

SALLY ANGELLE)
(Putative dependent of STERLING J.)
RICHARD, deceased))
)
Claimant-Petitioner)
)
v.)
)
STEEN PRODUCTION SERVICE,) DATE ISSUED: Nov. 8, 2000
INCORPORATED)
)
and)
)
LOUISIANA WORKERS')
COMPENSATION CORPORATION)
)
Employer/Carrier-)
Respondents) DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

David A. Hurlburt and George D. Ernest III (Hurlburt, Privat & Monroe), Lafayette, Louisiana, for claimant.

Patricia H. Wilton (Egan, Johnson & Stiltner), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-138) of Administrative Law Judge Lee J. Romero, Jr., 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 if they 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).

Sally Angelle (claimant) and Sterling Richard, the deceased employee (decendent), began living together in 1993 at the home of claimant's mother, Mrs. Eula Angelle, in the State of Louisiana. Claimant and decendent shared a bedroom in the home, maintaining separate telephone and cable television lines, and decendent paid rent to Mrs. Angelle. Claimant testified that she and decendent were planning to marry in September 1996. On June 21, 1996, decendent was killed in a helicopter crash during the course of his employment with employer. Thereafter, claimant filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. §909.

In his Decision and Order, the administrative law judge determined that since claimant is not decendent's widow under Louisiana law, she is not entitled to death benefits under Section 9(b) of the Act, 33 U.S.C. §909(b). The administrative law judge further found that claimant failed to establish that she qualifies as decendent's "dependent" for purposes of recovering benefits under Section 9(d) of the Act, 33 U.S.C. §909(d).

On appeal, claimant challenges the administrative law judge's determination that she is not decendent's widow and therefore is ineligible to receive death benefits under Section 9. Specifically, claimant contends that the administrative law judge improperly relied on state law to determine her marital status, and asserts that the administrative law judge should have found claimant to be a widow pursuant to the holding of the United States Supreme Court in *Thompson v. Lawson*, 347 U.S. 334 (1954). Claimant further argues that the administrative law judge erred in finding that she does not qualify to receive death benefits as a dependent under Section 9(d) of the Act. Employer responds, urging affirmance of the administrative law judge's decision.

The first issue presented by the instant appeal is whether the administrative law judge erred in finding that claimant is ineligible to recover death benefits as a widow under Section 9(b) of the Act. Section 2(16) of the Act provides:

The terms "widow or widower" includes only the decendent'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.

33 U.S.C. §902(16). In the instant case, it is undisputed that claimant and decendent lived together at the time of his death but did not formally participate in a marriage ceremony. Thus, the issue in the instant case is whether claimant was decendent's wife at the time of his death without the benefit of a marriage ceremony. See *Griffin v. Bath Iron Works Corp.*, 25 BRBS 26 (1991). The Act does not define the terms "husband" or "wife." Nevertheless, in

Trainer v. Ryan-Walsh Stevedoring Co., 601 F.2d 1306, 10 BRBS 852 (5th Cir. 1979), *rev'g in part* 8 BRBS 59 (1978), the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction the instant case arises, held that state law is dispositive of whether a claimant is the “wife” of an employee. In its decision in *Trainer*, the Board established guidelines for construing the terms “widow” and “widower” under the Act using “federal common law” in order to develop a uniform method of ensuring that the laws of various states do not interfere with the federal compensation scheme under the Act. *Trainer v. Ryan-Walsh Stevedoring Co.*, 8 BRBS 59 (1978). In reversing the Board, the Fifth Circuit held that if the application of state law produces results contrary to the purposes of the Act, then it is for Congress to reform the legislation. *Trainer*, 601 F.2d at 1313-1315, 10 BRBS at 857-859. In rejecting the Board’s guidelines, the court specifically stated that the Supreme Court’s decision in *Thompson v. Lawson*, 347 U.S. 334 (1954),¹ should not be interpreted “as authorizing the

