United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 6, 2023
Lyle W. Cayce
Clerk

No. 21-60752

HUNTINGTON INGALLS, INCORPORATED,

Petitioner,

versus

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

Respondents.

Petition for Review of the Order of the
Benefits Review Board
BRB No. 16-0690

Before STEWART, ELROD, and GRAVES, *Circuit Judges*.

JENNIFER WALKER ELROD, *Circuit Judge*:

The Longshore and Harbor Workers' Compensation Act provides covered employees with "the right to choose an attending physician authorized by the Secretary to provide medical care under this chapter." 33 U.S.C. § 907(b). The question here is whether audiologists are "physicians" under § 907(b) of the LHWCA. In this matter of first impression, we hold that they are.

I

First, the facts. Although "nothing recounted in this Part has much bearing on the rest of our decision"—given that the dispositive issue is purely a legal one—"a recitation of the facts and proceedings below at least shows how the question presented arose." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408–09 (2019).

From 2003 to 2009, Clarence Jones worked at Huntington Ingalls Incorporated as a sheet-metal mechanic. After leaving the company, Jones complained of hearing loss. In April 2014, Jones selected and met with an audiologist. Audiologists are health care professionals who identify, assess, and manage disorders of hearing, balance, and other neural systems. Jones's selected audiologist administered a hearing test that generated an audiogram, a chart that shows how well one hears sounds in terms of frequency and intensity. The audiogram indicated a 17.2% binaural hearing impairment under the American Medical Association's *Guide to the Evaluation of Permanent Impairment*. Jones presented the audiogram and the results of a completed hearing-loss questionnaire to Huntington Ingalls's claims adjuster. In May 2014, the company filed a report recognizing Jones's claim.

Upon recognizing Jones's claim, the company scheduled Jones for another audiogram. This time, Huntington Ingalls wanted Jones to be evaluated by its own preferred audiologist. Jones complied. The company's preferred audiologist completed an audiogram and determined that Jones's level of hearing impairment was not 17.2%, but rather 0% (albeit with "mild high frequency sensorineural hearing loss"). The company took the position that it would accept liability for medical benefits, but only as to the results of the audiogram completed by the company's own selected audiologist.

In March 2015, Jones filed a formal claim for compensation under the Longshore and Harbor Workers' Compensation Act. 33 U.S.C. § 901. In

response, Huntington Ingalls reiterated its position that it would authorize Jones to schedule an appointment to be fitted with hearing aids, but only from its preferred audiologist. Jones requested instead that his original audiologist conduct the fitting. The company again refused, and the claim proceeded.

In 2016, an administrative law judge denied Jones's LHWCA claim for compensation and medical benefits, holding that Jones did not prove causation by a preponderance of the evidence. Jones moved for reconsideration, but the administrative law judge again denied his claim.

Jones appealed this decision to the Department of Labor's Benefits Review Board. In October 2017, the Board unanimously affirmed as to the denial of compensation benefits. But the Board reversed and remanded to the District Director regarding medical benefits, based on the Company's earlier stipulation to pay for Jones's hearing aids. Critical to the present dispute, the Board held that although Jones was eligible for that medical benefit, he did not "have a statutory or regulatory right to choose [his] own audiologist[]."

Jones moved for reconsideration. In July 2021, by a two-to-one vote, the Board reversed its initial decision on whether Jones could choose his own audiologist. The Board held instead that "an audiologist is a 'physician' such that Claimant is permitted his initial choice of audiologist pursuant to Section 7(b) of the [LHWCA] as a matter of statutory construction." The Company timely petitioned this court for review. We have jurisdiction under 33 U.S.C. § 921(c).

II

The sole question presented by this appeal is whether an audiologist is a "physician" as that word is used in § 907(b) of the LHWCA. We review the Benefits Review Board's ruling on that matter of law *de novo*. *Grant v. Dir., Off. of Worker's Comp. Programs*, 502 F.3d 361, 363 (5th Cir. 2007). As

is always true when we first interpret of one of Congress's laws, "we start with the statutory text." *Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020).

The LHCWA provides that if a covered employee is injured, his or her employer must "furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). And a claimant under the LHWCA "shall have the right to choose an attending *physician* authorized by the Secretary to provide medical care under this chapter as hereinafter provided." *Id.* § 907(b) (emphasis added).

A

The term "physician" in § 907(b), which was added in 1972, is not provided with a statutory definition. *See* Act of Oct. 27, 1972, Pub. L. No. 92-576, 86 Stat. 1251, 1254. Dictionaries published in or around 1972 may then shed some light on the meaning of the term "physician" at the time it was codified in the LHWCA. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1740 (2020) (consulting dictionary definitions published around the time that the law being examined was enacted). *Webster's Third* provides that a physician is:

> 1. a person skilled in the art of healing **:** one duly authorized to treat disease **:** a doctor of medicine — often distinguished from *surgeon*
> 2. one who restores (as a troubled spirit or the body politic) **:** one exerting a remedial or salutary influence <a ~ of the soul> <nature as a ~>
> 3. *obs* **:** NATURAL PHILOSOPHER, PHYSICIST

Webster's Third New International Dictionary 1707 (1966).

The second and third definitions can safely be discarded for overbreadth and obsolescence, respectively. Under the second definition, anyone who restores the troubled spirit or exerts a remedial influence is a

"physician." This cannot be what Congress meant. After all, the barista at my preferred coffee shop restores my tired spirit and remedies my fatigue. Is she a physician? The linguistic context of the word "physician" is that the Act requires employers to "furnish such medical, surgical, and other attendance or treatment [of injured employees] . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). As helpful as the coffee she brews may be, my barista does not provide me with medical, surgical, or other similar treatment. To call her a "physician" would thus be an inappropriate reading of that word outside the semantic context in which it appears within the statute. *Cf. Bond v. United States*, 572 U.S. 844, 870–71 (2014) (Scalia, J., concurring in the judgment) ("When, for example, 'draft,' a word of many meanings, is one of the words used in a definition of 'breeze,' we know it has nothing to do with military conscription or beer.").

The third definition may also be set aside. Under that meaning, which *Webster's Third* notes specifically to be obsolete, an entirely different profession with similar linguistic origin is identified: physicists.[1] This does not apply to the case at hand.

We turn then to the primary definition listed in *Webster*'s. At its start, the definition provides a broad sense of the word. It says that a physician is

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[1] As *Merriam-Webster*'s etymological researchers explain:

> Medical experts are called *physicians* because the word *physic* originally referred to both the practice of medicine and to natural science. As scientific fields matured, *physic* as it applied to healing was phased out in favor of *medicine*. *Physicist* was coined to refer to someone who studies "physics," and *physician* was left with its association with medical doctors.

Why Is a Medical Expert Called a 'Physician'?, Merriam-Webster: Word History (June 2, 2020), https://www.merriam-webster.com/words-at-play/why-is-a-medical-expert-called-a-physician.

"a person skilled in the art of healing: one duly authorized to treat disease." This reading would undoubtedly include audiologists, as audiology is "a clinical profession devoted to the diagnosis and treatment of hearing and balance disorders." Brad A. Stach & Virginia Ramachandran, *Clinical Audiology: An Introduction* xiii (3d ed. 2022). But the definition continues, also offering a narrower sense of the word. The more restrictive portion of the definition says that somebody is a physician only if he or she is "a doctor of medicine — often distinguished from *surgeon*." Webster's Third New International Dictionary 1707 (1966). If that more restrictive conception controls, then audiologists are not physicians. Although the work of audiologists often intertwines with that of otolaryngologists—the medical doctors who study the ears, nose, and throat—audiologists are not themselves doctors of medicine. *See Doctor of Audiology Program Overview*, The University of Mississippi Medical Center, Degree Programs, https://www.umc.edu/graduateschool/Degree-Programs/Doctor-of-Audiology/Program-Overview.html.

The duality within the primary definition—having both a broad and narrow sense—is not unique to *Webster*'s understanding of the word. *The American Heritage Dictionary*, another reputable text published shortly after the adoption of the relevant amendment to the LHWCA, confirms these two distinct meanings:

1. A person licensed to practice medicine; medical doctor.
2. A person who heals or exerts a healing influence.

The American Heritage Dictionary 936 (2d College ed. 1976). The first sense is narrower and more technical, covering only those who practice medicine. The second sense is broader and sweeps in those who heal, even if they are not medical doctors.

Dictionaries thus leave us with genuine ambiguity. Based on the education they receive and the role that they play in identifying and treating hearing disorders, audiologists can fairly be described as "skilled in the art of healing." Webster's Third New International Dictionary 1707 (1966). And the technical, post-graduate education they receive makes them "duly authorized to treat disease" related to hearing. *Id.* However, audiologists are not themselves medical doctors. Their work complements that of medical doctors, where the medical doctors and audiologists play important but distinct roles.

B

But dictionaries are not the only item in our interpretive toolkit: we can turn as well to the structure of the LHWCA. As Justice Thomas once explained when writing for the Court, "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Section 907(b) is the specific part of the law at issue in this case, but the very next section seems to equate audiologists with physicians who have a certification in otolaryngology. That part of the LHWCA, amended relevantly in 1984, says that in calculating payments for permanent partial disability, "[a]n audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the dater thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology." 33 U.S.C. § 908(c)(13)(C).

It would be structurally odd for § 908 and § 907 to treat audiologists differently in this regard. If an audiologist can perform the audiogram that is necessary to determine *quantitively* the amount of disability for § 908, then an audiologist would also seem able to use that audiogram for purposes of a

§ 907 as a diagnostic tool in determining *qualitatively* that care is necessary. And if claimants were not free to choose their own audiologists but were able to choose their own otolaryngologist, then that otolaryngologist would likely need to refer the claimant to an audiologist anyway for an audiogram and the fitting of hearing aids. This additional step adds delay for claimants and costs for the employers ultimately responsible for their medical care.

Our job is not to design efficient statutes, though. "[O]ur task is confined to deciding cases and controversies, which requires us to apply the law as Congress has written it." *Cargill v. Garland*, 57 F.4th 447, 472 (5th Cir. 2023) (*en banc*). And while structural evidence suggests that § 908 and § 907 interact to inform and provide further context for the word "physician," it is still true that the language of § 908 distinguishes audiologists from physicians. It says that an audiogram is presumptive evidence of the level of hearing loss sustained only if conducted by a "certified audiologist or a physician who is certified in otolaryngology." 33 U.S.C. § 908(c)(13)(C). It does not say "audiologist or *other* physician." The structural interactions between these historical amendments to sections 907 and 908 would seem to exacerbate, rather than alleviate, the ambiguity presented by the plain text of the statute.

C

With text, structure, and history all indeterminate, we turn—as the Supreme Court has instructed us—to the purposes of the statute. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2424 (2019) (describing the traditional interpretive toolkit as "text, structure, history, and purpose"); *see also W. Refining Sw., Inc. v. FERC*, 636 F.3d 719, 727 (5th Cir. 2011) (observing that the court's interpretation of the statute at issue "is consistent with congressional intent" and "is in line with the purposes of the Act"). Importantly, inquiry into purpose cannot be used to contradict otherwise clear text. We look only

because the text, structure, and history all prove indeterminate, so the meaning of the words at issue in this case could be clarified by the aims of the statute. The Supreme Court has long recognized that some of the LHWCA's clear aims include "ensuring prompt payment to injured workers and of relieving claimants and their employers of the undue expense and administrative burden of litigating compensation claims." *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 538 (1983).

Achieving that aim requires that injured employees be able to get an accurate diagnosis. And the statute's amendment history suggests that the purpose of the physician-selection provision is to reduce the risk that employers will select physicians who say employees are in better health than they really are, so as to reduce the cost of medical treatments that might accompany a more fulsome diagnosis. In 1960, the LHWCA was amended "to provide that an injured employee shall have the right to select his own physician." Public L. 86-757, 74 Stat. 900 (Sept. 13, 1960). But the scope of that selection privilege was quite narrow: the statute provided that "The employee shall have the right to choose an attending physician from a panel of physicians to be named by the employer subject to [certain provisions]." *Id.* § 7(b). This is a far cry from the 1972 Amendments, which allow a much broader right to select a physician that is not constrained by the employer's screening of options, as the employer was able to do in the 1960 version of the law. *See* 86 Stat. 1254 (1972).

