

ESA AND INCAPACITY FOR WORK APPEAL

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INTRODUCTION

- 1 This memo gives guidance on cases where a person who
 1. fails the PCA **or**
 2. fails to return the questionnaire or attend a medical examinationand is, or is treated as, capable of work, successfully appeals the decision incorporating that determination, but in the meantime has claimed and is entitled to ESA.
- 2 The memo should be read with the guidance in paragraphs 9 - 15 of Memo DMG 12/09.

BACKGROUND

- 3 Paragraphs 4 - 8 of Memo DMG 12/09 explain that a person can claim and be entitled to ESA while they are pursuing an appeal against a decision ending IB or credits which incorporates a determination that they are not incapable of work following application of the PCA.
- 4 That guidance applies where a claimant is appealing a decision (including IS) incorporating a determination that they are treated as capable of work because they have
1. failed without good cause to return the questionnaire¹ **or**
 2. failed without good cause to attend for medical examination² **or**
 3. started work which is not exempt work³.

1 SS (IFW) (Gen) Regs, regs 6, 7 & 9; 2 regs 8 & 9; 3 regs 16 & 17

EFFECT OF IFW APPEAL ON ESA ENTITLEMENT

- 5 The guidance to terminate the award of ESA in the event of a successful IfW appeal in paragraph 9 of Memo DMG 12/09 is **cancelled** and should no longer be followed. The FtT decision on the IfW appeal does not mean that the decision to award ESA was erroneous at the time it was made, nor does it show a change relevant to the award of ESA. An existing award of IB precludes a claim for ESA being made¹ (see DMG 45215), but the FtT decision to reinstate IB after ESA entitlement began does not provide grounds for ending the award of ESA. This is because ESA and IB are not incompatible benefits. In addition, once the ESA claim was decided it ceased to exist² (see DMG 02421).

1 ESA (Trans Provs) Regs, reg 3(1); 2 SS Act 98, s 8(2)(a)

- 6 There is no provision preventing a person from being **entitled** to both ESA and IB for the same period. However, other provisions prevent both benefits being **paid** for the same period. See paragraphs 10 - 17 of this memo for guidance on the action to take where the IB appeal is allowed.
- 7 The guidance at paragraphs 18 - 22 explains what action to take where the claimant successfully appeals a decision terminating credits, in particular where they were entitled to IS on the grounds of IfW before being awarded ESA.

Note: Where the claimant's entitlement to IS is terminated, the claimant should be advised to make an appeal against the IS disallowance as well as the decision terminating IB or credits.

- 8 This memo also applies where a decision awarding IB, credits or IS is revised either on an application for revision within the time limits¹, or after an appeal is made², for example where the claimant fails to return the questionnaire, and the DM accepts that there was good cause for the failure. Any reference to action to take following a successful appeal applies where a decision on IB, credits or IS is revised.

1 SS CS (D&A) Regs, reg 3(1)(a); 2 reg 3(4A)

COMMENCING REVISION ACTION

- 9 In **all** cases where an award of ESA is made following an appeal against a decision incorporating a determination that the claimant is, or is treated as, capable of work, the case should be noted that the ESA awarding decision and, where appropriate, the IS disallowance, may need to be revised¹ following determination of the appeal.

1 SS CS (D&A) Regs, reg 3(1)(a)

ESA(CONT) AWARDED AND IB APPEAL ALLOWED

- 10 Where

1. the claimant made an appeal against termination of IB **and**
2. the claimant is awarded ESA(Cont) **and**
3. the IB appeal is successful

entitlement to IB is reinstated. The claimant remains entitled to ESA and IB as long as the conditions of entitlement for each benefit continue to be satisfied.

Overlapping benefits

- 11 ESA(Cont) and IB are both personal benefits and subject to adjustment¹ (see DMG 17040 - 17041). The guidance at DMG 17050 and 17052 - 17061 should be followed to decide which benefit should be adjusted².

1 SS (OB) Regs, reg 2(1); 2 reg 4(5)

Example

Audrey's award of IB was terminated on 8.5.09 after she failed the PCA. She claimed and was awarded ESA(Cont) from 25.5.09 and was placed in the support group from 24.8.09. Her IB appeal was allowed on 27.11.09 and she is due IB arrears from 8.5.09. For the purposes of overlapping benefits the weekly benefit ESA(Cont) takes precedence over the daily benefit IB. Only the balance, if any, of IB is payable for the same period.

ESA(IR) AWARDED AND IB APPEAL ALLOWED

12 Where

1. the claimant made an appeal against termination of IB **and**
2. the claimant is awarded ESA(IR) **and**
3. the IB appeal is successful

entitlement to IB is reinstated. The claimant remains entitled to ESA and IB as long as the conditions of entitlement for each benefit continue to be satisfied.

Income other than earnings

13 IB is an income other than earnings and falls to be taken fully into account when determining entitlement to ESA(IR)¹. This is because there is no disregard for it².

1 ESA Regs, reg 104(1); 2 reg 104(2)

14 Where the claimant's income from IB exceeds the claimant's ESA(IR) applicable amount then there is no entitlement to ESA(IR)¹.

1 WR Act 07, Sch 1, para 6(1)(a)

Example

Martin has made an appeal against a decision that he is not entitled to IB following application of the PCA. He claims and is awarded ESA(IR) of £89.80 including the WRAC. His appeal succeeds, and entitlement to IB of £89.80 is reinstated. The DM supersedes the decision awarding ESA(IR) on the grounds of a relevant change of circumstances, the change being that the FtT has reinstated the IB award, and terminates Martin's award of ESA(IR) from the first day of the benefit week which

includes the FtT's decision. IB arrears are reduced (abated) by the amount of ESA(IR) paid for the same period¹ in accordance with DMG 09372 - 09375.

ISSA Act 92, s 74(2)

CLAIMANT ENTITLED TO ESA(CONT) AND (IR)

15 Where

1. the claimant's awards of IB and IS were terminated **and**
2. an appeal is made against the IB decision only **and**
3. the claimant is awarded ESA(Cont) and (IR) **and**
4. the IB appeal is successful

entitlement to IB is reinstated. The claimant remains entitled to ESA and IB as long as the conditions of entitlement for each benefit continue to be satisfied (but see paragraphs 16 - 17 where the claimant wishes to have entitlement to IS restored). The DM should apply the overlapping benefit rules and income rules as in paragraphs 10 - 14 above.

Note: see paragraph 21 if the IS termination is successfully appealed.

Example

Simon was entitled to IB and IS, and was treated as capable of work after he failed to attend for a medical examination. The awards of IB and IS were disallowed on supersession, and Simon appealed against the decision terminating IB only. He claims and is awarded ESA(Cont) and (IR) of £117.15 including the SDP as he was awarded DLA middle rate care component after entitlement to IS and IB ended. His IB appeal is allowed, and IB is reinstated. IB of £89.80 is adjusted by ESA(Cont) of £64.30. The remaining IB payable of £25.50 is taken into account as income. Simon's benefit of £117.15 is made up of ESA(Cont) of £64.30, ESA(IR) of £27.35, and IB of £25.50. Arrears of IB are reduced by application of the overlapping benefit and abatement rules for periods where there is entitlement to ESA and IB.

Simon's award of ESA is superseded from the 14th week of entitlement to award him the support component after application of the WCA. His award of ESA(Cont) of £95.15 overlaps IB completely, and no further IB is payable. The decision awarding IS is not revised, as his ESA(IR) applicable amounts of £117.15 increasing to £161.50 exceed his IS applicable amount of £91.80.

- 16 Where the IS applicable amount exceeds the ESA applicable amount, the decisions disallowing IS and awarding ESA should be revised as in paragraph 9 so as to reinstate IS entitlement and remove ESA entitlement. But see paragraph 21 if the IS termination is successfully appealed.

Example

Gina was entitled to IB and IS, and her awards were terminated following application of the PCA. She appealed the IB decision only. She claimed and was awarded ESA(Cont) and (IR) of £117.15 including the SDP, which is increased to £142.65 to include the WRAC from week 14. Her appeal succeeds, and her award of IB is reinstated. Her combined entitlement to IB and IS including the DP and SDP of £144.65 is greater than her ESA entitlement. The decision disallowing IS is revised to reinstate the IS award from the date of the disallowance, and the decision awarding ESA is revised to disallow from the date of the original award on the grounds that Gina is entitled to IS. Arrears of IS of £27.50 per week are due for the first 14 weeks of ESA entitlement, and £2 weekly thereafter, together with any arrears of IB and IS due for the period before ESA entitlement began.

- 17 Where

1. IS was not previously in payment before the claimant was awarded ESA **and**
2. entitlement to IB or credits is reinstated

a claim to IS could be made¹ as in DMG 45214 4. (because the claimant is entitled to IB) provided that they relinquish entitlement to ESA. See DMG 04120 et seq for guidance on relinquishment.

1 ESA (Trans Provs) Regs, reg 2(2)(d)

ESA AWARDED AND CREDITS APPEAL ALLOWED

- 18 Where

1. the claimant made an appeal against termination of credits **and**
2. the claimant is awarded ESA **and**
3. the credits appeal is successful

the claimant remains entitled to ESA, and credits are awarded on the basis that the claimant has, or is treated as having, LCW¹. Although the decision awarding credits on the basis that the claimant is incapable of work has been reinstated by the FtT, only

one credit can be awarded for any week. Once the claimant has been credited with earnings equal to the lower earnings limit for any week, a further credit cannot be awarded for that week.

1 SS (Credits) Regs, reg 8B(2)(aa)

- 19 If the claimant ceases to be entitled to ESA at a later date, for example because they are found not to have LCW, they remain entitled to be awarded credits as long as they are incapable of work.

Entitlement to Income Support

- 20 If

1. the claimant's entitlement to IS and credits was terminated **and**
2. they made an appeal against the decision ending credits only **and**
3. they claimed and were awarded ESA **and**
4. the credits appeal is allowed

the claimant's award of IS may be reinstated and the award of ESA terminated as in paragraph 15. Any arrears of IS should be offset against the ESA paid¹.

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

- 21 Where

1. the claimant also makes an appeal against the decision terminating IS **and**
2. that decision is set aside by a FtT on appeal

the award of ESA may be terminated as in paragraph 15, with an offset as in paragraph 19.

- 22 If the claimant wishes to remain on ESA, for example where ESA entitlement exceeds IS entitlement, the DM should supersede the original decision awarding IS from the first day of the benefit week in which ESA entitlement began on the grounds of a relevant change of circumstances¹. The change is that the claimant was awarded ESA, and a person cannot be entitled to IS if they are entitled to ESA².

1 SS CS (D&A) Regs, Sch 3A para 1; 2 SS CB Act 92, s 124(1)(h)

SATISFYING THE CONDITIONS OF ENTITLEMENT TO ESA AND IB

- 23 The claimant must continue to satisfy the conditions of entitlement for both IB and ESA, even where only one of those benefits is in payment following application of the overlapping benefit rules. Where entitlement to ESA or IB is subject to submitting medical evidence, the claimant must continue to send in medical certificates even if the benefit is not in payment.

ANNOTATIONS

Please annotate the number of this memo (16/10) against the following DMG paragraphs:

45201 main heading, 45205, 45211 heading

Memo DMG 12/09

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 2010