

## ESA: WORK-RELATED ACTIVITY AND SUBSTANTIAL RISK

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### INTRODUCTION

- 1 This memo gives guidance on
  1. considering substantial risk in the context of whether a claimant should be treated as having LCWRA<sup>1</sup> **and**

2. in particular, what evidence of WRA is required in order to determine this question

in the light of UT decisions<sup>2</sup>.

*1 ESA Regs, reg 35(2); 2 AH v SSWP (ESA) [2013] UKUT 118 (AAC); [2013] AACR 32;  
ML v SSWP (ESA) [2013] UKUT 174 (AAC); [2013] AACR 33;  
IM v SSWP (ESA) [2014] UKUT 412 (AAC)*

- 2 The guidance in this memo is for the attention of staff

1. dealing with requests for mandatory reconsideration **and**
2. preparing responses to the FtT

in cases where a claimant has requested mandatory reconsideration of, or lodged an appeal against, a decision made following application of the WCA. Examples of how the guidance should be applied are at the end of the memo.

**Note: It is important that staff read all the guidance contained in this memo.**

- 3 The memo should also be read with Memo DMG 4/15, which advises DMs of an update to the substantial risk guidance for HCPs in the WCA Handbook.

## **BACKGROUND**

- 4 Where a claimant is found to have LCW<sup>1</sup>, or is treated as having LCW<sup>2</sup>, the DM is required to determine whether or not the claimant has LCWRA<sup>3</sup>, or should be treated as having LCWRA<sup>4</sup>, in order to determine
  1. whether the WRAC or support component should be included in the award<sup>5</sup> **and**
  2. whether the claimant is required to
    - 2.1 take part in one or more Wfl<sup>6</sup> **and**
    - 2.2 undertake WRA<sup>7</sup> **and**
  3. in the case of an award of ESA(Cont), whether the award is limited to 365 days<sup>8</sup>.

*1 ESA Regs, reg 19; 2 reg 20, 25, 26, 29 & 33; 3 reg 34; 4 reg 35;  
5 WR Act 07, s 2(1)(b) & 4(2)(b); 6 s 12; 7 s 13; 8 s 1A*

- 5 Where the claimant is found not to have LCWRA because

1. none of the LCWRA descriptors apply<sup>1</sup> **and**
2. they cannot be treated as having LCWRA<sup>2</sup> as in DMG 42365

the DM should consider whether, as a result of being found not to have LCWRA, there would be a substantial risk to the physical or mental health of the claimant or any other person<sup>3</sup>.

*1 ESA Regs, reg 34(1); 2 reg 35(1); 3 reg 35(2)*

- 6 The substantial risk provision ensures that, in the case of a limited number of claimants who would otherwise be required to undertake WRA, a potential and substantial risk of harm to health, which could not be ignored due to its nature and gravity, is taken into account when determining whether a particular claimant is treated as having LCWRA.

## THE UT DECISIONS

- 7 In all the UT cases, the claimants' existing awards<sup>1</sup> had been converted to awards of ESA, the claimants having been found to have LCW, either by the DM, or the FtT on appeal. The remaining issue before the FtT was whether the claimants had LCWRA. The FtT found that the claimants did not have LCWRA<sup>2</sup>, and could not be treated as having LCWRA<sup>3</sup>. The claimants' appeals to the UT were allowed and remitted to the FtT for rehearing.

**Note:** see DMG 45204 for guidance on the meaning of "existing award".

*1 WR Act 07, Sch 4, para 11; 2 ESA Regs, Sch 3; 3 reg 35(2)*

## Reported decisions [2013] AACR 32 and 33

- 8 The UT Judge held that, applying principles in case law<sup>1</sup> on the LCW equivalent provision<sup>2</sup>, the DM should assess the range or type of WRA which a claimant was capable of performing and might be expected to undertake.

*1 Charlton v SSWP [2009] EWCA Civ 42; R(IB) 2/09; 2 SS (IW) (Gen) Regs, reg 27(b); ESA Regs, reg 29(2)(b)*

- 9 The substantial risk can arise from
1. the WRA itself **or**
  2. the journey to and from the place where the WRA is undertaken (where relevant).

- 10 There must be appropriate evidence before the FtT of
1. the nature of the WRA (which **must** be provided by the DM) **and**
  2. the claimant's health.

***IM v SSWP* [2014] UKUT 412**

- 11 The Chamber President of the UT directed that the claimant's appeal be heard by a three judge panel of the UT, as there had been differing views by UT Judges on identifying what WRA a claimant might be required to undertake.
- 12 The UT held
1. the DM is required to predict what WRA the individual claimant might be required to undertake, when considering whether there would be a risk to their health if they were so required
  2. in some case it will be obvious that there is no risk, because none of the types of WRA available in the claimant's area would cause such a risk to materialise
  3. the FtT should be provided with evidence about **all** the types of WRA available in the claimant's area, whether provided by the Secretary of State or Work Programme providers, including the least and most demanding types, together with information about what the claimant might be required to undertake from that list
  4. this evidence is required in appeal responses about whether the claimant has LCW as well as those about whether they have LCWRA, so that the FtT can consider risk in cases where they find that the claimant has LCW, but does not satisfy any LCWRA descriptor
  5. if the Secretary of State does not provide evidence as in **3.**, the FtT can
    - 5.1 use its own knowledge if that is up to date and complete **or**
    - 5.2 adjourn to obtain the necessary evidence **or**
    - 5.3 decide the case itself without evidence.
  6. where **5.3** applies, the FtT could find that the claimant should be treated as having LCWRA.

## WHEN SHOULD SUBSTANTIAL RISK BE CONSIDERED

13 The following guidance explains how the UT's decision as summarised in paragraph 12 should be applied by DMs dealing with

1. requests for mandatory reconsideration **or**
2. appeals to the FtT

where the decision in question incorporates a determination that the claimant does not have, and cannot be treated as having, LCWRA.

**Note:** See also paragraphs 16 – 17 for guidance on appeal responses where the appeal is about whether the claimant has, or can be treated as having, LCW.

### Determining LCWRA

14 The question of whether there is a substantial risk to the health of the claimant or any other person should be considered where the DM finds that

1. the claimant has, or is treated as having, LCW<sup>1</sup> **and**
2. no LCWRA descriptors apply<sup>2</sup> **and**
3. the claimant cannot otherwise be treated as having LCWRA<sup>3</sup>.

*1 ESA Regs, reg 19, 20, 25, 29 & 33(2) & Sch 2; 2 Reg 34 & Sch 3; 3 reg 35(1)*

### Mandatory reconsideration and appeals

15 The information in paragraphs 16 – 19 should be included in

1. a decision made following mandatory reconsideration whether or not the decision is revised **and**
2. responses to an appeal to the FtT

depending on whether the decision or appeal is about whether the claimant has LCW, or has LCWRA. This includes where a decision is revised after an appeal is received, and the claimant is found to have LCW, but not LCWRA.

### Claimant does not have LCW

16 Where a claimant is found not to have LCW, the appeal response should refer to the LCWRA provisions, but need not explain why it is considered that those provisions do

not apply. This is because it will be implicit that they do not from the decision or response on why it is considered that the claimant does not have LCW.

- 17 The appeal response should include a list of all types of WRA provided through the Work Programme in the claimant's area. There is no need to identify which is the most and least demanding.

**Note:** The guidance at paragraphs 16 – 17 does **not** apply to decisions made following mandatory reconsideration where the claimant is found not to have LCW.

**Claimant has LCW but does not have LCWRA**

- 18 Where the issue is whether the claimant has, or should be treated as having, LCWRA, the DM should explain

1. why it is considered that no LCWRA descriptors (limited to those put at issue by the claimant if identified) apply **and**
2. by reference to the list of types of WRA available in the claimant's area
  - 2.1 which is the most and least demanding WRA on the list for the particular claimant **and**
  - 2.2 which types of WRA it is considered that the claimant could be expected to undertake without substantial risk.

**Note:** See paragraphs 30 – 33 for which list to consider, and include in appeal responses.

- 19 The DM should also consider, where available, evidence of

1. any Wfls attended, or WRA undertaken, **and**
2. if any, the effect of the Wfl or WRA on the claimant's health

since the claimant was placed in the WRAG. This could be by production of the JCP action plan in appeal responses. Information about how the claimant has coped with Wfls and WRA may be relevant when assessing whether any risk to the claimant's or anyone else's health is likely, and if so, whether it is substantial.

- 20 The DM should remember that a Wfl is **not** WRA, and serves a different purpose. The Wfl acts as a gateway to WRA. However, as part of a WRA requirement, the claimant may be asked to attend an interview other than a Wfl, for example to discuss the effectiveness of a previous WRA requirement.

**Note:** See DMG 53017 for guidance on the purpose of a Wfl, and DMG [53031](#) for the meaning of WRA.

## **WHAT IS SUBSTANTIAL RISK**

21 Although any of the factors in paragraphs 28 – 29 may give rise to a risk to the claimant’s or anyone else’s health, the question is whether

1. that risk is likely **and**
2. if so, it arises as a result of the claimant’s health condition **and**
3. if so, it is substantial.

22 A risk is substantial where the harm or damage to the person’s health would be serious, and could not be prevented or mitigated. It is not minor or trivial. It may be immediate, or in the longer term. The risk of harm has to be caused by the individual claimant’s physical or mental health condition, and be triggered by being found not to have LCWRA. The DM should bear in mind that claimants may be required to take part in a Wfl, undertake WRA, and potentially have their ESA award reduced if they fail to do so without good cause.

**Note:** A person who is unable to undertake WRA, or whose award of ESA is reduced, is not automatically at risk. The nature and severity of the risk must be identified.

23 The DM should always consider whether a substantial risk could be prevented or mitigated, particularly where a risk is identified by the individual claimant. For example, in paragraph 25 **1.** and **2.**, although there could be a substantial risk of harm to health if the claimant was exposed to a cold environment, the risk could be prevented or reduced if the claimant were not required to attend in person on cold days.

24 Where there is evidence that there is a risk to health, the DM should also consider whether any reasonable adjustments could be made to accommodate any problems the claimant may have in order to avoid the risk. For example, where the claimant has problems getting about due to panic attacks, it may be possible to undertake WRA at or from home, doing things in writing, reading, on-line or by telephone. A claimant who has difficulties with face-to-face social contact could be capable of undertaking WRA by telephone, or on-line.

### **Immediate substantial risk**

25 Examples of immediate substantial risk:

1. Angina which is normally controlled could be exacerbated in the short term by cold environments.
2. Asthma which is normally controlled could be exacerbated in the short term by cold or dusty environments, where this causes chest pain and difficulty breathing which is not relieved with inhalers.
3. A claimant with hypertension which is uncontrolled despite medication may be at substantial risk of a stroke or heart attack, even if they do not satisfy any of the LCWRA descriptors.
4. Panic attacks could be triggered by anxiety in some situations, such as going to unfamiliar or crowded places, or meeting strangers.

### **Longer term substantial risk**

26 There **may** be substantial risk if it is likely that the claimant's physical or mental health condition would deteriorate in the longer term as a result of undertaking WRA. A deterioration in a medical condition might be evidenced by, for example:

1. an increase in symptoms
2. a change in medication
3. an increase in medical input
4. hospital admission
5. an increase in attendance at hospital.

27 The examples are not conclusive that there is substantial risk. The DM should consider each case on its facts. In cases of doubt, the DM should consult Medical Services.

### **Health factors**

28 In assessing the likelihood of substantial risk to health, the DM should consider

1. the nature and severity of the claimant's health condition
2. the duration of the claimant's health condition
3. whether or not the claimant's health condition has been stable
4. any previous deterioration or improvement in their health condition

5. what caused any deteriorations in the past and whether WRA is likely to engage any of these triggers
6. whether there are several conditions which may interact with each other
7. the nature and strength of any medication
8. whether any risk can be mitigated.

**Note:** This list is **not** exhaustive.

### **Other factors**

- 29 Other factors which should be taken into account when considering whether a substantial risk is likely include
1. was the claimant previously in work without incident despite their health condition?
  2. did the claimant give up work because of their health condition? If so, what was the nature of the employment? Could suitable WRA be found to ensure there is no harm to health?
  3. if a risk is identified, is it present throughout the day? Are there times of the day when WRA could be carried out without risk?
  4. does the claimant's description of their typical day indicate that they are capable of some types of WRA without risk?
  5. has the DM accepted that the claimant satisfies a descriptor, and therefore cannot undertake an activity which might be required as part of any WRA they would be required to undertake, and which might cause harm to health?

### **EVIDENCE OF WRA**

- 30 The DM should consider whether the claimant should be treated as having LCWRA using the appropriate list of WRA by area. In cases where it is determined that the claimant does not have, and cannot be treated as having, LCW, this will be the list of WRA provided through the Work Programme.
- 31 Where the claimant is found to have, or is treated as having, LCW, the list to use depends on

1. whether the claimant would in practice be required to undertake WRA (see paragraphs 39 – 40) **and**
2. when it is considered that the claimant should be referred for a subsequent WCA (see Memo DMG Memo 27/14 for details).

32 Where the circumstances in paragraphs 39 – 40 apply, that is, where the claimant would **not** be required to undertake WRA, the list of WRA provided through the Jobcentre Plus Offer should be used, irrespective of when the claimant would be referred for a subsequent WCA.

33 In cases where the claimant would be required to undertake WRA, and the period before referral for a further WCA is

1. 12 months or less, the list of WRA provided through the Work Programme **or**
2. more than 12 months, the list for Jobcentre Plus Offer

should normally be used.

**Note:** If the claimant has already been required to undertake WRA under a different programme from normal, the list for that programme should be considered, and included in the appeal response.

34 Although the lists do not include information as to when a particular type of WRA became available, the types of WRA on either list have not changed significantly since the requirement for ESA claimants to undertake WRA was introduced on 1.6.11.

35 It should be noted that the Jobcentre Plus Offer list includes

1. WRA where a referral to a provider is required **and**
2. discretionary WRA.

36 The DM should provide the FtT with examples of the most and least demanding WRA which it is considered the claimant could undertake (see paragraph 37), rather than the whole list. The response to the FtT should explain that it is not practical to produce the whole list due to size constraints.

37 The DM should then consider what types of WRA that the claimant could undertake without risk, and which may be appropriate to help them become work-ready, given any information the DM has about the claimant's work history and skills. This could be obtained from the ESA claim information, the questionnaire (form ESA50), the HCP

report where there was a face-to-face assessment, and any other information which may be available.

- 38 The DM is **not** required to consider whether the types of WRA on the list of what is available in the claimant's area, and that would be appropriate for that claimant, could be provided on the date of the decision, for example due to operational delivery issues. Nor is this necessarily the same as the WRA which the claimant might eventually be required to undertake.

### **WRA not required or appropriate**

- 39 Not all claimants who are placed in the WRAG are required to take part in a Wf1, or to undertake WRA<sup>2</sup> – see DMG [53014](#) and [53036](#) for further details. For example, a claimant who is entitled to CA or CP cannot be required to undertake WRA<sup>3</sup>.

*1 ESA Regs, reg 54(2); 2 ESA (WRA) Regs, reg 3(2); 3 reg 3(2)(c) & (d)*

- 40 There may be claimants who could be required to undertake WRA, but for whom it would not be appropriate. For example, a claimant who has a contract of employment, and who is absent from work while recovering from medical treatment, may not be required to attend a Wf1, or to undertake WRA<sup>2</sup>. This is because the only thing preventing a return to work is the need to recover from the treatment.

*1 ESA Regs, reg 60; 2 ESA (WRA) Regs, reg 6*

- 41 The DM should disregard the fact that the individual claimant may be exempt from the requirement to undertake WRA, or would not in practice be required to undertake WRA, when considering whether there is a substantial risk if the claimant were found not to have LCWRA. The test is a hypothetical test, and should still be considered accordingly by reference to the lists of what WRA is available.

## **EXAMPLES**

### **Example 1**

Alison suffers from chronic fatigue syndrome and anxiety, and is found to have LCW as she is unable to repeatedly mobilise 200 metres due to exhaustion, and needs to be accompanied to unfamiliar places due to anxiety and panic attacks. The HCP recommends a further WCA referral in 18 months, as Alison's condition is improving slowly. Alison spends four or more hours a day using her PC, including communicating with friends and family. She works for an hour or so a week editing a magazine on-line. She works one day a week as a volunteer at the Citizen's Advice

Bureau, her family taking her there and back. Alison states that she needs the next day to recover from the extreme exhaustion this causes.

In the area where Alison lives, the least demanding WRA for her would be courses expanding her IT skills at home via her PC, and the most demanding would be a requirement to attend infrequent short sessions at her local Jobcentre, scheduled around the availability designed to explore job opportunities which would enable her to work from home at her own pace. The DM determines that Alison's health would not be at substantial risk.

### **Example 2**

Robin gave up work as a call centre operator due to stress and anxiety, and became depressed with social phobia and agoraphobia. He spent several months in hospital as a voluntary patient after attempting suicide. He had been unable to contemplate attending cognitive behavioural therapy so far, and never answered the door or phone. Medication had to be controlled by his mother in order to prevent further suicide attempts. He attended the medical examination centre with his mother, and the HCP recorded that he was visibly distressed throughout the examination; most questions had to be answered by his mother.

The DM determines that Robin has LCW as he is unable to get to familiar places unaccompanied, and is too distressed to engage in social contact with unfamiliar people, either face-to-face or by telephone. The DM also determines that any WRA would be likely to exacerbate Robin's mental health state, and places him in the support group.

### **Example 3**

Gavin has been suffering from frequent unexplained blackouts without warning. His GP states that he should avoid dangerous activity such as driving, using machinery or working at heights, due to the risk of injury. He is treated as having LCW, with a recommendation of re-referral within 12 months. The DM determines that, for the purposes of WRA, although there is a risk of injury from the blackouts, the risk can be mitigated by ensuring that a third party is present to deal with any potential incidents. WRA which does not involve any potentially hazardous activity as identified by Gavin's GP could be undertaken.

Gavin left school with no academic qualifications, and was previously employed as a fork-lift truck operator. In the area where Gavin lives, the most and least demanding types of WRA in the list include courses designed to explore the potential for changing careers including self-employment, as well as sessions on preparing for job search,

and interviewing skills. Also available are sessions on IT skills and safety in the workplace. The DM determines that Gavin could be required to undertake all of these without any risk to his or anyone else's health.

#### **Example 4**

Tahla has diabetic neuropathy and also suffers from anxiety. His consultant neurologist provides a report stating that he has been advised to avoid walking long distances and spending more than a few minutes outside when it is cold because of the risk of damage to the feet. Damage can take the form of ulceration of the skin, arthritis and deformity of the joints. The damage is painless because of the nerve damage to the feet so tends to be noticed at a late stage when it is severe. Poor healing is also a feature of this condition. The risk is severe damage to the foot resulting in amputation and loss of mobility. Tahla is very anxious about going out and using public transport because of the risk of damage, and is always taken everywhere by his wife. He is found to have LCW scoring 6 points for mobilising and 9 points for getting about.

The DM determines that, although there is a potential for substantial risk to Tahla's health, it can be prevented by not requiring him to undertake WRA outside the home on cold days, and ensuring anywhere he has to attend has disabled parking near the entrance. The most demanding types of WRA in Tahla's area includes weekly health and well-being workshops designed to help people learn how to manage their health condition in the workplace, as well as sessions about building confidence and motivation, and the DM considers that Tahla could undertake these without risk to his health.

#### **Example 5**

Michael suffers from mental health problems including depression, anxiety and agoraphobia. He has panic attacks if he has to go anywhere on his own, or meet people he doesn't know. Michael has fortnightly counselling sessions with a voluntary organisation at a nearby drop-in centre, but progress after 6 months has been slow. Following application of the WCA, the DM determines that Michael has LCW due to difficulties with getting about (Activity 15(b), 9 points) and coping with social engagement (Activity 16(c), 6 points). The DM determines that no LCWRA descriptors apply. The HCP recommends a further referral in 18 months.

Evidence from the voluntary organisation is that Michael has problems coping financially, and is in arrears with rent and utilities. His fears about leaving his home began when he was assaulted by someone from whom he had borrowed money. He lives alone and has no support from family or friends. Although Michael could not

undertake the most demanding of the WRA offered by the local Jobcentre, as this would require attendance at the Jobcentre, the least demanding WRA on the list includes debt counselling and advice on benefits, which could be carried out by telephone to avoid any risk to his mental health. The DM determines that Michael cannot be treated as having LCWRA.

### **Example 6**

Harriet is injured while on holiday, and following surgery continues to have problems with mobilising as well as sitting and standing. Her condition is expected to improve within 3 months. She had previously had a number of temporary jobs as an office clerical assistant. The DM determines that Harriet has LCW, scoring 9 points for Sch 2 Activity 1(c) and 6 points for Activity 2(c), and that no LCWRA descriptors apply. The DM considers that Harriet should, without risk to her health, be capable of attending a wide range of WRA offered by the Work Programme provider for her area. The most demanding would be attendance at a series of short workshops designed to help her with CV preparation, interview skills and confidence building, and the least demanding would be attending an awareness session to discuss future participation and options.

### **ANNOTATIONS**

Please annotate the number of this memo (Memo DMG 17/15) against the following DMG paragraphs:

DMG 42366, 42394.

### **CONTACTS**

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 1S25, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in [Memo DMG 03/13](#) - Obtaining legal advice and guidance on the Law.