

WILHILMINA WOOD	)	
(Administratrix of the estate	)	
of JOHN D. WHITE)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	
	)	
Self-Insured	)	DATE ISSUED: _____
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT OF	)	
LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Decision and Order on Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Mark A. Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Decision and Order on Reconsideration (89-LHC-3219) of Administrative Law Judge Richard D. Mills rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The Board held oral argument in this case in Mobile, Alabama, on January 11, 1994.<sup>1</sup>

Decedent, a retired employee who was exposed to injurious noise during the course of his employment with employer, underwent an audiological evaluation on January 15, 1987, the results of which revealed a 58.4 percent binaural impairment. Cl. Ex. 2. Based on these results, decedent filed a claim for compensation under the Act on March 18, 1987; however, he died on July 9, 1987. Subsequently, decedent's widow died on October 29, 1988, prior to the adjudication of the claim. Cl. Exs. 5, 22. At the formal hearing, claimant<sup>2</sup> and employer stipulated that the date of injury is January 15, 1987, and the applicable average weekly wage is \$302.66. Jt. Ex. 1. They disputed, however, the question of the proper recipient of the benefits. Decision and Order at 2. Noting decedent's 1977 retirement, the administrative law judge converted the 58.4 percent binaural impairment to a 20 percent impairment of the whole person, pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23) (1988). Additionally, the administrative law judge awarded medical expenses and interest, and he ordered employer to pay benefits awarded under the Act to the Special Fund pursuant to Section 8(d)(3), 33 U.S.C. §908(d)(3) (1988), as he determined decedent died without statutory survivors. Decision and Order at 3-4.

Thereafter, claimant moved for reconsideration of the award of benefits to the Special Fund. The administrative law judge denied claimant the relief she sought, reasoning that Section 8(c)(23) benefits are not excluded by the provisions of Section 8(d)(3). Decision and Order on Recon. at 2. Further, he found that survivor status is determined at the time entitlement is established and an award is made; thus, because he found that claimant is not a minor and decedent's widow died before benefits were awarded, he affirmed his conclusion that decedent died without statutory survivors. *Id.* at 4.

On appeal, claimant challenges the propriety of the administrative law judge's decisions

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<sup>1</sup>By Order dated March 2, 1993, the Board consolidated this case with *Maynard v. Ingalls Shipbuilding, Inc.*, BRB Nos. 92-1813, 92-1813A, and by Order dated December 3, 1993, the Board consolidated this case for oral argument with *Clemon v. ADDSCO Industries, Inc.*, BRB No. 91-1801. We hereby sever these cases, 20 C.F.R. §802.104(b), and note that our decisions therein will be issued separately.

<sup>2</sup>Claimant is decedent's non-minor step-daughter, administratrix of the estates of decedent and his widow.

awarding the Special Fund benefits. Specifically, claimant contends decedent's estate is entitled to the benefits which accrued to decedent under the Act prior to decedent's death. Alternatively, claimant contends that decedent's widow was a statutory survivor within the meaning of the Act, 33 U.S.C. §908(d)(1), and thus her estate is entitled to the benefits due decedent. Employer responds, urging affirmance of the award of benefits to the Special Fund. Alternatively, employer argues that if the Board awards the estate benefits, the Special Fund is liable for them, as employer paid benefits to the Special Fund in accordance with the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Program (the Director), also responds, arguing that the Special Fund is entitled to decedent's unpaid permanent partial disability benefits, including both accrued and unaccrued amounts, pursuant to the plain language of Section 8(d)(3), asserting that survivorship is not determined until benefits are awarded and, consequently, decedent died without statutory survivors. Further, the Director contends that benefits should be calculated pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13) (1988), in accordance with the decision of the United States Supreme Court in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993).

Initially, we agree with the Director that, in light of *Bath Iron Works*, compensation for decedent's hearing loss must be calculated pursuant to Section 8(c)(13) of the Act. We therefore vacate the administrative law judge's award of benefits under Section 8(c)(23), and, as neither the administrative law judge's finding that decedent suffered a 58.4 percent binaural impairment nor his acceptance of the stipulated average weekly wage of \$302.66 is challenged on appeal, we modify the award to reflect employer's liability for 116.8 weeks (58.4 percent of 200 weeks) of permanent partial disability benefits based upon the stipulated average weekly wage pursuant to Section 8(c)(13) of the Act. *Bath Iron Works*, U.S. at , 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT); *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993).

