] estate" but did not specifically name anyone. Thus, it is insufficient to trigger the Rule 25(a)(1) 90-day deadline. *Id.*

Even if the February 2018 letter is considered in conjunction with Decedent's siblings' subsequent filings before the OALJ, i.e., their June 28, 2022 opposition to Employer's motion to dismiss and their September 6, 2022 response to the ALJ's show cause order,[21] those pleadings still fall short of the criteria for triggering the ninety-day deadline rule. In this regard, the siblings' June 2022 pleading fails to specifically identify Mr. Villanueva, and while the September 2022 pleading identifies him as Decedent's child,[22] it concedes that his "present whereabouts" are unknown, thereby acknowledging he has not received any notice regarding these proceedings. The record in this case thus establishes the "statement noting the death" has not yet been served by any party on "all

[21] Both of Decedent's siblings' submissions were accompanied by separate affidavits from Ms. Wendorf, including the petition before WCAB and the ensuing March 11, 2021 order appointing Ms. Wendorf as Decedent's "Guardian ad Litem."

[22] We reject Decedent's siblings' argument that the 2021 WCAB order terminated Decedent's parental rights and obligations, thereby rendering Section 6451(a) inapplicable and removing Sonny Villanueva from Decedent's intestate line of succession. Instead, we affirm the ALJ's decision to accord "no weight" to the 2021 WCAB order because, as he rationally found, it is based on incorrect information.

interested parties and nonparties," i.e., Mr. Villanueva and his stepsister.[23] *Gilmore*, 936 F.3d at 866-867. Consequently, we hold, as a matter of law, that the 90-day time limit for substitution under Rule 25(a)(1) has not been triggered in this case. Therefore, we vacate the ALJ's finding that Claimant "has not timely established a proper successor party under Federal Rule 25," as well as his resulting dismissal of both claims, and remand this case for further consideration of this issue.

The Director urges the Board to remand this case for the ALJ to analyze which of the parties – FENIX or Decedent's siblings – should have the responsibility of locating Mr. Villanueva and notifying him of these proceedings.[24] At the outset, we reject the siblings'

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[23] We affirm the ALJ's findings that under California probate law, Sonny Villanueva "may be the appropriate successor-in-interest" to Decedent's estate and, therefore, presumably supersedes "Decedent's siblings in the intestate line of succession," Order Dismissing Claims at 5, 6, as they are rational, supported by substantial evidence, and in accordance with California probate law. *See* Cal. Prob. Code §§6402, 6451. The record contains evidence which could satisfy the statutory requirements of Section 6451(a)(1) and (2) that Sonny Villanueva's adoption did not sever his relationship with Decedent for purposes of possible inheritance and that as "the issue of decedent," *Id.* §6402(a), Sonny Villanueva supersedes Decedent's siblings in terms of intestate succession. *Id.* §6402(c).

We note that the ALJ found the evidence establishes that Mr. Villanueva falls within the exception in the California probate law. However, that law requires more than mere cohabitation and subsequent adoption by a parent's spouse. It requires "living as parent and child." Cal. Prob. Code §6451. The ALJ did not make any specific finding to that effect. (In that regard, we note that the ALJ may draw reasonable inferences from the evidence, but the making of the requisite finding is within the purview of the ALJ, not the Board. 20 C.F.R. §802.301.). The ALJ also accepted the evidence as establishing that Decedent had another biological child (Michelle Olivares) who was subsequently adopted by her mother's spouse but did not live with Decedent as parent and child, and therefore did not meet the requirements of the California probate law. Because the uncontroverted evidence establishes Decedent had a biological child who was subsequently adopted by her mother's spouse, and she has not been notified of these proceedings and given an opportunity to establish, contrary to the declaration in evidence, that she lived with Decedent as parent and child, it was premature for the ALJ to conclude she does not meet the California Probate Code's requirements. Based on the evidence submitted to date, she may be an interested party who could qualify as a successor.

[24] We note Decedent's siblings' affidavits for substitution as successor-in-interest to Decedent's estate, whether viewed in terms of the requirements for a Small Estate

contention that requiring Counsel to locate the adopted-out son imposes an unethical conflict of interest on him. Clarity regarding Mr. Villanueva is a necessary element to establish Decedent's siblings' legal status as possible successors-in-interest. Cal. Prob. Code §§6402, 6451.[25] Moreover, providing notice to all affected parties is an obligation that attaches to clients; consequently, we hold that providing notice to Sonny Villaneuva and Michelle Olivares, Decedent's adopted-out daughter, does not create a conflict of interest for Counsel in this case. Accordingly, the ALJ may require either the siblings, in their individual capacity or through Counsel, or Employer to make the requisite efforts to provide Sonny Villaneuva and Michelle Olivares with the appropriate "statement noting [Decedent's] death" in accordance with Rule 25(a).

However, the parties have made matters more complicated than necessary for the claims arising under the Act, and we also instruct the ALJ, on remand, to identify if there is anyone who can carry on Decedent's claims on behalf of his estate without resorting to California's successor-in-interest law. As previously stated, Rule 25(a)(1) provides: "A motion for substitution may be made by any party or by the decedent's successor or representative." Fed. R. Civ. P. 25(a)(1). As written, Rule 25(a)(1) does not require the named substitute who will pursue the claim to be "the decedent's successor or

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Affidavit under the California Probate Code or to become successor-in-interest to Decedent's pending Longshore claims under the California Civil Procedure Code are flawed, as each requires declarations that they are "the successor of the decedent," Cal. Prob. Code §13101(a)(8)(A); Cal. Civ. Proc. Code §377.32(a)(5)(A), and that "[n]o other person has a superior right to interest in the described property," Cal. Prob. Code §13101(a)(9); Cal. Civ. Proc. Code §377.32(a)(6). Given the present uncertainty about Sonny Villanueva's and Michelle Oliveras's interests, it is unclear whether these declarations can be considered "true and correct" in terms of "the laws of the State of California" or the extent to which those potentially incomplete statements affected the WCAB order. Cal. Prob. Code §13101(a)(11); Cal. Civ. Proc. Code §377.32(a)(7).

[25] While there is no explicit legal duty for one heir to locate another potential heir under California's intestate succession laws, if an heir is aware of other potential heirs, it is generally in their best interest to make them known to ensure the estate is distributed correctly according to California state law. Providing clarity on the status of Decedent's children therefore supports the Decedent's siblings' position because, depending on the circumstances, it may legitimize their claims as successors-in-interest and their claims to Decedent's intestate estate under California law. Moreover, because Counsel and the siblings also seek to represent the estate, they would be in a position comparable to that of an estate's executor or administrator, who not uncommonly may be both a putative heir and the estate representative responsible for notifying other parties.

representative."[26] Rather, the rule may be "applied liberally and flexibly to permit substitution of the party or parties who, as plaintiffs, would adequately represent" the prior party's interests. *In re Baycol Prods. Litig.*, 616 F.3d 778, 789 (8th Cir. 2010). Indeed, the United States Court of Appeals for the D.C. Circuit explained in *Sinito v. U.S. Dep't of Justice*, 176 F.3d 512 (D.C. Cir. 1999) (internal citations updated):

> We have previously held that the purpose of the 1963 amendments to Rule 25, which replaced a harsher prior rule regarding proper party plaintiffs, was 'to liberalize the rule and to allow flexibility in substitution of parties.' *McSurely v. McClellan,* 753 F.2d 88, 98-99 (D.C. Cir. 1985). … Although it is generally accepted that the proper party for substitution must be a "legal representative" of the deceased, *see* 7C Wright, Miller & Kane, at §1956 (citing *Mallonee v. Fahey,* 200 F.2d 918, 919 (9th Cir.1952)), the addition of the word "successor" to the rule means that a proper party need not necessarily be the appointed executor or administrator of the deceased party's estate.

Sinito, 176 F.3d at 516.[27]

It is possible one of Decedent's siblings could be substituted at this juncture in the Longshore claim as someone who "would best represent the decedent's interests" or who has a professed interest in securing the benefits owed to Decedent's estate. *In re Baycol Prods. Litig.*, 616 F.3d at 789. Therefore, the ALJ may reconsider whether one of them

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[26] Due to the parties' focus on Decedent's siblings' contentions that they are his "successors-in-interest," the ALJ seemingly did not address the "any party" language of Rule 25(a)(1) and instead immediately considered the succession aspect of California law. In doing so, he relied on Cal. Civ. Proc. Code §377.30, which explicitly limits substitution to the decedent's "personal representative" or "successor-in-interest." But again, this issue represents the core of Decedent's siblings' substitution claim.

[27] The D.C. Circuit's use of the term "successor" appears to mean only "the person who follows" rather than "the next person who is entitled to the recovery," as the parties seem to interpret it. According to Black's Law Dictionary, a "successor" is a person or corporation that takes over the rights and duties of another, but a "successor in interest" is someone who acquires ownership of property from another person.

constitutes a viable substitution under Rule 25(a)(1) in this case.[28] After all, the question for the ALJ to decide under the Act is whether Decedent was entitled to an award for benefits before his death, thereby determining whether his estate is entitled to the award for benefits. *See* 33 U.S.C. §§908(d)(3), 919(f); *Krohn*, 29 BRBS at 73; *Hamilton*, 28 BRBS at 128; *Clemon*, 28 BRBS at 111-112 (1994); *Wood*, 28 BRBS at 36. The ALJ arguably need not identify the "proper" successor-in-interest/heir to Decedent's estate to answer that question – he merely needs to determine who, in representing Decedent's estate and pursuing the claims Decedent filed before he died, will "best represent the decedent's interests." *In re Baycol Prods. Litig.*, 616 F.3d at 789; Fed. R. Civ. P. 25(a). Any award would be payable to his estate. Thereafter, the question of who the heir(s) or successor(s)-in-interest entitled to the estate are would be a matter of state law which may be disputed and resolved later in state court. Finding someone to carry on the claim on behalf of Decedent's estate satisfies the well-established principle under the Act that a decedent's estate is entitled to benefits that the decedent accrued before death, regardless of when the award is entered. *Krohn*, 29 BRBS at 73; *Hamilton*, 28 BRBS at 128; *Clemon*, 28 BRBS at 111-112 (1994); *Wood*, 28 BRBS at 36. It also assuages Decedent's siblings' concerns that dismissal of Decedent's claims would result in an improper windfall for Employer. For these reasons, we remand the case to the ALJ for further consideration, including the determination of who may act on behalf of Decedent's estate under Rule 25(a).[29]

[28] It is clear there are actual persons interested in pursuing the benefits owed to Decedent's estate as Decedent's siblings who could inherit his estate, absent someone with a higher priority.

[29] On remand, the ALJ should specify the documentation he would find adequate to satisfy Rule 25(a) to establish who may be substituted for purposes of pursuing Decedent's *inter vivos* claims for benefits. He may also require the substituting party to carry out the requisite notifications to all potentially interested parties, including Decedent's biological children.

Accordingly, we vacate the ALJ's Order Dismissing Claims and Order Denying Motion for Reconsideration and remand this case for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge