

**EXPLANATORY MEMORANDUM TO**  
**THE SOCIAL SECURITY (MISCELLANEOUS AMENDMENTS)( No. 3)**  
**REGULATIONS 2010**

**2010 No. 840**

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

The main purpose of these Regulations is to clarify the rules for paying Employment and Support Allowance where an appeal has been made. This instrument also includes a number of minor changes which correct or clarify regulations relevant to Employment and Support Allowance and/or incapacity benefits. One amendment is relevant to state pension.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

None

**4. Legislative Background**

The wide range and number of changes within this instrument mean that most of the legislative context is outlined a paragraph 7. Generally the instrument addresses a number of issues in the operation of the regulations that have come to light since the introduction of Employment and Support Allowance by the Welfare Reform Act 2007. The instrument makes minor changes, updates and corrections. A list of regulations amended by this instrument is in Annex 1.

**5. Territorial Extent and Application**

This instrument applies to Great Britain.

**6. European Convention on Human Rights**

6.1 The Minister for Disabled People, Jonathan Shaw has made the following statement regarding Human Rights: In my view the Social Security (Miscellaneous Amendments)(No.3) Regulations 2010 are compatible with the Convention rights.

**7. Policy background**

**Payment of Employment and Support Allowance pending an appeal**

7.1 Employment and Support Allowance has two rates, the assessment phase rate, and the higher - main phase - rate which applies after 13 weeks of entitlement or, if later, when a determination is made as to whether a claimant has or is to be treated as having limited capability for work. Where an Employment and Support Allowance award is terminated following a work capability assessment and the claimant then

appeals, the policy is that, where that person continues to provide medical evidence of incapacity, benefit will continue to be paid at the assessment rate, without the need for a further claim, pending the outcome of the appeal (the “pending appeal award”). If the appeal is unsuccessful, this award should terminate. These amendments: -

- Provide that no determination of limited capability for work may be made until the appeal is determined (this prevents the main phase rate from being payable until that date)
- Provide that a claimant whose appeal is unsuccessful be treated as not having limited capability for work (thereby ending entitlement)
- Provide that, where a claimant succeeds in their appeal, findings of fact and other determinations of the First-tier Tribunal, be conclusive evidence as to whether the claimant has limited capability for work or for work-related activity.

7.2 Where a pending appeal award is in payment and the claimant provides evidence of deterioration in health or a new medical condition, or falls to be treated as not having limited capability for work without the need for an assessment, the policy is that the pending appeal award be made (and revised if necessary) on the basis of this subsequent change. The amendments achieve this intention by excluding such changes of circumstances from the provisions described in the first to second bullet points above.

7.3 Generally, Employment and Support Allowance awards link when they are not separated by more than 12 weeks and an earlier linked award can count towards the 13 week period required to elapse before main phase rates become payable. Amendments are made to ensure that the basis of calculating entitlement to the main phase rates is equitable when comparing someone with a pending appeal award to someone who makes a new claim.

#### Qualifying conditions for State Second Pension

7.4 State Second Pension is an addition to Retirement Pension. Entitlement, in some circumstances, can result from entitlement to Employment and Support Allowance if the relevant contribution conditions are satisfied. It is also intended that people can qualify for state pension if they would qualify for Employment and Support Allowance but for not having paid insufficient National Insurance contributions. The amendment ensures that people can benefit from this provision regardless of whether it is the first or second contribution condition that is not satisfied.

#### Adult dependency increases where the dependant is aged at least 60

7.5 People receiving Incapacity Benefit can currently receive extra benefit for a spouse or partner where the spouse/partner is aged at least 60. The age limit applies to both men and women. An amendment aligns it with the qualifying age for Pension Credit. This ensures that the age limit rises in line with the increases in state pension age for women from April 2010 as part of equalising state pension age for men and women.

### Amending references from “doctor” to “health care professional”

7.6 The Secretary of State has the power to refer a person to a health care professional for medical examination and report. The term “health care professional” is wider than “doctor”. Personal capability assessments and work capability assessments are carried out by health care professionals such as registered nurses who then advise decision makers so that they can make a decision about entitlement to Incapacity Benefit or Employment and Support Allowance. The definition of “medical evidence contains a reference to “doctor” and this has been replaced with “health care professional”. The reference is relevant to decisions related to the personal capability assessment for Incapacity Benefit and related benefits. It does not affect the role of a General Practitioner (GP) in providing medical certificates to a claimant.

### Expiry of medical certificates and loss of contact with people receiving Employment and Support Allowance or Incapacity Benefit

7.7 Where a claim is made for Employment and Support Allowance or Incapacity Benefit payment can normally be made pending a work capability assessment or a personal capability assessment if medical evidence from a GP is provided. Credits are also available to protect a person’s National Insurance record.

7.8 Where medical evidence expires, existing legislation allows for the suspension of payment and termination of benefit entitlement pending assessment but it does not provide for the suspension or termination of an award of credits. Currently a full assessment or an assessment related decision is needed to decide entitlement to both benefit and credits. The amendments provide that the Secretary of State may treat a person as capable of work in Incapacity Benefit, or as not having limited capability for work in Employment and Support Allowance, once six weeks has passed since the medical evidence has expired. These provisions affect both the main award of benefit as well as associated credits. The provision is discretionary and medical referrals can continue, for example, where someone has a potentially severe mental health condition or is otherwise within a vulnerable group, so that they have more opportunity to resume contact and have a work capability assessment or personal capability assessment.

### Minor amendments to “permitted work rules”

7.9 Employment and Support Allowance and Incapacity Benefit recipients are able to do a certain amount of work within limits and still remain entitled to benefit. These are usually referred to as “the permitted work rules”. One of the categories of permitted work allows people to work for up to 52 weeks and earn £93 a week providing they work for less than 16 hours a week. The 52-week period allows people an opportunity to move towards work of more than 16 hours if they are able to do so. It also discourages long-term dependency on benefit supplemented by part-time earnings. Amendments are made to clarify that once work starts the period of permitted work runs for 52 weeks regardless of how many weeks are worked in that period or when the work ceases.

7.10 Some people can earn £93 a week without a 52 week restriction (“supported permitted work”). This applies to work that is supervised by someone employed by a public or local authority, or a voluntary organisation which provides or finds work for disabled people. Community interest companies may provide relevant supervision in the context of supported permitted work but they are not within the current scope of the regulations because there is an element of profit in their operations. However these profits are restricted and can only be used for the benefit of the community. It is therefore appropriate that the regulations are amended to include such companies.

#### Employment and Support Allowance claims when Child Benefit is in payment for the claimant

7.11 Where a young person claims Employment and Support Allowance, the policy is that the parents cannot be entitled to Child Benefit for that young person at the same time. An amendment is made to allow for an offset of the benefit paid for any period when there is entitlement to Employment and Support Allowance and for which Child Benefit has been paid to a parent or guardian. This prevents dual provision.

#### Interchange of information between DWP and local authorities

7.12 Employment and Support Allowance has been added to the list of benefits that are relevant to the interchange and use of social security information between the DWP and local authorities. This amendment ensures that the double handling of information relevant to benefits is avoided.

#### Establishing the benefit year and the contribution years when a claim is made late

7.13 An amendment is made to clarify that the contribution conditions for Employment and Support Allowance are determined on the basis of the period of the claim made within the time limit allowed for claiming that benefit. Entitlement to Employment and Support Allowance is therefore linked to contributions paid as the result of recent work. This has been the policy since the contribution conditions for Incapacity Benefit were amended in 2001. A further consequential amendment protects the position of young people claiming under special provisions who need to have limited capability for work for six months before entitlement can commence.

#### Entitlement to ESA where contribution conditions are satisfied in a later benefit year

7.14 The current regulations allow for the modification of the normal rules around establishing the benefit year and relevant tax years for the purpose of meeting the contributory requirements of ESA. This is to help those who fail the contribution conditions when first making a claim, who may have paid significant contributions immediately before falling ill, and so would be able to re-claim and be successful in a later benefit year. Currently provisions do not allow for the benefit year to be modified unless there is a break in the period of limited capability for work. This is often unlikely to be the case. This amendment removes the requirement for a break in the period of limited capability for work.

### Preventing immediate payment of Employment and Support Allowance for the same incapacity when IB is disallowed

7.15 Regulations are amended to prevent a claim for Employment and Support Allowance, and consequential payment of the assessment phase rate of that benefit, where there has been a recent disallowance of Incapacity Benefit following a medical assessment. A claim can succeed however where there is clear evidence of deterioration in a person's medical condition or where a new condition applies. Payment may also be made where the disallowance related to the failure to provide a personal capability assessment questionnaire but that has since been provided. This provision will apply where the disallowance occurred in the six months before a claim for Employment and Support Allowance. This approach reflects the policy that applies where Employment and Support Allowance is claimed following a disallowance of benefit as a result of a work capability assessment. It also reflects the policy that applied to Incapacity Benefit.

### Support for Mortgage Interest

7.16 An amendment is made to ensure that a claimant over the age of 60, with a partner under the age of 60, no longer has to wait for 13 weeks before receiving support mortgage interest. This aligns the position in Employment and Support Allowance with that in Jobseeker's Allowance.

### Work-focused health-related assessments and work-focused interviews

7.17 The work-focused health-related assessment report is produced by a healthcare professional trained to assess a person's ability to perform activities related to work. These amendments remove the requirement for such assessments to take place at a medical examination centre and allow them to take place in the claimant's home or over the phone as appropriate.

