



The Draft Social Security (Incapacity for Work)
(General) Amendment Regulations 2003

Report by the Social Security Advisory Committee
under Section 174(1) of the Social Security
Administration Act 1992 and the statement withdrawing
the proposed regulations by the
Secretary of State for Work and Pensions



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*Presented to Parliament by the Secretary of State for Work and Pensions
by Command of Her Majesty
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Statement by the Parliamentary Under Secretary of State for Work and Pensions

Ministers referred a draft amendment to Regulation 27 of the Social Security(Incapacity for Work)(General) Regulations 1995 to the Social Security Advisory Committee (“the committee”) on 18th February 2003, in accordance with Section 172(1) of the Social Security Administration Act 1992.

The amendment would have reversed the effect of the Court of Appeal Judgment in *Howker* and the Secretary of State for Work and Pensions and the Social Security Advisory Committee (8th November 2002) which restored the provision allowing people to be treated as incapable of work if there is a substantial risk to the health of any person if they are found capable of work. The provision had been omitted as part of various amendments made to Personal Capability Assessment provisions from January 1997.

In May 2003 the Committee recommended that no change be made for the present but that the Government should monitor the situation. It considered that it had seen no evidence of any inappropriate broadening of the criteria leading to benefits being paid in “undeserving” cases. It sees the current regulation 27(b) in its reinstated form as crucial to ensuring that income to a number of vulnerable and disadvantaged customers is not disrupted and their lives destabilised. The Committee also considers that the current provisions provide a necessary safety net for people who do not get a correct Personal Capability Assessment.

The Government has decided to withdraw the proposal at the present time. The Government intends to gather more information about the operation of the “substantial risk” provision in practice before deciding whether or not further proposals are warranted.

Normal practice, in line with legal requirements, is to publish Social Security Advisory Committee reports when regulations to which they relate, are laid. Despite the fact that these regulations are withdrawn, it is possible that further proposals will be made in the future and the Government has decided to publish the report at this time in order to inform discussion.

Maria Eagle

Parliamentary Under-Secretary
Department for Work and Pensions

from the Chairman

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13 May 2003

REPORT OF THE SOCIAL SECURITY ADVISORY COMMITTEE MADE UNDER SECTION 174 OF THE SOCIAL SECURITY ADMINISTRATION ACT 1992 ON THE SOCIAL SECURITY (INCAPACITY FOR WORK) (GENERAL) AMENDMENT REGULATIONS 2003

Introduction

This is our report on the proposals for regulations to amend regulation 27 of the Social Security (Incapacity for Work)(General) Regulations 1995. The proposals relate to the Personal Capability Assessment (PCA), and their effect would be to tighten the categories of “exceptional circumstances”. The PCA determines whether or not a person is incapable of work for the purpose of various benefits including Incapacity Benefit, Severe Disablement Allowance, Income Support, Housing Benefit, Council Tax Benefit and National Insurance Credits.

The draft regulations were put to the Committee for consideration on 5 March 2003. On 10 March 2003 we published a press release inviting comments on the effect of this proposal to reach us by 7 April 2003. We were able to take into account representations from the 23 organisations and individuals listed in *Appendix 1* to this report. The Committee received a number of letters of concern even before the draft amendment regulations had been brought to our meeting on 5 March 2003. These are listed at *Appendix 2*. We would like to thank all those who made representations to the Committee and to officials from the Department for Work and Pensions for their assistance.

Details of the proposals – the purpose

The purpose of the regulations is set out in an explanatory memorandum. This is reproduced at *Appendix 3* along with a copy the 1995 report on the Medical Assessment for Incapacity Benefit at *Appendix 4*.

The proposal would amend regulation 27 of the Social Security (Incapacity for Work)(General) Regulations 1995 so as to tighten the categories of “exceptional circumstances”. The regulation is intended to provide a safety net provision for a small number of benefit recipients who have significant restrictions on their capacity to work but who are not covered by the other parts of the medical assessment of incapacity.

The memorandum explains that the amending regulations will remake the 1997 version of the regulation, which was declared invalid as a result of a recent Court of Appeal Judgement, given on 8 November 2002. (*E. Howker v the Secretary of State for Work and Pensions and the Social Security Advisory Committee*). The provision relevant to Mr Howker's claim for benefit was regulation 27(b) of the 1995 regulations.

Background and origins of regulation 27

Regulation 27 was introduced in April 1995, when a new medical test was introduced for Incapacity Benefit and other benefits.

The medical test of the PCA is an assessment of functions (to be incapable of work, a "points" threshold has to be reached). Some people with severe conditions are exempt from the assessment of functions. Regulation 27 is intended to serve as a safety net for a small number of people with significant medical restrictions to working who are not covered by the functional assessment or exemption categories. There are no figures for the number of people found incapable of work as a result of exceptional circumstances.

The original wording of the regulation was broadened in scope as a result of the High Court case (*Moule Judgement (1996)*). The main focus of the case was on the legality of allowing doctors, rather than adjudication officers, to make decisions on benefit entitlement. The Department is concerned that the result of this judgement, in effect removing the requirement for evidence from an approved doctor, would be a broadening of access to this provision, inconsistency in decisions, unfairness from case to case and a likelihood of confusion over terms like "substantial risk". It therefore introduced new regulations to limit the scope of regulation 27. The *Howker Judgement 2002* declared this change invalid, because the implications of the change had not been correctly represented to SSAC.

The Department now proposes to remake the regulation in the form that it took from 1997 until the *Howker Judgement*.

The differences between the 1995 regulation and the proposed amendment

Annex G describes the differences between the 1995 regulation and the proposed amendment. The proposed amendment does not include the category

he suffers from some specific disease or bodily or mental disablement and by reason of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if he were found capable of work.

