No. 07-176

In the Supreme Court of the United States

JULIE AMBER-MESSICK, ADMINISTRATRIX OF THE ESTATE OF CHRISTOPHER KANGAS, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the Bureau of Justice Assistance's interpretation of the term "firefighter," as used in the Public Safety Officers' Benefits Act of 1976, 42 U.S.C. 3796 *et seq.*, was entitled to deference.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-22a) is reported at 483 F.3d. 1316. The opinion of the United States Court of Federal Claims (Pet. App. 23a-50a) is reported at 70 Fed. Cl. 319.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2007. A petition for rehearing was denied on May 11, 2007 (Pet. App. 51a-52a). The petition for a writ of certiorari was filed on August 9, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. The Public Safety Officers Benefit Act of 1976 (PSOBA or Act), 42 U.S.C. 3796 *et seq.*, provides for the payment of a one-time, lump-sum benefit of $250,000 "[i]n any case in which the Bureau of Justice Assistance * * * determines, under regulations issued pursuant to [the Act], that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty." 42 U.S.C. 3796(a) (Supp. IV 2004).

At the time in question, the Act defined "public safety officer" as including "an individual serving a public agency in an official capacity, with or without compensation, as * * * a firefighter." 42 U.S.C. 3796b(7)(A) (current version to be codified at 42 U.S.C. 3796b(9)(A) (2006)); accord 28 C.F.R. 32.2(j) (2001); cf. 28 C.F.R. 32.3 (2007). The Act further provides that "'firefighter' includes an individual serving as an officially recognized or designated member of a legally organized volunteer fire department." 42 U.S.C. 3796b(4) (Supp. IV 2004).

The Bureau of Justice Assistance (BJA) is authorized to establish such rules, regulations, and procedures as may be necessary to carry out the Act. 42 U.S.C. 3796c(a). In determining whether a public safety officer is entitled to a benefit, the BJA gives "substantial weight to the evidence and findings of fact presented by State, local, and Federal administrative and investigative agencies." 28 C.F.R. 32.5.

2. Christopher Kangas was a fourteen-year old "apprentice firefighter" with the Brookhaven, Pennsylvania, Volunteer Fire Department. Pet. App. 54a. On May 4, 2002, Kangas rode his bicycle toward the fire station in response to a fire alarm. He ran through a stop sign

and was struck by an automobile. He died as a result of the accident. *Id.* at 54a-55a.

At the time of Kangas' death, Pennsylvania child labor laws specifically limited the types of activities in which minors who were associated with of a volunteer fire department could participate. See 43 Pa. Cons. Stat. Ann. § 48.3 (West Supp. 2001). Minors under the age of sixteen were permitted to participate only in training, first aid, clean-up activities after a fire is under control, and food and drink services. *Id.* § 48.3(b). Further, minors under the age of sixteen were specifically prohibited from operating high pressure fire hoses or climbing ladders, except in training. *Id.* § 48.3(c). And no minors could operate an aerial ladder, platform, or jack; use wire cutters and other cutting devices; operate fire pumps at any fire scene; or enter a burning structure. *Id.* § 48.3(a)(3).

3. In June 2002, petitioner, Kangas' mother, filed a claim for death benefits pursuant to the PSOBA. Pet. App. 55a. On September 16, 2002, the BJA issued an initial determination denying the claim because Kangas was not a "public safety officer" within the meaning of the Act. *Id.* at 75a. The BJA explained that the "evidence presented shows that [Kangas] was not a public safety officer with Brookhaven Fire Company No. 1 in[ ] an official capacity as a firefighter[.] * * * [Kangas] was a trainee but did not possess authority to act as an official firefighter." *Id.* at 78a. Petitioner appealed the initial denial of benefits to a BJA hearing officer. *Id.* at 55a, 65a.

The BJA conducted a hearing on January 22, 2004. Pet. App. 66a. After hearing several witnesses and reviewing the submitted documents, the hearing officer determined that Kangas was not a "firefighter" within

the meaning of the Act, because, pursuant to Pennsylvania law, fourteen- and fifteen-year old individuals "do not have authority to engage in fire suppression activities." *Id.* at 74a. Petitioner appealed the hearing officer's determination to the BJA Director.

On April 28, 2005, the BJA Director issued the agency's final decision denying the claim. Pet. App. 53a. The Director concluded that, "although young [Kangas] may have been a member of the firefighting community in some sense, he was not a 'firefighter' within the meaning of the PSOB Act, because he had no legal authority to fight fires [under Pennsylvania law]." *Id.* at 54a. The Director further determined that, "[e]ven if [Kangas] were a 'firefighter' within the meaning of the PSOB Act, his tragic death did not occur in the 'line of duty,' as defined in the PSOB regulations, because Pennsylvania law did not obligate or authorize him to engage in firefighting or fire-suppression activity." *Id.* at 58a. In view of those determinations, the Director noted that it was unnecessary to decide whether Kangas' possible negligence would preclude payment of the claim, see 42 U.S.C. 3796a(1) and (3). Pet. App. 63a n.9.

4. On June 27, 2005, petitioner filed a complaint in the Court of Federal Claims (CFC) seeking review of the agency's final decision. Pet. App. 29a. The CFC possesses jurisdiction to review BJA decisions to determine (1) whether there has been substantial compliance with statutory requirements and provisions of implementing regulations; (2) whether there has been any arbitrary or capricious action by government officials involved; and (3) whether substantial evidence supports the decision. *Chacon* v. *United States*, 48 F.3d 508, 511 (Fed. Cir. 1995).

The CFC set aside the BJA's determination and awarded benefits to petitioner. Pet. App. 47a-48a. The CFC concluded that Kangas was a "firefighter" for purposes of the Act because he was "part of a team dedicated to the suppression of fires and control of fire scenes." *Id.* at 45a. The CFC further concluded that Kangas died in the "line of duty" because his "primary function was to be part of the team that engaged in 'the suppression of fires.'" *Id.* at 46a. The court granted judgment in favor of petitioner in the amount of $250,000, adjusted in accordance with 42 U.S.C. 3796(h). Pet. App. 48a.

5. The court of appeals reversed. Pet. App. 1a-22a. The court concluded that Christopher was not a firefighter under the PSOBA. *Id.* at 14a. In reaching that conclusion, the court applied the two-step inquiry directed in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984) (*Chevron*). Pet. App. 11a.

The court of appeals first held that "Congress has not directly spoken to the precise question of whether the term 'firefighter' covers a minor apprentice firefighter" prohibited by law from engaging in certain firefighting activities. Pet. App. 11a. The court rejected petitioner's (and the CFC's) argument that the PSOBA established an unambiguous definition of "firefighter" by providing that "firefighter includes an individual serving as an officially recognized or designated member of a legally organized volunteer fire department." *Ibid.* (citing 42 U.S.C. 3796b(4) (Supp. IV 2004)). As the court explained, that language in the Act was meant to include *volunteer* firefighters in the PSOBA's coverage, not to define "firefighter." *Ibid.* Moreover, the court of appeals explained that, if the language were interpreted as a comprehensive definition of the term "firefighter,"

firefighters serving in *professional* fire departments would have been excluded from the Act's coverage—an obviously absurd result. *Ibid.*

The court of appeals next determined that the BJA's conclusion that Kangas was not a "firefighter" was permissible. Pet. App. 12a-13a. The court concluded that the BJA's interpretation of "firefighter" as one who is "authorized to actively engage in the suppression of fires" is consistent with the ordinary meaning of the word. *Id.* at 12a. Moreover, the court held that this interpretation is consistent with the PSOBA's legislative history. *Ibid*. Applying that definition to petitioner's case, the court concluded that, as a minor "apprentice firefighter," Kangas was not authorized, by operation of Pennsylvania child labor laws, to participate in firefighting activities. *Id*. at 12a-13a. The court of appeals additionally noted that the BJA need not defer to the state agency's determination that petitioner was eligible for a death benefit under state law, because 28 C.F.R. 32.5 mandates "substantial weight" be given only to a state agency's findings of facts, not its legal conclusions. Pet. App. 13a. Accordingly, the court of appeals concluded that the BJA had permissibly decided that Kangas was not entitled to PSOBA benefits. *Ibid.*

Judge Newman dissented, arguing that the BJA's determination conflicted with the Act's "purpose of recognizing the role of the firefighter and others serving the public." Pet. App. 20a.

ARGUMENT

The court of appeals properly applied well-established principles of *Chevron* deference to conclude that the BJA's interpretation of "firefighter" in the PSOBA is permissible and entitled to deference. The decision of

the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. a. The court of appeals correctly determined (Pet. App. 11a) under *Chevron*'s first step that Congress has not "directly spoken to the precise question" whether a minor apprentice firefighter, whom state law does not authorize to engage in fire suppression duties, is a "firefighter" under the Act. See 467 U.S. at 842.

The PSOBA elaborates the term "firefighter" only in 42 U.S.C. 3796b(4) (Supp. IV 2004), which states that "'firefighter' includes an individual serving as an officially recognized or designated member of a legally organized volunteer fire department." Section 3796b(4) plainly does not define "firefighter" as such, because it references solely persons associated with a volunteer fire department. Rather, as the court of appeals concluded, Congress included that language in the PSOBA to ensure that volunteer firefighters were given the same benefits as professional firefighters, while leaving the term "firefighter" undefined. Pet. App. 11a-12a (citing H.R. Rep. No. 1031, 94th Cong., 2d Sess. 4 (1976)). Thus, "the statute is silent or ambiguous with respect to the specific issue" at hand. *Chevron*, 467 U.S. at 843.

Quoting a portion of Judge Newman's dissent (Pet. 5-6 (quoting Pet. App. 20a-21a)), petitioner argues that the term "firefighter" is not ambiguous in light of the Act's purpose of encouraging and recognizing public service and alleviating burdens placed on public servants and their families. Those broad legislative purposes shed little if any light on the question whether Congress intended an apprentice firefighter, who is not authorized to fight fires, to be eligible for a death benefit. Because "no legislation pursues its purposes at all

costs," *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam), petitioner's arguments based on general statements of purpose cannot overcome the gap in the statute's text.

b. Given that Congress did not define the term "firefighter" in the instant circumstances, the court of appeals properly applied principles of *Chevron* deference to the BJA's interpretation. See Pet. App. 12a; 467 U.S. at 843. The BJA has congressionally delegated authority to adjudicate claims and promulgate rules with legal force, see 42 U.S.C. 3796c(a), and issued its interpretation through a relatively formal adjudicative process. See *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001) (*Chevron* deference is available "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"); *Groff* v. *United States*, 493 F.3d 1343, 1350 (Fed. Cir. 2007) ("Congress intended for the BJA's statutory interpretations announced through adjudication to have the force of law, and * * * those interpretations are therefore entitled to deference under *Chevron*."); cf. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (granting *Chevron* deference to determinations made through adjudication by Board of Immigration Appeals). Accordingly, the BJA's legal conclusion that "firefighter" excludes one who "has no legal authority to engage in fire-fighting," Pet. App. 58a, is eligible for *Chevron* deference.

c. The BJA's legal conclusion reflects a permissible construction of the PSOBA and is therefore deserving of deference. Petitioner argues (Pet. 6) that the Act's silence regarding "firefighter" precludes the BJA from

defining the term with reference to the duties performed by the claimant. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). The BJA reasoned that, in the absence of a statutory definition of "firefighter," the term should be given "its ordinary meaning; i.e., * * * someone who is authorized to 'fight fires.'" Pet. App. 58a. Defining "firefighter" by reference to the claimant's job duties is consistent with how one defines any job, and reflects the term's common usage. See *id.* at 12a (listing dictionary entries).

Petitioner relies on the Act's legislative history (Pet. 6-7 (quoting Pet. App. 37a-38a)) to contend that the duties performed by the claimant are irrelevant to PSOBA benefits eligibility. The legislative history, however, suggests only that Congress did not limit benefits to firefighters who died while performing particularly dangerous duties; it says nothing about who qualifies as a firefighter in the first place. The Conference Committee that negotiated the final bill rejected the House proposal which "authorized payment whenever a fireman sustained fatal injuries while actually and directly engaged in fighting fires or in other activities determined * * * to be potentially dangerous." H.R. Conf. Rep. No. 1501, 94th Cong., 2d Sess. 5 (1976). The Committee instead chose the Senate proposal, which "authorized payment of the death benefit to the survivors of law enforcement officers and firemen for all line of duty deaths." *Ibid.* That choice was intended to broaden the qualifying circumstances of a public safety officer's death: "The Managers believe that 'line of duty' is a well established concept and that it is appropriate to extend coverage to all

acts performed by the public safety officer in the discharge of those duties which are required of him in his capacity as a * * * fireman." *Id.* at 6. Thus, the Act's legislative history is silent as to who qualifies as a "firefighter," and it certainly does not undermine the BJA's reasonable definition.

Also demonstrating the permissibility of the BJA's interpretation is the current version of the PSOBA's implementing regulations. The current regulations, which the BJA promulgated after notice and comment, codify the position expressed by the BJA in this proceeding and warrant deference. See 28 C.F.R. 32.3 (2007) (defining "firefighter" as "an individual who is trained in suppression of fire or hazardous-materials emergency response and has the legal authority and responsibility to engage in the suppression of fires"); *Smiley* v. *Citibank, N.A.*, 517 U.S. 735, 744 n.3 (1996) ("[I]t would be absurd to ignore the agency's current authoritative pronouncement of what the statute means."); *United States* v. *Morton*, 467 U.S. 822, 836 n.1 (1984) (deferring to regulation promulgated after suit was initiated because suit raised issue for which Congress delegated authority to agency to address). Because the court of appeals correctly deferred to the BJA's interpretation, further review is unnecessary.

2. Petitioner also asserts (Pet. 8-10) that the court of appeals' opinion included legal errors regarding the PSOBA's legislative history and Pennsylvania's administrative code. Those assertions do not merit further review.

a. The PSOBA's legislative history played a minor role in the court of appeals' ruling in this case, which was premised primarily upon the court's determination that the BJA's exercise of statutory interpretation was

entitled to *Chevron* deference. See Pet. App. 11a-12a. Indeed, the court of appeals cited only one piece of legislative history: a House Judiciary Committee Report which explained that, because "firefighting has been determined to be one of the most hazardous professions, the Committee is of the opinion that coverage should extend to all activities performed by firemen when they are actually and directly engaged in fighting fires." *Id.* at 12a (quoting H.R. Rep. No. 1031, 94th Cong., 2d Sess. 4 (1976)). Petitioner does not allege that the court of appeals inaccurately read the Judiciary Committee Report. Instead, petitioner advances (Pet. 8) the same argument regarding the legislative history that the CFC made, namely that subsequent Conference Committee action enlarged the definition of "firefighter." As demonstrated above, however, the subsequent Committee action enlarged only the qualifying circumstances of death and has no bearing upon the definition of "firefighter."

b. As petitioner notes (Pet. 9), the court of appeals made a trivial error in misreading the Pennsylvania administrative code as prohibiting Kangas from riding in an official vehicle to the scene of a fire. The court made that error in the course of detailing the numerous limitations placed upon minor apprentice firefighters. As the court correctly observed, Kangas' activities were limited to training, first aid, clean-up after a fire is under control, and providing coffee wagon and food services; and he was prohibited from operating fire hoses or ascending a ladder (except in training), or from entering a burning structure. Pet. App. 13a.[1] The fact that Kangas

[1] Although the court of appeals cited 34 Pa. Code § 11.67(a)(5) (1996), which had been superseded by 43 Pa. Cons. Stat. Ann. § 48.3(c) (West

was permitted to ride in official fire vehicles, though contrary to the court of appeals' understanding, is of no significance to either the court of appeals' rationale or the BJA's determination, both of which focused on the dispositive fact that Kangas was not authorized to fight fires.

3. Petitioner also errs in contending (Pet. 10) that the court of appeals "ignore[d]" the Commonwealth of Pennsylvania's recognition of Kangas as a firefighter. The court correctly concluded that the PSOBA regulations require the BJA to give weight only to a state agency's factual findings, and thus the state agency's legal conclusion that the claimant was eligible for state benefits was irrelevant. Pet. App. 13a; 28 C.F.R. 32.5; cf. *Demutiis* v. *United States*, 291 F.3d 1373, 1379 (Fed. Cir. 2002) (BJA not required to give weight to state agency's legal conclusion that death occurred in "line of duty"); *Yanco* v. *United States*, 258 F.3d 1356, 1360-1363 (Fed. Cir. 2001) (state finding of police officer's entitlement to benefits not controlling because of different statutory benefits requirements), cert. denied, 534 U.S. 1114 (2002). Petitioner provides no reason why the BJA or the court of appeals should nevertheless have deferred to the Pennsylvania benefits determination.

4. Petitioner's assertion (Pet. 4-5) that denying her claim would discourage the future recruitment of firefighters provides no basis for review. Petitioner's assertion rests upon the unsupported speculation that payment of PSOBA benefits to the survivors of minor ap-

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Supp. 2001) (see *id.* § 48.3(e)), in detailing the state law prohibitions upon apprentice firefighters, the superseding statutory provisions continued to prohibit apprentice firefighters under 16 years of age from ascending ladders or operating high pressure hose lines (except during training), or from entering a burning structure. *Ibid.*

prentice firefighters, who are statutorily forbidden to engage in hazardous fire suppression work, is necessary for their recruitment. To the contrary, because minor apprentice firefighters are forbidden from engaging in hazardous fire suppression duties, PSOBA benefits are unlikely to enter into any consideration of whether to become an apprentice firefighter. In any event, petitioner's policy argument should be addressed to Congress, not this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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