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**COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD**

IN RE: ACCOUNT OF KENNETH R. MOSLEY (D)  
DOCKET NO. 2012-13  
CLAIM OF HELENE DAVIS

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs; the Hearing Examiner's Proposed Opinion and Recommendation; Claimant's Exceptions to the Hearing Examiner's Proposed Opinion and Recommendation and request for oral argument; and PSERS' Brief Opposing Exceptions and oral argument in which PSERS objected to the consideration of Claimant's Brief on Exceptions because the Claimant failed to timely file exceptions to the Hearing Examiner's Proposed Opinion and Recommendation with the Board.

By law, Claimant's exceptions must have been received by the Board on or before April 1, 2014. It is "[t]he date of receipt at the office of the agency and not the date of deposit in the mails [that] is determinative." 1 Pa. Code §31.11. Because Claimant's exceptions were not received until April 3, 2014, the Board finds that Claimant failed to timely file exceptions to the Hearing Examiner's Proposed Opinion and Recommendation and thereby waived any exceptions to the Hearing Examiner's Proposed Opinion and Recommendation. 1 Pa. Code § 31.1. *Harasty v. Public School Employees' Retirement Board*, 945 A.2d 783 (Pa. Cmwlth. 2008).

We note that even if the Board considered Claimant's Exceptions as timely filed, Claimant raises no additional facts or authority to support her Exceptions to

the Hearing Examiner's Proposed Opinion and Recommendation that would affect the Board's decision in this matter. Claimant excepts to the Hearing Examiner's Proposed Opinion and Recommendation on the basis that: (1) the member's mental and physical capacity at the time of the beneficiary change still needs to be determined; (2) intervener knew about the beneficiary change prior to the form being sent to PSERS; and (3) the intervener's action in submitting the August 31, 2011, beneficiary form was premeditated. Such issues have been adequately addressed by the Hearing Examiner based on the record developed at the administrative hearing in this matter. Indeed, Claimant's main issue appears to be her disappointment with the legal representation she received by the counsel she chose to employ. As PSERS correctly points out, such allegation constitutes a professional liability claim that is not a ground for relief before this Board. Claimant had a meaningful opportunity to present evidence at the administrative hearing in this matter but failed to present sufficient evidence to support her claim.

Claimant has requested oral argument before the Board. Section 201.12 of the Board's regulations provide:

(a) The right to oral argument is discretionary with the Board and will be granted to the extent the Board believes it will be helpful in enabling the Board to acquire an understanding of and to resolve the issues. When oral argument is granted, the Secretary of the Board will schedule the argument for the next available Board meeting.

As previously noted, the Hearing Examiner adequately addressed all of Claimant's exceptions. The Board, therefore, does not believe that oral argument will be helpful in enabling the Board to understand and resolve the issues. Claimant's request for oral argument, therefore, is DENIED.

Accordingly, the Board finds appropriate the Hearing Examiner's Findings of Fact, Discussion, Conclusions of Law, and Discussion attached hereto, and we hereby adopt them as our own, and accordingly:

IT IS HEREBY ORDERED that Claimant's request to void the *Nomination of Beneficiaries* form received by PSERS on August 31, 2011, and have the death benefits paid under the *Nomination of Beneficiaries* form received by PSERS on June 27, 2011, is DENIED.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: June 13, 2014

By: Melva S. Vogler  
Melva S. Vogler, Chairman

COMMONWEALTH OF PENNSYLVANIA  
BEFORE THE PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE:

ACCOUNT OF KENNETH MOSLEY (D)  
CLAIM OF HELENE DAVIS  
EVELYN MOSLEY, INTERVENOR

DOCKET NO. 2012-13

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OPINION AND RECOMMENDATION

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Ruth D. Dunnewold  
Hearing Officer

Date of Hearing: October 16, 2013  
Hearing Officer: Ruth D. Dunnewold  
For the Claimant: Kenneth S. Robinson, Esquire  
For the Intervenor: Evelyn Mosley  
For PSERS: Jennifer A. Mills, Assistant Counsel

## HISTORY

This matter is before the Public School Employees' Retirement Board ("Board") on an appeal filed by Helene Davis ("Claimant") from a decision of the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS") dated April 25, 2012 ("denial letter"), which denied Claimant's request that PSERS not honor the Nomination of Beneficiaries form PSERS received August 31, 2011. On August 21, 2012, Jennifer A. Mills, Assistant Counsel, filed an Answer on behalf of PSERS.

By letter dated August 28, 2012, PSERS notified Evelyn Mosley ("Intervenor") of Claimant's appeal and explained that Intervenor may participate in any hearing on Claimant's appeal. On September 6, 2012, Intervenor filed with PSERS a written petition to intervene, which was granted by Order of the Board dated September 17, 2012.

By letter dated January 3, 2013, Ruth D. Dunnewold was appointed by the Board's Secretary, Jeffrey B. Clay, to act as Hearing Officer for Claimant's administrative hearing. By letter dated January 4, 2013, the Board's Appeal Docket Clerk notified Claimant that the administrative hearing on her appeal was scheduled for March 13, 2013 in Harrisburg, PA. Intervenor was copied on the scheduling letter of January 4, 2013. Kenneth S. Robinson, Esquire, entered his appearance on behalf of Claimant by letter dated March 1, 2013, in which he also requested a continuance, to which PSERS did not object. Accordingly, by Order Granting Claimant's Request for Continuance dated March 4, 2013, the hearing was continued generally, to be rescheduled at a mutually agreeable time upon Claimant's indicating, by motion, her readiness to proceed.

On August 9, 2013, PSERS filed a Motion to Schedule an Administrative Hearing. Thereafter, by Order Granting PSERS' Motion to Schedule an Administrative Hearing dated August 15, 2013, the Docket Clerk was directed to schedule the matter for hearing on the first convenient date in October

2013 or thereafter. By letter dated August 20, 2013, the hearing was rescheduled for October 16, 2013. A reminder of the hearing date was sent by letter dated August 26, 2013.

The hearing then was held as scheduled at the Public School Employees' Retirement System, 30 North Third Street, Suite 150, Harrisburg, PA 17101. Claimant attended the hearing and was represented by Kenneth S. Robinson, Esquire, while Attorney Mills represented PSERS. Intervenor appeared and participated *pro se*. At the close of the hearing, the parties were given the opportunity to file post-hearing briefs. Thereafter, the hearing transcript was filed on October 31, 2013, and an Order Establishing Briefing Schedule, dated November 1, 2013, was issued, providing for Claimant to file her initial brief by close of business on December 2, 2013, for PSERS and Intervenor to file their post-hearing briefs by close of business on December 23, 2013, and for Claimant to file her post-hearing brief in response, if any, by January 2, 2014.

The deadline for Claimant to file her post-hearing brief passed without Claimant's filing anything. Attorney Mills filed PSERS' post-hearing brief on December 11, 2013. Intervenor filed nothing, and the deadline for Claimant to file a reply passed without Claimant's filing anything as well. Accordingly, the matter is now before the Board for final disposition.

## FINDINGS OF FACT<sup>1</sup>

1. Kenneth R. Mosley (“Member”) was a member of PSERS. Notes of Testimony (“NT”) at 6.

2. On May 19, 2010, PSERS received a Nomination of Beneficiaries form for Member (“May 2010 Nomination of Beneficiaries form”), which named Claimant as Member’s primary beneficiary with 100% distribution. Exhibit PSERS-1; NT at 6.

3. In accordance with its standard business practice, PSERS sent Member a letter of acknowledgment dated May 20, 2010 stating:

The Public School Employees’ Retirement System (PSERS) received and accepted your *Beneficiary Nomination*. This will replace any previous nomination submitted to PSERS.