This provision applied to Mr Howker and is set out the 1995 regulation 27(b). The Department believes that regulation 10(2)(viii) of the Social Security (Incapacity for Work)(General) Regulations, which provides an exemption for people with a mental illness who may be at substantial risk, is likely to encompass most people who have a severe mental disease which is uncontrolled or uncontrollable and where there are likely to be unpredictable behavioural manifestations.

The Department's Position

The Department's view is that even though there was little experience of the original (1995) regulations being applied by non-medically qualified decision making bodies; over time the Department believes that there is a risk that the "gateway" will be widened and that other cases will emerge. The Department is also concerned that there will be a tendency for decision-making bodies to interpret the "substantial risk" provision more widely than was originally intended.¹

1 The former Department of Social Security (DSS) undertook a major evaluation study of the IB medical test and related procedures during 1995/6. *The Evaluation of the Incapacity Benefit Medical Test, DSS Social Research Report, DSS February 1997* indicated that even specially trained doctors had difficulty in applying the "substantial risk" test in a reliable and consistent way.

The effects of the amending proposals

The Department believes that it is possible that a very small number of people would lose benefit as a result of the proposal. The Department also believes that it is also possible that some people will be treated as incapable of work under the broader wording now, but when reassessed under the proposed wording may be disallowed. The Department believes that these numbers will also be very small. It has been unable to quantify this, but has indicated that even with over 5 years experience of the operation of the narrower 1997 regulation it has found very few claimants with exceptional medical circumstances rendering them incapable of work (for benefit purposes) who were not adequately covered by the functional assessment, the exemptions or the more restricted exceptional circumstances. The Department is unaware of any look-alike cases or any cases before Commissioners in the same or similar circumstances to Mr Howker.

The Northern Ireland Position

Northern Ireland has separate legislative provisions, and there has not been a “Howker”-type challenge to the Northern Ireland provisions. Thus the Northern Ireland regulations reflect the position in Great Britain before the Howker judgement. However, we understand that the Northern Ireland regulation may be vulnerable to legal challenge because of the errors made in 1996. We have received representations from interested parties in Northern Ireland about the position of provision in Northern Ireland in the light of both the court’s decision and the proposed amendment.

Representations prior to the Consultation

The representations received by the Committee in advance of the formal consultation highlighted a difference of opinion between the Department and the special interest groups that had written to us regarding the numbers of people likely to be affected by the proposals. Several respondents suggested that some people with mental health problems (particularly people with chronic anxiety, phobias and obsessive compulsive disorders) would be adversely affected by the loss of the “substantial risk to self or others” test. This would therefore lead to a substantial number of customers losing entitlement to benefit.

It was also suggested to us that there are a relatively small number of people with physical health problems that do not easily fit in with the measurements of the PCA. For example, people with uncontrolled blood pressure, heart conditions, diabetes, and bowel problems where a colostomy bag has been fitted. For them to be deemed capable of work could have serious implications for their health.

Responses to the Consultation

Respondents to the consultation have suggested to us that there are a number of categories of individuals who are genuinely incapable of work and who do not fall easily into the physical and mental descriptors in the PCA test, and who may need the protection afforded by the substantial risk provision. Broadly, the claimants most likely to be affected fall into a number of groups:

- Mental health conditions
- Drug and alcohol dependency problems (and such problems combined with other mental and physical health conditions – so called dual-diagnosis cases)
- Physical health conditions
- Specific immunodeficiency problems

And, whilst numbers were not quoted, the implication is that respondents do not share the Department’s view that only a very few people would suffer if the regulation were agreed.

Mental health conditions

A number of respondents have suggested there are a range of conditions which do not fit easily into the current descriptors, such as eating disorders, obsessive compulsive behaviour, personality disorders and conditions that arise as result of stress at work. Respondents have advised us that those people with these sorts of problems do not present to a standard format. And the progress and behaviour of people presenting with mental illness (including substance abuse) may not always fall within the measurement of the functional tests, or within the more restrictive assessment of regulation 10(2)(viii).

Respondents have also informed the Committee that other problems arise where people are in “recovery” stages but are still vulnerable to relapse. Being found capable of work because of insufficient points from the PCA may undermine their recovery. It seems that where symptoms start to improve, and the claimant has to start to look at the possibility of moving into training, education or permitted work, the prospect of a return to work too early may have an adverse effect on the state of their health. Particularly where stress may exacerbate the condition, an ability to cope with change is very limited. Even where there is a supported transition back into the workplace, stress and potential income-stream disruption may provide a set back.

Respondents have indicated to us that there remains a need to retain the “substantial risk” category, as a safety net for the exceptional circumstances when a mental health condition does not fit the main criteria exemption, or where having been found fit to pursue employment the person would be at substantial risk if found capable of work.

Physical health conditions

A number of respondents have suggested that physical health problems may prevent claimants from returning successfully to work in the short term, or necessitate a move into different work. For example, people who have undergone heart bypass surgery may have raised blood pressure, which may be pushed to an unacceptable level by the stresses involved in certain kinds of work. Also, those with fluctuating conditions, particularly those that have periods of crisis, such as Sickle Cell, Multiple Sclerosis, severe asthma, and psoriasis may be similarly affected. Others at risk include people with drug and alcohol dependency problems, where physical symptoms (heart and liver disease, infections through sharing needles) are not yet severe.

Respondents drew our attention to a number of other significant cases that were subject to decisions by the Social Security Commissioners. These suggest that regulation 27(b) provided the only route to entitlement to Incapacity Benefit for a number of claimants such as:

- ***CIB/4406/2000***

The claimant in this case had a severe and adverse sensitivity to certain perfumes but it was only when she had an attack that she became physically incapable of many tasks. The main focus of the case was on what environment the PCA had to be gauged in. However, the Commissioner noted that had regulation 27(b) been in force at the time the claimant may have been able to qualify under it.

- ***CIB/1256/2002 – Anaphylactic shock***

The claimant in this case had severe anaphylactic shock reaction to a wide variety of chemicals occurring in everyday life, and his consultant had advised him that he should not work. The Commissioner upheld the decision of the appeal tribunal which had rejected the claim for incapacity benefit and found that the PCA could not be satisfied and nor could any of the exemptions or the exceptional circumstances.

Fortunately, cases on facts similar to CIB/1265/2002 and CIB/406/2000 are likely to be rare. It is clear that the importance of regulation 27(b) lies in the fact that it can allow for a judgement to be made on a variety of diverse facts, relating to an individual's condition, but with the common feature that in all cases the decision-maker has to consider whether there will be a substantial risk to the person's health if found capable of work.

Common Variable Immunodeficiency (Hypogammaglobulinaemia) and Primary Immunodeficiencies

The Committee has been made aware that certain individuals with Primary Immunodeficiencies find that going to work has an adverse effect on their health. Primary Immunodeficiencies are a rare group of disorders estimated to affect around 5,000 individuals in the UK. Typical problems include extreme breathlessness from chest and lung problems, joint pains, overwhelming fatigue and exhaustion. The degree and type of deficiency varies between patients, as do the clinical signs and symptoms and any associated disability. A feature of many immune deficiency conditions is a greater susceptibility to infectious agents than non-affected individuals.

We have been made aware that some of these individuals have had difficulty in meeting the criteria of the PCA and have used the regulation 10 exemption in a number of successful appeal cases. Having a primary immunodeficiency can make it very difficult to get and hold down a job. However typical difficulties do not make it easy to reach the 15 points required to satisfy the PCA criteria. The regulation 10 exemption does not address exposure to infection which is a real concern for people with primary immuno-deficiencies. It appears that such situations could be dealt with by the use of regulation 27(b).

Application of the Personal Assessment Capability

It is evident from what we have been told by respondents that there are problems with the PCA when it is employed in the sorts of circumstances outlined above. It seems likely that at least some of those who have "failed" the PCA, and been refused benefit would not have had to look to regulation 27(b) if their PCA test had been properly applied. It appears that many of these current problems may relate to the incorrect application of the PCA rather than any circumstance relevant to regulation 27(b).

In particular it appears from what our respondents have told us that the PCA fails a number of people with mental health illnesses, as it does not easily lend itself to the extremely variable and complex symptoms of mental illness. People suffering from physical disabilities can be treated by means of conventional drugs and other therapies: the symptoms are normally predictable and the patient can easily describe the disabling nature of the particular condition. In the case of mental illness however the opposite is more often the case. The symptoms associated with mental illness are variable and unpredictable. The patient is often unable to cope with the rudiments of everyday life and often their insight into their illness is limited and this can make the ability to engage and participate in the process for claiming Incapacity Benefit limited.

We have also noted that one of the reasons given by the Department for the high success rate of Incapacity Benefit appeals is that evidence relating to their claim for Incapacity Benefit produced at appeal was not provided with the original claim.²

Respondents therefore see regulation 27(b) as a very important safety net in an area of legislation that does not always meet the needs of claimants with mental illness. Whilst regulation 10(2)(viii) will continue to provide protection, respondents have asserted that if regulation 10(2)(viii) were to become the only protection that was afforded to

2 The National Audit Office's 2001 report *The Medical Assessment of Incapacity and Disability Benefits* highlighted the Department's problems getting evidence from claimants' GPs.

mental health patients, the wording is such that it is open to being interpreted in a number of different ways by different people. By comparison regulation 27(b) is far more clear in its intended meaning and specifically refers to the “*ability to work*”.

By contrast again, the PCA (by scoring on a points basis) determines the extent to which a person who has some specific disease or bodily or mental disablement is to be treated as capable or incapable of performing tasks, whether or not they are incapable of work as a condition of benefit entitlement.

Pathways to Work: Helping People into Employment – Green Paper

The Committee could not have considered the proposed amendment to the Social Security (Incapacity for Work)(General) Regulations 1995 without having regard to the complex issues raised in the recent Green Paper consultation *Pathways to Work: Helping People into Employment*. The Committee welcomes the recognition that there is a new will to tackle the problems of large numbers of people who find themselves increasingly disconnected from the world of work for reasons of ill-health or disability. In particular we are concerned that there is adequate flexible support to enable the very vulnerable to move into work and training at a pace that does not jeopardise their health problems whilst providing incentives for people to make the attempts to improve their current situation. The transition to work may be a difficult, extended process, and this consultation has provided us with evidence of some cases in which even a supported move into employment may create unmanageable risks.

Conclusions

We have seen no evidence of any inappropriate broadening of the criteria leading to benefits being paid in “undeserving” cases, as a result of the present position. In contrast, however, the respondents suggest that there are a significant number of individuals for whom the current version of regulation 27(b) is crucial to ensuring that income to a number of vulnerable and disadvantaged customers is not disrupted and their lives destabilised.

It is hard to be certain, but our impression is that many of the examples quoted derive not from the wording of the regulations, but in the way that officials interpret them. In other words, both the government and our respondents may be correct: *in theory* very few people should be affected by the proposals, but *in practice* the current provisions provide a necessary safety net for individuals who do not get an appropriate PCA. Obviously the Department can strive to ensure a broader application of the PCA but, like any equivalent test, it will always be subject to a certain degree of discretion in its application. We do not think that vulnerable people should be placed at risk unless it is absolutely unavoidable. No conclusions can validly be drawn about the effectiveness of the current version of the regulations. The research at Annex I of the DWP submission simply questions the effectiveness of the approved doctors, rather than giving a clear picture of what may happen should the current version of the regulations remain intact.

The removal of regulation 27(b) of the Incapacity for Work Regulations will affect a small number of people. Such a change should await consideration in the wider discussion of the proposals from the Green Paper on *Pathways into Work*, and the forthcoming piloting of new ways of working with Incapacity Benefit claimants. The latter may provide a useful analytical tool for gauging the strengths and weaknesses of the PCA. In the absence of any compelling evidence as to the necessity of changing the exceptional circumstances tests, making that change before taking forward the Incapacity Benefit reforms would be premature. We would think it better that the Department should run the risk of possibly paying a few “undeserving” cases, rather than risking the virtual certainty of denying benefit to a few genuine cases.

Finally, we believe that on this issue, legislative parity between Northern Ireland and Great Britain should be sought. The current situation, in which the Northern Ireland position is open to challenge, is not desirable.

Recommendations

In our view, therefore, no change should be made for the present. However, the situation should be monitored, and if the demand for this provision falls, as a result of improved administration, or there is real evidence of exploitation, then the matter should be reconsidered.

We also recommend continuing legislative parity in Great Britain and in Northern Ireland and that the Secretary of State for Work and Pensions communicates with the Secretary of State for Northern Ireland on this issue.

I am copying this letter to the Rt. Hon. Paul Murphy MP, Secretary of State for Northern Ireland.

Sir Thomas Boyd-Carpenter
Chairman of the Social Security Advisory Committee

RESPONDENTS TO THE CONSULTATION EXERCISE

1. Northumberland Care Trust
2. Brian Todd
3. Bruce Barnes
4. Hastings Advice & Representation Centre
5. Martin McGowan
6. Primary Immunodeficiency Association
7. A P Cull
8. Robbie Campbell
9. National Association of Welfare Rights Advisers
10. Neath MIND Association
11. Rethink
12. Northern Ireland Association of Citizens' Advice Bureaux
13. Disability Alliance
14. Tameside Welfare Rights Service
15. South Lanarkshire Council
16. Luton Law Centre
17. Ted Hutchinson
18. East Renfrewshire Council
19. London Borough of Hounslow
20. National Association of Citizens' Advice Bureaux
21. MIND
22. The Child Poverty Action Group
23. Manchester Welfare Rights Service

PRE-CONSULTATION REPRESENTATIONS

1. Euan Henderson
2. The Child Poverty Action Group
3. Stevenage Citizen's Advice Bureaux
4. Catherine McClellan
5. Benefits and Work, Chippenham
6. Tameside Welfare Rights Service
7. Salford Welfare Rights Service
8. National Association of Welfare Rights Advisers
9. Benefit Advice and Tribunal Unit, Doncaster
10. Durham County Council Welfare Rights Team
11. Manchester Welfare Rights Service
12. Scottish Association for Mental Health

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Professor Anthony Ogus CBE
Professor Robert Walker

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Bob Elbert
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Memorandum to the Social Security Advisory Committee on the Social Security (Incapacity for Work) (General) Amendment Regulations 2003

Summary

1. The Secretary of State for Work and Pensions proposes to amend regulation 27 of the Social Security (Incapacity for Work)(General) Regulations 1995 to tighten the categories of exceptional circumstances, to require that there is supporting medical evidence and that there must be evidence from a doctor approved by the Secretary of State.

2. There are likely to be some people who will lose benefit as a result of the proposed amendment but we believe that the numbers will be small. However we believe that the amendment is necessary to ensure the effective application of the range of provisions which make up the Personal Capability Assessment. In particular we believe that the amendment will help to ensure that the provisions for exceptional circumstances act as a safety net after the other PCA provisions have been applied and that the provisions are drafted in a way that encourages consistency and fairness in their application.

Background

3. In October 1994 the then Government published a document “The medical assessment for Incapacity Benefit”. This set out the Government’s intentions for the new medical test and was based on an extensive programme of consultation, scientific development and rigorous evaluation during the preceding 18 months. (The document has been sent to Committee members in advance of the meeting.)

4. The policy intention was that the new test would identify those people who, because of their medical disease or disablement, could not be reasonably be expected to seek work of at least 16 hours a week in the open labour market as a condition of receiving benefit. The threshold for the test was not intended to identify the point at which working would be impossible for the individual. This intention has been restated by the present Government (see for example the recent Pathways to Work Green Paper, page 11).

5. “The medical assessment for Incapacity Benefit” document set out the basis for the new incapacity for work test:

- that it would be a functional assessment of the person’s ability to perform everyday physical and mental activities (see Annex B)
- that people with the most severe medical conditions and disabilities were to be defined in law and exempted from undergoing the new test (see Annex C)
- that a small number of people might not be exempt or meet the threshold for the functional test but who should be treated as incapable of work according to the policy intention (see above).

6. The following is an extract from Chapter 1 of the document and relates to the proposals to introduce a tight test of non-functional incapacity to sit alongside the new procedures.

“Para 1.12

The new test must be an effective assessment of the effects of all medical conditions on capacity for work. Throughout the development work it has been recognised that there are a minority of conditions that do not lend themselves to a

functional assessment. In other words, the individual could still carry out all the functions in the test, but still be incapable of work. This has been borne out in a minority of cases which appeared in the evaluation studies”.

Para 1.13

The development work has also identified the type of criteria, which have to be considered to ensure that anyone in this situation will be given a fair assessment of their incapacity. After carrying out the functional assessment, a BAMS doctor [doctor approved by the Secretary of State] will need to consider whether there is evidence of the following:

- *a previously undiagnosed potential life threatening situation, such as possible cancer, or ischaemic heart disease or*
- *a severe uncontrolled or uncontrollable physical or mental disease with unpredictable manifestations, such as severe inflammatory bowel disease, uncontrollable diabetes or uncontrollable severe headache or*
- *the potential for causing substantial danger or hindrance to other people at work as a result of the medical condition or*
- *the person is waiting for a major surgical operation, or other major therapeutic procedure, which will substantially affect their ability to work, and which is planned to take place within the next three months.*

The BAMS doctor will advise the Adjudication Officer if there is evidence that any of these criteria apply- Chapter 3, paragraph 3.13. They will also advise on an appropriate date for reviewing the claim in line with the prognosis.”

