No. 17-14468

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OAK GROVE RESOURCES, LLC, and
NATIONAL UNION FIRE INSURANCE/AIG,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and CARRIE FERGUSON,
Respondents

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

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BRIEF FOR THE FEDERAL RESPONDENT

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CERTIFICATE OF INTERESTED PERSONS

The Director, Office of Workers' Compensation Programs, has identified the following interested persons in this matter:

1. Ball, Theresa, Esq., Associate Regional Solicitor, U.S. Dep't of Labor
2. Belcher, Roger, District Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor
3. Casey, Steven Frank, Esq., Counsel for Oak Grove Resources, LLC
4. Chance, Michael, District Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor
5. Clay, Jean, Claims Examiner, Office of Workers' Compensation Programs, U.S. Dep't of Labor
6. Ferguson, Carrie, individual respondent/claimant
7. Ferguson, Lee, coal miner (deceased)
8. Fisher, Maia S., Esq., Associate Solicitor, U.S. Dep't of Labor
9. Geale, Nicholas C., Esq., Acting Solicitor of Labor, U.S. Dep't of Labor (former)
10. Gilligan, Ryan, Administrative Appeals Judge, Benefits Review Board, U.S. Dep't of Labor
11. Goldberg-Kraft, Emily, Esq., Attorney, U.S. Dep't of Labor (retired)
12. Hall, Betty Jean, Chief Administrative Appeals Judge, Benefits Review Board, U.S. Dep't of Labor
13. Hurley, Sarah, Esq., Attorney, U.S. Dep't of Labor
14. Jacobs, John Riley, Esq., Counsel for Carrie Ferguson

15. Jones Walker, LLP, Counsel for Oak Grove Resources, LLC, and National Union Fire Insurance/AIG

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17. Maples, Tucker & Jacobs, LLC, Counsel for Carrie Ferguson

18. National Union Fire Insurance/AIG, Petitioner

19. Oak Grove Resources, LLC, Petitioner

20. Odegard, Adele H., Administrative Law Judge, U.S. Dep't of Labor

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22. Rogers, April S., Esq., Counsel for Oak Grove Resources, LLC

23. Rolfe, Jonathan, Administrative Appeals Judge, Benefits Review Board, U.S. Dep't of Labor

24. Shepherd, Matt S., Esq., Attorney, U.S. Dep't of Labor

25. Singleton, Shelia, District Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor

26. Stearman, Gary K., Esq., Counsel for Appellate Litigation, U.S. Dep't of Labor

27. Wolfe, Kary Bryant, Esq., Counsel for Oak Grove Resources, LLC

STATEMENT REGARDING ORAL ARGUMENT

The Director, Office of Workers' Compensation Programs, believes oral argument is unnecessary because this appeal presents a narrow legal issue and the legal arguments have been fully presented in the briefs.

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Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

This appeal involves Carrie Ferguson's claim for survivor's benefits under the Black Lung Benefits Act ("BLBA"), 30 U.S.C. §§ 901-44, as amended by section 1556 of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, sec. 1556, 124 Stat. 119, 260 (2010). Carrie Ferguson is the widow of Lee Ferguson, a former coal miner whose black lung benefits claim was posthumously awarded. A Department of Labor ("DOL") administrative law judge

("ALJ") awarded her automatic derivative benefits pursuant to 30 U.S.C. § 932(*l*), and the Benefits Review Board ("Board") affirmed. Mr. Ferguson's former employer Oak Grove Resources, LLC ("Oak Grove"), the liable coal mine operator, has petitioned the Court to review the Board's decision. The Director of DOL's Office of Workers' Compensation Programs ("OWCP"), responds in support of the award.

STATEMENT OF JURISDICTION

This Court has both appellate and subject matter jurisdiction over Oak Grove's petition for review under 33 U.S.C. § 921(c).[1] Oak Grove petitioned for review of the Board's August 8, 2017 decision on October 5, 2017, within the sixty-day limit prescribed by § 921(c). Moreover, the "injury" as contemplated by § 921(c)—Lee Ferguson's exposure to coal mine dust—occurred in Alabama, within this Court's territorial jurisdiction.

The Board had jurisdiction to review the ALJ's decision on Carrie Ferguson's claim under 33 U.S.C. § 921(b)(3). The ALJ issued a final decision on June 28, 2016. Oak Grove filed a notice of appeal with the Board on July 25, 2016, within the thirty-day period prescribed by 33 U.S.C. § 921(a).

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[1] The BLBA incorporates section 21 of the Longshore Act and Harbor Workers' Compensation Act, 33 U.S.C. § 921. 30 U.S.C. § 932(a).

STATEMENT OF THE ISSUE

In addition to providing benefits to coal miners totally disabled by pneumoconiosis (colloquially known as black lung disease), the BLBA provides survivor's benefits to certain of their dependents. A dependent survivor may obtain benefits in two ways. The first is by proving that the miner's death was due to pneumoconiosis. The second is by showing that the miner "was determined to be eligible to receive benefits . . . at the time of his or her death." 30 U.S.C. § 932(*l*). Under this second method, an eligible survivor of an awarded miner is entitled to automatic derivative benefits without having to prove that the miner's death was due to pneumoconiosis and without having to file a new claim or otherwise revalidate the miner's approved claim.[2] *Id*.; *U.S. Steel Min. Co., LLC v. Dir., OWCP*, 719 F.3d 1275, 1284 (11th Cir. 2013) ("*Starks*").

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[2] The relief provided by § 932(*l*) has been variously described as "automatic entitlement," "derivative benefits," and "automatic derivative benefits." *Drummond Co., Inc. v. Dir., OWCP*, 586 F. App'x 541, 541-42 (11th Cir. 2014) ("*Gardner*") ("automatic derivative benefits"); *Jim Walter Res., Inc. v. Dir., OWCP*, 766 F.3d 1333, 1334-35 (11th Cir. 2014) ("derivative benefits"); *Vision Processing, LLC v. Groves*, 705 F.3d 551, 553 (6th Cir. 2013) ("automatic (or derivative) benefits"); *B & G Constr. Co. v. Dir., OWCP*, 662 F.3d 233, 242 (3d Cir. 2011) ("automatic entitlement"). Although the terms are largely interchangeable, we employ "automatic derivative benefits" because "automatic" indicates that the survivor need not file a claim, and "derivative benefits" recognizes that the survivor's benefits arise (or derive) from the miner's award.

Lee Ferguson ("Lee"), a former coal miner in Alabama, applied for benefits under the BLBA, but died before his claim was approved. Based on Lee's approved claim, Lee's widow Carrie Ferguson ("Carrie") was awarded automatic derivative benefits pursuant to 30 U.S.C. § 932(*l*).

The question before this Court is whether Carrie must be denied automatic derivative benefits under § 932(*l*) simply because Lee's award was approved posthumously.[3]

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

A. BLBA Provisions Regarding Survivor's Benefits

Since the BLBA was first enacted in 1969, the BLBA has compensated both miners who are totally disabled by pneumoconiosis and certain surviving dependents of coal miners afflicted with pneumoconiosis. *Starks*, 719 F.3d at 1277 (citations omitted). As the BLBA has been amended, the requirements to secure survivor's benefits have changed over time. *See id.* at 1277-79; *B & G Const. Co.*

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[3] There is no dispute that Carrie Ferguson satisfies the relationship and dependency requirements for survivor's benefits. *See* 20 C.F.R. §§ 725.212-725.216 (surviving spouse criteria). There is also no dispute that Carrie filed after the effective date of the ACA amendment restoring the automatic entitlement provision in the BLBA. *See* ACA, Pub. L. No. 111-148, sec. 1556(c), 124 Stat. at 260 (2010 amendments apply to claims filed after January 1, 2005, and pending on or after March 23, 2010).

v. Dir., OWCP, 662 F.3d 233, 239 (3d Cir. 2011) ("[T]he statutory background [of the BLBA's survivor's benefits provisions] . . . could hardly be more complicated.") (citation omitted).

> In 1969, the declared purpose of the statute was
>
> to provide benefits . . . to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 401, 83 Stat. 742, 792 (codified at 30 U.S.C. § 901 (1970)). The statute directed the Secretary to make benefits payments "in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis." *Id.* § 411(a), 83 Stat. at 793 (codified at 30 U.S.C. § 921(a) (1970)). A miner's widow would be paid survivor's benefits "[i]n the case of death of a miner due to pneumoconiosis or of a miner receiving benefits under this part." *Id.* § 412(a)(2), 83 Stat. at 794 (codified at 30 U.S.C. § 922(a)(2) (1970)).[4]

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[4] 30 U.S.C. § 921(a) and § 922(a)(2) are in Part B of the statute, which, as originally enacted, provided that the federal government would pay benefits on claims filed on or before December 31, 1972. Part C of the statute addresses claims filed after December 31, 1972, which would be paid by approved state workers' compensation programs or the miner's former coal mine employer. *See B*

During the first twelve years of the black lung program, Congress repeatedly evinced its intent that survivors should have liberal access to benefits. In 1972, Congress amended the BLBA's declaration of purpose to read:

> It is . . . the purpose of this subchapter to provide benefits . . . to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease *or who were totally disabled by this disease at the time of their deaths*; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

Black Lung Benefits Act of 1972, Pub. L. No. 92-303, sec. 4(b)(2), § 401, 86 Stat. 150, 154 (codified at 30 U.S.C. § 901 (1976)) (emphasis added). 30 U.S.C. § 921(a) was similarly amended such that the Secretary was directed to pay benefits "in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis *or who at the time of his death was totally disabled by pneumoconiosis*." *See id.* sec. 4(b)(1), § 411(a), 86 Stat. at 154 (codified at 30 U.S.C. § 921(a) (1976)) (emphasis added). Section 922(a)(2) remained the same.

In 1978, Congress enacted 30 U.S.C. § 932(*l*), which provided:

& G Constr. Co., 662 F.3d at 239 (describing history of Parts B and C). If the former employer is to pay, the statute directs the employer to pay benefits to the persons listed in 30 U.S.C. § 922(a) (miners, widows, children, parents, brothers, sisters). 30 U.S.C. § 932(c); *Starks*, 719 F.3d at 1277.

> In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this title at the time of his death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner.

Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, sec. 7(h), § 422(*l*), 92 Stat. 95, 100 (1978) (codified at 30 U.S.C. § 932(*l*) (1976 & Supp. III 1979)). Sections 901, 921(a), and 922(a)(2) remained the same.

In 1981, Congress reversed course and amended § 901, § 921(a), § 922(a)(2), and § 932(*l*) to restrict survivors' access to benefits. Congress deleted the language added to § 901 by the 1972 amendments, such that the stated purpose of the statute was once again to:

> to provide benefits . . . to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease ~~*or who were totally disabled by this disease at the time of their deaths*~~; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, sec. 203(a)(4), § 401(a), 95 Stat. 1635, 1644 (codified at 30 U.S.C. § 901(a) (1982)) (emphasis added). 30 U.S.C. § 921(a) was amended to direct the Secretary to pay benefits

> in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis or, *except with respect to claim filed under part C of this subchapter on or after the effective date of the Black Lung Benefits Amendments of 1981,* who at the time of his death was totally disabled by pneumoconiosis.

