

BRB No. 02-0335

WILLIAM R. DUCK )  
(Decedent) )  
)  
MARY KYLEE PULLIN )  
)  
Claimant-Petitioner )  
)  
v. )  
)  
FLUID CRANE & CONSTRUCTION )  
COMPANY )  
)  
and )  
)  
LOUISIANA WORKERS' )  
COMPENSATION CORPORATION )  
)  
Employer/Carrier- )  
Respondents )  
)  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
)  
Respondent )

DATE ISSUED: Oct. 22,  
2002

DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Gordon P. Sandoz II (Sandoz and Sandoz), Abbeville, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

Edward D. Sieger (Eugene Scalia, Solicitor of Labor; Allen H. Feldman, Associate Solicitor for Special Appellate and Supreme Court Litigation; Nathaniel I. Spiller, Deputy Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2001-LHC-1038) of Administrative Law Judge C. Richard Avery 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

William Duck (decedent) sustained fatal injuries while working for employer on May 10, 1998. His minor, illegitimate daughter, Mary Kylee Pullin, survived him. Claimant, Kimberly Pullin, filed a claim seeking death benefits on behalf of her minor daughter, pursuant to Section 9(c) of the Act, 33 U.S.C. §909(c). In his decision, the administrative law judge determined that Mary Kylee Pullin was not dependent upon decedent at the time of his death, and thus, she is not entitled to death benefits under the Act.

On appeal, claimant challenges the administrative law judge's denial of death benefits. Employer and the Director, Office of Workers' Compensation Programs (the Director) respond, urging affirmance.<sup>1</sup>

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<sup>1</sup> By Order dated September 24, 2002, the Board requested the Director to file a brief addressing the following issues:

1. Whether the Board should address the contention that the dependency requirement violates the Equal Protection Clause as this issue was not raised before the administrative law judge?
2. Assuming the Board addresses the issue, whether the provision of Section 2(14) requiring that an acknowledged illegitimate child establish dependency violates the Equal Protection Clause?
3. Whether claimant is presumed dependent by operation of state law?

Claimant argues that the Louisiana Civil Code provides a presumption that decedent was legally obligated to support his daughter up to the time of his death, and thus avers that Mary Kylee Pullin is entitled to death benefits. In addition, claimant asserts that as the Act requires a higher standard of proof for an illegitimate child, *i.e.*, proof of dependency, it violates the Due Process Clause of the Fifth Amendment of the United States Constitution.

Section 9(c) of the Act provides for the payment of compensation for death of an employee to a child or children of the deceased employee where there is no surviving spouse. 33 U.S.C. §909(c). A “child” includes an “acknowledged illegitimate child dependent upon the deceased.”<sup>2</sup> 33 U.S.C. §902(14). It is uncontested that decedent “acknowledged” Mary Kylee Pullin as his child. Thus, entitlement herein turns on whether Mary Kylee Pullin (Kylee) was required to establish that she was “dependent” upon decedent at the time of his death, and if so, whether she was dependent on decedent.<sup>3</sup>

### **Equal Protection Clause**

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<sup>2</sup> Section 2(14) states, in pertinent 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.

33 U.S.C. §902(14) (emphasis added).

<sup>3</sup> Section 9(f) of the Act, 33 U.S.C. §909(f), states that “All questions of dependency shall be determined as of the time of injury.”

Claimant contends that by requiring an illegitimate child to establish dependency, the Act violates the Equal Protection Clause of the Fifth Amendment of the United States Constitution. This issue was mentioned very briefly at the hearing. Tr. at 16-17. The administrative law judge stated in his decision that he did not think that requiring claimant herein to establish dependency was a fair result since a “legitimate child does not have to prove dependency, and legally and morally speaking Mr. Duck was under an obligation to provide support for the child he fathered whether he was actually doing so at the time of his death or not.” Decision and Order at 4 n.4. As the issue raised on appeal concerns purely a question of law, it is appropriate for the Board to address the issue.<sup>4</sup> See *Logara v. Jackson Engineering Co.*, 35 BRBS 83 (2001); *Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff’d mem.*, No. 90-4135 (5<sup>th</sup> Cir. March 5, 1991); see also *Martinez v. Mathews*, 544 F.2d 1233 (5<sup>th</sup> Cir. 1976).