When Congress still authorized employers to select physicians for their employees, the care that those employees received sometimes suffered. *See, e.g.*, *Atl. & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908, 910 (5th Cir. 1971) (an employee's necessary back surgery was delayed by months because the employer's hired doctors claimed the treatment was not required, which was proven incorrect when the employee sought surgery on his own accord). The mismatch in diagnoses and proposed treatments between an employee's

preferred physician and one hired by the employer is not just explainable by diverging financial interests, though. The doctor-patient relationship requires trust and confidentiality to facilitate the candid disclosure of sensitive health information. *Cf. Zadeh v. Robinson*, 928 F.3d 457, 476 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) (concluding that, in the Fourth Amendment context, "the law strongly protects privacy in medicine").

All the purposes of the physician-selection provision discussed above would also seem to apply to an employee's selection of his or her own audiologist. The employer has a financial incentive in selecting audiologists who have a reputation of finding that an employee's hearing is not as impaired as the employee believes it to be. In the facts at hand, for example, Respondent Jones's preferred audiologist diagnosed him with a 17.2% hearing deficiency. The audiologist selected by the employer did not just disagree by a matter of a couple percentage points. He found that Jones's hearing-impairment level was 0%.

However, further examination of the statute's apparent purposes reveals that this conclusion about physician choice may not be so simple. Sections 908 and 907 work in tandem to provide employees with the tools for diagnosing and then treating hearing-relating injuries, respectively. Congress may have included audiologists among those who can *diagnose* hearing loss under § 908 while intentionally omitting audiologists from those who can *treat* such hearing loss under § 907 (which contains the physician-selection provision at issue). "It is not axiomatic that someone whose hearing is tested should be provided hearing aids, and the fact that Congress placed faith in the judgment of audiologists to determine the amount of hearing loss does not equate to faith in audiologists to prescribe care." Benefits Review Board No. 16-0690, Decision and Order on Motion for Reconsideration at 23 (Boggs, C.A.A.J., dissenting). Congress could believe that a medical doctor

is better suited than an audiologist to look at the results of an audiologist-administered audiogram, as well as other relevant health information, and then determine the appropriate care for the patient.

Looking for congruence between the text of a portion of a statute and the purposes of the statute as a whole as expressed by its internal structure can sometimes resolve ambiguity. But here, this tool seems yet again to pull equally in both directions. Perhaps this is a good illustration of why we avoid "open-ended policy appeals and speculation about legislative intentions" that are not otherwise apparent from the text and structure of the statute alone. *Kisor*, 139 S. Ct. at 2442 (Gorsuch, J., concurring in the judgment).

* * *

We have exhausted all of our traditional tools of statutory construction. And yet "the relevant language, carefully considered, can yield more than one reasonable interpretation." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting). Whether audiologists are covered by the Act's physician-choice provision is therefore genuinely ambiguous.

III

Because the statute that Congress wrote is silent or ambiguous as to the legal issue raised by this case, we now "name *Chevron*, and apply its precedent." *Mexican Gulf Fishing Co. v. U.S. Dep't of Commerce*, 60 F.4th 956, 963 n.3 (5th Cir. 2023); *see also Forrest Gen. Hosp. v. Azar*, 926 F.3d 221, 228 (5th Cir. 2019).[2] When an ambiguous statute is accompanied by lawfully

[2] Although "*Chevron* has become something of the-precedent-who-must-not-be-named," it is the law "until and unless it is overruled by our highest Court." *Mexican Gulf Fishing*, 60 F.4th at 963 n.3. That said, the judgment in this case is not conditional on *Chevron*'s longevity. *See Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, --- S. Ct. ---, 2023 WL 3158352 (granting *certiorari* on whether *Chevron*

issued implementing regulations, "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (footnote omitted). Instead, we look to the agency's lawfully promulgated regulation and defer to that interpretation if—but only if—"the agency's answer is based on a permissible construction of the statute." *Mexican Gulf Fishing*, 60 F.4th at 963 (quoting *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 433 (5th Cir. 2021)).

A

The LHWCA provides authorization for the Secretary of the Department of Labor to issue rules and regulations required to administer the provisions of the statute. 33 U.S.C. § 939(a). And we have held specifically that *Chevron* deference can apply to regulations that implement the LHWCA. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 227 (5th Cir. 2001). Therefore, we turn to the regulations to see if they are "reasonable." *Forrest Gen. Hosp.*, 926 F.3d at 228.

In 1977, the Agency interpreted the term "physician" to "include[] doctors of medicine (MD), surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 20 C.F.R. § 702.404 ("Physician defined"). The Agency defines the term not only by positively including examples of practitioners but also by excluding others: "Naturopaths, faith healers, and other practitioners of the healing arts which are not listed herein are not included within the term 'physician' as used in

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should be overturned). Even without according any deference to the agency's regulation, audiologists are properly understood as physicians under the LHWCA for the reasons discussed *infra*.

this part." *Id.* And in 1985, after § 908 of the statute was relevantly amended to add the portion on hearing loss, the Agency promulgated a regulation on claims for loss of hearing that included references to audiologists and otolaryngologists. 20 C.F.R. § 702.441.

The Agency's interpretation of the statute fits neatly within the broad and narrow readings of the word "physician" that the traditional statutory interpretation methods revealed. *Cf. Kisor*, 139 S. Ct. at 2416 ("Note that serious application of those tools therefore has use even when a [statute] turns out to be truly ambiguous. The text, structure, history, and so forth at least establish the outer bounds of permissible interpretation."). The regulation includes many learned health care professionals, even though they are not all medical doctors. But the regulation draws the line at some point to prevent the term "physician" from sweeping in untrained or uncertified individuals who purport to exert a healing influence. These are the exact bounds discovered earlier, in Part II of the opinion.

B

Because the regulations are permissible under *Chevron*, we now see if they can relieve us from the ambiguity that the statute has left us with. *See Dominion Ambulance, L.L.C. v. Azar*, 968 F.3d 429, 434 (5th Cir. 2020) ("When a regulation is unambiguous, courts . . . simply apply the regulation's plain meaning."). Whether the regulations answer the question at hand is not immediately obvious, though. Although they provide a list of specific professions to be included in the definition of "physician," the regulations make no explicit mention of audiologists. However, a regulation "is not ambiguous merely because 'discerning the only possible interpretation requires a taxing inquiry.'" *Kisor*, 139 S. Ct. at 2415 (quoting *Pauley*, 501 U.S. at 707 (Scalia, J., dissenting)).

The full regulatory definition of "physician" is as follows:

> The term *physician* **includes doctors of medicine (MD), surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law.** The term includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings. Physicians defined in this part may interpret their own X-rays. All physicians in these categories are authorized by the Director to render medical care under the Act. **Naturopaths, faith healers, and other practitioners of the healing arts which are not listed herein are not included** within the term "physician" as used in this part.

20 C.F.R. § 702.404 ("Physician defined") (emphases added).

Huntington Ingalls argues that the regulation's limiting clause at the end of the definition requires that the list of examples appearing at the beginning must be exclusive. Because the limiting clause flatly says that "other practitioners of the healing arts which are not listed herein are not included within the term 'physician,'" and because audiologists are other practitioners of the healing arts, the company argues, they are not "physicians" for purposes of the LHWCA.

This line of reasoning is mistaken. First, the list of examples of the beginning of the regulation says "includes," not "is limited to." And as we have held in the past, "the word 'includes' is usually a term of enlargement, and not of limitation." *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 527 (5th Cir. 2005) (internal brackets and citation omitted). And second, the familiar semantic canon of *ejusdem generis* requires that the exclusionary clause at the end of the regulation be limited only to those other practitioners of the healing arts that are similar to naturopaths and faith healers.

On *ejusdem generis*: that canon "applies when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics, as in *dogs*, *cats*, *horses*, *cattle*, *and other animals*." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012). In Justice Scalia's example, the canon is required to determine the proper scope of the phrase "other animals" because that phrase is not defined. The text does not say "other mammalian animals," "other domesticated animals," or otherwise provide the relevant class. As a result, the reader must use his or her own reasoning to determine what level of generality the term "other animals" covers, based on context.

Likewise, the reader of the relevant regulation here does not know what kind of omitted practitioners are intended to be excluded from the "physician" category because the regulation does not define the relevant class. It says merely "other practitioners of the healing arts." 20 C.F.R. § 702.404. Thus, it would be appropriate as a matter of ordinary language to infer that the catchall phrase at the end of the list does not actually catch *all* other professions; it includes only other *similar* professions. The question, then, is whether audiologists are more akin to the explicitly included practitioners of the healing arts or closer in kind to the explicitly excluded practitioners.

