BRB No. 07-0626

L.H. (Grandson of J.H., deceased) Claimant-Petitioner v. KIEWET SHEA and KEMPER INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**PUBLISHED** DATE ISSUED: 02/29/2008 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Decision and Order Denying Motion for Reconsideration of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Richard W. Galiher, Jr. (Galiher, Clarke & Galiher), Chevy Chase, Maryland, for claimant.

Kevin J. O'Connell (O'Connell, O'Connell & Francuzenko), Rockville, Maryland, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and the Decision and Order Denying Motion for Reconsideration (2004-DCW-00005) of Administrative Law Judge William S. Colwell 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*. (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973) (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). This case is before the Board for the second time.

Claimant, the decedent's grandson, appeals the administrative law judge's finding that he is not entitled to death benefits under the provisions of the 1972 Longshore Act. The decedent sustained a work-related "cardiac incident" on May 1, 1981. In a 1985 Decision and Order, Administrative Law Judge Groner awarded the decedent temporary total disability benefits from the date of injury until October 5, 1981, at which time an award of permanent total disability benefits commenced. Employer was awarded Section 8(f) relief, 33 U.S.C. §908(f), and the Special Fund assumed disability payments as of October 1983.

Claimant was born on September 28, 1985, and went to live with his paternal grandparents when he was an infant. Upon decedent's death in 2001, claimant filed a claim for death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909, alleging that decedent's injury caused his death.[1] The administrative law judge denied the claim because claimant was not dependent upon decedent at the time of the 1981 injury, pursuant to Section 9(f) of the Act, 33 U.S.C. §909(f). On claimant's appeal, the Board held that the definition of "injury" contained in Section 2(2) of the Act, 33 U.S.C. §902(2), applies to the word "injury" in Section 9(f) such that an individual must establish his or her dependency upon the decedent at the time of death.[2] *[L.H.] v. Kiewet Shea*, 39 BRBS 119 (2006). The Board remanded the case for the administrative law judge to address the remaining issues.

On remand, the administrative law judge denied benefits, finding that claimant was not a "child" to whom decedent stood *in loco parentis*, that claimant was not a grandchild dependent upon decedent at the time of death, and that claimant was not an "other dependent person." Claimant filed a timely motion for reconsideration and alternatively sought to introduce additional evidence by way of a motion for modification pursuant to

[1] Decedent was a widower.

[2] Section 2(2) states, in pertinent part, that "The term 'injury' means . . . death arising out of and in the course of employment."

Section 22 of the Act, 33 U.S.C. §922. The administrative law judge denied reconsideration, and also stated that he could not consider a motion for modification as such proceedings must be initiated before the district director. Claimant appeals the administrative law judge's denial of benefits and the denial of his motions for reconsideration and modification. Employer responds, urging affirmance of the denial of benefits.

Section 2(14) of the Act states:

> "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employer, a child in relation to whom the deceased employee stood *in loco parentis* for at least one year prior to the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. "Grandchild" means a child as above defined of a child as above defined. . . . "Child", "grandchild", "brother", and "sister" include only a person who is under eighteen years of age, or who, though eighteen years of age or over, is (1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or (2) a student as defined in paragraph (19) [(18)] of this section.

33 U.S.C. §902(14). Section 9 of the Act provides death benefits to eligible survivors. Section 9(c) provides benefits for surviving legitimate and adopted children under age 18, as defined in Section 2(14), without regard to dependency.[3] *See Duck v. Fluid Crane & Constr. Co.*, 36 BRBS 120 (2002). If there is no widow and no children, then Section 9(d) provides, "for the support of grandchildren . . . *if dependent* upon the deceased at the time of the injury, . . . 20 per centum of such wages for the support of each such person during such dependency." 33 U.S.C. §909(d) (emphasis added). Thus, a child under age 18, including one to whom the decedent stood *in loco parentis*, need not establish dependency

---

[3] Section 9(c) states:

> If there be one surviving child of the deceased, but no widow or widower, then for the support of such child 50 per centum of the wages of the deceased; and if there be more than one surviving child of the deceased, but no widow or dependent husband, then for the support of such children, in equal parts 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed 66 2/3 per centum of such wages.

