



BRB No. 15-0504

GINA DiCECCA)	
(Putative Dependent of GERALD J.)	
DiCECCA, deceased))	
)	
Claimant-Respondent)	
)	
v.)	
)	
BATTELLE MEMORIAL INSTITUTE)	DATE ISSUED: <u>June 6, 2016</u>
)	
and)	
)	
VIGILANT INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Granting Motion for Reconsideration of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Howard S. Grossman and Michael J. Ferrin (Grossman Attorneys at Law), Boca Raton, Florida, for claimant.

Robert N. Dengler and Timothy A. Pedernana (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order Granting Motion for Reconsideration (2014-LDA-00197) of Administrative Law Judge Jonathan C. Calianos 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they

are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant’s father (decedent) worked for employer in a Department of Defense laboratory in Tbilisi, Georgia, until May 26, 2012, when he died due to injuries sustained in a work-related car crash. Administrative Law Judge Daniel F. Sutton awarded decedent’s widow and claimant’s stepmother, Sandra DiCecca, death benefits pursuant to Section 9(b) of the Act. 33 U.S.C. §909(b). The Board and the United States Court of Appeals for the First Circuit affirmed the award of death benefits. *DiCecca v. Battelle Mem’l Inst.*, 48 BRBS 19 (2014), *aff’d*, 792 F.3d 214, 49 BRBS 57(CRT) (1st Cir. 2015). Claimant’s entitlement to death benefits under the Act as a dependent child was not addressed in Judge Sutton’s decision.

Claimant was born on June 10, 1987. She has been treated for various mental health conditions since childhood. Decision and Order at 3. Claimant lived with her mother, Marie Mazzeo, until December 2009, when she began living with her father and stepmother. CX 20 at 16. Claimant quit her job at a jewelry store in February 2011 when she moved with her father and stepmother to a location 65 miles away. She was unemployed at the time of her father’s death in May 2012. *Id.*

In his decision, Administrative Law Judge Calianos (the administrative law judge) found that claimant established entitlement to death benefits as a wholly dependent adult child. 33 U.S.C. §§902(14), 909(b). On reconsideration, the administrative law judge modified his decision to provide that claimant is to receive 25 percent of the death benefits payable pursuant to Sections 6(b)(1) and 9(b), 33 U.S.C. §§906(b)(1), 909(b).¹

On appeal, employer challenges the administrative law judge’s finding that claimant was “wholly dependent” on her father for support at the time of his death and thus is a “child” within the meaning of Section 2(14) of the Act. Claimant responds, urging affirmance of the administrative law judge’s award of death benefits. Employer filed a reply brief in support of its position.

¹ Decedent’s average weekly wage was \$3,359, which entitled Mrs. DiCecca to an initial compensation award at the maximum rate of \$1,295.20, subject to Section 10(f) adjustments. Decision and Order at 16; 33 U.S.C. §§906(b)(1), 909(b), 910(f). The administrative law judge awarded claimant weekly compensation of \$323.80, subject to annual adjustments under Section 10(f), which is 25 percent of Mrs. DiCecca’s award, and Mrs. DiCecca’s award was reduced by \$323.80. The parties agreed that claimant’s award would be prospective only. The administrative law judge’s calculation of the awards has not been appealed.

In general, Section 9 of the Act provides death benefits to certain survivors where, as here, a work-related injury causes an employee's death. 33 U.S.C. §909. 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,

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 mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994) (table). Section 9(f) of the Act states that issues of dependency are to be determined as of the time of the injury. 33 U.S.C. §909(f); see *Henderson v. Kiewit Shea*, 39 BRBS 119 (2006). In this case, it is undisputed that claimant was over the age of eighteen at the time of decedent's death. Thus, the issue addressed by the administrative law judge was whether claimant, at the time of decedent's death, was wholly dependent upon decedent and incapable of self-support by reason of mental or physical disability. Employer expressly does not challenge the administrative law judge's finding that claimant is incapable of self-support due to her mental disability. Thus, this finding is affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 47 (2007). Claimant's eligibility for death benefits thus turns on whether she was “wholly dependent” upon decedent at the time 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).

The administrative law judge discussed claimant's testimony that she relied on decedent for support as, at the time of his death, claimant was unemployed and living in decedent's house without paying rent or utilities. Tr. at 127; Decision and Order at 12. The administrative law judge found that claimant's mother did not provide financial support for her, and claimant testified that her mother had taken money from claimant's savings account to pay rent when the two lived together. Tr. at 127; CX 20 at 10. Claimant testified that she has never lived independently and that she is unable on her own to care for herself or the home for extended periods. Tr. at 138-139.

The administrative law judge found claimant's testimony supported by the credible testimony of Mrs. DiCecca. Decision and Order at 12-13. Mrs. DiCecca testified that decedent bought claimant a car, allowed claimant to live rent-free at their home, paid for claimant's health insurance and gave her money. Tr. at 87, 92. Mrs. DiCecca and claimant's mother, Ms. Mazzeo, testified that, except for occasional gas money, Ms. Mazzeo did not give claimant money or pay for her living expenses or psychological treatment. Tr. at 88, 104; CX 23 at 18. The administrative law judge also credited the deposition testimony and medical records of claimant's therapist, Alexandra

Erickson, that decedent, and not Ms. Mazzeo, paid her fees.² CXs 8 at 55, 9 at 54. The administrative law judge rejected employer's assertion that claimant also relied on Mrs. DiCecca's support, independently of decedent, as he found that employer mischaracterized Mrs. DiCecca's testimony in contending that she made mortgage payments and partially paid for claimant's therapy.³ Decision and Order at 13; *see* Tr. at 33, 53, 104-105. The administrative law judge concluded that the evidence is sufficient to establish that, except for an inconsequential amount of gas money provided to claimant by Ms. Mazzeo, decedent "was paying all Claimant's expenses at the time of his death" and that claimant established that she was wholly dependent on him. Decision and Order at 13.

The administrative law judge is entitled to draw inferences and to make credibility assessments; his findings may not be disturbed if they are rational and supported by substantial evidence of record. *Bath Iron Works Corp. v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001). It is immaterial that the facts permit diverse inferences or could support a conclusion different from that drawn from the evidence by the administrative law judge. *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982). In this case, the administrative law judge rationally credited the hearing testimony of claimant and Mrs. DiCecca, Tr. at 33, 53, 87-88, 92, 104-105, 127, 138-139, the deposition testimony of Ms. Mazzeo and Ms. Erickson, CXs 8 at 55, 23 at 18, and Ms. Erickson's records, CX 9 at 54, to conclude that claimant was "wholly dependent" on decedent at the time of his death. *Mikell*, 24 BRBS 100; *Bonds v. Smith & Kelly Co.*, 21 BRBS 240 (1988); *see also Hutchins*, 244 F.3d 222, 35 BRBS 35(CRT); *Sprague*, 688 F.2d 862, 15 BRBS 11(CRT). Contrary to employer's contention, documentary evidence is not required to support claimant's claim that she was wholly dependent upon decedent. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Eller & Co. v. Golden*, 620 F.2d

² The administrative law judge rejected employer's assertion that Ms. Mazzeo paid some of claimant's therapy expenses. Decision and Order at 13; Tr. at 90, 104; CX 8 at 55. The administrative law judge found that decedent's statements that he wanted Ms. Mazzeo to bear some responsibility for the therapy expenses were only expressions of hope that Ms. Mazzeo would bear some financial responsibility for claimant's care. Decision and Order at 13.

³ The administrative law judge noted that Mrs. DiCecca was retired from her employment. The administrative law judge found that merely because Mrs. DiCecca testified that she "wrote the checks" for the mortgage does not establish that the source of the mortgage payments was her own funds as the administrative law judge determined that "the money used for paying the mortgage came from [the decedent]." Decision and Order at 13.

71, 12 BRBS 348 (5th Cir. 1980); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969); *see also Dobbins v. Schweiker*, 641 F.2d 1354 (9th Cir. 1981). Nor was it necessary for any witness to state unequivocally that “claimant was wholly dependent upon decedent,” as the administrative law judge was entitled to draw this conclusion from the evidence presented. *See Bonds*, 21 BRBS 240. Therefore, as the administrative law judge’s finding that claimant was wholly dependent on decedent at the time of his death is supported by substantial evidence, we affirm it and the consequent award of death benefits to claimant.

Accordingly, the administrative law judge’s Decision and Order Awarding Benefits and the Order Granting Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge