



news

14 March 2018

Incapacity benefit to ESA – did your clients miss out?

In December 2017 the government [announced](#) that it would be carrying out a trawl of incapacity benefit claimants who were migrated over to contributory ESA (cESA) but not assessed for income-related ESA (irESA). Some claimants may have been entitled to a top-up, due to either or both of the severe disability premium and the enhanced disability premium, or help with mortgage interest payments.

The government states that there are around 300,000 claimants of which they estimate – following a trial of reassessing 1,000 – there will be 75,000 underpaid. Currently, the DWP have said they will only backdate any payments to 21 October 2014 due to applying the anti-test case rule ([section 27 of the Social Security Act 1998](#)) in relation to the Upper Tribunal decision [LH v SSWP \(rightsnet summary\)](#). NAWRA disputes that the anti-test case rule applies and is [in correspondence with the Secretary of State Esther McVey](#) about this. Members will be kept updated about any progress on this.

NAWRA has recently attended a DWP stakeholder meeting about how the process of contacting clients - which is due to commence in April 2018 - will take place. Below are some notes to help you support any of your claimants that are contacted –

- DWP aim to have 400 staff in place by beginning of April 2018 and for the whole process to be completed within a year (ie before universal credit managed migration starts) – the staff are

specifically trained and their only work will be this trawl – a specific helpline is being set up for it.

- They will deal with the identified claimants in batches – they may prioritise to do ones who look most like to be eligible first.
- First stage in process is to carry out a scrutiny looking at what data the DWP have and can get from, for example, housing benefit about the claimant on the day they were migrated. If they have evidence that the claimant had a partner working more than 24 hours, or had capital over £16,000 then they will deselect them from the process as they could not have qualified for irESA – these two criteria are the only ones they can use to deselect at this stage.
- To all others a warm-up letter is sent (we couldn't get a copy to take away but it explains a bit about error and that the DWP need to assess for irESA) – it advises that the DWP will call within the next two weeks. Also there is a short form to fill in if you want to deselect yourself on the basis of capital or your partner working (24 hours +).
- A call is made to those who don't deselect after about 10 days – a modified ESA 3 form (details of income and savings) can be completed over the phone either as part of that call or a callback can be arranged for when the claimant has had a chance to collect information. Alternatively, the claimant can ask for the ESA3 to be sent out – see next bullet.
- If the claimant does not respond to the phone call or they have requested a paper form, an ESA3 is sent with a covering letter which again explains what has happened and that they are being assessed for irESA. They have specially designed ESA3s which ask the claimant about their situation from their date of migration onwards or, if the claim has subsequently closed, to the date it closed. Any mention of the WCA has been removed from the ESA3s to avoid claimants thinking it is about that. NAWRA has asked that the front of the ESA3s could say 'we are checking your entitlement for income-related ESA' as opposed to 'we are checking whether you are getting the right amount of money'

which could sound like a fraud investigation – the DWP have taken that away to think about.

- The ESA3 is chased twice but if no response a closure letter is sent which also makes it clear that the issue can be looked at again at any time in the future.
- If the claimant is now deceased the DWP will contact a next of kin if they can, but they welcome suggestions about how to find out who the appropriate person is if they can't access it via their own records or other governmental records.
- A decision letter is issued after the ESA3 whether or not arrears are paid. The letter says arrears are not counted as capital for 52 weeks. NAWRA has raised the fact that if over £5,000 any arrears should be ignored to the end of award as official error under Schedule 9 para 11 of the [Employment and Support Allowance Regulations 2008](#) – DWP have said they are still taking legal advice on whether it counts as official error...

NAWRA's advice

NAWRA advises that any claimants who are entitled to a backdated award of income-related ESA should MR/appeal any limitation of the backdated payment on the grounds that regulation 8 of the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No.2) Regulations 2010 requires that on conversion from IB to ESA an claimant should be assessed for both contributory and income-related ESA. This is confirmed in DWP guidance at DMG 45580 onwards which was in place before the decision in LH.

NAWRA also advises that claimants apply for payments under the Financial redress for maladministration process - <https://www.gov.uk/government/publications/compensation-for-poor-service-a-guide-for-dwp-staff> - which says DWP can make special payments where a claimant has not been paid statutory entitlement due to official error.