Claimant argues, based on decisions of the United States Supreme Court in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 176 (1972), *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Glonn v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968), wherein the Court invalidated three Louisiana statutes because of their denial of equal protection rights to illegitimate children, that the Act is unconstitutional to the extent that it requires illegitimate children to prove dependency in order to establish entitlement to death benefits.<sup>5</sup> In contrast, the Director argues that the Act provides a scheme whereby death benefits are limited to actual dependents of the worker and normally continue only for the period of

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<sup>4</sup> The Director asserts that the Board should address the constitutional issue but maintains that the Board’s authority to address the constitutional issue is unclear. The Board has held, however, that it possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction. *Herrington v. Savannah Machine & Shipyard Co.*, 17 BRBS 194 (1985); see also *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 (6<sup>th</sup> Cir. 1984).

<sup>5</sup> The Board has previously held, citing *Weber*, that the Act does not discriminate in an impermissible fashion because it permits illegitimate children to recover if acknowledged and dependent. *Hicks v. Southern Illinois University*, 19 BRBS 223 (1987). The child in *Hicks* was neither acknowledged nor dependent. Additionally, in *Ingalls Shipbuilding Corp. v. Neuman*, 322 F.Supp. 1229 (D.Miss. 1970), *aff’d*, 448 F.2d 773 (5<sup>th</sup> Cir. 1971), the district court, albeit in *dicta*, determined that there is no “invidious discrimination” contrary to the United States Constitution in requiring that illegitimate children prove factual dependency in order to recover death benefits under the Act.

dependency. The Director acknowledges that there are differing requirements of proof for illegitimate as opposed to legitimate children on the issue of dependency but asserts that this distinction is appropriate as it serves a legitimate Congressional purpose of “administrative convenience.” The Director relies on the decision of the Supreme Court in *Mathews v. Lucas*, 427 U.S. 495 (1976), in support of his position.

The Due Process Clause of the Fifth Amendment prohibits a “discriminatory” act by the federal government. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *see also San Francisco Arts & Athletics v. U.S. Olympic Committee*, 483 U.S. 522, 542 n. 21 (1987); *Buckley v. Valeo*, 424 U.S. 1 (1976). As a general proposition, discrimination on the basis of suspect classifications like illegitimate birth calls for an intermediate scrutiny test wherein the government action must directly advance substantial interests and clear governmental objectives and be no more extensive than necessary. *Weber*, 406 U.S. at 176.

In *Lucas*, the Supreme Court sustained provisions of the Social Security Act governing the eligibility for surviving children’s insurance benefits, observing that one of the statutory conditions of eligibility was dependency upon the deceased wage earner. *Lucas*, 427 U.S. 495. Although the Act presumed dependency for a number of categories of children, including some categories of illegitimate children, it required that the remaining illegitimate children prove actual dependency. The Court held that the “statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations.” *Lucas*, 427 U.S. at 513; *see also Trimble v. Gordon*, 430 U.S. 762 (1977). The presumption of dependency, observed the Court, is withheld only in the absence of any significant indication of the likelihood of actual dependency and where the factors that give rise to a presumption of dependency lack any substantial relation to the likelihood of actual dependency. In identifying these factors, the Court relied predominantly on the Congressional purpose in adopting the statutory presumptions of dependency, *i.e.*, to serve administrative convenience. With regard to administrative convenience, the Court recognized that:

While Congress was unwilling to assume that every child of a deceased insured was dependent at the time of death, by presuming dependency on the basis of relatively readily documented facts, such as legitimate birth, or a support order or paternity decree, which could be relied upon to indicate the likelihood of continued actual dependency, Congress was able to avoid the burden and expense of specific case-by-case determination in the large number of cases where dependency is objectively probable. Such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny.

*Lucas*, 427 U.S. at 509. As a result, the Court found that “the statutory classifications challenged here are justified as reasonable empirical judgments that are consistent with a design to qualify entitlement to benefits upon a child’s dependency at the time of the parent’s death.” *Lucas*, 427 U.S. at 511. The Court thus held that conditioning entitlement upon dependency at the time of death is not impermissibly discriminatory in providing benefits only for those children for whom the loss of the parent is an immediate source of the need. Therefore, the Court upheld the statutory classifications as they were “reasonably related to the likelihood of dependency at death.” *Lucas*, 427 U.S. at 509.

In *Lucas*, the Court specifically framed the constitutional question as not whether a presumption of dependency is required, but whether it is permitted. The Court added that in ratifying these statutory classifications, it is not:

our role to hypothesize independently on the desirability or feasibility of any possible alternative basis for presumption. These matters of practical judgment and empirical calculation are for Congress. Drawing upon its own practical experience, Congress has tailored statutory classifications in accord with its calculations of the likelihood of actual support suggested by a narrow set of objective and apparently reasonable indicators. Our role is simply to determine whether Congress’ assumptions are so inconsistent or insubstantial as not to be reasonably supportive of its conclusions that individualized factual inquiry in order to isolate each nondependent child in a given class of cases is unwarranted as an administrative exercise.

