

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 Scottish Adult Disability Living Allowance (Scottish Adult DLA). 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 reports 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

3. Case managers should check to see whether the guidance on errors (including official errors) 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 an 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 an 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 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 makes a determination of entitlement that is not correct which leads to an overpayment to the individual¹.

1 Scottish Adult DLA Regs, reg. 45(1)(b)

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

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

1 Scottish Adult DLA Regs, reg. 45(3)(a)(i)

2 Scottish Adult DLA Regs, reg. 45(3)(a)(ii)

9. An error can also take place where a new determination has not been made after an assumption on which an earlier determination was made has proven to be wrong¹.

1 Scottish Adult DLA Regs, reg. 45(3)(b)

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

- an error made by Social Security Scotland or DWP and
- 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 care 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 Scottish Adult DLA 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

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

- an award of Scottish Adult DLA to which they were not entitled¹
- a higher award than that to which they were entitled²

1 Scottish Adult DLA Regs, reg. 45(1)(b)(i)

2 Scottish Adult DLA Regs, reg. 45(1)(b)(ii)

Example: incorrect information is used to make a determination

Ben receives the middle rate of the care component of Scottish Adult DLA and reports a change on 9 June. Social Security Scotland gathers supporting information on Ben's behalf from his consultant. The consultant completes the report and the case manager makes a determination that Shabaz is entitled to the higher rate of the care component of Scottish Adult DLA.

Some months later, Ben's 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 Ben should have been paid the middle rate of the care component of Scottish Adult DLA.

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

Example: an individual's entitlement transfers from DWP to Social Security Scotland at wrong rate

Eva was entitled to the care component of Disability Living Allowance (DLA) at the lowest rate. She is notified that her payments will be transferred to Social Security Scotland. Her last payment of DLA will be on 10 March, with her entitlement to Scottish Adult DLA commencing the following day.

Due to an IT error by DWP, Social Security Scotland is informed that Eva is entitled to the highest rate of the care component of DLA. Social Security Scotland therefore makes a determination that Eva is entitled to the higher rate of Scottish Adult DLA from 11 March.

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

Example: information that has been altered

David has a review of his Scottish Adult DLA award on 14 September. When submitting the review form to Social Security Scotland, David provides a copy of a previous social work assessment. The case manager makes a determination that David is entitled to the highest rate of the care component of Scottish Adult DLA, as the assessment has both daytime and nighttime needs.

During David'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 David 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 lowest rate of the care component Scottish Adult DLA only, as David has significant adaptations to his home which were not reflected in the social work report. These adaptations mean that David is able to attend to his care needs independently. 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 Scottish Adult DLA.

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 Scottish Adult DLA Regs, reg. 45(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 Scottish Adult DLA Regs, reg. 45(1)(c)

2 Scottish Adult DLA Regs, reg. 45(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 Scottish Adult DLA. This involves:
- considering all the entitlement criteria, including applying the backwards test. The chapter on the backwards test explains the test 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 completing the determination without application:
- information provided by the DWP as part of the transfer that led to the original determination¹
 - any other information that they have obtained in connection with the individual's entitlement to Scottish Adult DLA²
 - any other information available to them that is relevant to their consideration of whether the individual is entitled to Scottish Adult DLA³.

1 Scottish Adult DLA Regs, reg. 45(2)(a)

2 Scottish Adult DLA Regs, reg. 45(2)(b)

3 Scottish Adult DLA Regs, reg. 45(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 Scottish Adult DLA Regs, reg. 41(1)(d)

2 Scottish Adult DLA Regs, reg. 41(2)

Official error leading to an underpayment

22. 'Official error' is a type of error.

23. An official error is defined as:

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

1 Scottish Adult DLA Regs, reg. 44(3)

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

25. An official error creating an underpayment results from a determination of entitlement to Scottish Adult DLA which either:

- does not award Scottish Adult DLA to an individual to which they are entitled¹
- is a lower rate of Scottish Adult DLA than they are entitled to².

