

BRB No. 01-0470

A'SHA BONDS)
(Grandchild of SAMUEL WIGGINS))
)
 Claimant-Petitioner)
)
 v.)
)
 CERES MARINE TERMINALS) DATE ISSUED: Feb. 14, 2002
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Death Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum), Savannah, Georgia, for claimant.

Shari S. Miltiades (Shari S. Miltiades, P.C.), Savannah, Georgia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Death Benefits (2000-LHC-1379) of Administrative Law Judge Richard K. Malamphy 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).

Claimant, A'sha Bonds, is the stepgranddaughter of Samuel Wiggins (decedent), who was killed in a work-related accident on November 2, 1999. Her grandmother, Matilda Wiggins, was married to Samuel Wiggins for 17 years and lived with him until his death.¹

¹The parties stipulated that Matilda Wiggins is presently being paid death benefits in

Mrs. Wiggins's daughter, Angela Bonds, lived with the couple for 17 years prior to Mr. Wiggins's death and continued to live with her mother after her stepfather's death. Claimant, Angela's daughter, was five years old at the time of the hearing, and, since birth, has lived in the Wiggins's home. The administrative law judge denied death benefits to both Angela and A'sha Bonds, finding that neither was dependent upon decedent for over half of their support within the meaning of 26 U.S.C. §152(a), as required by the latter half of Section 9(d) of the Act, 33 U.S.C. §909(d).²

On appeal, claimant contends that the administrative law judge erred in finding that she was not dependent upon decedent, and thus erred in finding that she is not entitled to death benefits. Employer responds urging, affirmance of the denial of death benefits.

Section 9(d) of the Act states:

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 grandchildren or brothers and 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 per centum of such wages for the support of each such person 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.

33 U.S.C. §909(d). The administrative law judge found that claimant failed to satisfy the definition of the term "dependent" in 26 U.S.C. §152. Section 152(a) defines "dependent" as:

the amount of \$607.34 per week based on decedent's average weekly wage of \$1,248.68. *See* 33 U.S.C. §909(b).

²The denial of death benefits to Angela Bonds is not challenged on appeal, and thus is affirmed.

(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.

26 U.S.C. §152(a); *see also Angelle v. Steen Production Co.*, 34 BRBS 157 (2000). With respect to claimant, the administrative law judge concluded she did not establish that over half of her support came from Mr. Wiggins. The administrative law judge found that in order to establish that she received over half of her support from Mr. Wiggins, the entire amount of her support from all sources first would have to be established. Decision and Order at 6, *citing Turecamo v. C.I.R.*, 554 F.2d 564 (2^d Cir. 1977). The administrative law judge found that claimant received \$150 per month in child support from her father. In addition, her mother testified she that spent \$50 per week on claimant’s child care and \$18 every two weeks on medical insurance that covered both of them, and that she paid for claimant’s toys and medical expenses. The administrative law judge found, however, that Ms. Bonds did not specify how much of the \$250 she retained each month after paying her expenses was spent on claimant. The administrative law judge then found that even if the expenses documented by Ms. Bonds constitute her total costs for claimant’s support, the record does not reflect how much support Mr. Wiggins provided for claimant, leaving him unable to determine whether Mr. Wiggins provided over half of her support during the applicable period. Decision and Order at 6, *citing Rivers v. C.I.R.*, 33 T.C. 935 (1960).

On appeal, claimant contends that Mr. Wiggins’s monthly payments of household expenses should be divided by four, the number of persons in the house, and that one-fourth should be attributed as his support for claimant. Claimant argues that the record establishes that decedent paid a monthly mortgage payment of \$262.21, utility bill ranging between \$94 and \$140, telephone bill averaging between \$40 and \$45, and the sewer bill averaging \$97.96 for every two months. Mr. Wiggins also gave his wife approximately \$150 per week or every other week to buy groceries for everyone in the house, and Mrs. Wiggins would add her own money if she needed more to cover the costs.³ Claimant calculates Mr. Wiggins’s

³In addition to occasionally paying for groceries out of her salary, Mrs. Wiggins testified that she paid the monthly cable bill of \$50.89. She stated that she never used her

total monthly household expenses as \$1,166.67, of which one-fourth, or \$291.67, is his monthly support for claimant.

We reject claimant's contention that this establishes that decedent provided over one-half of her support. Assuming, *arguendo*, that claimant's calculation is valid, claimant still has not established that over half of her support came from Mr. Wiggins. Ms. Bonds spent approximately \$200 per month on child care for claimant, and claimant received \$150 per month from her father. This is already more than half again as much as Mr. Wiggins "paid" to "support" claimant. Moreover, if one is to divide the household expenses by four, then Ms. Bond's expenses should be divided by two, namely, half her car payments and insurance payments should be attributed to claimant, or almost an additional \$200 per month.⁴ Obviously, then, the money provided to claimant by Ms. Bonds and claimant's father for her support is more than half of claimant's total support. Therefore, we affirm the administrative law judge's finding that claimant was not "dependent" on Mr. Wiggins within the meaning of 26 U.S.C. §152(a) and is not entitled to death benefits under the latter half of Section 9(d).⁵

Nonetheless, we cannot affirm the administrative law judge's denial of death benefits, as the administrative law judge did not analyze claimant's "dependency" status under Section 2(14) of the Act, 33 U.S.C. §902(14), and the first part of Section 9(d). Section 2(14) states, in relevant part:

"Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, 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.

own money to pay the mortgage or other household expenses. Ms. Bonds testified that she did not contribute to the household expenses.

⁴Ms. Bonds's car payment equaled approximately \$138 every two weeks. Her automobile insurance was \$97 per month.

⁵The administrative law judge did not address whether claimant had her principal place of abode in Mr. Wiggins's home and was a member of his household. Nonetheless, these requirements would seem to be established as a matter of law. *See Angelle v. Steen Production Co.*, 34 BRBS 157 (2000). In any event, our affirmance of the administrative law judge's finding that claimant did not establish that over half of her support was provided by Mr. Wiggins in the taxable year preceding his death makes the issue moot.

"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,

33 U.S.C. §902 (14). Thus, as a minor child of decedent's stepchild, as a matter of law, claimant is decedent's "grandchild" under the Act. Pursuant to Section 9(d) a grandchild is entitled to death benefits if she was "dependent" on the deceased at the time of injury.⁶ See *Myers v. Bethlehem Steel Co.*, 250 F.2d 615 (4th Cir. 1957).

It is well settled that, under the Act, partial dependency is sufficient to support an award of death benefits to a minor child or grandchild, see *id.*; *Michigan Transit Corp. v. Brown*, 56 F.2d 200 (6th Cir. 1929), which is a lesser standard than that required under 26 U.S.C. §152(a). The United States Court of Appeals for the Fifth Circuit has held that "dependency" is defined by its common meaning, *i.e.*, "not self-sustaining," or "relying on for support." *Standard Dredging Corp. v. Henderson*, 150 F.2d 78, 80 (5th Cir. 1945); see also *Texas Employers' Ins. Ass'n v. Sheppard*, 62 F.2d 122 (5th Cir. 1932); *Jones v. St. John Stevedoring Co., Inc.*, 18 BRBS 68 (1986), *aff'd in part and rev'd on other grounds sub nom. St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397 (5th Cir. 1987), *cert. denied*, 484 U.S. 976 (1987); *Bonds v. Smith & Kelly Co.*, 21 BRBS 240 (1988); *Bonds v. Smith & Kelly Co.*, 17 BRBS 170 (1985). The United States Court of Appeals for the Fourth Circuit has stated that the inquiry is whether the claimant "depended, at least in part, for the maintenance of her accustomed standard of living upon the contributions of the deceased." *Norfolk Shipbuilding & Dry Dock Co. v. Parker*, 154 F.2d 560, 562 (4th Cir. 1946).

In *Myers*, 250 F.2d 615, decedent's married daughter was separated from her husband and she and her son resided with decedent in rented housing. The court held that decedent's minor grandchild was dependent on the decedent even though his daughter was employed and able to pay for her child's room and board. The decedent, however, paid some weekly amounts toward his grandson's support, bought him shoes and clothing, and paid for his medical expenses at the time of his birth. The court was not impressed with the argument that the grandchild should be deemed to have been supported by the small earnings of the daughter and that the contributions made by the deceased were not necessary to the child's

⁶As Mrs. Wiggins, decedent's widow, is receiving benefits in the amount of 50 percent of decedent's average weekly wage pursuant to Section 9(b), 33 U.S.C. §909(b), claimant, if eligible, would receive $16^{2/3}$ percent of decedent's average weekly wage. 33 U.S.C. §909(d).

support and should be considered as “mere gifts” to the daughter. As the grandson was partially dependent upon the decedent, the court reversed the deputy commissioner’s denial of death benefits. Similarly, in *Bonds*, 21 BRBS at 242-243, the Board affirmed the award of death benefits to an acknowledged illegitimate child, based on the administrative law judge’s finding that she was dependent upon the decedent. The administrative law judge credited evidence that decedent paid \$40 per week toward his daughter’s support, and gave her gifts, and sometimes assisted in paying for her clothes and food. The Board held that gifts are relevant to the issue of dependency, and stated that dependency may be found even when monetary contributions are small. *Bonds*, 21 BRBS at 243, citing *Texas Employers’ Ins. Ass’n v. Shea*, 410 F.2d 56 (5th Cir. 1969) (contributions to family grocery bill and joint bank account “may be minuscule and minute support in terms of dollars and cents” but are sufficient to establish dependency).

As the administrative law judge did not address the issue of claimant’s dependency as a grandchild of the decedent, we must remand this case for further findings of fact. The administrative law judge must make the determination of dependency based on all of the circumstances the case. *See Sheppard*, 62 F.2d at 124; *Bonds*, 21 BRBS at 242. If claimant was partially dependent upon decedent, she is entitled to death benefits. 33 U.S.C. §902(14), 909(d).

Accordingly, the administrative law judge’s Decision and Order Denying Death Benefits to claimant is vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this decision. The administrative law judge’s findings that Ms. Bonds is not entitled to death benefits and that claimant was not dependent upon decedent within the meaning of 26 U.S.C. §152(a) are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge