

CHARLES SMITH, JR.)
(Putative dependent of Charles Smith, Sr.,)
Deceased))

Claimant-Petitioner)

v.)

MT. MITCHELL, LLC)

and)

EAGLE/SEABRIGHT/WASHINGTON)
INSURANCE GUARANTEE)
ASSOCIATION)

Employer/Carrier-)
Respondents)

HIGHLAND REFRIGERATION)

and)

WESTERN GUARANTY FUND SERVICES)

Employer/Carrier-)
Respondents)

ARCTIC ALASKA FISHERIES)

and)

OLD REPUBLIC INSURANCE)

Employer/Carrier-)
Respondents)

EVERETT SHIPYARDS)

DATE ISSUED: Feb. 25, 2014

and)
)
 ALASKA NATIONAL INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 UNION BAY SHIPBUILDING)
)
 and)
)
 LIBERTY NORTHWEST INSURANCE)
 CORPORATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Dismissing Claim of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants’ National Law Center), Washington, D.C., and Jeffrey Winter, San Diego, California, for claimant.

Norman Cole (Sather, Byerly & Holloway), Portland, Oregon, for Mt. Mitchell, LLC and Eagle/Seabright/Washington Insurance Guarantee Association.

Marc A. Centor (Cox, Wootton, Griffin, Hansen & Poulos LLP), San Francisco, California, for Highland Refrigeration and Western Guaranty Fund Services.

Thomas Owen McElmeel, Seattle, Washington, for Arctic Alaska and Old Republic Insurance.

Jennifer Kim (Metz & Associates P.S.), Seattle, Washington, for Everett Shipyards and Alaska National Insurance Company.

Sarah Bahlert Stewart (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for Union Bay Shipbuilding and Liberty Northwest Insurance Corporation.

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

PER CURIAM:

Claimant appeals the Decision and Order Dismissing Claim (2012-LHC-00156) of Administrative Law Judge Jennifer Gee 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).

In January and April 2007, claimant's father (decedent) filed claims under the Act against multiple employers seeking benefits for lung disease he allegedly contracted due to his exposure to asbestos and welding fumes during his employment as a pipefitter and welder between 1967 and his retirement in 2004. Prior to the adjudication of his claims, decedent passed away on June 28, 2010, following surgery for lung cancer. Decedent's widow (claimant's mother), who became the representative for decedent's claim, filed a claim for death benefits under the Act. On or about May 18, 2011, claimant, decedent's adult son, filed a claim for death benefits as a wholly dependent, disabled "child."¹ On November 10, 2011, the administrative law judge consolidated these three claims. Following the death of claimant's mother on December 10, 2011, claimant became the representative of his father and mother's claims as executor of their estates.

At the formal hearing on August 7, 2012, the administrative law judge was informed that all claims filed by decedent and claimant's mother had been settled, and that four named employers had also settled with claimant. 33 U.S.C. §908(i). Consequently, the administrative law judge proceeded to adjudicate claimant's remaining claim against decedent's employers Mt. Mitchell, Highland Refrigeration, Arctic Alaska Fisheries, Everett Shipyards, and Union Bay Shipbuilding.

In her Decision and Order, the administrative law judge found that claimant did not qualify as a "child" under Section 2(14) of the Act, 33 U.S.C. §902(14), and therefore is not entitled to death benefits under Section 9(b) of the Act, 33 U.S.C. §909(b). The

¹ Since approximately October 2005, claimant has received benefits from the Social Security Administration and the Washington State Department of Social & Health Services (DSHS) as a result of his multiple medical conditions, including Crohn's disease. Claimant sought benefits under the Act as a dependent of decedent at the time of decedent's death.

administrative law judge further found that claimant did not qualify as decedent's "dependent" for purposes of recovering benefits under Section 9(d) of the Act, 33 U.S.C. §909(d). The administrative law judge consequently denied claimant's claim.²

On appeal, claimant challenges the administrative law judge's determination that he is neither a "child" nor an "other dependent" and is ineligible to receive death benefits under Section 9. The five named employers have each filed a response brief, urging affirmance of the administrative law judge's decision. Claimant filed a reply brief.

