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DRAFT SCOTTISH STATUTORY INSTRUMENTS

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**2022 No.**

**SOCIAL SECURITY**

**The Disability Assistance for Working Age People (Transitional Provisions and Miscellaneous Amendment) (Scotland) Regulations 2022**

<i>Made</i>	- - - -	2022
<i>Coming into force</i>	- -	2022

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 31, 43(5), 52 and 95 of the Social Security (Scotland) Act 2018(a) and all other powers enabling them to do so.

In accordance with section 96(2) of that Act, a draft of these Regulations has been laid before and approved by resolution of the Scottish Parliament.

In accordance with section 97(2) of that Act, the Scottish Ministers have informed the Scottish Commission on Social Security of their proposals, notified the Scottish Parliament that they have done so and made their proposals publicly available by such means as they consider appropriate.

**Citation and commencement**

1. These Regulations may be cited as the Disability Assistance for Working Age People (Transitional Provisions and Miscellaneous Amendment) (Scotland) Regulations 2022 and come into force on [29 August] 2022.

**Interpretation**

2. In these Regulations—

“the 2018 Act” means the Social Security (Scotland) Act 2018,

“the ADP Regulations” means the Disability Assistance for Working Age People (Scotland) Regulations 2022,

“Adult Disability Payment” means disability assistance given in accordance with the ADP Regulations,

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(a) 2018 asp 9 (“the 2018 Act”), amended by the Social Security Administration and Tribunal Membership (Scotland) Act 2020 (asp 18). Schedule 5 of the 2018 Act makes provision about the exercise of powers under section 31. The powers to make these Regulations are exercised together by virtue of section 33(2) of the Interpretation and Legislative Reform (Scotland) Act 2020 (asp 10) and the Regulations are subject to the affirmative procedure by virtue of section 33(3) of that Act.

“date of transfer” means the date when a transferring individual’s entitlement to Adult Disability Payment begins by virtue of a determination under regulation [4],

“daily living component of Adult Disability Payment” has the same meaning as “daily living component” in regulation 2 of the ADP Regulations,

“Disability Living Allowance” means a disability living allowance under section 71 of the Social Security Contributions and Benefits Act 1992(a),

“mobility component of Adult Disability Payment” has the same meaning as “mobility component” in regulation 2 of the ADP Regulations,

“notice of intention to transfer” means the notice required by regulation [3]

“relevant individual” means an individual who—

- (a) has an award of Disability Living Allowance who appears to the Scottish Ministers to be likely to be eligible for Adult Disability Payment,
- (b) [was aged between 16 and 65 years on 8 April 2013,]
- (c) is—
  - (i) ordinarily resident in Scotland, or
  - (ii) someone to whom regulation 15(3) of the ADP Regulations (residence and presence conditions)[, regulation 17(1) of the ADP Regulations (serving ,members of Her Majesty’s forces, civil servants and their family members)] or regulation 20(2) of the ADP Regulations (persons residing outside the United Kingdom to whom a relevant EU Regulation applies) applies,
  - (iii) “sufficient” means a link to Scotland that is sufficiently close that regulation 15(3) or 20(2) of the ADP Regulations would be incompatible with the applicable agreement mentioned in either of those regulations, if the relevant individual were not entitled to Adult Disability Payment,

“review determination” means the determination required by regulation [12(1)],

“transfer determination” means the determination required by regulation [4(1)],

“transferred individual” means an individual whose entitlement to Adult Disability Payment is given under a transfer determination,

“transferring individual” means a relevant individual on whom the Scottish Ministers have served a notice of intention to transfer in accordance with regulation [3].

## PART 1

### Transfer to Adult Disability Payment

#### **Notice of intention to transfer to Adult Disability Payment**

**3.—**(1) The Scottish Ministers are to notify each relevant individual of their intention to transfer that individual’s entitlement to disability assistance from an entitlement to Disability Living Allowance to an entitlement to Adult Disability Payment.

(2) A notice under paragraph (1) must—

- (a) be given in a way that leaves the relevant individual with a record of the information which they can show to, or otherwise share with, others,
- (b) inform the relevant individual—
  - (i) that they have been identified as a relevant individual for the purposes of transfer to Adult Disability Payment,

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(a) 1992 c.4. Section 71 was amended by section 67(1) of the Welfare reform and Pensions Act 1999 (c.30).

- (ii) that the Scottish Ministers will make a determination, without receiving an application, to transfer the individual's entitlement to Disability Living Allowance to an entitlement to Adult Disability Payment within a period to be specified within the notice (the individual will be notified when the transfer determination is made and informed about their award and start date of Adult Disability Payment),
- (iii) that the individual's award of Disability Living Allowance will cease immediately before the award of Adult Disability Payment begins,
- (iv) that, except where the individual is subject to the special rules for terminal illness in regulation 9, the Scottish Ministers will make a review determination of the individual's entitlement to Adult Disability payment within 12 months of the date of the notice.

(3) Where a notice under paragraph (1) is given in error where the individual is neither—

- (a) ordinarily resident in Scotland, nor
- (b) an individual who is habitually resident in an EEA state, Gibraltar or Switzerland and has a genuine and sufficient link to Scotland,

the duty on the Scottish Ministers in regulation 4(1) does not apply.

(4) Where paragraph (3) applies in respect of an individual and a determination under regulation 4(1) has not been made, the Scottish Ministers are to notify the individual that the duty on the Scottish Ministers in regulation 4(1) does not apply.

#### **Determination without application of entitlement to Adult Disability Payment**

**4.—**(1) The Scottish Ministers are to make a determination in respect of a transferring individual, without receiving an application, of that individual's entitlement to Adult Disability Payment.

(2) A determination under paragraph (1) must be made on the assumption that the transferring individual who had been entitled to Disability Living Allowance prior to the date of transfer is—

- (a) is not in receipt of the other benefits set out in regulation 4,
- (b) meets the residence and presence conditions set out in regulations 15 to 21, and
- (c) subject to paragraph (3), meets the age criteria set out in regulation 22,

of the ADP Regulations.

(3) Regulation 22(1)(b) of the ADP Regulations does not apply where an individual has reached the relevant age (within the meaning of regulation 22(2) of those Regulations), including for the purposes of any determination of their entitlement to Adult Disability Payment made after they have reached the relevant age, if they are a transferring individual.

(4) Entitlement to Adult Disability Payment under a determination under paragraph (1) begins on the date specified in the notice of determination given to the transferring individual in accordance with section 40 of the 2018 Act.

(5) The determination under paragraph (1) is to be made on the basis of—

- (a) such information as the Scottish Ministers have received from the Secretary of State for Work and Pensions in respect of the transferring individual's entitlement to Disability Living Allowance, and
- (b) any other information available to the Scottish Ministers that appears to them to be relevant.

(6) Subject to regulation [9], a determination under paragraph (1) must be made in accordance with regulation [5].

(7) A determination under paragraph (1)—

- (a) may be made on the assumption that whatever can be discerned about the transferring individual's circumstances from the information mentioned in paragraph (5) remains accurate on the date on which the determination is made,

- (b) must be made no later than the end of the period specified within the notice of intention to transfer unless the Scottish Ministers have—
  - (i) good reason to extend that period,
  - (ii) agreed the period for extension with the Secretary of State for Work and Pensions, and
  - (iii) notified the transferring individual of the extension and the reason for it.

### **Entitlement to Adult Disability Payment**

**5.—**(1) A transferring individual is to be awarded the daily living component at the lowest rate in accordance with regulation 6 if the transferring individual had been entitled to the lowest rate of the care component of Disability Living Allowance immediately prior to the date of transfer.

(2) The lowest rate of the daily living component is to be treated for all purposes as a payment of the daily living component within the meaning of regulation 2 of the ADP Regulations.

