

2010 No. 2430

SOCIAL SECURITY

The Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No. 2) (Amendment) Regulations 2010

Made - - - - - 4th October 2010

Laid before Parliament 11th October 2010

Coming into force in accordance with regulation 1(2) and (3)

The Secretary of State for Work and Pensions makes the following Regulations in exercise of the powers conferred by paragraphs 4(4), 20(1) and 23(1) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000(a), and sections 24(1), 25(2), (3) and (5), and 28(2) of, and paragraphs 1, 4 and 9 of Schedule 2 and paragraphs 1(1), 7 and 8(1) of Schedule 4 to, the Welfare Reform Act 2007(b).

The Social Security Advisory Committee has agreed that the proposals in these Regulations should not be referred to it(c).

In respect of the provisions in these Regulations relating to housing benefit and council tax benefit, the Secretary of State has consulted with organisations appearing to the Secretary of State to be representative of the authorities concerned(d).

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No. 2) (Amendment) Regulations 2010.

(2) Subject to paragraph (3), these Regulations come into force on 1st November 2010.

(3) Paragraph (2) of regulation 19 comes into force on 31st January 2011.

(4) In these Regulations—

“the 2008 Regulations” means the Employment and Support Allowance Regulations 2008(e); and

“the Migration Regulations” means the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No. 2) Regulations 2010(f).

(a) 200 c. 19 Paragraph 20(1) was amended by S. I. 2008/2833, Article 9 and Schedule 3, paragraph 190(15)(a). Paragraph 23(1) is an interpretation provision and is cited for the definition of “prescribed”.

(b) 2007 c. 5 Section 24(1) is cited because of the meaning it gives to “prescribed” and “regulations”.

(c) See sections 172(1) and 173(1)(b) of the Social Security Administration Act 1992 (c. 5).

(d) See sections 176(1) of the Social Security Administration Act 1992 (c. 5).

(e) S.I. 2008/794.

(f) S.I. 2010/1907.

SI 2010/2430

Regs 2-23

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[Regulations 2 - 19 make various consequential amendments to S.I. 2010/1907.]

[Regulation 20 amends regulation 7 of S.I. 2001/1002.]

[Regulations 21 - 23 amend regulations 148, 149 & 150 of S.I. 2008/794.]

Signed by authority of the Secretary of State for Work and Pensions.

4th October 2010

Chris Grayling
Minister of State,
Department for Work and Pensions

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No. 2) Regulations 2010 (“the Migration Regulations”) and the Employment and Support Allowance Regulations 2008 (“the 2008 Regulations”). They also make a small amendment to the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001. The Migration Regulations set out the process for determining whether existing awards (of incapacity benefit, severe disablement allowance or income support on the grounds of incapacity) are to be converted into awards of an employment and support allowance (“ESA”).

Regulation 1 provides for the citation, commencement and interpretation of these Regulations.

Regulation 2 amends regulation 1 of the Migration Regulations (commencement), so as to allow for the commencement of paragraph 1A of Schedule 4 to those Regulations (to be inserted by regulation 19(2) of these Regulations) on 31st January 2011.

Regulation 3 amends regulation 3 of the Migration Regulations (persons to whom those Regulations apply) so as to make definitively clear that the regulations within those Regulations which relate to the conversion process (namely regulations 4 to 22) apply to any person who, on or after 1st October 2010, is entitled to an existing award.

Regulation 4 amends regulation 7 of the Migration Regulations (qualifying for conversion) and applies where a person’s existing award qualifies for conversion, but that person is already entitled to an award of ESA. This could happen where a person previously in receipt of an incapacity benefit award: (i) appeals the decision to terminate their entitlement, (ii) claims and is entitled to ESA whilst awaiting the outcome of the appeal and (iii) is successful in their appeal and therefore becomes entitled again to incapacity benefit. Regulation 7 of the Migration Regulations as amended by regulation 4 provides that such a person is to be taken as having satisfied one of the basic conditions of entitlement for ESA, namely that the claimant has limited capability for work.

Regulation 5 amends regulation 8 of the Migration Regulations (amount of an employment and support allowance on conversion) so that (i) where a person qualifies for conversion by virtue of having already been entitled to ESA (under regulation 7 of the Migration Regulations as amended) and (ii) there had been a determination that that person had or did not have, limited capability for work-related activity, that determination shall be treated as having been made for the purposes of the first step of determining the amount of ESA to which a person is entitled.

Regulation 6 amends regulation 10 of the Migration Regulations so as to list definitively all the elements of incapacity benefit and severe disablement allowance needed to calculate the weekly rate payable of those benefits. This is so as to allow the Secretary of State to calculate the correct amount of transitional addition. It also sets out what amounts shall be disregarded when calculating the weekly rates of those benefits.

Regulation 7 amends regulation 14 of the Migration Regulations, particularly in relation to cases where a person’s existing award of income support qualifies for conversion to an award of ESA and that person satisfies another condition of entitlement for income support. If the person notifies the Secretary of State of their wish to remain entitled to income support, then any entitlement to incapacity benefit, severe disablement allowance or an income support disability premium (where entitlement arises solely on the grounds of incapacity) terminates immediately before the effective date of the conversion decision but they will remain on income support.

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Regulation 14 of the Migration Regulations (as amended by regulation 7(4)) also provides that where a person is already entitled to an award of an employment and support allowance by virtue of the Welfare Reform Act 2007 (i.e. not by virtue of the Migration Regulations) then that award shall terminate immediately before the effective date of a person's conversion decision.

Regulation 8 makes similar provision to regulation 7 but applies where the conversion decision is that an existing award of income support does not qualify for conversion.

Regulation 9 amends regulation 17 of the Migration Regulations in consequence of the changes made to regulations 14 and 15 of the Migration Regulations by regulations 7 and 8 of these Regulations.

Regulation 10 amends regulation 19 of the Migration Regulations to clarify how the amount of the transitional addition is to be reduced where a person has dependent children.

Regulation 11 amends regulation 20 of the Migration Regulations to clarify how the amount of the transitional addition is to be reduced where a person has dependent adults.

Regulation 12 amends regulation 21 of the Migration Regulations (termination of transitional addition) so as to provide, amongst other things, that where regulation 145(1) of the 2008 Regulations applies – which allows for two periods of limited capability for work to be linked for a particular period – what would otherwise have been a termination of a transitional addition is instead a suspension. This occurs only where it is determined that a person has limited capability for work (in relation to a claim subsequent to when that determination was first made as part of a conversion decision).

Regulation 13 adds the provision in the Social Security Contributions and Benefits Act 1992 covering days and periods of incapacity for work to the list of provisions disapplied following a conversion decision.

Regulation 14 inserts regulation 23A into the Migration Regulations, so as to end entitlement to an income support disability premium related to being incapable of work, subject to savings.

Regulation 15 corrects the paragraph numbering of Schedules 1, 2, 4 and 5 to the Migration Regulations.

Regulation 16 makes amendments to Schedule 1 to the Migration Regulations (modification of enactments for the purpose of making conversion decisions). In particular, paragraph (2) ensures that persons receiving relevant education and entitled to an existing award of income support as a result can qualify for an award of ESA.

Regulation 17 makes a number of amendments to Schedule 2 to the Migration Regulations (modification of enactments: after the conversion phase) including–

- Paragraph (2) amends the conditions of entitlement for ESA following the conversion phase so as to include the conditions relating to financial position in Part 2 of Schedule 1 to the Welfare Reform Act 2007, where a person's award of income support converts to one of ESA.
- Paragraph (4) modifies the Income Tax (Earnings and Pensions) Act 2003 so as to make clear that contributory ESA, which attracts income tax liability, includes any transitional addition to which a person is entitled under the Migration Regulations.
- Paragraphs (6) and (7) provide that a person who has made and is pursuing an appeal against a conversion decision where they had previously been entitled to an existing award of incapacity benefit or severe disablement allowance is treated as having already satisfied the contributions conditions for contributory ESA. This is to make it easier for such a person to then become entitled to that benefit were their appeal to be successful.

- Paragraph (12) modifies the Social Security and Child Support (Decisions and Appeals) Regulations 1999 so as to make it possible to revise certain types of decisions relating to the conversion process in particular circumstances which that legislation would otherwise have prevented.

Regulation 18 amends Schedule 3 to the Migration Regulations (list of regulations that apply after the conversion phase) to include the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996.

Regulation 19 amends Schedule 4 to the Migration Regulations (consequential amendments) to include amendments to the provisions in the Jobseeker's Allowance Regulations 1996 which allow an award of a jobseeker's allowance ("JSA") to continue while a person is incapable of work for up to two weeks (regulation 55) and enable entitlement to JSA to continue during certain temporary absences (regulation 55A). The amendments to those Regulations (i) remove the disapplication from regulation 55 where a person had been unable to work within 8 weeks of an entitlement to incapacity benefit, severe disablement allowance or income support, and (ii) remove references to those benefits from regulation 55A.

Paragraph (3) of regulation 19 corrects a drafting error in Schedule 4.

Regulation 20 amends the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (which had been amended by Schedule 5 to the Migration Regulations) to ensure that certain housing benefit decisions may be superseded where a claimant's partner is appealing a conversion decision.

Regulations 21 to 23 make a number of amendments to regulations 148 to 150 of the 2008 Regulations relating to "work or training beneficiaries" ("WTB"). The effect of the amendments is to expand the definition of a WTB, so as to include those whose previous period of limited capability for work lasted for less than 13 weeks immediately following their migration to ESA from another benefit. A further change is that a WTB is treated as having limited capability for work from the first day within a linking term (i.e. a period of 104 weeks from the first day immediately following the last day in a period of limited capability for work) rather than for a 13 week period within that linking term.

A full impact assessment of the effect that the Migration Regulations will have on the public sector is available from the Department for Work and Pensions, Level 1, Caxton House, Tothill Street, London SW1H 9NA and was annexed to the Explanatory Memorandum for S.I. 2010/875, which was available alongside that instrument on the OPSI website. These Regulations will have no further impact on the public sector and so a separate impact assessment has not been prepared. As with the Migration Regulations, these Regulations have no impact on the private or voluntary sectors.