33 U.S.C. §909(c).

in order to be entitled to death benefits. *Brooks v. General Dynamics Corp.*, 32 BRBS 114 (1998). A grandchild, however, must establish his dependency on the decedent. *See generally Johnson v. Continental Grain Co.*, 58 F.3d 1232 (8th Cir. 1995); *Wilson v. Vecco Concrete Constr. Co.*, 16 BRBS 22 (1983).

Claimant first contends the administrative law judge erred in finding that decedent did not stand *in loco parentis* to him, averring that the administrative law judge erroneously focused on the relationship between the two in the year prior to decedent's death. The administrative law judge found that Section 2(14) requires the decedent to have stood *in loco parentis* to claimant for at least the one year immediately preceding his death. As claimant had moved to his aunt's house more than one year prior to the decedent's July 15, 2001, death, and the aunt had assumed responsibility for claimant, the administrative law judge found that decedent did not stand *in loco parentis* to claimant within the meaning of the Act.

We affirm the administrative law judge's consideration of the parties' relationship in the one year prior to decedent's death. Section 2(14) states the employee had to stand *in loco parentis* to the minor "for at least one year prior to the time of [death]." The administrative law judge properly found that this phrase means "at least" the one year immediately prior to the death although it also could encompass a longer period. Claimant's contention that "at least one year" means any one year is not supported by the entirety of the phrase which includes "prior to the time of [death]." 33 U.S.C. §902(14). The administrative law judge therefore properly looked to evidence, at a minimum, of decedent's relationship to claimant in the one year prior to the former's death. *See generally Ryan-Walsh Stevedoring Co. v. Trainer*, 601 F.2d 1306, 10 BRBS 852 (5th Cir. 1979).

We also affirm the administrative law judge's finding that decedent did not stand *in loco parentis* to claimant in the one year prior to his death as it is rational, supported by substantial evidence, and in accordance with law. The Board has held that the definition of the term "*in loco parentis*" is to be found in the laws of the pertinent state, as it is not elsewhere defined in the statute. *Brooks*, 32 BRBS at 117; *Franklin v. Port Allen Marine Service*, 16 BRBS 304, 306 (1984). In the District of Columbia, this concept is established by case law:

> The term "in loco parentis," according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties. *Fuller* [*v. Fuller*], 247 A.2d [767], 770 [(D.C. 1968)] (*quoting Niewiadomski v. United States*, 159 F.2d 683, 686 (6th Cir.), *cert. denied*, 331 U.S. 850, 67

> S.Ct. 1730, 91 L.Ed. 1859 (1947)); . . . "This relationship involves more than a duty to aid and assist, more than a feeling of kindness, affection or generosity." *Fuller*, 247 A.2d at 770; *Niewiadomski*, 159 F.2d at 686.

Simms v. U.S., 867 A.2d 200, 205 (D.C. 2005). In claimant's answers to employer's interrogatories, claimant stated he lived with decedent until the summer of 2000 when he went to live nearby with one of his aunts. EX 1. Linda Keyes, an employee of the District of Columbia Office of Early Childhood Development and friend of claimant's aunt, wrote two letters in support of claimant, apparently to other agencies of the District government. On May 15, 2001, she wrote "in support of the *continued guardianship* of [claimant] by his aunt . . . ." CX 6 (emphasis added). On August 16, 2002, Ms. Keyes wrote that claimant "resided with his grandfather, . . . , since he was four (4) or five (5) months old, until [decedent's] last illness, at which time responsibility for [claimant] was assumed solely by his aunt, ..." *Id*. Ms. Keyes stated that decedent had been claimant's "primary care giver" until his last illness and testified that claimant "circulated" among relatives' homes, but that "his aunt was providing the guidance for him." *Id.*; Tr. at 39. Claimant's aunt testified that she took over the care of claimant in the year before her father died due to the latter's failing health. Tr. at 43, 59.

Based on this evidence, the administrative law judge rationally found that decedent did not stand in *loco parentis* to claimant in the year prior to death, as claimant had moved out of decedent's house and thereafter claimant's aunt provided his care and supervision. While claimant's domicile is not necessarily determinative of this issue, there is no specific evidence that decedent discharged any parental duties after claimant moved. Therefore, we affirm the administrative law judge's finding that claimant is not entitled to death benefits on the basis that he was decedent's "child." [4] *See generally Franklin*, 16 BRBS at 306.

