

# Explanatory Memorandum for the Social Security Advisory Committee

Decision Making and Appeals Regulations for Universal Credit, Personal Independence Payment, Jobseekers Allowance (Contributory) and Employment and Support Allowance (Contributory).

For the meeting of the Social Security Advisory Committee on  
Wednesday 13 June 2012

# Introduction

The proposed Decision and Appeals Regulations being presented to the Committee are designed to support the introduction of Universal Credit and Personal Independence Payment and the administration of the contributory Jobseekers Allowance and Employment Support Allowance after the introduction of Universal Credit (they do not apply to the Jobseekers Allowance (IR) and ESA (IR) which will continue to be administered under existing provisions). The following explanatory memorandum sets out the proposals relating to decision-making, revision, supersession, suspension, termination, and appeals. Draft regulations are also provided, so that the Committee can see how the drafts attempt to reflect those proposals. We will continue to refine the draft regulations between now and the autumn, improving the drafting where appropriate.

Section 33 of the Welfare Reform Act 2012 provides for the abolition of income-based JSA and income-related ESA. The proposed regulations, therefore, only apply to JSA and ESA when those benefits are contributory-only benefits. The existing Decisions and Appeals Regulations will, however, continue in force in relation to current-style JSA (which is both an income-based and contributions-based benefit) and current-style ESA (again an income-based and contributions-based benefit) until such a time as all claimants are claiming Universal Credit, new-style JSA (as a contributory-only benefit) and new-style ESA (as a contributory-only benefit).

In many respects the proposed provisions mirror those which exist for in the current Decision and Appeals Regulations (S.I. 1999/991 (this is particularly the case for Jobseekers Allowance and ESA) but they also have key differences – explained in detail below in the Annexes - to support and ensure that the overall objectives of the new benefits are met.

The existing Decisions and Appeals Regulations will be revoked in so far as they apply to JSA and ESA, with savings for claimants still entitled to current-style JSA and ESA (including where certain groups of claimant are still able to claim current-style JSA or ESA after the launch of Universal Credit, as a result of the phased approach to migration).

Only one version of the Regulations will apply to a person at any one time.

Universal Credit will restructure the benefit system, to create one single income-replacement benefit for working age adults which unifies the current system of means-tested in and out of work support. It will be easier to understand and to administer and thereby protect the welfare of those most in need. One of its core aims is to encourage people to move into sustainable work. As a result, we intend that Universal Credit will be paid monthly, the frequency with which most people are

paid earnings. In a similar vein Personal Independence Payment aims to ensure that support is targeted to those who face the greatest barriers to leading full, active and independent lives.

None of this can be achieved if the process for claiming and administering these benefits and changing decisions and managing appeals, doesn't itself change. Accordingly for Universal Credit the proposed regulations include provisions which support a predominantly online, self-service process with real time adjustments. They also allow for rapid re-awards where claimants move in and out of work. For Personal Independence Payment the regulations, by simplifying the initial claims process, support the overall objective and specifically the face-to-face assessment consultation being introduced.

For all benefits, whilst there are changes, as described, the proposals continue to protect the rights of claimants and recognise vulnerability for example in relation to the date of claim, reporting changes and appeal rights.

In addition to the changes necessary to support the introduction and policy aims of the new benefits, we have taken the opportunity to re-structure and streamline the presentation of the Regulations where possible – the current provisions having become cluttered and unwieldy down the years.

The Annexes below set out:

1. Those provisions which are common to Universal Credit, Personal Independence Payment, Jobseekers Allowance and Employment and Support Allowance, and
2. The details of the key changes which we propose to introduce for Decisions and Appeals.

# Annex 1: Common Provisions

## Decisions and appeals

The policy intent is that the following provisions capture the effect of the existing Decisions and Appeals Regulations in so far as this is considered relevant to the benefits to which the proposed regulations would apply.

**Regulation 3 – Service of documents [But see [ ] concerning electronic communications]**

## Revisions

**Regulation 5 - Revision on any grounds [But see also Annex 2 for proposed changes in relation to PIP and ESA]**

**Regulation 6 - Late application for revision [But below concerning mandatory reconsideration]**

**Regulation 7 – Procedure for making an application for a revision**

**Regulation 9 – Revision of decision arising from official error, mistake, etc [But see Annex 3 for specific provisions for PIP]**

**Regulation 10 - Revision of decisions where there is no right of appeal**

**Regulation 11- Revision of decisions where there is an appeal**

**Regulation 12 – Revision in connection with an award of another benefit**

**Regulation 13 – Revision in the case of advance awards**

**Regulation 17 – Revision in contribution cases**

**Regulation 20 – Effective date of a revision**

**Regulation 21 - Grounds for supersession [But see Annex 3 for specific provisions in relation to UC, PIP and ESA/Jobseekers Allowance]**

**Regulation 22 - Decisions which may not be superseded**

**Regulation 23 – Procedure for making an application for supersession**

**Regulation 25 – Effective dates: Secretary of State decisions [But see Annex 3 for specific provisions in relation to UC, PIP and ESA/Jobseekers Allowance]**

**Regulation 26 – Effective dates for Tribunal cases (but see below for UC & PIP)**

**Regulation 27 – Effective dates for superseding decisions where changes notified late**

**Regulation 28 - Correction of accidental errors**

**Regulation 29 – Determinations on incomplete evidence [But see Annex 3 for specific provisions in relation to UC and PIP]**

**Regulation 32 – issues for HMRC connected to the Transfer Act**

**The provisions of Part 5 Suspension**

**The provisions of Part 6 Termination (with some adjustment for Universal Credit)**

**Regulations 40 to 43 - Appeals**

## **New revision provision**

**Regulation 8 – Consideration of revision before appeal**

The policy intent is that before a decision can be appealed a person **must** have the decision reconsidered as allowed for in section 102 of the Welfare Reform Act 2012. Individuals will be notified when the requirement applies. This follows the Department's principle that issues should be resolved, and errors should be identified and corrected at the earliest possible occasion.

It is proposed that the existing time limits for applying for a decision to be revised still apply, except that we do not plan to carry forward the restriction on in regulation 4(6) (late application for revision) of the existing Decisions and Appeals Regulations in light of the new requirement to apply for a revision.

The person will have any right of appeal when they are notified of the outcome of the reconsideration. The regulation also provides that where a person appeals against a decision not having first applied for revision, the appeal may be treated in the first instance as an application for revision.

It is also proposed that appeal notices are sent direct to HMCTS and so the draft Regulations make no provision in connection with the receipt of appeal notices by the Secretary of State.

# Annex 2: Key Changes Decisions and Appeals

## Universal Credit

### Introduction

1. Universal Credit will work within the current decision-making and appeals policy framework, supporting the Department's drive to ensure that claimants understand how a decision on their case is made, that decisions are right first time, and that we see fewer appeals as a result. The intent has therefore been to simplify and align rules where possible, to ensure that rules are easier for claimants to understand and easier for the Department to administer, while ensuring protection for claimants' rights and welfare.

### Wider context

2. The wider policy underpinning the new Universal Credit is set out in more detail in the Explanatory Memorandum covering the Main Scheme draft Universal Credit Regulations.
3. Our approach to Universal Credit sits within the wider DWP policy, agreed by Parliament as part of the Welfare Reform Act 2012, to ensure that a decision is reconsidered fully before an appeal can be made. Any change in social security could be expected to lead to increased appeals at the point of introduction – and Universal Credit is a fundamental change. Some 12m individual benefit claims in the current system will translate to approximately 8m household claims to Universal Credit. This may have some impact on appeal volumes, and we have been working with the Ministry of Justice to project the likely impact on appeals volumes. For example, whereas in the past claimants may previously have lodged separate appeals on, for example, Housing Benefit and Income Support, under Universal Credit they would only need one appeal.
4. The award calculation for Universal Credit will involve a number of elements based on personal circumstances, and reduced by a percentage of their recorded earnings, income, capital and savings. If claimants don't understand how their award is calculated, they are more likely to dispute it. The design of a new IT platform therefore provides the opportunity to improve the communications provided to claimants about their benefit application or award.

### Part 1: General

5. **Notifying a decision & the use of electronic communications [DA4]**
  - (a) Our intention is that the majority of people will claim Universal Credit online through an online account which they will set up. The proposed regulations

therefore enable the use of electronic communications (regulation DA4) in the case of Universal Credit and the other benefits to which they would apply. Once an award is in payment, this account would be the primary channel for interacting with the claimant to administer Universal Credit (though they may be required to attend certain places at certain times for the purposes of fulfilling conditionality requirements).

- (b) The online account should therefore be the primary channel through which we notify claimants of a decision relating to their claim. In the case of a joint claim by two partners in a relationship, each partner would have their own account and each would receive notification of a decision relating to the claim. In cases where we pay housing costs direct to a landlord, we would also be able to notify the landlord of the decision to pay the relevant amount – possibly by post, for example.
- (c) We also propose to retain the ability to notify claimants of a decision relating to their claim in person or by post if appropriate. In the same way that a decision notice is currently treated as given to a claimant on the date of postage, a decision notice would be treated as given to a claimant on the date that it becomes available for them to view in their online Universal Credit account.
- (d) Finally, we propose that all decisions made in an assessment period will be notified to the claimant(s) together in a single decision notice at the end of the assessment period, rather than issuing decision notices ad-hoc as each decision was made. This will help the claimant to understand how their award has been calculated taking account of changes in the month. The time limits for disputing these decisions would then begin at the point of the single decision notice being issued. Certain decisions that require immediate effect would still need to be notified immediately, such as a decision to pay hardship to a claimant who has been sanctioned, or a decision to pay more frequently than monthly to a claimant who is in a vulnerable situation.
- (e) We also intend that claimants will be able to notify DWP of a change in their circumstances by electronic means, subject to meeting the conditions set out in Schedule [2] (electronic communications) to the proposed Claims and Payments Regulations 2012.

## **6. Decision notices**

- (a) Universal Credit Decision Notices policy will follow Department-wide policy on the content of Decision Notices, and as such we do not think that any specific regulations will be required. Our approach to delivery is set out below for reference.
- (b) Operationally, we intend our Decision Notices to be more detailed and comprehensive than has previously been the case, building on the recommendations from Professor Harrington's review of the Work



Capability Assessment<sup>1</sup>. This will help claimants to understand how their award has been calculated.

