

EXPLANATORY MEMORANDUM TO
THE SOCIAL SECURITY (MISCELLANEOUS AMENDMENTS) (NO.4)
REGULATIONS 2007

2007 No. 2470

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. **Description**
 - 2.1 The changes been made to close gaps and correct anomalies in the rules which apply where entitlement to one benefit is affected by entitlement to another benefit – the benefit linking rules; they clarify the rules which determine the date from which benefit awards change where claimants’ circumstances change; they allow for automatic claims for state pensions in certain circumstances, and where payment is due death.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.
4. **Legislative Background**
 - 4.1 The changes are all generated by departmental policy considerations. Those being made to the benefit linking rules and where awards change because of changed circumstances, are consequent on decision makers identifying problems with individual cases which give rise to policy considerations. The changes in relation to the automatic claims for State Pension and payments on death arise out of the department’s Pension Transformation Programme – a major transformation initiative to improve services and lower the costs of pension delivery.
5. **Territorial Extent and Application**
 - 5.1 This instrument extends to Great Britain.
6. **The European Convention on Human Rights**

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

7. Policy background

Amendments to the Social Security Claims and Payments Regulations 1987

7.1 Regulation 2(2)

- 7.1.1 This provides for the automatic claiming of State Pension in certain circumstances.
- 7.1.2 Any entitlement to benefit requires a claim to be made. There are however certain exceptions set out in regulations. In each case they are where the Department knows from official records that the person would be entitled to the benefit in question and can therefore make an award without requiring the beneficiary to go through the administrative burden of making a claim.
- 7.1.3 Four situations have arisen where we wish to extend the list of exceptions:
- a) a Category B State Pension (ie State Pension based on the contribution record of the beneficiary's spouse or civil partner) where a beneficiary already entitled to Category A State Pension and/or Graduated Benefit (based on their own contributions) marries or enters a civil partnership. In these circumstances we would want to make the award as soon as we became aware of the marriage/civil partnership.
 - b) conversely, we would want to be able to make an award of a Category A State Pension when an individual, already entitled to a State Pension of any category, became divorced or whose civil partnership is dissolved.
 - c) we do not want a surviving spouse and civil partner, who is above state pension age, to be required to make a claim for the one-off Bereavement Payment when the death of the late spouse or civil partner is notified. We wish the award to be made automatically.
 - d) we do not want a spouse or civil partner who is in receipt of Category A in their own right to have to claim again where their partner becomes entitled to a Category A pension which means that they become entitled to a higher rate Category A pension now based on their partner's contributions.

7.1.4 The amendment at regulation 2(2) extends the exceptions list in regulation 3 of the Claims & Payments Regulations to include the above circumstances.

7.2 Regulation 2(3) & (11)

7.2.1 This amendment ensures that the linked benefit provisions of regulation 6 of the Claims and Payments Regulations are subject, where appropriate, to the time limits of regulation 19 of the same Regulations.

7.2.2. The general rule with regard to claims is that the date of claim is the date the claim is received by DWP. This general rule is however subject to a variety of other rules, each of which permit the date of claim to be *treated* as made on an earlier date than the date on which it was actually received.

7.2.3 There are a number of rules about assigning a 'treat as made' date where a claim for one benefit can only succeed if there is already a prior entitlement to a second benefit. They are called 'linking rules'. A loophole has recently been identified in these rules in regulation 6. It emerges in cases where an award of the qualifying benefit is terminated but then followed by another award of the same benefit. There may or there may not be a gap between the ending of the first award and the start of the second award. It is probably easiest to explain this in the context of the Carer's Allowance (CA)/Disability Living Allowance (DLA) link although the principle applies across the linking rules.

7.2.4. Where a CA claim is made within 3 months of a decision awarding a qualifying benefit to the disabled person, the policy intention is that one of two provisions will operate to determine the effective date of claim:

a) either the CA claim is treated as made on the date awarding the qualifying benefit; or

b) the normal time for claiming rules applies whereby a claim for CA would be sufficient for establishing an entitlement to CA up to 3 months earlier, provided the other conditions of entitlement are satisfied.

7.2.5 However currently the law operates so that both rules can work together in the circumstances where there are two or more separate periods of entitlement to the qualifying benefit. As a result decision-makers are going back to the date the latest period of

qualifying benefit began to establish the date on which the CA claim can be treated as made, but then are going back a further 3 months in cases where there was an earlier period of entitlement to the qualifying benefit on the grounds that the prescribed time for claiming CA is 3 months. This is not the policy intention.

7.2.6. The amendment closes this loophole so that a person either gets the benefit of the linking rules or the benefit of the prescribed time for claiming, but not both together at the same time.

7.3 Regulation 2(4) - (7)

7.3.1 This ensures that the transitional protection offered to Child Dependency Increases by regulation 6(19) of the Claims and Payments Regulations is not lost when the person being cared for goes into hospital

7.3.2 A Social Security Commissioner considered regulation 6(19) in relation to the payment of a Child Dependency Increase (CDI) to a carer. The person being cared for, and in receipt of Disability Living Allowance (DLA), had gone into hospital which meant that both the Carer's Allowance (CA) and the CDI stopped. When the person left hospital their DLA was re-instated as was the CA to their carer, but the CDI was not. On appeal it was argued that it should have been because it was protected where the circumstances in regulation 6(19) applied. The protection arose out of Article 3(3)(c) of the Tax Credits Act 2002(Commencement No 3 and Transitional Provisions and Savings) Order 2003.

7.3.3 The Commissioner said that it does not apply when the DLA customer is in hospital and the DLA is reduced only because of the hospital downrating rules. The Commissioner said that the DLA award itself had not been terminated or reduced by the supersession to downrate. It was only its payability which had been affected by the supersession. The problem is that reg 6(19) is drafted on the basis that the award itself is superseded.

7.3.4. What this means is that a re-claim for CA, even if made within its prescribed time limit of three months, will not come within regulation 6(19). For entitlement to the CA itself this is not crucial, but it has a knock-on effect for the protected CDI which the CA customer was receiving before the DLA customer was hospitalised. The transitional protection legislation provides that the CDI will not be lost where regulation 6(19) of the Claims and Payments Regulations applies. With the Commissioner deciding

that regulation 6(19) did not apply, the CDI is lost. This is not the policy intention.

- 7.3.5 The amendment will ensure that the expected role of regulation 6(19) in offering protection is preserved. *But it should be noted that it is drafted to capture all similar cases and not just the CDI problem.*

7.4 Regulation 2(8)

- 7.4.1 This allows Income Support to be backdated in full to link with a delayed award of a linked benefit
- 7.4.2. Regulation 6(33) of the Claims and Payments Regulations allows a customer to delay claiming Carer's Allowance (CA) until such time that the necessary qualifying benefit, that is, Disability Living Allowance (DLA), has been decided. Previously the customer had to claim CA when the claim for DLA was made and again when it was awarded.
- 7.4.3 It has come to light that a similar problem can exist for Income Support (IS) in certain circumstances.

For example: A customer in receipt of IS claims Incapacity Benefit (IB). IB is awarded at a higher rate than the IS so the IS stops. Customer later claims Disability Living Allowance (DLA). If awarded he will be entitled to a Disability Premium which when added to his IS entitlement would put his IS entitlement at a higher rate than his IB. In this case, the DLA is awarded on appeal some eight months after it is claimed. IS is re-claimed immediately. The customer expects it to be backdated to the date from which DLA is paid. As the law stands it can only be paid from the date it is claimed.

- 7.4.4 The policy intention is that the two benefits should link at the point that DLA is awarded so that the customer is not penalised. The amendment will ensure this is possible.

7.5 Regulation 2(9) & (10)

- 7.5.1 This amendment is being made because of anomaly identified in the working of regulation 6(33). It fails the policy in the following scenario: Where a claim for CA is made within three months of a decision on a repeat DLA claim made in advance (all repeat claims for DLA are made in advance so that they link seamlessly with the

existing claim) that awards benefit from a date **after** the CA claim was received.

- 7.5.2 On a literal reading of regulation 6(33) it means that the claimant is penalised. The normal claims rule, regulation 6(1), means that the date of claim should be the date it is received in an appropriate office. However, 6(1) is subject to 6(33). Regulation 6(33) provides that the date of claim for the CA is the date from which the DLA is payable. This would mean that the CA would be payable from a date after the date it was claimed (received). This is clearly unfair to the carer and not the policy intention. Under normal claiming rules the CA would be payable from the date it was received with the possibility of it being backdated three months.

For example: DLA in payment due to end 1.8.07. Repeat claim made on 1.4.07 in advance of DLA ending. Decision on repeat claim made 1.6.07. Customer, who until this point has not claimed CA, realises that he has entitlement to CA and claims on 1.7.07. However, because entitlement to CA is tied to the date of entitlement on the repeat claim for DLA the CA is not payable until 1.8.07. Under normal rules the claimant would be entitled from 1.7.07 because the qualifying rate of DLA is already in payment.

- 7.5.3 The amendment ensures that CA can be paid from the date that entitlement first arises in the above scenario, that is, 1.7.07.

7.6 Regulation 2(12) & (13)

- 7.6.1 This amendment ensures that the Secretary of State can, in certain cases, pay outstanding benefit to the spouse of the deceased without requiring an application for it, written or otherwise.
- 7.6.2. At present where there is any unpaid benefit at death, the Secretary of State has a certain amount of discretion when it comes to paying the arrears to relatives or interested parties. Normally the executor or administrator will have first call on any outstanding benefit because they are responsible for calling in and distributing the estate, and after that we would expect to pay any unpaid benefit to go to a surviving spouse.
- 7.6.3 The legislation governing these arrangements, that is regulation 30 of the Claims and Payments Regulations, requires any person wishing to receive all or part of the deceased's unpaid benefit to

make an application in writing to the Secretary of State within 12 months of the death (or longer if considered appropriate).

- 7.6.4. The Pension Service now receive the vast majority of claims for State Pension and Pension Credit by telephone. Relevant changes in circumstances are similarly notified by telephone. Given this it appears increasingly anomalous to require people to make a *written* application for arrears of the same benefits. Imposing this burden upon a grieving spouse seems both insensitive and, often, unnecessary. Conversely, removing the burden would clearly benefit those affected and improve customer service.
- 7.6.5. There is therefore a desire to extend the discretion of the Secretary of State so that, in certain cases, he can pay the outstanding benefit to the spouse of the deceased without requiring an application for it, written or otherwise.
- 7.6.6. The general requirement to make a written application for any outstanding benefit owed to a deceased claimant is still important because of the understandable sensitivities surrounding a death and the need to ensure that decision makers do not risk a legal challenge through making an ill-judged and hasty decision to make a payment to an inappropriate person.
- 7.6.7. The amendment achieves this in the circumstances outlined.

7.7 Regulation 2(14)

- 7.7.1 Is consequent on the coming into force of the Mental Capacity Act. It ensures that payments to third parties reflect the changes introduced by the Mental Capacity Act.

Amendments to the Social Security and Child Support (Decisions and Appeals) Regulations 1999

7.8 Regulation 3(2) – (4)

- 7.8.1 This amendment allows the Secretary of State to revise a decision where there is a non-medical change in a disability and incapacity benefit decision.
- 7.8.2. In April 2006 an amendment was made to the Decisions and Appeals Regulations to provide that the effective date of an adverse non-medical change of circumstances on Disability Living Allowance, Attendance Allowance and Incapacity Benefit is the

date of change itself. This amendment was required because the Social Security Commissioners had decided that the existing regulations only allowed a non-medical change to be effective from the date of the superseding decision itself rather than the date of change. This meant that potential overpayments were missed. This was not the policy intention and so the amendment was made.

7.8.3 We did not make the same change for revision, that is, where a decision is changed from its original date. We should have done so because it is possible that someone may have misrepresented their non-medical circumstances from the outset of their claim. The amendment closes this loophole.

7.9 Regulation 3(5)

7.9.1 This amendment will allow the Secretary of State to revise a decision, which awarded incapacity benefit from a date later than the first day claimed because of the six month rule, when the claimant subsequently passes the personal capability assessment

7.9.2 As the law currently stands at the moment an award of Incapacity Benefit (IB) may be made from a date after the first day claimed for. This situation arises where we cannot treat the claimant as incapable of work from the first day claimed (the law allows such treating pending the claimant being subject to a personal capability assessment (PCA)) because he has been found capable of work in the six months prior to the current claim – no one can be entitled to IB if they claim within six months of having been refused on a previous claim because they failed their PCA, unless it is for a different incapacity.

Example:

The claim to benefit is made on 1st September. In the previous May (15th) the claimant had been found to be capable of work when he failed his PCA. The claimant is told that his claim will be decided either when his incapacity for work is actually assessed (that is by a PCA) or if that has not happened within 6 months of the last time it was determined that he was capable or treated as capable of work, ie 15th November (6 months after the last PCA), it will be done then.

November arrives, he has not actually been assessed so the decision maker determines that as six months have elapsed he can be treated as incapable of work from 15th November. An award of benefit is made incorporating this determination.

In January he is actually examined and the PCA carried out. He scores sufficient points and is incapable of work. This determination "covers" all days of the claim for IB/credits where there is no determination of incapacity, that is, it includes the period from 1 September to 14 November as well as the period from January.

- 7.9.3 In the above example, benefit has been paid from 15 November and needs to be paid from 1 September to 14th November. There is currently no provision which allows a decision maker to make this payment. The claim made on 1 September can be decided in January once the PCA has been passed but cannot be backdated.
- 7.9.4 The amendment ensures that if the customer passes the PCA the Secretary of State will be able to revise the awarding decision to pay for the period between the date of claim and the date reg 28 applies.

7.10. Regulation 3(6) & (7)

- 7.10.1 This corrects an anomaly that has arisen out of the amendment made to regulation 7(2) of the Decision and Appeals Regulations (D&A Regs) in October 2006.
- 7.10.2 In October last year, we amended the Decision and Appeals Regulations to allow decisions to be superseded and full arrears paid to an Income Support (IS) customer (with a non-resident carer in receipt of Carer's Allowance (CA)) where the person receiving CA ceased to receive the Allowance and the IS customer was unaware of the fact immediately and only reported it some time later. The law provides that where CA is in payment the IS customer cannot receive a severe disability premium (SDP). So, once CA stopped SDP became payable. The amendment made in October meant that we could pay arrears of SDP lost because of the delay in reporting the stopping of CA.
- 7.10.3 Unfortunately, it is possible to interpret the regulation in a way which benefits carers as well as the disabled person - customers it was not intended to help. The carers are customers who have no excuse for not informing us timeously of a change in their circumstances. They are already covered by existing provisions and are penalised accordingly if they do not inform us on time.

For example: Male customer in receipt of IS has a female non-resident carer in receipt of CA and IS. The carer must report any change in her circumstances. The ending of entitlement to CA is

one such change. In this example the CA stops but is not reported. Clearly it is in the CA customer's own interest to tell us because her IS/SPC would increase. If she does not tell us timeously then the normal change of circumstances rules apply, that is, the change must be reported within one month or the date of change becomes the date that notification is made, and IS/SPC would be increased only from the date she does tell us. However, the amendment made in October means that she is not so penalised. This is because the stopping of CA is an advantageous change for her IS and thus satisfies the new provision. Thus the sanction for late notification is avoided. This is not the intention.

7.10.4 The amendment will ensure that the existing provision will apply only to the person being cared for and not the carer.

7.11 Regulation 3(8)

7.11.1 This ensures that Invalidity Benefit (IVB), the predecessor of Incapacity Benefit, is a relevant benefit for decision making purposes.

7.11.2 In October 2006 we introduced provisions which allowed us to overcome the problems identified by Commissioners where we wanted to supersede awards of benefits which had been repealed by the time the Social Security Act 1998 (the 98 Act) came into force, e.g. Invalidity Benefit (IVB). The Commissioners said that we could not supersede because we had not made these benefits relevant benefits under the 98 Act. Only relevant benefits were capable of being superseded.

7.11.3 Unfortunately the amendment made in October 2006 and intended to reverse the effect of the Commissioners' decision, failed to do so. This is because it only solved half the problem. The first problem was that IVB was not a relevant benefit. The 2006 amendment sorted that out. However, there was a second problem which we overlooked and which made the amendment ineffective.

7.11.4 This is that a decision to award IVB is not one which embodies a determination about incapacity or has one necessary to it. The problem arises because of the definition of "incapacity benefit decision" in regulation 7A(1) of the Decision and Appeals Regulations. This is "a decision to award a relevant benefit...embodied in or necessary to which is a determination that a person is or is to be treated as incapable of work under Part XIII A of the C&B Act". IVB could never come within this definition

because it was never a condition of entitlement that that there was embodied in the decision or necessary to it that a person is or could be treated as incapable of work. Accordingly, simply describing IVB as a relevant benefit, which the amendment had done, was always going to be inadequate. So we have a situation where IVB purports to be a relevant benefit within the meaning of regulation 7A(1) but it is not.

7.11.5 The amendment extends the definition in regulation 7A(1) to include long term incapacity benefit within the definition of an "incapacity benefit decision".

7.12 Regulation 3(9)

7.12.1 This updates the definition of "patient" in the Decisions and Appeals Regulations

7.12.2 The definition in Schedule 3B, paragraph 6 of the Decision and Appeals Regulations currently refers to the Social Security (Hospital In-Patients) Regulations 1975. These are obsolete.

Amendments to the Housing Benefit and Council Tax Benefit Regulations

7.13 Regulation 4

7.13.1 This removes an anomaly in the interplay between regulation 8(3) of the Housing Benefit Decisions and Appeals Regulations ("HBDA Regs") and regulation 79 of the Housing Benefit Regulations ("HB Regs") in relation to the effective date of a change of circumstances.

7.13.2 Regulation 8(1) of the HBDA Regs says that the effective date of a superseding decision shall be a date other than the date the decision is made or the date of the application for supersession where regulation 8(2) to (7) applies. Regulation 8(2) is subject to 8(3). The latter tells us that the date of notification of a change is the date when the change occurred. The opening words of 8(3) then send the decision maker back to 8(2) which in turn send him to regulation 79 of the HB Regs. But this regulation is itself subject to 8(3). So the legislation sends the decision maker around in circles with no provision providing a definitive effective date. This is not the policy intention.

7.13.3 The amendment corrects the position to ensure that there is a rational interplay between the provisions.

7.14 Regulations 5, 6 & 7

7.14.1 These mirror 7.14 above for the equivalent provisions in the Housing Benefit (persons who have attained the qualifying age for state pension credit) Regulations 2006, the Council Tax Benefit Regulations 2006 and the Council Tax Benefit (persons who have attained the qualifying age for state pension credit) Regulations 2006.

7.15 Regulation 8

7.15.1 This revokes redundant provisions in the Housing Benefit and Council Tax (Decisions and Appeals) Regulations (HBDA Regs).

7.15.2 In the HBDA Regs , regulations 7(2ZA) and 8(6A) and (6B) apply to all claimants. This means there is no need to have regulations 7(2A) and 8(12) and (3) which pre-date 7(2ZA) and 8(6A) & (6B) and do the same job. They ought to have been abolished in April 2004 when the HB & CTB (Abolition of Benefit Periods) Amendment Regulations 2004 abolished benefit periods in HB and CTB for all claimants. It is an oversight we are now correcting.

Consultation

7.16 The regulations are subject to statutory consultation with Social Security Advisory Committee. They have indicated they are content with the draft regulations. None of the amendments were the subject of consultation with outside bodies. This was not necessary as they are of a technical nature designed to reflect the policy intention.

Guidance

7.17 A Memorandum will be issued to decision makers explaining what the changes are and what they mean in practice. This information will also be incorporated into the Decision Makers Guide which will be available to the public in due course.

Consolidation

7.18 The public will be able to read a consolidated version of the affected Regulations in The Law Relating to Social Security (“The Blue Volumes”) on the DWP website.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as there is no impact on business, charities or voluntary bodies.

8.2 The impact on the public sector is negligible.

9. Contact

Lyndon Walters at the Department for Work and Pensions can answer any queries regarding this instrument. He can be contacted on tel: 020 7962 8047 or by e-mail to: lyndon.walters@dwp.gsi.gov.uk