If you wish to change your beneficiary nomination with PSERS in the future, you must complete a new *Beneficiary Nomination* and submit it to PSERS for processing.

Exhibit PSERS-2; NT at 6 – 7.

4. On August 6, 2010, PSERS received Member’s Application for Retirement (“August 2010 Application for Retirement”) in which Member elected an Option 1 annuity and a total withdrawal of his contributions and interest. Exhibit PSERS-3; NT at 8.

5. At the time of retirement, by means of the August 2010 Application for Retirement, Member nominated Claimant as his primary beneficiary, with 100% distribution. Exhibit PSERS-3 at page 5; NT at 9.

6. The beneficiary under an Option 1 annuity can be changed at any time following retirement by the member’s submitting a new Nomination of Beneficiaries form to PSERS. Exhibit PSERS-3 at page 5, section 7; NT at 9 – 10; *see also* 24 Pa.C.S. § 8507(j).

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<sup>1</sup>Because the proposed findings of fact set forth in PSERS’ post-hearing brief are supported by the record, and because Claimant neither challenged them nor proposed any alternative findings of fact, those facts proposed in PSERS’ brief are adopted here in full, supplemented by additional Findings of Fact warranted by the record and necessary to the Discussion, below.

7. On June 27, 2011, PSERS received a new Nomination of Beneficiaries form for Member (“June 2011 Nomination of Beneficiaries form”) which named Claimant and Intervenor as primary beneficiaries with 70% and 30% distribution, respectively. Exhibit PSERS-4; NT at 10.

8. In accordance with standard business practice, PSERS sent Member a letter of acknowledgment dated July 11, 2011 stating:

The Public School Employees’ Retirement System (PSERS) received and accepted your *Beneficiary Nomination*. This will replace any previous nomination submitted to PSERS.

If you wish to change your beneficiary nomination with PSERS in the future, you must complete a new *Beneficiary Nomination* and submit it to PSERS for processing.

Exhibit PSERS-5; NT at 10 – 11.

9. Claimant took Member to live with Intervenor, Member’s sister, in mid-August 2011, so that Member officially relocated to Washington, D.C. at that point. NT at 23.

10. After Member came to live with Intervenor, and prior to August 31, 2011, Member called PSERS, requested a Nomination of Beneficiary form, signed it, and sent it back, all without Intervenor’s assistance. Exhibit PSERS-6; NT at 28 – 29.

11. At that point, Member was still driving, talking, and getting around on his own. NT at 29.

12. On August 31, 2011, PSERS received a new Nomination of Beneficiaries form for Member (“August 2011 Nomination of Beneficiaries form”), naming Claimant and Intervenor as primary beneficiaries with 20% and 80% distribution, respectively. Exhibit PSERS-6; NT at 12 – 13.

13. The August 2011 Nomination of Beneficiaries form was signed and dated by Member. Exhibit PSERS-6, page 3; NT at 12.

14. On the August 2011 Nomination of Beneficiaries form, Member also indicated an address change for himself, to [REDACTED], which was the same as the address he provide on the August 2011 Nomination of Beneficiaries form for Intervenor. Exhibit PSERS-6.



15. In accordance with standard business practice, PSERS sent Member a letter of acknowledgment dated September 3, 2011 stating:

The Public School Employees' Retirement System (PSERS) received and accepted your *Beneficiary Nomination*. This will replace any previous nomination submitted to PSERS.

If you wish to change your beneficiary nomination with PSERS in the future, you must complete a new *Beneficiary Nomination* and submit it to PSERS for processing.

Exhibit PSERS-7; NT at 13.

16. Sometime after August 31, 2011, Member went to the VA Hospice, and Intervenor had a durable power of attorney for Member which was signed through the VA, with which Intervenor took care of Member's business while he was in hospice. NT at 23, 26, 28.

17. PSERS was notified by Intervenor that Member died on November 8, 2011. NT at 14.

18. Between August 31, 2011 and November 8, 2011, Member did not contact PSERS or submit any other Nomination of Beneficiaries form. NT at 13 – 14.

19. By letters dated January 6, 2012, PSERS notified Claimant and Intervenor separately that each was named as a beneficiary of Member's account, with a distribution of approximately \$15,311.78 and \$61,247.12, respectively. Exhibits PSERS-8 and 9; NT at 15 – 16.

20. Although Claimant and Member had discussed his previous Nominations of Beneficiary, they never had discussed specific percentages, and Member did not inform her about the change he made via the August 2011 Nomination of Beneficiaries form, so Claimant thought there was something wrong with that form. NT at 21, 22, 24.

21. After PSERS sent the January 6, 2012 letters, Claimant responded by letter that she did not agree with the amount payable to her. Exhibit PSERS-10; NT at 16, 24.

22. By letter dated February 24, 2012, PSERS notified Claimant that PSERS was honoring the August 2011 Nomination of Beneficiaries form because that was the last form PSERS had on file for Member at the time of his death. Exhibit PSERS-10; NT at 16.

23. Claimant then appealed to PSERS' Executive Staff Review Committee ("ESRC"), which denied Claimant's request not to honor the August 2011 Nomination of Beneficiaries form because Member was presumed competent at the time he executed that form and it is the last form on file with PSERS. Exhibit PSERS-11; NT at 17.

24. In her appeal, Claimant argued that Member's signature was forged on the August 2011 Nomination of Beneficiaries form. Exhibit PSERS-11 at Attachment A, second page, third paragraph.

25. Claimant filed an Appeal and Request for Administrative Hearing on the above issue, and the hearing was held on October 16, 2013 before Hearing Examiner, Ruth D. Dunnewold. NT, *passim*.

26. Claimant was present and represented by counsel for her hearing, and had the opportunity to be heard, cross-examine witnesses, make a closing statement for the record and file a post-hearing brief in support of her appeal. NT at 3 and *passim*.

## CONCLUSIONS OF LAW<sup>2</sup>

1. PSERS is a creature of statute and derives its authority from the provisions of the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 et seq. ("Retirement Code"). *Forman v. Pub. Sch. Employees' Ret. Bd.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001).
2. Members of PSERS have only those rights recognized by statute and none beyond. *Bittenbender v. State Employees' Retirement Board*,<sup>3</sup> 622 A.2d 403 (Pa. Cmwlth. 1992).
3. Claimant bears the burden of establishing those facts upon which she relies in order to prevail. *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991).
4. Claimant was afforded notice and an opportunity to be heard in connection with her appeal. Findings of Fact 19, 21 – 26.
5. A member who has elected an Option 1 retirement may change his designated beneficiary at any time. 24 Pa.C.S. § 8507(j).
6. A "beneficiary" is defined under the Retirement Code as: "[t]he person or persons last designated in writing to the board by a member to receive his accumulated deductions or a lump sum benefit upon the death of such member." 24 Pa.C.S. § 8102 (relating to definition of "beneficiary").
7. The Member is presumed to have been competent at the time he executed the August 2011 form. *Estate of McGovern v. State Employees' Retirement Board*, 517 A.2d 523 (Pa. 1986).
8. Claimant is only entitled to receive 20% of the Member's death benefit payable by PSERS. Findings of Fact 10 – 15, 18 – 19.

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<sup>2</sup>Because the proposed conclusions of law set forth in PSERS' post-hearing brief are supported proposed findings of fact, and because Claimant neither challenged them nor proposed any alternative conclusions of law, those conclusions of law proposed in PSERS' brief are adopted here in full.

<sup>3</sup>Cases interpreting provision of the State Employees' Retirement Code "are equally applicable in deciding issues arising under similar or identical provisions" of the Retirement Code. *Krill v. Pub. Sch. Employees' Ret. Bd.*, 713 A.2d 132, 134 n.3 (Pa. Cmwlth. 1998).

