

ESA AND UC: RESPONSE TO THE FIRST-TIER TRIBUNAL

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INTRODUCTION AND BACKGROUND

1 This memo provides guidance on the Secretary of State's responsibilities in preparing a response to the FtT where an award of ESA or UC has been superseded following a second or subsequent WCA.

2 This guidance is issued as a result of a decision of a three Judge panel of the UT.

1 [2016] AACR 24 (FN v SSWP (ESA) [2015] UKUT 670 (AAC)

3 In reaching its decision the UT considered a number of previous UT decisions that have been made in this area of law¹.

1 ST v SSWP (ESA) [2012] UKUT 469 (AAC); AM v SS [2013] UKUT 458 (AAC); JC v Department for Social Development (IB) [2011] NICom 177; [2014] AACR 30

4 The UT endorsed the previous case law and decided that regulations¹ authorise a supersession decision following receipt of medical evidence from a HCP. There is no requirement to identify a change of circumstances. However, the decision, whether made by the DM or the FtT should be made after an assessment of all relevant evidence. This will include making decisions on whether the substantive tests of LCW were satisfied.

1 UC,PIP,JSA,ESA(D&A)Regs, reg 26(1)

THE SECRETARY OF STATE'S RESPONSIBILITIES

- 5 In a previous decision of the UT¹ the Judge concluded that the Secretary of State is obliged to provide all **relevant** information in relation to the decision and that the decision making chronology and history is clear. The Judge drew reference from rule 24(4)(b) of the Tribunal Procedure Rules 2008² where the Secretary of State is obliged to provide the FtT with all relevant documents in his possession. The three-Judge panel agreed with that approach.

1 ST v SSWP (ESA) [2012] UKUT 469 (AAC) 2 The Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008

- 6 For example, if a claimant appeals against a supersession decision to disallow ESA following the application of the WCA but they had been previously awarded ESA by the FtT, which was never appealed, the Secretary of State should explicitly document this in the decision making history. It will then be clear that the FtT replaced a decision of the DM with its own decision and so there will be no relevant findings of fact or reasons for the FtT's decision.
- 7 From this sequence of events the FtT will be aware that only the decision notice will be available and that the value of that evidence is minimal. This will assist the FtT in deciding whether an adjournment is necessary to call for other evidence.
- 8 If the claimant asserts that their medical condition has not changed since it was previously determined that they had LCW and where there has been no relevant supervening event such as a change in the law or successful medical operation, the Secretary of State must provide the FtT with previous medical reports concerning the claimant. The Secretary of State should say why the contents of the new ESA 85 or UC 85 as appropriate, whether accepted with or in preference to other relevant evidence, establish that the claimant does not have LCW.
- 9 If medical reports are no longer in the DM's possession, the FtT should be made aware of this. It should be clear from the decision making history that they did exist together with the decision(s) made subsequent to them. The emphasis here is on the Secretary of State's duty but is limited to documents **relevant** to the decision under appeal.
- 10 The three Judge panel held that the requirements imposed on the Secretary of State by previous case law¹ were binding and it was for the Secretary of State to ensure compliance with them.

- 11 The duties and obligations that apply to the Secretary of State also apply to appellants and representatives. Representatives have to be proactive in alerting FtTs to evidence which it is submitted is relevant to the issues arising in the appeal and where it is possible to do so to seek that evidence on behalf of appellants.

THE FIRST-TIER TRIBUNAL'S DUTY

- 12 Where the Secretary of State does not fulfil the obligations imposed by case law¹, the three-Judge panel held that the FtT is entitled to call on whatever evidence it considers **relevant** to the proper determination of the issues arising in the appeal. They held that it was not necessary, **as a matter of law**, for the FtT to have considered the evidence of a claimant's previous assessment for LCW in every case. The case law¹ only applies to the duties and responsibilities of the Secretary of State in preparing a response in an ESA or UC supersession appeal. There is no suggestion that the FtT would always be found to have erred in law where the Secretary of State fails to provide documentation following an assertion that the claimant's medical condition was unchanged.

ANNOTATIONS

Please annotate the number of this memo (22/17) against ADM paragraph A5333

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 23/16](#) - Obtaining legal advice and guidance on the Law.

DMA Leeds: October 2017

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