

IB REASSESSMENT – ARREARS OF ESA(IR)

Contents	Paragraphs
Introduction	1
Background	2 - 6
Making the initial conversion decision	7 - 9
The LEAP exercise	10 - 13
Claimant applies for arrears of ESA(IR) – non-LEAP cases	14
Decision making and appeals	
Request for mandatory reconsideration	15
Appeals	16
Offset	17
Examples	
Annotations	
Contacts	

INTRODUCTION

- 1 This memo gives guidance on payment of arrears of ESA(IR) to claimants whose awards of IB or SDA were converted to awards of ESA(Cont) only. It **replaces** Memo DMG 2/18 which is **cancelled** and should no longer be followed.

BACKGROUND

- 2 This memo is issued following a recent Order by a three Judge panel of the UT on an application for judicial review (“JR”)¹.

1 DS v SSWP [2018] UKUT 270 (AAC)

- 3 The claimant’s award of IB had been converted to an award of ESA(Cont) only effective from 14.9.12. On 15.12.17 the claimant asked for the conversion decision to be revised for official error so as to include ESA(IR). The DM refused to revise for

official error, and instead superseded for error of law to include ESA(IR) from 21.10.14. The claimant applied to the High Court for permission to JR the refusal to revise, and the application was transferred to the UT.

- 4 On 10.8.18 the UT granted permission to apply for JR, and allowed the JR claim by consent between the parties. The Secretary of State accepted that
 1. ESA is a single benefit with two elements
 2. no separate claim is required for each element
 3. the DM is required to consider entitlement to both elements from the effective date when making a conversion decision and to gather information about the claimant's financial circumstances
 4. the failure to gather financial information was an official error, and the conversion decision should be revised from the effective date
 5. *SK v SSWP*¹ (which held that a previous decision of the UT² showed that the conversion decision in *SK v SSWP* was erroneous in law) was itself erroneous in law.

1 CSE/33/18; 2 LH v SSWP [2014] UKUT 480 (AAC); [2015] AACR 14

- 5 The UT ordered that
 1. the conversion decision arose from an official error **and**
 2. *SK v SSWP* should not be followed.
- 6 The claimant in *SK v SSWP* has been granted permission to appeal to the Court of Session. The Secretary of State is seeking to agree a similar order in that case for the Court of Session to consider.

MAKING THE INITIAL CONVERSION DECISION

- 7 Detailed guidance on conversion of awards of IS, IB and SDA is contained in [DMG Chapter 45](#).
- 8 Where the DM determines that
 1. an award of IB or SDA qualifies for conversion to ESA **and**
 2. the claimant is not entitled to IS

the DM **must** determine whether the claimant satisfies the financial conditions for ESA(IR) **before** making the conversion decision. Information should be gathered in the normal way, for example by issuing form ESA3 and allowing sufficient time for its return¹.

Note: See DMG [45413](#) - [45414](#) for further details about obtaining information.

1 SS (C&P) Regs, reg 32(1) & (1A); ESA (TP, HB & CTB)(EA)(No. 2) Regs, Sch 1 para 13

9 If the claimant

1. does not return form ESA3 **or**
2. states that they do not wish to be assessed for entitlement to ESA(IR)

a record of this **must** be kept (see DMG [01302](#) and [01320](#)). The DM should make the conversion decision on the basis that, on the balance of probabilities (see DMG [01343](#) - [01345](#) and [01405](#)), the claimant is not entitled to ESA(IR).

THE LEAP EXERCISE

10 Conversion decisions, where no evidence about the claimant's financial circumstances was requested **before** the decision was made, are being reviewed in a special exercise (called a Legal Entitlements and Administrative Practices (LEAP) exercise). As part of this exercise the claimant is asked to provide information relating to the ESA(IR) financial conditions¹. Where the information indicates that the claimant satisfied the financial conditions from and including the effective date of the conversion decision, that decision should be revised for official error, and arrears of ESA(IR) paid accordingly.

1 WR Act 07, s 1(2)(b) & Sch 1, Part 2

11 If the financial conditions are satisfied from a later date, the normal supersession rules apply¹. See DMG [Chapter 04](#) for further details.

1 SS Act 98, s 10; SS CS (D&A) Regs, regs 6 & 7 & Sch 3C

12 Until 31.7.18, decisions made as part of the LEAP exercise were made on the basis that the conversion decision could not be revised for official error, and instead were superseded for error of law effective from 21.10.14¹.

1 SS Act 98, s. 27

- 13 These decisions will be looked at again as part of the LEAP exercise – see also paragraphs 15 and 16 where the claimant applies for mandatory reconsideration or has lodged an appeal.

CLAIMANT APPLIES FOR ARREARS OF ESA(IR) – NON-LEAP CASES

- 14 The guidance in paragraphs 10 - 11 also applies in conversion cases where
1. entitlement to ESA(IR) was not considered when the conversion decision was made **and**
 2. the claimant applies for and is entitled to arrears of ESA(IR) from
 - 2.1 the effective date of the conversion decision **or**
 - 2.2 a later date.

DECISION MAKING AND APPEALS

Request for mandatory reconsideration

- 15 Where a claimant applies for mandatory reconsideration of a decision made incorrectly as in paragraph 12, the DM should consider whether it should be revised for official error¹, and replaced with a decision revising the conversion decision for official error.

1 SS & CS (D&A) Regs, reg 1(3) & 3(5)(a)

Appeals

- 16 Where an appeal has been lodged against a supersession decision made incorrectly as in paragraph 12, the decision under appeal should be revised as in paragraph 15 and the appeal lapsed¹. See DMG [Chapter 06](#) for guidance on lapsing appeals.

1 SS & CS (D&A) Regs, reg 30

Offset

- 17 Where a conversion decision is revised or superseded as in paragraphs 10 - 11 or 15 - 16, any ESA paid under the original conversion decision should be offset against arrears due¹. See DMG [Chapter 09](#) for detailed guidance about offsetting.

1 SS (POR) Regs, reg 5(1), (2) & (6) Case 1

EXAMPLES

Example 1

Raheel's award of IB is converted to ESA(Cont) effective from 6.9.11 after it is determined that he has LCW. The DM does not consider whether he satisfies the ESA(IR) financial conditions. Raheel is also entitled to the middle rate of the care component of DLA and has no other income. He is single, lives alone, and has no carer. Raheel's award of ESA(Cont) terminates after 365 days, and he is awarded ESA(IR) including the SDP from 6.9.12.

Raheel's case is reviewed as part of the LEAP exercise. The DM determines that Raheel satisfied the conditions for an award of the SDP at the effective date of the conversion decision. The conversion decision is revised for official error to include the SDP from 6.9.11, the effective date of the conversion decision.

Example 2

Anna's award of IB is converted to ESA(Cont) effective from 20.6.12 after it is determined that she has LCW. The DM does not consider whether she satisfies the ESA(IR) financial conditions. On 17.9.13 following a routine WCA the DM determines that Anna has LCWRA. The conversion decision is superseded to include the support component from 17.9.13.

Anna's case is reviewed as part of the LEAP exercise. The DM determines that Anna's award of ESA(Cont) on 20.6.12 was the same amount as entitlement to ESA(IR), so that the ESA award is treated as an award of ESA(Cont) only, and no arrears of ESA(IR) are due from that date. However, when Anna was placed in the support group, she would have been entitled to the EDP. The decision made on 17.9.13 is revised for official error to include the EDP from 17.9.13, the effective date of the supersession.

Example 3

Matt's award of IB is converted to ESA(Cont) effective from 17.7.11 after it is determined that he has LCW and LCWRA. The DM does not consider whether he satisfies the ESA(IR) financial conditions. On 17.9.12 Matt is awarded the highest rate care component of DLA. He is single, lives alone, and has no carer. He has no other income.

Matt's case is reviewed as part of the LEAP exercise. The DM determines that Matt satisfied and continues to satisfy the ESA(IR) financial conditions. The conversion decision is revised for official error to include the EDP from 17.7.11, the effective date

of the conversion decision, and then superseded to include the SDP from 17.9.12 under the qualifying benefit rules.

Example 4

Yvonne's award of IB is converted to ESA(Cont) effective from 14.3.13 after it is determined that she has LCW and LCWRA. The DM does not consider whether she satisfies the ESA(IR) financial conditions. Yvonne is also entitled to the highest rate care component of DLA, and lives with her husband Jack who is in F/T employment. Jack reduces his hours to 15 hours a week from 5.2.18.

Yvonne's case is reviewed as part of the LEAP exercise. The DM determines that Yvonne did not satisfy the ESA(IR) financial conditions at the effective date of conversion, so the conversion decision is not revised. Yvonne is entitled to a small amount of ESA(IR) once Jack's earnings reduced. As Yvonne did not report this at the time, the DM supersedes the conversion decision to include the couple rate, the EDP and SDP from the date the review action began.

Example 5

Ross's award of IB is converted to ESA(Cont) effective from 9.10.13 after it is determined that he has LCW and LCWRA. The DM does not consider whether he satisfies the ESA(IR) financial conditions. Ross is also entitled to the enhanced daily living component of PIP. He is single, lives alone, and has no carer. He has no other income.

As part of the LEAP exercise, on 16.4.18 the DM supersedes Ross's award of ESA(Cont) to include the EDP and SDP from 21.10.14. Ross applies for mandatory reconsideration. The DM revises the decision dated 16.4.18 and the conversion decision for official error to include the EDP and SDP from 9.10.13.

ANNOTATIONS

Please annotate the number of this memo (Memo DMG 11/18) against the following DMG paragraph:

DMG [45580 main heading](#)

CONTACTS

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 3E, Quarry House, Leeds. Existing arrangements for such

referrals should be followed, as set out in [Memo DMG 23/16](#) - Obtaining legal advice and guidance on the Law.

DMA Leeds: August 2018

The content of the examples in this document (including use of imagery) is for illustrative purposes only