

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DOUGLAS ULMER, JR., o/b/o)
DOUGLAS ULMER, SR., DECEASED,)
)
Petitioner,)
) Case No. 06-3274
and)
)
KAYLA ULMER,)
)
Intervenor,)
)
vs.)
)
DEPARTMENT OF MANAGEMENT)
SERVICES, DIVISION OF)
RETIREMENT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on November 27, 2006, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Edwin Ferguson, Esquire
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For Intervenor: Jeffrey Clements, Esquire
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For Respondent: Elizabeth Regina Stevens, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent wrongly presumed that Petitioner's father had been "killed in the line of duty," which presumption entitled the surviving spouse of Petitioner's father to receive "in line of duty" death benefits during her lifetime, to the exclusion of the rights of her late husband's children, whom he had named as his primary beneficiaries.

PRELIMINARY STATEMENT

After her husband, Douglas Ulmer, Sr., died of heart failure on December 14, 2005, Cynthia Andrews-Ulmer applied for "in line of duty" death benefits under the Florida Retirement System. In or around July 2006, Respondent Department of Management Services, Division of Retirement, granted Mrs. Ulmer's request, announcing that it intended to pay her, as the surviving spouse of a member "killed in the line of duty," the benefits she had sought.

The agency's preliminary decision adversely affected Mr. Ulmer's two children, whom he had designated as his primary beneficiaries, because their rights as such would be superseded

by the award of "in line of duty" death benefits to Mrs. Ulmer, who is not the mother of either. Consequently, Mr. Ulmer's minor son, Petitioner Douglas Ulmer, Jr., timely requested a hearing to contest the award of benefits to Mrs. Ulmer.

Thereafter, Respondent referred the matter to the Division of Administrative Hearings, where the case was assigned to an Administrative Law Judge, who scheduled a final hearing for October 10, 2006. The final hearing was later continued, on Petitioner's motion, to November 27, 2006.

The final hearing commenced on the appointed date. Both parties appeared, and each was represented by counsel. Additionally, at the outset of the hearing, Petitioner's older sister, Kayla Ulmer, asked to intervene in the proceeding, on the side of Petitioner. Her request was granted. She, too, was represented by counsel.

Petitioner and Intervenor presented three witnesses: Lilly Hill-Jones, mother of Petitioner; Claudia Jones, mother of Intervenor; and Intervenor. Petitioner offered one exhibit, which was received in evidence without objection. Respondent presented the testimony of its Benefits Administrator, Ms. Stanley Colvin, and moved Respondent's Exhibits 1 through 3 into evidence, each without objection.

Neither party ordered the final hearing transcript. The parties timely filed their respective proposed recommended orders by the established deadline, which was January 17, 2007.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2006 Florida Statutes.

FINDINGS OF FACT

1. On December 14, 2005, Douglas Ulmer, Sr. ("Mr. Ulmer"), died as a result of complications from coronary artery disease and hypertension. At the time of his death, Mr. Ulmer was married to Cynthia Andrews-Ulmer ("Mrs. Ulmer"). His other survivors included two children: a son named Douglas Ulmer, Jr. ("Douglas"), who had been born on July 13, 1991; and a daughter named Kayla Ulmer ("Kayla"), who had been born on October 3, 1983. Mrs. Ulmer was not the mother of either Douglas or Kayla.

2. From February 1993 until his death, Mr. Ulmer had been employed as a fireman in Palm Beach County, Florida. Through that employment, he had become a member of the Florida Retirement System ("FRS"), which is administered by Respondent Department of Management Services, Division of Retirement ("Division").

3. After having been offered the job as a fireman, Mr. Ulmer had undergone a "post-offer physical" examination. This examination, which had taken place on January 15, 1993, had revealed no evidence of any medical abnormalities; specifically,

the physician had found Mr. Ulmer's "heart and vascular system" to be "normal."

4. In October 2004, Mr. Ulmer had experienced chest pain while lifting equipment at work and been taken to the hospital. Thereafter, diagnosed as having heart disease, Mr. Ulmer had gone on disability and never returned to work full time.

5. About one month before his death, Mr. Ulmer had completed a Pension Plan Beneficiary Designation Form in which he had named Douglas and Kayla as his primary beneficiaries for retirement benefits payable under the FRS.

6. After Mr. Ulmer passed away, Mrs. Ulmer submitted an application to the Division for "in line of duty" death benefits, which are available under the FRS to the surviving spouse of a member "killed in the line of duty." In July 2006, the Division gave notice that it intended to approve Mrs. Ulmer's application.

