

JEANNE JOHNSTON)
(Putative Widow of ROY JOHNSTON))
)
 Claimant-Petitioner)
)
 v.)
)
 HAYWARD BAKER) DATE ISSUED: Oct. 31, 2014
)
 and)
)
 KEMPER INSURANCE COMPANY/)
 LUMBERMAN'S MUTUAL CASUALTY)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Granting Benefits and the Order Denying Motion for Reconsideration of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan, II (Longshore Claimants' National Law Center), Washington, D.C., and Eric A. Dupree and Paul R. Myers (Dupree Law), Coronado, California, for claimant.

Timothy B. Guillory and Jeremiah N. Johns (Brown Sims), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Benefits and the Order Denying Motion for Reconsideration (2011-LHC-00983, 00984) of Administrative Law Judge Russell D. Pulver 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 administrative law judge's findings of fact and

conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent worked as a crane operator from the early 1980s, working for multiple employers. He worked for employer from 1998 until October 2004, when he retired due to orthopedic pain. He filed a claim under the Act for cumulative injuries to his neck, back, and knee as a result of his employment. Decedent was hospitalized in 2008 and diagnosed with a subdural hematoma, and he underwent a craniotomy. At the same time, he was diagnosed with lung cancer. Decedent died on September 10, 2009, due to non-small cell lung carcinoma with contributing causes of chronic obstructive pulmonary disease, hypertension, and pulmonary embolus. EX 28. Claimant filed a claim for death benefits, contending decedent’s death was due to work-related exposure to diesel exhaust and silica, and decedent’s estate assumed his claims for his cumulative orthopedic injuries.

The administrative law judge determined that decedent’s estate is entitled to total disability benefits from August 2, 2004, through September 10, 2009, for decedent’s orthopedic injuries. Decision and Order at 37. The administrative law judge denied the claim for death benefits finding that: claimant and decedent had legally separated; there was no evidence of reconciliation; and that the conjugal nexus had been severed at least as of May 2009 when decedent filed for divorce. *Id.* at 28-29. Accordingly, the administrative law judge did not address claimant’s claim that decedent’s death was work-related. *Id.* at 3 n.1. The administrative law judge denied claimant’s motion for reconsideration. Claimant appeals the administrative law judge’s denial of death benefits, and employer responds, urging affirmance. Claimant filed a reply brief to which employer responded.

Claimant contends she is decedent’s “widow” as she was dependent upon him for support at the time of his death or, alternatively, living apart from him for justifiable cause. Claimant avers the administrative law judge failed to properly address whether there was a conjugal nexus between claimant and decedent, submitting that he erroneously focused on decedent’s behavior; claimant asserts that only her post-separation conduct should be examined in determining whether there remained a conjugal nexus. Employer urges the Board to affirm the administrative law judge’s findings as they are supported by substantial evidence and are legally sound. Employer argues that claimant’s dependency issue was not raised at the formal hearing and cannot be raised for the first time on appeal. We agree, in part, with claimant: the denial of death benefits cannot be affirmed.

The Marital Facts

Claimant and decedent were married on March 18, 1972, in California. Claimant stated, and the separation document stipulated, they separated on August 31, 2004, following a domestic violence incident. EXs 31; 42 at 696; 100. Although decedent initially filed for divorce, the parties decided, instead, upon a legal separation.¹

On May 30, 2005, claimant and decedent signed an Agreement and Stipulation of Separation. EX 100. The document settled the parties' rights and obligations related to their marital property, including: community property; inheritance rights; proceeds from the sale of their house; decedent's retirement benefits; decedent's health insurance; and spousal support. Specifically, spousal support was set at zero, any property or earnings accumulated after the date of separation were designated as separate property, and each party waived all rights to those future acquisitions. Decedent was required to maintain his health insurance for the benefit of claimant, and claimant received her community share of decedent's retirement pension plan. *Id.* at 2703-2704. Upon execution, the agreement provided that the parties "shall live separate and apart," and "each party shall be free from interference, authority and control of the other as equally as though he or she were single and unmarried."² *Id.* at 2703.³ The Superior Court of California entered the decree on June 1, 2005. EXs 33, 100.

¹ Decedent was deposed in August 2008 in relation to his cumulative trauma claim. EX 12. Therein, he spoke briefly about his separation but focused mainly on his employment history and his injuries and treatments. With regard to his separation, he stated that both he and claimant originally filed for divorce, but that, due to financial concerns, they decided to legally separate. *Id.* at 201. Claimant testified that only decedent filed for divorce. EX 42 at 696.

² In California, a legal separation "leaves the marriage bonds intact." *Estate of Lahey*, 76 Cal. App. 4th 1056, 91 Cal. Rptr. 2d 30 (Cal. Ct. App. 2000). The separation agreement resolves the financial responsibilities of the spouses and remains in force whether or not the marital status is ever adjudicated. *Faught v. Faught*, 30 Cal. App. 3d 875, 106 Cal. Rptr. 751 (Cal. Ct. App. 1973).

³ The agreement also stated that, except as otherwise provided in the document, "each party release[d] the other and the other party's successors from any and all liabilities, debts or obligations, and from [any and] all claims and demands, it being understood by this Agreement, Husband and Wife intend to settle all aspects of their respective property rights." EX 100 at 2721. The document provided that any reconciliation by the parties did not cancel, terminate, or modify the document unless the parties agreed to the contrary in writing. *Id.* at 2726.

Decedent met his girlfriend, Jan Hultgren, in November 2005 and began living with her in September 2007. EX 109 at 2880-2881, 2883. Ms. Hultgren knew of decedent's separation from claimant. *Id.* at 2885-2886. Decedent filed for divorce from claimant in May 2009. EX 70; TR at 63. According to Ms. Hultgren, decedent proposed to her in August 2009. EX 109 at 2880-2881. They did not marry before his death on September 10, 2009, as the divorce had not been finalized.

The Law

Section 9(b) of the Act provides in pertinent part:

If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16^{2/3} per centum of such wages for each child;...

33 U.S.C. §909(b). The term "widow" is defined in Section 2(16) of the Act, 33 U.S.C. §902(16). It states:

The terms "widow or widower" includes [sic] only the decedent's wife or husband living with or dependent for support 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.

Whether a claimant is a "widow" is determined by applying the law of the forum to resolve the marital status of the couple. *See, e.g., Welch v. Fugro Geosciences, Inc.*, 44 BRBS 89 (2010); *Jordan v. Virginia Int'l Terminals*, 32 BRBS 32 (1998); *see also Albina Engine & Machine Works v. O'Leary*, 328 F.2d 877 (9th Cir.), *cert. denied*, 379 U.S. 817 (1964).

A claimant must establish her status as a "wife" and at least one of the Section 2(16) criteria in order to be entitled to death benefits as a "widow." *See Ryan-Walsh Stevedoring Co. v. Trainer*, 601 F.2d 1306, 10 BRBS 852 (5th Cir. 1979); *Omar v. Al Masar Transp. Co./Int'l Trading Co.*, 46 BRBS 21 (2012); *Denton v. Northrop Corp.*, 21 BRBS 37 (1988). If the married couple is not living together, then the spouse must be "dependent upon" the decedent, or be living apart from the decedent for "justifiable cause" or by reason of the decedent's desertion. If the spouse was not dependent on the employee for support, the proper analysis is to first determine whether the spouses were

living apart by reason of decedent's desertion or "for justifiable cause."⁴ *Matthews v. Walter*, 512 F.2d 941 (D.C. Cir. 1975) (justifiable cause - employee's excessive drinking); *Meister v. Ranch Restaurant*, 8 BRBS 185 (1978), *aff'd*, 600 F.2d 280 (D.C. Cir. 1979) (table) (no justifiable cause); see *Henderson v. Avondale Marine Ways, Inc.*, 204 F.2d 178 (5th Cir.), *cert. denied*, 346 U.S. 875 (1953) (the parties separated for justifiable cause but then the claimant lived with other men; the court held this was a new and independent reason for living apart that, as a matter of law, precluded widow's benefits). If the separation was for justifiable cause, the Supreme Court has stated that the essential requirement for demonstrating "widow" or "widower" status under the Act is the maintenance of a "conjugal nexus" between the decedent and the claimant. *Thompson v. Lawson*, 347 U.S. 334 (1954);⁵ *Matthews*, 512 F.2d at 944-945.⁶ The existence of a "conjugal nexus" depends in large part upon the behavior of the claimant and not necessarily that of the decedent. *Id.*; see also *Leete v. Director, OWCP*, 790 F.2d 418, 18 BRBS 93(CRT) (5th Cir. 1986);⁷ *Kennedy v. Container Stevedoring Co.*, 23

⁴ No party classified the circumstances of this case as a "desertion" by decedent.

⁵ *Thompson* involved a wife who had been deserted by her husband, the decedent. After his desertion, they never lived together nor did he support her. Rather, they each found others with whom they went through "marriage" ceremonies, and, even after those "marriages" ended, the wife would not take the decedent back. The Supreme Court determined that, because the wife held herself out to be another's wife and refused to reconcile with the decedent before his death, she had not continued to live as a deserted wife and, therefore, had severed the conjugal nexus with the decedent.

⁶ In *Matthews*, the claimant and the decedent maintained separate houses, but the claimant continued to hold herself out as the decedent's wife, continued to have sexual relations with him, despite also having a boyfriend, and cared for him when he was ill. The district director found, and the Board and court of appeals affirmed, that a conjugal nexus remained.

⁷ The United States Court of Appeals for the Fifth Circuit held in *Leete* that "justifiable cause" need not be limited to situations where the spouse is fearful of bodily injury or infectious disease, as the administrative law judge had held. Rather, the facts of each case must be addressed, and, in *Leete*, it was sufficient that the couple could not live together amicably. Although the claimant moved out of the family home, the conjugal nexus remained as the couple sought counseling and maintained a relationship. The court held that it was improper to focus on the decedent's conduct in living with another woman to find the marital bond severed.

BRBS 33 (1989).⁸ Where justifiable cause exists for the initial separation from the employee, subsequent conduct of the parties may sever the conjugal nexus and, thus, the claimant will not be considered the widow/widower under the Act. *Thompson*, 347 U.S. 334; *Henderson*, 204 F.2d 178. In *Thompson*, a case of desertion, the Supreme Court explained:

We do not reach this conclusion [that the claimant was not a “widow”] by assessing the marital conduct of the parties. That is an inquiry which may be relevant to legal issues arising under State domestic relations law. Our concern is with the proper interpretation of the [Longshore] Act. Congress might have provided in that Act that a woman is entitled to compensation so long as she is still deemed to be the lawful wife of the decedent under State law, [but] Congress did not do so. *It defined the requirements which every claimant for compensation must meet. . . . The essential requirement is a conjugal nexus between the claimant and the decedent subsisting at the time of the latter’s death, which, for present purposes, means that she must continue to live as the deserted wife of the latter.*

Thompson, 347 U.S. at 336-337 (emphasis added); see n.4, *supra*. The existence of “justifiable cause” and “conjugal nexus” are questions of fact to be determined by the administrative law judge. *New Valley Corp. v. Gilliam*, 192 F.3d 150, 33 BRBS 179(CRT) (D.C. Cir. 1999);⁹ *Lynch v. Washington Metropolitan Area Transit Authority*,

⁸ In *Kennedy*, the claimant informed her husband she could no longer live with him due to his jealousy. Although she moved out, they continued to see each other and remained intimate, they went on vacations together, they filed joint tax returns, and they went to couples counseling. They never divorced or filed for legal separation, and she was not dependent upon him, although he occasionally gave her money. The Board concluded that the parties lived apart for justifiable cause and that the conjugal nexus had not been severed, and it reversed the administrative law judge’s denial of benefits.

⁹ In *Gilliam*, following his injury, the decedent deserted his wife and their 10 children. He provided them no support. For 35 years, the claimant lived in the marital home and did not enter into a relationship with anyone else or change her name. At some point, the decedent attempted to return home, claiming the property but not a reconciliation, and the claimant rejected him. The claimant also twice tried to divorce the decedent, but abandoned both attempts, first on his request and second due to lack of funds. In the years nearer to his death, the claimant sometimes cooked for the decedent, and they saw each other socially at family occasions. Based on these facts, the administrative law judge found that a conjugal nexus remained and that the claimant was the decedent’s “widow.” The Board affirmed, as did the court, finding that the

22 BRBS 351 (1989);¹⁰ *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986);¹¹ *Hicks v. Southern Illinois University*, 19 BRBS 222 (1987).¹²

The Administrative Law Judge's Decision

In addressing the issue of claimant's widow status, the administrative law judge first stated that "the parties appear to agree" that claimant was still legally married to

administrative law judge's factual determination was supported by substantial evidence, and that it matters not that other inferences may be drawn.

¹⁰ In *Lynch*, the administrative law judge relied on the facts that the decedent had severe mental problems, forced the claimant to sign a separation agreement at gunpoint, and frequently abused her while they were living together. The administrative law judge also relied on the facts that the parties never divorced, the claimant cared for the decedent after his mother died, that they retained a friendly relationship, and that she had not married since his death. The Board found that these facts constituted substantial evidence supporting the administrative law judge's finding that the parties were living apart for justifiable cause and that a conjugal nexus existed.

¹¹ In *Lewis*, the Board affirmed the administrative law judge's determination that the claimant was the decedent's widow. The administrative law judge found that the decedent's adulterous relationships provided justifiable cause for living apart. With regard to the conjugal nexus, he found that the decedent would visit most weekends to spend time with the couple's children, he would sometimes stay over, and they would sometimes engage in sexual relations. Further, the administrative law judge credited the claimant's testimony that she and the decedent spoke of reconciliation just two weeks before his death and that her friends knew her by her married name. Despite the claimant's infrequent relationship with another man, the administrative law judge found, and the Board affirmed as being supported by substantial evidence, that the claimant and the decedent retained a conjugal nexus, entitling her to death benefits.

¹² In *Hicks*, the employee consistently stayed out until early morning, failed to return home at all one evening, had his suitcase packed and given to him the next day by his wife and then never attempted to return to or support his wife and daughter. The administrative law judge found that the decedent deserted his wife and that she remained in the same area as the employee for one year after their separation, she maintained her status publicly as "married but separated," she never filed for divorce, and she was never intimate with anyone else after the separation. The Board held that this constituted substantial evidence supporting the administrative law judge's finding that a conjugal nexus existed at the time of the employee's death.

decedent but that she was neither living with him nor dependent upon him at the time of his death. Thus, he concluded the issue is whether claimant satisfied the second part of the definition of “widow:” “was she living apart for justifiable cause or due to desertion?” Decision and Order at 27. The administrative law judge summarized claimant’s arguments regarding a continued conjugal nexus, stating she alleged she did not sever the nexus by her actions or desires. He summarized employer’s contention that the case precedent does not limit the inquiry regarding conjugal nexus to only the claimant’s desires, but, rather, a holistic examination of all the relevant evidence is required. *Id.* at 28. Despite believing claimant’s assertions that she still loved decedent and that they had occasional sexual relations, the administrative law judge stated he was “convinced that at least by May of 2009, when Decedent filed for divorce listing his fiancé as part of his household, that any conjugal nexus that may have remained was clearly severed.” *Id.*

In making this finding, the administrative law judge observed that the parties had not attempted any reconciliation over the years. He listed the actions decedent took to make clear that there would be no reconciliation and, hence, that no conjugal nexus remained: decedent’s living with Ms. Hultgren for several years; his filing for divorce; his identifying Ms. Hultgren as part of his household in his divorce papers; his changing his will to exclude claimant; his naming Ms. Hultgren as executor and giving her power of attorney over his medical treatment; and his proposal of marriage to Ms. Hultgren. Decision and Order at 28. Further, to show there had been no reconciliation, the administrative law judge found, based on claimant’s testimony, that claimant and decedent had not seen each other for the five months before his death because decedent was understandably angry at claimant for involving herself in his finances by calling his attorney about his Longshore case. *Id.* at 28-29. Thus, the administrative law judge found that the conjugal nexus was severed at least as of May 2009. He stated that it was unnecessary to address the parties’ relationship at any other earlier date because, by virtue of the divorce filing, there was no conjugal nexus at the time of decedent’s death, which is the relevant statutory inquiry. *See* 33 U.S.C. §902(16) (widow status assessed at time of employee’s death). The administrative law judge, therefore, found that claimant “does not qualify as a surviving spouse under the Act and thus is not entitled to death benefits, even if causation could be proven.” Decision and Order at 29. Claimant filed a motion for reconsideration which the administrative law judge summarily denied.

