BRB No. 97-901

GWENDOLYN L. JORDAN (Widow of ALVIN JORDAN)	)	
Claimant-Respondent	)	DATE ISSUED:_____
v.	)	
VIRGINIA INTERNATIONAL TERMINALS	)	
Self-Insured Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh and Matthew H. Kraft (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

R. John Barrett and Kelly O. Stokes (Vandeventer, Black, Meredith & Martin, L.L.P.), Norfolk, Virginia, for self-insured employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (96-LHC-645) of Administrative Law Judge Fletcher E. Campbell, Jr., 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent sustained a back injury on January 29, 1986, while working for employer. Pursuant to a compensation order, decedent was awarded permanent partial disability benefits, and employer was awarded relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Dir. Ex. 4; *see also* Emp. Ex. A. Due to causes directly related to his back injury, he died on April 27, 1994. Decision and Order at 2; Dir. Ex. 5. After his death, claimant pursued and obtained death benefits under Section 9 of the Act, 33 U.S.C. §909. Dir. Exs. 1, 6. Thereafter, the Director, Office of Workers' Compensation Programs, as administrator of the Special Fund, filed a notice of suspension of payment of death benefits because he determined claimant was not decedent's widow and therefore was not entitled to death benefits. Dir. Ex. 1. These proceedings followed.

The administrative law judge found that the facts of this case are not in dispute, and he found that claimant is not a "widow" under Virginia law. Additionally, he found no common law marriage had been created under the laws of any state to which claimant and decedent had traveled. Decision and Order at 4. However, he held that his inquiry does not end there, and, applying the criteria the Board set forth in *Trainer v. Ryan-Walsh Stevedoring Co.*, 8 BRBS 59 (1978), *aff'd in part and rev'd in pert. part*, 601 F.2d 1306, 10 BRBS 852 (5th Cir. 1979), he found that claimant is a "widow" within the meaning of the Act and is entitled to benefits. Decision and Order at 5. Although the administrative law judge noted that the United States Courts of Appeals for the Fifth, Ninth and District of Columbia Circuits have rejected such an approach, he stated that the United States Court of Appeals for the Fourth Circuit, wherein this case arises, has not done so; therefore, the Board's decision in *Trainer* is still binding precedent in cases arising in the Fourth Circuit. *Id.* Employer appeals this decision, and claimant responds, urging affirmance.[1]

Employer's sole contention is that claimant is not a "widow" under the Act and is not entitled to benefits. It argues that the administrative law judge improperly relied on the Board's decision in *Trainer* to determine claimant's marital status. Rather, it asserts, the administrative law judge should have ceased his analysis after determining that claimant is not a "widow" under Virginia law. Claimant responds, urging affirmance of the decision

[1]Although the Special Fund was paying claimant's benefits, employer has standing to challenge the award. 33 U.S.C. §908(f)(2)(B); 20 C.F.R. §702.148.

on the grounds that it is supported by substantial evidence and in accordance with law.[2]

[2]Also, according to employer, claimant and decedent did not satisfy the requirements for creating a common law marriage in any state they visited. The administrative law judge agreed with employer, so there is no contention of error on this point. Claimant, however, argues that she and decedent consummated a valid common law marriage in South Carolina as additional support for affirming the decision. Claimant's argument is raised in a response brief as an alternate avenue for reaching the same favorable judgment as in the administrative law judge's decision, *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987), and shall be addressed, *infra*.

Before addressing the law on this issue, the following facts are pertinent to the resolution of this case. Claimant and decedent were married in Portsmouth, Virginia on March 11, 1969. They resided in Virginia and bore two children together. Because she was being physically abused, claimant moved out of the domicile and filed for divorce in 1978. The state of Virginia granted her a divorce, and custody of the two children, on November 15, 1979. Emp. Ex. D; Tr. at 17-20. While claimant was living with decedent's mother, decedent moved into an apartment. Seven months after the divorce, claimant and decedent reconciled, and she and the children moved in with decedent with the stipulation that he not physically abuse her again. Tr. at 21-27. Decedent kept his promise, and both fulfilled their "marital" obligations.[3] Tr. at 28. With the exception of two periods in 1990, claimant and decedent continued to live together. Both periods, one of approximately five months and one of several weeks, were preceded by non-physical arguments. During these separations, claimant and the children lived with decedent's relatives. Tr. at 29, 44.