1 Scottish Adult DLA Regs, reg. 44(1)(b)(i)

2 Scottish Adult DLA Regs, reg. 44(1)(b)(ii)

26. 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 care 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 Scottish Adult DLA against historic eligibility criteria rather than current criteria
- misapplying the correct age, residence and presence, backwards test or 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)

27. This list is not exhaustive.

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

Gary is 92 years old, lives alone and receives the lowest rate of the care component of Scottish Adult DLA. Gary has dementia, and is unable to prepare a main meal

independently, as he often becomes distracted whilst cooking and can leave food in the oven or on a hot stove.

Gary's informs Social Security Scotland of a change in his circumstances on 22 July. Gary's daughter reports that he now has significant difficulty with personal care and requires visits from a carer to support with toileting and bathing in the daytime. The case manager determines that he is not entitled to an award of Scottish Adult DLA. The case manager arrives at this conclusion by following Scottish Adult DLA decision-making guidance on bodily functions.

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 misapplied the Scottish Adult DLA decision-making guidance on the requirement for frequent attention in relation to bodily functions. Social Security Scotland therefore needs to take action to correct the official error that caused the individual to be underpaid. As a result, Gary is awarded the middle rate of the care component, taking effect from the 22 July.

Correcting an official error that causes an underpayment

28. 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 Scottish Adult DLA Regs, reg. 44(1)

29. 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 Scottish Adult DLA Regs, reg. 44(1)(c)

2 Scottish Adult DLA Regs, reg. 44(1)(d)

30. The case manager should contact the appropriate team to establish this. This includes the:

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

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

32. Completing a determination without application involves correcting previous errors in order to work out the individual's correct entitlement to Scottish Adult DLA. This involves:
- considering all the entitlement criteria, including applying the backwards test. The chapter on the backwards test explains the tests in more detail
 - working out when the change in entitlement should begin.
33. The case manager may use any or all of the following when making completing the determination without application:
- information provided by the DWP as part of the transfer that led to the original determination¹
 - any other information that they have obtained in connection with the individual's entitlement to Scottish Adult DLA³
 - any other information available to them that is relevant to their consideration of whether the individual is entitled to Scottish Adult DLA⁴.

1 Scottish Adult DLA Regs, reg. 44(2)(a)

2 Scottish Adult DLA Regs, reg. 44(2)(b)

3 Scottish Adult DLA Regs, reg. 44(2)(c)

When change in entitlement begins

34. 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

35. If the individual has been overpaid as a result of an official error, see 'Error that leads to an overpayment'.

36. 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 Scottish Adult DLA Regs, reg. 40(1)(d)

2 Scottish Adult DLA Regs, reg. 40(2)

Example: Previous determination was incorrect due to an official error

Ian has bronchiectasis. He needs oxygen throughout the day and receives support from his partner with bathing due to breathlessness and exhaustion relating to the physical exertion required. Ian receives the middle rate of the care component of Scottish Adult DLA. Following a scheduled review, 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 14 April, Ian requests a re-determination of this decision. He states he has had the same needs for the past year. The case manager reviews Ian's review form and looks at the supporting information provided.

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

- was extremely fatigued and breathless at rest, requiring oxygen 24 hours a day;
- required frequent attention and continual supervision during the day with getting to and from the toilet, and washing and dressing.

This means Ian needs frequent attention throughout the day in connection with his bodily functions.

The case manager:

- decides that the earlier determination was incorrect
- decides that Ian should have been awarded the lower rate of Scottish Adult DLA
- 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 Ian supplied was taken into account. The case manager confirms that Ian's circumstances meant that he should have been paid for this period, and determines that there has been an underpayment of Scottish Adult DLA. The new determination awards the lower rate of Scottish Adult DLA. The change in entitlement begins on the date that the original determination took effect.

37. Where an individual was awarded a lower rate award when they should be entitled to a higher rate award, they will be paid the difference between any Scottish Adult DLA already paid under the original determination and any Scottish Adult DLA due under the new determination (if both determinations relate to the same period of time)¹.