The two named practitioners in the excluded list are "naturopaths" and "faith healers." As the Benefits Review Board found, "[a]udiologists are utterly antithetical to both." Benefits Review Board No. 16-0690, Decision and Order on Motion for Reconsideration at 16. A "naturopath" is a practitioner of naturopathy, which is a "theory of disease and system of therapy based on the supposition that diseases can be cured by natural agencies without the use of drugs." The New Shorter Oxford English Dictionary 1890 (3d ed. 1993). A faith healer "act[s] by faith and prayer, not drugs or other conventional medicine." *Id.* at 908.

Audiologists, by contrast, are licensed by the State of Mississippi (where the employee in this case lives), and they engage in conventional medical treatment. They are analogous in many ways to optometrists, who are included as "physicians" in the regulatory definition. Optometrists, despite lacking a medical degree, are able to administer and interpret vision tests. And based on the results of those tests, optometrists can prescribe the appropriate corrective lenses that someone with impaired vision can use to bolster his or her ability to see. *What Is an Optometrist?*, Mississippi Optometric Ass'n (2019), https://www.mseyes.com/your-family-eye-doctor/what-is-an-optometrist/. Audiologists are similarly able to administer hearing tests, evaluate the resulting audiograms, and then use that information to fit a patient with hearing aids that are appropriately calibrated to the individual's level of auditory impairment.

Because the plain meaning of the regulation includes audiologists, and because that regulation is entitled to *Chevron* deference, audiologists are included in § 907(b) of the LHWCA's use of the word "physician."

IV

In the alternative, we analyze the issue presented by assuming *arguendo* that the regulations are actually ambiguous. "*Chevron* deference (regarding ambiguous statutes) has a less-famous doctrinal cousin" under which a court provides some level of deference to an agency's reasonable interpretation of its own ambiguous regulation. *Forrest Gen. Hosp.*, 926 F.3d at 229. There are two levels of deference that may be appropriate in such a circumstance: *Skidmore* deference and *Auer* deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Auer v. Robbins*, 519 U.S. 452 (1997).

"When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean." *Kisor*, 139 S. Ct. at 2414, 2418. However, "that phrase 'when it applies' is important—because it often doesn't." *Id.*

A court should only use this stronger form of deference when an agency's interpretation: (1) is authoritative; (2) is based on its expertise; and (3) reflects the agency's "fair and considered judgment." *Kisor*, 139 S. Ct. at 2417 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012). If an agency interpretation does not meet these factors, then it is owed deference only so far as it is persuasive. *Skidmore*, 323 U.S. at 140.

A

The agency has interpreted its regulatory definition of "physician" as including audiologists. We therefore address the three requirements for *Auer* deference in turn and defer to the agency's interpretation only if it meets each necessary condition.

1

First is whether the agency's interpretation is authoritative, rather than merely a convenient litigating position. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988). To be authoritative, the action need not come from the Secretary or his chief advisors. *Kisor*, 139 S. Ct. at 2416. In the past, "official staff memoranda" reported in the Federal Register have been considered authoritative, even if not officially approved by the agency head. *Id.* (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 n.9, 567 n.10 (1980)). But a speech made by "mid-level official" and an "'informal memorandum' recounting a telephone conversation between employees" have not counted as sufficiently authoritative. *Id.* at 2416–17. (citations omitted); *see also N.Y. State Dep't of Soc. Servs. v. Bowen*, 835 F.2d 360, 365–66 (D.C. Cir. 1987)).

Putting aside the Director's litigation materials, the two materials that could most plausibly be candidates for the "authoritative" agency view are a letter from the Occupational Health and Safety Administration and the Longshoreman's Manual. OSHA has indicated in a letter on a separate

regulation that audiologists are considered "physicians" for the purposes of treating hearing loss.[3] Perhaps it is for this reason that although § 702.404 has never been formally amended to include audiologists, "[i]n practice, claimants have long been given their choice of audiologists to provide medical care for hearing loss." Benefits Review Board No. 16-0690, Decision and Order on Motion for Reconsideration at 3. This is positive evidence that the agency's position is not novel to this litigation. But it is not enough. The letter comes from the director of the Directorate of Enforcement Programs for OSHA, which is parallel to the Office of Workers' Compensation Programs in the Department of Labor's organization, but still a separate unit. *See* Opinion Letter, *supra* note 3. And although the letter does arguably equate audiologists with physicians, it concerns an unrelated regulation. The regulations at issue in this case make no reference to that OSHA program, so it is unclear how the OSHA program could be incorporated into the LHWCA or its implementing regulations.