Claimant testified that she and decedent often traveled together, reserving rooms as husband and wife when they did not stay with relatives. These trips included several prolonged trips to visit family members and several lengthy vacations.[4] Tr. at 31-38, 42. According to claimant, neither of them worked during their time in other states and they always retained their Virginia apartment as their home. Tr. at 41, 43. She also stated that decedent always introduced her as "his wife," that they received mail as "Mr. and Mrs." and that they filed joint income tax returns until decedent became disabled and no longer had to file. Tr. at 30, 43. Although they never officially remarried, claimant stated that their relationship after 1979 was "totally different from [their] first marriage. . . ." Tr. at 43, 46.

Section 2(16) of the Act defines the terms "widow" and "widower" as including:

> only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death; or living apart for justifiable cause or by reason of his or her desertion at such time.

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[3]Claimant testified that she performed her duties as a wife and decedent supported her and their children. Decedent paid all medical bills, rent and utilities, and he listed claimant as his wife on his ILA insurance. Tr. at 28, 39. On occasion, claimant worked as a nurse's assistant. Tr. at 43.

[4]They visited South Carolina and Pennsylvania most often, as well as Indiana, Florida, and Texas. Tr. at 31-38, 42.

33 U.S.C. §902(16). In the instant case, it is undisputed that claimant and decedent lived together at the time of his death. Therefore, at issue is only whether she was decedent's wife at the time of his death. *See Griffin v. Bath Iron Works Corp.*, 25 BRBS 26 (1991) (clauses of Section 2(16) are to be read in the disjunctive, providing alternative conditions for qualifying for benefits). The Act, however, does not define the terms "husband" or "wife;" therefore, we must look to the rules of statutory construction to define these terms. The Supreme Court has held that when Congress does not define a term in a federal statute, the proper course is to look to the law of the relevant state for such definition. *Seaboard Air Line Railway v. Kenney*, 240 U.S. 489 (1916).[5] In determining whether a claimant qualifies as a "husband" or "wife" in cases arising under the Act, the normal course of action, with the notable exception of the 1978 Board decision in *Trainer*, has been to follow *Kenney* and to look to state law for the definition. *Ryan-Walsh Stevedoring Co., Inc. v. Trainer*, 601 F.2d 1306, 10 BRBS 852 (5th Cir. 1979), *rev'g in pert. part* 8 BRBS 59 (1978); *Marcus v. Director, OWCP*, 548 F.2d 1044, 5 BRBS 307 (D.C. Cir. 1976); *Powell v. Rogers*, 496 F.2d 1248 (9th Cir.), *cert. denied*, 419 U.S. 1032 (1974); *Albina Engine & Machine Works v. O'Leary*, 328 F.2d 877 (9th Cir. 1964), *cert. denied*, 379 U.S. 817 (1964); *E.W. Coslett & Sons, Inc. v. Bowman*, 354 F.Supp. 330 (E.D. Pa.), *aff'd*, 487 F.2d 1394 (3d Cir. 1973); *Gibson v. Hughes*, 192 F.Supp. 564 (S.D. NY 1961); *Keyway*

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[5]At issue in *Kenney* was the definition of the phrase "next of kin" in the Federal Employer's Liability Act, 45 U.S.C. §51 *et seq.* (1910). The Court stated:

> Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But, as speaking generally under our dual system of government, who are next of kin is determined by the legislation of the various states to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law.

Kenney, 240 U.S. at 493-494.

