

**EXPLANATORY MEMORANDUM TO
THE EMPLOYMENT AND SUPPORT ALLOWANCE (AMENDMENT OF LINKING
RULES) REGULATIONS 2012**

2012 No. 919

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

2. Purpose of the instrument

2.1 This instrument abolishes the provision within the Employment and Support Allowance Regulations 2008 (“the Employment and Support Allowance Regulations”) which allows a period of limited capability for work (“LCW”) in a claim for Employment and Support Allowance (“ESA”) to link to an earlier period of LCW where the two periods are separated by no more than 104 weeks. Other regulations are also amended as a consequence of that abolition.

2.2 Additionally, this instrument clarifies the circumstances in which entitlement to an ESA component arises where a new claim is made within 12 weeks of an earlier award ending.

2.3 It also clarifies when entitlement to a transitional addition (see footnote 1) awarded as part of the reassessment exercise¹ is retained where a new ESA claim is made within 12 weeks of an award ending.

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

None.

4. Legislative Context

4.1 There are two linking rules in the Employment and Support Allowance Regulations, the 12-week linking rule² and the 104-week linking rule³.

4.2 This instrument abolishes the 104 week linking rule in order to complement section 51⁴ of the Welfare Reform Act 2012 (which received Royal Assent on 8th March 2012). This inserted a new section 1A into the Welfare Reform Act 2007 (“the 2007

¹ The reassessment exercise is the exercise to determine whether claimants with an “existing award” of an incapacity benefit (i.e. incapacity benefit, severe disablement allowance or income support on grounds of disability) should have that award converted into an award of ESA. A transitional addition is, essentially, a sum representing any shortfall between a claimant’s entitlement under the existing award and their entitlement to ESA once the reassessment exercise is complete, so that where the claimant is reassessed and qualifies for ESA, they do not suffer a loss in benefit entitlement. For further details of the exercise, see the explanatory memoranda for S.I. 2010/1907 and S.I. 2010/2430.

² Contained in regulation 145(1) of the Employment and Support Allowance Regulations.
<http://www.dwp.gov.uk/docs/a13-5101.pdf>

³ Principally contained in regulation 145(2) of the Employment and Support Allowance Regulations – link as per footnote 2.

⁴ <http://www.legislation.gov.uk/ukpga/2012/5/section/51/enacted>

Act”). Section 1A introduces a time limit of 365 days on entitlement to contributory ESA for claimants who are not in the support group. The operation of time-limiting would, however, be frustrated by the existence of the 104 week linking rule as this would treat the gap between two periods of LCW (an essential condition of entitlement to ESA) as being one continuous period, which would in turn reduce (in some cases to zero) the number of days’ entitlement to contributory ESA to which the claimant might become entitled following a reclaim within the linking period. This instrument amends the Employment and Support Allowance Regulations accordingly and makes consequential amendments to other regulations.

4.3 This instrument also makes amendments to the 12-week linking rule and the associated rules contained within the Employment and Support Allowance Regulations on entitlement to additional components. This is in response to a recent Upper Tribunal decision⁵ which interpreted the relevant provisions of those Regulations in a way that was not fully in accordance with the policy intention. This instrument amends the Regulations in order to reflect the original policy intention (see paragraphs 7.1 and 7.7 to 7.8 below).

5. Territorial Extent and Application

This instrument applies to Great Britain. Equivalent provision will be made for Northern Ireland at a later date in line with the Northern Ireland Welfare Reform Bill which will be introduced later in the year.

6. European Convention on Human Rights

As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

Background

Employment and Support Allowance

7.1 ESA is paid at a lower rate for the first 13 weeks (the “assessment period”) during which time claimants are assessed to determine whether or not they have LCW. If - following the medical assessment - it is decided that a claimant has LCW, the weekly rate of benefit is increased by the work-related activity component. If it is decided that the claimant has both LCW and limited capability for work-related activity, the weekly rate of benefit is increased by the support component (which is paid at a higher rate than the work-related activity component). Payment of either component therefore depends on it being determined in the first instance that the claimant has LCW.

⁵ *S of S for Work and Pensions v PT (ESA) [2011] UKUT 317 (AAC); CE/52/11*. The decision can be found at this link: <http://www.bailii.org/uk/cases/UKUT/AAC/2011/317.rtf>

Abolition of the 104-week linking rule

7.2 This rule was introduced to provide some protection for people who had been in receipt of ESA for more than 12 weeks and then returned to work or training. If a new claim is made within 104 weeks, the National Insurance contribution record that applied when the first claim was made can be re-used for the new claim. This allows people to re-qualify for benefit when they otherwise might not. In addition, any component in place in the previous award is payable from the outset of the new award, subject to the outcome of a new medical assessment.

7.3 The introduction of a time-limit to awards of contributory ESA (under section 1A of the 2007 Act) means that a rule that was meant to be beneficial could have the opposite effect for around 5,500 claimants. If this linking rule was retained, it would mean that some claimants would not be able to start a new 365 day period of entitlement even though they have recently worked and paid National Insurance contributions. They would only be entitled to the balance, if any, of the 365 day period from their earlier award.

7.4 The removal of the 104-week linking rule means that claimants will start a new 365 day period of entitlement based on a more recent contribution record and will not be inadvertently tied to an earlier period. They will, however, no longer be able to rely on the contributions on which their previous award was based, and they will need to serve a new 13-week assessment period before becoming potentially entitled to a component. The effect of the change will be beneficial for many claimants but will be potentially disadvantageous to those who are unaffected by the time-limiting provision, such as those in the support group (i.e. those entitled to the support component as described in paragraph 7.1, above) and those receiving income-related ESA (entitlement to which arises under section 1(2)(b) of the 2007 Act).

7.5 In deciding to abolish, rather than amend, the 104-week linking rule, account was taken of the effect on particular groups and the introduction of Universal Credit. Any adverse impact on support group recipients is likely to be negligible, as these are the claimants furthest from the labour market and therefore least likely to take advantage of the rule. Any adverse impact on recipients of income-related ESA is limited to the amount of the relevant component for the first 13 weeks of the new claim; and the effect will be short-lived because of the planned replacement of income-related ESA by Universal Credit from October 2013.

Clarification of the 12-week linking rule

7.6 The operation of the 12-week linking rule is being clarified following an Upper Tribunal decision in which the Judge decided that, where a claim was made which linked to an earlier period of LCW which had exceeded 13 weeks, the award in respect of that new claim should automatically include the work-related activity component, whether or not a work capability assessment had taken place during the currency of the earlier period of LCW. This runs counter to the policy intention that a component can only be paid when the claimant has been medically assessed (i.e. the Work Capability Assessment), and it has been determined that they have limited capability for work.

7.7 The Employment and Support Allowance Regulations (as amended by these regulations) make it clear that entitlement to a component does not arise until a medical assessment has been carried out. These regulations also clarify the circumstances where

it is not necessary to serve a new assessment period before the component is paid. The policy intention is that where:

- the first award lasted fewer than 13 weeks, the relevant component will be paid from the beginning of the 14th week of the aggregate of the two awards *but only when a medical assessment has taken place*;
- the first award exceeded 13 weeks and was terminated for a reason *other than* that the claimant was fit for work and that award included a component, the new award will include the component *from the outset*. Where a component was not included in the first award, it will be paid, following a medical assessment, from the start of the second award;
- the first award exceeded 13 weeks and the award is terminated because the claimant is found fit for work, either component will be paid, following a medical assessment, from the beginning of the second award.

Consequential amendments

7.8 In consequence of the abolition of the 104-week linking rule and the clarification of the operation of the 12-week linking rule, appropriate amendments are being made to the Social Security and Child Support (Decisions and Appeals) Regulations 1999, the Housing Benefit Regulations 2006, the Council Tax Benefit Regulations 2006, and the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No. 2) Regulations 2010 (“the Reassessment Regulations”) (these being the Regulations which underpin the reassessment exercise).

7.9 In particular, the Reassessment Regulations are amended to clarify that where – on conversion to ESA - a claimant has been awarded a transitional addition, then, in the event of a repeat claim which satisfies the 12-week linking rule, where

- the first award was terminated for a reason other than that the claimant was fit for work, the new award will include the transitional addition *from the outset*, and
- the first award was terminated because the claimant was found fit for work, the transitional addition will be paid (from the beginning of the second award) *only following a medical assessment*.

Consolidation

7.10 There are no immediate plans to consolidate the Statutory Instruments which these Regulations amend. However, in due course, the Department will make available informal consolidated versions of the legislation, as amended, on its website <http://www.dwp.gov.uk/publications/specialist-guides/law-volumes/the-law-relating-to-social-security/>

8 Consultation outcome

8.1 This change removes a rule that has proved difficult to understand and apply, and thus introduces a procedural simplification. As this is a consequence of wider welfare reforms the Department has not consulted on it specifically. The Department consulted extensively about the implications of those wider reforms as part of the Welfare Reform

Bill consultation process, and has also discussed informally with stakeholders to ensure that the operational implications are fully understood and that processes are in place to ensure that the change is implemented correctly.

8.2 The draft regulations were presented to the Social Security Advisory Committee on 7 December 2012. Members had some concerns about the abolition of the 104-week linking rule and asked for further analysis of an alternate approach. Following receipt of this analysis, the Committee agreed that any alternate approach was unworkable because of the complexity involved, and decided that it did not require the regulations to be formally referred to it, or to consult on them.

9 Guidance

Guidance is being developed for staff in the Jobcentre Plus offices who advise claimants and for staff in benefit centres including decision makers. Welfare Rights advisers have also been notified of the change.

10 Impact

10.1 There is no direct impact on business and civil society organisations.

10.2 The impact on the public sector is negligible.

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

11. Regulating small business

The legislation does not directly apply to small business.

12. Monitoring & review

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 at the Department for Work and Pensions (Tel: 0113 232 4501 or email: diane.s.mitchell@dwp.gsi.gov.uk) can answer any queries regarding the instrument.