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It is common ground that X made a claim for ESA in December 2020, which was later backdated to November, when her Fit Notes commenced (medical evidence of unfitness to work). She returned an ESA50 questionnaire (Capability for Work) in early February 2021 and then received her first payment of ESA at the basic rate.

13 January 2021: she started a Universal Credit claim and received the first paymenton 19 February for the period 13 January – 12 February 2021.

12 March 2021: she was assessed for ESA, in a Work Capability Assessment following which she was assessed as having Limited Capability for Work and Work Related Activities (LCWRA) and therefore entitled to the ESA Support Component.

She received this backdated to 6 February as this was 13 weeks after starting her ESA, as per regulations.

It was allowed in her Universal Credit calculations until the assessment period 13 April 2021 to 12 May 2021.

This appeal hinges on the interpretation of Regulation 28 (5) (b)(i) of the Universal Credit Regulations.

This states:

‘Regulation 28

(5) Paragraph (1) also does not apply if—

(a)the claimant is terminally ill; or

(b)the claimant—

(i) is entitled to an employment and support allowance that includes the support component or the work-related activity component’

In its Advice for Decision Makers, the DWP guidance is clear that if a UC claimant starts being in the ESA Support Group after claiming UC then they do still have to serve the three month relevant period for Universal Credit. What is not clear is whether or not there is any lawful basis for this.

**Firstly**, the relevant three month period is surely the three months beginning from the start of the claim for Limited Capability for Work, or the first day on which the claimant provides medical evidence of LCW. This was accepted by ESA as beginning on 6 November 2020. The Limited Capability for Work questionnaire was returned to ESA, not Universal Credit, and the assessment then arranged by ESA.

The DWP is not contesting that the evidence of LCW has to be provided specifically in connection with the UC claim and has accepted the evidence from ESA.

There is no legal basis for stating that the three month period has to be in connection with UC claim specifically.

**Secondly,** I submit that the relevant period of three months for Universal Credit claimants does not apply to an ESA claimant in the Support Group

Regulation 28 (5)(b)(i) says: “[The waiting period] also does not apply if ... the claimant ... is entitled to an employment and support allowance that includes the support component”.

The logical interpretation of this is that even if the waiting period for Universal Credit is already in progress, it would end when entitlement to the support component starts.

The decision to put the claimant in the Support Group ends any relevant period that may be running under Universal Credit, and so the LCWRA element would have to be included in the Universal Credit assessment from the assessment period in which the ESA Support Group starts.

This would therefore mean that the Higher rate Work Capability component should also be included in the Universal Credit calculation from the assessment period in which the ESA Support group starts.

The illogicality of the DM position is highlighted by the fact that following their interpretation of Regulation 28(5)(b) leads to the ridiculous and unjust situation where the claimant is held to have been overpaid by more - £509.61- than she was paid in additional ESA - £386.40 – in the period January 2021 – 13 April 2021.

Signed:

Rose Lawrence (Appeals Representative)

Date: 24 October 2021