

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CLARA F. HOLLAND,)
)
 Petitioner,)
)
 vs.) Case No. 98-3886
)
 DIVISION OF RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on March 19, 1999, in Quincy, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Stanley M. Danek, Esquire
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For Respondent: Robert B. Button, Esquire
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STATEMENT OF THE ISSUE

The issue is whether to grant Petitioner's request that her deceased husband's selection under the Florida Retirement System be changed from Option 1 to Option 3.

PRELIMINARY STATEMENT

This matter began on June 17, 1998, when Respondent, Division of Retirement, issued a letter advising Petitioner, Clara F. Holland, that it was denying her request that her deceased husband's selection under the Florida Retirement System be changed from Option 1 to Option 3. Petitioner then requested a formal hearing under Section 120.569, Florida Statutes, to contest the proposed action.

The matter was referred by Respondent to the Division of Administrative Hearings on September 1, 1998, with a request that an Administrative Law Judge be assigned to conduct a formal hearing. By Notice of Hearing dated September 22, 1998, a final hearing was scheduled on January 20, 1999, in Sneads, Florida. At the parties' request, the case was continued to March 19, 1999, in Quincy, Florida.

At the final hearing, Petitioner testified on her own behalf and presented the testimony of J. C. McDaniel, a family friend; Judith Pinkston, a neighbor; Savannah Comerford, a former co-worker of her deceased husband; and Karen J. Wood, her daughter. Also, she offered Petitioner's Exhibits 1-6. All exhibits were received in evidence. Exhibit 6 is the deposition of Linda Blake Boynton, a retired speech language pathologist, who was accepted as an expert in speech pathology. Respondent presented the testimony of William Nelson, Jr., chief of police of Sneads, Florida; Clara F. Holland; Paula M. Kazmirski, an agency benefit

programs supervisor analyst; and Margaret H. White, the decedent's sister. Also, it offered Respondent's Exhibits 1-5. All exhibits were received in evidence.

The Transcript of the hearing was filed on April 7, 1999. By agreement of the parties, the time for filing proposed findings of fact and conclusions of law was extended to May 28, 1999. The same were timely filed by the parties, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. In this retirement dispute, Petitioner, Clara F. Holland, seeks to change her late husband's selection under the Florida Retirement System from Option 1 to Option 3 on the ground he was mentally incompetent to make a rational decision when the selection was made. Respondent, Division of Retirement (Division), has denied the request on the grounds that the late husband, William T. Holland (Holland), cashed or deposited his Option 1 retirement benefits from February 1993 until his death in December 1997, and that the law prohibits a change of options under these circumstances.

2. Counting his state and military service, Holland accrued almost thirty years of creditable service with the Florida Retirement System between 1959 and early 1993, when he retired,

due to a disability. In the spring of 1990, while employed at Florida State Hospital as a vocational instructor II, he first began contemplating retirement and contacted the Division requesting an estimate of benefits.

3. In April or May 1990, Holland was sent an estimate of benefits, a pamphlet entitled "Preparing to Retire," and an "OPT FRS form," which explained in detail the various retirement options available. Among these were Options 1 and 3. In general terms, the first option paid the largest monthly benefits but terminated upon the death of the retiree. The third option paid smaller benefits, but if the retiree predeceased his spouse, the spouse would continue receiving benefits for her lifetime. This was fully explained in the form.

4. On October 8, 1992, Holland was admitted to Tallahassee Community Hospital (TCC) suffering from recurrent transient ischemic attacks. After various tests were run, Holland underwent an emergency carotid endarterectomy to alleviate a blockage in his left carotid artery. During that surgery, he suffered a stroke, which, among other things, paralyzed his left side and temporarily confined him to a wheelchair. Immediately after the stroke, he could not speak or recognize family members, and he was totally dependent on others.

5. Holland was eventually discharged from TCC on October 22, 1992, and referred to Capital Rehabilitation Hospital (CRH) for additional physical and speech therapy. At the time of

discharge from TCC, his treating neurologist, who did not testify at final hearing, noted in the patient records, and without further explanation, that he had "returned to essentially his normal mental status." As a medical record, and an exception to the hearsay rule, this notation constitutes the only competent evidence of record from a medical doctor concerning Holland's mental status at that time.