1 Scottish Adult DLA Regs, reg. 40(4)

Ignorance of a material fact

What is ignorance of a material fact?

38. Ignorance of a material fact is not necessarily an error.

39. This guidance only applies where:

- there has been a determination that has been incorrect
- this has led to an underpayment or overpayment
- but was not caused by official error

40. 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

41. An alternative outcome is one that:

- results in an alteration to the rate of Scottish Adult DLA the individual is entitled to, or
- means the individual is no longer entitled to Scottish Adult DLA¹

1 Scottish Adult DLA Regs, reg. 43(a)

42. A material fact is therefore one that would make a difference to the level of Scottish Adult DLA that the individual is entitled to¹.

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

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

Example: supporting information not available to original case manager

Kelly receives Scottish Adult DLA and reports a change on 24 November 2024. On the basis of the information in the review form, a case manager makes a determination on 21 December that Kelly is entitled to the lower rate of the care component of Scottish Adult DLA from 24 November 2024.

In March 2025, Kelly submits a copy of an occupational therapy report, dated 11 November 2024. The report notes that Kelly requires full-time care in the day and the night from their partner.

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 Kelly should be entitled to the higher rate of Scottish Adult DLA from 24 November 2024.

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

Beth receives Scottish Adult DLA and reports a change on 19 March. The review form is accompanied by a three-page letter from Beth's GP. The information leads the case manager to make a determination that Beth is entitled to the lower rate of the care component of Scottish Adult DLA from 19 March, as she satisfied the daytime condition.

Three months later, the Social Security Scotland mailroom finds that a page of the letter from Beth's GP had not been scanned correctly. The additional information details the

impact of Beth's condition on her care needs, suggesting that Beth would satisfy the night-time condition. The result is that Beth should have been entitled to the higher rate of the care component of Scottish Adult DLA.

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.

44. 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

Henry is 76 years old and receives Scottish Adult DLA. He reports a change on 6 June. Henry has a hearing impairment. Henry requires frequent attention throughout the day in connection with the bodily function of hearing.

The case manager makes a determination on 9 July that Henry meets the daytime condition after considering all the information available to them. George is therefore awarded the lower rate of the care component of Scottish Adult DLA.

In December, Social Security Scotland receives information that Henry provides care for his wife. The nature of the care that Henry provides is said to be inconsistent with the impact of his condition.

A new case manager does not realise that George had already stated in his Scottish Adult DLA review form that he has caring responsibilities for his wife and believes that the last determination was made in ignorance of material fact. The new case manager requests a case discussion. The practitioner details that although Henry requires frequent attention with his hearing, it is not unreasonable for him to care for his wife while also requiring frequent attention in relation to his own condition.

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

Correcting a determination made in ignorance of a material fact

45. 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 rate of Scottish Adult DLA the individual is entitled to, or
 - is likely to mean that the individual is no longer entitled to Scottish Adult DLA¹.

1 Scottish Adult DLA Regs, reg. 43(a)

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

- consideration of all entitlement criteria, including applying the backwards test
- working out when the change in entitlement should begin

47. This should be approached as if making a determination for the first time with full consideration given to the relevant chapters of the DMG Qualifying periods for Scottish Adult DLA, Principles of Decision Making for Scottish Adult DLA, Eligibility Criteria and Component Definitions for Scottish Adult DLA and Scottish Adult DLA Determinations and Awards.

When increase in entitlement begins

48. 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 Scottish Adult DLA Regs, reg. 40(1)(b)(ii)

49. 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 Scottish Adult DLA Regs, reg. 40(2)

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

1 Scottish Adult DLA Regs, reg. 40(4)

Liability to repay an overpayment

Generally

51. 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

52. 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

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

54. 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.

55. 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).

56. Case managers should refer cases to a Decisions Team 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

57. If the Decisions Team 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.

58. If the case manager and Decisions Team 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

60. 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.
61. 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
62. 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'.**
63. 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
64. 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
65. 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

66. 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

67. 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.

68. 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.