7. For reasons that will soon be made clear, the Division's intended decision deprived Kayla of any benefits under the FRS, and it threatened to deny benefits to Douglas, even though the children's father had named them as his primary beneficiaries. Consequently, Douglas timely requested a hearing to contest the payment of "in line of duty" benefits to his father's widow. (Kayla would later intervene in this proceeding, on the eve of the final hearing.)

8. Sadly, Mrs. Ulmer died suddenly on September 24, 2006, before the dispute over Mr. Ulmer's retirement benefits could be resolved.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

10. Section 121.091(7), Florida Statutes, prescribes the death benefits payable under the FRS. In pertinent part, this statute provides:

(d) Notwithstanding any other provision in this chapter to the contrary, with the exception of the Deferred Retirement Option Program, as provided in subsection (13):

1. The surviving spouse of any member killed in the line of duty may receive a monthly pension equal to one-half of the monthly salary being received by the member at the time of death for the rest of the surviving spouse's lifetime or, if the member was vested, such surviving spouse may elect to receive a benefit as provided in paragraph (b). Benefits provided by this paragraph shall supersede any other distribution that may have been provided by the member's designation of beneficiary.

2. If the surviving spouse of a member killed in the line of duty dies, the monthly payments which would have been payable to such surviving spouse had such surviving spouse lived shall be paid for the use and

benefit of such member's child or children under 18 years of age and unmarried until the 18th birthday of the member's youngest child.

(Emphasis added).

11. The term "death in line of duty" is defined in Section 121.021(14), Florida Statutes, as meaning:

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.

Thus, for "in line of duty" death benefits to be payable, the deceased member must have died on the job, while actually performing a required duty; and the agency or instrumentality of death—the thing that killed the member—must have been causally connected to the performance of a required duty. In practical, succinct terms, actual performance of the job must have put the decedent in harm's way. See Kugler v. Department of Management Services, DOAH Case No. 02-2578 (Recommended Order Jan. 21, 2003) (Final Order April 4, 2003).

12. Based solely on this definition, Mrs. Ulmer probably would not have been entitled to "in line of duty" death benefits, because Mr. Ulmer did not die on the job, while

actually performing a required duty. There exists, however, a statutory presumption, which is implicated when a fireman or law enforcement officer is stricken by certain cardiopulmonary diseases, that assisted Mrs. Ulmer in establishing her claim. Sometimes called the "heart-lung" statute, Section 112.18(1) provides as follows:

Any condition or impairment of health of any Florida state, municipal, county, port authority, special tax district, or fire control district firefighter or any law enforcement officer or correctional officer as defined in s. 943.10(1), (2), or (3) caused by tuberculosis, heart disease, or hypertension resulting in total or partial disability or death shall be presumed to have been accidental and to have been suffered in the line of duty unless the contrary be shown by competent evidence. However, any such firefighter or law enforcement officer shall have successfully passed a physical examination upon entering into any such service as a firefighter or law enforcement officer, which examination failed to reveal any evidence of any such condition. Such presumption shall not apply to benefits payable under or granted in a policy of life insurance or disability insurance, unless the insurer and insured have negotiated for such additional benefits to be included in the policy contract.

13. Pursuant to the heart-lung statute, if the proximate cause of a fireman's death was a fatal condition (e.g. heart attack or stroke) that was caused in fact by a particular pulmonary or cardiovascular disease, then it shall be presumed

that the fatal condition was suffered in the line of duty, absent "competent evidence" to the contrary.

14. This presumption, clearly, is rebuttable. See Caldwell v. Division of Retirement, Florida Dept. of Administration, 372 So. 2d 438, 441 (Fla. 1979). The party attempting to defeat it, however, must "show that the disease causing disability or death was caused by a specific, non-work related event or exposure." Id. In addition,

[w]here the evidence is conflicting, the quantum of proof is balanced and the presumption should prevail. This does not foreclose [a party] from overcoming the presumption. However, if there is evidence supporting the presumption[, it can] only [be overcome] by clear and convincing evidence. In the absence of cogent proof to the contrary the public policy in favor of job relatedness must be given effect.

Id. (emphasis added.)

15. In Caldwell, a county fireman who was unable to work following an on-the-job heart attack sought "in line of duty" disability benefits. He lost at the trial level and in the district court, the First DCA holding that though the medical testimony was conflicting, there was substantial competent evidence to support a finding that the fireman's heart attack had been caused by a preexisting condition (arteriosclerosis) unrelated to the performance of his job. Id. at 440. In reversing, the Florida Supreme Court explained that the

presumption "supplie[d] the element of service-connection" linking the arteriosclerosis and the fireman's duties, id., and ruled that the agency had failed to prove otherwise by clear and convincing evidence.