Stevedoring Co. v. Clark, 43 F.2d 983 (D. Md. 1930). The Board departed from the norm in its decision in *Trainer*, 8 BRBS at 59, which was reversed in pertinent part by the Fifth Circuit.

In *Trainer*, the Board established "new guidelines for construing 'widow' and 'widower' as those terms are used in the Act." *Trainer*, 8 BRBS at 65. Specifically, the Board stated that the new guidelines omit the need to look to state law and that:

> [F]or purposes of receiving death benefits under the Act, it shall be conclusively established that a claimant is a 'widow' or 'widower' if, at the time of death of the employee, and for at least ten years prior to his or her death, the employee and the claimant had lived together in the same household and held themselves out to their relatives, friends, neighbors and tradespeople in the community in which they resided as husband and wife. Joint ownership of real and personal property, joint bank accounts, and joint tax returns are some factors which may be considered as evidence that the employee and claimant held themselves out as husband and wife. However, where the evidence shows that the employee and the claimant had lived together for a substantial period of time, but for less than ten years, then, based upon the evidence in the record considered as a whole and the purposes of the Act, in the exercise of sound judgment a deputy commissioner or administrative law judge shall decide whether the claimant should be deemed a 'widow' or 'widower.' In making that decision, a deputy commissioner or administrative law judge shall take into consideration all of the facts and circumstances in evidence that have a bearing upon the relationship of the employee and the claimant during the time they lived together. Among the circumstances to be considered are those, enumerated above, in regard to 'holding themselves out as husband and wife.' However, any 'widow' or 'widower' claim based on living together, as described above, cannot prevail if another claimant proves 'widow' or 'widower' status on the basis of (1) a valid ceremonial or common law marriage to the deceased employee, and (2) fulfillment of the other requirements of Section 2(16) - that is, by proof that the claimant was dependent for support upon the employee at the time of death, or that the claimant and the employee were living apart at the time of death for justifiable cause or by reason of the employee's desertion.

Trainer, 8 BRBS at 65-66. The Board justified this departure from the norm by stating that reliance on state law is not a "rule" of domestic relations but is merely the customary approach that "carries no statutory or constitutional mandate. . . ." *Id.* at 67. The Board further reasoned that use of state law is not a "rule" because the Supreme Court formulated its own test for determining when a claimant qualifies under the Act as a "deserted spouse" or one who is living apart for justifiable cause in *Thompson v. Lawson*, 347 U.S. 334 (1954). *See* discussion *infra*. The Board continued, explaining that the purpose for creating these guidelines, or what would be "federal common law," is to

develop a uniform method of ensuring that the laws of various states do not interfere with the federal compensation scheme under the Act. *Trainer*, 8 BRBS at 67, 72-73. Further, the Board stated that its construction of the terms "widow" and "widower" is not unprecedented, as the Social Security Administration promulgated regulations similar to the Board's guidelines for use in another "remedial statute with a beneficent purpose." *Id.* at 77-78.

The Fifth Circuit, however, did not agree with the Board. In reversing the Board in its decision in *Trainer*, the Fifth Circuit held that state law is dispositive of whether a claimant is the "wife" of an employee; therefore, it was improper for the Board to apply its own guidelines rather than applicable state domestic relations law.[6] According to the court, if the application of state law produces results contrary to the purposes of the Act, then it is for Congress to reform the legislation. *Trainer*, 601 F.2d at 1313-1315, 10 BRBS at 857-859. In rejecting the Board's guidelines, the court specifically stated that the Supreme Court's decision in *Thompson* should not be interpreted "as authorizing the creation of a federal common law of marriage to determine whether the claimant, in the first instance, was married to the deceased employee." *Id.,* 601 F.2d at 1315, 10 BRBS at 859; *see* discussion *infra*.

