



BRB No. 16-0084

MARJORIE BELL SMITH)
(Mother of TIMOTHY M. BELL, deceased))

Claimant-Petitioner)

v.)

SERVICE EMPLOYEES)
INTERNATIONAL, INCORPORATED)

DATE ISSUED: Aug. 29, 2016

and)

INSURANCE COMPANY OF THE STATE)
OF PENNSYLVANIA)

Employer/Carrier-)
Respondents)

DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

John D. Gibbons (John D. Gibbons & Associates, P.C.), Mobile, Alabama, for claimant.

Billy J. Frey and Erin R. Cesta (Hendrickson, Hall & Frey), Dallas, Texas, for employer/carrier.

Before: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant, decedent’s mother, appeals the Decision and Order (2014-LDA-00460) of Administrative Law Judge Patrick M. Rosenow 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge’s findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in

accordance with law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Timothy Bell, the decedent, lived with claimant and contributed to the maintenance of their household prior to his starting work for employer in Iraq in 2003. Tr. at 40-41. Mr. Bell worked for employer in Iraq until April 9, 2004, when he disappeared after a combatant attack on his convoy. *See Fisher v. Halliburton*, 667 F.3d 602, 45 BRBS 95(CRT) (5th Cir.), *cert. denied*, 133 S.Ct. 427 (2012). Employer continued paying Mr. Bell’s salary, which was deposited into an account in the United States over which his sister, Felicia Carter, had power-of-attorney. Claimant and Ms. Carter testified that, at Mr. Bell’s request, claimant regularly received money from her son’s account. This practice purportedly continued until 2009, when claimant filed a petition to be appointed conservator of her son’s financial accounts and to have Ms. Carter’s power revoked. The Mobile County Probate Court denied the petition and appointed a third-party conservator. EX 7. From that time, neither claimant nor Ms. Carter had access to Mr. Bell’s financial accounts. Mr. Bell was declared dead on April 26, 2010. At that time, employer stopped paying the decedent’s salary. Pursuant to a stipulated compensation order issued by the district director on April 9, 2014, employer paid death benefits to two of decedent’s children for their periods of eligibility.¹ *See* 33 U.S.C. §§902(14), (18), 909(c); EX 3. Claimant filed a claim for death benefits under the Act as a dependent parent. 33 U.S.C. §909(d).²

¹ Employer paid death benefits to decedent’s daughter from April 27, 2010 to December 12, 2011, and to one of his sons from April 27, 2010 to February 27, 2015. EX 1 at 13; Decision and Order at 2; *see* 33 U.S.C. §902(14), (18). Pursuant to Section 9(c), 33 U.S.C. §909(c), each child received 33 1/3 percent of the decedent’s average weekly wage until the termination of the daughter’s benefits. At that time, the son began receiving 50 percent of the decedent’s average weekly wage.

² Section 9(d) provides in pertinent part:

If there be no surviving wife or husband or child, or if the amount payable to a surviving wife or husband and to children shall be less in the aggregate than 66 2/3 per centum of the average wages of the deceased; then . . . for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between 66 2/3 per centum of such wages and the amount payable as hereinbefore provided to widow or widower and for the support of surviving child or children.

In his decision, the administrative law judge found that claimant must establish her dependency on the decedent under the criteria enumerated in Section 152(d) of the Internal Revenue Code, 26 U.S.C. §152(d). These criteria require that a parent's gross income be less than the exemption amount and that the decedent's payments comprise over one-half of the parent's support. The administrative law judge found that claimant failed to carry her burden of showing this degree of dependency given the ambiguity and unreliability of her testimony and that of Ms. Carter. Decision and Order at 16. The administrative law judge thus denied the claim for death benefits.

On appeal, claimant challenges the denial of death benefits. Employer responds that the denial of death benefits was properly based on the lack of supporting evidence. Claimant filed a reply brief in support of her appeal.

Claimant contends the administrative law judge erred by applying the tax code definition of "dependent." We agree. This issue was squarely addressed in *Urso v. MVM, Inc.*, 44 BRBS 53 (2010). In *Urso*, the parents of the decedent filed a claim for death benefits, and the administrative law judge analyzed the issue of their dependency pursuant to Section 152(d) of the Internal Revenue Code. Claimant and the Director, OWCP, contended that the administrative law judge erred in this regard and the Board agreed, noting it had specifically rejected the application of the tax code test for parental dependency in *Fino v. Bethlehem Steel Corp.*, 5 BRBS 223 (1976), based on the text of Section 9(d).³ See n.2, *supra*. The Board stated that, "[P]arents, grandparents, grandchildren, brothers and sisters of the decedent are entitled to death benefits if they establish that, at the time of decedent's death, they were dependent at least in part upon the decedent for the maintenance of their accustomed standard of living." *Urso*, 44 BRBS at 56 (citing *Henderson v. Kiewit Shea*, 39 BRBS 119 (2006)); see *Wilson v. Vecco Concrete Constr. Co.*, 16 BRBS 22 (1983). Partial dependency is sufficient and it is appropriate to consider gifts in determining dependence upon the decedent. *Urso*, 44 BRBS at 56-57. The Board stated that the United States Court of Appeals for the Fifth Circuit has defined dependency under the Act, "by looking to its common meaning, *i.e.*, 'not self-sustaining,' 'relying on for support,' 'helping to maintain the dependent in his customary standard of living.'" *Id.* (citing *St. John Stevedoring Co., Inc. v. Wilfred*, 818

33 U.S.C. §909(d). In this case, should claimant be eligible for death benefits, we note that she claimed her benefits should commence under Section 9(d) on December 13, 2011, when the daughter's benefits terminated. See Cl. Post-Hearing Br. at 12.

³ Pursuant to Section 9(d), death benefits may be payable to "any other persons [not a spouse, child, parent, grandchild or sibling] who satisfy the definition of the term "dependent" in section 152 title 26 of the United States Code...." 33 U.S.C. §909(d); see *Angelle v. Steen Production Service, Inc.*, 34 BRBS 157 (2000).

F.2d 397, 399 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987); *Texas Employers' Ins. Ass'n v. Shea*, 410 F.2d 56 (5th Cir. 1969); *Standard Dredging Corp. v. Henderson*, 150 F.2d 78, 80 (5th Cir. 1945)).⁴ The Board has adopted this approach. *Bonds v. Smith & Kelly Co.*, 17 BRBS 170 (1985). Accordingly, we hold that the administrative law judge erred by applying Section 152(d) of the Internal Revenue Code in determining claimant's dependency under the Act.

Claimant next contends that, pursuant to *Urso*, she presented substantial evidence of her dependence on decedent. Employer responds that, regardless of the legal standard applied, the evidence claimant presented is inadequate for a determination that she was dependent upon decedent.

In his decision, the administrative law judge found claimant's testimony and that of her daughter, Ms. Carter, "internally inconsistent" and that, at times, they "specifically contradicted each other." Decision and Order at 15. Claimant gave various answers to the amount of support she received from decedent's account, which ranged from \$500 to \$2,000 a month depending upon her needs. *Id.*; Tr. at 47, 85-86, 95, 100-101. Claimant testified that she told the Probate Court she had received a total of \$30,000 from her son's account. Tr. at 100. Ms. Carter, however, testified she gave claimant \$2,000 per month in cash from the decedent's account, but she was uncertain how much, in the aggregate, she had actually given claimant over the years. CX 2 at 22-23, 38-39, 81-82. The administrative law judge concluded, given the ambiguity and uncertainty of claimant's and Ms. Carter's testimony, that he could not determine at any one time after the decedent's disappearance how much claimant received from the decedent's account, and that claimant, therefore, failed to carry her burden of proof for establishing dependency. Decision and Order at 16.

