



Department
for Work &
Pensions

The Rt Hon ESTHER MCVEY MP
Secretary of State for Work & Pensions

15th May 2018

Daphne Hall
NAWRA

Thank you for your letter dated 9th February 2018, which asks for further clarification in relation to the handling of the conversion of Incapacity Benefit awards to Employment and Support Allowance, and our approach to how we are engaging with individuals to make appropriate payments.

With regard to the significance of the case of *LH v SSWP* to the incapacity benefit reassessment process, you will probably be aware that the case of *CSE/33/2017* was heard in the Upper Tribunal in December 2017. The decision in that case addresses the points you have raised in your letter and, in particular, the impact of the case of *LH* and how section 27 of the Social Security Act 1998 applies to claims that have been through the incapacity benefit reassessment process.

Where we have reviewed cases and found that there has been an underpayment, and where the decision in question pre-dates 21 October 2014 (the date of the relevant determination for the purposes of section 27) those decisions will be superseded. Revision for official error is not available in those cases, because official error cannot include an error of law which is shown to be such by virtue of a subsequent decision of the Upper Tribunal or the court (regulation 1(3) of the Social Security (Decisions and Appeals) Regulations 1999). In these cases, arrears will be disregarded for a maximum period of 52 weeks, in accordance with paragraph 11(1).

With regard to decisions made after 21 October 2014, the SSWP is able to revise for official error and paragraph 11(2) of Schedule 2 to the Employment and Support Allowance Regulations 2008 will apply in those cases where the arrears amount to £5000 or more.

Therefore how we treat arrears depends on the legal basis for their payment. As these cases involve an error of law rather than official error current ESA legislation only allows payments of arrears to be disregarded for 52 weeks. I

have asked my officials to look at ways to extend the disregard to 52 weeks or the life of the award (whichever is longer) in these cases.

We are mindful of how we engage with individuals on this matter and note the concerns you raise. Our initial approach to reviewing cases began with a review of 1,000 cases to consider the best method of engagement to secure the right outcomes. In this phase and due to the sensitive nature of the exercise the first contact, where possible, was made by telephone, which does include basic security questions to ensure that we have contacted the correct person. The purpose of the call is to explain what has happened and, where possible, obtain the relevant information to assess potential entitlement to the income-related element of ESA. If, during the call, the claimant is not comfortable with providing personal information, they are given the option of completing an ESA3 (IBR) form by post, or arranging a call back at a more convenient time.

If, after 3 call attempts, we are unable to contact the individual an ESA3(IBR) review form, along with a covering letter, is sent explaining why we have sent the form and providing contact details should they require any help or support in providing the information as requested. We also offer the option of capturing the details over the telephone at that point if they would prefer.

If no response is received from the individual after 2 weeks a series of follow-up letters are sent. If after 8 weeks no response has been received a closure letter is issued advising the claimant that, as we have not received a response from them, we have been unable to make a decision on whether they are entitled to the income-related element of ESA. The closure letter advises the claimant that if they return their form or contact us with the relevant information in the future we will review their claim.

If, at any time, we identify that the individual may be vulnerable their case will be referred to our visiting team who arrange a home visit to enable the collection of the necessary information.

Having reviewed in detail our learning from the 1,000 sample cases, we have revised our process for contacting those who may be affected by this issue to include sending an introductory letter. This explains that we have identified that additional premiums may be due, and advise that we will be contacting them within the next two weeks.

Following the introductory letter, the process for engaging with the individual remains the same as described above. From the point of us contacting people, we aim to review and process the case and award payment (if appropriate) within 12 weeks – subject of course to all the relevant information being available. I hope you welcome the introductory letter given the point made in your letter.

Provided that the claimant provides us with the relevant information that will enable us to assess their entitlement to income-related ESA (ESA(IR)) they will receive a letter advising them of their entitlement and where applicable, the amount of arrears that are due. These letters include their appeal rights and makes clear reference to disregarding payments received for the purposes of calculating on-going benefit entitlement.

We are committed to making sure that we do all we can to obtain the information required to establish entitlement to ESA(IR) and pay any arrears that are due.

I hope the stakeholder event that my officials held on 26 February aided your understanding and provided more assurance on our approach.

Kind regards


The Rt Hon Esther McVey MP
SECRETARY OF STATE FOR WORK AND PENSIONS

