

# **Disability Benefits Policy Position Papers**

## **Paper 5: How do I challenge a decision on my disability benefit application?**

## **Disability Benefits Position Papers – October 2020**

*This is Paper 5 of 5 position papers published in October 2020, which provide an overview of the new Scottish approach to disability benefits. These papers were correct as at the date of publication: please check the Scottish Government's [Social security: policy position papers](#) webpage for any further updates.*

### **Paper 5: How do I challenge a decision on my disability benefit application?**

#### **Introduction**

The Scottish Government has always been clear that people will have a right to challenge and ask for an appeal if they believe that Social Security Scotland has not made the right decision. We believe the process for challenging decisions should be as simple and straightforward as possible. Our processes have been co-designed with the people who have lived experience of the current Department for Work and Pensions (DWP) system and will ensure that our system is more accessible to clients and easier for them to engage with. The approach we have developed is consistent with a rights-based approach, supporting people to access administrative justice, and an individual's right to choose.

In the following sections, we set out the Scottish Government's plans for processes through which people will be able to challenge decisions made by Social Security Scotland about their applications. We also explain Short-term Assistance (STA), a new and unique form of assistance that supports people when their payment has been reduced or stopped, and they have requested a re-determination or an appeal of the decision. The paper also includes a table that sets out the differences between the current UK Government system, and the Scottish approach to re-determinations and appeals.

#### **A simple process**

There are two stages to the process to challenge a decision: 're-determinations' and 'appeals'. An individual can challenge a decision made by Social Security Scotland by requesting a re-determination, where Social Security Scotland looks again at an application and somebody different considers whether the decision was right: Social Security Scotland must complete this re-determination within defined timescales. Following the re-determination, if the individual is still unhappy or if it has taken longer than allowed, the individual will have a right to appeal to the Social Security Chamber of the First-tier Tribunal for Scotland.

#### **Re-determination**

A request for a re-determination will be simple to make. Requests can be made by completing the re-determination form supplied with the first decision letter and postage paid envelope, by phone, online, or by making an appointment with our Local Delivery service, who will take the information and ensure the re-determination request is forwarded to the client experience team for action.

A request for a re-determination can be made without supplying further information, but Social Security Scotland will take into consideration any new information which the client wants to provide.

The client experience team will be dedicated specialist staff members within Social Security Scotland with no previous involvement in the decision process. They will take a fresh look at the original application, supporting information and any new information, before making a new decision for the client. The staff member taking the new decision, called a re-determination, will keep the individual informed throughout the process.

There will be extensive and on-going training for staff carrying out re-determinations. The aim is to create a supportive environment to ensure an evidence-based decision is reached quickly and effectively and that the individual's concerns are considered in each case. The aim is to ensure better quality and consistency of decision making throughout.

### Timescales

The Scottish Government has set out the re-determination timescales for both the client and Social Security Scotland in regulations. We want to ensure that our timescales are appropriate so that individuals do not have to wait for long periods before having the option to access the First-tier Tribunal, should that be required.

For Disability Assistance, an individual will have 42 calendar days (6 weeks) to request a re-determination. Social Security Scotland will have 56 calendar days (8 weeks) to complete it.

We will also consider late requests up to a maximum of 12 months from the date of the determination if the individual can set out good reasons why they were not able to request a re-determination sooner. Any decision to refuse a late request would carry a right of appeal to the First-tier Tribunal. This dual approach will ensure the Scottish system is fair and aligns with a rights-based approach by strengthening access to justice.

We want to ensure that Social Security Scotland has the opportunity to correct mistakes as quickly as possible. If the re-determination is not completed within set timescales, people will have the immediate right to appeal to the First-tier Tribunal if they do not wish to wait for the re-determination to be carried out. This is not available in the DWP system where an individual has to wait for the Mandatory Reconsideration process to finish before they are allowed to appeal to the First-tier Tribunal.

### **Appeals to the First-tier Tribunal**

We expect the re-determination process will ensure that most decisions are made correctly. If nevertheless someone remains dissatisfied, they will be able to appeal to the First-tier Tribunal.

An individual will have 31 calendar days from the date they hear the re-determination outcome to request an appeal. However, the First-tier Tribunal will consider appeals for up to one year following a re-determination, provided an individual has good cause for not submitting their appeal earlier.

If an individual does wish to appeal, then they should notify Social Security Scotland at the earliest opportunity. Requests can be made by completing the appeal form which will be supplied with the re-determination outcome letter and postage paid envelope, by phone, online or by making an appointment with the Local Delivery service who will take that information and ensure the appeal request is forwarded to the client experience team for action.

Social Security Scotland will do all it can to help an individual with an appeal, including providing information about the process, providing the right form to make an appeal and signposting to organisations who can support the individual throughout the process. It will forward the appeal form and the documents used in making the initial decision right through to the re-determination decision to the First-tier Tribunal who will then manage the appeals process.

Disability Assistance cases will always be considered by three First-tier Tribunal members – a legal member, a medical member and a member with disability experience.

Once the appeal has been heard and the outcome delivered, Social Security Scotland will take action as instructed by the First-tier Tribunal and provide an update to the individual regarding the effect on their benefit application.

### **Short-term Assistance**

The Scottish Government believes people should not be discouraged from challenging a decision or making an appeal whilst having to manage on a reduced income. We have committed to providing Short Term Assistance where Social Security Scotland has made a decision to reduce or stop a continuing payment (such as disability assistance payments) and where the client has requested a re-determination or an appeal. The Child Disability Payment is the first type of devolved assistance to be delivered where Short Term Assistance will be available.

Short Term Assistance will mean the client continues to receive the amount of money they were getting before the decision was made to lower or stop their payment. To ensure clients are not put off seeking an appeal or re-determination, they will not have to repay Short Term Assistance if the re-determination or appeal upholds the decision to lower or stop their social security payment.

The exception to this would be where an investigation by Social Security Scotland has determined that the original payment was claimed fraudulently. Where fraud has been identified, a new determination will be made, which will carry re-determination and appeal rights. However, Short Term Assistance will not be payable even if the individual has requested a re-determination or an appeal, and Social Security Scotland will seek the recovery of any Short Term Assistance previously paid alongside other fraudulently claimed payments.

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Short Term Assistance is not available in the reserved DWP system. Providing support in this way is another example of where Scottish Ministers are removing barriers to challenging decisions in the Scottish social security system.

### Scope of Short-Term Assistance

The Scottish Government will make Short Term Assistance available for regular ongoing payments made by the Scottish social security system. It cannot be used to support people whose reserved benefit is reduced or stopped because the Scottish Government has no control over UK Government policy, processes and decision making. This also includes certain “passported benefits” which are benefits or schemes which some groups of people are entitled to because of their entitlement to certain other benefits or tax credits. Where an individual is receiving passported benefit payments or assistance from Social Security Scotland and the DWP reserved system, Short Term Assistance will only apply to Scottish Government passported benefits and not those in the reserved system.

However, where there is a successful appeal, an individual's entitlement record would be backdated to the point at which it was previously reduced or stopped, or from a point decided by the First-tier Tribunal. The Scottish Government would expect that UK Government passported benefits would be reinstated.

Short Term Assistance will not be means tested, just as other types of devolved ongoing payments are not subject to means-testing. Short Term Assistance will not be automatically awarded – people will retain their autonomy and as such will choose whether or not to receive Short Term Assistance. It will be easy to request, however – we expect this will happen through the same process by which an individual requests a re-determination or an appeal. The 2018 Act sets out that it will be payable from the point requested and not backdated to the point where the award was reduced or stopped.

### Further Eligibility Criteria

The Scottish Government consulted on the design and operation of Short Term Assistance as part of the consultation on disability assistance. The policy principles detailed below reflect the feedback received from the consultation and wider stakeholder engagement.

#### Residence

Under EU social security coordination rules, individuals may be in receipt of certain kinds of devolved disability assistance while living in the EEA or Switzerland. Short Term Assistance will be available to those living outside the UK who have been receiving the principal assistance. Where a person moves from Scotland to another part of the UK, their entitlement to benefits would normally be transferred from Scotland to the relevant jurisdiction, subject to meeting local eligibility requirements. The Scottish Government will work closely with the DWP and the Northern Ireland Social Security Agency to ensure this handover between jurisdictions is as seamless

as possible, so people do not experience unnecessary gaps in payments or administrative burdens.

### **Servicing an overpayment liability**

There may be situations where deductions are being made from a client's ongoing assistance to manage a previous overpayment. The client will have had the right to dispute the determination that put that deduction in place. These deductions will also apply to Short Term Assistance to ensure the client does not have to enter into a new agreement around deductions at the same time as challenging the decision and receiving Short Term Assistance, which would otherwise become complex for the client and Social Security Scotland to manage.

### **Process decision appeals**

Process decision appeals occur when Social Security Scotland refuses a re-determination request which it deems is not valid or has been submitted after the specified timescale without a good reason. An individual can then appeal the decision directly to the First-tier Tribunal who will decide whether or not Social Security Scotland should carry out the re-determination. For successful process appeals, Short Term Assistance will become available at the point the decision is overturned, rather than from the date of the original request. This is because the First-tier Tribunal may not rule in favour of the individual or may decide that they have not been expedient in bringing an appeal. We expect the number of process appeals to be low, but will keep this under review should this not be the case.

### **Breaks in Disability Assistance**

Those in residential care or prison will not be eligible for Short Term Assistance when challenging decisions about disability assistance entitlement as a result of a break in payment. This is because people in these situations do not experience financial loss as a result of a negative decision about their entitlement, as they will continue to have their care needs met by the institution.

### **Next steps**

The Scottish Government will deliver a simple and straightforward challenge process which supports our clients through their journey. We will continue to engage with stakeholders in development of Short Term Assistance.

## An overview of the differences between the UK and Scottish approaches to re-determinations and appeals

### *Re-determinations and Appeals*

#### UK

Clients have one month from the date of a decision to request a mandatory reconsideration, which may not be enough time to engage with relevant services.

In the event that we make a decision to reduce or stop an award, clients will have longer to ask us to make a re-determination (6 weeks).

DWP has no time limits for carrying out mandatory reconsiderations, leaving clients without essential assistance

Social Security Scotland will have eight weeks to make a re-determination: this balances the need to make decisions on vital support quickly, with the need to collect additional supporting information, where required.

Clients cannot appeal to a tribunal without going through the mandatory reconsideration process first.

Clients can appeal directly to the First-tier tribunal if Social Security Scotland is unable to carry out a re-determination within the time limit.

### *New forms of assistance*

No equivalent

During re-determinations and appeals, clients will have the option to receive Short-term Assistance, which will be the difference in value between the previous award and the new award.

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