*Lucas*, 427 U.S. at 515-516. The Court concluded:

the precise accuracy of Congress’ calculations is not a matter of specialized judicial competence; and we have no basis to question their

detail beyond the evident consistency and substantiality. [cite omitted]. We cannot say that these expectations are unfounded, or so indiscriminate as to render the statute's classifications baseless. We conclude, in short, that, in failing to extend any presumption of dependency to [certain illegitimate children], the Act does not impermissibly discriminate against them as compared with legitimate children or those illegitimate children who are statutorily deemed dependent.

*Id.* at 516. The Court in *Lucas* further noted that the statutory scheme therein is significantly different from the provisions confronted in cases in which it has invalidated legislative discrimination among children on the basis of legitimacy, including those presently cited by claimant in this appeal. *Lucas*, 427 U.S. at 510-511. In *Levy*, 391 U.S. 68, and *Glonn*, 391 U.S. 73, the statutes were such that not only was the legitimate child automatically entitled to benefits, but an illegitimate child was denied benefits solely and finally on the basis of illegitimacy, regardless of any demonstration of dependency or other justifiable factor.<sup>6</sup> See also *Griffin v. Richardson*, 346 F.Supp. 1226 (D.Md.), *summarily aff'd*, 409 U.S. 1069 (1972); *Davis v. Richardson*, 342 F.Supp 588 (D.Conn.), *summarily aff'd*, 409 U.S. 1069 (1972)

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<sup>6</sup> In *Levy*, the Supreme Court held that the denial to illegitimate children of the right to recover for the wrongful death of their mother on whom they were dependent constituted invidious discrimination against them. *Levy*, 391 U.S. at 71-72. Similarly, in *Glonn*, the Supreme Court held that a state tort law that prevented the mother of an illegitimate child from obtaining a tort recovery for his wrongful death merely because the child, wrongfully killed, was born to her out of wedlock, violated the Equal Protection Clause of the Fourteenth Amendment. *Glonn*, 391 U.S. at 74.

In *Weber*, 406 U.S. 164, the decedent, who died as a result of work-related injuries, had maintained a household with four legitimate minor children, one unacknowledged illegitimate minor child,<sup>7</sup> and the petitioner, to whom he was not married. A second illegitimate child was born posthumously. Under the Louisiana workers' compensation law, unacknowledged illegitimate children were not within the class of "children" who could recover death benefits, but were relegated to the lesser status of "other dependents" who could recover only if there were not enough surviving dependents in the preceding classes to exhaust the maximum benefits. The four legitimate children were awarded the maximum allowable compensation and the two illegitimate children received nothing. The Supreme Court held that the denial of equal recovery rights to the *dependent* unacknowledged illegitimate children violated the Equal Protection Clause of the Fourteenth Amendment,<sup>8</sup> as the inferior classification of these *dependent* children bore no significant relationship to the recognized purposes of recovery that workers' compensation statutes were designed to serve. Thus, there was never any question as to the issue of dependency in *Weber*, and this serves herein, as it did in *Lucas*, as the distinguishing feature among these cases.<sup>9</sup> *Id.*

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<sup>7</sup> Under the state law, the decedent was prohibited from acknowledging his illegitimate child because he was incapable of contracting marriage with the child's mother, as he was married to another woman. *Weber*, 406 U.S. at 171.

<sup>8</sup> The Court observed that:

so far as this record shows, the dependency and natural affinity of the unacknowledged illegitimate children for their father were as great as those of the four legitimate children whom Louisiana law has allowed to recover. The legitimate children and the illegitimate children all lived in the home of the deceased and were equally dependent upon him for maintenance and support. It is inappropriate, therefore, for the court below to talk of relegating the unacknowledged illegitimates 'to a less favorable position as are other dependent relatives such as parents.' The unacknowledged illegitimates are not a parent or some 'other dependent relative;' in this case they are *dependent* children, and as such are entitled to rights granted other *dependent* children.

*Weber*, 406 U.S. at 170 (emphasis added). See also *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (statutory bar to recovery by afterborn illegitimate children without regard to dependency violates the Equal Protection Clause).

<sup>9</sup> In *Weber*, the Supreme Court did not question the importance of the state's interest in protecting "legitimate family relationships." Rather, they questioned how the challenged statute would promote this purpose. The Director in the instant case has posited a different interest than that of protecting "legitimate family relationships,"



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*i.e.*, administrative convenience as demonstrated by the Court’s decision in *Lucas*. In addition, the Supreme Court has recognized that there is a permissible basis for some “distinctions made in part on the basis of legitimacy,” *Lucas*, 427 U.S. at 505; specifically, where the statutory provisions have an evident and substantial relation to the state’s interest in providing for the orderly and just distribution of a decedent’s property at death. See *Reed v. Campbell*, 476 U.S. 852 (1986); *Lalli v. Lalli*, 439 U.S. 259 (1978). This is analogous to the Director’s stated goal of “administrative convenience.”

The instant case is akin to *Lucas* and factually distinguishable from *Levy*, *Glon*, and *Weber*. Applying the Court’s holding in *Lucas*, Section 2(14) does not “broadly discriminate between legitimates and illegitimates, without more,” but rather is “carefully tuned to alternative considerations” by withholding a presumption of dependency to illegitimate children “only in the absence of any significant indication of the likelihood of actual dependency.” *Lucas*, 427 U.S. at 513. The Act’s distinction between legitimate and illegitimate children is reasonable, for as the Court stated in *Lucas*, “[i]t is clearly rational to presume [that] the overwhelming number of legitimate children are actually dependent upon their parents for support,” *Lucas*, 427 U.S. at 513, while, in contrast, illegitimate children are not generally expected to be actually dependent on their fathers for support. Unlike the Act, the statutes at issue in *Levy* and *Glon* denied benefits “solely and finally on the basis of illegitimacy.” *Lucas*, 427 U.S. at 511. In addition, as a dependency-based distinction between legitimate and illegitimate children was not at issue in *Weber*, *i.e.*, the Court noted that under the Louisiana law at issue “dependency on the deceased is a prerequisite to anyone’s recovery,” *Weber*, 406 U.S. at 173, and because the Court in that case recognized that such a distinction could be permissible,<sup>10</sup> *Weber* is likewise not a persuasive authority for invalidating the dependency-based distinction between legitimate and illegitimate children in Section 2(14) of the Act.<sup>11</sup> Thus, for the reasons stated in *Lucas*,<sup>12</sup> we reject claimant’s contention that Section 2(14) of

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<sup>10</sup> The Court intimated that some statutory distinctions between legitimate and illegitimate children could “reflect closer family relationships in that the illegitimate is more often not under the care in the home of the father nor even supported by him.” *Weber*, 406 U.S. at 173.

<sup>11</sup> Moreover, the Act, as suggested by the Director, indicates a general purpose of providing death benefits to individuals who are *dependent* on an injured maritime worker at the time of death. See 33 U.S.C. §§902(14), (15), 909(d) (together providing for death benefits for dependent grandchildren, brothers, sisters, parents and grandparents if there is no spouse or eligible children); *Williams v. Donovan*, 198 F.Supp 237 (D.La. 1961); see also *Maryland Drydock Co. v. Parker*, 37 F.Supp. 717 (D.Md. 1941). In addition, the Act does not “broadly discriminate between legitimates and illegitimates without more,” *Lucas*, 427 U.S. at 513, since it treats illegitimate children at least as favorably as it treats other classes of related individuals, such as parents or siblings, for whom dependency is not “objectively probable.” *Lucas*, 427 U.S. at 509.

<sup>12</sup> In so doing, we give considerable deference to the Director’s position and thus his interpretation of the Act on this issue. In this regard, we hold that the Director’s position is reasonable and does not contravene plain statutory language. See *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113(CRT) (5<sup>th</sup> Cir. 1993); *Force v. Director*,

the Act violates the equal protection clause.<sup>13</sup>

### Dependency

With regard to the administrative law judge's finding that Kylee was not dependent on decedent, we observe that claimant does not challenge the administrative law judge's findings of fact, but rather argues that she was, under the Louisiana Civil Code, legally dependent on decedent at the time of his death. Claimant therefore asserts that an application of state law to define the term dependent as it pertains to Section 2(14) of the Act is appropriate in this case. In contrast, the Director asserts that in defining the term dependency under the Act, the Board should follow the "common sense" approach espoused in its decisions in *Jones v. St. John Stevedoring Co., Inc.*, 18 BRBS 68 (1986), *aff'd in part, sub nom. St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397 (5<sup>th</sup> Cir.), *cert. denied*, 484 U.S. 976 (1987), and *Bonds v. Smith & Kelly Co.*, 17 BRBS 170 (1985).

