

**United States Department of Labor
Employees' Compensation Appeals Board**

S.B., claiming as surviving parent of D.B., Appellant)	
)	
and)	Docket No. 09-706
)	Issued: November 13, 2009
U.S. POSTAL SERVICE, POST OFFICE, Hillsdale, NJ, Employer)	
)	

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 13, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 14, 2008 merit decision concerning her entitlement to benefits as a parent of a deceased employee. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant is entitled to benefits as a dependent parent of the deceased employee under section 8133(a) of the Federal Employees' Compensation Act.

FACTUAL HISTORY

The Office accepted that on May 24, 2003 the employee, then a 35-year-old mail carrier, sustained a ruptured right quadriceps tendon due to a fall at work. The employee underwent surgery on August 1, 2003 which had been authorized by the Office. He died on August 23, 2003 and the Office determined that his death was causally related to the August 2003 surgery

for the accepted condition. In June 2004 appellant filed a Form CA-5 and claimed compensation as a dependent.

In a May 4, 2005 letter, the Office requested that appellant provide specific argument and evidence to support her claim for dependency compensation. In an October 12, 2005 statement, appellant stated that the employee lived with her all his life except for the period 1986 to 1990 when he served in the U.S. Navy. She lived with the employee and his twin brother for the 12-month period before his August 23, 2003 death and the employee furnished most of the contribution to the mortgage and bills during this period.¹ Appellant asserted that the employee paid many of the bills at home including mortgage payments on the house. On May 18, 1992 she had transferred her interest in the house *via* quit-claim deed to her three sons.² Appellant indicated that her only income was from social security benefits which in 2004 totaled \$12,031.20. She now lived with one of her sons, but she paid most of the bills.³

In a November 29, 2006 decision, the Office denied appellant's claim explaining that the evidence did not establish that she was wholly dependent on the employee such that she was entitled to benefits under the Federal Employees' Compensation Act. In a March 12, 2007 decision, the Office set aside its November 29, 2006 decision indicating that it had failed to make a determination under the proper standard regarding whether appellant was at least partially dependent on the employee at the time of his death.

In a March 27, 2007 statement, appellant indicated that during the 12 months prior to August 23, 2003 her social security was only \$936.00 per month and she could not have met her basic expenses without the help of the employee. Since the employee's death, the house had been deeded back into appellant's name by her two remaining sons and the estate of her late husband. Appellant had indicated that she deeded her interest in the house to her sons on March 18, 1992 because she was fearful of litigation but noted that the fear of such litigation had passed. The mortgage was paid off completely at some point after the employee's death and appellant took a home equity line of credit which required a monthly payment of \$270.00 (a figure much lower than the prior mortgage payment). Appellant submitted a copy of the March 18, 1992 deed.

In a January 9, 2008 decision, the Office denied appellant's claim for survivor's benefits finding that the evidence was not sufficient to establish that she was partially dependent on the employee such that she would be entitled to such benefits under the Act. It indicated that the evidence submitted by appellant did not provide much detail regarding what types of payments the employee made on her behalf.

¹ Appellant later indicated that she made some of the mortgage payments during this period.

² At the time of the 1992 deed, appellant was married but her husband did not deed his interest to the three sons. Appellant's husband died in 1998 and his estate was never probated, but appellant believed that she would have inherited her husband's share of the house under New Jersey law.

³ Appellant attached a number of check copies showing payments by the employee to a mortgage company between 2002 and 2003. Two checks from 2001 and one check from 2003 memorialized total payments of about \$840.00 from the employee to appellant.

Appellant requested a hearing before an Office hearing representative. At the April 16, 2008 hearing, appellant's attorney, argued that appellant was dependent on the employee before his death in August 2003 and noted that copies of checks written on the employee's account and statements from the employee's friends were submitted in support of the claim. He explained that in 1992 appellant signed her interest in her house over to her three sons, including the employee, for financial reasons and that the house remained in their names until 2006 when the two surviving sons transferred the house back to her. Counsel indicated that appellant stayed in the house after the 1992 interest transfer and that her sons were primarily paying the mortgage.

