

BLIND PENSIONS:

Effect of Finding of Eligibility by Commission made in ignorance of death of applicant.

8-2

July 27, 1934.



Honorable Forrest Smith, State Auditor,
Jefferson City, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of July 12, 1934, such request being in the following terms:

"We would like very much to have the opinion of the Attorney General upon the liability of the state to pay blind pension to the estate of a pensioner where it appears that such pensioner had died just prior to the finding of the Commission that he was eligible for pension.

The usual procedure is for the blind pension applicant to apply either to the Probate Court or the Blind Commission. He is then examined by a competent oculist at the direction of the Commission. Thereafter an investigator appointed by the Commission investigates the particular case. With the consequent reports before it, the Commission then makes its finding as to the eligibility of the applicant for enrollment. In the question involved here the pension applicant died just prior to the time the Commission rendered its finding, which was rendered without any knowledge of his death. The law (Sec. 8896, R. S. Mo. 1929) provides that after a pensioner is enrolled, his pension shall commence from the date of his application. After the name of such pensioner had been certified to the Auditor, it was discovered that he was deceased. Should the Auditor proceed to make payment for the period from the date of application to death, or was the applicant ever validly enrolled so as to require any warrant to be drawn at all?"

I.

RIGHT TO RECEIVE BLIND PENSION IS PERSONAL RIGHT.

While there is no provision in the statutes expressly stating the purpose of the provisions relating to blind pensions, such purpose is implicit and indicates the desire of the state to aid and assist such persons as combine the misfortunes of poverty and blindness. The Constitution of Missouri, Article IV, Section 47, authorizes a tax to raise a fund for the "pensioning of the deserving blind." For a person to be a member of the class of the deserving blind, such person must personally need the assistance of the state. There is no intention displayed in the statutes to help the families or personal representatives of the deserving blind. Thus it would seem entirely clear that if a blind person died without having applied for a pension the right so to apply and receive the pension would die with him, and his executor or administrator could not bring an original application on the ground that the decedent himself would be entitled to make such application. Whether or

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not a right given by statute survives the death of the person to whom it is given depends on the intention displayed in the statute. See *Siberell v. St. Louis-San Francisco Ry. Co.*, 9 S. W. 2d, 912 (1928), 320 Mo. 916, wherein the court said:

"It may be conceded that the question as to whether a particular cause of action, dependant upon a statute survives the death of the plaintiff, or of the beneficiary for whose benefit the action is brought, is a question of right, and not of procedure, depending upon the substance of the cause of action, and its solution must be sought in the statute giving the right of action." (9 S. W. 2d, 917)

It would thus seem clear that if the application had not been made before the death of the blind person all rights to receive the pension would be extinguished.

II.

EFFECT OF FINDING OF COMMISSION.

Had the Commission for the Blind at the time it was called upon to make a decision as to the eligibility of this applicant been advised of his death, it could not have found him eligible for a pension for the reasons outlined above, because it would no longer be possible to pay a pension to him, and his personal representatives and heirs would have no claim to it. The question then remaining is whether or not the finding of the Commission that the applicant was eligible for a pension created any rights in his personal representatives or heirs, when such finding was based entirely on a mistake of fact, and when such finding would not and could not have been made had such mistake not existed. It is submitted that The Commission on its own motion could set aside its finding as erroneous, and that the decisions of the courts involving the setting aside of judgments based on mistakes of fact would serve as a persuasive analogy. In the case of *State ex rel Potter v. Wiley*, 219 Mo. 667, 118 S. W. 647 (1909) the question of setting aside a judgment which had been rendered against a person who is dead, the court having no knowledge of his death at the time of rendering the judgment, was raised, and the court said:

"The great preponderance of authority is to the effect that, where the court has acquired jurisdiction of the subject-matter and the persons during the lifetime of a party, a judgment rendered against him after his death is, although erroneous and liable to be set aside, not void nor open to collateral attack." (219 Mo. 685).

In the case of *Dugan v. Scott*, 37 Mo. App. 663 (1889) the following facts were before the court:

"This is a proceeding in the nature of a writ of error coram nobis begun in the circuit court of Pettis county. By reference to the statement in the cause, it will be seen that the party

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defendant, principal in interest in the cause, died after service had upon him, but before the judgment was rendered. He had made no appearance to the suit, and the fact of his death was not known to the court at the time of rendering the judgment, and nothing from which it could be ascertained appeared of record until this proceeding originated." (669)

The lower court set aside its own judgment on the ground it was erroneous and based on mistake of fact, and the appellate court sustained such ruling.

There would apparently be no reason why the Commission for the Blind could not follow the precedent of the courts in setting aside a finding based on mistake of fact. Since the Commission is only authorized to find a "person" eligible for a pension, and since there was no person in existence who could be the subject of this particular finding at the time it was made, it would likewise seem to be the duty of the Commission to set aside its finding, and when this is done even although by Revised Statutes of Missouri 1929, Section 8896, the finding of the Commission causes the pension payments to begin as of the date of the application, when the finding is set aside it could no longer have any effect, retroactive or otherwise, and there would be no justification to you after such event for making any payments.

CONCLUSION.

It is our opinion that where a finding is made by the Commission for the Blind that a person is eligible for pension in ignorance of the fact that such person has died between the date of the application and the date of the finding that the Commission has the power and is under a duty to set aside and vacate such finding, that the Auditor should, upon receiving notice of the setting aside of such finding, strike the name of such petitioner from the rolls, and that no payments to the personal representatives or heirs of such applicant would be authorized or justified.

Yours very truly,

EDWARD H. MILLER

APPROVED:

ASSISTANT ATTORNEY GENERAL.

ATTORNEY GENERAL.