¹In *Thompson*, 347 U.S. at 334, the Supreme Court was faced with a situation arising under the Act wherein it had to determine the status of a wife who was originally deserted by her husband, the decedent. She later “married” and “divorced” another man and still later refused the decedent’s request to reconcile. In determining that she did not qualify as a “widow” under the Act, the Supreme Court created a rule to ascertain whether a deserted wife held that status at the time of the decedent’s death. The Court specifically stated:

We do not reach this conclusion by assessing the marital conduct of the

creation of a federal common law of marriage to determine whether the claimant, in the first instance, was married to the deceased employee.” *Trainer*, 601 F.2d at 1315, 10 BRBS at 859.

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 Federal Longshoremen’s Act. * * * Considering the purpose of this federal legislation and the manner in which Congress has expressed that purpose, 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. That nexus is wholly absent here.

Thompson, 347 U.S. at 336-337. Using the “conjugal nexus” rule, it agreed with the lower court that the claimant, at the time of the decedent’s death, was not “living apart from him ‘by reason of his desertion[.]’” *Thompson*, 347 U.S. at 336.

Subsequently, the Board, in *Jordan v. Virginia Int'l Terminals*, 32 BRBS 32 (1998), followed the Fifth Circuit's decision in *Trainer* and specifically held that state law must be applied to determine whether a claimant is a "wife" or "husband" of an employee. In *Jordan*, the administrative law judge determined that claimant, who lived with the decedent at the time of his death but was not formally married to him, was a "widow" under the Act, despite the fact that common law marriages cannot be created in Virginia. The administrative law judge based his decision on the criteria set forth by the Board in its decision in *Trainer*. The Board reversed the administrative law judge's determination, ruling that its previous decision in *Trainer*, 8 BRBS at 59, was no longer valid precedent. The Board cited overwhelming case precedent which indicates that the validity of a marriage, and hence the status of a "wife" under the Act, is a matter of state law. See *Marcus v. Director, OWCP*, 548 F.2d 1044, 5 BRBS 307 (D.C. Cir. 1976); *Powell v. Rogers*, 496 F.2d 1248 (9th Cir.), cert. denied, 419 U.S. 1032 (1974); *Albina Engine & Machine Works v. O'Leary*, 328 F.2d 877 (9th Cir.), cert. denied, 379 U.S. 817 (1964);² *Bell v. Tug Shrike*, 332 F.2d 330 (4th Cir.), cert. denied, 379 U.S. 844 (1964). The Board cited the reasoning of the courts in both *Trainer* and *Powell* that the Supreme Court's holding in *Thompson* should not be construed so broadly as to mean that a "conjugal nexus" is all that is required to form a marriage in the first instance. "In other words, the Court created the 'conjugal nexus' test, not to determine whether a marriage had been created, but to fill a gap in federal and state law and determine whether a marital relationship still existed where the two were no longer living together at the time of entitlement." *Jordan*, 32 BRBS at 37. Accordingly, for the reasons set forth in the Fifth Circuit's decision in *Trainer* and the Board's decision in *Jordan*, we reject claimant's contention that the administrative law judge erred in applying Louisiana law to determine her marital status.

Next, we must consider whether the administrative law judge properly applied Louisiana domestic relations law in determining that claimant is not a "widow" under the Act. The Louisiana Civil Code provides that "[m]arriage is a legal relationship between a man and a woman that is created by civil contract." LSA C.C. Art. 86 (West 1999). The

²Claimant's reliance on *Albina Engine* is misplaced. In that case, the Ninth Circuit relied on the laws of Oregon and Idaho and found that the claimant and the decedent had contracted into a valid common law marriage under the laws of both states. Thus, the claimant was entitled to benefits under the Act upon her husband's death. See *Albina Engine*, 328 F.2d at 877.

Code further provides that three requirements must take place for a valid contract of marriage: (1) The absence of a legal impediment; (2) A marriage ceremony; and (3) The free consent of the parties to take each other as husband and wife, expressed at the ceremony. LSA C.C. Art. 87 (West 1999). In the instant case, the administrative law judge found that since claimant and decedent never participated in a marriage ceremony, claimant failed to meet the requirements for a valid marriage contract in the State of Louisiana. *See* Decision and Order at 10. It is undisputed that claimant and decedent did not participate in a marriage ceremony. Rather, on appeal, claimant contends that the administrative law judge erred in not following a line of Louisiana state cases beginning with *Henderson v. Travelers Ins. Co.*, 354 So.2d 1031 (La. 1978), which stand for the proposition that common-law spouses may receive benefits under the Louisiana workers' compensation scheme. Contrary to claimant's contention, however, *Henderson* is not controlling. In rendering his decision, the administrative law judge properly distinguished *Henderson* from the instant case, as *Henderson* concerned whether the claimant who lived with the decedent could receive benefits not as a "widow" but as an "other dependent" "member of the family" under the Louisiana workers' compensation law, a classification that allows dependents to receive compensation only if liability to certain preferred classifications, such as children and spouses, does not exhaust the maximum benefits payable by the employer. *Id.*, 354 So.2d at 1032. As the administrative law judge's finding that claimant was not decedent's wife at the time of his death is in accordance with Louisiana law, we affirm the administrative law judge's determination that claimant is precluded from receiving death benefits as a widow under Section 9(b) of the Act.

We now address claimant's contention on appeal that the administrative law judge erred in determining that she is not entitled to receive benefits as a dependent of decedent pursuant to Section 9(d) of the Act. Section 9(d) of the Act provides that if there be no surviving spouse or child, death benefits may be granted to a "dependent" of decedent at the time of death, who is not otherwise eligible under Section 9, as that term is defined by

Section 152 of Title 26. *See* 33 U.S.C. §909(d);³ 26 U.S.C.A. §152 (West 2000). Pursuant to Section 152(a), “dependent” is defined as:

(a) General definition. – For purposes of this subtitle, the term ‘dependent’ means any of the following individuals *over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer* (or is treated under subsection (c) or (e) as received from the taxpayer):

(9) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 7703, of the taxpayer) who, for the taxable year of the taxpayer, *has as his principal place of abode the home of the taxpayer and is a member of the taxpayer’s household.*

³Section 9(d) provides in pertinent part:

If there be no surviving wife or husband or child, . . . then for the support of grandchildren or brothers or sisters, if dependent upon the deceased at the time of the injury, and any other persons who satisfy the definition of the term ‘dependent’ in section 152 of Title 26, but are not otherwise eligible under this section, 20 percentum of such wages for the support of each such person during such dependency and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of injury, 25 percentum of such wages during such dependency.

33 U.S.C. §909(d).

(b) Rules relating to general definition. – For purposes of this section –

(5) An individual is not a member of the taxpayer's household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law.

26 U.S.C.A. §152(a)(9), (b)(5)(West 2000)(emphasis added).

In rendering his decision, the administrative law judge applied a three-tier test and considered whether claimant (1) received over half of her support from the decedent during his taxable year; (2) had as her principal place of abode the home of the taxpayer; and (3) had a relationship with decedent that was in violation of the law. With regard to the first tier, the administrative law judge found that claimant failed to establish that decedent provided her with over half of her support during either tax year 1995 or 1996, noting claimant's testimony that she was employed and self-supporting during tax year 1995 and that she was employed and self-sufficient from July 1996 to November 1996. The administrative law judge further noted that claimant failed to substantiate with objective evidence that decedent provided her with full financial support. Thus, the administrative law judge determined that claimant failed to meet the first requirement of dependency. *See* Decision and Order at 13. For the reasons set forth below, the administrative law judge's determination that claimant is not entitled to receive death benefits pursuant to Section 9(d) of the Act as a dependent of decedent cannot be affirmed.