The Longshore Procedure Manual, an official document, could also provide some evidence of the agency's authoritative views. The Manual "instructs that audiograms are presumptive evidence of the amount of hearing loss sustained if they are administered by a certified audiologist, physician, or a qualified technician under their supervision." Benefits Review Board No. 16-0690, Decision and Order on Motion for Reconsideration at 9. And as the Director put it in a letter responding to a public inquiry, "the fact that the Longshore Program has long accorded to their audiograms the same deference as those of physicians, indicates that the

[3] U.S. Dep't of Labor Occup. Safety & Health Admin., Opinion Letter on Definition of a Physician under 29 CFR 1910.95 and What Credentials Would Qualify a Person to Perform the Duties that Are Specifically Ascribed to Physicians by this Standard (May 10, 2016), *as published at* 2016 WL 6440727.

Director has considered audiologists' reliability and expertise to be the same as physicians." *Id.* (quoting Dir. Letter Br. at 7, n.10).

However, the guidance provided by the Manual on this point is merely a parroting of the definition of "physician" that is provided in § 702.404. DLHWC Proc. Manual 5–0100, para. 4(1) https://www.dol.gov/agencies/owcp/dlhwc/lsProMan/ProMan#05-0100. This proves fatal. We have previously held that "an agency is not entitled to additional deference when its 'interpretation' of the statute simply repeats the statute's language." *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 608 F.3d 217, 222 (5th Cir. 2010).

The Director's position is therefore not authoritative.

2

The second consideration is whether the interpretation implicates the Department's substantive expertise. An agency is at its strongest when the interpretation is within the bounds of its ordinary duty and implicates technical matters. *Kisor*, 139 S. Ct. at 2417. But other interpretive issues "fall more naturally into a judge's bailiwick," like the "elucidation of a simple common-law property term." *Id.*

The Director's position satisfies the substantive-expertise condition. The interpretation here is directly related to the Department's expertise—work-related injuries and the compensation and medical care that accompany them. Whether audiologists should be able both to assess and treat injuries or only to assess them is certainly more of a policy question and does not avail itself to judicial interpretation. As previously explored, the policy implications raised by that question are beyond the scope of our job and lead us only to ambiguous results.

The third and final consideration is whether the Director's interpretation is "fair and considered." *Id.* at 2417 (citation omitted). It should not be merely a "convenient litigating position," *id.*, nor should it be a new interpretation that "creates 'unfair surprise.'" *Id.* at 2418 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)). This is especially so when a disputed interpretation contradicts a prior one. *Id.* There is no indication here that the Department took a prior position contradictory to this one (*e.g.*, that it previously interpreted the regulation as excluding audiologists from the definition of physician). Nor is it a "convenient litigating position," as the manual and letter pre-existed litigation and take the same stance. Therefore, the Director's interpretation is likely "fair and considered."

* * *

Although the Director's interpretation might satisfy two of the three conditions needed for *Auer* deference, it fails to receive that heightened level of deference because it is not sufficiently authoritative. We therefore hold in the alternative that if the Director's position is to be granted any deference, it should receive only *Skidmore* deference.[4] Because we are persuaded by the text of the regulation itself that audiologists meet the definition of

[4] "This circuit follows the rule that alternative holdings are binding precedent and not obiter dictum." *Jarkesy v. SEC*, 34 F.4th 446, 459 n.9 (5th Cir. 2022) (quoting *Texas v. United States*, 809 F.3d 134, 178 n.158 (5th Cir. 2015)). The two holdings are as follows: First, under the plain meaning of the regulation, audiologists are physicians, so the agency's interpretation of its own regulation is not due any deference. Second, even if the regulation is ambiguous, the agency's interpretation of that regulation should receive only *Skidmore* deference—not *Auer* deference. Under either holding, the Benefits Review Board was correct to order that Clarence Jones had a right to select his own audiologist.

"physician," applying *Skidmore* deference to the Director's same conclusion leads to an identical result.

V

Because an audiologist is a "physician" as that word is used in the Longshore and Harbor Workers' Compensation Act, the Benefits Review Board was correct to order that Clarence Jones had a right to select his own audiologist. Accordingly, we DENY the petition for review submitted by Huntington Ingalls, Inc.