(3) A transfer determination is to be made on the basis that a transferring individual who had been entitled to the—

- (a) lowest rate of the care component of Disability Living Allowance prior to the date of transfer is entitled to the lowest rate of the daily living component of Adult Disability Payment,
- (b) middle rate of the care component of Disability Living Allowance prior to the date of transfer is entitled to the standard rate of the daily living component of Adult Disability Payment,
- (c) highest rate of the care component of Disability Living Allowance prior to the date of transfer is entitled to the enhanced rate of the daily living component of Adult Disability Payment,
- (d) lower rate of the mobility component of Disability Living Allowance prior to the date of transfer is entitled to the standard rate of the mobility component of Adult Disability Payment,
- (e) higher rate of the mobility component of Disability Living Allowance prior to the date of transfer is entitled to the enhanced rate of the mobility component of Adult Disability Payment.

### **Amount and form and time of payment of Adult Disability Payment**

**6.—**(1) The weekly rate of payment of the daily living component of Adult Disability Payment that is payable under a transfer determination is, where the transferring individual is entitled to the lowest rate, [£23.70/£24.45].

(2) [Regulation 36 of the ADP Regulations does not apply in relation to an award of Adult Disability Payment to a transferred individual.]

(3) [Where a transferred individual was paid Disability Living Allowance—

- (a) 4 weekly in arrears, the Scottish Ministers will pay the individual Adult Disability Payment 4 weekly in arrears,
- (b) weekly in advance, the Scottish Ministers will pay the individual Adult Disability Payment weekly in advance.]

### **Effect of determination on entitlement to Disability Living Allowance**

**7.** Where a transfer determination is made that the transferring individual is entitled to Adult Disability Payment, the transferring individual's entitlement to Disability Living Allowance will cease on—

- (a) the date their entitlement to Adult Disability Payment begins, or
- (b) where regulation [9] applies, the date their entitlement to Adult Disability Payment would have begun had regulation [9(2)], not applied to set an earlier date of entitlement.

### **Periods in respect of a re-determination request in relation to a transfer determination**

**8.**—(1) Regulation 54 of the ADP Regulations does not apply to a re-determination request in relation to a transfer determination.

(2) The period for requesting a re-determination of entitlement to Adult Disability Payment under section 41 of the 2018 Act (right to request re-determination) in relation to a transfer determination is 42 days beginning with the day that the individual is informed, in accordance with section 40 of the 2018 Act (notice of determination) of the right to make the request.

(3) [In relation to determining entitlement to Adult Disability Payment, the period allowed for re-determination (within the meaning of section 43 of the 2018 Act (duty to re-determine)) is 182 days beginning with—

- (a) the day that the request for a re-determination is received by the Scottish Ministers,
- (b) in a case where the request for a re-determination is received by the Scottish Ministers outwith the period prescribed in paragraph (1), the day on which it is decided by the Scottish Ministers or (as the case may be) the First-tier Tribunal for Scotland that the individual in question has a good reason for not requesting a re-determination sooner, or
- (c) in a case where the Scottish Ministers have informed the individual of their decision that the request for re-determination was not made in such form as the Scottish Ministers require, the day on which it is subsequently decided by the First-tier Tribunal for Scotland that the individual in question has made the request in such form as the Scottish Ministers require.]

### **Special rules of terminal illness - exceptions to regulation 4(6)**

**9.**—(1) Where the Scottish Ministers have—

- (a) received information from the Secretary of State for Work and Pensions that the transferring individual is terminally ill in terms of section 72(5) of the Social Security Contributions and Benefits Act 1992<sup>(a)</sup> immediately before the date of transfer, or
- (b) not received information from the Secretary of State for Work and Pensions that the transferring individual is terminally ill in terms of section 72(5) of the Social Security Contributions and Benefits 1992, but become aware, before they have made a transfer determination, that a transferring individual has a terminal illness in terms of regulation 26(7) of the ADP Regulations,

the transfer determination must be made on the basis that the transferring individual satisfies the conditions for the enhanced rate of both the daily living component and the mobility component of Adult Disability Payment.

(2) Where paragraph (1) applies—

- (a) paragraphs (4) to (6) of regulation 26 of the ADP Regulations do not apply, and
- (b) the transferring individual's entitlement to Adult Disability Payment will commence on whichever is the later of—
  - (i) the date that the ADP Regulations came into force, or
  - (ii) the day that the clinical judgement was made in accordance with regulation 26(7) of the ADP Regulations.

### **Modification of the ADP Regulations: transferring individuals**

**10.** The ADP Regulations apply to a transferring individual on and after the date of transfer with the following modifications—

- (a) regulation 32 (entitlement beginning while in alternative accommodation) is to be read as if—
  - (i) in paragraph (1) after “begins” there are the words “in terms of these Regulations”, and

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(a) 1992 c. 4.

- (ii) in paragraph (2) for “that day” reads “the day on which the individual has been entitled to Adult Disability Payment for 28 days”,
- (b) regulation 35 (when an application is to be treated as made and beginning of entitlement to assistance) is treated as omitted,
- (c) where regulation 9 or [para (6) of regulation re CoC] applies, for the period between the date when entitlement to Adult Disability Payment begins and the date of the determination under paragraph 4(1), regulation 4 (entitlement to other benefits) is treated as omitted.

### **Appointees**

**11.**—(1) A person appointed by the Secretary of State for Work and Pensions under regulation 33 or 43 of the Social Security (Claims and Payments) Regulations 1987(a) to receive Disability Living Allowance on behalf of a transferring individual is to be treated on and after the date of transfer as though appointed by the Scottish Ministers to act on behalf of that transferring individual under section 85B of the 2018 Act(b).

- (2) As soon as reasonably practicable after the date of transfer, the Scottish Ministers must—
  - (a) consider whether the conditions for making an appointment in respect of the transferring individual are met (having regard to section 85B(3) of the 2018 Act),
  - (b) consider whether to terminate the appointment that is treated as having been made by virtue of sub-paragraph (1) and terminate it if they consider it appropriate, and
  - (c) if they have terminated an appointment in pursuance of head (b), appoint under section 85B of the 2018 Act another person to act on the transferring individual’s behalf if they consider it appropriate to do so.

## **PART 2**

### **Review of entitlement to Adult Disability Payment**

#### **Review determination without application of entitlement to Adult Disability Payment**

**12.**—(1) The Scottish Ministers are to make a determination in respect of a transferred individual, without receiving an application, of that individual’s entitlement to Adult Disability Payment within the period of 12 months beginning with the date of that individual’s notice of intention to transfer.

- (2) Paragraph (1) does not apply to transferred individuals to whom regulation 9 applies.
- (3) Regulation 22(1)(b) of the ADP Regulations does not apply where an individual has reached the relevant age (within the meaning of regulation 22(2) of those Regulations), including for the purposes of any determination of their entitlement to Adult Disability Payment made after they have reached the relevant age, if they are a transferring individual.
- (4) Entitlement to Adult Disability Payment under a determination under paragraph (1) begins on the date specified in the notice of determination given to the transferred individual in accordance with section 40 of the 2018 Act.
- (5) The determination under paragraph (1) is to be made on the basis of any information that—
  - (a) the Scottish Ministers have received from the Secretary of State for Work and Pensions in respect of the transferred individual’s entitlement to Disability Living Allowance,
  - (b) the Scottish Ministers requested from the transferred individual, and

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(a) S.I. 1987/1968, relevantly amended by S.I. 1991/2741, S.I. 2002/2469, S.I. 2003/492, S.I. 2004/696, S.I. 2005/337 and S.I. 2013/235.  
 (b) Section 85B of the Social Security (Scotland) Act 2018 was inserted by section 2(4) of the Social Security Administration and Tribunal Membership (Scotland) Act 2020 (asp 18).

(c) is available to the Scottish Ministers that appears to them to be relevant.