Claimant’s Contentions

Dependency

Claimant first contends she is decedent’s widow because she was dependent upon him at the time of his death. Specifically, claimant contends that her receipt of her community property portion of decedent’s retirement pension and his continuing to carry her on his health insurance, both pursuant to the legal separation agreement, constitute

undisputed evidence of support. Claimant asserts that the administrative law judge erred in stating that she stipulated she was not dependent, and she asserts that dependency need not mean “wholly dependent.” Employer argues that claimant may not raise this issue on appeal as it was not raised before the administrative law judge.

Initially, claimant mischaracterizes the administrative law judge’s statement as he stated that the parties “appear to agree” that claimant was not dependent on decedent at the time of his death. *See* Decision and Order at 27. This is not an unreasonable statement given that claimant did not raise the issue of dependency before the administrative law judge at the hearing or in her pleadings or briefs. Although claimant’s status as “widow” was an issue before the administrative law judge, claimant did not assert that she was dependent upon the decedent. Specifically, as a defense against claimant’s claim for death benefits, employer asserted a lack of a conjugal nexus between claimant and decedent because there was a legal separation. At the hearing, in identifying the issues for the administrative law judge to address, claimant’s counsel alleged there remained a conjugal nexus because the two maintained a sexual relationship. Counsel argued that the absence of such intimacy in the last few months was insufficient to sever widow status and that “every other agency which deals with the matter” considered claimant to be decedent’s widow.¹³ TR at 15. In claimant’s post-trial brief, she again focused on the conjugal nexus aspect, stating that she continued to live as decedent’s wife and made every effort to maintain the relationship. Claimant stated she was justifiably living apart from decedent because he had abused her and that there is no evidence that she had taken any affirmative action to sever her relationship with decedent. As claimant did not raise before the administrative law judge the contention that she was dependent upon decedent, the administrative law judge did not err in not addressing this issue. Therefore, we decline to address claimant’s contention, as it is raised for the first time on appeal. *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982) (an employer is not required to defend a claim that is not made). Hence, in order to be considered decedent’s “widow” under the Act in this case, claimant must show that she lived apart from him for “justifiable cause” and, pursuant to *Thompson*, 347 U.S. at 336-337, she must establish that a “conjugal nexus” remained between them at the time of his death.

¹³ Claimant later testified that she is considered decedent’s widow by the Operating Engineers, Social Security, Veterans Administration, and the IRS. TR at 51. Contrary to counsel’s assertion, this is immaterial, as the different entities may have different standards for defining a “widow.” *See Thompson*, 347 U.S. at 336-337.

Justifiable Cause

It is undisputed that claimant and decedent had legally separated and had not lived together for five years preceding decedent's death. Claimant contends she was living apart from decedent for justifiable cause, as he had abused her¹⁴ and consumed too much alcohol.¹⁵ Employer asserts that claimant continued to live apart from decedent because they mutually agreed to separate and to live separate lives, citing irreconcilable differences as the reason; thus, it asserts there was no longer "justifiable cause" for living apart under the case precedent. The administrative law judge made no specific finding regarding any justifiable cause for the separation, and addressed only whether a conjugal nexus existed at the time of death. *Matthews*, 512 F.2d 941; *Meister*, 8 BRBS 185. Moreover, the administrative law judge did not address such cases as *Gilliam*, *Henderson*, *Lynch*, *Lewis*, and *Hicks* to determine whether there remained justifiable cause for claimant's living apart from decedent at the time of his death. As the justifiable cause analysis is incomplete, we vacate the denial of death benefits.

In this case, it is undisputed that decedent was arrested for physically abusing claimant on August 31, 2004; decedent removed claimant from her house without her belongings on the day of separation.¹⁶ Thus, it appears they initially lived apart for justifiable cause. *Lynch*, 22 BRBS 351. Employer asserts that, thereafter, the situation changed and their living apart was by mutual agreement.¹⁷ One court has espoused the

¹⁴ Claimant testified that decedent was physically and verbally abusive. EX 42 at 696.

¹⁵ Claimant and decedent differed in their testimony on how much alcohol decedent regularly drank. EX 12 at 280-281; EX 42 at 727-728.

¹⁶ Claimant's and decedent's versions of the events that transpired differ somewhat, as do their reasons for their separation. TR at 38-40; EX 12 at 206-207, 210-213; EX 42 at 709, 722-723.

¹⁷ Employer argues that claimant's abuse claims did not commence until after decedent's death, making them unverifiable, especially in light of the fact that the separation agreement between them stated that the reason for their separation was "irreconcilable differences." EX 100 at 2702. Thus, it contends, although there may have been justifiable cause as of August 2004, as part of the separation agreement in 2005, they agreed to be mutually restrained from interfering with each other, and they also agreed they would cooperate to have decedent's restraining order removed. *Id.* at 2720-2721. We note that, in *Leete*, 790 F.2d 418, 18 BRBS 93(CRT), the parties' inability to live together amicably was sufficient to constitute "justifiable cause."

rule that “the effect of the original justification persists and inheres in the relationship of the parties despite the change in circumstances since the initial separation.” *Matthews*, 512 F.2d at 944. On remand, if the administrative law judge finds evidence that, at the time of decedent’s death, there no longer was justifiable cause for claimant and decedent to be living apart, *see Henderson*, 204 F.2d at 179, claimant cannot be decedent’s widow and benefits should be denied. If, however, he finds that the original justification persisted to the date of death, then he must reconsider whether the conjugal nexus had been severed.

Conjugal Nexus

Claimant contends a conjugal nexus existed between her and decedent at the time of decedent’s death. She asserts the administrative law judge erred in focusing on decedent’s actions rather than focusing solely on her behavior in addressing the existence of a conjugal nexus. It is apparent from his decision that the administrative law judge gave greatest weight to *decedent’s* actions in determining the conjugal nexus had been severed. *See* Decision and Order at 28-19. We agree with claimant that his finding is not affirmable on this basis. *Thompson*, 347 U.S. 334; *Leete*, 790 F.2d 418, 18 BRBS 93(CRT); *Kennedy*, 23 BRBS 33. The focus is properly on whether claimant’s conduct evidenced a continuing conjugal nexus. *Id.* Therefore, we vacate the administrative law judge’s finding that the conjugal nexus was severed at least as of May 2009, and we remand the case for him to reconsider the issue.

However, on remand, the administrative law judge is not required, as claimant asserts, to credit only her actions and “wishes.” Although the emphasis is on whether claimant’s actions maintained or severed the conjugal nexus, the administrative law judge’s finding should rest on all the relevant evidence of record.¹⁸ *See generally* 5 U.S.C. §557(c)(3)(A); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991) (where evidence could support a finding in favor of either party, the choice among reasonable inferences is left to the administrative law judge); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969) (solely within the administrative law judge’s discretion to accept or reject all or any part of any testimony according to his judgment).

Claimant asserts that the conjugal nexus between her and decedent had not been severed at the time of his death. Employer asserts that, by virtue of the separation agreement, to which they mutually agreed, claimant and decedent were to live “separate

¹⁸ The administrative law judge agreed with employer that the overall facts needed to be considered and that he would not rely exclusively on the “wishes” of the spouse seeking to obtain benefits. Decision and Order at 28.

and apart,” “free from interference, authority and control of the other as equally as though he or she were single and unmarried.” EX 100 at 2703. Thus, employer contends that parties intended the conjugal nexus to be severed.

Claimant testified that she maintained a relationship with decedent following their separation and that she tried to get back together with him. EX 42 at 697, 724-726; TR at 40-42. She stated that he would make repairs at her house, he would take her to lunch, she would take him to medical appointments, he initially put her in charge of his medical treatment, and they talked about going to counseling together. TR at 42. Claimant also stated that they maintained an intimate relationship. EX 42 at 711-716; TR at 42-43, 57. She stated she had not dated or been involved with anyone else. EX 42 at 716; TR at 52. Claimant stated also that she was “involved in” decedent’s 2008 bankruptcy case because she was legally married to him.¹⁹ EX 42 at 726. Claimant also testified that she and decedent filed joint tax returns for the first two years after their separation, and separately thereafter, but that she was advised to file jointly for 2009, the year decedent died.²⁰ TR at 50-52.