The first issue presented by this appeal is whether the administrative law judge erred in determining that claimant is ineligible to recover death benefits as a "child" under Section 9(b) of the Act. In general, Section 9 of the Act provides death benefits to certain survivors where a work-related injury causes an employee's death. 33 U.S.C. §909. In cases such as the one before us where decedent's wife was alive at the time of his death, Section 9(b) provides for death benefits to a surviving child in the amount of 16 2/3 percent of the decedent's average weekly wage during the life of the decedent's widow, and of 50 percent upon the death of the widow. 33 U.S.C. §909(b). Section 2(14) of the Act provides, in pertinent part, that:

"Child". . .include[s] 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. . . .

33 U.S.C. §902(14); *see Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994). In this case, it is undisputed that claimant was over the age of eighteen at the time of the decedent's death. Thus, the initial issue addressed by the administrative law judge was whether claimant, at the time of the decedent's death, was wholly dependent upon the decedent and incapable of self-support by reason of mental or physical disability.

The administrative law judge's finding that claimant was not wholly dependent upon the decedent at the time of the decedent's death is supported by substantial evidence. In her decision, the administrative law judge found that, as claimant received monthly Social Security disability benefits at least three times greater than the monthly sums he received from the decedent, claimant "was by no stretch of the imagination

² The parties had agreed to bifurcate the issue of claimant's dependency from the other issues in the claim. Finding that claimant was not dependent, the administrative law judge did not reach any other issues.

‘wholly’ dependent upon the [decedent] when [the decedent] died.” Decision and Order at 13. In challenging the administrative law judge’s finding on this issue, claimant asserts that the decedent gave him between \$200 and \$400 per month and acknowledges that at the time of the decedent’s death he was receiving monthly Social Security disability benefits of \$1,357.80, before deductions.³ See Cl. Brief at 6. Claimant avers, however, that the administrative law judge erred in taking into account claimant’s monthly Social Security benefits since, he asserts, the “public benefits a disabled relative receives should not affect whether he or she meets the . . . ‘wholly dependent’ criterion” necessary to establish the applicability of Section 9(b) of the Act. See *id.* at 8-10. As noted in the response briefs filed by employers, claimant has cited no statute, case precedent or authority supportive of his argument that public benefits received by a claimant should be excluded from consideration in determining whether that claimant was “wholly dependent” upon the employee for Section 9(b) purposes. To the contrary, the Board in *Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988), affirmed an administrative law judge’s finding, as supported by substantial evidence, that a claimant was not wholly dependent on the employee at the time of the employee’s injury when “part of claimant’s support. . . was derived from public welfare funds. . . .” *Id.*, 21 BRBS at 145. Similarly, in *Mikell*, 24 BRBS 100, the Board affirmed an administrative law judge’s finding that a claimant’s receipt of \$97.33 per month in Social Security benefits constituted an inconsequential and insubstantial amount of independent income insufficient to preclude claimant from being “wholly” dependent on the decedent. *Mikell*, 24 BRBS at 109. These cases support the administrative law judge’s inclusion of claimant’s monthly receipt of \$1,357.80 in Social Security benefits in the determination of claimant’s “wholly dependent” status. Based on claimant’s receipt of these benefits, we affirm the administrative law judge’s determination that claimant was not wholly dependent on the decedent at the time of the decedent’s death, as it is rational, supported by substantial evidence, and in accordance with law. *Doe*, 21 BRBS 142. Therefore, we affirm the administrative law judge’s denial of claimant’s claim for death benefits pursuant to Section 9(b) of the Act.⁴

Claimant alternatively argues that he is entitled to death benefits pursuant to Section 9(d) of the Act because he is, pursuant to Section 152(a) of the Internal Revenue

³ After deducting claimant’s medical insurance premiums, claimant received \$1,261 monthly from the Social Security Administration. See Tr. at 93; JX 23 at 133-134; JX 70 at 1873.

⁴ In light of our affirmance of the administrative law judge’s determination that claimant was not wholly dependent upon the decedent, we need not address claimant’s argument regarding the second prong of Section 2(14), *i.e.*, was claimant incapable of self-support due to a physical or mental ailment at the time of decedent’s demise.

Code, 26 U.S.C. §152, a “dependent” of the decedent who is not otherwise eligible under Section 9 for death benefits. The administrative law judge found that because claimant was a “surviving child,” albeit one who is not entitled to compensation under Section 9(b), Section 9(d) cannot apply to this case. Claimant avers on appeal that this conclusion is legally erroneous because he should be able to qualify for the lesser benefit available under Section 9(d) as “any other person who satisfy [satisfies] the definition of the term ‘dependent’” in Section 152 of the IRS Code.⁵ Section 9(d) of the Act provides, in pertinent part, that if there is no surviving spouse or child, death benefits may be granted to an “other person” who was “dependent” on the decedent, as that term is defined by Section 152 of the IRS Code. See 33 U.S.C. §909(d);⁶ 26 U.S.C. §152; *Welch v. Fugro*, 44 BRBS 89 (2010); *Angelle v. Steen Production Service, Inc.*, 34 BRBS 157 (2000).

Section 152(a), in relevant part, defines “dependent” as:

(a) In general

For purposes of this subtitle, the term “dependent” means--

- (1) A qualifying child, or
- (2) A qualifying relative.

⁵ Under Section 9(b), an eligible child is entitled to 16 2/3 percent of the decedent’s average weekly wage during the eligibility of the decedent’s spouse, and to 50 percent upon the death or remarriage of the spouse. Pursuant to Section 9(d), an “other person” entitled to death benefits receives 20 percent of the decedent’s average weekly wage.

⁶ Section 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).

(c) Qualifying child

For purposes of this section--

(1) In general

The term “qualifying child” means, with respect to any taxpayer for any taxable year, an individual--

(D) who has not provided over one-half of such individual’s own support for the calendar year in which the taxable year of the taxpayer begins....

26 U.S.C. §152(a), (c). Pertinent to this case is subsection (c)(1)(D), which requires that a putative dependent must not have provided over one-half of his own support.

The administrative law judge found that claimant is not entitled to death benefits under Section 9(d) because the decedent did not provide claimant with over one-half of his support. *See* Decision and Order at 17. In challenging the administrative law judge’s findings, claimant argues that, as Section 152(c)(1)(D) of the Tax Code requires an analysis of claimant’s self-support, the administrative law judge erred in focusing on the support the decedent provided to claimant. Additionally, claimant reiterates his prior contention that the administrative law judge erred by including claimant’s Social Security benefits as claimant’s own support. We reject claimant’s contention that the administrative law judge committed reversible error. Any error by the administrative law judge in discussing decedent’s support of claimant, as opposed to the degree of claimant’s self-support, is harmless, as the administrative law judge fully addressed the relevant evidence of record, and her findings support the conclusion that claimant was providing over one-half of his own support at the time of the decedent’s death.

In her decision, the administrative law judge found the monthly Social Security benefits received by claimant, \$1,357.80, to be more than four-times greater than the \$325 per month claimant received from the decedent and that, accordingly, claimant did not establish his dependency on the decedent at the time of the decedent’s death. Decision and Order at 17. In this regard, we find supportive of the administrative law judge’s findings the Internal Revenue Service’s Publication 501, which states in pertinent part that “[i]f a child receives social security benefits and uses them toward his or her own support, the benefits are considered as provided by the child.” 2011 IRS Publication 501 at 18. Moreover, in light of claimant’s conflicting statements regarding his expenses and income, the administrative law judge, within her discretion as fact finder, rationally declined to credit as evidence of the decedent’s support of claimant, claimant’s testimony

that he did not pay rent to his parents during the time he resided in decedent's home.⁷ *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Substantial evidence supports the administrative law judge's findings that claimant was receiving \$1,357.80 in monthly Social Security benefits at the time of the decedent's death, as well as the decedent's support of approximately \$325 per month. This evidence thus supports the conclusion that claimant was providing over one-half of his own support at the time of the decedent's death. Consequently, as claimant did not establish that he was a "dependent" as defined by Section 152(a) of the Tax Code, we affirm the administrative law judge's finding that claimant is not entitled to death benefits pursuant to Section 9(d) of the Act. *Welch*, 44 BRBS 89.

Accordingly, the administrative law judge's Decision and Order Dismissing Claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁷ In forms submitted to the Washington State DSHS, claimant and his parents asserted that claimant paid rent. *See* JX 22 at 422-24, 463, 468. Before the administrative law judge, claimant testified that he paid no rent between September 2006 and June 2010. *See* Tr. at 65, 122.