

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the claimant, brought with my permission, against a decision of the Birkenhead Appeal Tribunal made on 2 December 2004. For the reasons set out below I dismiss the appeal.

Introduction

2. The claimant attained the age of 60 in 1999 and duly claimed and was paid a Category A state retirement pension based on her own national insurance contributions. This was at less than the full rate, owing to a less than full contribution record. On 8 January 2002 the claimant's husband attained the age of 65 and duly claimed and was paid a Category A state retirement pension from that date based on his contributions. On 15 March 2004 the Claimant completed a further retirement pension claim form, and by a decision made on 30 March 2004 was awarded, by reason of her husband's entitlement to a Category A pension, an increased Category A pension of her own from 15 December 2003 (i.e. 3 months before that new claim). The Claimant contended, on appeal to the Tribunal, that she was not required to make a fresh claim in order to obtain an increase in her Category A retirement pension, and so should have been awarded the increase from 8 January 2002, the date on which she had fulfilled the conditions of entitlement. The Tribunal did not accept that contention and dismissed the appeal.

The statutory structure

3. In order to understand this case it is necessary to have in mind the following provisions of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act"):

(1) Section 48A provides for entitlement to a Category B retirement pension in the case of a married person who has attained pensionable age and whose spouse has become entitled to a Category A pension.

(2) Section 51A provides:

"(1) This section has effect where, apart from section 43(1) above, a married person would be entitled both -

- (a) to a Category A retirement pension, and
- (b) to a Category B retirement pension by virtue of the contributions of the other party to the marriage.

(2) If by reason of a deficiency of contributions the basic pension in the Category A retirement pension falls short of the weekly rate specified in Schedule 4, Part I, paragraph 5, that basic pension shall be increased by the lesser of -

- (a) the amount of the shortfall, or
- (b) the amount of the weekly rate of the Category B retirement pension.

(3)

(3) S.43 provides:

“(1) A person shall not be entitled for the same period to more than one retirement pension under this Part of this Act

(2)

(3) A person who, apart from subsection (1) above, would be entitled –
(a) to both a Category A and a Category B retirement pension under this Part for the same period, or

(b)

may from time to time give notice in writing to the Secretary of State specifying which of the pensions referred to in paragraph (a) above he wishes to receive.

(4) If a person gives such a notice, the pension so specified shall be the one to which he is entitled

(5) If no such notice is given, the person shall be entitled to whichever of the pensions is from time to time the most favourable to him (whether it is the pension which he claimed or not).

(6)

4. When, therefore, the claimant's husband attained the age of 65 on 8 January 2002, the claimant became entitled, under s.43(3), to elect whether to receive (a) a category A retirement pension, based on her own contributions, but increased under s.51A by reference to her husband's contributions or (b) a category B pension under s.48A by reference solely to her husband's contributions.

Nelligan

5. It was held by the Court of Appeal in *Secretary of State v. Nelligan* (R(P) 1/03) that the words in brackets at the end of s.43(5) of the 1992 Act do not have the effect that a person in the position of the claimant in this case can, when her husband attains 65 and is awarded a Category A pension, be awarded a Category B pension *without having made a separate claim for it*. It was held that the words in brackets do not override the general requirement in s.1 of the Social Security Administration Act 1992 that no person shall be entitled to any benefit unless, “in addition to any other conditions relating to that benefit being satisfiedhe makes a claim for it in the manner, and within the time, prescribed in relation to that benefit by regulations under this Part of this Act

6. However, it should be noted that the mere fact that Category A and Category B pensions are separate benefits does not necessitate the making of a separate claim, because under regulation 9 of the Social Security (Claims and Payments) Regulations 1987 a person who claims Category A retirement pension can be awarded, alternatively or in addition, Category B pension. What necessitates the making of a separate claim is the fact that the entitlement to the Category B pension arises subsequently to original the award of the Category A pension, and when that original award was made the original claim “shall not be regarded as subsisting after that time and accordingly the claimant shall not (without making a

further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time”: s.8(2) of the Social Security Act 1998.

The claimant's submissions

7. The claimant is represented by Mr. Richard Atkinson of the Wirral Welfare Rights Unit. He has presented an ingenious and carefully constructed written argument that *Nelligan* does not prevent the claimant being entitled to the increase in her Category A pension as from 8 January 2002, for reasons which can be summarised as follows:

(1) *Nelligan* was concerned with the entitlement of the claimant in that case to a Category B pension under s.48A and s.43 of the 1992 Act. No consideration was given to entitlement to an increased category A pension under s.51A.

(2) Even though s.51A(1) requires notional entitlement to a category B pension before the category A pension is increased under that section, no separate claim to the category B pension is necessary because:

(a) the claimant in such a case cannot actually receive a Category B pension, because s.51A gives her an increased Category A pension;

(b) s.1 of the Social Security Administration Act 1992 requires a claim to be made in the prescribed manner and within the prescribed time. The prescribed manner is to claim on an approved form. However there is no separate form for a Category B pension, there being only what Mr. Atkinson describes as a “generic” claim form for all categories of retirement pension.

(c) The time prescribed by reg. 19(2) of the Social Security (Claims and Payments) Regulations 1987 is “three months beginning with any day on which, apart from satisfying the condition of making a claim, the claimant is entitled to the benefit concerned”. However, since the claimant in such a case cannot actually be entitled to a Category B pension, the time can never begin to run.

(d) What the decision maker on a correct analysis did (or should have done) in the present case when the increased Category A pension was awarded was not to make a fresh award on a separate claim but to supersede the previous decision awarding Category A pension by reason of a change of circumstances (namely the entitlement to an increased amount of Category A pension).

Analysis and Conclusions

8. As to Mr. Atkinson’s point (1), he is in my view right in submitting that the Court of Appeal in *Nelligan* dealt with the case on the footing that what the claimant there was seeking (and had been awarded) was a category B pension. No express consideration was given to what the position would have been if she had been seeking entitlement to a category A pension increased under s.51A. For example, in paragraph 4 of his judgment Scott Baker L.J. said that “her claim is that her Category B pension should have been backdated to 1992 (when her husband was 65) rather than to December 1999.”

9. Mr. Atkinson submits, however, that what the claimant in *Nelligan* must in fact have been seeking (and have been awarded) was a category A pension increased under s.51A.

The Secretary of State's submission in this appeal appears to agree with this. His representative states that "the pension in this case, as in [*Nelligan*], is what the Pension Service as a matter of clarification refers to as "ABL" in regard to a category of retirement pension. It refers more properly to a pension awarded in accordance with the special provisions for married people under the provisions of section 51A of the [1992 Act]". I suspect that Mr. Atkinson and the Secretary of State may be right on this point, because I find it difficult to see (although I may be wrong) how it could ever be to the financial advantage of a person in the position of the claimant in this case and in *Nelligan* to elect under s.43(3) for, or to be awarded in default of election under s.43(5), a Category B pension rather than a Category A pension increased under s.51A.

10. Mr. Atkinson goes on to make the bold submission that the consequence is that *Nelligan* was decided per incuriam, because the Court did not take into account s.51A when it should have done. I would not accept that because I must proceed on the footing that the Court of Appeal was correct in stating that what the claimant there sought and had been awarded was simply a Category B pension. That was also the basis on which Mr. Commissioner Williams had proceeded at first instance in *Nelligan*: at para. 29 of his decision (in *CP 3632 2001*) he had said:

"Mrs. N was entitled from the date of her husband's claim to both a Category A pension and a Category B pension. Subsection (2) [*which should I think have been a reference to subsection (1)*] stopped her being entitled to more than the higher of them. Subsection (3) allowed her to choose whether she received the Category A pension topped up by Category B entitlement or simply the Category B entitlement. As she did not make any option under subsection (3) the Secretary of State, under subsection (5), **awarded her the Category B entitlement.**" (My emphasis).

11. However, what Mr. Atkinson is entitled to submit, as I have said, is that *Nelligan* did not deal directly with the position where a claimant elects, or is awarded in default of election, a category A pension increased under s.51A. In my judgment, however, it is clear that that can make no difference, because s.51A is expressed only to apply where, apart from s.43(1), "a married person would be entitled both to (a) a Category A pension and (b) a Category B pension increased by virtue of the contributions of the other party to the marriage." S.51A does not bite at all unless there is entitlement to a Category B pension (in this case under s.48A). As was held in *Nelligan*, there is no such entitlement unless a separate claim is made when the spouse becomes entitled to his Category A pension.

12. The submissions which I summarised in para. 7(2) above, which were intended to overcome the difficulty that s.51A only bites where there is entitlement to a Category B pension, do not succeed in doing so. As to (a), it is not correct to say that a claimant in such a situation cannot be entitled to a Category B pension. S.48A gives her such an entitlement, and she is entitled under s.43(3) to elect for it if she wishes. As to (b), the fact (if it be a fact) that there is no separate claim form does not prevent a claim being made on whatever form is prescribed. As to (c), as I have said it is not correct to say that such a claimant could not be awarded a category B pension. As to (d), I think that Mr. Atkinson is probably correct in submitting that the technically correct method of awarding an increase of a Category A pension under s.51A is by way of supersession of the original decision awarding Category A pension. However, that does not assist him because under reg. 7(2) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 the date from which such a

supersession operates would be, at the earliest, the date of the relevant change of circumstances. The relevant change of circumstances is the claimant's entitlement to an increased Category A pension under s.51A, which in turn requires entitlement to the Category B pension, which requires a separate claim to have been made.

13. In my judgment, therefore, the Tribunal was right to dismiss the claimant's appeal, for substantially the reasons which it gave.

(signed on the original)

Charles Turnbull
Commissioner
11 May 2005