#### **[Time of payment**

**13.**—(1) Regulation 36 of the ADP Regulations does not apply in relation to an award of Adult Disability Payment to a transferred individual.

(2) Where a transferred individual was paid Adult Disability Payment—

- (a) 4 weekly in arrears, the Scottish Ministers will continue to pay the individual Adult Disability Payment 4 weekly in arrears,
- (b) weekly in advance, the Scottish Ministers will continue to pay the individual Adult Disability Payment weekly in advance.]

#### **Change of Circumstances**

**14.** Where the Scottish Ministers are making a review determination of an individual's entitlement to Adult Disability Payment, where the individual—

- (a) before receiving a notice under regulation 3(1), reported a change of circumstances to the Secretary of State for Work and Pensions, which had not been taken into account for the individual's entitlement to Disability Living Allowance, or
- (b) has, since receiving a notice under regulation 3(1), notified a change of circumstances to the Scottish Ministers,

the change of circumstances—

- (c) is not to be regarded as relating to the individual's entitlement to Disability living Allowance, and
- (d) is to be taken into consideration by the Scottish Ministers in making the review determination.

#### **When an increase in level of entitlement takes effect**

**15.**—(1) Regulation 45 of the ADP Regulations does not apply in relation to a review determination.

(2) Subject to regulation 14, where, as a result of a review determination, the amount of Adult Disability Payment payable in respect of an individual is increased or their entitlement to a component is awarded, the change takes effect on the date of transfer.

(3) Where an individual has previously received Adult Disability Payment for a period under a transfer determination and a review determination has subsequently been made that the same individual is entitled to Adult Disability Payment at a higher rate for that period, that individual is entitled to be paid the difference between the value of entitlement to Adult Disability Payment under the review determination and the value of Adult Disability Payment to which that individual was previously entitled under the transfer determination.

#### **When a decrease in level or cessation of entitlement takes effect**

**16.**—(1) Regulation 46 of the ADP Regulations does not apply in relation to a review determination.

(2) Subject to regulation 14, where, as a result of a review determination, the amount of Adult Disability Payment payable in respect of an individual is decreased or their entitlement to a component is ceased, the change takes effect on the day that the Scottish Ministers make the review determination.

## PART 3

### Miscellaneous amendments

#### **Amendment of the Disability Assistance for Children and Young People (Scotland) Regulations 2021**

17. In regulation 6 (interpretation – residence and presence conditions) of the Disability Assistance for Children and Young People (Scotland) Regulations 2021(a) omit the definitions of—

- (a) “civil partnership”, and
- (b) “person who is living with another person as if they were in a civil partnership”.

#### **Amendment of the Disability Assistance for Working Age People (Scotland) Regulations 2022**

18.—(1) The Disability Assistance for Working Age People (Scotland) Regulations 2022 are amended in accordance with paragraphs (2) to (5).

(2) In regulation 2 (interpretation)—

- (a) omit the definition of “EU withdrawal agreement”,
- (b) omit the definition of “medical treatment”, and
- (c) after the definition of “ previous award” insert—

““qualifying services” means accommodation, board and personal care.”.

(3) In regulation 7(2)(a) (determination of ability to carry out activities) after “schedule 1” insert “or as the case may be, the activity set out in column 2 of the table in Part 3 of schedule 1”.

(4) In regulation 17(4) (serving members of Her Majesty’s forces, civil servants and their family members) omit the definitions of—

- (a) “civil partnership”, and
- (b) “person who is living with another person as if they were in a civil partnership”.

(5) In Part 3 of schedule 2 (transfer from Personal Independence Payment to Adult Disability Payment), in paragraph 12(4)(a) (change of circumstances), in both places where it appears, for “care” substitute “daily living”.

A member of the Scottish Government

St Andrew’s House,  
Edinburgh  
2022

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(a) S.S.I. 2021/174, relevantly amended by S.S.I. 2021/146.



**EXPLANATORY NOTE**

*(This note is not part of the Regulations)*