We hold that the Board's decision in *Trainer* is not valid precedent, and the test enunciated therein should not be applied to this or any other case. Rather, an administrative law judge must consider relevant state law when defining the terms "husband" and "wife" in the Act, as these terms have been left undefined by Congress. There is significant case precedent which indicates that the validity of a marriage, and hence the status of a "wife" under the Act, is a matter of state law. Besides the Fifth Circuit in its decision in *Trainer*, the United States Courts of Appeals for the Ninth and District of Columbia Circuits also have held that the proper course is to examine the law of the forum of the marriage to determine whether a claimant can be considered a "husband" or "wife" under the Act. *Marcus*, 548 F.2d at 1047, 5 BRBS at 308; *Powell*, 496 F.2d at 1250. In *Marcus*, the D.C. Circuit held that a claimant did not qualify as a "husband" under the local law of the District of Columbia. Not only had he and the decedent not undergone a marriage ceremony, but he failed to establish that they properly contracted a common law marriage recognizable by the District. Consequently, the court affirmed the denial of death benefits. *Marcus*, 548 F.2d at 1047-1049, 5 BRBS at 309-312. In *Powell*, the Ninth Circuit denied the claimant death benefits, holding that she was neither a lawful wife nor a putative

[6]The Fifth Circuit also concluded that the case could be challenged on the grounds that the Board, a quasi-judicial body, is not empowered to administer the Act or create rules. *Trainer*, 601 F.2d at 1314 n.7, 10 BRBS at 857-858 n.7. Thus, it found the Board's analogy to the Social Security Administration inapposite.

wife. Rather, the claimant's status was that of common law wife which is a status not recognizable by California or Nevada, the two states with which the decedent and the claimant had significant contacts. *Powell*, 496 F.2d at 1250. In an earlier case, *Albina Engine*, 328 F.2d at 877, the Ninth Circuit relied on the laws of Oregon and Idaho, and found that the claimant and the decedent had contracted into a valid common law marriage under the laws of both states. Thus, she was entitled to benefits upon her husband's death. *Id.* at 877.

Three district courts also followed a similar analysis when addressing this issue under the Act. In 1973, the United States District Court for the Eastern District of Pennsylvania held that, as there were no impediments to the marriage, the claimant was the common law wife of the decedent under Pennsylvania law, and as such, she was entitled to benefits under the Act upon his death. *Bowman*, 354 F.Supp. at 330. The United States District Court for the Southern District of New York held that the marriage between the claimant and the decedent, which took place in French Morocco before his divorce from his first wife became final, was valid under French law. Under that law, there is a presumption that a marriage which has been celebrated and recorded is valid until there is a court action brought to invalidate it. Thus, the claimant was entitled to benefits under the Defense Base Act, 42 U.S.C. §1651 *et seq.* *Gibson*, 192 F.Supp. at 564. Finally, the United States District Court for the District of Maryland held, in 1930, that the claimant was not entitled to death benefits under the Act. It relied on Maryland law to uphold the deputy commissioner's determination that the claimant was the decedent's common law wife. However, because Maryland does not recognize common law marriages, it reversed the deputy commissioner's award of benefits. *Clark*, 43 F.2d at 983.

Additionally, employer relies on *Bell v. Tug Shrike*, 332 F.2d 330 (4th Cir. 1964), *cert. denied*, 379 U.S. 844 (1964), in support of its argument that the administrative law judge should have considered his inquiry complete after examining Virginia law. In *Bell*, the Fourth Circuit addressed the validity of a marriage of the claimant to a seaman under the Jones Act, 46 U.S.C. §688 *et seq*. Specifically, the court held that a woman who entered into a bigamous marriage with a seaman prior to his divorce from his first wife, but did not remarry him after his divorce became final, was not his "surviving widow" notwithstanding her dependency on him or the lack of other claimants. Thus, she held the status of common law wife, but because common law marriages cannot come into being in Virginia, the claimant was denied benefits. *Bell*, 332 F.2d at 331, 336-337.