---

[4] Claimant contends that a parent/child relationship is not served when the parties are forced to live apart due to the illness of one of the parties. This premise is undoubtedly true with regard to a legitimate or adopted child of an injured employee, as such a person, under age 18, is presumptively dependent upon the employee under the Act, and need not prove any additional facts. *See generally Maryland Drydock Co. v. Parker*, 37 F.Supp. 717 (D.C. Md. 1941). Generally, a legitimate child and a child to whom one stands *in loco parentis* enjoy the same rights unless a statute is enacted to restrict the latter's rights. 59 Am.Jur.2d Parent and Child §9 (2002). A critical distinction, however, is that the latter relationship may be temporary and terminated at any time, by either party. *Id.*; *see*, *e.g.*, *Peters v. Costello*, 891 A.2d 705 (Pa. 2005). "Once the person alleged to be *in loco parentis* no longer discharges all the duties incident to the parental relationship, the person is no longer *in loco parentis*." 59 Am.Jur.2d Parent and Child §9 (2002); *see*, *e.g.*, *Jones v. Barlow*, 154 P.3d 808 (Utah 2007). Thus, although decedent's relinquishment of any parental responsibilities was involuntary due to his illness, the fact that Section 2(14)

Claimant next contends that the administrative law judge erred in finding that he was not dependent upon decedent. The administrative law judge found that there was testimony from claimant and his aunts about the expenditures decedent made on claimant's behalf during claimant's life, but no testimony or other evidence about any specific expenditures decedent made in the year prior to his death. Decision and Order at 11. The administrative law judge stated that without such specific evidence he could not find that claimant was dependent upon decedent at the time of death. *Id*.

Section 9(d) premises an under-18 year old grandchild's entitlement to death benefits upon a showing of "dependence."[5] 33 U.S.C. §909(d). The United States Court of Appeals for the Fifth Circuit has defined "dependency" under the Act by looking to its common meaning, *e.g.*, "not self-sustaining," "relying on for support," "helping to maintain the dependent in his customary standard of living." *St. John Stevedoring Co., Inc. v. Wilfred*, 818 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). The Board has adopted this approach and has held that the term "dependent" does not require an examination of state law. *Duck v. Fluid Crane & Constr. Co.*, 36 BRBS 120 (2002); *Bonds v. Smith & Kelly Co.*, 17 BRBS 170 (1985). Partial dependency is sufficient. *Texas Employers' Ins. Ass'n v. Sheppeard*, 62 F.2d 122 (5th Cir. 1932). A claimant may have been dependent on the decedent even if he also was dependent upon others. *Ingalls Shipbuilding Corp. v. Neuman*, 322 F.Supp. 1229 (S.D. Miss. 1970), *aff'd*, 448 F.2d. 773 (5th Cir. 1971). The administrative law judge must make the determination as to dependency based on all the circumstances of a particular case. *Duck*, 36 BRBS at 126.

The administrative law judge summarized the testimony of claimant and his two aunts regarding expenditures made by decedent for the support of claimant. He found that while there is evidence of decedent's general financial support of claimant throughout claimant's life, the evidence is not specific enough to permit him to find that claimant was dependent upon decedent at the time of death. Decision and Order at 11. Although the administrative law judge accurately characterized much of the testimony regarding decedent's expenditures as non-specific as to time frames, there is evidence of specific expenditures that the administrative law judge did not discuss. *See infra*. Moreover, the administrative law judge did not acknowledge that a claimant's partial dependence upon

---

contains a temporal requirement with regard to *in loco parentis* status requires that the relationship have existed in the one year prior to death.

[5] If the grandchild is over 18, his entitlement to death benefits is premised upon his being wholly dependent, disabled and incapable of self-support, or upon his being a full-time student up to age 23. 33 U.S.C. §902(14).

decedent is sufficient to under the Act, *Standard Dredging Corp.*, 150 F.2d 78, or that claimant's residence as of 2000 with his aunt does not preclude his continued dependence upon decedent. *Ingalls Shipbuilding Corp.*, 322 F.Supp. 1229. Therefore, we must vacate the denial of benefits and remand for further findings.

