

When a previous determination is based on an error or made in ignorance of a material fact

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Introduction

1. This chapter is about Adult Disability Payment (ADP). It focuses on when Social Security Scotland identifies a determination that is one of the following:

- based on an error (including an official error)
- made in ignorance of a material fact.

2. The term ‘error’ means an error that is likely to cause an individual to receive the wrong amount of assistance. It does not include any of the following:

- situations where an individual experiences a change in their circumstances that alters their entitlement to assistance
- when a determination is made correctly but the eligibility criteria changes at a later date
- a determination that is made in ignorance of a material fact.

3. Case managers should check to see whether the guidance on error (including official error) applies to individual cases.

4. If the guidance on error does not apply, a case manager should consider whether a determination has been made in ignorance of a material fact. This will only apply if the original determination did not involve one of the following:

- an error (including official error) leading to an overpayment
- an official error that leads to an underpayment.

5. Different rules apply as to when the change in entitlement will begin depending on whether the original determination involves an error (including official error) or was made in ignorance of a material fact.
6. Where an error (including an official error) results in an overpayment, a decision has to be made on whether the individual is to be held to be liable to repay this to Social Security Scotland.

Error that leads to an overpayment

What is an error?

7. 'Error' refers to a wide range of errors. It includes any circumstance where Social Security Scotland both:

- makes a determination of entitlement that is not correct
- which leads to an overpayment to the individual¹.

1 ADP Regs, reg. 50(1)(b)

8. An error includes circumstances where a determination is made either of the following circumstances:

- wrongly¹
- correctly but is based upon incorrect information or an assumption that proves to be wrong².

9. It also includes circumstances where a new determination has not been made after an assumption on which an earlier determination was made has proven to be wrong³.

1 ADP Regs, reg. 50(3)(a)(i)

2 ADP Regs, reg. 50(3)(a)(ii)

3 ADP Regs, reg. 50(3)(b)

10. An error includes an 'official error', which is:

- an error made by Social Security Scotland or DWP
- to which no one else materially contributed.

11. If the individual or anyone else is at least partly responsible for the error, then the error is not an 'official error'.

12. Examples of official error include:

- a court or tribunal ruling that Social Security Scotland has consistently misapplied the way that the eligibility criteria applies to people with a specific daily living or mobility need
- an IT issue within DWP or Social Security Scotland that causes an individual to be underpaid or overpaid
- Social Security Scotland mistakenly determines an application for ADP against historic eligibility criteria rather than current criteria
- misapplying the correct age, residence and presence, backwards and forwards eligibility criteria to the facts of the case
- determining that an individual is either entitled or not entitled in the face of obvious, contradictory supporting information
- making a determination that is so unreasonable, no reasonable person could have made the same determination¹.

13. The overpayment may happen if the individual is given either:

- an award of ADP to which they were not entitled¹
- a higher award than that to which they were entitled²

1 ADP Regs, reg. 50(1)(b)(i)

2 ADP Regs, reg. 50(1)(b)(ii)

Example: incorrect information

Jas makes an application for ADP on 9 June. Social Security Scotland gathers supporting information on Jas' behalf from his consultant. The consultant completes the report and the case manager makes a determination that Jas is entitled to the enhanced rate of the daily living component and standard rate of the mobility component.

Some months later Jas' consultant contacts Social Security Scotland to explain that there has been an administrative error. The report provided was about another patient with a similar name and same date of birth. They provide an updated report with the correct information, which means that Jas should have been paid the standard rate of the daily living and mobility components.

The original determination was made correctly but on the basis of incorrect information, which amounts to an error leading to an overpayment of ADP.

Example: entitlement transfers from DWP to Social Security Scotland at wrong rate

Jessica was entitled to PIP at the standard rate of the daily living component only. She is notified that her payments will be transferred to Social Security Scotland. Her last payment of PIP will be on 10 March, with her entitlement to ADP commencing the following day.

Due to an IT error by DWP, Social Security Scotland is informed the Jessica is entitled to the enhanced rate of the daily living component only. Social Security Scotland therefore makes a determination that Jessica is entitled to the enhanced rate of the daily living component of ADP from 11 March.

Jessica contacts Social Security Scotland on 11 April to say that she should have been paid the standard rate of the daily living component. She also supplies a copy of her most recent award letter from DWP. Social Security Scotland has overpaid Jessica as a result and this amounts to an official error.