16. Here, the parties have stipulated that the "immediate cause[s]" of Mr. Ulmer's death were coronary artery disease and hypertension. Based on this stipulation, the undersigned is required to (and does) presume that Mr. Ulmer experienced a fatal medical condition, and died therefrom, in the line of duty.¹

17. Douglas and Kayla argue that their father suffered from high blood pressure before becoming a fireman and that he had a congenital heart murmur as well. The evidence offered in support of these contentions, however, such as it is, falls far short of establishing, clearly and convincingly, that either Mr. Ulmer's heart disease and hypertension or his death was caused by a specific, non-work related event or exposure.

18. It is concluded, therefore, that Section 112.18(1), Florida Statutes, dictates a finding that Mr. Ulmer's death occurred in the line of duty. That being the case, it is further concluded that Mrs. Ulmer, as the surviving spouse of a member "killed in the line of duty," was entitled to receive, during her lifetime, "in line of duty" death benefits.

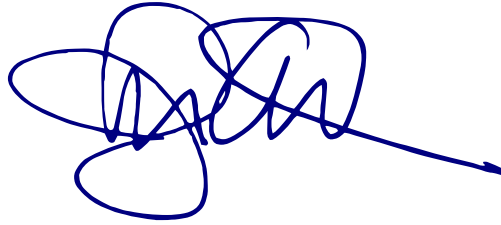
19. Because "in line of duty" death benefits supersede any other distribution that otherwise would have been made, Douglas and Kayla—who, as Mr. Ulmer's primary beneficiaries, would have received normal retirement benefits until each, respectively, reached the age of 25, had Mr. Ulmer not died in the line of duty, see § 121.091(12), Florida Statutes—lost their rights to receive any benefits, at least during Mrs. Ulmer's lifetime. Kayla, already being more than 18 years old when her father died, was ineligible ever to receive benefits.

20. Douglas, however, became eligible to receive "in line of duty" death benefits upon the passing of his father's widow, because he was an unmarried minor at the time. Such benefits must be paid for Douglas's use and benefit until he turns 18 or gets married, whichever first occurs.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Division enter a final order: (a) finding that Mr. Ulmer died in the line of duty; (b) awarding Mrs. Ulmer's estate the benefits to which Mrs. Ulmer, as the surviving spouse of a member killed in the line of duty, was entitled under Section 121.091(7)(d)1., Florida Statutes; and (c) providing for the payment of benefits to Douglas Ulmer, Jr., in accordance with Section 121.091(7)(d)2.

DONE AND ENTERED this 29th day of January, 2007 in
Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of January, 2007.

ENDNOTE

^{1/} It is possible to interpret the heart-lung statute as having no effect on the requirement under § 121.021(14), Fla. Stat., that, to occur in the line of duty, death must happen on the job, while actually working. Under this construction, the presumption would be available to help prove the requisite causal connection between work, on the one hand, and death on the other (the latter must "aris[e] out of" the former), but it would be of no help in establishing that death came during "working hours" while performing a required duty. Thus, if a fireman suffered a heart attack and died during working hours while doing required paperwork at the fire station, then his death would be presumed to have occurred in the line of duty, even if the heart attack were caused by hypertension and not, for example, by smoke inhalation. But if instead this fireman happened to die of a heart attack at home in bed, then (under the statutory interpretation now being discussed) the presumption ultimately would not be dispositive, because the temporal element of § 112.021(14) (death during working hours, while working) would not, in fact, have been met. (Indeed, the

presumption would be unavailing even if, though the heart attack occurred at work, death came after hours, in the hospital say, for in that event also, the element of death during working hours would not be satisfied.)

The Division, however, does not construe the statute so narrowly, but rather equates fatal "condition or impairment" with death, so that, even if the two did not occur simultaneously, as here, and even if neither actually occurred at work, as here also, it must still be presumed that the death occurred in the line of duty. In other words, as the Division interprets § 112.18(1), Fla. Stat., if the fatal condition (e.g. heart attack) was caused by tuberculosis, heart disease, or hypertension, then the resulting death must be presumed to have occurred in the line of duty, regardless of when either the heart attack or death actually occurred.

The Division's interpretation of § 112.18(1) is at least reasonable, and it favors the persons whom the statute is designed to protect. Having no compelling reason to reject this construction placed upon the statute by the agency charged with its administration, the undersigned has concluded that the fact Mr. Ulmer did not happen to die while actually on the job is not a barrier to applying the statutory presumption.

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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.