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THE RIGHT TO RECEIVE PAYMENT OF SURVIVOR BENEFITS GRANTED: IN §3307.49 (B) (1) R.C.—WHETHER BENEFITS TO SURVIVOR BENEFICIARIES MAY BE INCREASED UNDER §3307.49 R.C. §§3307.49 (B) (1)—3307.49, R.C. OAG No. 816—1951—PAGE 598.

SYLLABUS:

1. The right to receive payment of survivor benefits granted in Section 3307.49 (B) (1), Revised Code, accrues on the date of the death of the member or at the time of the happening of any statutory condition precedent (attaining of the age requirement by the survivor) whichever is later; and the benefits to be received by a survivor thereunder are fixed by the law in effect at the time the right to survivor benefits accrues.

2. There is no provision of Section 3307.49, Revised Code, under which benefits to survivor beneficiaries whose benefits were granted and vested prior to August 1, 1959 (the effective date of present Section 3307.49, *supra*) may be increased.

Columbus, Ohio, June 16, 1960

Hon. L. D. Shuter, Executive Secretary
The State Teachers Retirement System of Ohio
Columbus, Ohio

Dear Sir:

I have your request for my opinion which asks the following questions:

1. If a member of the State Teachers Retirement System died prior to August 1, 1959 (the effective date of Amended Senate Bill No. 160) and his widow, under the law in existence at date of the member's death was entitled to a survivor benefit upon her attainment of age sixty-five, may such widow now commence receiving the survivor benefit at age sixty-two?
2. If your answer to the first question is in the affirmative, should the monthly amount to which the widow is entitled be governed by the amount recited in the law existing on the date of the member's death, or should the amount be that provided in new Section 3307.49, R.C.?
3. If your conclusion in the second question is that the amount fixed by the new section applies, what should the Retirement Board do concerning lesser amounts now being paid to widows and other survivors where such payments originated prior to August 1, 1959?"

Section 3307.49, Revised Code, as it is pertinent to your request, reads as follows:

"In lieu of accepting the payment of the accumulated account of a member who dies before superannuation or commuted superannuation retirement, a survivor, if designated as a sole beneficiary, may elect to forfeit the accumulated account and to substitute certain other benefits either under division (A) or division (B) of this section.

"* * *

"(B) If the deceased member had completed at least one and one-half years of credit for Ohio service, with at least one-quarter year of contributing service credit within the two years prior to the date of death, or was receiving at the time of death a disability retirement allowance as provided in section 3307.43 of the Revised Code, certain designated beneficiaries may

elect to receive monthly benefits, provided they meet the following requirements:

“(1) A widow sixty-two years of age, or a widower sixty-five years of age, married to the member at least three years, and not remarried subsequent to the member’s death, shall be paid ninety dollars per month or a monthly amount which on an annual basis shall not exceed seventy-five per cent of the member’s earnings during his last twelve calendar months of employment as a teacher, whichever is the lesser; provided, however, that the benefit payable under this paragraph shall not be less than seventy-five dollars per month. Such benefit shall be payable the month subsequent to the death of the member, or thereafter upon attainment of the age requirement by the beneficiary. * * *”

Your attention is called to the case of *The State ex rel. Jeffrey v. Industrial Commission of Ohio*, 164 Ohio St., 366. The court in the Jeffrey case, *supra*, said in a *per curiam* opinion beginning at page 367:

“The right of an injured employee to compensation and medical benefits under the Workmen’s Compensation Act is governed strictly by the provisions of that act and may not be changed by the Industrial Commission or even by the General Assembly subsequent to the accrual of the right. The right to payment for medical and hospital expenses is a substantive right, measured by the provisions of the act in force at the time the cause of action accrues, which is the time the injury is received. *Industrial Commission v. Kamrath*, 118 Ohio St., 1, 160 N.E., 470; *State, ex rel. Schmersal, v. Industrial Commission*, 142 Ohio St., 477, 52 N.E. (2d), 863. The cause of action is the right to participate in the State Insurance Fund or the right to receive benefits payable by a self-insuring employer.”

It seems apparent that the insurance fund referred to by the court in the Jeffrey opinion, *supra*, is analogous to the pension funds, for each grants rights that are in derogation of the common law and in so doing are strictly creatures of statute.

The first paragraph of the syllabus of *The State, ex rel. McLean v. Retirement Board*, 161 Ohio St., 327, reads as follows:

“The right of a member of the Public Employees Retirement System to disability retirement allowance is governed by the statutes in force when such member becomes eligible for and is granted such retirement, and that right can not be reduced or denied by subsequent legislation.”

I have been unable to find any similar decision relating to the time that the rights accrue to a survivor under the pension laws.

In accordance with the rule set forth in the *Jeffrey* and *McLean* cases, *supra*, I am of the opinion that the right to receive a payment as a survivor of the member of the State Teachers Retirement System accrues on the date of death of the member or at the time of the happening of any statutory condition precedent to the establishment of such right, and that the benefits to be received by a survivor are fixed by the law in effect at the time the right to survivor benefits accrues.

In arriving at the above conclusion, I am not unmindful of Opinion No. 816, Opinions of the Attorney General for 1951, Page 598, the syllabus of which reads as follows:

“Where a member of the State Teachers Retirement System has, pursuant to the provisions of Section 7896-41, General Code, duly designated a beneficiary to receive his accumulated contributions in case of his death before retirement, and said member dies before the effective date of the enactment of Section 7896-41a, General Code, such beneficiary will not be entitled to the benefit of the options provided by said Section 7896-41a.”

Section 7896-41a, General Code, was the former analagous section to Section 3307.49, Revised Code.

While I concur in the above opinion, I feel that its effect is merely to say that the right of a designated beneficiary to make an election to take survivor benefits in lieu of the payment of the accumulated account of the member, accrues at the death of the member. Therefore, the law in effect at the date of such member's death would govern as to the requirements which the member must have had to entitle the beneficiary to qualify to be permitted to make an election. This, however, is not dispositive of the question raised here as to the subsequent rights of the survivor, who has qualified to make such election and has in fact elected to take survivor benefits.

Applying the aforementioned conclusion to the information set forth in your first question, I am of the opinion that the right of the widow therein described had not yet accrued on August 1, 1959, since said widow had not as of that date reached the age of sixty-five, and therefore was not entitled to a payment under the provisions of Section 3307.49, Revised

Code, as it read prior to the 1959 amendment. Said section as it then existed read in pertinent part as follows:

“(B)

(1) A surviving spouse sixty-five years of age, married to the member at least three years, and not remarried subsequent to the member's death, shall be paid fifty dollars per month. Such spouse may qualify for this benefit in addition to any payments received as provided by division (B) (3) of this section.

* * *

Since the widow would not be entitled to receive a payment until she reached the age of sixty-five, she clearly would have no cause of action against the retirement board until such age was reached. It therefore follows that her rights to receive a benefit had not accrued at the time the amendment to the law was effected and therefore such rights were not fixed by the statute in effect at the time of the death of her husband.

In answer to your second question, I am of the opinion as above indicated, that the benefits to be received are fixed by the law in effect at the time the right to survivor benefit accrues. In the case referred to in your question, the survivor benefits would accrue under Section 3307.49, Revised Code, as it now exists and therefore the survivor would be entitled to the amount of benefits set forth herein.

The answer to your third question is implicit in the answer to your second question in that the rights of a survivor to benefits are fixed by the law in effect at the time the survivor benefits accrue unless, of course, such benefits are specifically increased by statute. Furthermore, such rights are vested in the beneficiary pursuant to the provisions of Section 3307.711, Revised Code.

Your attention is called to Section 3307.401, Revised Code, which provides for increases in the monthly allowance of pensions which were granted and vested prior to the enactment of such section. The General Assembly did not provide for an increase in benefits to survivors in Section 3307.401, Revised Code. Furthermore, there is nothing in the language of Section 3307.49, Revised Code, which indicates in any manner an intent on the part of the legislature that such section would increase benefits that were granted and vested prior to its enactment. In the absence of an expression of such an intent on the part of the legislature,

I am powerless to provide by interpretation such increased benefits to persons whose benefit was granted and vested prior to the enactment of the present Section 3307.49, Revised Code.

In answer to your specific questions, I am of the opinion and you are advised:

1. The right to receive payment of survivor benefits granted in Section 3307.49 (B) (1), Revised Code, accrues on the date of the death of the member or at the time of the happening of any statutory condition precedent (attaining of the age requirement by the survivor) whichever is later; and the benefits to be received by a survivor thereunder are fixed by the law in effect at the time the right to survivor benefits accrues.

2. There is no provision of Section 3307.49, Revised Code, under which benefits to survivor beneficiaries whose benefits were granted and vested prior to August 1, 1959 (the effective date of present Section 3307.49, *supra*) may be increased.

Respectfully,
MARK MCELROY
Attorney General