



Department  
for Work &  
Pensions

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

January 2018



Dear Ms Hall,

**RE: CONVERSION OF INCAPACITY BENEFIT CLAIMANTS TO  
EMPLOYMENT AND SUPPORT ALLOWANCE**

I am writing in response to your letter dated 8 January 2018 regarding errors in the conversion of Incapacity Benefit claimants to Employment and Support Allowance. I would like to thank you for your interest in this matter and the opportunity to provide an update on our investigations and the action that we are taking.

As you know we are now aware that some cases that were migrated from previous incapacity benefits to ESA between 2011 and 2014 were converted to contributory ESA and entitlement to income-related ESA was not always considered. These cases may therefore be entitled to additional premia, such as the enhanced disability premium, which are only payable to people claiming income-related benefits.

The Department has established a special team to review all the potentially affected cases which we have identified by a scan of our systems. This team is currently being expanded with a view to completing the review and correction of cases during the course of 2018/19. In the meantime work continues to review all claims that may be affected and where necessary contact individuals to obtain the information required to make an assessment of eligibility for income-related ESA (ESA (IR)). Initial contact will be by both letter and phone, depending on the contact information we hold, and follow up with additional phone calls, letters and referral for a home visit if necessary.

We will be asking individuals to complete a form (ESA3 (IBR)), (over the phone or by post) which will gather all the information required to assess eligibility for ESA (IR), including premiums.

There is no need for people to independently contact the Department. Once an individual is contacted, provided we can establish the relevant information about their circumstances, we expect to make a decision and repay the appropriate arrears within 12 weeks.

Where arrears of benefit are paid claimants are advised in writing that ESA repayments will not be taken into account either for 52 weeks or the life of their ESA award depending on their circumstances. Additionally any arrears will not be taken into account as income for the purposes of calculating a future UC award and while there is a capital limit of £6,000 in UC, we will disregard capital from benefit repayments for 12 months.

Turning now to your questions relating to the application of Section 27 of the Social Security Act 1998 to these cases – forgive me if the response below is quite technical but this is a complex legal issue.

The caselaw quoted, LH v SSWP [2015] AACR 14, established the legal principle that, in accordance with Part 1 of the Welfare Reform Act 2007, ESA is one benefit. Therefore, when assessing a person's entitlement to ESA, we must consider entitlement to both contributory ESA and income-related ESA. Separate claims for income-related and contributory aspects of ESA are not required.

The Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No.2) Regulations 2010 ("the 2010 Regulations") apply to benefit conversions from Incapacity Benefit (IB) to ESA.

This means that IB conversion decisions must determine the amount of ESA to which that person is entitled in accordance with regulation 8 of those Regulations. Regulation 8 provides that the amount of ESA payable is calculated by determining in accordance with Part 1 of the Welfare Reform Act 2007 – which links back to the legal principle established in LH.


Section 27 of the Social Security Act 1998 has the effect that a determination of the Upper Tribunal on social security appeals does not apply to periods before the date of the relevant determination where a decision falls to be made by the Secretary of State in accordance with that determination in most other cases.

The Upper Tribunal has made a relevant determination in LH that ESA is one benefit, and separate claims are not required for the two aspects of ESA. As a relevant determination, LH has a mandatory binding effect. Therefore, decisions in relation to IB claims made after LH must be made in accordance with it for the purposes of section 27(1)(b). Section 27(3) has the effect that LH cannot be applied before 21<sup>st</sup> October 2014. It is not relevant that LH concerned a new claim, rather than a conversion from IB.

While I realise you may be disappointed with the information relating to the limiting of arrears under S27 of the Social Security Act 1998 I hope you find this response helpful.

As my predecessor said in his statement the Department is reviewing its processes to ensure any lessons are learnt and that this error is avoided in the future.

In addition, I have asked my officials to arrange a meeting with yourselves and other key stakeholders to share more information on the process we'll be undertaking to review cases. They will be in touch in the near future.

Yours  


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