

## ESA: FURTHER EVIDENCE OF LCW

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### INTRODUCTION

- 1 This memo gives details of a change to the guidance to HCPs about obtaining further evidence (“FE”) during the WCA process.
- 2 The change follows decisions made by the UT on a JR about whether the current WCA process discriminates against ESA claimants with a mental health condition, and if so whether there is a remedy to prevent discrimination.

### BACKGROUND

- 3 Two claimants argued that the WCA process discriminated against claimants with impaired mental, cognitive and intellectual functions, referred to as people with mental health problems (“MHPs”), because of the failure by the Secretary of State to obtain FE in every case involving a claimant with MHPs. It was contended that this breached the Secretary of State’s duty to make reasonable adjustments to avoid claimants being placed at a substantial disadvantage<sup>1</sup>.

*1 Equality Act 2010, s 20(3)*

- 4 In decisions given on 22.5.13 and 9.3.15<sup>1</sup>, a three Judge panel of the UT (acting as a court of JR) held that the DWP’s practice relating to FE led to a significant number of claimants with MHPs

1. being placed at a substantial disadvantage **and/or**

2. suffering an unreasonably adverse experience.

*1 [2013] UKUT 259 & 260 (AAC); [2015] UKUT 107 (AAC); [2016] AACR 11*

- 5 The UT did not determine whether the Secretary of State should make reasonable adjustments, because the individual claimants had not shown that they as individuals had been placed at a disadvantage. The claims for JR were therefore dismissed.

## **FURTHER EVIDENCE**

- 6 The current WCA process requires the HCP to consider whether FE should be obtained at what is known as the filework stage, where the HCP considers the evidence held, such as the doctor's statement and form ESA50 if completed. FE may be obtained at this stage where
    1. it is likely to confirm the evidence held and enable the HCP to advise without the need for a face-to-face assessment that the claimant
      - 1.1 has LCW and LCWRA **or**
      - 1.2 can be treated as having LCW **or**
    2. the claimant has an appointee **or**
    3. there is evidence of a previous suicide attempt, suicidal ideation or self-harm **or**
    4. the claimant was previously found to have LCW after a face-to-face assessment, and FE may confirm whether the claimant's condition has changed.
  - 7 During the hearings, the UT heard arguments about the form of a planned pilot to test a change to the FE policy, as part of a response to recommendations made in the third independent [review](#) of the WCA process<sup>1</sup>.
- 1 WR Act 07, s 10*
- 8 Following a small scale test which trialled changes to the process for requesting FE during the WCA process, the guidance to HCPs on obtaining FE has been expanded.
  - 9 The additional requirement is for HCPs to consider requesting FE at filework when it would be helpful to the assessing HCP or the DM. For further details, see UTS 3/17 attached in the Appendix to this memo.

**Note:** The requirement to consider whether to obtain FE is not limited to claimants with a MHP.

## **ANNOTATIONS**

Please annotate the number of this memo (Memo DMG 13/17) against the following DMG paragraphs:

DMG 42160 heading, 42190 heading, 42270 heading.

## **CONTACTS**

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, GS36, 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.

**DMA Leeds: May 2017**

## Update to Standard – 03/2017

<b>Subject:</b>	<b>Expanding the ability to gather further evidence at filework</b>
<b>Effective from:</b>	<b>15<sup>th</sup> May 2017</b>
<b>Audience:</b>	<b>All ESA/UC trained Healthcare Professionals</b>
<b>Guides affected:</b>	<b>Revised WCA Handbook</b> <b>ESA Filework Guidelines</b> <b>Registered Nurse Revised WCA New Entrant Course</b> <b>Registered Medical Practitioner Revised WCA New Entrant Course</b> <b>Registered Physiotherapist Revised WCA New Entrant Course</b> <b>Registered Occupational Therapist Revised WCA New Entrant Course</b>

**This Update will be incorporated into the next version of the Standards on review of the procedures.**

### **Introduction:**

Current indications for requesting Further Medical Evidence (FME) at the filework stage remain in place. This guidance change requires HCPs to consider requesting FME in additional circumstances.

The change is relevant to filework practitioners who will request FME and also to those carrying out F2F assessments who will utilise this additional FME in formulating their advice.

## Background:

The Judicial Review in the cases of MM & DM vs. SSWP challenged the process by which the Department seeks further medical evidence for claimants with a **mental health condition** as part of the Work Capability Assessment (WCA), on the basis that the existing process resulted in substantial disadvantage to or an adverse experience for such claimants, and that DWP had failed to make a reasonable adjustment to the process. The final judgment dismissed the case against DWP on the basis that the individual claimants did not show that the failure to make reasonable adjustments had resulted in personal disadvantage.

However the judgment stated that the DWP's existing process might result in claimants with a mental health condition, as a class, **suffering a substantial disadvantage and/or an unreasonably adverse experience** (Equality Act 2010).

As a result of this judgement, in addition to the current guidance, HCPs should consider requesting FME where it may inform the assessment.

## Action:

**HCPs should consider the following indications for FME when carrying out filework. (Note the first 4 are current guidance)**

- Where there is a strong probability that this will confirm the level of claimed disability to allow advice to be given on one of the Limited Capability for Work and Work-Related activity (LCWRA) criteria or 'Treat as LCW' criteria
- Where the claimant is noted to have an appointee
- Where there is evidence of a previous suicide attempt, suicidal ideation or self-harm expressed in the questionnaire, previous reports or any documentation relating to the case
- Where a claimant has previously been found to have limited capability for work at a face to face assessment, and evidence is required to confirm the current level of functional restriction, for example to determine whether this has remained the same or whether it has deteriorated
- **Where the HCP considers that further information would be helpful to the assessing HCP and Decision Maker. This is FME to inform the assessment.**

In **ALL** cases where FME is requested the reason must be clearly justified and documented.

Where the HCPs opinion is that FME should not be sought it is **NOT** mandatory to

provide justification.

## Scope

Whilst the cases involved in the judicial review related to mental health there are physical conditions that may benefit from this approach. Therefore FME to inform the assessment is not limited to mental health diagnoses only.

**There MUST be a reasonable expectation that the FME would assist the assessing HCP and subsequently the Decision Maker.** It is not appropriate to request FME for cases where there is no reasonable expectation of this.

All subtypes of FME remain available – 113, FRR2 and FRR3. Careful consideration should be given as to the most appropriate source.

## **Summary**

At the filework stage additionally consider whether FME is reasonably likely to inform the assessment or assist the DM. Your justification should be recorded where FME is sought.