When decedent was hospitalized in November 2008, claimant held a durable power of attorney for decedent’s medical care. Claimant testified that when decedent got out of the hospital, they maintained a good relationship and even spent the holidays together with their adult children. TR at 43-46. However, on his next hospitalization in January 2009 for a blood clot in his leg, claimant was not given durable power of attorney. Claimant stated that when decedent was told of the aggressiveness of his cancer, he wrote a will giving her half of his belongings as well as durable power of attorney.²¹ TR at 46-47, 56-57. However, claimant testified that she called decedent’s attorney in spring 2009 to inquire about his workers’ compensation claim, and decedent got mad at her.²² In response to what was interpreted as claimant’s interference, decedent

¹⁹ It is unclear why decedent filed for bankruptcy in 2008. He appears to have testified that it was related to gambling and/or credit card debts. EX 12 at 206-208. Unless the debts pre-dated the separation, it is unclear why claimant would have been involved. *See* EX 100.

²⁰ The record establishes that claimant and decedent filed a joint tax return for 2005, the year the separation was adjudicated, separate returns for 2006-2008, and that she filed a joint return for 2009. EX 34.

²¹ Claimant’s statements, like those pertaining to their discussing attending counseling, are unverifiable.

²² By virtue of the legal separation, any proceeds from the workers’ compensation claim would be post-separation assets and would belong solely to decedent. The

changed his will, leaving claimant nothing, and he refused to have anything to do with her. Claimant testified she wanted to patch things up, but she was afraid of him in light of his anger issues and his brain lesions. TR at 48-50, 57. Claimant knew that decedent was living with Ms. Hultgren and that he had filed for divorce prior to his death. She also knew he had removed her from his most recent will, even indicating therein that he was not married. EX 42 at 711, 718.

Ms. Hultgren testified that she and decedent had lived together from September 2007 until his death in 2009. EX 109 at 2881-2885. She stated that decedent did not like claimant, but she agreed with claimant's statement that he would sometimes help out with repairs at her place. *Id.* at 2886-2887, 2891, 2894. However, Ms. Hultgren disputed claimant's claim that she had sexual relations with decedent after he and Ms. Hultgren began living together. *Id.* at 2888-2890, 2903. Nevertheless, Ms. Hultgren acknowledged her perception that claimant still loved decedent. *Id.* at 2890. Ms. Hultgren testified that claimant may have been involved with another man because decedent had seen her holding hands with someone. *Id.* at 2888. Ms. Hultgren also stated that she was with decedent every day after his diagnosis because she was his caretaker, and she was with him every day during his hospitalizations. *Id.* at 2882, 2895-2896. She also testified that she held the power of attorney and was named the executor of his will. *Id.* at 2879-2880.

On remand, the administrative law judge must assess the weight and credibility of this, and any other, relevant testimony and evidence, as well as resolve conflicts in the evidence, in order to determine if claimant's conduct maintained or severed her conjugal nexus with decedent.²³ The administrative law judge should re-examine the case precedent in view of the proper focus on claimant's actions in maintaining or severing the conjugal nexus. *See* n. 5-12, *supra*. If the administrative law judge finds that the conjugal nexus between claimant and decedent had been severed, claimant is not decedent's "widow," and she is not entitled to death benefits. If the administrative law judge finds that a conjugal nexus between the two existed at the time of decedent's death, then claimant is decedent's "widow" under the Act. He then must address whether decedent's death was work-related such that claimant is entitled to death benefits. 33 U.S.C. §920(a).

administrative law judge found that decedent was justifiably upset at claimant for interfering. Decision and Order at 29.

²³ For example, the administrative law judge found that claimant did not see decedent at all in the last five months of his life, *see* Decision and Order at 28, but Ms. Hultgren testified that claimant visited decedent in the hospital. EX 109 at 2895.

Accordingly, the administrative law judge's denial of death benefits is vacated. The case is remanded to the administrative law judge for further proceedings consistent with this opinion. In all other respects, the Decision and Order is affirmed.²⁴

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

²⁴ The awards of permanent total and temporary total disability benefits on the *inter vivos* claim are affirmed as no party challenged them on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).