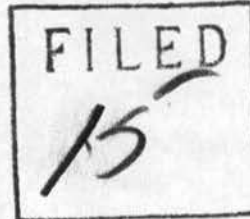


DIVISION OF WELFARE: Legal representative of deceased blind pensioner
PENSIONS: is entitled to receive payment on pension check
previously paid pensioner and to receive payment
of accrued pension covering portion of month to
pensioner's date of death.

September 26, 1949

Division of Welfare
Department of Public
Health & Welfare
State Office Building
Jefferson City, Missouri



10/7/49

Attention: Mr. Proctor N. Carter, Director,
Division of Welfare

Gentlemen:

Your letter at hand requesting an opinion of this
department, which reads:

"Due to the fact that the present blind
pension law does not contain a provision
that when a blind pensioner dies having
any accrued and unpaid pension the amount
thereof shall be paid to the legal repre-
sentatives of such pensioner, we would
appreciate receiving from you an opinion
on the following questions:

"(1) If a blind pensioner dies after a
check has been issued to him but before
he endorses and cashes it, can a legal
representative be appointed to cash such
pension check?

"(2) If a blind pensioner dies during a
particular month, can a legal representative
of the pensioner claim blind pension bene-
fits for the proportionate part of the month
in which death occurred, and, if so, can
I legally certify such claim for payment?"

In the law formerly in effect relating to blind pensions,
there was a provision that permitted paying an accrued and
unpaid pension to the legal representative of a blind pensioner
who had died. Thus, Section 9457, Laws of Missouri, 1945,
page 1352, provided:

"The state auditor shall supply to all persons appearing upon the blind pension roll, suitable blank forms for monthly requisitions for pensions containing, among other things, a statement that requisitioner is the recipient of the pension personally and that he or she has the free and full use of such pension, and that the same is devoted exclusively to his or her needs, giving present address; and each pensioner shall forward each requisition for pension last accrued to the state auditor who shall draw his warrant in favor of such pensioner upon the state treasurer for any moneys in the treasury available therefor and forward same to pensioner or the legal guardian thereof at such post office address: Pro-
vided, that where such pensioner is under legal guardianship, such requisition may be made by the guardian; and in case any pensioner shall die, having any accrued and unpaid pension, the amount thereof shall be paid to the legal representatives of such pensioner; and in case any pensioner should abandon his or her residence in this state, having an accrued and unpaid pension, upon requisition, as herein provided, such unpaid amount shall be forwarded to the address of such pensioner or the legal guardian thereof."

The 64th General Assembly, by the enactment of House Bill No. 334, repealed the above section and enacted another in lieu thereof with the same section number. Thus, Section 9457, Laws of Missouri, 1947, Volume II, page 331, reads as follows:

"The Division of Welfare shall supply to all persons appearing upon the blind pension roll, suitable blank forms for monthly requisitions for pensions containing, among other things, a statement that requisitioner is the recipient of the pension personally and that he or she has the free and full use of such pension, and that the same is devoted exclusively to his or her needs, giving present address; and each pensioner shall forward each requisition for pension last accrued to the Division of Welfare.

Monthly, the Division of Welfare shall prepare a separate roll of persons entitled to receive blind pension, which roll shall be by counties in triplicate showing the name, post office address, amount of pension payable, and such other information as the Division of Welfare may determine to be necessary. One copy of each roll shall be retained as a record by the Division of Welfare. The original roll and one copy properly certified by the Director, shall be delivered to the State Comptroller, who shall certify the same to the State Auditor, who shall audit the same and then issue one warrant for the total amount of all rolls payable to the Division of Welfare, which warrant shall be attached to the copy of the rolls and delivered to the State Treasurer. The State Comptroller shall retain the original rolls as a record of his office. The State Treasurer upon receiving said roll, warrant, and checks prepared by the Division of Welfare for each person on said roll, shall sign said checks and deliver same to the Division of Welfare for delivery to the proper payees."

We apprehend that you have submitted the two questions in your request in view of the fact that the later statute enacted by the 64th General Assembly is silent as to paying accrued and unpaid pensions to the legal representative of a deceased blind pensioner.

In both situations presented in your request, we assume that the pensioner had been duly certified to the Division of Welfare and his name had been placed on the "blind pension roll." Such being the case, we direct your attention to Section 9458 of the act passed by the 64th General Assembly, Laws of Missouri, 1947, Volume II, pages 332, 333, which reads:

"The Division of Welfare shall place the names of all persons certified by it for a pension under this article upon a record to be kept in its office to be known as the 'blind pension roll' which shall contain also the residence, post office address, date upon which the application for pension was filed with the judge of the probate

court or Division of Welfare, and the date the certificate was received by the Division of Welfare; and the name of any person appearing upon the said blind pension roll shall be prima facie evidence of the right of such person to the pension herein provided. The custody and control of the 'blind pension roll,' heretofore kept by the Comptroller, and the powers and duties relating thereto, are hereby transferred to the Division of Welfare."

(Underscoring ours.)

Under the provisions of the above section, the pensioner's name being placed upon the "blind pension roll" is prima facie evidence of his vested right to the pension.

In the first situation you have submitted in question (1), we believe that under the facts the pensioner becoming certified to the Division of Welfare and complying with all the provisions of the statutes acquired a vested right to the particular monthly pension payment. The pension had accrued, and, therefore, constituted a claim against the state. This right of the pensioner was recognized by payment being made to him in the form of a check.

While we are aware of the rule that pensions of this type are considered mere gratuities of the sovereign and are subject to being discontinued in the future at the will of the grantor, we are further mindful of the limitation on this rule that where any particular payment under a pension has become due the pensioner has a vested right thereto. Thus, in Volume 40, Am. Jur., Section 24, page 981, it is said:

" * * * And it is a strongly supported rule that where any particular payment under a pension has become due, the pensioner has a vested right thereto. In some of the later decisions this rule has been extended to include instances in which the contingency upon which the pension was to be payable has happened, or where all the conditions have been fulfilled entitling the person in question to a pension. * * * "

Cases holding that where the contingency upon which the pension was payable had happened that the claimant was entitled

to the pension, and in these cases the particular contingency was being placed upon the pension rolls, are *Rohe vs. City of Covington*, 255 Ky. 164, 73 S.W. (2d) 19, *Tyson vs. Board of Trustees of Firemen's Pension Fund*, 139 Ky. 256, 129 S.W. 820, *Miller vs. Price*, 282 Ky. 611, 139 S.W. (2d) 450, *Johnson vs. State Employees' Retirement Association*, 208 Minn. 111, 292 N.W. 767; and in *Passaic Natl. Bank & T. Co. vs. Eelman*, 116 N.J.L. 279, 183 Atl. 677, it was held that where installments of a pension have matured, the right of the pensioner to payments vests and constitutes an obligation imposed by the applicable statute.

We further believe that the accrued pension which had been paid to the pensioner by check constituted a valid claim against the state, and, as such, became an asset of the deceased blind pensioner's estate. In this connection, it is said in Volume 33, C.J.S., Section 100, page 1056:

"A claim against the government is an asset of the estate of claimant, and passes to his executor or administrator to be applied in satisfaction of his debts, like any other claim existing in favor of the estate, if it is founded on a contract obligation or other right which the law recognizes, * * * "

A Missouri case which is somewhat analogous to the situation presented in the first question is *Ex parte Hickey, Adm'r of Holland, vs. Dallmeyer*, 44 Mo. 237. In this case a writ of mandamus was sought to command the state treasurer to pay a certain warrant drawn upon him by the state auditor in favor of Holland, while living, for the sum of \$1,900.00, which was appropriated to him as compensation for injuries received upon a railroad while owned by the state. Holland had received the warrant, but before its payment he had died and the treasurer declined to pay it. At l.c. 238, the court said:

" * * * After Mr. Holland had received the warrant, and before its payment, he died of his injuries; and the treasurer declines to pay it in consequence of the phraseology of the act, which directs payment 'upon presentation thereof by the said Timothy Holland, or by his agent, with the signature of the said Holland indorsed thereon.' This language is construed as limiting the claim to him personally, and denying it to his personal representatives. We can give it no such construction. The appropriation,

by the first section of the act, is general. The second section only defines the mode of payment, and seems to have been intended to guard against a sale of the claim, and nothing more. The debt was due to Holland at the time of his death, and his personal representative is entitled to receive it. * * "

Consequently, in light of the foregoing, we are constrained to the view in answering your first question that the legal representative of the deceased blind pensioner, such as the duly appointed and qualified administrator or executor of his estate, would be entitled to receive payment on the pension check previously paid to the pensioner for the accrued pension, which would be part of the assets of the deceased pensioner's estate.

Under the facts of the second question, no check had been paid to the pensioner, but it is asked whether or not the legal representative of a deceased pensioner can claim a proportionate part of a month's pension where the pensioner had died during the month.

It is our understanding of the procedure that ordinarily the pensioner, who has been certified to the Division of Welfare and whose name appears on the roll, does not receive his check for a month's pension until the end of the month when he is paid by check for the entire month's accrued pension. But it is our thought that where a pensioner dies in a particular month and his name has been placed upon the pension rolls of the Division of Welfare, there has accrued to him a portion of a month's pension up to the date of his death and that there is a vested right existing to this portion of the accrued and unpaid pension. It is a right in the nature of a claim for money against the state arising out of the statutes providing for blind pensions to those eligible and who have been properly certified to the Division of Welfare. Consequently, we believe that the accrued but unpaid pension for that portion of the month up until the date of the pensioner's death would also be an asset of his estate for which his legal representative would have a valid claim.