## DISCUSSION

The basic facts in this case are that Member died in November 2011, leaving in PSERS' records of his account a May 2010 Nomination of Beneficiaries form which named Claimant as Member's primary beneficiary with 100% distribution; an August 2010 Application for Retirement in which Member again nominated Claimant as his primary beneficiary, with 100% distribution; a June 2011 Nomination of Beneficiaries form which named Claimant and Intervenor as primary beneficiaries with 70% and 30% distribution, respectively; and an August 2011 Nomination of Beneficiaries form which named Claimant and Intervenor as primary beneficiaries with 20% and 80% distribution, respectively.

The Retirement Code defines a "beneficiary" as "the person or persons last designated in writing to the board by a member to receive his accumulated deductions or a lump sum benefit upon the death of such member." 24 Pa.C.S. § 8102 (relating to definition of "beneficiary"). In this case, Claimant and Intervenor were the persons last designated in writing to the Board by Member to receive Member's death benefit. That last designation was the August 2011 Nomination of Beneficiaries form; there is no evidence that Member made any subsequent designation of a beneficiary in writing. Accordingly, under the definition at § 8102, PSERS was bound by the August 2011 Nomination of Beneficiaries form.

However, upon being notified of PSERS' determination that it would honor the August 2011 Nomination of Beneficiaries form and that consequently, Claimant would receive approximately \$15,311.78 as the death benefit from Member's account, Claimant disagreed with that amount and filed an appeal with PSERS' ESRC. In her appeal, she argued that Member's signature was forged on the August 2011 Nomination of Beneficiaries form. Claimant bears the burden of establishing those facts upon which she relies in order to prevail, *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991), so it was her burden at the hearing to produce a preponderance of evidence<sup>4</sup>

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<sup>4</sup>The degree of proof required to establish a case before an administrative tribunal in an action of this nature is a preponderance of the evidence. *Lansberry v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). A preponderance of the evidence is generally understood to mean that the evidence demonstrates a fact is more likely

supporting her argument that Member's signature was forged on the form in question. Claimant produced no such evidence, so she has failed to meet her burden of proof and her appeal cannot be sustained.

Claimant in her testimony indicated that, because Member did not inform her about the change he made in the August 2011 Nomination of Beneficiaries form, she thought there was something wrong. NT at 24. To the extent that this might be considered an assertion that Member was not in his right mind when he executed the August 2011 Nomination of Beneficiaries form, neither the case law nor the record supports such an argument. In *Forman v. Public School Employees' Retirement Board*, 778 A.2d 778 (Pa. Cmwlth. 2001), the Commonwealth Court stated that

a signed document gives rise to the presumption that it accurately expresses the state of mind of the signing party. The presumption is rebutted where the challenger presents clear and convincing evidence of mental incompetence. Mental incompetence is established through evidence that the person is unable to understand the nature and consequences of the transaction. A presumption of mental incapacity does not arise merely because the disposition of the property seems unreasonable.

*Forman* at 780, citing *McGovern v. State Employees' Retirement Board*, 517 A.2d 523, 526 (Pa. 1986).

Therefore, the fact that Claimant thought there was something wrong about the change does not create any presumption of mental incapacity.

To successfully make an argument of mental incompetence, Claimant had to produce "clear and convincing evidence" to that effect, which she failed to do. In fact, Claimant provided no evidence whatsoever as to Member's mental capacity in August 2011. Claimant testified that she took Member to Washington to live with Intervenor, his sister, in mid-August 2011, but Claimant did not give any indication of his mental state at the time. Moreover, Intervenor testified that Member came to live with her at that time, and Member was the one who then called PSERS, requested the forms, signed them,

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to be true than not to be true, or if the burden were viewed as a balance scale, the evidence in support of the Commonwealth's case must weigh slightly more than the opposing evidence. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854, 856 (Pa. 1950). The Commonwealth therefore has the burden of proving the charges against Respondent with evidence that is substantial and legally credible, not by mere "suspicion" or by only a "scintilla" of evidence. *Lansberry*, 578 A.2d at 602.

and sent them back, all without her assistance. PSERS received that August 2011 Nomination of Beneficiaries form at the end of August 2011, so Member took those steps within two weeks of moving in with his sister.

Furthermore, Intervenor testified that, at the point at which he took the action to obtain and submit the August 2011 Nomination of Beneficiaries form to PSERS, Member was still driving, talking, and getting around; he had not yet arrived at the point where he could not do such things on his own. Only later did Member go to the VA Hospice, and Intervenor obtained a durable power of attorney for Member which was signed through the VA, so she could take care of Member's business while he was in hospice. The fact that Member did not pass away until November supports Intervenor's testimony about Member's abilities in August 2011, a mere two weeks after Claimant took Member to his sister's home in Washington. Accordingly, the facts adduced at the hearing do *not* support a finding that Member was mentally incompetent when he executed the August 2011 Nomination of Beneficiaries form.

Lastly, Claimant testified about her conversations with Member regarding the distribution of his death benefit, but they never discussed specific percentages. It is well-established in Pennsylvania case law that a retiree's mere oral expression of his intention to designate a beneficiary is insufficient. *Estate of Rosenstein v. Public School Employees' Retirement System*, 685 A.2d 624, 626 (Pa. Cmwlth. 1996)(citing *Myers v. State Employees' Retirement Board*, 486 A.2d 529 (Pa. Cmwlth. 1984)); *see also Hess v. Public School Employees' Retirement Board*, 460 A.2d 1231 (Pa. Cmwlth. 1983); *Coleman Appeal*, 33 Pa. D.&C.2d 191 (1963). Moreover, because a "beneficiary" is defined under the Retirement Code as "[t]he person or persons *last designated in writing to the board by a member* to receive his accumulated deductions or a lump sum benefit upon the death of such member," 24 Pa.C.S. § 8102 (relating to definition of "beneficiary"), that is a substantive provision of law which requires the member

to nominate his beneficiary in writing. That statutory provision cannot properly be disregarded and cannot be waived; rather, it must be fully complied with. *See Coleman, supra.*

## CONCLUSION

PSERS is a creature of statute and derives its authority from the provisions of the Retirement Code. *Forman, supra*, 778 A.2d at 780. Members of PSERS have only those rights recognized by statute and none beyond. *Bittenbender, supra*. Therefore, given Claimant's failure to produce any evidence to meet her burden and support her appeal, the Board must comply with its statutory obligation by paying the death benefits payable on Member's account to the person last designated in writing to the Board. That last designation in writing, in the form of the August 2011 Nomination of Beneficiaries form, was 80% to Intervenor and 20% to Claimant. Accordingly, Claimant is entitled to no more, and the following recommendation will be made to the Board:



COMMONWEALTH OF PENNSYLVANIA  
BEFORE THE PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD


IN RE:

ACCOUNT OF KENNETH MOSLEY (D)  
CLAIM OF HELENE DAVIS  
EVELYN MOSLEY, INTERVENOR

DOCKET NO. 2012-13

RECOMMENDATION

AND NOW, this 10<sup>th</sup> day of February, 2014, upon consideration of the foregoing findings of fact, conclusions of law and discussion, the Hearing Officer for the Public School Employees' Retirement Board recommends that the Board **DENY** Claimant's request to dishonor the Nomination of Beneficiaries form which PSERS received on August 31, 2011, and **DISMISS** Claimant's administrative appeal.



Ruth D. Dunnewold  
Hearing Officer

*For Claimant:* Kenneth S. Robinson, Esquire  
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*For PSERS:* Jennifer A. Mills, Assistant Counsel  
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*For Intervenor:* Evelyn Mosley  


*Date of Mailing:* 2/10/14