Id. sec. 203(a)(5), § 411(a), 95 Stat. at 1644 (codified at 30 U.S.C. § 921(a) (1982)) (emphasis added). 30 U.S.C. § 922(a)(2) was similarly amended such that a surviving spouse would be paid survivor's benefits "[i]n the case of death of a miner due to pneumoconiosis or, *except with respect to a claim filed . . . on or after the effective date of the Black Lung Benefits Amendments of 1981 [January 1, 1982]*, of a miner receiving benefits under this part." *Id.* sec. 203(a)(1), § 412(a)(2), 95 Stat. at 1643 (codified at 30 U.S.C. § 922(a)(2) (1982)) (emphasis added). The same time-limiting language was also added to 30 U.S.C. § 932(*l*):

> In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner, *except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981 [January 1, 1982]*.

Id. sec. 203(a)(6), § 422(*l*), 95 Stat. at 1644 (codified at 30 U.S.C. § 932(*l*) (1982)) (emphasis added).

Consequently, after the 1981 amendments, survivors were automatically entitled to benefits under § 932(*l*) only if the miner was awarded benefits as a result of a disability claim filed before January 1, 1982. Survivors whose miners were awarded benefits as a result of a claim filed on or after January 1, 1982, had to independently prove that the miner died due to pneumoconiosis in order to obtain benefits, even though by definition the miner's award meant the miner had

been totally disabled due to pneumoconiosis. *See* 20 C.F.R. § 725.201(a)(2)(ii) (1984); *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1328 (3d Cir. 1988).[5]

There things stood until 2010, when as part of the ACA, Congress once again amended the BLBA. The current 30 U.S.C. § 932(*l*) now states, as it did before the 1981 amendments:

> In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner~~, *except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981 [December 31, 1981]*~~.

30 U.S.C. § 932(*l*) (2012) (emphasis added); *see* ACA, Pub. L. No. 111-148, sec. 1556(b), 124 Stat. at 260. Congress, however, neglected to rectify § 901(a), § 921(a), and § 922(a)(2). This Court and others have resolved the apparent tension by uniformly holding that survivors who meet the requirements of § 932(*l*)

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[5] The 1981 amendments also tightened the BLBA's eligibility requirements by eliminating three statutory presumptions, including one known as the fifteen-year presumption. Under it, workers who had spent at least fifteen years in underground coal mines and suffered from a totally disabling pulmonary impairment were rebuttably presumed to be totally disabled by pneumoconiosis and/or to have died due to pneumoconiosis. 30 U.S.C. § 921(c)(4) (1976). As with § 932(*l*), the 1981 amendments limited § 921(c)(4) to claims filed before January 1, 1982. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, sec. 202(b)(1), § 411(c)(4), 95 Stat. 1635, 1643 (codified at 30 U.S.C. § 921(c)(4) (1982)).

are not required to prove that their miner died of pneumoconiosis. *See Starks*, 719 F.3d at 1285; *Vision Processing*, 705 F.3d at 558-59; *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 389-91 (4th Cir. 2011), *cert. den.* 568 U.S. 816 (2012); *B & G Constr. Co.*, 662 F.3d at 247-59.

B. DOL's Regulations Regarding Survivor's Benefits

Prior to the 1981 statutory amendments, DOL's regulation allowed a surviving spouse to obtain benefits if she could show that she met the relationship and dependency criteria and that the deceased miner:

> (i) Was receiving benefits . . . at the time of death; or
>
> (ii) Is determined to have been totally disabled due to pneumoconiosis at the time of death, or to have died due to pneumoconiosis . . . .

20 C.F.R. § 725.212 (1980).[6]

After the 1981 statutory amendments requiring surviving spouses to prove death due to pneumoconiosis, DOL amended its regulation such that, to obtain benefits, a surviving spouse had to show that the deceased miner:

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[6] This brief focuses on the statutory and regulatory provisions addressing surviving spouses. Surviving children, parents, and siblings are eligible for survivor's benefits if they meet certain relationship and dependency criteria and if their associated miners meet criteria similar to those listed in 20 C.F.R. § 725.212(a)(3)(ii). *See* 20 C.F.R. §§ 725.218-725.225.

> (i) Was receiving benefits . . . at the time of death *as a result of a claim filed prior to January 1, 1982*; or
>
> (ii) Is determined *as a result of a claim filed prior to January 1, 1982,* to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis. *A surviving spouse . . . of a miner whose claim is filed on or after January 1, 1982, must establish that the deceased miner's death was due to pneumoconiosis in order to establish entitlement to benefits . . . .*

20 C.F.R. § 725.212 (1984) (emphasis added).

Following the ACA's reinstatement of automatic derivative benefits, DOL again amended § 725.212. To obtain benefits, a surviving spouse must now show that the deceased miner:

> (i) Is determined to have died due to pneumoconiosis; or
>
> (ii) Filed a claim for benefits on or after January 1, 1982, which *results or resulted in a final award of benefits*, and the surviving spouse . . . filed a claim for benefits after January 1, 2005 which was pending on or after March 23, 2010.

20 C.F.R. § 725.212 (2017) (emphasis added).[7] The current regulation, like all previous versions of the regulation, allows any surviving spouse to obtain benefits by proving the miner died due to pneumoconiosis. For a surviving spouse whose miner never filed a claim or had his claim denied, this is the only way to obtain

[7] The 2013 regulations do not apply to claims filed before June 30, 1982. The regulatory provisions applicable to those claims are found in the 2010 edition of the Code of Federal Regulations. 20 C.F.R. § 725.2 (2017).

benefits. However, reflecting the 2010 amendment to § 932(*l*), the current regulation allows the surviving spouse of a miner to make an alternate showing—that the miner's claim results or resulted in a final award of benefits.