Example: information that has been altered

Ru makes an application for ADP on 14 September. When submitting the application to Social Security Scotland, Ru provides a copy of a social work assessment. The information suggests that Ru lives in a heavily adapted property as a result of their needs, in addition to requiring the use of a powered wheelchair to move any distance. The case manager make a determination that Ru is entitled to the enhanced rate of both daily living and mobility components, relying upon the supporting information.

During Ru's next scheduled review, another case manager seeks supporting information on their behalf from the local authority social work team. The information provided includes a copy of the previous report. There are discrepancies between the copy that Ru provided and the copy from the local authority that suggests the original report has been altered.

Upon further investigation, it becomes clear that the original report would support an award of the enhanced rate of the daily living component only. The original determination was made correctly but relied upon information provided which was incorrect at the time. This is an error which has led to an overpayment of ADP.

Correcting an error that leads to an overpayment

14. A case manager must conduct an unscheduled review (legally known as a determination without application) to correct an error (including an official error) that results in an overpayment¹.

1 ADP Regs, reg. 50(1)

15. Before correcting an error, case managers must make sure that there has not been any of the following:

- request for a re-determination¹
- request for an appeal²
- fraud investigation started

1 ADP Regs, reg. 50(1)(c)

2 ADP Regs, reg. 50(1)(d)

16. The case manager should contact the appropriate team to establish this:

- re-determinations team
- appeals team
- fraud team.

17. If a re-determination or appeal has been requested, but not yet been determined, then the case manager cannot make a determination without application.

18. Completing a determination without application involves correcting previous errors in order to work out the individual's correct entitlement to ADP. This involves:

- considering all the entitlement criteria, including applying the backwards and forwards test. The chapter on Backwards and Forwards Test explains the tests in more detail
- working out when the change in entitlement should begin.

19. The case manager may use any or all of the following when making completing the determination without application:

- information provided in the application that led to the original determination¹
- any other information obtained with that application²

- any other information that they have obtained in connection with the individual's entitlement to ADP³
- any other information available to them that is relevant to their consideration of whether the individual is entitled to ADP⁴.

1 ADP Regs, reg. 50(2)(a)(i)
2 ADP Regs, reg. 50(2)(a)(ii)
3 ADP Regs, reg. 50(2)(b)
4 ADP Regs, reg. 50(2)(c)

When change in entitlement begins

20. The change in entitlement begins on the date the previous determination took effect¹ where all of the following apply:

- the original determination contains an error (including an official error)
- the individual is now entitled to a lower (or no) award as result of the new determination
- the individual has been overpaid as a result of the previous determination.

21. Case managers may choose a later date for the change in entitlement to take effect from if (in all the circumstances) it would be unjust not to do so².

1 ADP Regs, reg. 46(1)(c)
2 ADP Regs, reg. 46(2)

22. Case managers should seek advice through a case discussion if they think there are special circumstances that justify fixing a later date for the change in entitlement to begin.

Official error leading to an underpayment

23. Official error is a type of error.

24. An official error is defined as:

- an error made by Social Security Scotland or DWP
- to which no one else materially contributed¹.

1 ADP Regs, reg. 49(3)

25. If the individual or anyone else is at least partly responsible for the error, then the error is not an 'official error'.

26. An official error creating an underpayment results from a determination of entitlement to ADP which either:

- does not award either component or both components of ADP to an individual to which they are entitled¹
- a lower rate of ADP than they are entitled to².

1 ADP Regs, reg. 49(1)(b)(i)
2 ADP Regs, reg. 49(1)(b)(ii)

27. Examples of official error include:

- a court or tribunal ruling that Social Security Scotland has consistently misapplied the way that the eligibility criteria applies to people with a specific daily living or mobility need
- an IT issue within DWP or Social Security Scotland that causes an individual to be underpaid or overpaid
- Social Security Scotland mistakenly determines an application for ADP against historic eligibility criteria rather than current criteria
- misapplying the correct age, residence and presence, backwards and forwards eligibility criteria to the facts of the case
- determining that an individual is either entitled or not entitled in the face of obvious, contradictory supporting information
- making a determination that is so unreasonable, no reasonable person could have made the same determination¹.

1 Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223

28. This list is not exhaustive.

Example: Upper Tribunal for Scotland rules Social Security Scotland has consistently misapplied specific eligibility criteria

Hugo lives alone and has agoraphobia and severe social anxiety. Hugo applies for ADP on 22 July. Hugo is able to speak to his GP and counsellor on the phone, but engaging with anyone else causes him extreme distress. The case manager determines that he is not entitled to the daily living component, as he scores 2 points for activity 9(b). The case

manager arrives at this conclusion by following decision-making guidance on the application of activity 9.

The case manager also determines he is entitled to the standard rate of the mobility component, as he score 10 points for activity 1(e). The case manager's determination is made on 11 August and takes effect from 22 July.

Three months later, Social Security Scotland receives a determination from the Upper Tribunal in another case, stating that it has consistently misapplied activity 9 of the daily living component. Social Security Scotland therefore needs to take action to correct the official error that caused the individual to be underpaid.

Example: assessing an application against historic eligibility criteria

The eligibility criteria for ADP is amended with effect from 17 January. Niall makes an application for ADP on 9 April, which is considered by a case manager on 26 April. The case manager mistakenly applies the eligibility criteria that pre-date 17 January, refusing Niall both the daily living and mobility components at any rate.

Had the case manager correctly applied the eligibility criteria, Niall should have been entitled to the standard rate of the mobility component. Niall takes the notice of determination to his local Citizens Advice Bureau. The adviser notices that the case manager has clearly applied the wrong test and notifies Social Security Scotland of this on 10 May.

This should be treated an official error as Social Security Scotland alone is responsible for the error which has caused Niall to be underpaid.

Correcting an official error that causes an underpayment

29. A case manager must conduct an unscheduled review (legally known as a determination without application) to correct an official error that results in an underpayment¹.

1 ADP Regs, reg. 49(1)

30. Before correcting an error, case managers must make sure that there has not been any of the following:

- request for a re-determination¹
- request for an appeal²

*1 ADP Regs, reg. 49(1)(c)
2 ADP Regs, reg. 49(1)(d)*

31. The case manager should contact the appropriate team to establish this:

- re-determinations team
- appeals team
- fraud team.

32. If the re-determination or appeal has been requested, but not yet been determined, then the case manager cannot make a determination without application.

33. Completing a determination without application involves correcting previous errors in order to work out the individual's correct entitlement to ADP. This involves:

- considering all the entitlement criteria, including applying the backwards and forwards test. The chapter on Backwards and Forwards Test explains the tests in more detail
- working out when the change in entitlement should begin.

34. The case manager may use any or all of the following when making completing the determination without application:

- information provided in the application that led to the original determination¹
- any other information obtained with that application²
- any other information that they have obtained in connection with the individual's entitlement to ADP³.

1 ADP Regs, reg. 49(2)(a)(i)

2 ADP Regs, reg. 49(2)(a)(ii)

3 ADP Regs, reg. 49(2)(b)

When change in entitlement begins

35. The change in entitlement begins on the date the previous determination took effect¹ where all of the following apply:

- the original determination involved making an official error
- the individual is now entitled to a higher award as a result of the new determination
- the individual has been underpaid as a result.

36. If the individual has been overpaid as a result of an official error see 'Error leading to an overpayment'.

37. Case managers may choose an earlier date for the new determination to take effect from if (in all the circumstances) it would be unjust not to do so².

1 ADP Regs, reg. 45(1)(c)

2 ADP Regs, reg. 45(2)

Example: Previous determination was incorrect due to an official error

John has bronchiectasis. He needs oxygen throughout the day. He makes an application for ADP on 5 April. Social Security Scotland makes a determination on 10 April that no award is due on the basis that he does not meet the eligibility criteria.

On 10 June that year, John makes another application for ADP. It states he has had the same needs for the past year. The case manager notices that there was a similar, unsuccessful application recently and looks at the documents.

The previous case manager had not taken into account that John:

- was breathless at rest
- required oxygen 24 hours a day
- could therefore not stand and move more than 20 metres, either aided or unaided (mobility component activity 2 descriptor E which is 12 points)

This means John needs help to move around during the day. The case manager:

- decides that the earlier determination was incorrect
- decides that John should have been awarded the enhanced rate of the mobility component
- makes a determination without application to correct the error.

This was an official error as the determination was procedurally made correctly, but it came to light that not all of the information that John supplied was taken into account. This has caused an underpayment of ADP. The new determination awards the enhanced rate of the mobility component. The change in entitlement begins on the date that the original determination took effect.

38. Case managers should seek advice if they think there are special circumstances that justify fixing an earlier date from when entitlement will begin.

39. The individual will be paid the difference between any ADP already paid under the original determination and any ADP due under the new determination (if both determinations relate to the same period of time)¹.

1 ADP Regs, reg. 45(4)

Ignorance of a material fact

What is ignorance of a material fact?

40. Ignorance of a material fact is not an error.
41. This guidance only applies where:
- there has been a determination that has been incorrect
 - this has led to an underpayment
 - but was not caused by official error.
42. A determination made in ignorance of a material fact covers instances where all of the following apply:
- a determination was made correctly at the time based on the information held
 - the information held at the time was accurate
 - other information comes to light later which would have resulted in an alternative outcome.
43. An alternative outcome is one that:
- results an alteration to the component or rate of ADP the individual is entitled to, or
 - means individual is no longer entitled to ADP¹.

1 ADP Regs, reg. 48(a)

44. A material fact is therefore one that would make a difference to the level of ADP that the individual is entitled to¹.

1 [CIS/3655/2007](#) at para. 40

45. The fact must exist at the time the original determination is made.

Example: supporting information not available to original case manager

Emma applies for ADP on 24 November 2022. On the basis of the information in the application, a case manager makes a determination on 21 December that Emma is entitled to the standard rate of the daily living component only from 24 November.

In March 2023, Emma submits a copy of an occupational therapy report, dated 11 November 2022. The report notes that Emma requires full-time care from their partner, in addition to having very restricted mobility.

The new piece of supporting information pre-dates the last determination of entitlement and contains new facts about the impact of the individual's condition. The result is that the information taken as a whole suggests that Emma should be entitled to the enhanced rate of the daily living and mobility components from 24 November 2022. The case manager should correct the determination on the basis that it was made in ignorance of a material fact, causing the individual to be underpaid.

Example: supporting information with pages missing

Mo applies for ADP on 19 March. The application is accompanied by a three-page letter from Mo's GP. The information leads the case manager to make a determination that Mo is entitled to the standard rate of the mobility component only from 19 March.

Two months later, the Social Security Scotland mailroom finds that a page of the letter from Mo's GP had not been scanned correctly. The additional information details the impact of Mo's condition on daily living, suggesting that Mo would score points for a number of daily living activities. The result is that Mo should have been entitled to the standard rate of the daily living component.

As the determination was made in ignorance of a material fact and caused the individual to be underpaid, the case manager should correct the determination.

46. Opinions should be distinguished from facts. There is a difference between a decision made on an incorrect factual basis (which would trigger a determination without application) and one which someone else looking at the same factual basis thinks should have led to a different outcome (which would not trigger a determination without application)².

2 [CDLA/2160/03](#) at para. 11

Example: difference between ignorance of a material fact and opinion

Kerrin applies for ADP on 6 June. On the application form, it is noted that Kerrin has arthritis, ankylosing spondylitis and asthma. Kerrin takes part in a consultation with a practitioner who noted that Kerrin's medication had been less than beneficial. The practitioner noted that Kerrin was determined to try and keep themselves mobile, but couldn't stand and then move more than 20 metres aided or unaided. It was also noted that Kerrin was still able to undertake part-time work as a cleaner.

The case manager makes a determination on 9 July that Kerrin is entitled to the enhanced rate of the mobility component of ADP from 6 June.

In December, Social Security Scotland receives information that Kerrin is currently working part-time. The nature of the work is said to be completely inconsistent with the impact of Kerrin's condition. A new case manager does not see that the consultation report notes Kerrin works part-time. They believe that the original determination was made in ignorance of a material fact.

Whilst the new case manager may disagree with the award the original case manager made, there is no reason to suppose that the original determination was made in ignorance of a material fact.

Correcting a determination made in ignorance of a material fact

47. A case manager must carry out an unscheduled review (legally known as a determination without application) when both:

- a previous determination was made in ignorance of a material fact
- the material fact being known either:

- may result in an alteration to the component or rate of Adult Disability Payment the individual is entitled to, or
- is likely to mean that the individual is no longer entitled to Adult Disability Payment¹.

1 ADP Regs, reg. 48(a)

48. Completing a determination without application involves correcting previous determinations in order to work out the individual's correct entitlement to ADP. This involves both:

- consideration of all entitlement criteria, including applying the backwards and forwards test
- working out when the change in entitlement should begin [LINK to 'Date When increase in entitlement begins below].

49. This should be approached as if making a determination for the first time with full consideration given to the relevant chapters of the DMG.

When increase in entitlement begins

50. The increase in entitlement begins on the date of the new determination¹ where all of the following apply:

- the original determination was made in ignorance of a material fact
- the individual is now entitled to a higher award as a result of the new determination
- the individual has been underpaid as a result.

1 ADP Regs, reg. 45(1)(b)(ii)

51. A case manager may fix an earlier date for entitlement to begin from if, in all the circumstances, it would be unjust not to do so¹. In other words, the case manager may fix an earlier date if fairness requires it.

1 ADP Regs, reg. 45(2)

52. Case managers should seek advice if they think there are special circumstances that justify fixing an earlier start date.

53. The individual will be paid the difference between any ADP already paid under the original determination and any ADP due under the new determination (if both determinations relate to the same period of time)¹.

1 ADP Regs, reg. 45(4)

Liability to repay an overpayment

Generally

54. If an individual is given assistance in error, the individual is liable to repay that assistance¹. However, an individual is not liable to repay the assistance if the error is neither:

- the individual's fault
- the kind of error that an individual could reasonably be expected to notice².

1 s. 63(1) of the 2018 Act

2 s. 64(1) of the 2018 Act

55. An error may result because the individual has failed to supply information about their circumstances that might have resulted in a different determination. This could be because they may have:

- deliberately supplied information that they know to be incorrect or false
- accidentally failed to supply information.

56. The information could be contained or missing from on an application form, or a piece of supporting information (such as a report from a medical professional).

57. It is clear the error is not the individual's fault when an overpayment as a result of official error has occurred. The individual may still be liable if they could reasonably be expected to have noticed the error.

58. This means deciding if a hypothetical person, acting reasonably, could be expected to have noticed the error. It is important to note that it does not mean deciding if the individual in the immediate case could reasonably be expected to notice the error (i.e. it is an objective test).

59. An overpayment error might need to be very large and/or very obvious to conclude that an individual could reasonably be expected to have noticed it.

60. Case managers should refer cases to a disability assistance manager for a second opinion where they conclude that one of the following applies:

- the error was the individual's fault
- the error was one that a person might reasonably have been expected to notice the error .

61. If the Disability Assistance Manager agrees with the case manager, the case manager should both:

- refer the case to the Interventions Team
- make a determination without application to address the error.

62. If the case manager and disability assistance manager conclude that an individual could not reasonably have been expected to notice the error, then the case manager:

- makes a determination without application to correct the error
- classifies the overpayment as an error and refer it to the Interventions Team.

Split liability to repay an overpayment

63. An overpayment may increase after the point at which the individual provides information due to processing times until a new determination is made. However, Social Security Scotland will not seek to recover that part of the overpayment which came after the required information was provided.

64. This happens where all of the following apply:

- an individual provides information which Social Security Scotland did not have before
- the information provided would reduce their award or end entitlement altogether
- this amounts to an error and generates an overpayment which the client is liable to repay to Social Security Scotland
- processing times mean a further overpayment accrues after the individual provides the information. This is due to time taken by Social Security Scotland to process the change

65. This means the overpayment must be broken down into two parts. Whilst the client is liable for the overpayment, they may not be liable to repay some of it. **This is known as a 'split liability'**.

66. The part for which we will seek to recover overpaid assistance:

- accrues from the day that the individual should have notified Social Security Scotland of the change of circumstances
- ends on the day the individual provides the information required to make the new determination

67. The part for which we will not seek to recover the overpaid assistance:

- starts the day after they provide the information required to make the new determination
- ends on the day the new determination is processed.

68. The case manager records the date when the individual provides the information needed to make the new determination. Social Security Scotland will:

- seek to recover any assistance overpaid as a result of the error before the date the individual provides the information
- not seek to recover any assistance that is overpaid as a result of the error after the date the individual provides the information.

Calculating the value of an overpayment

69. The overall value of the overpayment is the difference between the payment:

- actually made
- that would have been made if there had not been an error¹.

1 s. 63(2) of the 2018 Act

70. The case manager should make the calculation to separate the overpayment into its two parts. They do this by deducting from the overpayment any amount that accrued after the individual provides the information required to make the determination. What is left is the value of assistance that the individual must repay. For more information on split recovery of an overpayment liability, see ‘Split recovery of an overpayment liability’ above.

71. The case manager should:

- calculate the overall value of the overpayment
- calculate the part which is to be recovered
- refer the case to the Interventions Team.