Next, we address the Section 8(d) issues raised by claimant. Claimant contends Section 8(d)(3) is inapplicable because the term "unpaid" in Section 8(d)(1) refers to "unaccrued" benefits, and there are no unaccrued benefits in this case. Specifically, relying on *Alabama Dry Dock & Shipbuilding Corp. v. Director, OWCP*, 804 F.2d 1558, 19 BRBS 61 (CRT) (11th Cir. 1986), *Turner v. Christian Heurich Brewing Co.*, 169 F.2d 681 (D.C. Cir. 1948), and *Wilson v. Vecco Concrete Construction Co.*, 16 BRBS 22 (1983), claimant asserts that decedent's estate is the proper recipient of the permanent partial disability benefits which accrued prior to decedent's death, as decedent's entitlement to the accrued benefits vested prior to his death and the vested interest is now the property of his estate.<sup>3</sup> In response, the Director contends that the plain language of Section 8(d)(3) mandates payment of the unpaid benefits to the Special Fund; specifically, the Director argues that

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<sup>3</sup>The Supreme Court held that occupational hearing loss injuries end when exposure ends. *Bath Iron Works*, U.S. at , 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT). Thus, the Board has held that the proper date for benefits to commence in cases involving retirees with hearing losses, *i.e.* the date that injuries are complete, is the date of last exposure to workplace noise. *Moore*, 27 BRBS at 76. Because decedent retired in 1977, it is readily apparent that all benefits accrued prior to his death.

the term "unpaid" should be interpreted literally, including accrued and unaccrued amounts, making the maturity or immaturity of the payments irrelevant. The Director further asserts that, as there are no statutory survivors to collect the awarded benefits in the instant case, the Special Fund is entitled to them under Section 8(d)(3). Lastly, the Director contends that claimant's reliance on *Turner* is misplaced, as Section 8(d)(3) invalidates the *Turner* analysis regarding unaccrued payments and overrules the analysis regarding accrued but unpaid payments, and that *Alabama Dry Dock and Wilson* do not apply as they involve total disability benefits.

When interpreting a statute, the starting point is the plain meaning of the words of the statute. *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296, 109 S.Ct. 1814 (1989); *see also Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 183 (1993). If the intent of Congress is clear, that is the end of the matter; the court, as well as the agency that administers the policy under the statute, must give effect to the unambiguously expressed intent of Congress. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984). Thus, our review of the Section 8(d) issue in this case properly begins with the language of that section.<sup>4</sup> Section 8(d) provides:

- (1) If an employee who is receiving compensation for permanent partial disability pursuant to section 8(c)(1)-(20) dies from causes other than the injury, the total amount of the award unpaid at the time of death shall be payable to or for the benefit of his survivors, as follows. . . .
  - (2) Notwithstanding any other limitation in section 909 of this title, the total amount of any award for permanent partial disability pursuant to subsection (c)(1)-(20) of this section unpaid at the time of death shall be payable in full in the appropriate distribution.
  - (3) An award for disability may be made after the death of the injured employee. Except where compensation is payable under section 8(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 44(a) of this Act.
- 33 U.S.C. §908(d) (1988).<sup>5</sup>

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<sup>4</sup>We note that the purpose of Section 8(d) is to ensure the payout of the entire scheduled award, irrespective of an employee's death. *See Hamilton v. Ingalls Shipbuilding, Inc.*, 26 BRBS 114, 119 (1992), *rev'd mem. on other grounds sub nom. Director, OWCP v. Ingalls Shipbuilding, Inc.*, No. 93-4054 (March 10, 1993); 33 U.S.C. §908(d) (1988).

<sup>5</sup>Section 8(d)(1) of the Act enumerates the hierarchy of recipients of benefits in the event an injured employee receiving scheduled permanent partial disability benefits dies due to causes unrelated to his injury. Incorporating Section 9(d), the statutory survivors include the widow or widower, and also children, grandchildren, siblings, parents and grandparents, all of whom must have been dependent on the decedent. 33 U.S.C. §§908(d)(1), 909(d).

Because the principle of statutory construction requires courts to begin with the plain language of the statute, the threshold question before us concerns the interpretation of the term "unpaid" in Section 8(d)(1), since the total amount "unpaid" is paid to the benefit of specified survivors, and if there are no statutory survivors, to the Special Fund. The Director's argument that the plain language of Section 8(d) supports payment of decedent's benefits to the Special Fund rests on the general definition of the term "unpaid" as including any money that has yet to be physically received by the person entitled to it. Statutory interpretation, however, requires that language be construed and defined to meet with legislative intent and to prevent absurdities or inconsistencies created by using the general definition of a term; in extraordinary circumstances, the courts have held that words may be disregarded, substituted, transposed or inserted. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 102 S.Ct. 3245 (1982); *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 60 S.Ct. 1059 (1940); Sutherland Stat. Const. §§47.35-47.38 (5th ed. 1992). The Longshore Act, moreover, must be liberally construed in order to effectuate its remedial purposes and avoid harsh and incongruous results. *See, e.g., Voris v. Eikel*, 346 U.S. 328 (1953). In this case, we must reject the Director's position as inconsistent with the statute, case precedent and the purpose of the Act, as use of a literal definition of the word "unpaid" would pay to the Special Fund instead of the deceased employee's estate benefits to which he had a vested right. We do not agree that the plain meaning of the Act supports this construction.

It is a well-established concept that disability compensation which accrues prior to an employee's death is the property of the employee's estate.<sup>6</sup> In *Turner*, 169 F.2d at 681, the United States Court of Appeals for the District of Columbia Circuit rejected a claim by the administrator of a deceased employee's estate for the portion of a scheduled award which accrued after the employee's death. In *Turner*, benefit installments were regularly paid until the date of death, leaving a balance of \$2,905. In rejecting the estate's claim for the balance, the court stated:

Doubtless, as the cases hold, the employee does acquire a vested right in unpaid benefit installments which have become due and payable before his death. They pass to his estate if he dies without dependents. But in this case all matured installments were paid to the date of the employee's death. He having died without dependents the unmatured portion of the award abated.

*Id.* at 682. The Director contends that this case, which appears to be on point, was overruled by the

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<sup>6</sup>Courts have long recognized the potential inheritance problems which arise with scheduled permanent partial disability awards because of the general rule that there are no property rights in compensation awards, and to solve the problems, they distinguish between "accrued" and "unaccrued" scheduled benefits. Larson, *The Law of Workmen's Compensation*, §§2.60, 58.40. Citing cases in which the courts have unanimously awarded accrued payments to the estates of deceased employees, Larson states: "Accrued but unpaid installments are, of course, an asset of the estate, like any other debt." Larson, §58.41; *see also* 82 Am. Jur. 2d Workers' Comp. §728; 99 C.J.S. Workmen's Compensation §149.

1972 Amendments to the Act. Prior to 1972, Section 8(d) provided for the payment to specified survivors of "any compensation to which any claimant would be entitled under subdivision (c) of this section [except subdivision (c)(21)] notwithstanding death arising from causes other than the injury." The 1972 Amendment changed this language to that currently in Section 8(d)(1), requiring that where an "employee who is receiving compensation for permanent partial disability [under the schedule] dies from causes other than the injury, the total amount of the award unpaid at the time of death shall be payable" to specified survivors, and added current Section 8(d)(3) providing for the payment of benefits to the Special Fund where the employee died without statutory survivors.

The Director argues that this change overruled *Turner* in two respects. First, the Director states that by enacting Section 8(d)(3), Congress provided that the unmatured portion of an award must be paid even where the employee dies without survivors instead of lapsing as in *Turner* and that payment in such cases is made to the Special Fund. We agree with the Director on this point. Clearly, Section 8(d)(3) is consistent with the directive in Section 8(d)(1) that the total schedule award shall be paid, and it provides a beneficiary for the unmatured portion where a deceased employee leaves no statutory survivors.