In a pre-*Trainer* case, the Board held that in determining the validity of an alleged common law marriage, it must look to the law of the state in which the alleged marriage was contracted. *McMillan v. Gardinier, Inc.*, 6 BRBS 650 (1977). In *McMillan*, the Board relied on *Thompson*, *Albina Engine*, *Marcus*, and *DeSylva v. Ballentine*, 351 U.S. 570, *reh'g denied*, 352 U.S. 859 (1956) and 362 U.S. 907 (1960), to support its reliance on state domestic relations law for determining the validity of a marriage.[7] *McMillan*, 6 BRBS

[7] *DeSylva* involved an action by the mother of an illegitimate child of an author,

at 652. After finding the evidence of record insufficient to support the determination that a common law marriage existed, the Board remanded the case to the administrative law judge for reconsideration, permitting him to admit new evidence on the validity of a common law marriage pursuant to Georgia law. *Id.* at 655. In *Bonds v. Smith & Kelly Co.*, 17 BRBS 170 (1985), the Board addressed the definition of the term "dependent" in assessing whether a claimant fell within the scope of the term "child" under the Act. It stated:

> Although it is sometimes appropriate to resort to local law for the definition of terms not defined in the Act, this approach is only appropriate when the term does not have a clear, common meaning and 'reasonable doubt exists as to the proper meaning of a term.' * * * In both *Marcus* and *Trainer*, state law was relied upon to define the terms "husband" and "wife." These terms cannot be easily defined, and involve matters of particular state importance. . . .

Bonds, 17 BRBS at 172 (citations omitted). In two other cases, which arose subsequent to

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against the author's widow, to protect the child's interest in the renewal of the author's copyrights. The Court addressed whether the illegitimate child is included within the term "children." Although it noted that the scope of a federal right is a federal question, it stated that such right need not be determined by federal law. Specifically, the Court stated:

> This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.

DeSylva, 351 U.S. at 580. Only the two dissenting Justices, Douglas and Black, felt the "statutory policy of protecting dependents would be better served by uniformity, rather than by diversity which would flow from incorporating into the [Copyright Act] the laws of the forty-eight states." *Id.* at 583.

Trainer and concerned the issue of whether the claimants qualified as widows, the Board followed state law. *Smith v. Sealand Terminal, Inc.*, 14 BRBS 844 (1982) (Board compelled to use state law in this case which arose in the Fifth Circuit, but Board reasserted its reasoning for establishing the *Trainer* guidelines, stating that avoidance of state conflicts, uniformity, and proper interpretation of the Act are of paramount concern); *Bowman v. Riceland Foods*, 13 BRBS 747 (1981) (Board applied state law but noted that the claimant also was entitled to benefits under *Trainer*, and that it would continue to adhere to those guidelines). Thus, other than the *Trainer* case itself, the Board has followed precedent relying on state law to define terms under the Act which "involve matters of particular state importance."

In light of the overwhelming case precedent adhering to the rule requiring reliance on state law to define a term when a federal statute has failed to do so, we hold that the rule, which is well-established and not merely "customary," shall be used to define the terms "wife" and "husband" in cases arising under the Act. Not only do we decline to resurrect the *Trainer* guidelines in the face of this precedent, but we acknowledge their invalidity in view of the Fifth Circuit's reversal of *Trainer*. Moreover, we agree with employer that authority for creating this test is lacking. Initially, we note that courts have discussed and rejected the argument for creating a federal common law for determining the validity of a marriage. Reasons for rejecting such an assertion are two-fold. First, the courts have trouble with the judiciary over-stepping its limits by writing law, and second, they tend to agree that determination of the existence of a valid marriage belongs in the realm of domestic relations law, of which there is no federal counterpart.[8] *Trainer*, 601 F.2d at 1315, 10 BRBS at 858-859; *Powell*, 496 F.2d at 1251; *Bell*, 332 F.2d at 336-337; *see also Clark*, 43 F.2d at 984 (court rejected contention that a "common law definition" should be used to maintain uniformity). Additionally, the courts in both *Trainer* and *Powell* specifically stated that the Supreme Court's holding in *Thompson* should not be construed so broadly as to mean that a "conjugal nexus" is all that is required to form a marriage in the first instance.[9]

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[8]*But see General Dynamics Corp. v. Director, OWCP*, 585 F.2d 1168 (1st Cir. 1978) (when state workers' compensation law defines marital status, that definition is preferred over domestic relations definition).

[9]In *Thompson*, 347 U.S. at 334, the Supreme Court was faced with a situation arising under the Act wherein it had to determine the status of a wife who was originally deserted by her husband, the decedent. She later "married" and "divorced" another man and still later refused the decedent's request to reconcile. In determining that she did not qualify as a "widow" under the Act, the Supreme Court created a rule to ascertain whether a deserted wife held that status at the time of the decedent's death. The Court specifically stated:

> We do not reach this conclusion by assessing the marital conduct of the parties. That is an inquiry which may be relevant to legal issues arising under State domestic relations law. Our concern is with the proper interpretation of the Federal Longshoremen's Act. * * * Considering the

In other words, the Court created the "conjugal nexus" test, not to determine whether a marriage had been created, but to fill a gap in federal and state law and determine whether a marital relationship still existed where the two were no longer living together at the time of entitlement. *Trainer*, 601 F.2d at 1315, 10 BRBS at 859; *Powell*, 496 F.2d at 1251; *see also Thompson*, 347 U.S. at 336-337. Consequently, we abandon the Board's *Trainer* guidelines, and we vacate the administrative law judge's finding that claimant is a "widow" pursuant to those guidelines. We hold that state law must be applied to this case to assess claimant's marital status.[10]

The administrative law judge in the case at bar specifically held that claimant does not qualify as a "wife" or "widow" under Virginia law. Decision and Order at 4. Claimant and decedent were married, divorced, and residing in Virginia at the time of his death. Although they lived together for approximately 13 years after the final divorce, they never remarried in accordance with Virginia law, Tr. at 43, and Virginia does not recognize common law marriages. Va. Code Ann. §20-13 (1950); *Bell*, 332 F.2d at 330. However,

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> purpose of this federal legislation and the manner in which Congress has expressed that purpose, the essential requirement is a conjugal nexus between the claimant and the decedent subsisting at the time of the latter's death, which for present purposes, means that she must continue to live as the deserted wife of the latter. That nexus is wholly absent here.

Thompson, 347 U.S. at 336-337. Using the "conjugal nexus" rule, it agreed with the lower court that the claimant, at the time of the decedent's death, was not "living apart from him 'by reason of his desertion[.]'" *Thompson*, 347 U.S. at 336.

[10]Similar results can be found where other definitions were required in cases before the Board. Where the issue involved the definition of "child" under Section 2(14), 33 U.S.C. §902(14), the Board concluded that the terms "acknowledged" and "dependent" are general terms which can be given a clear definition without resorting to state law. *Jones v. St. John Stevedoring Co., Inc.*, 18 BRBS 68 (1986), *aff'd in pert. part sub nom. St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987); *Bonds*, 17 BRBS at 170. When the issue raised concerned the definition of the specific term "*in loco parentis*," the Board affirmed the administrative law judge's reliance on Louisiana law to determine that the decedent did not hold that status. *Franklin v. Port Allen Marine Service*, 16 BRBS 304 (1984). When determining whether a claimant was a "minor" under Section 10(e), 33 U.S.C. §910(e), the Board initially held that a federal common law definition should be applied to keep results under the Act uniform, and it reiterated its adherence to its *Trainer* decision and rationale. *Stokes v. George Hyman Constr. Co.*, 14 BRBS 698 (1981). Following remand, however, after an intervening case from the D.C. Circuit held that the D.C. Act is a "local law" which needs to be interpreted as such, the Board affirmed the administrative law judge's use of D.C. law to define the age of majority. *Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986) (citing *Hall v. C&P Telephone Co.*, 793 F.2d 1354 (D.C. Cir. 1986)).

claimant argues that she and decedent entered into a valid common law marriage in the state of South Carolina and that Virginia accepts common law marriages originating in other states which recognize them.