- (c) Universal Credit Decision Notices must contain details of the claimant's right to dispute that decision through requesting revision. As in the legacy benefit system, certain decisions within Universal Credit will not carry the right of appeal – see section 25 below.
- (d) We intend that Decision Notices relating to a joint claim will be available to both partners in the benefit unit, even if they relate to sanctions for conditionality failures or fraud, and even if one partner requests that the decision notice be withheld from the other partner. This is because each partner is jointly entitled to Universal Credit and is jointly responsible for the claimant's part in administration of the claim and award. If a Decision Notice relates to a joint claim where the payment is split between the partners, for example in cases of proven financial abuse, the details of this split would be shown on the Decision Notice. However, we intend that sensitive personal information will be protected – for example, details of a partner's health condition.

## **7. Automated decisions**

- (a) To simplify and streamline processes, automated decision making will be used in Universal Credit wherever appropriate. This is enabled by Section 2 of the Social Security Act 1998. It is envisaged that only decisions which can be made on the basis of factual evidence or prior determinations, and which require no discretion, judgement or interpretation would be in scope for automation. Decision Makers would still be required to make any decision which is more complex than a factual application of the law.

## **8. Evidence & information in connection with a claim**

- (a) We propose that information or evidence required in support of a claim to Universal Credit or a change of circumstance must be received within one month of it being requested or such longer period as the Secretary of State considers reasonable.
- (b) In the case of a joint claim, the couple would be required to provide evidence and to confirm relevant data online, by phone or in person. During the actual claim process, each partner will be required to confirm that they agree with all the information that they have both provided.

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<sup>1</sup> Professor Malcolm Harrington, *An Independent Review of the Work Capability Assessment* (November 2010). <http://www.dwp.gov.uk/docs/wca-review-2010.pdf>

## **Part 2: Revision**

### **9. Revision on any grounds (DA5 – DA8)**

- (a) We propose that Universal Credit in general follow high level cross-benefit policy on revision on any grounds.
- (b) Regulation DA5(2)(a) provides that a decision making an advance award of Universal Credit in specific circumstance can't be revised if the claimant's circumstances have changed since the award decision was made. This is because the decision would be superseded when the change of circumstances occurs. We also intend to provide that, as happens now in the case of ESA, a decision cannot be revised where the claimant is terminally ill unless the application for revision contains a statement to that effect.

### **10. Revision on specific grounds (“any time” revision)**

- (a) We propose that Universal Credit in general follows high level cross-benefit policy on revision on specific grounds (DA9 – DA13). We propose, therefore, that a decision to impose a sanction may be revised at anytime. In the case of revision on the ground of official error (DA9), Universal Credit will align with PIP, ESA and JSA. In certain cases, we believe that additional grounds of revision specific to Universal Credit are appropriate, and these are set out in more detail below.
- (b) Regulation DA16B(1) provides that a decision to apply the benefit cap to Universal Credit may be revised at any time. This provides an important safeguard to the welfare of claimants as a decision to apply the benefit cap (i.e. the maximum rate of total benefits) in accordance with regulations will not carry the right of appeal. This is provided for in section 96(6) of the Welfare Reform Act 2012. The claimant can, however, appeal if they contest that the benefit cap has been applied incorrectly, subject to the requirement to first apply for the decision to be revised.
- (c) We also intend that a decision maker should be able to revise, at any time, a decision which adopts a rent officer's determination, broad market area determination or local housing allowance determination where the determination is altered subsequently so that there is an increase in the amount which represents rent for the purpose of calculating housing costs in Universal Credit. The ability to revise these decisions already exists in relation to housing benefit (regulation 4 (revision of decisions) of S.I. 2001/1002) and we propose to carry this power forward in Universal Credit.

## **Part 3: Supersessions**

### **11. Grounds for supersession (DA18 – DA20)**

- (a) We propose that Universal Credit in general follow high level cross-benefit policy on grounds for supersession.
- (b) We would draw the Committee's attention to the proposed grounds for supersession in regulation DA18(4)(d) and (e) concerning the receipt of medical evidence and limited capability for work.
- (c) We also propose that the Secretary of State should take supersession powers in relation to redeterminations which result in a reduction in the amount which represents rent (DA18(4)(g)) for the purposes of calculating the housing costs element of Universal Credit. Similar powers exist currently in relation to the administration of housing benefit (regulation 7 of S.I. 2001/1002).
- (d) Proposed regulation DA18(5) defines that "sanction decision" in DA18(4)(c) includes reductions of Universal Credit as well as reductions of ESA and JSA, ending a sanction, and a fraud sanction.

### **12. Changes of circumstance (DA Schedule 2 Part 3)**

- (a) Under the current system, changes of circumstance which affect an award commonly take effect from the start of the benefit week in which the change occurs, is reported or the date from which we are notified of the change. This is to allow for simpler administration, and to allow claimants to understand more easily how much benefit they will receive.
- (b) Universal Credit is a dynamic benefit which is calculated on the basis of a wide range of personal circumstances and which is assessed and paid monthly. We therefore propose an approach to changes of circumstance which seeks to ensure that, at the end of each assessment period, the claimant is paid the amount we think they will need to manage over the coming month (next assessment period).
- (c) We propose to achieve this by treating changes of circumstance which affect the amount of the award as if they occurred at the beginning of the assessment period, for the purpose of the award calculation. This is termed the "whole month" approach. The effect of this is that the full change in monthly award rate due from the change will be included in the award calculation, rather than attempting to prorate periods of different award level across the same assessment period. The award will thus be net of all changes – so that all changes are reflected in full at the next payment.
- (d) The alternative approach, calculating changes in the award on a pro rata basis, across different periods within the assessment period, would be less dynamic as there would always be a lag between a change affecting the

award, and the full value of that change being reflected in the award. We believe that it would therefore carry an increased risk of hardship to claimants, and of under-payment or over-payment. Relative to our assessment of their financial needs, the next payment would be too little to claimants whose award increased, and too much to those whose award decreased. Prorating would also make it harder for claimants to understand their award and would be more complex to administer.

i. Earnings & income

All earnings and income received (or in the case of tariff income, assumed to be received) during the assessment period will be considered in total for the purpose of the award calculation.

ii. Childcare costs

Claimants in work, or who have recently left work, will be eligible to receive a proportion of their childcare costs paid during an assessment period as part of the award for that assessment period. For the purposes of eligibility for childcare costs in Universal Credit, a person is treated as being in paid employment in the assessment period during which they cease to be employed and the following assessment period. This exception is to protect childcare places where people are between jobs.

- (e) We intend, however, that, in order to avoid a gap in entitlement, we will make an exception to the whole month change of circumstance model when a person in receipt of UC reaches the qualifying age for Pension Credit (the upper age limit for UC), if we know they have made a successful advance claim to Pension Credit. In this situation, the change will be treated *pro rata*, such that the days between the start of the assessment period and the claimant reaching the qualifying age for Pension Credit will be paid at a daily rate at the end of that assessment period (Schedule DAS2 Part 3, paragraph 6).
- (f) We will require claimants to report changes of circumstance as soon as possible in order to accurately calculate and administer their award. To support this, if a claimant reports a change late we propose to handle this change differently depending on whether it is advantageous or disadvantageous to the claimant. This is the same principle as in the existing system, and is designed to encourage claimants to meet their obligations to report changes of circumstance as soon as possible.
- (g) For the purpose of calculating an award of Universal Credit, we propose that the effective date of a change of circumstance would be the beginning of the assessment period in which it occurred. Where an advantageous change is reported after the end of that assessment period or such longer period as may be allowed for late reporting (see below), we propose that

the change takes effect from the start of the assessment period in which the notification is made.

- (h) Changes of circumstance reported in an assessment period after the one in which they occur would:
  - i. Be treated as occurring at the start of the assessment period in which they **occurred** if they **decrease** the award;
  - ii. Be treated as occurring at the start of the assessment period in which they are **reported** if they **increase** the award.
- (i) Changes of circumstance would include, but not be limited to:
  - (i) A change in housing cost liability;
  - (ii) Whether an element of Universal Credit becomes payable or ceases to be payable;
  - (iii) A change in the amount of an element of Universal Credit payable;
  - (iv) A change in household formation, including any effects on the amount of the Universal Credit Standard Allowance payable;
  - (v) A change which means the claimant no longer meets one or more of the basic conditions of entitlement to Universal Credit (see section 14 below).
- (j) When a change in circumstances leads to an element of Universal Credit becoming or ceasing to be payable, or a change in the amount payable (including a change in household formation), the decision is superseded to change the Universal Credit Maximum Amount. This amount can then be reduced by earnings, income or tariff income (income assumed from capital) received over the assessment period. A supersession decision to end entitlement due to income could therefore not be made until earnings and income received in that assessment period were known (although payment could be suspended if doubt arose whether the conditions of entitlement are met, and information requirements are not met – see section 21 below).
- (k) DA Sch2 Part 3, paragraph 3 allows for a short window after the assessment period during which earnings can be reported, while still taking effect in the assessment period during which they were received – providing a limited exception to the rule in section 12(h)(ii) to enable claimants to account for and report earnings accurately, where they are responsible for reporting their earnings to us.
- (l) DA Sch2 Part 3, paragraph 4 makes provision for the effective date of supersession decisions at the initiative of the Secretary of State within Universal Credit (see DA Sch2 Part 1(4)). This replicates the general position in ESA and JSA to ensure consistency with those benefits, whilst reflecting the “whole month approach” whereby changes take effect on day one of an assessment period.

- (m) The intention behind paragraph 5 of DA Sch2 Part 3 is to align Universal Credit with the existing position with ESA where a claimant assessed as having limited capability for work failed to notify a change of circumstance (see S.I. 1999/991, Schedule 3C, paragraph 7).
- (n) DA Sch2 Part 3, paragraph 7 makes provision in relation to hardship payments within Universal Credit – see section 16(b) below.
- (o) DA Sch2 Part 3, paragraph 8 replicates the position in ESA on notification of terminal illness (see DA Sch2 Part 1, paragraph 6), although this has been adapted for Universal Credit to take account of the “whole month” approach.
- (p) We also propose that a decision to adopt the determination of a rent officer should take effect from the first day of the assessment period in which the determination is made. This is given effect by DA22(9).

**13. Effective date of supersession – late reported changes of circumstance (DA 24)**

- (a) A longer period of time may be allowed at a Decision Maker’s discretion for the claimant to notify a change in their circumstances (for example where the claimant was ill or had an accident and was hospitalised). This would provide for a change which increased the award to be notified after the assessment period in which it took place, but – where the DM deemed it appropriate – to take effect at the beginning of the assessment period in which it occurred rather than when reported. Universal Credit would follow existing cross-benefit policy on the definition of that longer period of time, brought forward in DA24.

**14. Effective date of supersession – ending an award in the case of a change of circumstances**

- (a) A change in circumstance during an assessment period which reduces the award to zero or to below the minimum entitled amount would therefore result in the claimant receiving no payment at the end of that assessment period, and ceasing to be entitled to Universal Credit from the beginning of that assessment period. This may be a combination of changes of entitlement to certain elements in the award calculation or for the previous amount of these elements; it could be a result of increase income or earnings; or it could be a result of decreased housing or childcare costs.
- (b) However, the claimant would only cease to be entitled **after** they had already undergone the change of circumstance which ended their entitlement. We would not stop paying Universal Credit before the claimant’s circumstances changed. For example:

- i. A claimant whose earnings increased would only see their benefit reduced or withdrawn **after** they received those increased earnings;
  - ii. A claimant whose eldest child turned 18 and left the household would only see their benefit reduced or withdrawn **after** the child had left; or
  - iii. A claimant whose housing costs decreased would only see their benefit reduced or withdrawn **after** this reduction has taken place.
- (c) Please note that moving into work will not of itself lead to entitlement ceasing – rather, the award would not be reduced until related earnings were received and included in the award calculation at the end of the assessment period in which they were received.
- (d) Similarly, if the claimant stops meeting one of the basic conditions of entitlement (for example, permanently moves abroad) or if they relinquish their award, then that will be treated in line with the whole month model of changes of circumstance - as if it applied from the beginning of the assessment period during which it took place. The award would then cease on the last day of the previous assessment period. A claimant who relinquished their award or who stopped meeting one of the basic conditions of entitlement would therefore receive no payment at the end of that assessment period.
- (e) This also provides that a person can't be entitled to Universal Credit for less than a month. If their circumstances change within their first assessment period such that they cease to be entitled, or income or earnings reduce their award to nil, no payment would be due at the end of that assessment period.

#### 15. **Effective date of supersession – other circumstances (DA Sch2 Part 3)**

- (a) DA22(4)(a) and DA22(6) concern the date on which a superseding decision takes effect where a decision is superseded following receipt of medical evidence (see DA18(4)(d)). The intention behind the former is that the superseding decision should take effect at the beginning of an assessment period. Their award at the end of that assessment period therefore reflects the element in full, rather than *pro rata* for part of the assessment period. DA22(6) reflect the fact that under the Universal Credit Main Scheme Regulations set out the period from which a claimant becomes entitled to the limited capability for work element.

#### 16. **Effective date of supersession – sanctions and hardship**

- (a) **Sanctions** (DA22(7)(c)) – The policy intent is that a sanction would be applied at the daily rate applicable to the claimant based on the rules for calculating the effective date of supersession. The sanctioned amount will follow from the award calculation. The intention is that sanctions decisions

should take effect in accordance with the provisions of the Universal Credit Regulations.

- (b) **Hardship** (DA Sch2 Part 3, paragraph 8) – The Universal Credit Main Scheme regulations set out our proposal that hardship awards only be made on application by a claimant (the Secretary of State cannot decide to award hardship without receiving an application in the approved form). The intention is that the effective date of a decision to pay hardship to a claimant will take effect in accordance with the provisions of the Universal Credit Regulations relating to hardship.

#### **17. Effective dates: tribunal cases (DA23)**

- (a) This largely brings together existing provisions in regulation 6, 7 of and Schedule 3A and 3C to the existing Decisions and Appeals Regulations, with the aim of providing greater clarity and accessibility for readers of the legislation. In the case of UC, we propose that the date on which the superseding decision takes effect in line with the current position for ESA and JSA where the change takes effect as for a change of circumstances.

## **Part 4: Other matters relating to Decision-Making**

#### **18. Determinations on incomplete evidence (DA26(3))**

- (a) This regulation provides that the Secretary of State may make a decision on the amount of housing costs to pay as part of Universal Credit on the basis of the information or evidence that he has, where it appears to him that this information or evidence is incomplete. This is a safeguarding measure to allow housing costs to be paid where evidence or information are outstanding, to reduce risk to a claimant's housing.

#### **19. Determinations as to capability for work (DA27(3))**

- (a) This is simply an alignment measure to ensure that the existing provisions relating to ESA are also applied to Universal Credit. The current provisions are found in regulation 10 and 11 of S.I. 1999/991.

#### **20. Effects of alterations affecting Universal Credit (DA28)**

- (a) We intend that where the amount of a Universal Credit award changes because of a change in the level of earnings notified to us by HMRC, the change is to be applied without a further decision being required of the Secretary of State. This is to reduce the burden of administration and complexity of our IT solution, while also striking a balance to ensure that claimants are able to obtain a decision in the event of a dispute. The intention is that rights of dispute (revision) and appeal are then engaged.



## Parts 5 and 6: Suspension & Termination

### 21. Suspension & Termination

- (a) Subject to what is noted below, we propose that Universal Credit reflect existing high-level cross benefit policy on the provision of evidence and information, and on suspension and termination of benefit.