One of claimant's aunts testified that decedent gave claimant a weekly allowance and spent $600-$800 annually on clothes for claimant. Tr. at 49-52. Another aunt testified that decedent spent $1,500 annually on claimant's clothes and $250 for his Christmas gifts, and provided him with a weekly allowance, stating, "I know that my father spent more than $600.00 [annually] for [claimant's] care, for his upkeep." *Id*. at 65-67, 71. Claimant testified that decedent gave him a weekly allowance, paid for school supplies and books, vacations, class trips, and clothing. *Id*. at 91, 104-105. Claimant testified specifically that decedent bought him a computer in 2001, *id*. at 91-92, and that decedent paid an estimated $500 or $600 in school supplies when claimant entered high school. *Id*. at 92. One aunt also testified that decedent purchased supplies claimant needed as a member of the choir at Eastern High School, which claimant began attending in the 2000-2001 school year. *Id*. at 65-66.

Thus, in addition to the evidence concerning decedent's general support of claimant, *see generally Industrial Indem. Exchange v. Pillsbury*, 175 F.2d 911 (9th Cir. 1949), there is specific evidence regarding decedent's purchase of a computer for claimant in 2001 and his payment of claimant's school supplies and choir fees in the year before his death. This evidence is relevant to whether, at the time of death, claimant relied upon decedent for partial support and decedent helped sustain claimant's standard of living. *See Vinnell Corp. of California v. Pillsbury*, 199 F.2d 885 (9th Cir. 1952). On remand, therefore, the administrative law judge should fully address the evidence of claimant's dependence on decedent at the time of the latter's death consistent with applicable law as to the sufficiency of partial dependence.[6]

On remand, moreover, the administrative law judge must address the evidence claimant submitted with his motion for modification pursuant to Section 22. In a case

[6] We reject claimant's cursory contention of error with regard to the administrative law judge's finding that claimant is not an "other dependent" under Section 9(d) and 26 U.S.C. §152. Claimant is not a "qualifying child" as the administrative law judge rationally found that claimant did not have decedent's residence as his principal place of abode for more than one-half of the taxable year. The administrative law judge also rationally found that claimant is not a "qualifying child" or "qualifying relative" as claimant did not produce sufficient evidence from which the administrative law judge could determine that decedent provided "over one-half" of claimant's support. *See generally Angelle v. Steen Production Serv.*, 34 BRBS 157 (2000).

arising under the Act, modification need not be initiated with the district director, as stated by the administrative law judge. As claimant correctly contends, in a case arising under the Longshore Act, modification may be initiated with the administrative law judge while the case is still pending before him or is on appeal. *See Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Miller v. Central Dispatch, Inc.*, 16 BRBS 63 (1984); *Craig v. United Church of Christ*, 13 BRBS 567 (1981); *cf. Lee v. Consolidation Coal Co.*, 843 F.2d 159, 11 BLR 2-106 (4th Cir. 1988); *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987) (in cases arising under the Black Lung Act modification must be initiated with the district director). In addition, the evidence claimant seeks to admit is relevant to "mistake in fact" modification, as it pertains to the factual issue of claimant's dependency.[7] *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976). "[T]he basic criterion is whether reopening will 'render justice under the act.'" *McCord*, 532 F.2d at 1380-1381, 3 BRBS at 377; *see also Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002). On remand, therefore, the administrative law judge should evaluate the sufficiency of claimant's evidence in support of his claim of dependence, both old and new, and determine whether modification of the denial of benefits is warranted.[8] *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988).

[7] Section 22 of the Act states that a decision may be modified "on the ground of a change in conditions or because of a mistake in a determination of fact . . . ." 33 U.S.C. §922.

[8] We affirm the administrative law judge's rational decision to deny claimant's motion to admit this evidence by way of a motion for reconsideration, as the record had closed and claimant did not establish that the evidence was previously unavailable. *See generally Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd on reconsideration*, 20 BRBS 26 (1987), *aff'd and rev'd on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989); 29 C.F.R. §18.54(c).

Accordingly, we affirm the finding that decedent did not stand *in loco parentis* to claimant in the one year prior to his death and that claimant was not "an other dependent" of decedent's pursuant to Section 9(d). We vacate the findings that claimant was not dependent upon decedent and that claimant may not initially seek modification from the administrative law judge, and we remand this case for further consideration of the previously admitted evidence and the evidence claimant seeks to admit on modification consistent with this decision.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge