

LATE APPLICATION FOR A MANDATORY RECONSIDERATION

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[See Memo ADM 08/19]

INTRODUCTION

1. This memo provides guidance to DMs regarding subsequent appeal rights where

1. Claimants submit a late application for mandatory reconsideration on “any grounds” (outside of the absolute time limit of 13 months) and
2. where claimants request an “any time” revision on the basis of official error (DMG 03256 - 03259).

This guidance is issued as a result of a decision by Judge Poole QC dated 22.11.18¹ and replaces Memo DMG 17/17. Please see also Memo ADM 08/19.

1PH & SM v SSWP (DLA) (JSA) [2018] UKUT 404 (AAC)

BACKGROUND TO MANDATORY RECONSIDERATION

- 2 Decisions notified on or after 28.10.13 can only¹ be appealed if the claimant has applied for a revision and the notice of the decision includes a statement to that



effect. This is called “mandatory reconsideration” (MR). The time limit for requesting a MR on “any grounds” is 1 month from the date of notification of the original decision². The 1 month time limit for applying can be extended in certain circumstances up to a maximum of 13 months³. Where the application is made late (between 1 and 13 months) and the DM does not accept the reasons for lateness then the current guidance (DMG 03013) is to the effect that claimants have no right of appeal to the FtT and the claimant can only challenge the decision by means of Judicial Review.

1 SS CS (D&A) Regs, reg 3ZA(2) 2 reg 3 (1)(b) 3 reg 4

DMG MEMO 17/17

- 3 DMG memo 17/17 provided guidance to DMs following a three-Judge panel decision¹ about claimants who submit a late application for MR who are not granted an extension of time and subsequent appeal rights to the FtT. In their decision the Judges decided that it was possible to bring an appeal to a FtT when an application for MR had been made after 1 month but within 13 months after the DM’s original decision, even if the DM had declined to consider the application.

1 R(CJ) and SG v SSWP (ESA) [2017] UKUT 0324 (AAC)

- 4 The three-Judge panel acknowledged that the subject of a MR requested after 13 months was not an argument before them but suggested that a revision request made after the maximum period of 13 months may not constitute an application for revision. If so, this would mean that the DM would refuse to give a decision and there would be no right of appeal against that refusal. However, a recent Upper Tribunal (UT) decision has changed how DMs should now handle such applications.

THE RECENT UPPER TRIBUNAL DECISION

- 5 The cases before Judge Poole QC concerned the question of whether a claimant may still appeal where a request for MR was made more than 13 months after the DM’s original decision. The Judge decided that whether there was a right of appeal against the original decision after MR depends on whether the application for MR was made under (a) one of the provisions that allow revision on any grounds or (b) one of the provisions that allow revision at any time.

“Any grounds” application

In “any grounds” applications for MR (for example those where the claimant’s disagreement is simply that the DM got it wrong and there should have been a

higher award) the FtT will have no jurisdiction unless an application for MR was submitted within 13 months of the original decision (subject to small extensions where statements of reasons have been requested).

“Any time” application (specific grounds)

In “any time” applications for MR the claimant expressly or by implication relies on one of the provisions that allow a decision to be revised in specific circumstances (for example official error¹). There is no time limit for such applications. In these cases, a FtT will have jurisdiction to hear an appeal even if the request for MR has been made over 13 months after the original decision.

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

TIME LIMITS FOR MAKING AN APPEAL FOLLOWING MR

- 6 Even where there is jurisdiction to hear an appeal, limitation periods must be complied with. The right of appeal will only be exercisable if the appeal is brought within the time limits in the Tribunal Rules. In cases where MR applies, this is within one month after the date on which the claimant was sent notice of the result of the MR extendable by the FtT by a maximum period of 12 months¹. The FtT should only extend the 13 month time limit in exceptional circumstances and where the claimant personally has done all they can to bring the appeal timeously².

1 FtT Rules 2008 rule 22(2)(d)(i) & rule 22(8) 2 Adesina v Nursing and Midwifery Council [2013] EWCA 818

CASE 1 BEFORE THE UPPER TRIBUNAL

- 7 In the first case the claimant requested MR almost 18 months after the original decision was notified. The claimant considered that he may be entitled to a higher rate of the mobility component of DLA. The DM refused to reconsider the decision due to lateness. The UT Judge considered the substance of the request and decided that this was an “any grounds” request for MR as there was nothing in the request that could reasonably be read as based on official error and there was no allegation of any error by an officer of the DWP. The FtT and the UT Judge found that the MR request was made after the maximum period of 13 months from the date of notification of the decision and so did not constitute an application for revision. This means the FtT did not have jurisdiction to hear the appeal.

CASE 2 BEFORE THE UPPER TRIBUNAL

- 8 In the second case the claimant’s representative requested a revision expressly on the grounds of official error and approximately 14 months after the original decision



to terminate JSA. The official error was said to be that the claimant was misadvised by an officer of the DWP. The DM refused to revise the decision as the request was not made within 13 months of the decision being notified and because there was no official error. In contrast to the first case, the UT Judge considered the substance of the request for MR was a complaint of official error. It was an “any time” application which constitutes an application for revision and subject to official error being made out on the facts, the FtT had jurisdiction to hear the appeal.

