

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLYDE STEVENSON (claiming as widower of DONNA R. STEVENSON)
and U.S. POSTAL SERVICE, POST OFFICE, Roanoke, Va.

*Docket No. 95-3016; Submitted on the Record;
Issued February 4, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for survivor's benefits for his grandchild pursuant to section 8133 of the Federal Employees' Compensation Act.

The Board has duly reviewed the case record and finds that the Office improperly determined that appellant's grandchild was not entitled to survivor's benefits.

In the present case, the employee, Donna R. Stevenson, was killed in the performance of her federal duties on September 18, 1992. Her widower is in receipt of survivor's benefits pursuant to section 8133 of the Act. Subsequently, the widower claimed that his grandson should be entitled to survivor benefits as a "dependent" pursuant to section 8133 of the Act. The evidence of record indicates that prior to and at the time of the employee's death, the employee was providing financial support to her minor grandson. The widower gained custody of his grandson, Dustin L. Stevenson, by court order, dated April 14, 1994.

By decision dated August 24, 1994, the Office denied the claim for additional survivor's benefits. The Office found that pursuant to 5 U.S.C. § 8133(5) a grandchild was not entitled to compensation if there was a widower receiving compensation.

By decision dated February 23, 1995, the Office vacated the August 24, 1995 decision and found that pursuant to 5 U.S.C. § 8133(5)(c) dependent grandchildren could be entitled to death benefits even if there was a widow/widower in receipt of survivor's benefits. The February 23, 1995 decision also found that since, as in the present case, the grandson was partly dependent on the employee at the time of death, he was entitled to death benefits at a rate of 10 percent. By decision dated March 28, 1995, the Office set aside the February 23, 1995 decision. The Office therein stated that the February 23, 1995 decision contained an error of law in holding that dependent grandchildren were entitled to death benefits even if there is a widow/widower. A hearing was thereafter held before an Office hearing representative on

June 30, 1995. At the hearing, appellant testified that, prior to the employee's death, their grandson was receiving funds for his upkeep from the employee. Appellant also submitted a statement from the mother of the grandchild which indicated that the employee "gave substantial financial support to her grandson, Aza Dustin Stevenson. This occurred from the time of his birth, in May 1982, until the time of her death in September 1992. To the best of my estimation, she had been over 50 percent of his support." By decision dated August 16, 1995, the Office affirmed the denial of payment of additional survivor's benefits for the grandchild. The hearing representative found that "although the evidence supports that Dustin Stevenson may have been partially dependent at the time of [the employee's] demise, this is a moot issue because a 'grandchild' is not entitled to compensation if there is a widower receiving compensation benefits."

Section 8133 of the Act provides that survivor benefits are payable in accordance with the formula set forth in the statute. It is well established that the Act is a remedial statute and should be broadly and liberally construed in favor of the employee to effectuate its purpose and not in derogation of the employee's rights.¹ A primary rule of statutory construction is to give effect to legislative intent and it is well settled that, in arriving at intent, the statute must be construed in whole, rather than in part.

The Sutherland treatise, *Statutory Construction*, notes in relevant part:

"A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus it is not proper to confine interpretation to the one section to be construed."²

The Board finds that the Office's determination that the grandchild was not entitled to benefits pursuant to section 8133 because the widower was in receipt of survivor's benefits was not a proper interpretation of the Act. The intent of the statute is to provide compensation, up to a maximum total of 75 percent, to any dependent family member, be that a spouse, child, parent, sibling, grandchild or grandparent of the deceased employee.

The statute in question provides in relevant part as follows:

§ 8133. Compensation in case of death

"(a) If death results from an injury sustained in the performance of duty, the United States shall pay a monthly compensation equal to a percentage of the monthly pay of the deceased employee in accordance with the following schedule:

- (1) To the widow or widower, if there is no child, 50 percent.

¹ *Mary C. Anderson-Paine*, 47 ECAB _____ (Docket No. 94-76, issued October 18, 1995).

² Sutherland *Statutory Construction* § 46.05 (4th ed. 1986).

- (2) To the widow or widower, if there is a child, 45 percent and in addition 15 percent for each child not to exceed a total of 75 percent for the widow or widower and children.
- (3) To the children, if there is no widow or widower, 40 percent for one child and 15 percent additional for each additional child not to exceed a total of 75 percent, divided among the children share and share alike.
- (4) To the parents, if there is no widow, widower, or child, as follows --
 - (A) 25 percent if one parent was wholly dependent on the employee at the time of death and the other was not dependent to any extent;
 - (B) 20 percent to each if both were wholly dependent; or
 - (C) a proportionate amount in the discretion of the Secretary of Labor if one or both were partly dependent.

If there is a widow, widower, or child, so much of the percentages are payable as, when added to the total percentages payable to the widow, widower and children, will not exceed a total of 75 percent.

- (5) To the brothers, sisters, grandparents and grandchildren, if there is no widow, widower, child, or dependent parent, as follows --
 - (A) 20 percent if one was wholly dependent on the employee at the time of death;
 - (B) 30 percent if more than one was wholly dependent, divided among the dependents share and share alike; or
 - (C) 10 percent if no one is wholly dependent but one or more is partly dependent, divided among the dependents share and share alike.

If there is a widow, widower, child, or dependent parent, so much of the percentages are payable as, when added to the total percentages payable to the widow, widower, children and dependent parents, will not exceed a total of 75 percent.”

The first clause of subsection (a)(5) addresses the class of dependent siblings, grandparents and grandchildren. Subsection (a)(5) provides, “If there is a widow, widower, or child, or dependent parent, so much of the percentages are payable as, when added to the total percentages payable to the widow, widower, children and dependent parents, will not exceed a total of 75 percent.” This clause intends payment to a dependent grandchild of a percentage which when added to the total percentage payable to the widow, widower, children and dependent parents, will not exceed a total of 75 percent. The Board finds that the last sentence

of

subsection (a)(5)(c) has no meaning except if it is read together with the first clause of subsection (5). Such interpretation is consistent with the current construction of the Act, as well as with the Act's legislative history.

Former section 760 of the Act, the statutory predecessor to section 8133 which was in effect until 1966,³ stated in relevant part as follows:

“(F) To the brothers, sisters, grandparents and grandchildren, if one is wholly dependent upon the deceased employee for support at the time of his death, 20 percentum to such dependent; if more than one are wholly dependent, 30 percentum, divided among such dependents share and share alike; if there is no one of them wholly dependent, but one or more partly dependent, 10 percentum divided among such dependents share and share alike.

“The above percentages shall be paid if there is no widow, widower, child and/or dependent parent. If there is a widow, widower, child or dependent parent, there shall be paid so much of the above percentages as, when added to the total percentage payable to the widow, widower, children and dependent parents, will not exceed a total of 75 percentum.”

The language of former section 760 incorporated in one paragraph the provision for payment of benefits to dependent brothers, sisters, grandparents and grandchildren in the event there was no widow, widower, child or dependent parent; and in the event that there is a widow, widower, child or dependent parent, up to the maximum of 75 percent. The intent to provide compensation for the class of dependent siblings, grandparents and grandchildren, even in the event that a widow/widower or child was in receipt of benefits, was readily ascertainable from the phrasing of the former section 760.

In 1966, Title 5 of the United States Code was recodified and enacted into law and the provisions of the Act, as previously enacted and amended, were revised, rearranged and renumbered in Chapter 81 of Title 5 of the Code. In the “Report from the Committee on the Judiciary of the House of Representatives” accompanying the House bill to enact Title 5 of the United States Code, the committee stated in its “preliminary statement” in relevant part as follows:

“*Purpose.* -- The purpose of this bill [H.R. 10104] is to restate in comprehensive form, without substantive change, the statutes in effect before July 1, 1965, that related to government employees, the organization and powers of federal agencies generally and administrative procedure and to enact title 5 of the United States Code. In the revised Title 5, simple language has been superseded, executed and obsolete statutes have been eliminated. This bill is part of the program of the Committee on the Judiciary of the House of Representatives to enact into law all 50 titles of the United States Code.

³ See the Federal Employees' Compensation Act, formerly at 5 U.S.C. § 751 *et seq.*

“Substantive change not intended. -- Like other recent codifications undertaken as a part of the program of the Committee on the Judiciary of the House of Representatives to enact into law all 50 titles of the United States Code, there are no substantive changes made by this bill enacting Title 5 into law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged...”⁴

The Board has not found, nor has the Director alleged any substantive change in this section of the Act, regarding this issue, by the 1966 recodification of Title 5.

The construction of the current section 8133 indicates that its subparts are to be read cumulatively. Subsections (a)(1), (2) and (3) address the percentage of monthly pay to be paid to the widow/widower and child(ren) of the deceased employee, subsection (a)(4) addresses the percentage payable to dependent parents of the deceased employee and subsection (a)(5) addresses the percentage payable to dependent brothers, sisters, grandparents and grandchildren. The Office has interpreted subsection (a)(5) to preclude recovery by a dependent grandchild if there is a widow, widower, child or dependent parent entitled to receive benefits. Such an interpretation, however, renders meaningless the clauses found at the end of subsections (a)(4)(c) and (a)(5)(c). The Board notes in this regard that subsections (a)(4) and (a)(5) are similarly constructed. The Office argues that the class of dependent “brothers, sisters, grandparents, and grandchildren” are not entitled to death benefits if a “widow, widower, child or dependent parent” are in receipt of benefits. Such a construction would also deem that a dependent parent pursuant to subsection (a)(4) would not be eligible for benefits if there was a widow, widower, or child in receipt of benefits. Such construction is not reasonable as (a)(5)(c) clarifies that a widow, widower, child and dependent parent can receive benefits, to not exceed a total of 75 percent.

The Board notes that the Office’s own procedures clarify by a chart titled “Entitlement of Fringe Beneficiaries” that even with a widow/widower, child or parents, the dependent siblings or grandparents or grandchildren are entitled to compensation “as much of percentage payable as, when added to total percentage payable widow/widower, child or parents, will not exceed 75 percent.”⁵

As the Office’s interpretation of the Act failed to effectuate the intent of the last sentence of section 8133(a)(5)(c), to provide compensation up to a maximum 75 percent to any dependent spouse, child, parent, sibling, grandchild or grandparent, the Office erred in denying this claim for survivor’s benefits.

⁴ “Preliminary Statement” House Report No. 901, 89th Congress, 1st Session, August 31, 1985.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Death Claims*, Exhibit 1 (August 1994).

Finally, the Board notes that the Office's procedures require that the person claiming compensation, or someone acting on this person's behalf, must complete Form CA-5b and submit substantiating evidence to claim survivor's benefits and to establish dependency.⁶ It does not appear from the record that Form CA-5b has been completed in this case. The Office shall upon remand of the case record obtain such further evidence as necessary to determine whether the grandson in this case was partially or totally dependent upon the employee at the time of her death.

The decisions of the Office of Workers' Compensation Programs dated August 16 and March 28, 1995 are hereby reversed and this case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.
February 4, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Death Claims*, Chapter 2.700(10) (August 1994).