Section 5: The response

1 - See original response

Mr argues that the letter issued to him by the Secretary of State on 03 05 11 - this being the letter which constitutes "the notice commencing the conversion phase" for the purposes of regulation 4 of the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No.2) Regulations 2010), and which triggers the start of that phase in his case - (see regulation 4(4) - is not valid as it does not comply with regulation 4(3) of those Regulations. 

Mr therefore argues that he has never become a ‘notified person’ for the purposes of regulation 4(2) of those Regulations; that, as a consequence, his conversion phase has never begun; and, in particular, that regulation 5 of those Regulations (which provides for the making of conversion decisions) has no effect, as it only applies in relation to existing awards to which a notified person is entitled.

Essentially Mr is arguing that the reassessment process in his case is invalid, that the conversion decision in his case thereby has no standing in law and that presumably it should be revised and Mr returned to his existing award of Incapacity Benefit.

In response, the Secretary of State does not accept these arguments. The following submission is made in conjunction with pages 73 - 76 of the papers.

Regulation 4(3) of the relevant Regulations provides that the conversion notice must inform the notified person – 

- that an existing award is to be converted into an award of ESA if certain conditions are satisfied (sub-paragraph (a));

- that, if those conditions are not satisfied, the existing award [of an incapacity benefit] will not be converted and will terminate by virtue of these Regulations (sub-paragraph (b));

- of the requirements that must be met in order to satisfy those conditions (sub-paragraph (c)); and

- of such other matters as the Secretary of State considers appropriate (sub-paragraph (d)).
The Secretary of State submits that the notice sent out by Jobcentre Plus on his behalf to all persons due to be reassessed substantively complies with regulation 4(3), and is therefore valid. This is because:

- under the section of the notice which is headed "The benefit you receive is changing", it is explained to the recipient that awards of Incapacity Benefit, Severe Disablement Allowance and Income Support on disability grounds are being phased out; and that the recipient needs to be assessed for Employment and Support Allowance;

- under the section of the notice which is headed "What we are going to do", it is explained to the recipient that "We will ask you some questions to confirm your identity. After the call, we will send you a questionnaire to complete with details of your illness or disability. This questionnaire is called the Limited Capability for Work questionnaire."

- the ‘Further Information’ section contains the following advice:

  - **WHAT IS CHANGING?** Employment and Support Allowance is replacing Incapacity Benefit, Income Support paid on the grounds of illness or disability and Severe Disablement Allowance;

  - **DOES THIS CHANGE AFFECT EVERYONE?** Yes, but at different times. Customers will be considered and assessed for Employment and Support Allowance between 2010 and 2014. We are writing to you because you are affected now;

  - **HOW WILL I BE ASSESSED?**

    - To decide if you are entitled to Employment and Support Allowance we need to assess and understand how your illness or disability affects the amount and type of work you could do.

    - We will send you a questionnaire to complete and we use the information you provide to decide if you need to attend a Work Capability Assessment. It is important that you attend this assessment if you are asked to, or your benefit may be affected. We then decide if you are entitled to Employment and Support Allowance.

  - **WHAT HAPPENS AT A WORK CAPABILITY ASSESSMENT?** A health care professional will assess you and advise Jobcentre Plus how your illness or disability affects you in your everyday life. We will contact you by telephone to arrange the appointment and will also send you a letter with the appointment details and directions to the medical examination centre; and

  - the ‘Further Information’ also answers the question, “**WHAT HAPPENS IF I AM NOT ENTITLED TO EMPLOYMENT AND SUPPORT ALLOWANCE?**”. It states that “We will call you to discuss what your benefit options are including how to challenge our decision if you think it is wrong. You may be entitled to Jobseeker’s Allowance, Income Support for other reasons or Pension Credit.”.
The notification letter, read with the accompanying material in the factsheet, therefore covers all of the regulation 4(3) conditions. It does this in the following ways:

- sub-paragraph (a) is covered by the first and second paragraphs in the section of the letter which is headed "The benefit you receive is changing" taken together, in that it states that we need to assess the person for Employment and Support Allowance. The 'certain condition' to be satisfied is effectively that the person has limited capability for work, and the Work Capability Assessment which includes the limited capability for work determination is mentioned in the two paragraphs of the 'How will I be assessed' section in the Further Information. Paragraphs under the heading "What we are going to do" also mention the Limited Capability for Work questionnaire, thus making it clear to the appellant that the fundamental condition that needs to be satisfied by a notified person for the purposes of reassessment is that of having limited capability for work;

- sub-paragraph (b) is covered by the section in the Further Information headed 'what happens if I am not entitled to Employment and Support Allowance?' The fact that the section mentions that a person 'may be entitled to Jobseeker's Allowance, Income Support for other reasons or PC' also strongly suggests that the existing award ends where the person has been found not to be entitled to Employment and Support Allowance. The Secretary of State submits that the whole of the Further Information section, taken together, means that if a person does not satisfy the condition of having limited capability for work, then it follows that their existing award will not qualify for conversion into an award of Employment and Support Allowance;

- sub-paragraph (c) is covered in that regulations 21 and 23 of the Employment and Support Allowance Regulations 2008 (providing for the questionnaire and the requirement to attend a medical examination) are addressed in the "What we are going to do" and "What you need to do" sections of the letter and the second paragraph of 'how will I be assessed?' in the Further Information respectively. These are both 'requirements' which, once set, have to be met by the person in order to satisfy the limited capability for work condition; and

- sub-paragraph (d) is covered in that the letter also mentions the general timetable for reassessment, Work-Focused Interviews, Work-Focused Health-Related Assessments, and the interaction with Child Tax Credit and tax credits (where appropriate) in general.

The Secretary of State considers that, from a reading of the notice as a whole, the key aspects of the reassessment process are clear to the recipient, namely that:

- existing awards of incapacity benefits (Incapacity Benefit, Severe Disablement Allowance and Income Support on incapacity grounds) are being replaced, in appropriate cases, by awards of ESA;
- not everyone will be entitled to Employment and Support Allowance - we need to assess whether the notified person is so entitled;
- the assessment process will consider whether they have limited capability for work, and may include a Work Capability Assessment;
- by implication, the condition that needs to be satisfied for the purposes of reassessment is that of having limited capability for work;
- an existing award will end if a person does not satisfy the Work Capability Assessment (i.e. does not have limited capability for work); and
the recipient of the notice will be provided with additional information as appropriate and will be given every opportunity to raise any questions or concerns.

The Secretary of State finally submits that the Tribunal should also consider whether the appellant could have been in any way confused by the terms of the letter or disadvantaged by the way in which it was drafted or presented to the appellant. It is the Secretary of State's submission that any recipient of the letter would be left under no illusions about the nature of the reassessment process; the implications of not satisfying the conditions of entitlement for Employment and Support Allowance; what the appellant had to do in order to qualify for Employment and Support Allowance and any other information about the process considered appropriate. In that sense, there was clear substantive as well as procedural compliance with regulation 4(3).

The Secretary of State therefore submits that, taken as a whole, the notice which was issued to Mr on 03 05 11 contains sufficient information for it to comply with regulation 4(3) of the Regulations, and that the conversion decision has been lawfully made as a consequence.

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**Access to statute and case law for appellants**