Virginia requires a license and solemnization for the creation of a valid marriage within its borders, Va. Code Ann. §20-13 (1950), and it does not permit common law marriages to be consummated within the state. *Bell*, 332 F.2d at 330; *Ford v. American Original Corp.*, 475 F.Supp. 10 (E.D. Va. 1979). As a matter of record, claimant and decedent were divorced in 1979. Additionally, claimant testified that they were never "remarried," *i.e.*, no marriage ceremony was ever performed after the divorce became final. Therefore, there existed no legal marriage between the two according to the Virginia statute. However, if a couple contracts a valid common law marriage in a state which recognizes such a union, and the two people could have legally been married in the Commonwealth of Virginia, then Virginia recognizes the marriage. *Metropolitan Life Ins. v. Holding*, 293 F.Supp. 854 (E.D. Va. 1968); *Kelderhaus v. Kelderhaus*, 21 Va. App. 721, 467 S.E.2d 303 (1996). Accordingly, in order to properly apply Virginia law in its entirety, we must address claimant's assertion that she and decedent consummated a valid common law marriage in another state. *See McMillan*, 6 BRBS at 655.

Claimant contends she and decedent established a valid common law marriage under the laws of South Carolina. Employer argues that none of the couple's trips to other states resulted in the formation of a common law marriage.[11] To establish a common law

[11]Although Pennsylvania and Texas recognize common law marriages, Tex. Fam. Code Ann. §1.91; *Bowman*, 354 F.Supp. at 332; *Winfield v. Renfro*, 821 S.W.2d 640 (Tex. Ct. App. 1991), claimant does not assert that she and decedent formed a valid common law marriage in either state. Indiana and Florida no longer permit the consummation of common law marriages within their borders. Fla. Stat. §741.211 (1986) (common law marriages entered into after January 1, 1968, are void); Ind. Code §31-7-6-5 (common law marriages entered into after January 1, 1958, are void). With regard to whether claimant and decedent consummated a common law marriage in a state other than South Carolina, the administrative law judge merely stated: "None of the other states in which the couple spent a substantial amount of time recognizes common-law marriage in any way helpful to Claimant." Decision and Order at 4.

marriage in South Carolina, there must be

> a mutual agreement between the parties to assume toward each other the relation of husband and wife. Cohabitation without such an agreement does not constitute marriage.

Johnson v. Johnson, 112 S.E.2d 647, 651 (S.C. 1960); *see also United States of America v. Seay*, 718 F.2d 1279 (4th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984). Also necessary is a reputation in the community of being married. *In re Estate of Greenfield*, 141 S.E.2d 916 (S.C. 1965).

In this case, the administrative law judge held that the couple's seven- or eight-month sojourn in South Carolina did not create a common law marriage. Specifically, he found that the couple did not change their residence to South Carolina, but instead maintained their Virginia home. Additionally, he found that they did not gain a reputation as a married couple where the relatives with whom they visited knew they were divorced. Decision and Order at 4. Our analysis of this issue leads us to the conclusion that the administrative law judge did not fully apply South Carolina law to determine whether a valid marriage existed. Although claimant testified that relatives knew that she and decedent had divorced, she also stated that the divorce was not something they made public and that she was always introduced as decedent's wife to others in the community.[12] Tr. at 33. South Carolina specifically requires a reputation to be gained in the "community." The administrative law judge did not discuss the couple's reputation among the general community but instead restricted his conclusion to the couple's relatives.[13] However, in *Greenfield*, the Supreme Court of South Carolina stated that the "community" is

> composed of those persons who have had the opportunity, through social or business contact, to form an opinion of the character of the person, or of the relationship, under inquiry. * * * A witness who has observed the attitude of the community toward the marital status under inquiry as shown by its acceptance of the couple into its society as husband and wife, or by its refusal to so accept them, is competent to testify to reputation in that regard, and is not disqualified because his testimony is founded upon observation rather than discussion.