Appellant testified that the employee and another son were living with her in the period prior to the employee's August 23, 2003 death and that the employee was primarily paying the mortgage. She indicated that the employee also paid the house utility bills during this period. Appellant explained that the employee regularly bought food for the house and gave her money when she needed it. She had no income at that time other than her social security payment of \$936.00 per month. The mortgage for the house she lived in was \$764.00 per month in 2003 and appellant testified that she would not have been able to stay in the house, pay household bills and buy food without the employee's financial assistance. Appellant indicated that one of her sons provided minimal assistance to her prior to the employee's death and currently offered a little financial help on an inconsistent basis. She also testified that another son provided no financial assistance at the time of the employee's death and currently offered her no help. Appellant had been receiving state assistance to help with her oil and heat, but the assistance ceased as of January 2008. She indicated that the house was paid off at some point and that she had to get a credit line against the house to help pay her living expenses. Appellant indicated that she found it increasingly difficult to pay her living expenses after the employee died.

Appellant submitted an April 15, 2008 statement in which Eric Cinotti, a family friend, indicated that he was aware that the employee made regular mortgage payments (in the amount of \$1,100.00) and paid other expenses for appellant. In an April 15, 2008 statement, Deborah Jackson, another family friend, stated that she witnessed the employee giving appellant money for living expenses on numerous occasions. Appellant also submitted more than a dozen checks (some barely legible) dated between 2001 and 2003 which show payments from the employee to a mortgage company.

In an October 14, 2008 decision, the Office hearing representative affirmed the Office's January 9, 2008 decision finding that appellant had not shown that she was partly dependent on the employee within the meaning of section 8133(a) of the Act. She detailed some of the circumstances of appellant's living arrangements prior to August 2003 including the fact that she deeded her interest in her house to her three sons (including the employee) in 1992. The Office hearing representative stated, "While it has been argued that [appellant] was living in the house and the employee was regularly and consistently providing financial assistance to the claimant, to include paying a portion of the mortgage, the fact remains that [appellant] was living in the employee's house at the time of his death and the employee was paying household bills and his own mortgage, even if he only paid a portion of the mortgage, for his residence prior to and immediately before his death." The Office hearing representative noted that appellant submitted some copies of checks and witness statements, but noted, "[T]here has been no financial information submitted indicating what items/expenses [appellant] used her income to pay at the time of the employee's death or evidence indicating what percentage of [appellant's] support was

from contributions made by the employee as compared to funds from other sources.” She further indicated that the employee did not claim appellant as a dependent on his income tax returns and noted the fact that appellant has had problems meeting payments since the employee’s death did not in and of itself establish that she was wholly or partially dependent on the employee at the time of his death.

LEGAL PRECEDENT

With respect to compensation in the case of death, section 8133(a) of the Act provides:

“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.
- (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, 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.”⁴ (Emphasis added.)

With respect to whether a parent is considered to have been dependent on a deceased employee, Office procedure provides:

“Section 8133(a)(4) provides benefits to parent(s) who were wholly or partly dependent on the employee at the time of death. Note that this differs from the provision of [s]ection 8110(a)(4), which provides augmented compensation to a disabled employee on the basis of a parent wholly dependent on and supported by the employee....

“The test of dependency under the [Act] is not whether the claimant is capable of self-support without the amount which was previously provided by the deceased. ‘It is only necessary to show that the person claiming as a dependent looked to and relied upon the contributions in whole or in part, as a means of maintaining or helping to maintain a customary standard of living.’ (See *Viola Davidson*, 4 ECAB 263 [1951]).”⁵

ANALYSIS

The Office accepted that the employee’s death on August 23, 2003 was related to his work-related tendon injury and subsequent surgery. At the time of his death, the employee had no surviving spouse or child and he only had one surviving parent, *i.e.*, appellant. The record reveals that on March 18, 1992 appellant deeded her interest in the house where she resided to her three sons, including the employee.⁶ Appellant lived in the house with the employee up through the time of the employee’s death. She asserted that the employee was making various payments on her behalf, including those for the home mortgage, utilities and other living expenses such as food. Under section 8133(a) of the Act, appellant would be entitled to benefits if she was partly or wholly dependent on the employee at the time of his death.⁷

⁴ 5 U.S.C. § 8133(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Compensation to Parents*, Chapter 2.700.9(a), (b) (October 2005). The principles enunciated in *Davidson* regarding the standard for finding dependency have been followed in later cases. See *Gustina Nicholas*, 35 ECAB 291 (1983).

⁶ Appellant indicated that she deeded the house for financial reasons in that she feared a law suit against her interest in the house.

⁷ See *supra* note 4 and accompanying text.

In denying benefits to appellant, the Office emphasized that any payments the employee made related to the house (such as mortgage payments) were made on his own behalf because he had an ownership interest in the house at the time of his 2003 death and appellant did not. The Office failed to consider, however, whether appellant's continued residence in the house after March 18, 1992 represented a contribution from the employee to appellant that established she was at least partly dependent on the employee at the time of his death. The Board finds that this circumstance does show that appellant was at least partly dependent on the employee.

At the time of the employee's death, appellant had a relatively fixed income which was comprised of about \$936.00 per month in social security benefits. Between 1992 and the employee's death in 2003, the employee allowed appellant to reside in a house in which she had no legal interest. This served to establish an important contribution from the employee to appellant. It is common knowledge that housing is a major expense for most individuals, particularly when a given individual, like appellant, has a relatively modest level of income. Appellant only had about \$936.00 of monthly income in 2003. If she had not received this housing benefit from the employee, appellant would have been forced to spend a substantial portion of her income on housing and make payments for other basic expenses, such as food and medical costs, from a greatly diminished pool of money. Therefore, it would be reasonable to conclude that appellant looked to and relied upon the employee's contribution to her housing, at least in part, as a means of maintaining or helping to maintain a customary standard of living.⁸

The Board finds that appellant was at least partly dependent on the employee at the time of his death within the meaning of the Act, but the full extent of this dependency is unclear.⁹ Under section 8133(a) of the Act, the extent to which a claimant was dependent upon a deceased employee can effect the amount of compensation received by that claimant.¹⁰ The Board is currently unable to determine from the record the precise extent of appellant's dependency upon the employee at the time of his death or how this dependency would ultimately effect appellant's entitlement to compensation. Therefore, the case will be remanded to the Office to further develop the matter of appellant's level of dependency and her entitlement to compensation. After such development as it deems necessary, the Office will issue an appropriate decision on this matter.

⁸ See *supra* note 5 and accompanying text. Appellant asserted that the employee made other contributions, such as paying for utilities and food. There are two witness statements from family friends indicating that similar expenses were regularly paid by the employee for appellant, but these statements are vague in nature and of limited probative value. The record contains two checks from 2001 and one check from 2003 which memorialized total payments of about \$840.00 from the employee to appellant. However, no other evidence of such payments are contained in the record. Therefore, the record remains unclear regarding the contributions the employee might have made to appellant apart from the provision of housing.

⁹ The Office indicated that the employee did not claim appellant as a dependent on his income tax returns, but this fact would not be dispositive of the determination of whether appellant was a dependent under section 8133(a) of the Act.

¹⁰ See *supra* note 5 and accompanying text.

CONCLUSION

The Board finds that appellant was at least partly dependent on the employee under section 8133(a) of the Act. However, the case is not in posture regarding the full extent to which appellant is entitled to benefits as a dependent parent of the employee under section 8133(a) of the Act. The case is remanded to the Office for further development to be followed by the issuance of an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' October 14, 2008 decision is reversed and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: November 13, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board