### 22. Suspension (DA30-2)

- (a) Unlike the position with ESA, if a Universal Credit claimant fails to submit to medical examination then this would not result in a loss of entitlement to the benefit. Rather, as the Universal Credit claimant would not be deemed to have limited capability for work (or work-related activity), their award calculation would not include these elements and they would continue in the appropriate conditionality group.

### 23. Termination (DA33)

- (a) In a similar way to how suspension or changes of circumstance affect the award calculation, if an award is terminated then there will be no further payments against that award. So, for example, if an award were to be terminated on the 20<sup>th</sup> day of an assessment period then there would be no payment made at the end of that assessment period.

## Section 5 – Policy Intent: Appeals

### 24. Appeals in Universal Credit (DA35 – DA40)

- (a) Universal Credit plans to reflect existing high-level cross benefit policy and process on appeals. In particular, Universal Credit intends to follow the recent reforms on mandatory reconsideration of a decision before proceeding to appeal, and on the direct lodgement of appeals with HMCTS rather than DWP.

### 25. Decisions against which no appeal lies (Schedules 3 & 4)

- (a) In the main, Universal Credit will follow existing policy on appeal rights, and which decisions do or do not carry the right of appeal. Points of particular interest, or areas where appeal rights are particular to Universal Credit, are noted below.

### 26. Deductions

- (a) We propose that a **third party** will have no right of appeal against a decision whether to pay part of a person's benefit to that third party under the Third Party Deduction scheme. As now, the **claimant** will have a right

of appeal against a decision whether to pay part of their benefit to a third party under the Scheme. This provides an important protection to the welfare of the claimant and also promotes personal responsibility, by making sure that they are in control of their finances.

**27. Direct payment of housing costs to a landlord**

- (a) We propose that decisions made under regulation CP55 of the proposed Claims and Payments Regulations (payment to a 3<sup>rd</sup> party on the beneficiary's behalf) will not carry appeal rights. Payments under this provision include the direct payment of housing costs (other than arrears) to a landlord. Direct payment is designed to support claimants who are in extremely vulnerable circumstances, and the intervention is only made where there is compelling evidence that it is required to mitigate immediate risk of harm.
- (b) A decision adopting a rent officer's determination will not carry a right of appeal. This brings forward existing provision under Housing Benefit.

**28. A decision relating to the payment of mortgage interest to a qualifying lender**

- (a) There will be no right of appeal against a decision to pay mortgage interest payments direct to a qualifying lender. This replicates existing provision in Schedule 2 para 5(u) in SI 1999/991.

**29. Overpayments**

- (a) The recovery of overpayments of Universal Credit will in general not carry the right of appeal, in line with cross-benefit policy on overpayments. Further details, and exceptions provided for, are to be included in the explanatory memorandum on the Social Security (Recovery and Consequential Amendments) Regulations 2012.

**30. Carers**

- (a) There will be no right of appeal against a Secretary of State decision to nominate a main carer, where multiple people care for a disabled person and they cannot agree who should be nominated as the main carer. This is similar to the current position in Carer's Allowance (see paragraph 3 of Schedule 2 (decisions against which no appeal lies) to the Social Security Act 1998).

**31. Self-employment**

- (a) It is proposed that there will be no right of appeal against a decision to apply the Minimum Income Floor (MIF) made in accordance with the Universal Credit Regulations – in effect against the rate of Universal Credit provided by law. Where the claimant disputes that the MIF has been

applied correctly, they will be able to appeal the decision. The MIF will assume a level of income for the self employed based on the earnings we could expect a claimant with similar circumstances in employed work to achieve. The claimant will therefore receive a reduced Universal Credit award but will not be subject to work search or availability requirements. We know that it can take some time for new businesses to become profitable, but expect those in self-employment to receive a reasonable income from their business activity once they are established.

- (b) The Minimum Income Floor (MIF) will be set for each self employed adult and based on the conditionality threshold for that person. It will be the equivalent of National Minimum Wage for the hours that the claimant could be expected to work for Universal Credit. The intention is that claimants must develop their business in order to become less reliant on benefits. The claimant will not be required to look or be available for other work if subject to the MIF.
- (c) We propose that a decision as to the day, time and place that someone is required to attend for an interview to determine whether they are in gainful self-employment, or to meet the conditions relating to their start-up period, will not carry the right of appeal. This is because such attendance is required in order to establish the claimant's self-employed status.

## Personal Independence Payment

### **DA5(2)(c) Revision on any grounds and DA18(3)(b) Grounds for supersession**

These provisions carry forward the principle that an application for revision or supersession must contain an express statement that the claimant is terminally ill for it to be treated as an application under the PIP provisions for terminally ill people. The purpose of this is to ensure that we do not, through our actions, inadvertently inform a claimant of a prognosis relating to their condition that they are unaware of.

### **DA9 - Revision of decisions arising from official error, mistake etc**

This provision is highlighted because of something which we do not propose to carry forward from previous regulations.

Regulation 3(5)(C) of the existing regulations allows for a less advantageous revision of a "disability decision" only where the claimant could be "reasonably expected to know" of the ignorance or mistake. This regulation was necessary to distinguish between those claimants who deliberately misrepresented their circumstances when claiming Disability Living Allowance from those who did not understand the basis of their award sufficiently to know that it was based on a mistake or ignorance. This latter group fell to have their awards superseded under Regulation 6(2)(b)(i) rather than revised.

By contrast the PIP assessment regulations will provide a more transparent and objective basis for deciding entitlement to PIP. Claimants will be invited to provide information relating to their condition through the claim form and, where appropriate and possible, through the provision of additional evidence.

In most cases they will also be invited to attend a face-to-face consultation or a telephone consultation with a health professional. The consultation will allow the health professional to explore and give consideration to the claimant's circumstances and the impact of their health condition or disability on their lives. On the basis of all the evidence gathered during this process the health professional will provide advice, along with a justification, to the departmental Decision Maker on the claimant's ability to carry out daily living or mobility activities specified in the PIP Assessment Regulations. Departmental Decision Makers will make the decision on the PIP award on the basis of the advice received and having considered all the evidence.

The PIP decision notice will include the final descriptors within the assessment criteria that the Decision Maker has determined are appropriate to the claimant and the basis for this decision. Claimants will also be told what evidence the decision has been based on; the intention is that this will give claimants a clear understanding of why they have or have not been awarded PIP.

PIP entitlement criteria will be considerably less subjective than the DLA condition and the decision notifications more transparent. As well as making it more difficult for a claimant to misrepresent their needs, this means that we can reasonably expect claimants to identify where their award is based on a mistake or in ignorance of their actual abilities and not carrying forward the provision from existing regulations meaning that a revision will always be possible where that happens.

#### **DA18 - Grounds for supersession**

PIP intends to make use of two additional grounds that do not apply for DLA.

DA18(4)(d) allows for a decision on an existing award of PIP to be superseded where medical evidence has been received following a re-determination of someone's ability to carry out daily living or mobility activities specified in the PIP Assessment Regulations which have recently completed a 15 week period of consultation. Regulation 9 of these Regulations allows the Secretary of State to review existing awards of PIP to ensure that claimants remain entitled to the correct level of entitlement.

DA18(4)(h) provides a ground to allow a negative determination to be made where a claimant is being assessed as part of a claim to PIP and they do not comply with the evidence gathering processes in place to support the assessment. For example where they do not supply information about how their disability or health condition affects their abilities or they refuse to participate in a face-to-face consultation.

A new ground for revision is included in DA16 A(3). This will allow any supersession following a negative determination to be revised at any time where it is found that an error was made that the claimant did not cause or was not instrumental in creating. This will allow benefit to be reinstated from the date of disallowance.

### **Retrospective self financiers**

#### **DA26 Determinations on incomplete evidence**

#### **DA16A Revision – Personal Independence Payment**

Where a claimant is living in a residential care home (or similar institution) and their exact funding status cannot be determined e.g. where there is an ongoing dispute over funding or where there is uncertainty over the value or ownership of an asset case law protects the claimant from potential financial disadvantage. It does this by stating that any supersession decision should not be made to cease payment where a local authority is funding someone's stay in residential care if the question of whether they will seek repayment of funds has not been resolved.

These regulations seek to enshrine this protection in regulations by taking a new revision power so that, when the funding position is settled (which in practice can take several years), any decision that Personal Independence Payment was not payable at the relevant time may be revised on the basis of this new information with full arrears being paid to the claimant to the date they first became liable to fund their own care provisions, where appropriate

#### **DAS2 – Part 2 – Effective date for supersessions for PIP**

PIP is different from UC in treating the effective date of supersession where a change of circumstance has occurred as the date of the actual change, rather than at the end of the period of payment in which it occurs (the UC 'Assessment Period').

Paragraph 3 of this provision contains an exception to this general rule that changes of circumstance will take effect from the date of change to take account of PIP qualifying period.. Applying this will mean the effective date of change is the date the 3 month qualifying period is satisfied.

Paragraph 5 of this provision contains an exception to the general rule on the date of supersession following a change of circumstances. Where a change has occurred that the claimant could have been reasonably expected to know was relevant to their entitlement to benefit then the effective date will be the date that they could first have been expected to inform the Department. We recognise that over a period of time how individuals are affected by their health conditions or disabilities can change gradually and it is sometimes difficult for someone to recognise that there has been a change or how it has affected them.

#### **DSA4 - Decision to which no appeal lies**

Decisions attracting appeal rights in DLA and AA will also be reflected in PIP. Decisions relating to whether a claim for PIP should be treated as a claim to another benefit and the day and frequency of payment will continue to be non-appealable.

## **Jobseekers Allowance and Employment Support Allowance**

### **General**

These regulations will apply to JSA and ESA as contributory benefits. The structure of ESA with regard to the Work Capability Assessment is unchanged meaning that the events that give rise to a review or supersession will still arise. However, we have not carried forward each of the existing revision or supersession provisions unchanged, instead, taking the opportunity to simplify where possible.

### **Revision**

The existing regulation 3 covers all the grounds for revision. The new regulations itemise the different grounds where these remain appropriate. For example, **regulation 9 DA9** provides for official error, **DA10** for revision where there is no right of appeal, **DA11** for revision following an appeal and so on. This will bring clarity to the regulations and help the understanding of the provisions.

The following regulations are drawn to the Committee's attention because they are new or introduce changes.

**DA9 Regulation 9.** Regulation 3 of the Decisions and Appeals Regulations provides that an ESA decision may be revised where it shown to be wrong from the outset because the claimant has deliberately misrepresented his circumstances. The new provision excludes the element of claimant collusion. If the decision is incorrect because it was made in ignorance or mistake as to fact and is more advantageous as a consequence, it will be revised. Where the issue relates to the claimant's medical condition, his role in bringing this about will not be a factor taken into consideration. But we do not see this as a gap in the new provision.

ESA was added to regulation 3(5) when case law highlighted a potential issue with DLA. It was a case of closing off any possible loophole in the provision but on the basis that ESA could (for the majority) only be awarded on the presentation of a medical certificate then in reality the possibility of a need for revision arising for deliberate ignorance or mistake was always seen as remote. As explained above the existing provision will not be carried forward into PIP and we can see no reason to do anything different for ESA.

**DA13 Regulation 14** provides for sanctions to be imposed on ESA or JSA where the claimant has failed to comply with a requirement to carry out work related requirements as required by the Welfare Reform Act 2012. It also provides for revision to makes deductions in respect of repayment of a fine or the administration of a penalty as an alternative to prosecution for benefit fraud.

**DA14 Regulation 15** The carries forward existing provisions in relation to ESA appeals and decisions where there is a delayed LCW.

However, there is a new provision, 15(3), which is consequent on the shortening of the period over which ESA(C) can be paid.

It applies where an award of ESA is terminated because it has been paid for the maximum 365 days and it is later determined that the claimant satisfied the conditions for the Support Group for a period before the end of the award - being in this Group precludes termination after 365 days. In this situation, the decision to terminate the award can be revised so as to make a continuous award of ESA.

**DA 15 Regulation 16** This regulation has been carried forward with one change. As it is no longer possible to claim Income Support in this circumstance, there is now only a reference to Jobseekers Allowance. The regulation provides for the revision of a decision to award JSA which was made following a disallowance of an ESA award which was later reversed on appeal.

## Supersession

As with the revision provisions, the opportunity has been taken to re-structure the supersession provisions. The grounds for supersession for ESA and Jobseekers Allowance are still, as now, placed in a single provision, namely **DA21**, but the opportunity has been taken to rationalise them.

The existing general rules that allow a decision to be superseded where there has been a relevant change of circumstances or the original decision was erroneous in law or fact are unchanged. The following are drawn to the Committee's attention:

**DA18 Regulation 21(3)** provides that the fact that a claimant has become terminally ill is not a change of circumstances but provides an exception where the request for supersession is made expressly for that reason.

**DA 18 Regulation 21(4)** sets out which decisions can be superseded and in the context of ESA and JSA includes:

- sanctions decisions, with this now being defined by reference to the primary provision rather than this being repeated in the supersession provision itself.
- (for ESA only), a decision, where, since it was made, further medical evidence has been received. This will enable a supersession to be carried out following

a Work Capability Assessment (WCA) – this provision has been carried forward. The wording of this regulation is different from the current regulation, 6(2)(r), to reflect the fact that the Secretary of State wishes to use alternative examiners to Health Care Professionals to undertake examinations. He will be using doctors, nurses, physios, occupational therapists and paramedics.

- a decision where, since it was made, it has been determined that the claimant can be treated as having Limited Capability for Work (LCW). This will allow a supersession where the claimant falls within specific ESA provisions that allow a claimant to be treated as having LCW because of a particular health condition without the need for a WCA. This replaces the existing regulation 6(2)(r)(ii) as it now includes a cross-reference to the Universal Credit provisions. This means that a decision to treat a claimant as having LCW on ESA can give rise to a supersession of a UC decision and vice versa.

## **Effective Dates for Supersession**

**DAS 2 Schedule 2, Part 1, para 1**, carries forward the default position: The effective date for a JSA or ESA supersession is usually the first day of the benefit week in which the change takes effect.

The following reflect changes and/or clarification to the existing provisions.

**DA 22 Regulation 25.** A new provision has been added at regulation 25(2) to close a gap in the existing provisions. S10 of the SS Act 1998 allows the Secretary of State to supersede a decision where it was made in ignorance or mistake as to fact or where there is an error of law (for which the Secretary of State is responsible). The current provisions do not provide an effective date for this decision. Accordingly it could only be the date of the supersession decision as provided by S10. The new provision includes this but adds the date of the application. This reflects the policy intention.

We have retained at regulation 25(5) the rule that brings about payment of the appropriate ESA component at the beginning of the 14<sup>th</sup> week of entitlement.

In contrast with the current regulations, regulation 25(7) refers to the relevant principal benefit regulations for the effective dates of sanctions decisions. This reflects a move to tidy up the decision and appeals provisions by avoiding duplication. The effective dates of ESA and Jobseekers Allowance sanctions are set out in their respective Regulations and we see no need to repeat them here.

### **DA27 Regulation 30 – Determinations as to capability for work**

This provision has been carried forward but importantly now applies equally to Universal Credit where the same conditions apply. This means that determinations on capability for work whether made in relation to ESA or UC are binding on the other benefit.



**DA34 Regulation 37 – Termination in the case of entitlement: alternative benefits**

This is an existing provision which is carried forward without any change in effect.

**DAS 2 Schedule 2, Part 4 – Common Provisions**

We have clarified the effective date to make it clear that it is from the start of the relevant ESA or JSA benefit week. Currently this date is not prescribed and so has given rise to queries as to whether it could be in the middle of a benefit week. This change put it beyond doubt that it the first day.