

## **EMPLOYMENT AND SUPPORT ALLOWANCE UNDERPAYMENTS FAQ**

### **Incapacity Benefit Reassessment: Potential Underpayments of ESA Premiums**

Employment and Support Allowance (ESA) was introduced in 2008. From March 2011, the Department began reassessing people on incapacity benefits for eligibility for ESA.

The Department is currently correcting some past underpayments of ESA, which arose while reassessing incapacity benefit claims.

Initially the Department believed that we were legally restricted to paying arrears of benefit from 21 October 2014 due to a statutory rule (section 27 of the Social Security Act (S27 SSA) 1998) which governs the position with regard to payment of arrears when a court or tribunal finds that the Department has made an error on a point of law.

Concerns raised in the National Audit Office (NAO) report and the action brought by the Child Poverty Action Group (CPAG) raised new points for us to consider.

The Secretary of State therefore asked officials to look again at all the relevant evidence and the Department analysed the relationship between “official error” and S27 SSA 1998 in regulating how and to what extent arrears can be paid. As a result of the conclusions of this analysis, we now understand that S27 SSA does not apply to these cases and we will be paying arrears to those affected back to their date of conversion to ESA.

A special team is taking this work forward, reviewing cases, contacting claimants and correcting claims. Once individuals are contacted, and the relevant information gathered, we aim to clear appropriate payments within 12 weeks. Following initial contact all those who may be affected will be given a dedicated Freephone number so they can keep in touch with the Department.

The majority of cases identified as part of the initial activity (Phase 1) were completed by April 2019, and the Department aims to complete the additional cases (Phase 2) by the end of the year, utilising the specialist teams the Department has put in place.

As set out in previous updates, the cases included in this exercise were largely converted between 2011 and 2014. Revised operational guidance was put in place in October 2014 after individual cases that had been incorrectly converted came to light. As part of our commitment to correct all cases affected by this error, we decided to undertake additional testing of cases converted in 2015. As mentioned by the previous Minister for Disabled People, Health and Work in February (2019), this testing has shown that the error rate did not improve as quickly as expected and we therefore believe that it is prudent to review around a further 30,000 cases, that were converted from 2015 onwards. This reflects our commitment to ensure all those who may have been affected are identified and paid the arrears they are due.

The Department intends to publish further updates in July and October 2019, and January 2020.

Written Statements were tabled on 14<sup>th</sup> December 2017<sup>1</sup>, 15<sup>th</sup> March 2018<sup>2</sup>, 18<sup>th</sup> July 2018<sup>3</sup>, 17<sup>th</sup> October 2018<sup>4</sup> and 21<sup>st</sup> February 2019<sup>5</sup>.

### **How many people have been underpaid and in what areas/ constituencies?**

- The analytical release published 16 May 2019<sup>6</sup> provides an update of the number of cases found so far to be affected by underpayments of ESA on conversion from other incapacity benefits. The Department estimated in February 2019 that around 600,000 cases require review and that by the end of the exercise around 210,000 arrears payments could have been made.
- We are not able to make robust estimates of the numbers of cases likely to be due arrears at a regional level. All estimates are national only.
- We are focusing our efforts on contacting all potentially affected individuals to ensure they are paid as quickly as possible.
- The preferred approach remains unchanged - to prioritise ESA claims from individuals that we know from our systems to be terminally ill, followed by those cases assumed most likely to be in error within each phase of the exercise.

### **Why are you reviewing cases that were converted from 2015?**

- As part of our commitment to correct all cases affected by this error, we decided to undertake additional testing of cases converted in 2015.
- This testing has shown that the error rate did not improve as quickly as expected and we therefore believe that it is prudent to review around a further 30,000 cases, that were converted from 2015 onwards.
- This reflects our commitment to ensure all those who may have been affected are identified and paid the arrears they are due.

### **When will this be rectified?**

- The Written Statement on ESA made on 18<sup>th</sup> July 2018, which advised that we would be paying all cases back to the point of conversion, has widened the scale of the existing exercise and we will be reviewing an additional 250,000 cases.
- The majority of Phase 1 cases were completed by April 2019.
- Phase 1 also includes around 20,000 cases where the claimant has sadly died. These cases take longer to review, with reassessments for this group expected to be completed by the end of 2019.
- The Department aims to complete Phase 2 of this exercise by the end of this year, utilising the specialist teams the Department has put in place.
- Reviews of the 30,000 cases that were converted from 2015 onwards will begin as Phase 2 cases approach completion.

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<sup>1</sup> [WS 14/12/17](#)

<sup>2</sup> [WS 15/03/18](#)

<sup>3</sup> [WS 18/07/18](#)

<sup>4</sup> [WS 18/10/18](#)

<sup>5</sup> [WS 21/02/19](#)

<sup>6</sup> [ESA underpayments: forecast numbers, forecast expenditure and progress on checking 16 May 2019](#)

- The Departments preferred approach remains unchanged - to prioritise ESA claims from individuals that we know from our systems to be terminally ill, followed by those cases assumed most likely to be in error within each phase of the exercise.
- It is right that the Department looks to balance this important activity alongside the need to ensure that we continue to deliver an excellent service to all ESA claimants. The Department continues to monitor closely how this exercise is progressing. Our aim is for all claimants to receive the benefit they are due as quickly as possible.

### **How many DWP staff are working on putting these cases right?**

- We are monitoring closely how this exercise is progressing to ensure we are doing everything to complete this complex work at pace.
- We have a team of around 1,200 staff working on the exercise to correct these cases.
- It is right that the Department looks to balance this important activity alongside the need to ensure that we continue to deliver an excellent service to all ESA claimants.

### **How will you be contacting those who may have been underpaid?**

- We will contact claimants who may have been affected using a number of different methods, including letters, phone calls, texts and home visits when necessary.

### **Why didn't you pay people further back than 2014 straightaway?**

- Initially the Department believed that we were legally restricted to calculating repayments from 2014 due to a statutory rule (section 27 of the Social Security Act 1998) which governs the payment of arrears when a court or tribunal finds that the Department has made an error on a point of law.
- Following a thorough investigation of the legal position we have updated that interpretation and we will therefore be paying arrears to those affected back to the date of conversion to ESA.
- We are being open and honest and saying we made a mistake which we are now putting right.

### **The Department was made aware in 2013, why was no action taken then?**

- The Department was told about individual cases in 2013 and these were dealt with at the time.
- From 2014 additional guidance was put in place to ensure all claims transitioning from that point forward were paid the correct Income-Related ESA.
- As highlighted in the NAO report it wasn't until 2014, when a combination of the fraud and error statistics and activity in the Upper Tribunal led the Department to recognise that its operational approach to IBR was not sufficiently robust. This tribunal case was important in clarifying the law and the correct procedures.

### **In 2014 the Department changed the processes going forwards, why at this point did you not look back at historic cases?**

- Prior to 2014 we had been correcting individual cases as and when they arose and then in 2014 a fix was put in place.
- At the time officials did not identify the need to explore the potential impact of the earlier error.

### **How can you guarantee that the Department's Fraud and Error statistics are fit for purpose if they didn't spot this fundamental issue?**

- It is in fact through the work of the Fraud and Error team that the scale of this issue became apparent. Fraud and Error statistics are a valuable tool for identifying these kinds of issues.
- The Department publishes statistics on the levels of fraud and error in the benefits system twice each year. The data includes estimates of the proportion of claims with overpayments and underpayments.
- In the summer 2018 the Department ran a consultation exercise on the frequency and breakdown of the information for publication, alongside asking stakeholders how they use the statistics. A response which includes a summary of responses was published in December 2018 and is available here: <https://www.gov.uk/government/publications/fraud-and-error-in-the-benefit-system-publication-strategy>

### **Why did it take so long to start the exercise after the errors were uncovered?**

- We wanted to make sure we got this right so we took the time to fully understand the complexity of the issue and the best process to repay individuals and train staff sufficiently – this involved reviewing a sample of 1,000 claimants to learn lessons and develop a robust process.
- Now we have the right process in place – which has been examined and supported by a number of stakeholders and charities.

### **Will payments of arrears be disregarded for the life of the award?**

- Arrears of benefit under £5,000 are disregarded as capital for 52 weeks from the date they are paid.
- Payments of £5,000 or more are disregarded for 52 weeks or until the termination of the benefit award, whichever is longer.
- We have also introduced the same capital disregard in Universal Credit (UC) in respect of arrears relating to legacy income-related benefit entitlement which begins before migration to UC is complete.

### **What will you do about the people who have died and never received the money they were owed.**

- We will attempt to identify and contact the appropriate representative/next of kin of anyone deceased who is potentially affected. This will help us obtain the relevant information to enable us to review the case and pay any arrears of past payments that are due.

### **How can customers complain if they're not happy?**

- The Department has a clearly defined complaints process.
- Further information is available on the Gov.uk website via the following link: <https://www.gov.uk/government/organisations/department-for-work-pensions/about/complaintsprocedure>