C. DOL Regulations Regarding Black Lung Claims Processing and Adjudication

A miner seeking benefits under the BLBA submits an application to DOL's Office of Worker's Compensation Programs (OWCP). *See* 20 C.F.R. §§ 725.303-725.304. An OWCP district director then investigates and collects evidence regarding the claimant's eligibility for benefits and the miner's current and former coal mine employers' potential liability for benefit payments. *Id.* §§ 725.401, 725.404-725.408, 725.410, 725.412-725.414. The process typically culminates in the district director issuing a proposed decision and order that determines the claimant's entitlement and designates the liable party. *Id.* § 725.418. If the parties fail to respond to the district director's decision and order within 30 days, it becomes final. *Id.* § 725.419(d).

A party that disagrees with the district director's proposed decision and order can request a hearing before an ALJ. *Id.* §§ 725.419(a), 725.450-725.451. The ALJ reviews the case de novo and issues a decision and order that determines entitlement and identifies the party responsible for payment. *Id.* §§ 725.455(a); 725.476-725.477. Any party aggrieved by the ALJ's decision can appeal to the

Benefits Review Board. 33 U.S.C. § 921(b)(3); 20 C.F.R. § 725.483. Final decisions by the Board are reviewable by the courts of appeals. 33 U.S.C. § 921(c); 20 C.F.R. § 725.482(a).

A claimant is entitled to the payment of benefits upon the issuance of an award, notwithstanding the pendency of further proceedings. *See* 20 C.F.R. §§ 725.420(a), 725.522(a) (requiring payment following DOL district director's proposed decision awarding benefits even when ALJ hearing and decision is requested); *id.* § 725.502(a)(1) (making benefits due upon issuance of an ALJ, Board, or court order despite appeal, and requiring payment until the order is superseded and vacated). If a liable operator or its insurance carrier fails to pay, the Black Lung Disability Trust Fund will step in and pay the claimant and then seek reimbursement from the operator or carrier.[8] *Id.* § 725.522(a). If benefits are paid to the claimant while litigation is pending and it is later determined that the claimant was ineligible for benefits, the party that made the payments can seek to recover the overpayments from the claimant. *See id.* § 725.522(b).

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[8] The Trust Fund is financed by an excise tax on the sale of coal. 26 U.S.C. § 9501. It was Congress's intent to "ensure that individual coal operators rather than the trust fund bear liability for claims arising out of such operators' mines to the maximum extent feasible." *Dir., OWCP v. Oglebay Norton Co.*, 877 F.2d 1300, 1304 (6th Cir. 1989).

Benefits are payable to an entitled miner beginning with the month of onset of total disability due to pneumoconiosis. Where the evidence does not establish the miner's onset date (which is typically the case), benefits are payable beginning with the month in which the claim was filed. *Id.* §§ 725.203(a), 725.503(b). A survivor's entitlement date begins with the month of the miner's death. *Id.* § 725.503(c).

II. Procedural History

The facts are undisputed and procedural in nature.

Lee Ferguson worked in coal mines in Alabama for over 32 years. Appendix ("A.") 45.[9] He applied for black lung benefits on July 23, 2012. A.208. An OWCP district director issued a proposed decision and order denying his claim on February 26, 2013. A.96. Within thirty days, Lee requested a hearing before an ALJ. A.91. The hearing was held in August 2014 and the ALJ issued a decision awarding Lee's claim in November 2015. A.41-42. The ALJ ordered Lee's employer Oak Grove to pay retroactive benefits starting from July 2012, the month Lee's claim was filed. A.65. Oak Grove did not appeal the ALJ's decision.

[9] Because Oak Grove did not consecutively paginate its Appendix, we cite to the page numbers in the ECF header.

Lee died, however, in the three years and four months it had taken to award his claim. He passed away in November 2014, after the August 2014 hearing, but one year before the November 2015 award. A.68.

Lee's death led his widow, Carrie Ferguson, to file a claim for survivor's benefits in March 2015. A.31. An OWCP district director issued a proposed decision and order in February 2016, awarding Carrie automatic derivative benefits pursuant to 30 U.S.C. § 932(*l*). A.216. Oak Grove then requested a hearing before an ALJ. A.226.

The ALJ awarded Carrie automatic derivative benefits, pursuant to § 932(*l*). A.34. The ALJ interpreted § 932(*l*) to apply to "survivors of miners who were determined to be eligible for benefits based on claims they filed before their death and not only to survivors of miners who were receiving benefits at the time of their death." *Id.* She disagreed with Oak Grove's contention that *Starks* was dispositive on this point. The ALJ explained that, in *Starks*, unlike in this case, the miner was in award status when he died and therefore the decision did not address whether a miner had to be actually receiving benefits at the time of his death in order for

§ 932(*l*) to apply.[10] A.33. The ALJ also reasoned that Oak Grove's interpretation would lead to incongruous results: survivors would be at the mercy of OWCP's and ALJs' speed of adjudication, and employers would have to continue paying a survivor automatic derivative benefits even "if his or her miner was receiving benefits at the time of his death but the benefits award is overturned after the miner passes away." *Id.* The ALJ last noted this Court's affirmance of an award of automatic derivative benefits where the miner's claim was awarded posthumously. *Id*. (citing *Drummond Co., Inc. v. Dir., OWCP*, 650 F. App'x 690 (11th Cir. 2016) ("*Allred*")).

The Benefits Review Board affirmed the ALJ's decision in a published decision. A.13.[11] Agreeing with the Director, the Board observed "the plain language of [§ 932(*l*)] provides 'no basis to distinguish between miners' claims which were awarded . . . prior to the miner's death and those which were awarded thereafter.'" A.16. Rather, the provision "requires only that the miner 'was determined to be eligible to receive benefits . . . at the time of his or her death,'"

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[10] In *Starks*, the miner's claim was awarded in 2000, and the miner died in 2006. *Starks*, 719 F.3d at 1279.

[11] The Board's decision is also available at *Ferguson v. Oak Grove Res., LLC*, No. 16-0570 BLA, 2017 WL 3953435 (Ben. Rev. Bd. 2017).

and that is necessarily the case when a miner is awarded benefits "regardless of whether the award was issued before or after death." A.16-17. It thus concluded that "[a]s long as the miner is ultimately determined to be eligible to receive benefits, a survivor is entitled to the payment of benefits." A.17.

As further support, the Board explained that DOL's regulations implementing § 932(*l*) have consistently interpreted the statute in this manner. A.17-19 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984)). The Board noted that 20 C.F.R. § 725.212(a) (1980) provided for automatic derivative benefits when the miner was receiving benefits at the time of death *or* was determined to have been totally disabled due to pneumoconiosis at the time of death. A.18. Likewise, the current regulation, "covers [miner's] awards that occur before a miner's death (i.e. a miner's claim which 'resulted' in an award), as well as awards that occur after a miner's death (i.e. a miner's claim which 'results' in an award)." A.19 (citing 20 C.F.R. § 725.212(a)(3)).

Finally, the Board, like the ALJ, found "misplaced" Oak Grove's heavy reliance on *Starks*. *Id.* It explained that *Starks* addressed the broader issue whether survivors meeting the eligibility requirements of § 932(*l*) were "still required to prove that the miner's death was due to pneumoconiosis." *Id.* *Starks*, the Board emphasized, did not address "the issue of whether the timing of a

miner's award is significant." A.20. Accordingly, the Board upheld the ALJ's determination that Carrie was entitled to automatic derivative benefits.

Oak Grove then petitioned this Court for review.

STANDARD OF REVIEW

The issue presented here is one of law, involving the interpretation and scope of 30 U.S.C. § 932(*l*). Although the Court "review[s] de novo questions of statutory interpretation," *Starks*, 719 F.3d at 1280, the Director's interpretation of the BLBA, as expressed in its implementing regulations, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991). Moreover, the Director's interpretation of those implementing regulations "is deserving of substantial deference unless it is plainly erroneous or inconsistent with the regulation[.]" *Mullins Coal Co. v. Dir., OWCP*, 484 U.S. 135, 159 (1987) (citation and quotation marks omitted). Thus, if the language of § 932(*l*) is ambiguous, the court must defer to the Director's reasonable interpretation "even if [her] reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Chevron*, 467 U.S. at 843-45 & n.11.

SUMMARY OF THE ARGUMENT

The Court should affirm the award of Carrie Ferguson's claim. Under 30 U.S.C. § 932(*l*), a survivor is entitled to automatic derivative benefits, without having to independently prove that the miner's death was due to pneumoconiosis, if "the miner was determined to be eligible to receive benefits . . . at the time of his or her death." When Congress reinstated automatic derivative benefits in 2010, it intended to make it easy for dependent survivors to receive benefits based on their associated miners' approved claims. Congress eliminated any requirement that they revalidate their miner's approved claim or that they even file a new claim. Nothing in the statute requires Carrie Ferguson, the surviving spouse of a miner with an approved claim, to be treated differently from similarly-situated survivors based solely on the happenstance that her husband Lee died before an adjudicator approved his claim.

DOL's regulation, 20 C.F.R. § 725.212(a)(3)(ii), further supports Carrie's right to automatic derivative benefits. It provides for automatic derivative benefits when the miner's claim "results or resulted in a final award of benefits." The regulation thus encompasses miners' claims that were approved before death ("resulted in a final award") or those that were approved afterwards ("results in a final award"). This regulatory interpretation of § 932(*l*) is reasonable because it is consistent with the statutory text, the remedial purposes of the BLBA generally and

§ 932(*l*) specifically, and avoids the inequitable and irrational consequences of Oak Grove's interpretation. Nor is the regulation inconsistent with this Court's decision in *Starks*, which did not address the issue presented here. Accordingly, the Court should defer to DOL's regulation.

ARGUMENT

I. Dicta in *Starks* is not dispositive of Carrie Ferguson's right to automatic derivative benefits.

As a preliminary matter, neither this Court nor any other court of appeals has squarely addressed the question of whether a miner "was determined to be eligible to receive benefits . . . at the time of his or her death" if he filed a claim during his lifetime but was awarded benefits posthumously.[12] Thus, this panel can address the question on a clean slate. *Great Lakes Dredge & Dock Co. v. Tanker Robert*

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[12] The court of appeals cases addressing the 2010 amendment to § 932(*l*) have mostly featured miners like Starks, who applied for, were awarded, and received benefits during their lifetime. *See, e.g.*, *Gardner*, 586 F. App'x at 542; *Union Carbide Corp. v. Richards*, 721 F.3d 307, 311 (4th Cir. 2013); *Stacy*, 671 F.3d at 382; *B & G Constr. Co.*, 662 F.3d at 245; *see also Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (Ben. Rev. Bd. 1989). Because those cases do not present the critical distinguishing feature here—a posthumous miner's award—they are not binding on this case. Similarly, there have been cases where the miners, like Lee Ferguson, filed claims during their lifetime but were awarded benefits posthumously. *Allred*, 650 F. App'x at 691 & n.2; *Vision Processing*, 705 F.3d at 558-59. In those cases, however, the employers did not challenge the applicability of § 932(*l*) based on the posthumous nature of the living miner's award. Thus, no court of appeals has had the occasion to directly address the question at issue in this case.

Watt Miller, 957 F.2d 1575, 1578 (11th Cir. 1992) (where a question was not before a prior panel, the prior panel opinion's discussion of it is dicta and the current panel is "free to give that question fresh consideration").

Starks's imprecise substitutions of "receiving benefits when he died" for "was determined to be eligible to receive benefits . . . at the time of his or her death" are dicta and do not bind this panel because they were not necessary to the result or the reasoning of the case. *See Dantzler v. I.R.S.*, 183 F.3d 1247, 1251 (11th Cir. 1999) (holding that language in prior opinions is dicta "[t]o the extent that [the prior] opinions purport to hold anything extending beyond the facts with which each of those courts was presented"). In *Starks*, the miner applied for, was awarded, and received benefits, all before he died. 719 F.3d at 1279 (noting the miner died six years after being awarded benefits). Because it was indisputable that the miner satisfied the "was determined to be eligible to receive benefits . . . at the time of his . . . death" criterion in § 932(*l*), the *Starks* Court did not consider that question. Rather, the *Starks* Court addressed the broader issue whether "amended § 932(*l*) . . . eliminate[d] a survivor's requirement to prove that the miner spouse died due to pneumoconiosis." *Id*. at 1280.

Here, in contrast, Lee Ferguson applied for benefits during his lifetime, but the determination of his eligibility was not made and benefits were not received until after he died. Unlike the employer in *Starks*, Oak Grove disputes whether

Lee meets the "was determined to be eligible to receive benefits . . . at the time of his . . . death" criterion. The only question before this Court, therefore, is precisely the question not considered by the *Starks* Court.

That *Starks* used the phrase "was receiving benefits when he died" in describing its holding, *see* 719 F.3d at 1284, does not transform the phrase into binding precedent on the meaning of "was determined to be eligible to receive benefits . . . at the time of his or her death." This Court has "pointed out many times that regardless of what a court says in its opinion, the decision can hold nothing beyond the facts of that case." *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010) (collecting cases). "A holding that *X* + *Y* is enough to [satisfy] a provision does not mean that *X* alone is not enough. And that is true even if we say in the opinion that *X* alone would not be enough." *Id.* Here, although *Starks* held that a survivor could obtain benefits under § 932(*l*) when the miner received benefits ("X") before he died ("Y"), 719 F.3d at 1284, that does not mean that the survivor of a miner like Lee Ferguson, who received benefits ("X") after he died (not "Y") could not also obtain benefits under § 932(*l*).

Nor was the concept of the miner's actual receipt of benefits prior to death necessary to the reasoning behind *Starks*. *See United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) ("[T]he holding of a case is . . . comprised both of the result of the case and 'those portions of the opinion necessary to that result

by which we are bound.'") (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996)). If *Starks* had used the phrase "was determined to be eligible to receive benefits . . . at the time of his or her death" or "filed a claim, which results or resulted in a final award of benefits" in every instance where it mentioned the miner receiving benefits before he died, the result of the case and the reasoning behind it would have been the same. The *Starks* Court was simply unconcerned with the timing of the miner's death vis-à-vis the timing of his award.

In addition, because DOL's 2013 regulation implementing amended § 932(*l*) was promulgated after *Starks*, the *Starks* Court did not have the occasion to consider giving *Chevron* deference to DOL's regulation.[13] Because *Starks* did not employ a *Chevron* step-one analysis to decide the precise issue here, DOL's post-*Starks* regulation, standing alone, constitutes a sufficient change in the legal landscape to revisit *Starks*. *See Brand X*, 545 U.S. at 982 (reasoning that, under *Chevron*, prior judicial precedent does not foreclose agency from subsequently interpreting ambiguous statute).

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[13] *Starks* was issued on June 27, 2013. DOL's final revised regulation was promulgated on September 25, 2013, and became effective October 25, 2013. Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners' and Survivors' Entitlement to Benefits, 78 Fed. Reg. 59,102 (Sept. 25, 2013) ("2013 Final Rule").

In sum, *Starks* does not constrain this Court's consideration of whether Lee Ferguson "was determined to be eligible to receive benefits . . . at the time of his . . . death."

II. A miner's survivor is entitled to automatic derivative benefits under 30 U.S.C. § 932(*l*) if the miner is found eligible for benefits as a result of a claim filed during his lifetime, regardless of when the eligibility determination is made.

A. The text of § 932(*l*) is ambiguous regarding when the miner's eligibility determination must occur.

The phrase in § 932(*l*) "was determined to be eligible to receive benefits . . . at the time of his or her death" is ambiguous regarding when the miner's eligibility determination must occur. The clause "at the time of his or her death" could be understood to modify either the miner's eligibility to receive benefits or the determination of his eligibility. Given this uncertainty, § 932(*l*)'s text is not as plain as Oak Grove makes it out to be.

Under the rule of the last antecedent, a canon of statutory construction, "a limiting clause or phrase (here, the relative clause ["at the time of his death"]) should ordinarily be read as modifying only the noun or phrase that it immediately

follows."[14] *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Here, Congress placed the limiting clause "at the time of his or her death" after "eligible to receive benefits," not after "determined." Thus, "at the time of his or her death" modifies the miner's eligibility, not the determination date. At a minimum, the last antecedent rule makes the phrase "was determined to be eligible to receive benefits . . . at the time of his or her death" susceptible to more than one reasonable meaning. *Cf. Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 330 (1993) (noting that application of last antecedent rule resulted in a statutory construction that was "quite sensible as a matter of grammar," and proceeding to evaluate the reasonableness of the interpretation on other grounds).[15]

Section 932(*l*) is also ambiguous when considered in the context of other statutory provisions in the BLBA addressing survivors' eligibility, namely, 30 U.S.C. §§ 901, 921(a), and 922(a)(2). *See Robinson v. Shell Oil Co.*, 519 U.S. 337,

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[14] The rule of the last antecedent is a jurisprudential application of an "elementary principle of composition": "Keep related words together." William Strunk, Jr. & E.B. White, *The Elements of Style* 28-31 (4th ed. 1999).

[15] *Starks* described the "was determined to be eligible to receive benefits . . . at the time of his or her death" language in § 932(*l*) as unambiguous. 719 F.3d at 1281; *see also B & G Constr. Co.*, 662 F.3d at 249. However, *Starks* is not binding on this point because, as discussed in Argument, Part I, *supra*, whether the miner met the "was determined to be eligible to receive benefits . . . at the time of his or her death" criterion was not at issue in *Starks*.

341 (1997) ("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."). As noted by this Court and others, the ACA's deletion of 1981 amendment language from § 932(*l*), but not from §§ 901, 921(a), and 922(a)(2), created inconsistencies in the statutory text regarding automatic entitlement.[16] Certainly, these unamended provisions do not speak to the issue here: whether the timing of the miner's award affects the survivor's right to automatic derivative benefits.

Because the statute is ambiguous, the Court must defer to the agency's reasonable interpretation of it.

B. Because § 932(*l*) is ambiguous as to when the miner's eligibility determination must occur, the Court must defer to the Director's reasonable interpretation set forth in 20 C.F.R. § 725.212(a)(3).

Congress has long entrusted the Secretary of Labor with the responsibility of implementing the black lung program and has delegated authority to DOL to issue

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[16] *See Starks*, 719 F.3d at 1280, 1283-84 (having to reconcile "the apparent tension between 932(*l*) as amended and the sections left unamended"); *Vision Processing*, 705 F.3d at 558 (describing Congress's failure to make corresponding changes to §§ 901, 921(a), and 922(a)(2) as "scrivener's misfortune"); *B & G Constr. Co.*, 662 F.3d at 252 (acknowledging that "there is no escape from the reality that the Act contains [] other provisions . . . that are inconsistent with the language of section 932(*l*)"); *Stacy*, 671 F.3d at 390-91 (applying *B & G Constr. Co.*'s analysis to resolve "apparent conflict" between statutory provisions).

regulations to administer the program. *See* 30 U.S.C. § 936(a) (1970). Between 2010 and 2013, pursuant to its rulemaking authority under 30 U.S.C. § 936(a), DOL engaged in notice-and-comment rulemaking and promulgated revised regulations to implement the ACA amendments to the BLBA. 2013 Final Rule, 78 Fed. Reg. 59,102 (Sept. 25, 2013). The current regulation provides that a surviving spouse is eligible for benefits if she meets certain relationship and dependency criteria and if the deceased miner:

> (i) Is determined to have died due to pneumoconiosis; or
>
> (ii) Filed a claim for benefits on or after January 1, 1982, which results or resulted in a final award of benefits, and the surviving spouse . . . filed a claim for benefits after January 1, 2005 which was pending on or after March 23, 2010.

20 C.F.R. § 725.212(a)(3) (2017). Under the current regulation, the survivor can obtain benefits by proving the miner died due to pneumoconiosis. *Id.* § 725.212(a)(3)(i). Alternatively, the survivor can show that, during his lifetime, the miner filed a disability claim "which results or resulted in a final award of benefits." *Id.* § 725.212(a)(3)(ii). This alternative showing encompasses the scenario in *Starks*, where the miner filed a claim, was found eligible, and received benefits before he died. *See* A.19 (claim "resulted" in an award). This also includes the fact pattern presented in this case, where the miner filed a claim and was found to be eligible for benefits for the last two years of his life, but the

determination of eligibility was not made until after he died. *See* A.19 (claim "results" in an award). In both cases, the surviving spouse is automatically entitled to benefits without having to prove the miner died due to pneumoconiosis.

Section 725.212(a)(3) is a reasonable construction of 30 U.S.C. § 932(*l*) because, as previously mentioned, grammatically, the clause "at the time of his or her death" would ordinarily modify the more immediate antecedent, "eligible," and not the more distant antecedent, "determined." Accordingly, the regulation assigns no significance to when the miner dies in relation to when his claim is approved.

Section 725.212(a)(3) is consistent with the "Continuation of Benefits" subheading given to the 2010 amendment to § 932(*l*). *See* ACA, Pub. L. No. 111-148, sec. 1556(b), 124 Stat. at 260. Regardless of whether the miner dies before or after his award is issued, he receives benefits from the date of onset of total disability due to pneumoconiosis (typically the date of claim filing) until death; survivor's benefits then pick up starting with the month of the miner's death. *See* 20 C.F.R. § 725.503(a)-(b) (2017).

Section 725.212(a)(3) is also consistent with the history of the BLBA. From the original enactment of the statute until 1981, Congress repeatedly expressed its concern that too many survivors were being denied benefits by emphasizing liberal access to survivor's benefits, especially for survivors of miners with approved claims. *See supra*, Statement of the Case, Part I.A. The enactment of § 932(*l*) in

particular demonstrated Congress's commitment to allowing survivors whose miners had approved claims to obtain benefits without requiring them to prove or re-prove anything about the miners' entitlement. Joint Explanatory Statement of the Committee on Conference, *reprinted in* H. Comm. on Education and Labor, 96th Cong., *Report on Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* (Comm. Print 1979) at 890 (stating Congress's intent that the "eligible survivors of approved claimants would not be required to file a new claim for benefits"). Congress has never evinced any intent to treat survivors of miners with approved claims differently depending on whether the miner died before or after his claim was approved. Oak Grove has not articulated a single policy reason why Congress would have wanted to do so. If anything, Congress evinced the opposite intent by enacting § 932(*l*) in 1978 to clarify that a survivor is automatically entitled to benefits whenever the miner "was determined to be eligible to receive benefits . . . at the time of his or her death" and not just when the miner was "receiving benefits." *Compare* 30 U.S.C. § 932(*l*) (1976 & Supp. III 1979) *with* 30 U.S.C. § 922(a)(2) (1970).

Relatedly, § 725.212(a)(3) is a reasonable construction of § 932(*l*) because it is consistent with the principle that, as remedial legislation, the BLBA "should be liberally construed in favor of the claimant." *Baker v. U.S. Steel Corp.*, 867 F.2d 1297, 1299 (11th Cir. 1989). Here, the language of the statute is susceptible to

more than one meaning. Given the remedial purpose of the statute, the interpretation that allows survivors of miners to more easily obtain benefits should be used. *See* 30 U.S.C. § 901(a) ("It is . . . the purpose of this subchapter . . . to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis."); *Keating v. Dir., OWCP*, 71 F.3d 1118, 1122 (3d Cir. 1995) ("The courts have repeatedly recognized that the remedial nature of the statute requires a liberal construction of the Black Lung entitlement program to ensure widespread benefits to miners and their dependents.").

C. Oak Grove's arguments against the Director's interpretation of § 932(*l*) are unavailing.

Oak Grove contends that the Director's construction would allow survivors to obtain benefits by showing the miner was totally disabled by pneumoconiosis at time of death, a possibility that was taken out of the statute by the 1981 Amendments and was not explicitly restored by the ACA. *See* Oak Grove Br. 18-19. Oak Grove miscomprehends the Director's position. Before the 1981 amendments, survivors could obtain benefits by proving the miner was totally disabled by pneumoconiosis at time of death, regardless of whether the miner ever filed a claim. 30 U.S.C. §§ 901, 921(a), 922(a)(2) (1976 & Supp. III 1979); 20 C.F.R. § 725.212(a)(3)(ii) (1980). DOL does not interpret the current statute as

restoring survivors' ability to do this. Rather, the current statute allows survivors to obtain benefits based on the miner's total disability only if the miner filed a claim during his lifetime and that claim results or resulted in an award of benefits. *Compare* 20 C.F.R. § 725.212(a)(3)(ii) (1980) (allowing benefits where the deceased miner "[i]s determined to have been totally disabled") *with* 20 C.F.R. § 725.212(a)(3)(ii) (2017) (allowing benefits where the deceased miner "[f]iled a claim for benefits . . . which results or resulted in a final award of benefits"). Thus, unlike the pre-1981 statute, the survivor whose miner never filed a claim (or whose claim was denied) can no longer obtain benefits by showing that the miner was totally disabled; she must show that the miner died of pneumoconiosis. This interpretation of the statute comports with Congress's 2010 ambiguous deletion of the 1981 language from § 932(*l*) but not from § 921(a) and § 922(a)(2).

Oak Grove also argues that, after the 2010 amendments deleted the 1981 language from 30 U.S.C. § 932(*l*), the Director's only option was to return to the pre-1981 version of 20 C.F.R. § 725.212(a)(3) because "[n]othing in the text of the relevant statutory provision has changed to justify [a] change in the regulation." Oak Grove Br. 22. Oak Grove is incorrect. Section 725.212 needed revision

because the pre-1981 version did not account for the 1981 statutory amendments (and the post-1981 version did not account for the 2010 amendments).[17]

Moreover, Oak Grove continues to selectively quote only subsection (i) of § 725.212(a)(3), which allowed survivors to obtain benefits by showing that their associated miner was receiving benefits at the time of his or her death. *See* 20 C.F.R. § 725.212(a)(3)(i) (1980); Oak Grove Br. 15; *see also* A.18 (criticizing Oak Grove for selectively quoting the regulation). Oak Grove leaves out subsection (ii) of the same regulation, which allowed survivors to obtain benefits by demonstrating that the deceased miner was totally disabled due to pneumoconiosis at time of death or died due to pneumoconiosis. 20 C.F.R. § 725.212(a)(3)(ii) (1980). Oak Grove seems to think that the only way Carrie Ferguson could have obtained benefits under the pre-1981 statutory and regulatory regime was to prove pursuant to subsection (i) that her husband was actually receiving benefits when he died. But, Ferguson would have qualified under subsection (ii), as her husband's posthumous award necessarily meant that he was totally disabled by pneumoconiosis at the time of his death.

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[17] In any event, agency interpretations are not carved in stone and agencies are permitted to change their statutory interpretations even when statutes do not change. *Brand X*, 545 U.S. at 981-82 ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.").

Practically speaking, Oak Grove's statutory construction creates arbitrary distinctions between survivors of miners with approved claims for no compelling reason. Under Oak Grove's interpretation, the happenstantial timing of the miner's death in relation to his award is the determining factor in a survivor's right to automatic derivative benefits. On the one hand, if the miner dies before his award, the survivor loses out. On the other hand, if he dies with an interim (appealable) award, the miner is "receiving benefits at the time of death," and therefore, the survivor is presumably entitled to automatic derivative benefits *even if the miner's award is overturned after his death*. *See* A.33. Certainly, this Court should refuse Oak Grove's invitation to produce such inequitable and irrational results.

But even if Oak Grove's interpretation was reasonable, the Supreme Court has repeatedly held that, to merit *Chevron* deference, the agency's interpretation need not be the only possible interpretation, the best interpretation, or even the most reasonable interpretation. Nor is the agency required to adopt the interpretation preferred by the courts or the regulated industry. An agency interpretation needs only to be reasonable. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009); *Brand X*, 545 U.S. at 980. The Director submits that the Director's interpretation passes this low bar and thus the Court must defer to it.

In sum, Carrie Ferguson is entitled to automatic derivative benefits under § 932(*l*) because her husband Lee was determined by an ALJ to be eligible for

benefits starting from July 2012 to his death, which satisfies the criteria that the miner "was determined to be eligible . . . at the time of his . . . death." Oak Grove has provided no good reason why the Court should treat survivors of miners with approved claims differently based solely on whether the miner dies before his claim is approved. The statutory text does not require it, and DOL's regulation is consistent with the statute's text, history, and remedial purpose. Accordingly, the Court should defer to the Director's reasonable interpretation of § 932(*l*) and affirm Carrie Ferguson's award.

CONCLUSION

For the reasons above, the Director requests that the Court affirm the Board's decision awarding Carrie Ferguson's claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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