7. The Social Security (Incapacity for Work) (General) Regulations 1995 were drafted to give effect to this policy intention though the precise wording of the regulations differed from the criteria above. The original version of regulation 27 (the 1995 regulation) made satisfaction of the criteria for exceptional circumstances conditional on the opinion of a doctor approved by the Secretary of State. The Moule Judgment (1996) decided that the regulation was ultra vires in respect of this requirement. The Judgment modified the wording of the regulation since the decisions would be made by adjudication officers (now decision makers) or social security tribunals rather than by doctors approved by the Secretary of State. The Judgment also meant that decisions about the satisfaction of the regulation 27 criteria could be made without any evidential requirement for expert medical advice or opinion. We believe that these changes broadened the regulation 27 provisions. There is more information about this judgment at Annex D.

8. In 1997 regulation 27 was amended (the 1997 regulation). The 1997 regulation narrowed the range of circumstances in which a person can be treated as incapable of work and included a requirement that there must be supporting medical evidence and that it must include evidence from a doctor approved by the Secretary of State. The 1997 regulation was declared invalid as a consequence of the judgment in the case of Howker and the Secretary of State for Work and Pensions in the Court of Appeal on 8th November 2002 (Howker). Details of Howker are at Annex D.

9. The 1997 regulation did not include the category *“he suffers from some specific disease or bodily or mental disablement and by reason of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if he were found capable of work”*. However at the same time an amendment was made to the exemption categories to cover people with a mental illness who may be at substantial risk. Regulation 10(2)(viii) of the Social Security (Incapacity for Work)(General) Regulations provides an exemption for people with *“a severe mental illness, involving*

the presence of mental disease, which severely and adversely affects a person's mood or behaviour; and which severely restricts his social functioning, or his awareness of his immediate environment."

10. A person with a mental disablement which could cause "substantial risk to the mental or physical health of any person" would be very likely to satisfy this exemption. Similarly this exemption is likely to encompass most people who have a severe mental disease which is uncontrolled or uncontrollable and where there are likely to be unpredictable behavioural manifestations.

Reasons for the Proposed Amendment

11. The Secretary of State proposes to amend regulation 27 in the form it took prior to the Howker Judgment. This would restore the 1997 regulation but taking account of later amendments due to the change from the AWT to the PCA in 2000. The proposed version would tighten the categories of exceptional circumstances compared to the 1995 regulation post Moule. The draft regulation is at Annex H. Annex G provides a comparison of the proposal with the 1995 regulation post Moule.

12. The Secretary of State proposes to make this amendment to make it clear that the regulation 27 categories are only intended to apply to a small number of exceptional cases where a person's condition is such that incapacity should be accepted but insufficient points are scored from the functional assessment and the exemption categories do not apply.

13. Since the regulation is intended to provide a safety net for a small proportion of cases assessed under the PCA provisions we believe that the wording should be tightly drawn. The categories may be interpreted very widely if the regulation is not tightly drawn particularly if there is no requirement for there to be evidence from a doctor trained to do the PCA. This may lead to incapacity being accepted where in fact the person's condition is not exceptional and where the person does not satisfy the PCA functional assessment or exemption categories.

14. Although guidance has been issued to decision makers and approved doctors following the Howker Judgment we do not think that it is sufficient to leave the regulation unchanged in the long-term. In addition to the possibility of the 1995 regulation (post Moule) being interpreted very widely there is also an increased risk of inconsistent interpretation by decision makers and tribunals. There is a potential for confusion over a term such as "substantial risk". We believe the proposed amendment will reduce the potential for unfairness in the operation of the PCA provisions from person to person.

15. We have considered carefully the coverage of the proposed regulations and the extent to which there will be clients who are disallowed benefit without the 'substantial risk' safety net. We believe that there is an element of overlap built in to the PCA provisions between exemption, the functional assessment and the regulation 27 exceptional circumstances. For example it is possible that a person with a mental disease or disablement might be found incapable of work under the exemption categories, the functional assessment and the exceptional circumstances. We believe that this element of overlap reduces the risk of cases not being properly covered by the more restrictive wording of the exceptional circumstances because clients with the relevant medical conditions will have coverage from the functional assessment (the PCA) or the exemption categories.

16. The element of overlap has increased since the PCA was introduced. Case law relating to the IB medical assessment has found that when determining which of the functional descriptors apply to an individual the decision maker must take account of pain, breathlessness and fluctuations in the condition. The test to be applied is broadly whether the person could perform the activity in a reliable and repeatable way when

called upon to do so. The effect of this has been that when approved doctors provide advice to Decision Makers about which functional descriptors in the Personal Capability Assessment relate to the claimant's medical circumstance they must take all these factors into account. Thus someone with a condition which meant they were easily fatigued when carrying out activities or someone with a painful condition such as inflammatory bowel disease could well be covered under the functional test. The same principle would apply to someone with diabetes mellitus which was poorly controlled if the effects of this poor control meant that they could not reliably carry out the PCA physical and mental functions.

17. Based on experience of applying the AWT/PCA since 1995 we have considered carefully in what circumstances an individual could be said to be at 'substantial risk' (from being found capable of work for benefit purposes) where their disease was currently controlled (ie they would not be covered by the 'severe life threatening/uncontrolled or uncontrollable' exceptional circumstance or the other provisions mentioned above.) In our view there are likely to be very few clinical circumstances of this kind.

18. A view has also been expressed that the 1997 regulation 27(2)(a) [ie the one we are seeking to remake] is couched in the present tense and, unlike the substantial risk test, does not permit regard to be had to future possible developments. This view fails to take account of the approach taken by the approved doctor when advising the Decision Maker. As an example: where someone has a mental or behavioural disorder it is possible that the doctor could clinically foresee a situation where, on being required to be available for work as a condition of benefit entitlement, the condition would relapse and hence would no longer be controlled. An approved doctor would need to advise the Decision Maker whether the risk of such an occurrence was substantial rather than simply a possibility and whether it was likely to be life threatening. Where, in the medical judgement, there was such a risk it could be argued that the condition was in fact not sufficiently controlled to allow the person to withstand the normal stresses of everyday life, including stress which might result from a change of circumstance, such as being found capable of work. From a medical point of view, assessment of the control of mental disease is not simply an assessment of mental health at one point in time, but requires an assessment of the person's ability to cope with any reasonably foreseeable stressors of life.

19. Since the Howker Judgment there are likely to be claimants who have been accepted as incapable using the widely drawn categories of the 1995 regulation (post Moule). Some of these claimants will no longer be regarded as incapable if they are re-assessed using the more restrictive criteria under the proposed regulation. We do not know how many claimants will be affected in this way. Our experience of the operation of the 1997 amendment suggests that there were very few claimants not adequately covered by the functional assessment or the exemptions or the more restricted exceptional circumstances.

20. The proposed amendment contains no transitional protection for cases where incapacity has been accepted under the 1995 regulation (post Moule). If the proposed amendment becomes law it is not intended to try to identify such cases for disallowance at that time. Existing procedures will be used so that there is no re-assessment of the PCA until the next referral is due.

ANNEX B

PCA – Functional Assessment

The Personal Capability Assessment (PCA) applies to the majority of claimants after 28 weeks of incapacity. The test is designed to assess the effects of an individual's medical condition and resultant disabilities upon that individual's capacity for all types of work.

Incapacity for work is accepted under the PCA provisions if

- sufficient points are scored from the functional assessment or
- an exemption applies or
- there are insufficient points and no exemption applies but one of the exceptional circumstances applies.

The Functional Assessment

The PCA involves an assessment of functional areas of the body and mind which are relevant to capacity for work. The functional areas and the points that apply to particular descriptors within these functional areas are set out in the Schedule to the Social Security (Incapacity for Work)(General) Regulations 1995. The functional areas are listed below. A person is incapable of all types of work under the PCA if he or she scores

- 15 points or above from the assessment of physical disabilities or from a combination of physical disabilities and mental disabilities or
- 10 points or more from mental disabilities alone.

Functional Areas – Physical Disabilities

Walking on level ground with a walking stick or other aid if such is normally used

Walking up and down stairs

Sitting in an upright chair with a back but no arms

Standing without the support of another person or the use of an aid except a walking stick

Rising from sitting in an upright chair with a back but no arms without the help of another person

Bending and Kneeling

Manual Dexterity

Lifting and carrying by use of the upper body and arms (excluding all other activities specified in Part I of the schedule)

Reaching

Speech

Hearing with a hearing aid or other aid if normally worn

Vision in normal daylight or bright electric light with glasses or other aid to vision if such aid is normally worn

Continence other than enuresis (bed-wetting)

Remaining conscious (without having epileptic or similar seizures during waking moments)

Functional areas – mental disabilities

Completion of tasks

Daily Living

Coping with pressure

Interaction with other people

ANNEX C

PCA Exemptions

There are a number of conditions which in themselves are such that it would be unreasonable to expect the person to be capable of work. Such claimants are not asked to complete an AWT questionnaire or undergo a medical examination. The exemption categories are set out in full in regulation 10 of the Social Security (Incapacity for Work)(General) Regulations 1995. These are listed in an abbreviated form below.

Assessed as 80% disabled for disablement benefit, War Pension or Severe Disablement Allowance purposes

In receipt of the highest rate care component of Disability Living Allowance and the higher rates of Constant Attendance Allowance paid with War Pensions or Industrial Injuries Benefit
Terminally ill

Registered blind

Suffering from the following severe medical conditions:

- A severe mental illness involving the presence of mental disease, which severely and adversely affects a person's mood or behaviour, and which severely restricts their social functioning, or their awareness of their immediate environment
- Tetraplegia
- Paraplegia, or uncontrollable involuntary movements or ataxia which effectively renders the sufferer functionally paraplegic
- Persistent vegetative state
- Severe learning disabilities
- Severe and progressive neurological or muscle-wasting diseases
- Active and progressive forms of inflammatory polyarthritis
- Progressive impairment of cardio-respiratory function which severely and persistently limits effort tolerance
- Dementia
- Dense paralysis of the upper limb, trunk and lower limb on one side of the body
- Multiple effects of impairment of function of the brain and/or nervous system causing severe and irreversible motor
- Sensory and intellectual deficits
- Manifestation of severe and progressive immune deficiency
- States characterised by the occurrence of severe constitutional disease or opportunistic infections or tumour formation.

ANNEX D

Background to the Legislation and Court Judgments

1. When the 1995 legislation was implemented these exceptional criteria and the role of the approved doctor in providing the adjudication officer with an opinion were reflected in regulation 27 of the Social Security (Incapacity for Work) (General) Regulations 1995. This is at Annex E. The regulation specifically made satisfaction of the exceptional criteria conditional “on the opinion of a doctor approved by the Secretary of State”

2. Although some of the wording was in fairly broad terms (“*a substantial risk to the mental or physical health of any person if he were found capable of work*”) the regulation would in effect be applied by specially trained doctors (approved by the Secretary of State) who would understand how widely or narrowly the wording should be interpreted.

3. Following the Moule Judgment (September 12th, 1996) the words “*in the opinion of a doctor approved by the Secretary of State*” in the 1995 regulation 27 were declared ultra vires. This was because the wording made satisfaction of its conditions conditional on the binding and non-appealable opinion of a doctor approved by the Secretary of State. The effect of the judgment was that the regulation had to be read as if the words “in the opinion of a doctor approved by the Secretary of State” were not there. This meant that it was for the adjudication officer (now the decision maker) to decide if the regulation 27 conditions were satisfied on the basis of all the available evidence. Similarly on appeal it was for the tribunal to make this decision. There was no longer a requirement in the regulation for there to be evidence from a doctor approved by the Secretary of State.

4. Regulation 27 was amended from 6.1.1997 so that the decision to treat or not to treat a person as incapable of work was for the decision maker and not for an approved doctor. The 1997 regulation also narrowed the range of circumstances in which a person can be treated as incapable of work and included a requirement that there must be supporting medical evidence and that it must include evidence from a doctor approved by the Secretary of State. The 1997 regulation is at Annex F.

The Howker Judgment

5. The 1997 amendment was considered by the Court of Appeal in Howker. The 1997 amendment to regulation 27 regulation omitted the old 27(b) category (specific disease such that there is a substantial risk to health). Instead, it was necessary for a person who wants to be deemed incapable to show that he suffers from a life threatening condition. The validity of this change was challenged in Howker. It was argued that the amending Regulation was not validly made because the Department failed to properly consult the Social Security Advisory Committee (SSAC).

6. The Social Security Administration Act provides that the Secretary of State has to refer proposals to make regulations to the SSAC – but that he does not have to do so if the SSAC itself has agreed that the proposals should not be referred. In this case the SSAC did agree that the proposal should not be referred. Counsel for Mr Howker argued that the agreement by the SSAC was not a valid agreement because the Department told the SSAC that the amendment in question was neutral (i.e. no-one would lose or gain) rather than adverse (i.e. some existing claimants will lose money in future).

7. In May 2001 the Commissioner rejected the argument that the amending regulation was invalid but gave leave to appeal to the Court of Appeal. The judgment in the case of Howker and Secretary of State for Work and Pensions in the Court of Appeal on 8th November 2002 (Howker) declared the 1997 version of the regulation invalid.

In paragraph 43 of his judgment Lord Justice Peter Gibson stated “...*the new regulation 27 is invalid,..*”. We believe that it follows that the 1995 regulation as it applied following another Court Judgment (Moule), is restored.

8. The provision relevant to Mr Howker’s claim for benefit was regulation 27(b) of the 1975 Regulations. In its Order the Court declared that [the 1996 Regulations is] “*of no effect insofar as it purported to delete sub-paragraph (b) of regulation 27*” of the 1995 regulations.

9. In our view, in consequence of the Court of Appeal judgment (particularly paragraph 43), the 1995 version of regulation 27 currently has effect (subject to the Moule decision). There is an alternative argument that as a result of the Order of the Court, particularly paragraph 5, the 1997 version of regulation 27 currently takes effect together with regulation 27(b) of the 1995 regulations. We understand that this is the view of CPAG. We believe that the declaration made in the Order which was particular to the Howker case does not contradict the wider view expressed in paragraph 43 of the judgment.

10. In either case we believe that the current position of the regulation is too widely drawn given that the Moule Judgment meant that decisions would be taken by decision makers and tribunals with no requirement to have expert medical opinion. Before Moule the categories of exceptional circumstances could only apply if a doctor approved by the Secretary of State had provided an opinion to the adjudication officer (now decision maker). Since the 1997 amendment is invalid our understanding is that the 1995 regulation continues in force but minus the words “*in the opinion of a doctor approved by the Secretary of State*” because of the Moule Judgment. The proposal before the Committee is to substitute regulation 27 (whichever interpretation applies) with the draft regulation at Annex H.

11. Guidance has been issued to approved doctors and to decision makers on the application of the regulation since the Judgment. This will be sent to the Committee in advance of the March SSAC meeting. Leaflet IB214 (Incapacity Benefit - The Personal Capability Assessment) will be amended from April to include the changed categories of exceptional circumstances.

12. In his decision the Commissioner made serious criticisms of the Department accusing officials of “sharp practice” in their dealings with the SSAC. The Permanent Secretary of the DWP subsequently acknowledged that officials made an error in the way they presented the change to the SSAC but concluded that there was no reason to believe that officials deliberately misled the Committee.

ANNEX E

The 1995 Regulation

(Regulation 27 of the Incapacity for Work (General) Regulations 1995 as it applied before 6.1.97 and since the Howker Judgment on 8.11.02. Following the Moule Judgment the regulation was to be read as if the words “in the opinion of a doctor approved by the Secretary of State” had been struck out)

Exceptional circumstances

27. A person who does not satisfy the all work test shall be treated as incapable of work if

- (a) he suffers from a previously undiagnosed potentially life-threatening condition; or
- (b) he suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if he were found capable of work; or
- (c) he suffers from a severe uncontrolled or uncontrollable disease; or
- (d) he will, within three months of the date on which the doctor so approved examines him, have a major surgical operation or other major therapeutic procedure.

ANNEX F

The 1997 Regulation

(Regulation 27 of the Incapacity for Work (General) Regulations 1995 as it applied from 6.1.97 until the Howker Judgment on 8.11.02)

27.—(1) A person who does not satisfy the all work test shall be treated as incapable of work if any of the circumstances set out in paragraph (2) apply to him

(2) The circumstances are that

- (a) he is suffering from a severe life threatening disease in relation to which
 - (i) there is medical evidence that the disease is uncontrollable, or uncontrolled, by a recognised therapeutic procedure, and
 - (ii) in the case of a disease which is uncontrolled, there is a reasonable cause for it not to be controlled by a recognised therapeutic procedure;
- (b) he suffers from a previously undiagnosed potentially life threatening condition which has been discovered during the course of a medical examination carried out for the purposes of the all work test by a doctor approved by the Secretary of State;
- (c) there exists medical evidence that he requires a major surgical operation or other major therapeutic procedure and it is likely that that operation or procedure will be carried out within three months of the date of a medical examination carried out for the purposes of the all work test.

Differences Between the 1995 Regulation and the Proposed Amendment

The proposed amendment would essentially restore the 1997 version (account has been taken of later amendments due to the change from the AWT to the PCA). The proposed version would tighten the categories of exceptional circumstances compared to the 1995 regulation post Moule. The differences between the proposed amendment and the 1995 regulation post Moule are listed below.

1. The proposed amendment does not include the category “he suffers from some specific disease or bodily or mental disablement and by reason of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if he were found capable of work”. This provision is relevant to Mr Howker and set out in the 1995 regulation 27(b). However there remains a separate provision in the exemption categories to cover people with a mental illness who may be at substantial risk. Regulation 10(2)(viii) of the Social Security (Incapacity for Work)(General) Regulations provides an exemption for people with “a severe mental illness, involving the presence of mental disease, which severely and adversely affects a person’s mood or behaviour, and which severely restricts his social functioning, or his awareness of his immediate environment”
2. The proposed regulation 27(2)(a) requires the uncontrollable or uncontrolled disease to be “life threatening”
3. The proposed regulation 27(2)(a) requires that there is medical evidence* that the disease is uncontrollable or uncontrolled by a recognised therapeutic procedure
4. The proposed regulation 27(2)(a) requires that there is reasonable cause for the disease not to be controlled by a recognised therapeutic procedure
5. The proposed regulation 27(2)(b) requires that the discovery of the previously undiagnosed potentially life threatening condition was made by the doctor during the medical examination carried out for the PCA. Should there be evidence from another source at this stage or at another stage in the PCA then incapacity could be accepted under regulation 27(2)(a).
6. The proposed regulation 27(2)(c) requires medical evidence* that a major surgical operation or other major therapeutic procedure is required. Medical evidence was not required in the 1995 regulation post Moule.
7. The proposed regulation 27(2)(c) uses the words “it is likely that that operation or procedure will be carried out within three months of the date of a medical examination”. The 1995 regulation was more restrictive in this respect. It stated “he will, within three months of the date on which the doctor so approved examines him, have a major surgical operation or other major therapeutic procedure”
8. *The definition of medical evidence requires there to be evidence from a doctor approved by the Secretary of State. It also includes evidence from another doctor, hospital or similar institution (regulation 2(1) of the Social Security (Incapacity for Work) (General) Regulations (1995).

 STATUTORY INSTRUMENTS

2003 No.

SOCIAL SECURITY

**The Social Security (Incapacity for Work) (General)
Amendment Regulations 2003**

<i>Made</i>	2003
<i>Laid before Parliament</i>	2003
<i>Coming into force</i>	2003

The Secretary of State for Work and Pensions, in exercise of the powers conferred on him by sections 171D, 171G(2) and 175(2) to (4) of the Social Security Contributions and Benefits Act 1992³ and of all other powers enabling him in that behalf, and after reference to the Social Security Advisory Committee⁴, hereby makes the following Regulations:

Citation and commencement

1.—(1) These Regulations may be cited as the Social Security (Incapacity for Work) (General) Amendment Regulations 2003 and shall come into force on 2003.

Amendment of the Incapacity General Regulations

2.—(1) For regulation 27 of the Social Security (Incapacity for Work) (General) Regulations 1995⁵ (exceptional circumstances) there shall be substituted—

“**27.**—(1) A person who is not incapable of work in accordance with the personal capability assessment shall be treated as incapable of work if any of the circumstances set out in paragraph (2) apply to him.

(2) The circumstances are that—

- (a) he is suffering from a severe life threatening disease in relation to which—
 - (i) there is medical evidence that the disease is uncontrollable, or uncontrolled, by a recognised therapeutic procedure, and
 - (ii) in the case of a disease which is uncontrolled, there is a reasonable cause for it not to be controlled by a recognised therapeutic procedure;
- (b) he suffers from a previously undiagnosed potentially life threatening condition which has been discovered during the course of a medical examination carried out for the purposes of the personal capability assessment by a doctor approved by the Secretary of State;

³1992 c.4. Sections 171D and 171G were inserted by the Social Security (Incapacity for Work) Act 1994 (c.18). Section 171G(2) is cited because of the meaning ascribed to the word “prescribed”. [Section 75 was amended by the Social Security Contributions (Transfer of Functions, etc.) Act 1999 (c.2).]

⁴See sections [172(1)] of the Social Security Administration Act 1992 (c.5).

⁵S.I. 1995/311; relevant amendments are S.I. 1999/3109 and 2000/590.

- (c) there exists medical evidence that he requires a major surgical operation or other major therapeutic procedure and it is likely that that operation or procedure will be carried out within three months of the date of a medical examination carried out for the purposes of the personal capability assessment.”

Signed by authority of the Secretary of State for Work and Pensions.

*Parliamentary Under-Secretary of State,
Department for Work and Pensions 2003*

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations further amend the Social Security (Incapacity for Work) (General) Regulations 1995 (S.I. 1995/311) by substituting a new regulation 27 which sets out three exceptional circumstances when a person who is capable of work in accordance with the personal capability assessment is nevertheless treated as incapable of work.

These Regulations do not impose any costs on business.

(Draft of 7 January 2003)



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