Greenfield, 141 S.E.2d at 920. There is evidence in the record that claimant and decedent

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[12]Q: "How would he introduce you to people and to his family when you would visit them such as this occasion in South Carolina?" A: "He always said my wife." Tr. at 33.

[13]According to claimant, who was the sole witness at the hearing, she and decedent stayed with decedent's aunt and uncle in South Carolina. Claimant later agreed that the "family members" they visited knew of the divorce. Tr. at 32-33. It is unclear whether this includes more than just the aunt and uncle.

held themselves out as husband and wife to the public in South Carolina, and such evidence was not considered by the administrative law judge; therefore, remand is required.

Additionally, the administrative law judge's reliance on the couple's lack of South Carolina residency appears to be misplaced. *Parker v. Parker*, 46 N.C.App. 254, 265 S.E.2d 237 (1980). In *Parker*, a couple sought a divorce in North Carolina. The plaintiff appealed the lower court's determination that she and the defendant were not lawfully married. The appellate court vacated the ruling and remanded the case for further consideration of the facts, applying South Carolina law with regard to the existence of a valid marriage. Specifically, the court held that the fact that neither the plaintiff nor the defendant was a resident of South Carolina is not controlling in determining whether they created a common law marriage in that state. *Parker*, 46 N.C.App. at 257, 265 S.E.2d at 239. Indeed, the court stated that the couple, who lived together in South Carolina as husband and wife for six weeks, "could have contracted a common law marriage in South Carolina during that period." *Id.*, 46 N.C.App. at 258, 265 S.E.2d at 240. In researching South Carolina law to resolve this issue, the court discovered "no South Carolina authority requiring a minimum period of cohabitation within the State for establishment of a common law marriage[.]"[14] *Id.* Further it acknowledged:

> where establishment of the relationship is dependent upon an agreement between the parties to act toward one another as husband and wife, no such minimum period of cohabitation has been required. *See Bloch v. Bloch*, 473 F.2d 1067 (3rd Cir. 1973) (agreement to be husband and wife during three-day vacation to jurisdiction recognizing common law marriage sufficient to establish the existence of such marriage).

Id.; *see also* 52 Am. Jur. 2d §96 (there is a split among jurisdictions as to whether common law marriages will arise after brief sojourns in states permitting them).

The Supreme Court of South Carolina has specifically held that the existence of a common law marriage is a question of fact which may be found on the basis of an express contract or may be inferred from the circumstances. *Johnson*, 112 S.E.2d at 651. Because the existence of a marriage is a question of fact, we vacate the administrative law judge's finding that no common law marriage arose in South Carolina, and we remand this case for him to reconsider whether a valid marriage existed under South Carolina law. Specifically, he must determine whether claimant and decedent created a common law marriage during their visits to South Carolina, the longest visit spanning seven or eight months. If no marriage was consummated in South Carolina, then there is no valid marriage for Virginia to recognize, and under Virginia law claimant is not a "widow" entitled to Section 9 benefits under the Act. *See Marcus*, 548 F.2d at 1049-1050, 5 BRBS at 312; *Powell*, 496 F.2d at

[14]Our research bears out this statement.

1250; *Clark*, 43 F.2d at 985. However, if the administrative law judge finds that a common law marriage was created in South Carolina, then as Virginia honors such marriages, claimant is decedent's widow and is entitled to death benefits pursuant to Section 9 of the Act. *See Albina Engine*, 328 F.2d at 877; *Bowman*, 354 F.Supp. at 330; *Gibson*, 192 F.Supp. at 564; *Kelderhaus*, 21 Va. App. at 721, 467 S.E.2d at 303; *Smith*, 14 BRBS at 847-850; *Bowman*, 13 BRBS at 752-754.

Accordingly, the administrative law judge's determinations that claimant is a "widow" under the Act pursuant to *Trainer* and that she failed to establish the existence of a valid common law marriage are vacated. The case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
JAMES F. BROWN
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge