

ESA, IB AND IS - FURTHER TRANSITIONAL ISSUES

[SEE DMG MEMO 16/10]

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INTRODUCTION

- 1 This memo gives guidance on claims made on or after 27.10.08 for
 1. periods on or after 27.10.08 for
 - 1.1 IB where the claimant is entitled to IS and SSP which ends
 - 1.2 IB or ESA following application of the PCA

1.3 IB under the modification of the benefit year rules

1.4 IB for the purpose of incapacity credits

1.5 IS or

2. IB where the period of claim is before 27.10.08.

IS AND SSP

[See Memo DMG 30/09]

2 Where

1. a person is claiming IS **solely** on the grounds that they are entitled to SSP¹ **and**
2. entitlement to SSP ends on or after 27.10.08

the award of IS should be terminated on supersession, and the person advised to claim ESA.

1 IS (Gen) Regs, Sch 1B para 7(d)

3 The conditions for making a claim for IB on or after 27.10.08¹ are not satisfied because

1. the period of SSP is not a day of IfW for the purposes of PIW linking rules² (see DMG 56294)
2. a person entitled to SSP is not a WtWB in a linking period³ (see DMG 56288)
3. an award of IS due to entitlement to SSP is not an award of IS "on the grounds of disability"⁴ (see DMG 45204 - 45205), even though it is an award of IS to a person incapable of work⁵ (see DMG 20134).

A claim for IB made after SSP ends where that is on or after 27.10.08 is therefore treated as a claim for ESA⁶.

1 ESA (Trans Provs) Regs, reg 2(2)(a), (b) or (e); 2 SS CB Act 92, Sch 12 para 1; 3 SSP (Gen) Regs, reg 3(2A);

4 ESA (Trans Provs) Regs, reg 1(4); 5 IS (Gen) Regs, Sch 1B para 7(d); 6 ESA (Trans Provs) Regs, reg 2(1)

ESA, IB OR IS CLAIMED FOLLOWING APPLICATION OF THE PCA

Claim for IB or ESA - PCA appeal outstanding

4 Where the claimant

1. is entitled to IB which is terminated following application of the PCA **and**
2. lodges an appeal against a decision which incorporates a determination that they are not incapable of work **and**
3. is
 - 3.1 entitled to reduced rate IS pending the appeal¹ (but see paragraph 7 for the effect of IS on ESA entitlement) **or**
 - 3.2 not entitled to IS (for example where income or capital exceeds) **and**
4. makes a claim for a period on or after 27.10.08 for
 - 4.1 IB for the same incapacity which has not deteriorated **or**
 - 4.2 ESA

the claim is treated as a claim for ESA², or is a claim for ESA - see DMG 45211 - 45213.

1 IS (Gen) Regs, Sch 1B para 25; 2 ESA (Trans Provs) Regs, reg 2(1)

- 5 This is because the claimant
 1. could not be treated as incapable of work for the purposes of IB or WtWBs so cannot immediately establish a new PIW for the purposes of linking - see DMG 13621¹ **and**
 2. is not entitled to IS on the grounds of disability².

1 SS (IW) (Gen) Regs, reg 28(2)(b); 2 ESA (Trans Provs) Regs, reg 1(4) & 2(2)(e)

- 6 A claim for ESA is treated as a claim for IB where, if that benefit had been claimed, the claimant would be entitled to an existing award¹ - see DMG 45215. However, where the claimant cannot establish a PIW, an award of IB cannot be made from the date of claim, and the claim cannot be determined pending application of the PCA. The claimant cannot therefore be entitled to an existing award, and any claim made can only be a claim for ESA. DMs should note that, for IB and WtWBs, the linking rules are in relation to linking PIWs, not to linking periods of claims.

1 reg 3(2)

- 7 The claim for ESA should be determined in the usual way - see also Memo DMG 48/08. DMs should note that where the claimant is entitled to reduced rate IS, the claim for ESA should be disallowed, as a person entitled to IS is not entitled to ESA¹

see DMG 41012 5.. Any award of reduced rate IS remains in place until the appeal is decided.

1 WR Act 07, s 1(3)(e)

8 Where

1. the person can be treated as incapable from the date of the IB claim, for example because there is a new incapacity **and**
2. the PIWs link (see DMG 45214) **and**
3. the claim is for a period on or after 27.10.08

the claim remains a claim for IB and should be determined accordingly.

PCA appeal allowed

9 Where the PCA appeal is allowed, the decision awarding ESA should be superseded and terminated on the grounds of a relevant change of circumstances¹. The change is that the FtT has held that the claimant is incapable of work, and as a result is entitled to an existing award throughout the period of the ESA award². The decision is effective from the date of the FtT's decision³.

1 SS CS (D&A) Regs, reg 6(2)(a)(i); 2 ESA (Trans (Provs) Regs, reg 3(1); 3 SS CS (D&A) Regs, reg 7(2)(c)(v)

10 The award of IB is reinstated from the date it was terminated, and the arrears of IB should be offset against the amount of ESA paid¹. See DMG 09344 et seq for guidance on offsets.

1 SS (POR) Regs, reg 5(2) Case 2

11 Where reduced rate IS was paid pending the outcome of the PCA appeal, the decision awarding reduced rate IS is revised to reinstate IS at the rate previously awarded¹. See DMG 03356 for guidance. Arrears of IS may also be offset².

1 SS CS (D&A) Regs, reg 3(7B); 2 SS (POR) Regs, reg 5(2) Case 1

WCA carried out before PCA appeal determined

12 Where

1. a PCA appeal is outstanding **and**
2. an award of ESA has been made **and**

3. the award of ESA is terminated on the grounds that the claimant does not have LCW **and**
4. an appeal is lodged against the ESA decision

the DM should ask the TS to link both appeals and hear them together, deciding the PCA appeal first. The claimant may be entitled to ESA while the appeal is ongoing¹ (see DMG 42204).

1 ESA Regs, reg 30(3)

- 13 The ESA appeal response should also include a reference to the outstanding PCA appeal to ensure that the FtT is aware.
- 14 Where on appeal the DM's decision on PCA is subsequently
 1. overturned in the claimant's favour, the FtT should lapse the ESA appeal as outside their jurisdiction following the successful PCA appeal **or**
 2. upheld, the FtT should then go on to decide the ESA appeal as to whether the claimant has LCW and LCWRA.
- 15 Where the appeals are not heard together, the action the DM should take depends on the outcome of the appeals. If the result is that
 1. both appeals are disallowed, any ESA award should be terminated from the date of the hearing
 2. the PCA appeal is disallowed, and the ESA appeal allowed, normal action should continue on the ESA award
 3. the PCA appeal is allowed, and the ESA appeal disallowed, normal action should continue on the IB award as in paragraph 10
 4. both appeals are decided in the claimant's favour, the DM should terminate entitlement to ESA as in paragraphs 9 - 10.

IB claim following PCA - no appeal made

- 16 The guidance in paragraphs 4 - 6 also applies where the claimant fails the PCA but does not lodge an appeal. Where, on a further claim for IB for a period on or after 27.10.08, the claimant cannot be awarded IB immediately because they cannot be treated as incapable of work, the claim is treated as a claim for ESA.

IB claim following determination that claimant is treated as capable

- 17 The guidance in paragraphs 4 - 6 also applies where the claimant is treated as capable of work because they failed without good cause
1. to return the questionnaire **or**
 2. failed to attend for medical examination.

Where, on a further claim for IB for a period on or after 27.10.08, the claimant cannot be awarded IB immediately because they cannot be treated as incapable of work, the claim is treated as a claim for ESA. But see DMG 13615 where the questionnaire is returned with the new claim, and the claimant can be treated as incapable. If the PIWs link, the claim remains a claim for IB.

IS claim - PCA appeal outstanding

- 18 DMs should note that a person is not prevented from claiming reduced rate IS on or after 27.10.08 pending an appeal against a decision incorporating a determination that they are not incapable of work following application of the PCA¹. A claim for ESA is not precluded, because reduced rate IS is not an award of IS on the grounds of disability. However, see paragraph 7 where a claim for ESA is made by a person entitled to reduced rate IS.

1 IS (Gen) Regs, Sch 1B para 25

IB CLAIMS UNDER MODIFICATION OF BENEFIT YEAR RULES

- 19 Where
1. a claim for IB made before 27.10.08 was disallowed for failure of the first and/or second contribution conditions¹ **and**
 2. the person has an ongoing award of incapacity credits² **and**
 3. a further claim for IB is made for a period on or after 27.10.08 under the modification of the benefit year rule³ (see DMG 56014 and 56285 - 56292) **and**
 4. the claimant is not entitled to IS on the grounds of disability⁴
- the further claim is treated as a claim for ESA⁵.

*1 SS CB Act 92, Sch 3 para 2; 2 s 30C; Social Security (Credits) Regulations 1975, reg 8B;
3 SS CB Act 92, Sch 3 para 2(7); 4 ESA (Trans Provs) Regs, reg 1(4); 5 reg 2(1)*

20 The conditions for claiming IB for a period on or after 27.10.08 are not satisfied, because

1. the claim is not for a new PIW which links to an earlier PIW for the purposes of IB or WtWBs¹, because the PIW which enables credits to be awarded has not ended **and**
2. there is no entitlement to IS on the grounds of disability².

1 ESA (Trans Provs) Regs, reg 2(2)(a) or (b); 2 reg 2(2)(e)

21 However, where the claimant is entitled to IS because they have been awarded incapacity credits¹, they are entitled to IS on the grounds of disability, and should claim IB even though there is no break in the PIW² - see DMG 45214 **5**..

1 IS (Gen) Regs, Sch IB para 7(a) or (b); 2 ESA (Trans Provs) Regs, reg 2(2)(e)

LATE CLAIM FOR IB

22 Where

1. a claim for IB is made on or after 27.10.08 **and**
2. the claim is for a period which begins before 27.10.08

the claim cannot be treated as a claim for ESA, because the conditions described in DMG 45211 - 45213 are not satisfied. This applies even if entitlement does not begin until after 27.10.08.

Example

Eddie makes a claim for IB on 30.1.09, producing medical evidence that he has been incapable of work since 1.10.08. The DM disallows the claim for the period 1.10.08 - 29.10.08 as it was not made within the prescribed time for claiming, and treats the claimant as incapable of work from 30.10.08 pending application of the PCA.

CREDITS

23 Where

1. following a claim for IB disallowed for failure of the contribution conditions, a person was awarded incapacity credits for a PIW which ended before 27.10.08 **and**

2. a further claim for IB is made for a period which

2.1 begins on or after 27.10.08 **and**

2.2 is for a PIW which links with the previous PIW

the claim remains a claim for IB¹. But see paragraphs 4 - 17 where the further claim is made after the award of credits is ended following application of the PCA. See DMG 45214 3. for guidance on linking IS claims.

1 ESA (Trans Provs) Regs, reg 2(2)(a) or (e)

CLAIM FOR BENEFIT TREATED AS CLAIM FOR ANOTHER BENEFIT

- 24 DMs should note that where a claim for one benefit is treated as a claim for another benefit, it is not a claim for both benefits. A decision is made only in relation to the benefit for which the claim is, or is treated as, made. For example, where a claim for IB is made after a PCA failure, and is treated as a claim for ESA, no decision is given to disallow IB before making a decision on the ESA claim.

ANNOTATIONS

Please annotate the number of this memo (memo DMG 12/09) against the following:

DMG 45201 main heading, 45205, 45211 heading

Memo DMG 48/08 paragraph 2.

CONTACTS

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, GS36, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in Memo DMG 26/08 - Obtaining legal advice and guidance from DMA Leeds.

DMA Leeds: March 2009