APPLYING THE UPPER TRIBUNAL DECISION

9 The following examples clarify the application of the guidance in this memo.

Example 1

- MR requested within 13 months of notification of decision on “Any grounds”
- Decision notified on 20.3.18
- MR requested on 29.8.18
- Whether or not the DM accepts lateness, a decision should be made to revise or not revise. A mandatory reconsideration notice (MRN) must be issued. If the application discloses arguable grounds for supersession, a further decision should be made to supersede or not supersede
- There is never a right of appeal against the revision decision itself but there are appeal rights against the original decision as revised or not revised (see DMG 03003 & 03211)
- The time for bringing an appeal will start when the MRN is issued.

Example 2

- MR requested outside of 13 months of notification of decision on “any grounds”
- Decision notified on 21.5.18
- MR requested on 19.8.19 and so approximately 15 months after notification of the decision
- The claimant argues that they should have been entitled to a higher rate of benefit. The claimant has not argued that the decision was based on official error by an officer of the DWP. The reasons given were simply that the decision was wrong on its merits



- Therefore the substance of the request is an “any grounds” request. As the MR request was made after the absolute time limit of 13 months, the request does not constitute an application for revision
- The DM should refuse to give a decision and there will be no right of appeal to the FtT. A MRN should not be issued (see point 1 below)
- If the application discloses arguable grounds for supersession, a decision should be made to supersede or not supersede. A MRN must be issued (see point 2 below).

Response to the FtT

1. If the claimant appeals and the FtT waive the requirement to provide a MRN¹ the response should focus on the lateness of the application and request that the appeal is struck out for want of jurisdiction². The appeal writer should ask the FtT to deal with the jurisdictional point as a preliminary issue³. The response should go on to say that if the FtT think otherwise then they should give a direction regarding next steps.

1 Tribunal Procedure(FtT)(SEC)Rules 2008, rule 7(2)(a), 2 rule 8(2)(a), 3 rule5(3)(e)

2. If a MRN has been issued for a supersession decision, the response should explain why no decision was issued in response to the application for revision and should focus on the decision to supersede or not supersede.

Example 3

- MR requested outside of 13 months of notification of decision for official error but the substance of the request is “any grounds”
- Decision notified on 29.5.18
- MR requested on 21.7.19 and so approximately 14 months after notification of the decision
- The claimant argues that they should be entitled to a higher rate of benefit and that the decision was based on official error. However, they fail to identify any matters that might, on proper investigation, constitute an official error. They also fail to identify any other circumstances that might allow an “any time” revision. They simply argue that the decision is wrong



- Therefore the substance of the request is an “any grounds” request. As the MR request was made after the absolute time limit of 13 months, the request does not constitute an application for revision
- The DM should refuse to give a decision and there will be no right of appeal to the FtT. A MRN should not be issued (see point 1 below)
 - If the application discloses arguable grounds for supersession, a decision should be made to supersede or not supersede. A MRN must be issued. (see point 2 below).

Response to the FtT

1. If the claimant appeals and the FtT waive the requirement to provide a MRN, the response should explain that the claimant has failed to identify official error and should then focus on the lateness of the application and request that the appeal is struck out for want of jurisdiction. The appeal writer should ask the FtT to deal with the jurisdictional point as a preliminary issue. The response should go on to say that if the FtT think otherwise then they should give a direction regarding next steps.

2. If a MRN has been issued for a supersession decision, the response should explain that the claimant has failed to identify official error and why no decision was issued in response to the application for revision. The response should focus on the decision to supersede or not supersede.

Example 4

- MR requested outside of 13 months of notification of the decision for official error or another “any time” ground
- Decision notified on 14.9.18
- MR requested on 12.12.19 and so 15 months after notification of the decision
- The claimant argues that they were misadvised by an officer of the DWP meaning that an overpayment of benefit occurred
- Therefore the substance of the request is an “any time” request on the grounds of official error and so constitutes an application for revision. If the DM disagrees there was official error, the DM should give a decision that refuses to revise. A MRN should be issued. If the application discloses arguable grounds for supersession, a further decision should be made to supersede or not supersede.
- The time for bringing an appeal will start when the MRN is issued.



Response to the FtT

Whether or not the DM has accepted the allegation of official error, the FtT has jurisdiction and the response should effectively be a business as usual response dealing with the decision(s) under appeal.

ANNOTATIONS

Please annotate the number of this memo (Memo DMG 05/19) against the following DMG paragraphs: 03013, 03212 – 03213, 03257 and ADM Memo 08/19.

CONTACTS

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 3E zone E, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in [Memo DMG 04/19](#) - Obtaining legal advice and guidance on the Law.

DMA Leeds: May 2019

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