The United States Court of Appeals for the Fifth Circuit has defined "dependency" within the meaning of the Act by looking to its common meaning, e.g., "not self-sustaining," "relying on for support," "helping to maintain the dependent in his customary standard of living." See *St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397; *Texas Employers' Ins. Ass'n*, 410 F.2d 56 (5<sup>th</sup> Cir. 1969); *Standard Dredging Corp. v. Henderson*, 150 F.2d 78 (5<sup>th</sup> Cir. 1945). Partial dependency is sufficient. *Texas Employers' Ins. Ass'n v. Sheppard*, 62 F.2d 122 (5<sup>th</sup> Cir. 1932). The Board has adopted this approach, and has held that the term "dependent" does not require an examination of state law. *Bonds*, 17 BRBS 170. The administrative law judge must make the determination of dependency based on all the circumstances of a particular case. *Jones*, 18 BRBS 68.

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*OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9<sup>th</sup> Cir. 1991); *Donovan v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 2 (1997).

<sup>13</sup> We recognize that in certain instances legitimate children entitled to the presumption of dependency may automatically be entitled to benefits under the Act even though they cannot in fact prove their economic dependence on the decedent at the time of death, e.g., a child whose parents have divorced and the deceased parent, for one reason or another, does not provide any economic support. *Maryland Drydock Co. v. Parker*, 37 F.Supp. 717 (D.Md. 1941). In *Lucas*, the Court acknowledged that there may be circumstances wherein presumptive dependents are automatically entitled to benefits despite their inability to establish actual dependency. See *id.* Nevertheless, the Court concluded that "the statutory classifications are permissible, however, because they are reasonably related to the likelihood of dependency at death." *Lucas*, 427 U.S. at 509.

The provisions of the Louisiana Civil Code cited by claimant in her brief establish that there is a presumption that a parent is obligated to provide support to his or her acknowledged illegitimate child. See La.Civ.Code art. 230, 240; La. Rev. Stat. §9:315.1. However, two criteria must be met before illegitimate children may receive support. These criteria are: “(1) having been legally acknowledged by both father and mother, or by either of them from whom they claim alimony, and (2) prove in a satisfactory manner that they stand absolutely in need of such alimony for their support.” *Haynes v. Cargo*, 422 So.2d 267, 268 (La. Ct. App. 1982). These issues must be resolved by the court. See *id.*; *Williams v. Williams*, 527 So.2d 1068 (La. Ct. App. 1988). Moreover, in the context of establishing dependency under the state workers’ compensation statute, the Louisiana Court of Appeal has stated that, “The mere existence of a need of support, or moral or legal obligation to support, is not sufficient to show dependency.” *Venable v. Liberty Mutual Ins. Co.*, 142 So.2d 639, 642 (La. Ct. App. 1962); see also *Broussard v. West-Cal Constr. Co., Inc.*, 676 So.2d 743 (La. Ct. App. 1996). Thus, as no findings of fact were made regarding Kylee’s need for support, we reject claimant’s contention that, were we to apply state law, she would be entitled to a presumption of dependency.

Moreover, given the well-settled law under the Act, we hold that the administrative law judge properly determined the issue to be whether Kylee was “dependent” on decedent, within that term’s common meaning. See *Jones*, 18 BRBS 68; *Bonds*, 17 BRBS 170. In this regard, the administrative law judge’s finding that Kylee was not dependent on decedent is supported by substantial evidence of record. Kylee was born in 1987. For the first six years of her life, decedent neither visited nor provided any support for Kylee. In 1993, for an eight-month period, decedent visited Kylee approximately once a month, gave her gifts, and provided claimant with some money for Kylee’s support. During this eight-month period, claimant petitioned a court for child support to be paid by decedent. Decedent countered with a petition for joint custody. Neither petition was pursued, and decedent thus was not ordered to provide child support for Kylee. The administrative law judge inferred from the fact that claimant abandoned her claim for child support that claimant elected not to rely on decedent for the support of their daughter. Moreover, the administrative law judge found that, after this eight-month period, Kylee had virtually no contact with decedent and that no support was provided for her benefit. He thus concluded that Kylee is not entitled to death benefits under the Act, as she was not in any way dependent upon decedent at the time of his death. These findings are not contested on appeal, and they are rational, supported by substantial evidence and in accordance with law. Therefore, we affirm the denial of death benefits.

Accordingly, the administrative law judge’s Decision and Order denying benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge