No. 10-1164

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STEPHANIE H. WHEELER,

Petitioner

v.

NEWPORT NEWS SHIPBUILDING & DRY DOCK CO. AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

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

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BRIEF FOR THE FEDERAL RESPONDENT

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BRIEF FOR THE FEDERAL RESPONDENT, DIRECTOR, OWCP

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arises under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (2000) (Longshore Act or Act). Stephanie H. Wheeler was injured while employed by Newport News Shipbuilding & Dry Dock Co. (Employer), and filed a claim for compensation under the Longshore Act.

Administrative Law Judge Krantz (the ALJ) had jurisdiction over the claim under sections 19(c) and (d) of the Longshore Act, 33 U.S.C. § 919(c), (d).[1] On April 17, 2009, the ALJ issued a Decision and Order denying Ms. Wheeler's request for compensation. Joint Appendix (JA) 195. That decision became effective when filed in the office of the District Director on April 21, 2009. JA 193; *see* 33 U.S.C. 921(a). Ms. Wheeler filed a Notice of Appeal with the Benefits Review Board (Board) on April 23, 2009, within the thirty-day period provided by section 21(a) of the Act. That appeal invoked the Board's review jurisdiction pursuant to section 21(b)(3) of the Act.

The Board issued its Decision and Order affirming the ALJ's decision on January 26, 2010. JA 206. This Court has appellate jurisdiction under section 21(c) of the Act, which provides for review of a "final order of the Board" in the court of appeals for the circuit in which a worker's injury occurred, provided an aggrieved party files a petition for review within sixty days after issuance of the Board's order. Ms. Wheeler was injured in Virginia, within this Court's territorial jurisdiction, and she filed her petition for review with this Court on February 5, 2010, within sixty days of the Board's final order. JA 215. Accordingly, the Court has jurisdiction over Ms. Wheeler's petition for review.

[1] Unless otherwise noted, all statutory references are to the Longshore Act, with section xx referring to 33 U.S.C. § 9xx.

ISSUE PRESENTED

Section 22 allows for the modification of a compensation order within a year after "the last payment of compensation" when the injured employee suffers "a change in conditions." Here, there is no dispute that (1) there was a change in conditions when Ms. Wheeler's medical condition deteriorated to the point that she needed two knee-replacement surgeries as a result of her work-related injury; (2) the Employer made payments of medical benefits for those surgeries; and (3) within a year after one of those payments, Ms. Wheeler sought modification of an earlier compensation order. Does section 22 permit modification of a compensation order within one year after a payment of medical benefits?

STATEMENT OF THE CASE

Stephanie Wheeler injured both knees in 1992 while working for Newport News Shipbuilding and Dry Dock Company (Employer). In earlier proceedings, Ms. Wheeler was awarded permanent partial disability compensation under the Act for the injury, but was denied permanent total disability compensation. When her condition later deteriorated, Ms. Wheeler claimed additional compensation and sought to modify the earlier order under Section 22 of the Act, 33 U.S.C. § 922. In a decision issued on April 17, 2009, the ALJ denied Ms. Wheeler's request for modification. JA 195-205. The Board affirmed the ALJ's decision on January 26, 2010. JA 207-214. It is these decisions that Ms. Wheeler asks the Court to review.

STATEMENT OF THE FACTS

A. Proceedings prior to Ms. Wheeler's modification request.

The facts are undisputed. Ms. Wheeler worked for the Employer as a shipfitter. On May 26, 1992, she injured both of her knees on the job. At that time, the Employer voluntarily paid Ms. Wheeler temporary total disability compensation under the Act. After Ms. Wheeler underwent three knee surgeries (two to her left knee and one to her right), the Employer also paid permanent partial disability compensation under section 8(c)(2) based on a 15 percent right-leg impairment rating, and a twenty-five percent left-leg impairment rating.[2] Ms. Wheeler claimed additional compensation for permanent total disability, which the Employer contested. In 1999, ALJ Campbell awarded her such compensation. The Employer's appeal to the Board was unsuccessful.

While paying compensation for permanent total disability, the Employer requested modification under section 22, alleging that Ms. Wheeler had a residual wage-earning capacity and therefore was not totally disabled. In a May 24, 2002 decision, ALJ Campbell found that the Employer had established the availability of

[2] Section 8(c), 33 U.S.C. § 908(c), contains a "schedule" that provides a set number of weeks of compensation when there is a loss, or total loss of use, of a specific body part. When there is only a partial loss of use, the number of weeks of compensation payable is reached by multiplying the percentage loss of use – the impairment rating – by the number of weeks of compensation allowed for loss of the body part.

suitable alternate employment, which demonstrated that a residual wage-earning capacity existed, and modified the award to require payment of compensation for permanent partial disability. On reconsideration, ALJ Campbell recognized that under *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980), Ms. Wheeler was limited to the section 8(c)(2) scheduled permanent partial disability awards that the Employer had previously paid for her knee injuries. Accordingly, ALJ Campbell issued an order on August 14, 2002, denying Ms. Wheeler's claim for permanent total disability compensation. Ms. Wheeler appealed to the Board, but the Board affirmed on September 12, 2003. *Wheeler v. Newport News Shipbuilding and Dry Dock Co*., 37 BRBS 107 (2003). No further appeal was taken from that order, and the Employer ceased paying disability compensation.

Ms. Wheeler's knees continued to deteriorate. On June 21, 2006, Ms. Wheeler had her right knee totally replaced. JA 5. She had additional right-knee surgery on October 5, 2006. JA 9. In early 2008, she had her left knee replaced. JA 3. The Employer did not dispute that this treatment was related to Ms. Wheeler's compensable May 1992 injury and paid for all three of the surgeries that were performed in 2006 and 2008. JA 196.

B. Modification proceedings

On September 13, 2007 – within a year after the October 2006 surgery paid for by the Employer – Ms. Wheeler filed an application for modification of ALJ Campbell's 2002 order under section 22. Section 22 permits modification of an otherwise final compensation order on the grounds of a mistaken factual determination or a change in conditions when application is made "at any time prior to one year after the date of the last payment of compensation." 33 U.S.C. § 922. After a hearing, ALJ Krantz issued a decision denying Ms. Wheeler's application. Although the ALJ found that Ms. Wheeler had sought modification within a year after the Employer's payment of medical benefits, he concluded that her application was untimely because, in his view, the payment of medical benefits does not amount to a "payment of compensation" within the meaning of section 22. JA 195.

In reaching this conclusion, the ALJ first noted that as a textual matter, the Act uses the term "compensation" inconsistently to refer to disability compensation *and* medical benefits or to disability compensation alone. JA 199. He then reviewed the case law interpreting the term in various provisions of the Act, starting with the Supreme Court's decision in *Marshall v. Pletz*, 317 U.S. 383 (1943). There, the Court considered section 13(a), which provides that where an employer has voluntarily paid "compensation" for "disability or death" without an

award, "a claim may be filed within one year after the date of the last payment." 33 U.S.C. § 913(a). The Court held that "compensation" as used in section 13(a) did not include medical benefits.

The ALJ next reviewed this Court's relevant precedent, noting that this Court had found the meaning of the term "compensation" to differ depending upon its use in the particular statutory provision. JA 203, *citing Jenkins v. Maryland Shipbuilding & Drydock Co.*, 594 F.2d 404 (4th Cir. 1979) (finding that compensation includes medical benefits in section 7(d)); *Newport News Shipbuilding and Dry Dock Co. v. Walker*, 261 Fed. Appx. 638, 2008 WL 179438 (4th Cir. 2008), *aff'g Walker v. Newport News Shipbuilding and Dry Dock Co.*, BRB No. 06-0711 (April 26, 2007) (dispute over medical benefits was dispute over compensation under section 28(b)); *Brown & Root, Inc. v. Sain*, 162 F.3d 813 (4th Cir. 1998) (compensation does not include medical benefits in the context of section 33(g)(1)). Finally, the ALJ reviewed case law from other circuits that, like this Court, had interpreted "compensation" as variously including or excluding medical benefits, depending upon the term's use in the particular statutory provision.

Given these varying interpretations, the ALJ recognized that here, "the term 'compensation' must be examined within the context of Section 22." JA 203. Rather than considering that context, however, the ALJ relied primarily on the

Pletz decision's interpretation of the term in section 13(a) – excluding medical benefits from compensation – because both section 13(a) and section 22 use the phrase "payment of compensation" and involve time limitations. He also found support for his conclusion in the Fifth Circuit's decision in *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297 (5th Cir. 1992), which held that "compensation" as used in section 18(a) – one of the Act's enforcement provisions – does not include medical benefits paid by an employer directly to a medical provider. Applying these cases, the ALJ found that the Employer's payment of Ms. Wheeler's medical expenses to her health-care providers did not constitute a "payment of compensation" under section 22. JA 204.

Ms. Wheeler appealed the ALJ's decision to the Board. The Board affirmed, also relying on *Pletz* and *Lazarus*. Remarking that it was "unable to discern any basis for adopting a different construction of the term 'compensation' for purposes of the Section 22 limitations period than that adopted by the Supreme Court in *Pletz* in the context of the Section 13(a) statute of limitations," the Board held that *Pletz* "compels the conclusion that employer's payment of medical benefits in this case is not the payment of 'compensation' for purposes of Section 22." JA 212. In a footnote, the Board recognized that this Court in *Jenkins*, 594 F.2d 404, had interpreted the term "compensation" in section 7(d) as including medical benefits. But the Board dismissed the import of *Jenkins* because the Court there did not

consider either the statutory definition of the term "compensation" or the *Pletz* decision, and the Court did not cite *Jenkins* in its later *Sain* decision, where it held that the term "compensation" in section 33(g)(1) – a provision involving third-person liability for injuries compensable under the Act – does not include medical benefits. "Under these circumstances," the Board stated, "we reject claimant's contention that the Fourth Circuit's holding in *Jenkins* controls the disposition of the issue raised in this case." JA 210.

SUMMARY OF THE ARGUMENT

Although no court has specifically addressed whether "compensation" includes medical benefits in the context of section 22, courts have addressed the question in the context of other provisions of the Act. They have reached different conclusions depending on the language and purpose of the particular provision at issue. Because the Act does not use the term "compensation" in a unitary fashion, the language and purpose of section 22 must be considered here. When they are, it is clear that "compensation" should be read to include medical benefits.

Congress designed section 22 to be a generous reopening provision that allows for modification of orders when a factual mistake is made or when an injured employee's condition or circumstances change over time. The Supreme Court has interpreted section 22 broadly, in terms of both the scope of its remedy and the manner in which that remedy may be accessed. Given that there is no

dispute that Wheeler experienced a change in conditions, and no dispute that her disability stems from the injury she sustained while working for the Employer, there can be little question that interpreting "compensation" in section 22 to include medical benefits would satisfy the provisions' purpose. Holding otherwise would result in Wheeler being denied compensation for what is clearly a work-related disability.

Interpreting "compensation" as used in section 22 to include medical benefits is also consistent with the way courts have interpreted the term in the context of other provisions. Unless the provision's unique language dictates otherwise, the courts have held that "compensation" includes medical benefits when that construction is supported by the specific provision's purpose. As there is nothing in the language of section 22 that weighs against reading "compensation" to include medical benefits, and because such a reading is compelled by the purposes of section 22, "compensation" should be construed to include medical benefits in the context of section 22.

Finally, the Court should hold that medical benefits are "compensation" for purposes of section 22 whether they were paid to the employee or his health-care provider. The Board relied on the Fifth Circuit's decision in *Lazarus* – which drew this distinction in the context of section 18(a), one of the Act's enforcement provision – to draw a similar distinction in the context of section 22. The Board

did so erroneously, however, because the language of section 18(a) compels such a result, while the language and purpose of section 22 weigh heavily against it.

STANDARD OF REVIEW

The Court reviews the Board's decision for errors of law and to determine whether the Board adhered to its standard of review. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). On questions of law, including interpretations of the Longshore Act, this Court exercises plenary, *i.e.*, *de novo*, review. *See Humphries v. Director, OWCP*, 834 F.2d 372, 374 (4th Cir. 1987). The Board's statutory interpretations are not entitled to deference, *Gilchrist v. Newport News Shipbuilding and Dry Dock Co.*, 135 F.2d 915, 918 (4th Cir. 1998), but the Director's reasonable interpretation of a provision of the Longshore Act is entitled to deference where the provision is ambiguous or silent on a point. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 384 (4th Cir. 1994); *Betty B. Coal Co. v. Director*, 194 F.3d 491, 498 (4th Cir. 1999).

ARGUMENT

The only question before the Court is whether the Employer's payment of medical benefits was a "payment of compensation" within the context of section 22. Ms. Wheeler correctly contends that the Board erred in excluding medical benefits from the term "compensation" in section 22. It is essential that the Court

consider this question in light of the particular language and purpose of section 22 because this Court and others have determined that "compensation" includes medical benefits in the context of some provisions, but not in the context of others. Accordingly, we start with a discussion of section 22.

A. Section 22 is a broad reopening provision designed to correct mistakes and accommodate changes in an employee's condition over time.

Section 22 provides, in pertinent part:

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a *change in conditions* or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time *prior to one year after the date of the last payment of compensation* . . . [or] rejection of a claim review a compensation case . . . and . . . issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

33 U.S.C. § 922 (emphases added).[3]

The Supreme Court has construed section 22 to ensure that either the employee or the employer will be able to modify an earlier compensation order "when changed conditions . . . make[] such modification desirable in order to render justice under the act." *O'Keefe v. Aerojet-General Shipyards, Inc*., 404 U.S.

[3] The title "deputy commissioner" has been replaced by "district director" for administrative purposes. 20 CFR § 701.301(a)(7). Some of the adjudicative duties originally within the deputy commissioners' authority have been transferred to administrative law judges. *See* 33 U.S.C. § 919(d). Applications for modification, therefore, are normally adjudicated by an administrative law judge, as was Ms. Wheeler's application here.

254, 255-56 (1972), (*quoting* S.Rep.No.588, 73d Cong., 2d Sess., 3-4 (1934); H.R.Rep.No. 1244, 73d Cong., 2d Sess., 4 (1934)).[4] This Court has also recognized that the section 22 "modification procedure is extraordinarily broad. . . . [It] is flexible, potent, easily invoked, and intended to secure 'justice under the act.'" *Betty B Coal Co.*, 194 F.3d at 497-498.[5] One primary advantage of section 22 – and similar reopening provisions in almost all other workers' compensation schemes – is "that it permits a[n adjudicator] to make the best estimate of disability it can at the time of the original award, although at that moment it may be impossible to predict the extent of future disability, without having to worry about being forever bound by the first appraisal." *Metropolitan Stevedore Co. v. Rambo (Rambo II)*, 521 U.S. 121, 131 (1997) (*quoting* 3 *A. Larson & L. Larson, Law of Workmen's Compensation* § 81.10, p. 15-1045 (1996)). *See also Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1362 (4th Cir. 1996) (noting that "[t]he health of a human being is not susceptible to once-in-a-lifetime adjudication.").

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[4] This language comes from the legislative history of the 1934 amendment to the provision, which was specifically intended to extend the time for seeking modification. As originally enacted, section 22 permitted modification only "during the term of an award . . . ." S.Rep.No.588, 73d Cong., 2d Sess., 3-4 (1934); H.R.Rep.No. 1244, 73d Cong., 2d Sess., 4 (1934); 33 U.S.C. § 922 (1927). In extending that period, Congress noted that, in many cases, the "term of an award" had expired by the time a compensation order was issued. *Id*.

[5] This decision (as well as others cited) was rendered under the Black Lung Benefits Act, which incorporates section 22. 30 U.S.C. § 932(a).

The Supreme Court has held that the language of section 22 should be read broadly in determining what events permit modification. *See O'Keefe*, 404 U.S. at 255-56 ("mistake in determination of fact" should not be limited to particular kinds of factual errors or to cases involving new evidence or changed circumstances); *Banks v. Chicago Grain Trimmer's Assn., Inc*., 390 U.S. 459, 465 (1968) (same); *Metropolitan Stevedore Co. v. Rambo(Rambo I)*, 515 U.S. 291 (1995) ("change in conditions" should not be limited to a single condition such as an employee's physical health but should include all the same conditions on which initial entitlement is predicated, including economic conditions). Moreover, the language of section 22 specifically contemplates modification to allow for additional compensation even after compensation payments have ceased, as it specifically provides that a modified compensation order may "reinstate" compensation. 33 U.S.C. § 922. In short, the '"principle of finality' just does not apply to Longshore Act and black lung claims as it does in ordinary lawsuits." *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993) (*citing Banks* and noting that the "Longshore Act's modification provision displaces *res judicata*).

With these principles in mind, we turn to the language of the Longshore Act and the cases construing it.

B. The term "compensation" does not have a unitary meaning throughout the Act.

Congress did not use "compensation as a term of art" throughout the statute. *Oilfield Safety and Machine Specialties, Inc. v. Harman Unlimited*, 625 F.2d 1248, 1257 (5th Cir. 1980). The Act defines "compensation" as "the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein." 33 U.S.C. § 902(12). While this definition does not explicitly refer to medical benefits, the statute as a whole shows that Congress did not intend to mechanically apply the definition each time the Act uses the term. *Cf. Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201, 206 (1949) (definition of "disability" in § 2(10) held not to be controlling of meaning of that term in § 8(f)).

In many contexts, "compensation" simply cannot be limited to the periodic disability and death payments referred to in section 2(12) without creating insurmountable textual difficulties. For example, section 4(a) provides that "[e]very employer shall be liable for and shall secure the payment to his employees of the *compensation* payable under *sections 907*, 908, and 909 of this Act." 33 U.S.C. § 904(a) (emphases added). The "compensation payable under section[] 907" can mean only medical benefits, as that is the only benefit payable under section 907. Similarly, section 6(a) indicates that Congress considered medical benefits to be compensation. The provision addresses when the payment of compensation commences, and provides that "no *compensation* shall be allowed

for the first three days of the disability, except the benefits provided for in Section 907 . . . .” 33 U.S.C. § 906(a) (emphasis added). If Congress had not believed that medical benefits were compensation, it would not have felt the need to provide an exception allowing for their payment within the first three days of the disability, when other forms of compensation are not payable.

In view of these usages of “compensation,” the definition of “compensation” in section 2(12) is plainly not intended to apply each time the term appears in the Act. Where the application of a statutory definition to a term’s use in a particular provision would create “incongruities in the language” of the provision and “destroy one of [its] major purposes,” Congress “would not have intended” such a reading, and the provision should be construed, notwithstanding the definition, to accomplish its purposes. *Lawson*, 336 U.S. at 201. *See also Oilfield Safety*, 625 F.2d at 1257 (looking to policies and purposes underlying section 28 to construe the term “compensation” as used in that section). This is such a case.

C. The Courts have held that "compensation" includes medical benefits when permissible under the provision's language and necessary to carry out the purposes of the statutory section at issue.

The courts have concluded that, in the context of some provisions, "compensation" includes medical benefits while in the context of others, it does not. The distinction between the two outcomes lies in the courts' analysis of the particular provision's language and, when the language does not compel a particular result, the purpose underlying the provision.

1. This Court's decisions.

This Court has held that "compensation" includes medical benefits when used in the context of section 7(d), *Jenkins*, 594 F.2d 404, but not when used in the context of section 33(g), *Sain*, 162 F.3d 813. These seemingly contradictory results can be explained by the different language employed in the two provisions. Specifically, section 7(d) refers simply to "compensation," while section 33(g) refers to "compensation" and "medical benefits" separately. Contrary to the Board's conclusion, these decisions support interpreting the term "compensation" in section 22 as including medical benefits.

The provision at issue in *Jenkins*, which was then codified as section 7(d), provided:

> If at any time the employee unreasonably refuses to submit . . . to an examination by a physician selected by the employer, the Secretary may, by order, suspend the payment of further *compensation* during

> such time as the refusal continues, and no *compensation* shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

33 U.S.C. § 907(d) (emphases added), *quoted in Jenkins*, 594 F.2d at 406.[6]

Employee Jenkins was found to have unreasonably refused to attend an examination by an employer-selected doctor. Because he had sought only medical benefits (and not disability compensation) under the Act, the question presented to the Court was whether medical benefits are included in the "compensation" that can be suspended under section 7(d) when an employee fails to submit to a medical examination. 594 F.2d at 406-07.

Reversing the Board, the Court held that Jenkins' medical benefits could be suspended because they were compensation within the meaning of section 7(d). Looking beyond the language of section 7(d), the Court cited section (4)(a) of the Act, and its provision that "[e]very employer shall be liable for and shall secure the payment to his employees of the *compensation* payable under *sections 907,* 908, and 909 of this Act." 33 U.S.C. § 904(a) (emphases added). The Court also recognized that "the compensation payable under section[ ] 907" could only mean

[6] This provision is now codified, substantially unchanged, at 33 U.S.C. § 907(d)(4). When *Jenkins* was decided, now-section 7(d)(4) was simply a single sentence within an undivided section 7(d).

medical benefits, as that is the only benefit payable under section 907. 594 F.2d at 407. The other sections mentioned in section 4(a) – sections 908 and 909 – address disability compensation and compensation for death, respectively. In light of section 4's reference to the payment of "compensation" under all three provisions, the Court held that "[t]he term 'compensation' must be read to apply to all benefits provided by these three sections," and thus concluded that amounts expended for medical treatment were "compensation" as the term is used in section 7(d). 594 F.2d at 407.

Significantly, in reversing the Board's decision, the *Jenkins* Court stated that the Board had "interpreted section 907 in such a manner as to read all meaning out of the statute." 594 F.2d at 406. The Court concluded that it was "not obliged to stand aside and rubber-stamp the affirmance of administrative decisions that [it] deem[s] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." 594 F.2d at 407.

In contrast, where the language of the particular provision being construed supplies the meaning of "compensation," the Court has reached a different conclusion. In *Sain*, the Court determined that "compensation" in section 33(g)(1) did not include medical benefits. Section 33 governs situations in which a third party – *i.e.*, some entity other than the employer – is liable for damages stemming from the employee's injury or death. Section 33(g)(1) requires that, if the

employee wishes to enter into a settlement with such a party "for an amount less than the *compensation* to which [he] would be entitled under this Act," he must first obtain the written permission of the employer. 33 U.S.C. § 933(g)(1) (emphasis added). If the employee enters into a settlement without first obtaining such permission, section 33(g)(2) provides that "all rights to *compensation and medical benefits* under this Act shall be terminated . . . ." 33 U.S.C. § 933(g)(2) (emphasis added).

Employee Sain had entered into a settlement without his employer's permission. In determining whether the amount of the settlement was less than the amount of "compensation" payable to the employee – section 33(g)(1)'s trigger for requiring employer approval – the Court considered whether the medical benefits to which Sain was entitled were "compensation" to be included in the sum. The Court held that, in the context of section 33(g)(1), they were not.

The Court relied on the fact that, while section 33(g)(1) refers only to the amount of "compensation" payable, section 33(g)(2) provides for the forfeiture of both "compensation *and medical benefits*." 162 F.3d at 818. The Court concluded that the reference to "compensation and medical benefits" in section 33(g)(2) meant that the reference to only "compensation" in section 33(g)(1) did not include medical benefits. In reaching this conclusion, the Court applied the rule of statutory construction that "inclusion of particular language in one section of a

statute suggests that the omission of such language in another section was intentional." *Id*. at 819, *citing Bethlehem Steel Corp. v. Mobley,* 920 F.2d 558, 560-61 (9th Cir. 1990). Indeed, it specifically cited "the close proximity of the phrases 'compensation' and 'compensation and medical benefits' in the provision we are interpreting" as the basis for its decision. *Id*. at 819 n.4.

The language of section 22 at issue here does not lend itself to such ready resolution. Instead, like section 7(d) in *Jenkins*, the unqualified and singular use of the term "compensation" calls for looking beyond the statutory text to the purposes underlying the provision. *See also Betty B Coal*, 194 F.3d at 498-500 (construing phrase "rejection of a claim" in section 22 in light of *de novo* nature of modification proceeding). Given the nature and goals of section 22, "compensation" should be read broadly to include both a payment of disability compensation and a payment of medical benefits. The Board's contrary reading "frustrate[s] the congressional policy underlying" section 22: to provide a mechanism to adjust compensation payments when an injured employee's condition changes and to promote accuracy in benefit payments over finality.

2. Other courts' decisions.

The pattern that emerges from this Court's cases – reading "compensation" to include medical benefits unless the language of the provision requires otherwise – also appears in other courts' decisions. In *Pletz*, for instance, the Supreme Court

held that "compensation" did not include medical benefits in the context of section 13(a). Section 13(a) governs the time for the initial filing of claims. Unlike section 22, however, section 13(a) does not refer to "compensation" generally, but to "compensation for disability or death." 33 U.S.C. § 913(a).[7] Specifically, it bars "the right to *compensation for disability or death*" unless a claim is filed "within one year after the *injury or death*." *Id*. The exception to this bar is that, "[i]f payment of compensation has been made without an award *on account of such injury or death*, a claim may be filed within one year after the date of the last payment." 33 U.S.C. § 913(a). Thus, the language of the provision itself makes clear that it is concerned exclusively with "compensation for disability or death"

[7] When *Pletz* was decided, section 13(a) referred to "compensation for disability" and "compensation for death" in separate sentences. 33 U.S.C. § 913(a) (1927). In 1972, Congress merged them into a single sentence, providing that "the right to compensation for disability or death . . . shall be barred unless a claim therefor is filed with in one year after the injury or death." The latter is the version currently in effect. Section 13(a) refers explicitly to compensation for "disability," which is payable under section 8, and to compensation for "death," which is payable under section 9. But it does not also reference medical benefits payable under section 907. *See generally Jenkins*, 594 F.2d at 407 (describing three distinct types of compensation payable under sections 7, 8 and 9).

and payments made for disability or death.[8] By contrast, sections 28(a) and 18(a) refer only to "compensation," and in the context of each of those provisions, "compensation" has been held to include medical benefits. *See Oilfield Safety*, 625 F.2d at 1248 (section 28(a)); *Lazarus*, 958 F.2d 1297 (section 18(a)).

In *Oilfield Safety*, the Fifth Circuit held that "compensation," as used in section 28(a), includes medical benefits. Section 28(a) allows for an award of attorneys' fees if the employer declines to pay "compensation," and the employee later successfully prosecutes his claim. 33 U.S.C. § 928(a). Oilfield Safety, one of the employers in the case, had paid the employee disability compensation, but had declined to pay him medical benefits based on the assertion that he was employed by another employer, Harman Unlimited. *Id*. at 1256. The ALJ awarded the employee both disability compensation and medical benefits, and held Oilfield Safety and Harman jointly liable for his attorney's fees. *Id*. at 1251. Oilfield Safety argued on appeal that, because it had refused to pay only medical benefits

[8] The Board implied that this Court overlooked *Pletz* in deciding *Jenkins*, and essentially dismissed *Jenkins* – even though it is binding precedent – on that ground. JA at 210 n.5. The Court also did not cite the *Pletz* decision in *Sain*. We do not believe that the Court would fail to apply a Supreme Court decision once, let alone twice, for any reason, but especially if, as the Board believes, the Supreme Court decision in question is outcome determinative. The better conclusion is that the Court determined – properly in our view – that the *Pletz* decision simply did not control the construction of "compensation" as used in the very different statutory provisions addressed in *Jenkins* and *Sain*.

and not "compensation" – the term used in section 28(a) – it should not be liable for attorney's fees. *Id*. at 1256.

The Fifth Circuit disagreed. In holding that "compensation" includes medical benefits, the court rejected Oilfield Safety's assertion that "compensation" and medical benefits are "terms of art . . . with totally different meanings." As this Court had in *Jenkins*, the Fifth Circuit relied on section 4(a), which refers to medical benefits as "compensation." 625 F.2d at 1257. The court also relied on section 6(a), which similarly refers to medical benefits as compensation. "These statutory provisions," said the court, "demonstrate that Congress used the term 'compensation' on several occasions in a fashion encompassing medical expenses." *Id*. Concluding that "[a] literal reading" of the statutory provision "provide[d] little assistance in resolving the attorney's fees question" presented, the court turned to the policies underlying section 28(a) to construe "compensation" in that provision. *Id.* The court cited Congress' intent that attorney fees not diminish an employee's recovery under the Act and recognized the incentive section 28(a) provided to employers to pay rather than contest injured workers' claims.

These court of appeals cases, which were all decided after *Pletz*, also show that the Supreme Court's interpretation of the term in the context of section 13(a) does not, as the Board found, compel the same reading of "compensation" in

section 22 any more than it did in sections 7(d), *see Jenkins*, 28(a), *see Oilfield Safety*, or 18(a), *see Lazarus*. Indeed, in 1998, the First Circuit surmised that whether the payment of medical benefits under the Longshore Act constitutes "compensation" remains an open question. *Barker v. United States Dept. of Labor*, 138 F.3d 431, 439 (1st Cir. 1998). It acknowledged *Pletz*, but noted that *Pletz's* holding was confined to section 13(a), and that the courts of appeals had already reached different holdings in the context of other provisions.[9]

The language of those provisions, discussed above, is clearly one of the reasons the courts have reached differing conclusions. But where the language is not dispositive, the purpose of the provisions at issue played a key role in their interpretation.

D. The purposes of section 22 compel the conclusion that "compensation" includes medical benefits within the context of the modification provision.

The purpose of section 22 supports reading "compensation" to include medical benefits. As noted, section 22 is designed to ensure that either the employee or the employer will be able to modify an earlier compensation order "when changed conditions . . . make[ ] such modification desirable in order to

[9] We note our disagreement with Ms. Wheeler's suggestion, Petitioner's Brief at 17-21, that the Court should not consider itself bound by the *Pletz* decision. As discussed above, however, *Pletz* simply does not answer the statutory-construction question presented here.

render justice under the act." *O'Keefe*, 404 U.S. at 255-56. This purpose is best served by reading section 22 to allow modification within a year after a payment of medical benefits. Such a reading would prevent Ms. Wheeler from being forever bound by a determination that she was only partially disabled – and entitled to compensation for only a brief period – when it is clear in light of two subsequent total knee replacements that her condition continued to deteriorate, and her level of disability increase. Indeed, as there is no dispute that her disability stems from workplace injuries, the only other option is to hold that Ms. Wheeler is not entitled to workers' compensation for what is concededly a work-related disability. That result is flatly inconsistent with the general purposes of the Longshore Act to protect employees from injury and compensate those who are injured. *See generally Temporary Employment Servs. v. Trinity Marine Group, Inc.*, 261 F.3d 456, 458-59 (5th Cir. 2001).

The Supreme Court construed section 22 to avoid this troublesome result in *Rambo II*, 521 U.S. at 135-36. There, the Court held that where an employee's injury has not caused a present disability but has significant potential to cause a future disability, the Act allows a nominal award of benefits. *Id*. at 138. It found that a nominal award was appropriate to ensure that the injured worker would not be foreclosed from receiving compensation based solely on the passage of time,

i.e., one year after either the rejection of a claim or the last payment of compensation. *Id.* at 131-32.

That is precisely the effect that reading "compensation" to include medical benefits in section 22 would have here: it would prevent a worker whose employment-related condition deteriorates – leaving her disabled – from being denied compensation for that disability. What makes Ms. Wheeler's case more compelling than Rambo's is that, while Rambo alleged only the potential for a future disability after expiration of the initial award, Ms. Wheeler alleges an actual increase in disability here.[10]

Finally, the Board's construction of "compensation" in section 22 as excluding medical benefits leads to unintended consequences – or at least consequences the Board did not articulate – that interfere with the general availability of modification. If "compensation" in section 22 does not include

[10] Arguably, Ms. Wheeler could have achieved the same result she seeks here by requesting a nominal award. But *Rambo II* should not be read to foreclose her application for modification for three reasons. First, nothing in *Rambo II* requires a worker to seek a nominal award; the case merely allows for a nominal award where the potential for future disability is foreseeable. Second, while the Court acknowledged that section 22 modification is not available more than a year after the last payment of compensation, it did not address whether "compensation" includes medical benefits, an issue that was not before the Court. Finally, given that the Court interpreted the Act liberally to ensure that Rambo would not be denied compensation for a work-related disability – or even a potential disability – it seems it would give an equally liberal interpretation to "compensation" here to reach the same result.

medical benefits, then an order requiring payment of an employee's medical treatment could never be modified because the request necessarily could not be made within one year "of the last payment of compensation." To illustrate, consider an employer ordered by an ALJ to pay $5,000 for an employee's back surgery under section 7. The employer pays the physician, but subsequently discovers that the bill was in error and that the cost of the surgery was only $4,000. The employer would be unable to seek correction of the ALJ's order despite the mistake in fact. Similarly, an employee who receives an order requiring the employer to provide medical testing to monitor the employee's work-related asbestosis may be precluded from asking for that order to be amended if his medical condition deteriorates (although not to the point that disability compensation would be payable) and he needs actual medical treatment for his asbestosis. While admittedly these scenarios may not occur often, this cannot be the result Congress intended in enacting section 22. *See, e.g.*, *Lazarus*, 958 F.2d at 1303 (looking at consequences of interpreting "compensation" as not including medical benefits).

E. The Board's conclusion that "compensation" includes medical benefits that are paid directly to an employee but not those paid to his health-care provider is inconsistent with both the language and purpose of section 22.

The ALJ and the Board both embraced the Fifth Circuit's decision in *Lazarus*, which drew a distinction between medical benefits paid directly to the employee and those paid to the employee's physician in determining whether they constituted "compensation" under section 18(a). JA 210-11. While that distinction made sense in the context of section 18(a), it does not make sense in the context of section 22. The provisions employ different language and serve vastly different purposes. Indeed, the language and purpose of section 18(a) compel the result reached in *Lazarus*. The language and purpose of section 22, by contrast, weigh against reaching such a result.

Section 18(a) addresses the situation in which an employer defaults "in the payment of compensation" due under a compensation order. It allows "the person to whom such compensation is payable" to apply to the district director for an order of default, and to enforce that default order in district court. 33 U.S.C. § 918(a). Given this language, the meaning of "compensation" in section 18(a) is textually limited to amounts owed to "the person to whom such compensation is payable." In other words, under section 18(a), the employee may enforce only "compensation" that is owed *to him*. The medical benefits at issue in *Lazarus* were

owed to the employee; the employer had refused to pay Lazarus' health-care providers, and Lazarus paid them himself. The Act provides that, under those circumstances, the medical benefits are payable to the employee. *See* 33 U.S.C. § 907(d)(1) (providing that an employee may recover amounts expended by him for medical care if the employer has refused).

Where the employee has not paid for the services of his health-care providers, payment for those services is not owed to him, but to his health-care providers. Because the employee is not "the person to whom such compensation is payable," section 18(a) gives him no right to enforce those payments.[11] The outcome of *Lazarus*, therefore, is compelled by the language and purpose of section 18(a).

Section 22, by contrast, does not limit "compensation" only to those amounts payable to a specific person. Rather, like sections 7(d)(4), interpreted in *Jenkins*, and 28(a), interpreted in *Oilfield Safety*, section 22 refers simply to

[11] An unpaid health-care provider is not left without a remedy by the limitations of section 18(a), because section 7(d)(3) gives him a different avenue to collect on unpaid medical bills. *See* 33 U.S.C. § 907(d)(3) (allowing award for reasonable value of employee's medical care "upon application by a party in interest"); *Hunt v. Director, OWCP*, 999 F.2d 419 (9th Cir. 1993) (physicians who provided care are parties in interest); *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997) (treating hospital held to be a party in interest). Under those circumstances – because the employee is not "the person to whom such compensation is payable" – section 18(a) simply does not allow him to enforce the payment of the medical benefits that are owed to his health-care provider.

"compensation." As in both of those cases, section 22 should be interpreted broadly to include medical benefits. This is particularly true given that one purpose of section 22 is to allow for modification when an injured employee's condition deteriorates. As discussed above, allowing Ms. Wheeler to receive compensation for a disability that undisputedly results from the injury she sustained while working for the Employer is in the interest of justice.

CONCLUSION

The Court should reverse the ALJ's and the Board's decisions and remand the case for proceedings on Ms. Wheeler's modification application. Because this is an issue of first impression, the Director requests oral argument pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and Fourth Circuit Rule 34(a).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 7,088 words, as counted by Microsoft Office Word 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2010, the required copies of this Brief were served electronically, through the Court's CM/ECF system, and by mail, postage prepaid, on the following:

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