We must vacate the denial of benefits and remand the case for the administrative law judge to address whether claimant established that she was at least partially dependent upon decedent in accordance with the above cited law. Moreover, the Act states that "All questions of dependency shall be determined as of the time of the injury." 33 U.S.C. §909(f); *see Henderson*, 39 BRBS at 123 ("time of injury" may mean "time of death"). In his decision, the administrative law judge addressed the ambiguity about the decedent's date of death and found that, "[T]he date (of death) affixed by the Department

⁴ Employer contends that the Fifth Circuit defines dependency as "a real need for help in living as well as actual contribution." Emp. Br. at 2 n.2 (citing *Standard Dredging Corp. v. Henderson*, 150 F.2d 78, 81 (5th Cir. 1945)). While *Henderson* contains this statement, it does so in the context of showing "real need" in maintaining a standard of living, which is variable depending on the circumstances of the case. *Henderson*, 150 F.2d at 80-81.

of the Army [April 26, 2010] is a relatively random and arbitrary date,” and that, given the peril faced by decedent, the “actual date of death was most probably the date of the attack, 9 Apr 04, and almost certainly before the Probate Court appointed a third party conservator [July 13, 2009].” Decision and Order at 15. However, the administrative law judge did not make a definitive determination as to the Section 9(f) “time of injury,” as he concluded that claimant did not carry her burden of establishing dependency “on her son as of either 9 Apr 04 or 26 Apr 10.” *Id.* at 16.

The administrative law judge has the discretion to infer an earlier date of death than the date utilized by the Department of the Army given the circumstances surrounding decedent’s disappearance. *See* Ala. Code §43-8-6 (1982);⁵ *see also* *Davie v. Briggs*, 97 U.S. 628 (1878) (no presumption as to when a person died but the trier-of-fact may infer earlier date than the legal date of death based on peril faced by the decedent); *accord* *Brownlee v. Mut. Benefit Health & Accident Ass’n*, 29 F.2d 71 (9th Cir. 1928). Thus, on remand, the administrative law judge should determine the “time of injury” and address whether claimant was dependent at that time.⁶ 33 U.S.C. §909(f). As the

⁵ Subsection 3 of this section states:

A person who is absent for a continuous period of five years, during which he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry is presumed to be dead. His death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

⁶ If the administrative law judge determines that the “time of injury” was the date of disappearance, and presumed death, we note that claimant submitted copies of three checks from decedent payable to her: \$444 in April 1998, \$5,000 in October 2000, and \$4,000 in November 2003, the latter of which was after the decedent started working in Iraq and six months before his disappearance in April 2004. CX 6. In the ordinary case, circumstances present after a person’s death would not be relevant to the dependency inquiry. However, the circumstances of this case, in which employer continued to pay decedent’s salary after his disappearance, are unusual. The administrative law judge may determine the relevance of any payments claimant received from decedent’s account after his disappearance, given Ms. Carter’s access to decedent’s account until 2009, and of claimant’s testimony that her other children helped support her when payments from decedent’s account ceased, to her claim of dependence as of the time of injury. *See* Tr. at 50-51, 56. The administrative law judge seemingly inferred that claimant received some money from decedent’s account, stating:

administrative law judge is entitled to determine the weight to be accorded to the evidence of record and to assess the credibility of witnesses, *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), we remand the case for further findings of fact regarding claimant's status as decedent's dependent, consistent with applicable legal standards. *Texas Employers Ins. Ass'n v. Sheppard*, 62 F.2d 122 (5th Cir. 1932); *Urso*, 44 BRBS 53.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

Given the ambiguity and unreliability of her testimony and that of her daughter, it is difficult to determine approximately *how much* Claimant was receiving from her son via her daughter at anytime.

Decision and Order at 16 (emphasis added). However, the administrative law judge is not required to equate the receipt of funds from decedent's account with claimant's dependence upon him.