In the case of Foot vs. Knowles, 45 Mass. 386, 4 Metcalf 386, the court was determining who should receive an accrued but unpaid pension given by act of Congress to widows of soldiers in the War of the Revolution. The plaintiff was executor of a widow's estate, said widow having died before the accrued pension had been paid to her, and the plaintiff was claiming the pension payment as part of her estate. In ruling for the plaintiff, the court, at l.c. 388, 389, 390, said:

" * * * The whole provision of the statute directly bearing on the question before us is that contained in the third section of the act of 1836, in these words: 'If any person, who served in the war of the revolution, in the manner specified in the act passed June 7th 1832, have died, leaving a widow whose marriage took place before the expiration of the last period of his service, such widow shall be entitled to receive, during the time she may remain unmarried, the annuity or pension which might have been allowed to her husband by virtue of the act aforesaid, if living at the time it was passed.'

"By force of this act, the pension in such case is to enure to the widow, and the right to receive any money due her on the same would seem to vest in her as a part of her estate, to the extent of the entire amount accruing on the same prior to her death; certainly as to all that part falling due prior to the last semi-annual pay day."

* * * * *

" * * * It was held by the war department, and is conceded here by all parties, that the testatrix was the person originally entitled to the pension money. She had properly presented her claim to it, and furnished the necessary evidence to sustain her claim: All which is shown by the pension certificate. Under these circumstances, we think the right to receive the arrearages attached to her estate, and that the same was assets in the hands of her legal representative. * * * "

In the above case, there was no provision in the pension law providing for payment of accrued but unpaid pensions to a legal representative of the deceased pensioner, nor is there any such provision in our present blind pension law, yet the court held, and we believe correctly so, that the accrued and unpaid pension was an asset in the hands of the legal representative and was a part of the deceased pensioner's estate.

In the case of Kieran vs. Hunter College Retirement Board, 7 N.Y.S. (2d) 612, an action was instituted by the executors of the last will and testament of Kieran to recover from the Hunter College Retirement Board a portion of retirement allowance which was alleged to be due the deceased. The pensioner had been retired September 1, 1933, and the pension had been paid him through March 31, 1936. Kieran, the pensioner, died April 25, 1936, and this action was brought to recover 25/30ths of the pension for the month of April, or that portion of the month's pension up to the date of the pensioner's death. The principal question involved was whether the apportionment for the month of April should be allowed. In ruling for the plaintiffs and in favor of the apportionment, the Supreme Court of New York, Appellate Division, said at l.c. 613-614:

"The defendants urge, first, that an apportionment is prohibited by Section G41-49.0 of the Administrative Code. This section provides that a retirement allowance 'shall be paid in equal monthly installments, and shall not be decreased, increased, revoked, or repealed except as otherwise provided in section G41-45.0 of the code.' We find nothing in this section of the code which prohibits the apportionment of the unpaid part of a pension. The fixing of a date for regular payments is obviously done for administrative convenience. It does not indicate any intention to cause a forfeiture of unpaid parts of pensions."

* * * * *

" * * * While the legislature might have provided that under the Retirement System there should be no apportionment, in the absence of a clear provision such a forfeiture will not be presumed. It was said in Matter of Juilliard's Will, 238 N.Y. 499, 144 N.E. 772, that 'a stipulation against the statutory rule of apportionment should not be implied from words of doubtful construction.' (Page 775.)

"In the case before us no words of doubtful construction exist. No part of the statute indicates an intention to prevent an apportionment.

"Judgment should be directed for plaintiffs

without costs."

The same, we believe, would be true under the facts of your second question. That is to say, there would accrue to the blind pensioner, who dies in the particular month, a portion of that month's pension up to the date of his death, and that upon the death of the pensioner, the accrued but unpaid portion of the month's pension would be an asset of his estate which should be paid to his legal representative. While the Legislature might have provided under the blind pension law that there should be no apportionment, we find no part of the law indicating an intention to prevent an apportionment, and, therefore, in the absence of a clear provision, no forfeiture of a month's pension should be presumed.

CONCLUSION

It is, therefore, the opinion of this department that in answer to the questions you have submitted, that:

(1) Where a pension check has been paid to a blind pensioner for a particular month and said pensioner dies before cashing the check, the legal representative of said deceased pensioner, upon correctly endorsing the check, is entitled to receive payment of the pension check as part of the assets of the deceased pensioner's estate.

(2) Where a blind pensioner dies during a particular month, there has accrued to him a portion of that month's payment up to the date of his death which constitutes an asset of his estate, and, therefore, should be paid to his legal representative.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:VLM