

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARILYN NELSON,)
)
 Petitioner,)
)
 vs.) Case No. 99-0706
)
 DEPARTMENT OF MANAGEMENT SERVICES,)
 DIVISION OF RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on February 29, 2000, in Fernandina Beach, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Stephen F. Dean.

APPEARANCES

For Petitioner: Gary Baker, Esquire
Post Office Box 1177
Callahan, Florida 32011

For Respondent: Emily Moore, Esquire
Division of Retirement
2639 North Monroe Street
Building D, Suite 230
Tallahassee, Florida 32399-1560

STATEMENT OF THE ISSUE

Whether Petitioner, Marilyn Nelson, the surviving spouse of Melton Nelson, is entitled to in-the-line-of-duty death benefits.

PRELIMINARY STATEMENT

This case arose from the Division of Retirement's (Respondent) denial of Petitioner's Marilyn Nelson's request for in-the-line-of-duty (ILOD) death benefits on the account of the later Melton Nelson, a member of the Florida Retirement System (FRS).

By final agency action letter, dated September 22, 1998, Respondent denied the request of Marilyn Nelson for ILOD death benefits. Petitioner timely filed a request for hearing and the case was referred to the Division of Administrative Hearings for the purpose of disposing of the Petition by Recommended Order.

Petitioner, represented by counsel, appeared and testified on her own behalf, but presented no other witnesses. Petitioner introduced Exhibit Nos. 1-4 which were received into evidence.

Respondent presented the testimony of its representative, Stanley Colvin, Administrator, Survivor Benefits Section, Bureau of Benefit Payments, and of the following staff of the Nassau County Public Works Department: Jack D. Amato, Director of Public Works (supervisor of Melton Nelson); George Hartman, Assistant Road and Bridge Superintendent (co-worker and successor of Melton Nelson); William Johnson, (co-worker of Melton Nelson); and Lew Eason, Supervisor of the Human Relations Department. Respondent's Exhibits 1 through 12 were also received into evidence.

Respondent also filed a Motion for Official Recognition of relevant statutes and rules; the motion was granted. A transcript was not ordered.

At the close of the hearing, Respondent noted the absence of medical evidence establishing ILOD death and moved for a recommended order denying the Petition. Petitioner moved to keep the record open to present medical evidence in the form of deposition testimony.

Petitioner's motion was granted, and Petitioner was allowed 14 days (until March 14, 2000) to schedule the deposition of a licenses medical doctor. Petitioner failed to schedule a deposition, but filed the March 20, 2000, Sworn Statement of Arthur Forbes, a Physician's Assistant on or about May 22, 2000. Respondent moved to strike the sworn statement and close the record. Respondent's motion to strike was granted by Order of this tribunal issued June 20, 2000. This Order also provided that, "[I]n the absence of the setting of the Forbes' deposition, in 10 days (June 30, 2000) the record in this case will be closed, and the parties will have until July 24, 2000, to file their proposed findings."

On July 7, 2000, Respondent received a Notice of Taking Deposition of Arthur Forbes, mailed on July 5, 2000, setting the deposition at noon on Monday, July 17, 2000. On the morning of the scheduled deposition, the court reporter's office called to

advise the undersigned that Mr. Baker's office had cancelled the deposition because the witness was not served by the Sheriff's department. The deposition was not rescheduled, and has not been taken.

Respondent filed Proposed Findings of Fact which were read and considered. Petitioner did not file proposed findings.

FINDINGS OF FACT

1. Petitioner, Marilyn Nelson, is the surviving spouse of Melton Nelson, who died on May 7, 1998. Petitioner and Melton Nelson had been married since June 15, 1997.

2. At the time of his death, Mr. Nelson was employed by Nassau County as the Assistant Road and Bridge Superintendent. He had been so employed for about 3 years.

3. Donald B. Twiggs, M.D., was Mr. Nelson's treating physician. Dr. Twiggs, completed Mr. Nelson's Death Certificate, which states that Mr. Nelson died from cardiopulmonary arrest and coronary artery disease. There was no autopsy to determine the cause of death.

4. During the course of his employment, Mr. Nelson was absent due to colds and other minor illnesses. His absences were not excessive and he had not complained either to his supervisor or to the personnel office of stress on the job. Further, Mr. Nelson did not advise his employer that his job was

affecting his health or request accommodations based upon his physical condition.

5. Marilyn Nelson was not aware that Mr. Nelson had heart problems.

6. Mr. Nelson was being treated by Dr. Twiggs for adult onset diabetes, hypertension, and anxiety.

7. As Assistant Road and Bridge Superintendent, Mr. Nelson's job was demanding and he often was on call due to road and bridge repairs. He supervised and assigned crews, but was not required customarily to do physically demanding work.

8. Mr. Nelson was a "laid-back" supervisor who did not confront or correct his staff. He had the backing of management to discipline his subordinates. The employer was satisfied with Mr. Nelson's work performance. There were no confrontations or arguments between Mr. Nelson and his supervisor, and he was never "dressed-down" or threatened with loss of his job.

9. Mr. Nelson reported to work about 7:00 a.m. on May 7, 1998. After a brief conversation with fellow workers and some of his subordinates, he walked back to his truck and collapsed. William Johnson, one of his subordinates, observed that Mr. Nelson "did not look good" and was "kinda red in the face." However, there had been no altercation, argument or confrontation, and Mr. Nelson did not appear upset.

10. The Respondent denied Marilyn Nelson's application for in-line-of-duty (ILOD) death benefits, advising that, although Mr. Nelson suffered a heart attack while on the job, which resulted in his death, the heart attack was not caused by any job-related accident or injury.

11. Marilyn Nelson's claim for death benefits was also denied by Workers' Compensation, which found that the injury was personal in nature and not job related.

12. Marilyn Nelson presented no expert medical testimony to support her claim that Mr. Nelson's death arose out of the performance of his job duties.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over this subject matter and the parties to this action pursuant to Section 120.57(1), Florida Statutes.

14. Marilyn Nelson is the surviving spouse of Melton Nelson, who was a member of the FRS at the time of his death.

15. The Petitioner has the burden of proof in these proceedings. Young v. State, Department of Community Affairs, 625 So. 2d 831 (Fla. 1993). Petitioner must demonstrate by a preponderance of competent evidence that she is entitled to the benefit she seeks. Agrico Chemical Co v. State Department of Environmental Regulation, 365 So. 2d 759 (Fla. 1st DCA 1978).

16. Section 120.021(14), Florida Statutes, provides:

(14) "Death-in-line-of-duty" means death arising out of and in the actual performance of duty required by a member's employment during his or her regularly scheduled working hours or irregular working hours as required by the employer. The administrator may require such proof as he or she deems necessary as to the time, date, and cause of death, including evidence from any available witnesses. Workers' compensation records under the provisions of Chapter 440 may also be used.

17. Petitioner has the burden of proving her entitlement to ILOD death benefits. In such a case, competent medical evidence is probative of causation and required by rule. The Division of Retirement is guided by the rules of the State Retirement Commission as to what constitutes competent medical evidence. Rule 60R-1.00481, Florida Administrative Code, provides:

(1) Competent medical evidence of total and permanent disability is required for a determination of disability retirement eligibility.

(2) Competent medical evidence of total and permanent disability requires testimony of a licensed physician, either at the hearing, or in a deposition, in which the member and the Division of Retirement had an opportunity to participate.

(3) In cases of eligibility for in the line of duty disability benefits, competent medical evidence shall be required showing that an injury or illness, arising out of and in the actual performance required by the member's employment, was the substantial producing cause or aggravating cause of the member's total and permanent disability.

(4) Medical records may be admitted as hearsay, but shall be insufficient for a finding of disability retirement eligibility.

18. Petitioner must establish, to a reasonable degree of medical probability, a causal relationship between the heart attack which led to Mr. Nelson's death, and the actual performance of his duties. Timmerman v. Division of Retirement, DOAH Case No. 98-5203.

19. Petitioner did not produce any expert medical testimony regarding a causal relationship between the heart attack which led to Mr. Nelson's death and the performance of his duties. Petitioner failed to carry her burden of proof.

20. Accordingly, Petitioner has not established that she is entitled to receive ILOD death benefits from the FRS account of her late husband.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That a final order be entered by the Department of Management Services, Division of Retirement holding that Petitioner's application for ILOD death benefits from the account of her late husband, Melton Nelson be denied.

DONE AND ENTERED this 7th day of August, 2000, in
Tallahassee, Leon County, Florida.

STEPHEN F. DEAN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of August, 2000.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.