We do not, however, agree that the legislative change made in 1972 overruled *Turner* in the second respect asserted by the Director, *i.e.*, that *Turner* was overruled insofar as it holds that the matured portion of unpaid permanent partial disability benefits are payable to the estate of the deceased employee. There is no evidence that Congress intended this result in amending Section 8(d).<sup>7</sup> Such a holding would represent a fundamental change inconsistent with general principles of workers' compensation laws. *See* n.6, *supra*. Far from indicating an intent to make such a sweeping revision, the legislative history states that the amendment "continues the existing provisions" for payment of enumerated benefits to survivors, making changes in the designated survivors and providing that if there are no survivors, the compensation which would be payable to the survivors is payable to the Special Fund. H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., 15-16 (1972); *see also* S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972). We hold, therefore, that Section 8(d)(3) filled a gap in the legislative scheme noted by *Turner*, in that the unmatured portion of scheduled awards were permitted to abate rather than being fully payable where a deceased employee left no statutory survivors.

While the Board has not been presented with a case involving accrued schedule payments, in cases involving other types of disability benefits we have consistently held that the estate is entitled to accrued benefits. For example, in *Wilson*, 16 BRBS at 22, the Board affirmed the administrative law judge's determination that an employee's estate was entitled to the additional temporary total

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<sup>7</sup>The primary focus of the 1972 Amendments to Section 8(d) was in creating a remedy for survivors with non-scheduled permanent disabilities. The Act was amended to add provisions entitling survivors of employees entitled to benefits for permanent partial disability under Section 8(c)(21) and permanent total disability under Section 8(a) at the time of death to recover a death benefit where the employee died from causes unrelated to the work injury. These provisions were repealed in 1984. *See* 33 U.S.C. §§908(d)(3), 909(a) (1982) (repealed 1984).

disability benefits, based on an adjusted average weekly wage, to which the employee would have been entitled had he lived. The Board stated:

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 benefit installments passes to his estate.

*Wilson*, 16 BRBS at 25 (citing *Turner*, 169 F.2d at 681). The United States Court of Appeals for the Eleventh Circuit has also relied on the court's reasoning in *Turner*, stating:

Once an employee establishes the right to payment, the Act does not attempt to direct what he may or may not do with the money. Because the right to payments accrued to [decedent] before his death, these payments must go to his estate.

*Alabama Dry Dock*, 804 F.2d at 1561, 19 BRBS at 64 (CRT); *see Turner*, 169 F.2d at 682. We decline to distinguish *Alabama Dry Dock* and *Wilson* on the basis that they do not concern permanent partial disability benefits as the discussions therein regarding accrued benefits are consistent with general workers' compensation laws. *See* n.6, *supra*.

Additionally, the preface to Section 8 mandates that "[c]ompensation for disability shall be paid to the employee. . . ." 33 U.S.C. §908 (emphasis added); *see also Henry v. George Hyman Construction Co.*, 749 F.2d 65, 73, 17 BRBS 39, 45 (CRT) (D.C. Cir. 1984), and Sections 8(d)(3) and 19(f), 33 U.S.C. §919(f), allow for an award of disability benefits after the death of the recipient. *See Alabama Dry Dock*, 804 F.2d at 1561, 19 BRBS at 63-64 (CRT). Where an award is entered after the death of an injured employee, his entitlement to disability benefits is determined by the terms of the Act and not by whether his claim happens to have been adjudicated at the date of death. *See, e.g., Eckley v. Fibrex & Shipping Co.*, 21 BRBS 120 (1988). In a case involving repealed Section 8(d)(3),<sup>8</sup> which contains language similar to that in current Section 8(d)(1), the Board addressed entitlement to death benefits where the deceased employee had settled his claim; thus, he was not physically receiving compensation on the date of death, although his entitlement to disability benefits was established. The Board held that the phrase "was receiving compensation" actually means "is entitled to compensation," and thus his survivor could claim benefits. *Abercrombia v. Chaparral Stevedores*, 22 BRBS 18.4, 19 (1989), *aff'g on recon.* 22 BRBS 18

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<sup>8</sup>In 1984, Section 8(d)(3) was repealed. It stated:

If an employee who was receiving compensation for permanent partial disability pursuant to Section 8(c)(21) dies from causes other than the injury, his survivors shall received death benefits as provided in Section 9(b)-(g), except that the percentage figures therein shall be applied to the weekly compensation payable to the employee at the time of his death multiplied by 1.5, rather than to his average weekly wages.

33 U.S.C. §908(d)(3) (1982). Current Section 8(d)(3), at issue here, was formerly Section 8(d)(4).

(1988). *Accord Acuri v. Cateneo Lines Service Co.*, 8 BRBS 102 (1978). Because the employee "is entitled to compensation," he has a vested interest in it, regardless of whether the claim has been adjudicated. See *Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992). There is no case precedent holding that entitlement is determined by physical receipt of payment, as Director would have us hold here, or by the date of an adjudication, which has no relation to the merits of a claim and is subject to delay. The terms of the Act and case precedent lead inexorably to the conclusion that installments due and payable prior to the employee's death are the property of the employee; his estate is thus entitled to these vested benefits upon his death.

Were we to interpret the term "unpaid" in the literal sense propounded by the Director, that is, that the term "unpaid" includes all accrued and unaccrued amounts due decedent, we would create a law which directly contradicts this well-established precedent and divests the employee's estate of a vested interest in the accrued compensation.<sup>9</sup> This we decline to do. Accordingly, we hold that an employee has a vested interest in benefits which accrue during his lifetime, and, after he dies, his estate is entitled to those benefits, regardless of when an award is made. Furthermore, as benefits which do not accrue prior to an employee's death abate unless otherwise provided by statute, see *Turner*, 169 F.2d at 682; *Larson*, §§58.42, 58.44; 82 Am. Jur. 2d Workers' Comp. §729, we hold that the term "unpaid" in Section 8(d) means "unaccrued," and we construe that section as curing the abatement of unaccrued scheduled permanent partial disability benefits under the Act. Thus, upon the death of an employee, his unaccrued scheduled permanent partial disability benefits go either to his statutory survivors or to the Special Fund upon his death without survivors. 33 U.S.C. §908(d)(1), (3) (1988).

In the instant case, it is uncontroverted that decedent accrued 116.8 weeks of benefits prior to his death in 1987. We therefore reverse the administrative law judge's award of these accrued benefits to the Special Fund, and we modify the administrative law judge's award to reflect that decedent's estate is entitled to the accrued benefits.<sup>10</sup>

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<sup>9</sup>Although it is common for the courts to give deference to the Director as the administrator of the Act, deference is not appropriate where the Director's position is unreasonable. See *Insurance Co. of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), cert. denied, 113 S.Ct. 1253 (1993); *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991); *Tyndzik v. University of Guam*, 27 BRBS 57 (1993) (Smith, J., concurring and dissenting). Because the Director's position deprives an employee's estate of a vested right, it is unreasonable. It is also unreasonable because, instead of encouraging an employer to promptly pay benefits, the Director's position fosters delay and gives the employer an incentive to pay the Special Fund, rather than its employees, thereby possibly reducing its annual assessment under Section 44 of the Act, 33 U.S.C. §944.

<sup>10</sup>Because employer previously paid benefits to the Special Fund pursuant to the administrative law judge's Order, it contends the Special Fund is liable to decedent's estate for benefits. We agree with employer's contention, as it is reasonable, and it prevents a windfall recovery by the Special Fund and a double payment by employer. See generally *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83 (CRT) (5th Cir. 1989), *vacated on other*



We note that even were we to adopt the Director's position and interpret the term "unpaid" as including both accrued and unaccrued amounts, the Special Fund would not be entitled to decedent's accrued benefits in this case. Claimant has raised a question as to when survivorship under the Act is determined. Specifically, claimant contends survivorship is determined as of the date of decedent's death and not, as the Director avers, on the date benefits are awarded. We agree with claimant, and we reject the Director's arguments to the contrary. Therefore, we hold that the operative time for determining survivorship under Section 8(d) is the date of an employee's death. Consequently, in that his wife survived him, decedent's death triggered the application of Section 8(d)(1) and not Section 8(d)(3).