Initially, the administrative law judge appears to have mischaracterized claimant's testimony. While the administrative law judge acknowledged claimant's testimony that she was employed and self-supporting during the tax year 1995, in fact claimant testified that prior to decedent's death on June 21, 1996, the last time she worked was in May 1995. She stated unequivocally that she earned no income from May 1995 until July 1996. *See* Tr. at 23-25, 27, 42-43. Moreover, on appeal, claimant asserts that the administrative law judge erred in considering income claimant earned subsequent to decedent's death. Section 152 provides that an individual is a "dependent" when over half of the person's support is derived from the taxpayer, "for the calendar year in which the taxable year of the taxpayer begins . . ." 26 U.S.C.A. §152(a). While the administrative law judge interpreted this language to include all of claimant's earnings for calendar year 1996 in calculating the source of her support, including amounts earned after decedent's death, this interpretation conflicts with Section 9(f) of the Act, which provides: "All questions of dependency shall be determined as of the time of the injury." 33 U.S.C. §909(f). The language of Section 9(f) suggests that any

support claimant provided for herself subsequent to decedent's death should not be considered in the calculation of whether decedent provided claimant over half of her support during the year of his death. *See Lucero v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 261 (1990), *aff'd mem. sub nom. Kaiser Aluminum & Chemical Corp. v. Director, OWCP*, 951 F.2d 360 (9th Cir. 1991)(table). This interpretation is rational, as an employee cannot continue to support his dependents after his death; thus, the fact that claimant returned to work after decedent had died and could not support her does not affect a determination as to her dependency at the time of death. Consistent with Section 9(f), we hold that decedent's taxable year for purposes of a dependency determination under Section 9(d) is the period from January 1, 1996 until June 21, 1996, the date of his death.

Moreover, the administrative law judge based his determination in part on the fact that claimant did not substantiate her testimony with objective evidence of decedent's support during 1996. We hold that the administrative law judge erred in this regard, as claimant's testimony regarding decedent's level of financial support constitutes record evidence, and there is no requirement under the Act or Section 152 of the Tax Code that claimant further substantiate her testimony with documentation. Additionally, it is unclear what kind of documentation claimant could have submitted in this regard. While the administrative law judge, as fact finder, has the discretion to discredit claimant's testimony should there be valid reasons to do so, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), he did not find her testimony in this case lacked credibility. Accordingly, the case must be remanded for reconsideration of whether decedent provided one-half of claimant's support prior to his death.

With regard to the second tier, Section 152(a)(9) requires that the person claiming dependency establish that her "principal place of abode" is the "home of the taxpayer," and that she "is a member of the taxpayer's household." *See* 26 U.S.C.A. §152(a)(9). In the instant case, the administrative law judge analyzed this issue in terms of whether claimant established that she lived in decedent's home, and whether decedent qualified as a "head of a household." In this regard, the administrative law judge acknowledged the testimony of claimant and Mrs. Angelle that decedent paid \$250 per month in rent to Mrs. Angelle, as well as expenses that went toward telephone bills, cable television and groceries. *See* Tr. at 20-21, 29. However, the administrative law judge found that decedent failed to qualify as "head of the household," as the record failed to establish that he paid more than half of the cost of keeping up the home for the year, pursuant to Internal Revenue Service regulations. *See* IRS Pub. 501; *see also* 26 U.S.C.A. §2(b)(1)(A), (B)(West 2000).⁴ He further found that because

⁴Section 2(b)(1) provides in pertinent part:

For purposes of this subtitle, an individual shall be considered a head of a household if, and only if, such individual is not married at the close of the taxable year . . . and . . .

(A) maintains as his home a household which constitutes for more than one-half of such taxable year the principal place of abode, as a member of such household, of – . . .

(ii) any other person who is a dependent of the taxpayer, if the taxpayer is entitled to a deduction for the taxable year for such person under section 151

For purposes of this paragraph, an individual shall be considered as maintaining a household only if over half of the cost of maintaining the household during the taxable year is furnished by such individual.

26 U.S.C.A. §2(b)(1)(A)(ii), (B) (West 2000)(emphasis added).

decedent lived in Mrs. Angelle's house as a renter, not an owner, he was not the taxpaying head of the household, and therefore, claimant cannot be considered a dependent of decedent's household. Rather, the administrative law judge found that decedent and claimant resided in the home of Mrs. Angelle, claimant's mother, as evidenced by that fact that claimant resided there before and after her relationship with decedent. *See* Decision and Order at 14; Tr. at 43.

In the instant case, it is apparent that claimant resided in decedent's principal place of abode. While all circumstances of a particular case must be considered in determining the issue of "principal place of abode," actual physical occupancy is a significant factor in the determination. *See Elward v. United States*, 484 F.2d 596 (7th Cir. 1973); *Prendergast v. Comm'r of Internal Revenue*, 483 F.2d 970 (9th Cir. 1973). In the instant case, although claimant and decedent lived in Mrs. Angelle's house, they resided in the same room and decedent paid rent and expenses to Mrs. Angelle for this room.

With respect to the second element of Section 152(a)(9), whether claimant was a member of decedent's household, the administrative law judge analyzed this issue in terms of whether decedent qualified as a "head of a household" pursuant to IRS regulations. However, Section 152 (a)(9) does not require that decedent's "household" include everyone living under one roof. Thus, contrary to the administrative law judge's analysis, claimant need not establish that decedent provided over half the cost of maintaining Mrs. Angelle's house in order to establish the second tier of the analysis. In the prosecution of her claim, claimant did not contend that decedent was the head of her mother's household, but rather that she and decedent were a household together, renting a room in the house and paying their own expenses.⁵ Claimant testified that she and decedent shared a bedroom and bathroom in a separate part of the house, and had their own telephone and cable television lines. *See* Tr. at 20-21. Claimant further testified without contradiction that as between her and decedent, decedent paid all the costs of renting and maintaining their quarters in Mrs. Angelle's house. *Id.*, at 29-30. Thus, claimant's and decedent's living arrangement could be regarded as tantamount to a couple living in a third person's house as boarders. In this regard, contrary to the administrative law judge's determination, Section 152 of Title 26 does not require that the taxpayer be an owner of his home, and therefore, whether decedent was an owner or a renter is immaterial to the determination of whether claimant was a member of decedent's household. 26 U.S.C.A. §152(a). Lastly, while claimant testified that decedent never actually claimed her as a dependent in his tax returns, *see* Tr. at 57, this is not outcome

⁵Claimant is 38 years old, and during a previous marriage, she lived in her mother's house with her husband. *See* Tr. at 16, 40-41. Claimant asserts that she stopped working to go to school, that decedent supported her financially prior to his death, and further that she drove decedent to and from work because he lost his driver's license. *Id.* at 24-26.

determinative as the issue is whether decedent was *entitled* to claim claimant as a dependent under Section 152, not whether he actually did so. Based on the foregoing, we vacate the administrative law judge's determination that claimant failed to establish the first two tiers necessary to qualify as a dependent under Title 26 of the Tax Code, and we remand the case for reconsideration of whether claimant received over half of her support from decedent during the taxable year, and whether claimant was a member of decedent's household, pursuant to 26 U.S.C.A. §152(a), and thus, whether claimant is entitled to receive survivor's benefits under Section 9(d) of the Act as a dependent.⁶

Accordingly, the administrative law judge's determination that claimant failed to qualify as a dependent for purposes of recovering benefits under Section 9(d) of the Act is vacated, and the case is remand for reconsideration consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

⁶With regard to the third tier for dependency, the administrative law judge found that claimant's and decedent's relationship did not violate local law. This finding is not challenged on appeal.