EXPLANATORY MEMORANDUM TO

THE SOCIAL SECURITY (PERSONAL INDEPENDENCE PAYMENT) (AMENDMENT) REGULATIONS 2020

2020 No. 1235

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument corrects an unintentional gap in regulation 27 of the Personal Independence Payment Regulations 2013 ("the PIP Regulations") to ensure that it fully underpins and accurately reflects the longstanding policy of restricting access to a new or enhanced award of the mobility component of Personal Independence Payment ("PIP") for claimants over State Pension age (SPa) where their award is superseded or revised.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 As this instrument corrects a lacuna in the PIP Regulations (see section 7 of this explanatory memorandum for further information as to the policy background), it is being issued free of charge to all known recipients.

3.2 The enabling powers for this instrument are sections 83 and 94 of the Welfare Reform Act 2012 ("WRA 2012"). The functions of the Secretary of State ("SoS") under those powers, as regards Scotland, transferred to the Scottish Ministers on 1 April 2020. This is both in terms of regulations 3 and 4 of the Scotland Act 2016 (Transitional) Regulations 2017/444, which provide for functions conferred on the SoS by a pre-commencement enactment that would be within the legislative competence of the Scottish Parliament by virtue of exception 1 in reservation F1 in schedule 5 of the Scotland Act 1998 (c.46) (social security schemes) to transfer to the Scottish Ministers on that date; and section 32 of the Scotland Act 2016 (c.11) which provides the meaning of "pre-commencement enactment" in this context. Therefore, without a Legislative Consent Motion the SoS does not have competence to legislate in relation to PIP as regards Scotland.

3.3 For the above reason, the territorial extent of this instrument (England and Wales) is more limited than that of its enabling powers (Great Britain – "GB") (see s.149 WRA 2012). Consequently (see Statutory Instrument Practice ("SIP") paragraph 3.13.2), the Department thought it necessary to include in this instrument an extent provision, in circumstances where the instrument being amended contains neither an extent nor an application provision.

3.4 The Department is aware that where the intention is for amendments to have a different extent and/or application from the instrument being amended, those changes should normally appear in the amended instrument, not the amending instrument. However, the Department did not consider that would be logical in this case because it

is not intended that PIP should operate differently in England and Wales than in Scotland. In order to ensure that regulation 27 of the PIP Regulations continues to operate identically across GB, the Scottish Ministers are making parallel regulations (The Social Security (Personal Independence Payment) Amendment (Scotland) Regulations 2020) to amend the same PIP regulation in identical terms to this instrument, to come into force simultaneously.

3.5 The Department did not think it necessary to make provision for both and extent and application in this instrument. Paragraph 3.13.8 of SIP suggests that is only appropriate where one or more provisions have effect in a way that differs from the extent coverage, which is not the case with this instrument. The PIP Regulations are silent as to both extent and application. As explained above, the difference as to extent between the PIP Regulations and this instrument is due to the functions of the SoS under the relevant enabling powers as regards Scotland having been transferred to the Scottish Ministers. In omitting provision about application in this instrument the Department has sought to retain consistency with the PIP Regulations, with the governing primary legislation (s.149 WRA 2012), with post 31 March 2020 amendment legislation relating to PIP (the Personal Independence Payment (Transitional Provisions) Amendment (Scotland) Regulations 2020 – SSI 2020/218), and with the Scottish statutory instrument making parallel amendments to this instrument (see paragraph 3.4 above).

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.6 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England and Wales.

4.3 See paragraphs 3.2 to 3.5 above for further explanation.

5. European Convention on Human Rights

5.1 The Minister for Disabled People has made the following statement regarding Human Rights:

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decision and Appeals) Regulations 2013/381 ('the D&A Regulations") make detailed provision in respect of supersession. Regulation 23 permits SoS to supersede a PIP decision where there has been a relevant change of circumstances; regulation 26 permits SoS to supersede a PIP

decision where she has received medical evidence from a DWP-approved Healthcare Professional (HCP).

6.2 Regulation 27 of the PIP Regulations includes provision for supersession, without making reference to any specific ground in the D&A Regulations, when a person is over the "relevant age" which is defined in WRA 2012 section 83(2) as "pensionable age within the meaning of Schedule 4 of the Pensions Act 1995 or, if higher, age 65". Regulation 27(3) provides that where in relation to the mobility component of PIP, there is 'a relevant change of circumstance which occurred after C reached the relevant age', C's award of PIP cannot be superseded to either newly award that component or to increase an existing award of that component.

6.3 The mobility component can be awarded or increased by means of a supersession under both regulation 23 and regulation 26. Regulation 23 is the prescribed ground for a relevant change of circumstances and thereby is clearly captured by the words in regulation 27. Regulation 26 provides for receipt of medical evidence from a DWP-approved HCP as the ground for supersession. Prior to 22 May 2020, decision makers had applied regulation 27 to regulation 26 on the basis that, although the HCP evidence had not identified a relevant change of circumstances, the fact that the HCP had recommended a new or increased award indicated that there had been a change since the previous decision had been made. Accordingly, as regulation 27 does not itself refer to regulation 23, the words were considered wide enough to include a change under regulation 26. However, in an Upper Tribunal (UT) decision on 22 May 2020, Judge Markus QC, said that the reference to 'a relevant change of circumstances' in regulation 27 applied only to regulation 23 of the D&A Regulations; regulation 26 had to be considered as a wholly separate ground for supersession in this context.

6.4 As regulation 27 of the PIP Regulations does not engage regulation 26 of the D&A Regulations, the SoS is unable to restrict an award of the mobility component where the ground is receipt of new medical evidence. As the policy intent is not to award or increase an award of the mobility component after the claimant reaches SPa (please see below), the UT decision means that the law no longer meets the policy intent.

6.5 This instrument restores the policy intent by amending regulation 27 of the PIP Regulations to clearly refer to regulations 23 and 26 of the D&A Regulations, allowing the SoS to engage either of the regulations independently when superseding an award for claimants who have reached the relevant age.

7. Policy background

What is being done and why?

Personal Independence Payment

7.1 PIP is a disability benefit for working age claimants making a claim prior to reaching SPa. Individuals can continue to receive PIP when they reach SPa (termed "the relevant age" in WRA 2012 and the PIP Regulations – see paragraph 6.2 above), if

they claimed prior to reaching SPa and so long as they continue to meet the entitlement conditions.

7.2 PIP assesses the impact of a person's health condition or impairment on their ability to carry out a series of key everyday activities which are fundamental to living an independent life. PIP is designed to ensure that the greatest level of support goes to those least able to carry out the activities, in order to contribute towards extra disability-related costs they are likely to incur.

7.3 The activities are split into two components, Daily Living and Mobility. Claimants can receive one or both components at either standard or enhanced rate, depending on the level of support that the assessment identifies that they need.

7.4 As for its predecessor benefit for working age people, Disability Living Allowance, one of the policy intentions of PIP is to focus support on those who become disabled earlier in life, i.e. before SPa, who have had less opportunity to work, earn and save for retirement. Where a claimant of SPa is subject to a change of award (supersession), we would not usually increase the rate of the mobility component payable or make the mobility component accessible where no previous entitlement existed. Age restrictions in relation to mobility support have been in place since the first benefit of its kind, Mobility Allowance, was introduced in 1976 and the policy is based on the fact that developing mobility needs in later life is a normal consequence of aging which non-disabled younger people have had opportunity to plan and save for.

7.5 The gap identified in the PIP Regulations governing this group of claimants means that where their PIP award is, following a review, subject to a supersession, the mobility component cannot be restricted on the basis of new medical evidence (an HCP's report) unless a relevant change of circumstances is identified. The policy intent is that the mobility component should also be restricted on the grounds of new medical evidence alone. The recent decision at the UT has been clear that a new medical assessment of needs does not automatically in and of itself constitute a relevant change of circumstances.

7.6 This means that there is disparity in treatment between those SPa claimants whose award is being superseded due to new medical evidence, and those whose award is being superseded due to a relevant change of circumstances – with the former being entitled to receive a new or increased mobility award, and the latter not entitled. The gap in the legislation undermines the policy intent.

7.7 The amending regulations restore policy intent and ensure that all SPa claimants are treated equally and in line with policy intent. Until such time as the gap in regulations is closed, SoS will seek to identify those claimants affected and award them with a new or increased mobility component if they are entitled.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

9.1 The consolidated text of the PIP Regulations will in due course be available to the public free of charge on the National Archives website, www.legislation.gov.uk.

10. Consultation outcome

10.1 There have been five formal consultations and one informal consultation on the introduction of PIP. Initial proposals for the reform of DLA, including the high-level principles of the PIP assessment criteria, were first consulted on between 6 December 2010 and 18 February 2011[1]. The detailed design of PIP, including the principles and policy applying to those reaching the relevant age were consulted on between 26 March 2012 and 30 June 2012, with the Government response published on 13 December 2012[2].

10.2 Bearing in mind the history of extensive consultation and the fact that the present instrument is intended to ensure DWP have the legal powers to support the original policy intention, the SoS has decided not to undertake further public consultation before making the present instrument.

10.3 In instances where the SoS decides not to consult on regulations, it is open to the Social Security Advisory Committee (SSAC) to decide to run a consultation. However, these proposals (including a draft of the regulations) have been presented to SSAC who pursuant to section 173(1)(b) of the Social Security Administration Act 1992 has confirmed that it agrees for the regulations to proceed without being taken on formal reference, and hence without any further consultation.

11. Guidance

11.1 Since this instrument simply provides for a sound legislative footing to a policy that continues to be delivered in practice, no changes in guidance are required.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because it relates to a technical change to restore policy intent that is already delivered in practice.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 This instrument maintains existing PIP policy and procedures. The Department for Work and Pensions will continue to monitor the introduction of PIP.

---

[1] *Disability Living Allowance reform* (Cm 7984): https://www.gov.uk/government/consultations/disability-living-allowance-reform

[2] *DLA reform and PIP: completing the detailed design*: https://www.gov.uk/government/consultations/dla-reform-and-pip-completing-the-detailed-design

15. Contact

15.1 Kate Mainon at the Department for Work and Pensions, kate.mainon@dwp.gov.uk can be contacted with any queries regarding the instrument.

15.2 Karen Jochelson, Deputy Director for PIP Policy, at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.

15.3 Justin Tomlinson, Minister of State for Disabled People, Health and Work at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.