In this case, both decedent and his wife died before the administrative law judge awarded benefits on this claim. Claimant, the non-minor step-daughter of decedent, was appointed administratrix of the joint estate. Cl. Ex. 22. The administrative law judge found that claimant "does not qualify as a statutory survivor since she is not a minor." Decision and Order at 3. On reconsideration, the administrative law judge agreed with the Director and concluded that the distribution to survivors in Section 8(d)(1) does not apply to this case, as the status of a statutory survivor is not determined until "entitlement to benefits is established and an award is made[.]" and, as of the time of the award, no statutory survivors remained. Accordingly, he affirmed his award of benefits to the Special Fund. Decision and Order on Recon. at 4.

It is undisputed that claimant is not a survivor under Section 8(d). However, she contends that her mother, decedent's widow, was a statutory survivor under the Act, and that her death prior to the administrative law judge's award of benefits does not change that result. The Director maintains that the existence of a statutory survivor cannot be determined until the date of the award, which, in this case, occurred after decedent's widow had died leaving no other survivors as defined by Section 8(d). Section 8(d)(1)(A) states:

(A) if the employee *is survived* only by a widow or widower, such unpaid amount of the award shall be payable to such widow or widower[.]

33 U.S.C. §908(d)(1)(A) (emphasis added). The common definition of "survive" is "to live longer than: outlive." Webster's New Riverside University Dictionary (1984). Under Section 2(16) of the Act, the term "widow or widower" includes the spouse of the decedent, "living with or dependent for support upon [decedent] *at the time of [decedent's] death. . .*" 33 U.S.C. §902(16) (emphasis added); *see, e.g., Griffin v. Bath Iron Works Corp.*, 25 BRBS 26 (1991). In the case at bar, it is uncontroverted that decedent's widow outlived decedent.

We agree with claimant's assertions that her mother's status as a "widow" was fixed as of the time of decedent's death, and that her death merely means that her estate would receive any unaccrued benefits. Contrary to the Director's argument, Section 8(d) does not mandate use of the

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*grounds*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) (*en banc*).

date of an award to determine the existence of statutory survivors.<sup>11</sup> Rather, under the Act, a survivor of a deceased employee acquires a vested right to death benefits. *Hickman v. Universal Maritime Service Corp.*, 22 BRBS 212 (1989). Should the survivor die before an award of death benefits is made, his estate is entitled to those benefits, as a delay beyond the survivor's death does not foreclose payment of the accrued death benefits. *Id.* at 215-217; *see also Williams v. Donovan*, 198 F.Supp. 237 (E.D. La. 1961). Thus, the plain language of Section 8(d)(1) of the Act provides that a survivor's rights depend solely on survival beyond the life of the employee and are ascertained as of the date the employee died. This construction of Section 8(d)(1) abides by the traditional

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<sup>11</sup>Moreover, we are not persuaded by the Director's contention that the first sentence of Section 8(d)(3), *see supra*, controls the time for determining the existence of statutory survivors. Like Section 19(f), 33 U.S.C. §919(f), it permits an award to be made after the death of the employee but does not indicate that the time of the award controls other factors of the case.

rules of statutory construction, comports with the definition of "widow" in Section 2(16),<sup>12</sup> and prevents administrative delay from divesting acquired rights. *See Mallard*, 490 U.S. at 296, 109 S.Ct. at 1814; *see generally Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP (Watkins)*, 594 F.2d 986, 9 BRBS 1089 (4th Cir. 1979). We, therefore, reverse the administrative law judge's determination that decedent died without a statutory survivor, and we hold as a matter of law that decedent's widow was a statutory survivor within the meaning of Section 8(d) as of the date of decedent's death. In her status as survivor, had there been any unaccrued benefits, she would have been entitled to them and, upon her death, her right to the payments would have passed to her estate.

Accordingly, the administrative law judge's award of decedent's accrued disability benefits to the Special Fund is reversed, and the decision is modified to reflect decedent's estate's entitlement to the accrued benefits. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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<sup>12</sup>Additionally, Section 9 provides: "If there be" a widow, widower, children, etc., which implies that the existence of survivors is to be determined in accordance with the Section 2 definitions. 33 U.S.C. §§902(14), (16), 909(b), (c), (d).