7.18 It is intended that a claimant's physical and mental health and the availability of childcare is considered when deciding whether there is good cause for a failure to undertake mandatory activities, such as a work focused interview, in order to continue to receive full benefit entitlement. Amendments have been made to reflect this.

### Absence abroad for NHS treatment or as a family member of someone in Her Majesty's forces

7.19 This amendment removes the requirement in Employment and Support Allowance for prior approval before a temporary absence abroad for NHS treatment commences. A similar amendment is made to ensure the same approach is taken for people who are temporarily absent from Great Britain because a family member is in Her Majesty's forces. It is not intended that people should lose entitlement to Employment and Support Allowance because they have not sought prior approval when they continue to meet the normal conditions of entitlement.

### Treatment of royalty payments

7.20 Regulations are amended to introduce a weekly disregard of £20 on income from royalties and similar payments. This will be applied when calculating income to establish entitlement to income-related Employment and Support Allowance and is consistent with the treatment of such payments in other income-related benefits. In cases where the claimant's partner is earning there should be an overall £20 disregard applied (first to the claimant's permitted work/earnings and any remaining balance to the partner's earnings).

### Treatment of child dependency increases

7.21 Regulations are amended to introduce a disregard in income-related Employment and Support Allowance for child dependency increases paid with some contributory benefits and Carer's Allowance. It is not intended that such payments are treated as income because Employment and Support Allowance does not include an amount for children.

### Treatment of training allowances

7.22 Regulations are also amended to clarify that a training allowance paid as a substitute for Jobseeker's Allowance is not disregarded as income for income related Employment and Support Allowance. The inclusion of Jobseeker's Allowance allows the training allowance of a Flexible New Deal participant to be taken into account as income. A training allowance paid as a substitute for Employment and Support Allowance is already taken into account as income so this amendment ensures consistency.

### Other minor amendments

7.23 Regulations set out a number of definitions which are relevant to decisions made by DWP decision makers. The definitions include "employment and support allowance decision" which is an award of Employment and Support Allowance based on an acceptance that a person has limited capability for work". Another is "limited capability for work determination" which normally refers to the determination of limited capability for work following a work capability assessment. However regulations do not cross refer to the relevant supersession provision for Employment and Support Allowance and the amendments correct this omission. A further amendment allows payment of Employment and Support Allowance to be suspended if the claimant fails to supply information or evidence within a month of a request. This brings Employment and Support Allowance into line with Incapacity Benefit and Income Support.

- ***Consolidation***

7.24 Informal consolidation of this instrument will be included in due course in the Department's "the law relating to Social Security" (the Blue Volumes) which are available at no cost to the public in main libraries and on the internet at: [The Law Relating to Social Security - DWP](#) .

## **8. Consultation outcome**

8.1 There is no substantive change in policy. The proposed regulations are a package of minor measures that have little impact on customers, a formal public consultation exercise is not appropriate. The amendment to the Social Security (Claims and Information) Regulations 2007 is a consequential amendment which was not done at the time ESA was introduced and for this reason the Local Authority Associations have not been consulted.

8.2 The draft regulations have been scrutinised by the Social Security Advisory Committee. The Committee decided that it did not require the regulations to be formally referred to it, and, accordingly, it did not consider any consultation exercise to be necessary.

## **9. Guidance**

Guidance will be updated to reflect these amendments. This will include amendments to the Decision Maker's Guide which is available to the public in main libraries and on the DWP website. Leaflets and other information products will be updated where appropriate.

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies is nil.

10.2 The impact on the public sector is negligible.

10.3 A full impact assessment has not been prepared for this instrument.

## **11. Regulating small business**

The legislation does not apply to small business.

## **12. Monitoring & review**

Most of the changes are minor and there are no plans to monitor these changes. The operation of the regulations will continue to be reviewed through the normal avenues of guidance enquiries received from Jobcentre Plus offices and correspondence from members of the public.

## **13. Contact**

Diane Mitchell and Steve Brooke at the Department for Work and Pensions can answer any queries regarding the instrument (Tel: 0113 232 4501 or email: [Diane.S.Mitchell@Jobcentreplus.gsi.gov.uk](mailto:Diane.S.Mitchell@Jobcentreplus.gsi.gov.uk) or Tel: 0113 232 7418 or email: [Steve.Brooke@Jobcentreplus.gsi.gov.uk](mailto:Steve.Brooke@Jobcentreplus.gsi.gov.uk) ).

## **Annex 1**

- Section 44A of the Social Security Contributions and Benefits Act 1992.
- The Social Security (Claims and Payments) Regulations 1987
- The Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988
- The Social Security (Incapacity Benefit – Increases for Dependants) Regulations 1994
- The Social Security (Incapacity for Work) (General) Regulation 1995
- The Social Security and Child Support (Decisions and Appeals) Regulations 1999
- The Social Security (Claims and Information) Regulations 2007
- The Employment and Support Allowance Regulations 2008.