6. Holland remained at CRH until November 25, 1992, or the day before Thanksgiving. During his month-long stay at CRH, he was given a course of rehabilitation treatment which included physical therapy, occupational therapy, speech therapy, psychology, and recreation. In addition, his brain function was evaluated by a certified speech language pathologist, Linda Boynton, who presented expert testimony as a speech pathologist in this cause.

7. Boynton had no independent recollection of Holland; instead, she based her deposition testimony on the evaluation and testing data she compiled in October and November 1992 while treating him. According to Boynton, because of a deficit in the right side of his brain, Holland was disoriented in terms of time and date; his brain could not interpret all of the images that it was picking up; he had difficulty with remembering, retaining, or recalling facts; and he had problems with the higher levels of mental activity. In addition, while he could read "chunks" of words, he could not read whole sentences. She also opined that

at the time she was evaluating him, Holland would have been unable to remember the information contained in the four retirement options even if it was explained to him.

8. Boynton conceded, however, that Holland's stroke was "mild," his comprehension was "adequate," and he scored "moderate" in the cognitive areas. She also confirmed that stroke victims could improve in a matter of days, and that everyone's recovery is different. She had no firsthand knowledge of Holland's mental status on November 7, 1992, the critical date in this dispute. Finally, Boynton was not a medical doctor, and her expertise was limited to speech pathology. For these reasons, her testimony has not been accorded the weight given to the notation in Holland's medical records during his stay at TCH.

9. Shortly after being transferred to CRH, that facility began allowing Holland to go to his home in Sneads, Florida, on "weekend passes." While at home on November 7, 1992, a Saturday, Holland decided to make application for disability retirement with the State. The record does not reflect the person who actually obtained the retirement papers from the Division, but Holland's daughter carried them to his treating physicians so that they could verify in writing the nature of his disability.

10. With the assistance of his wife, Holland completed Division Form FR-13 and selected Option 1, which extended retirement benefits for his lifetime only. In his wife's words, Option 1 was selected because "I don't think we knew we had a

choice." At that time, Petitioner says her husband was still strapped in a wheelchair, he was mentally confused, and he could only briefly converse with others. Petitioner also signed the form since there is a requirement that if Option 1 is selected by a married retiree, the spouse must sign the form.

11. Petitioner telephoned William "Bubba" Nelson, Jr., a second cousin who was chief of police in Sneads, and asked that he stop by the house that morning, witness Holland sign the form, and notarize the application. Nelson agreed and notarized the document as requested. The entire visit took no more than five minutes.

12. At hearing, Nelson recalled that Holland used a walker to come into the den to sign the document; he did not appear to be "confused" when he signed the application; he did not ever lose his train of thought; he did not struggle to think of a word while speaking; his "mental capacity seemed to be not affected," and the two were able to engage in small talk for a minute or so.

13. Petitioner then carried the papers to the Division's offices in Tallahassee on November 9, 1992, but was told that her husband needed to sign the form in one other place. Accordingly, she carried the form to CRH and obtained her husband's signature. A stamp on the document reflects that the fully executed document was later filed with the Division on November 13, 1992. When she filed the forms, Petitioner did not ask for any additional information regarding the various options; had she done so,

counseling was available at the Division during normal business hours.

14. When the application was filed, Holland had 1.84 years of military service; he also had refunded service from October 1959 to October 1961 and September 1963 to February 1966. Accordingly, on January 12, 1993, the Division advised Holland that \$3,334.68 was due if he intended to claim that service. If he did so, his Option 1 benefits would increase almost \$200.00 per month. The form requested that Holland notify the Division in writing only if he wished to retire with paid-on service, and not claim his military and refunded service. Finally, the form advised him in bold print as follows:

YOU HAVE CHOSEN OPTION 1. YOUR OPTION
SELECTION CANNOT BE CHANGED AFTER YOU CASH OR
DEPOSIT ANY BENEFIT PAYMENT.

15. The record does not specifically show if Holland opted to purchase his military and refunded service. However, it can be reasonably inferred that he did since the first benefit check described in Respondent's Exhibit 4 roughly equated to what his estimated benefits would have been under Option 1 if such service had been purchased, and there is no record of any written notice to the Division by Holland that he did not wish to purchase this service.

16. Holland's first benefit check was issued on February 5, 1993, and mailed to him on February 9, 1993. That check, and all subsequent monthly checks until his death in December 1997, were

cash or deposited by Holland. They totaled \$55,830.72, or more than his total deposits to the retirement system. Therefore, when he died, Petitioner was not due any refunded contributions or future monthly benefits. If Petitioner prevails in this action, however, she would be required to offset any future benefits by approximately \$22,000.00, which represents the difference between the benefits payable under Options 1 and 3 during the lifetime of her husband.

17. In August 1994, Holland received a new driver's license with the only restriction being that he had to drive a vehicle with an automatic transmission. He used his license to drive to Marianna for physical rehabilitation treatment.

18. At no time was Holland ever adjudicated incompetent or incapacitated by a court. It is fair to state that he experienced gradual but continued improvement from the time of his release from the hospital until his death in December 1997.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.57 and 120.569, Florida Statutes (Supp. 1998).

20. Respondent suggests that under the case of In re Bryan, 550 So. 2d 447, 448 (Fla. 1989), Petitioner is obligated to prove her husband's incapacity by clear and convincing evidence. That case, however, is inapposite since it involved a proceeding to

determine the appropriate standard for adjudicating a person incompetent to manage his property, a matter not in issue here. Moreover, in a long string of administrative decisions, the Division has always observed the rule that in order for a claimant to prevail in this type of action, it need only prove incapacity by a preponderance of the evidence. See, e.g., Maso v. Dep't of Mgmt. Svcs, Div. Of Ret., Case No. 98-0357 (Div. Of Ret., Dec. 31, 1998); Paehler v. Div. Of Ret., Case No. 95-4841 (Div. Of Ret., May 20, 1996); Portee v. Dep't of Admin., Div. Of Ret., Case No. 91-2306 (Div. Of Ret., Nov. 14, 1991). Accordingly, that standard will be used.

21. Section 121.091(6)(k), Florida Statutes (1997), reads as follows:

(h) The option selected or determined for payment of benefits as provided in this section shall be final and irrevocable at the time a benefit payment is cashed or deposited.

A similar provision is found in Rule 60S-4.002(4), Florida Administrative Code, which implements the foregoing statute.

22. Under Petitioner's theory, she acknowledges that her late husband was not adjudicated incompetent by a court. She requests, however, that an administrative determination be made that he was incapable of understanding the character of his acts on November 7, 1992, and that the transaction is voidable, notwithstanding the foregoing statute and rule.

23. In the absence of an adjudication of incompetence, the standard in Florida to determine incompetence is whether the party is unable to understand in a reasonable manner the nature and consequences of the transaction. Judge Robert W. Lee, Mental Illness and the Right to Contract, 72 Fla. Bar J., December 1998 at 48. To make this determination, it is necessary to consider, where relevant: (a) the party's medical and psychiatric history; (b) the party's medical and psychiatric diagnoses and opinions; (c) the party's behavior and conduct at the time of the transaction; and (d) the circumstances surrounding the transaction. Id. at 49.

24. The more persuasive evidence supports a conclusion that Holland was sufficiently competent when he executed his retirement papers on November 7, 1992, to understand the nature and consequences of the transaction. This conclusion is based on the notation in his medical records by his treating neurologist at TCH that he "had returned to essentially his normal mental status"; the testimony of an impartial witness who notarized his retirement papers and described his behavior and conduct as being relatively normal under the circumstances; the fact that explanatory pamphlets had been sent to Holland some two years earlier explaining in detail the various retirement options; the assistance rendered by his wife throughout this process in completing the paperwork; and Holland's comprehension of the fact that if he purchased refunded and military service, his benefits

would substantially increase. As to this latter consideration, this occurred in January 1993, or two months after he had selected Option 1, but one month before he received his first retirement check. Finally, while Holland may not have clearly understood the differences between Options 1 and 3 on November 7, 1992, a difficulty in understanding retirement options does not equate to a determination that one does not understand the nature and consequences of a transaction. This being so, Petitioner's request should regrettably be denied.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Division of Retirement enter a final order denying Petitioner's request that her late husband's election of retirement benefits be changed.

DONE AND ENTERED this 29th day of June, 1999, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
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this 29th day of June, 1999.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order within fifteen days. Any exceptions to this Recommended Order should be filed with the Division of Retirement.