

BRB No. 91-2102

MARTHA HODGE	)	
(Widow of JOHN HODGE)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAHER TERMINALS, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order of Steven E. Halpern, Administrative Law Judge, United States Department of Labor.

Richard J. Zeitler, Iselin, New Jersey, for claimant.

William J. Manning, Jr. (Kenny & Stearns), New York, New York, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (89-LHC-1641) of Administrative Law Judge Steven E. Halpern rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This is a claim for death benefits under Section 9 of the Act, 33 U.S.C. §909. The sole issue presented for adjudication was whether claimant is the statutory widow of decedent, and therefore entitled to death benefits. Decedent died on April 26, 1988, due to a work-related injury.

The administrative law judge found that claimant was decedent's legal wife, but that claimant and the decedent were living apart at the time of his death and claimant was not dependent upon decedent for support. Moreover, the administrative law judge found that there was no justifiable cause for the parties to be living apart and that claimant had severed the conjugal nexus ten years prior to decedent's death.

On appeal, claimant contends that the administrative law judge erred in finding that she was not the decedent's widow under Section 2(16) of the Act, 33 U.S.C. §902(16). Claimant contends that the Section 20(a), 33 U.S.C. §920(a), presumption is applicable to this issue and that the Act should be liberally construed in claimant's favor. Employer responds, urging affirmance of the administrative law judge's Decision and Order as it is supported by substantial evidence.

Initially, we reject claimant's contention that Section 20(a) provides a presumption that she is decedent's statutory widow. The Board has held that Section 20(a) presumes that death benefits are payable under the Act, *Meister v. Ranch Restaurant*, 8 BRBS 185, 189 (1978), but that once it is established that death benefits are payable, claimant bears the burden of establishing his or her status as an appropriate person to receive these benefits. *Id.* at 190.<sup>1</sup>

We affirm the administrative law judge's finding that claimant is not decedent's widow pursuant to Section 2(16) of the Act. Section 2(16) states that the term "widow or widower" includes "only the decedent's wife or husband living with or dependent upon him or her at the time of his or her death; or living apart for justifiable cause or by reason of his or her desertion at such time." 33 U.S.C. §902(16). The clauses are to be read in the disjunctive; that is, a widow or widower is a wife or husband who, at the time of the employee's death, is living with the employee, or is dependent for support upon the employee, or is living apart from the employee for justifiable cause, or is living apart by reason of desertion. See *Griffin v. Bath Iron Works Corp.*, 25 BRBS 26 (1991).

Claimant contends that the administrative law judge erred in finding that she was not living with decedent at the time of his death. Claimant initially testified that she lived with decedent in an apartment located at 7 East 17th Street in Brooklyn, New York, from late 1980 until decedent's death. On cross-examination, she amended this testimony and stated that she and her two children lived with her sister at 45 Martense Street, Brooklyn, from late 1980 until she rented the apartment at 7 East 17th Street beginning April 1, 1982. See Emp. Ex. 4; Tr. at 137-138, 144. During the period that she was living with her sister, claimant testified that decedent was living with his sisters and brothers at various addresses in New Jersey, but that he visited her at the Martense Street address and stayed there with her occasionally. Tr. at 136-139. Claimant also testified that throughout the years of their marriage, decedent paid the rent, food bills, utilities and all fixed expenses.

The administrative law judge found, however, that the record contains substantial documentary evidence associating decedent with an apartment located on Vauxhall Road in Union,

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<sup>1</sup>Moreover, although he noted the inapplicability of Section 20(a) to this issue, the administrative law judge, assuming, *arguendo*, its applicability, analyzed the evidence pursuant to the Section 20(a) presumption and found that employer established rebuttal of the presumption that claimant was decedent's widow under the Act. After weighing the evidence as a whole, the administrative law judge found that the overwhelming weight of the evidence supported a finding that claimant was not decedent's statutory widow, and thus was not entitled to benefits under the Act.

New Jersey, which he shared with his girlfriend, Geraldine Mann. The administrative law judge noted that decedent's sister, Mattie Brothers, testified that she was told by decedent that claimant moved out one day in 1978 while he was at work, taking his clothes and most of the furnishings with her. Ms. Brothers also testified that in 1982, decedent and Ms. Mann rented the apartment above her in the building she owns and that she saw him every day as he came and went, except when he and Ms. Mann were on vacation together. Based on the testimony of Ms. Mann and Ms. Brothers that they saw decedent every day, the administrative law judge concluded it was unlikely that decedent visited and stayed with claimant in Brooklyn.

In addition to the testimony, the administrative law judge noted that employer submitted documentary evidence to establish that decedent lived at the Vauxhall Road address until his death, including: credit line checks drawn on two joint accounts in the names of decedent and Ms. Mann at the Vauxhall Road address; checks written in 1985, 1986, and 1987 on Ms. Mann's checking account to pay bills in decedent's name; copies of decedent's federal and State of New Jersey income tax returns for 1985, 1986, and 1987 bearing the Vauxhall Road address; a Vacation Time Off and Payment Request Form signed by decedent, listing Vauxhall Road as his home address; and medical insurance forms for pathology services performed April 27, 1988, the day after decedent's death, listing Vauxhall Road as decedent's address.

The administrative law judge found the only documentary evidence that was submitted to support claimant's contention that decedent resided at the East 17th Street address were letters sent to claimant by the NYSA-ILA Welfare Fund on two dates in 1989, more than a year after his death, regarding medical expenses incurred during decedent's final hospital stay. The administrative law judge noted that employer's evidence shows that the hospital was using the Vauxhall Road address four months after decedent's death in connection with the same charges. The administrative law judge found that claimant's testimony that decedent lived with her is not credible because there is no corroborating evidence, whereas there is substantial corroborating evidence for the position that decedent resided at the Vauxhall Road address. Further, the administrative law judge discredited claimant's testimony inasmuch as claimant admitted lying to government agencies in order to qualify for financial assistance; she retracted portions of her testimony at the hearing when confronted with conflicting evidence; and she had limited knowledge of decedent's life before his death, including details involving previous work-related injuries.<sup>2</sup>

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<sup>2</sup>The administrative law judge also did not credit the testimony of claimant's corroborating witness, J.B. Clarke. Mr. Clarke testified that in December 1987 or January 1988, decedent told him that he had not been going home to his wife and wanted Mr. Clarke to tell his wife about the long hours that longshoremen work. Later, Mr. Clarke testified that decedent brought claimant to the docks and Mr. Clarke told her that longshoremen often work days on end without breaks of any significant length. Tr. at 302-303. The administrative law judge found the events described by Mr. Clarke to be highly improbable given the overwhelming evidence that decedent had not been living with claimant for several years, Ms. Mann's credible testimony that decedent did not hold claimant in high regard, and claimant's failure to mention Mr. Clarke or this meeting in her lengthy testimony. In addition, the administrative law judge noted that "it strains credulity to the breaking point that

The administrative law judge's credibility determinations are rational and claimant has raised no error committed by the administrative law judge in weighing the conflicting evidence. *See generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that the decedent was living apart from claimant at the time of his death.<sup>3</sup>

Claimant also contends on appeal that, in the alternative, the administrative law judge erred by failing to find that the evidence establishes that decedent deserted her for another woman and that she and decedent therefore lived apart for justifiable cause. We disagree. Initially, the administrative law judge noted that these grounds should not be relied upon because claimant testified at the trial that they lived together. Nonetheless, he evaluated the evidence to determine whether claimant was living apart from decedent at the time of his death for justifiable cause or by reason of desertion.

The administrative law judge found that it was claimant who deserted decedent based on the testimony of Ms. Brothers and Ms. Mann that decedent reported that claimant moved out and took most of their belongings with her. In addition, the administrative law judge found that claimant admitted that she moved to her sister's apartment in Brooklyn in 1978, two hours away from decedent's job, which indicated claimant's intent to separate herself and to live apart from decedent. The finding that claimant deserted decedent is rational and is affirmed. *See Meister*, 8 BRBS at 193.

Moreover, the administrative law judge found that there was no justifiable cause presented for the living arrangement as decedent did not move in with his girlfriend for several years after claimant left him. In addition, the only other evidence of decedent's involvement with other women are two of decedent's children, one of whom was born prior to decedent's marriage to claimant, and the other about whom claimant had no knowledge. Thus, the administrative law judge concluded that there was no credible evidence that claimant presented justification for leaving decedent. Inasmuch as claimant has raised no error in the administrative law judge's weighing of the evidence, we affirm the administrative law judge's finding that there was no justifiable cause for the separation. *See generally Thompson v. Lawson*, 347 U.S. 334 (1954).

Finally, although he did not need to reach the issue, *see Meister*, 8 BRBS at 194, the administrative law judge rationally found that the conjugal nexus was permanently severed by

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[claimant] would seek corroboration by this testimony rather than that of someone who had actually seen decedent at their supposed residence." Decision and Order at 7.

<sup>3</sup>The administrative law judge also found that there is no evidence that decedent was supporting claimant's family at the time of his death. The administrative law judge based this finding on the fact that claimant was sued several times in 1985, 1986, and 1987 for overdue rent. In addition, the administrative law judge noted that claimant maintained to the New York City Housing Authority that she was her family's sole support, thus qualifying for financial aid. As it is supported by substantial evidence, we affirm the administrative law judge's finding that decedent did not support claimant at the time of his death.

claimant in 1978 inasmuch as there was no evidence that the parties continued to have sexual relations or to stay overnight with each other, engaged in recreational activities together, filed joint tax returns, or sought marriage counseling. *See generally Kennedy v. Container Stevedoring Co.*, 23 BRBS 33 (1989). As claimant failed to establish that she is decedent's statutory widow under any of the alternate bases of recovery, 33 U.S.C. §902(16), we affirm the administrative law judge's finding that claimant is not entitled to death benefits pursuant to Section 9 of the Act.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge