



ESA: MANDATORY RECONSIDERATION AND PENDING APPEAL AWARDS

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INTRODUCTION

1. This memo gives guidance following a recent judgment by the High Court on an application for judicial review (“JR”)¹. The issue in the proceedings was whether mandatory reconsideration (MR)² is lawful insofar as it applies where the benefit claimed is ESA. The Judge issued a declaration that the requirement to have a MR before an appeal can be made is unlawful for ESA claimants who would be eligible for a payment pending appeal.

1 [2020] EWHC 1999 (Admin), 2 SS CS (D&A) Regs, reg 3ZA

BACKGROUND

2. On 18.10.18 the DM decided that, following application of the WCA, the claimant did not have LCW and was no longer entitled to ESA. The claimant applied for MR which was received on 1.11.18. The effect of MR is that a right of appeal does not arise unless the claimant first applies to the Secretary of State to revise her decision. No decision was made on the application until 20.3.19. This meant that



for the duration of the revision process, the claimant could not be treated as having LCW so that ESA could be paid pending the LCW appeal.

3. The claimant did not lodge an appeal to the FtT, and instead on 10.6.19 brought a claim for JR. He contended in the proceedings that the requirement for a MR is an unlawful restriction on his right of access to a court.
4. The Judge accepted that MR is an impediment or hindrance to the right of access to a court and the issue was whether it is proportionate.
5. The Judge held that
 1. MR pursues a legitimate objective, namely, improving the effectiveness of the administrative decision making by the Secretary of State, so as to make more efficient use of the resources of the FtT
 2. The extent to which the process of MR amounts to interference with the claimant's right of access is small as it will comprise no more than a relatively short period of delay
 3. There will be cases where MR works to the advantage of the claimant because when a decision is revised in the claimant's favour, payment of the benefit concerned will commence or resume much sooner than it would had it been necessary to pursue the matter to the FtT.
6. However, for ESA claimants who, were an appeal to be in progress would be treated as having LCW, the requirement is disproportionate having regard to the combined effect of
 1. The period of time the benefits claimant will need to wait before the right of appeal arises
 2. The absence of any payment of ESA during that period that would arise once an appeal has been started.
7. The Judge concluded that the requirement for MR is a disproportionate interference with the right of access to court, so far as it applies to claimants to ESA who, once an appeal is initiated, meet the conditions for payment pending appeal.



ESA AWARDS PENDING LCW APPEAL

8. An ESA claimant

1. who lodges an appeal against a decision which includes a determination that they do not have LCW following application of the WCA **and**

2. for claims made on or after 30.3.15, for whom it is the first determination

2.1 that they do not have LCW **or**

2.2 since the previous determination that they did have LCW **and**

3. provides medical evidence

can be treated as having LCW and paid ESA pending the outcome of the appeal¹ (for ESA (Cont) only, subject to the 365 day time limit² (see example 1 below)). See DMG 42790 - 42871 for detailed guidance.

Note 1: This does **not** apply where an ESA claimant is treated as not having LCW for failure to return the questionnaire or failure to attend or submit to a medical examination.

Note 2: DMs are reminded that if the ESA claimant is awarded another benefit such as new style JSA or UC they cannot be awarded ESA pending the outcome of any appeal.

1 ESA Regs, reg 30(3), (5) & (6); SS (Med Ev) Regs; 2 WR Act 07, s 1A

TIME FOR APPEALING WHERE ESA AWARDED PENDING AN APPEAL

9. Where the conditions are potentially met for an award of ESA pending a LCW appeal, MR is not required. The claimant should be notified that

1. they have one month after the date they were sent notice of the decision being challenged in which to appeal¹ **or**

2. if a written statement of reasons for the decision was requested within that one month period, the time within which to appeal is 14 days after the later of

2.1 the end of that month **or**

2.2 the date on which the written statement of reasons was provided².

1 TP (FrT) (SEC) Rules, rule 22(2)(d)(ii), Sch (1), para 5(a), 2 para 5(b)(i) & (ii)



APPLICATION FOR REVISION RECEIVED

10. The effect of the judgment is that the MR process is no longer mandatory where an ESA claimant would be eligible for payment pending appeal. However, a claimant may still make an application for revision of the decision which is being challenged. If an application for revision is received from the claimant within the application period (See DMG 03063 and 03070 – 03079), the DM should re-examine the facts of the case, the law used and any further evidence that may be available. The claimant should be notified of the decision. If the application is unsuccessful, the time for appealing to a FtT is one month after the date on which notice that the decision is not revised is sent to the claimant¹.

1 TP (FtT) (SEC) Rules, rule 22(2)(d)(ii), Sch (1), para 5(c)(ii)

Note: If the claimant appeals against the decision in accordance with paragraph 9 above, normal rules apply in respect of the power to revise and lapse the appeal¹ (See DMG 06100 – 06179). This applies in respect of a claimant's application for revision and where the Secretary of State acts on her own initiative.

1 SS CS (D&A) Regs, reg 3(4A)

TIME LIMIT FOR APPEALING WHERE ESA NOT AWARDED PENDING AN APPEAL

11. Where the claimant has no potential entitlement to a payment pending appeal, MR is required. The claimant should be notified that they have one month after the date they were sent notice of the result of the MR in which to appeal¹.

1 TP (FtT) (SEC) Rules, rule 22(2)(d)(i)

EXAMPLES

Example 1

Chidi has been entitled to ESA(Cont) since 23.8.19. It is his first claim for ESA. He is referred for the WCA, but this is delayed after a number of appointments were cancelled. Chidi's award of ESA ended on 22.8.20 due to the 365 day time limit, although he remained entitled to NI Credits as he continued to provide medical evidence.

Following assessment the DM determines on 23.9.20 that Chidi does not have LCW, and terminates the award of NI Credits. As Chidi would not be entitled to any



further award of ESA, he will need to apply for mandatory reconsideration if he wishes to dispute the ESA decision.

Example 2

Jason's entitlement to ESA ended on 4.12.19 after the DM determined that he did not have LCW following application of the WCA. Jason made a further claim to ESA from 26.2.20 after declaring a new health condition, and he is referred for the WCA again. The DM determines that Jason does not have LCW despite the new health condition. As this is the second determination that Jason does not have LCW, he would not be entitled to an award of ESA pending the outcome of any appeal, he will need to apply for mandatory reconsideration if he wishes to dispute the ESA decision.

Example 3

Tahani has been entitled to ESA since 11.2.20. It is her first claim for ESA, and she was previously entitled to IS including the SDP. She is referred for the WCA, and following assessment the DM determines on 23.9.20 that Tahani does not have LCW. Tahani can lodge an appeal against the ESA decision without applying for mandatory reconsideration, as she is eligible for payment of ESA pending the outcome of the appeal.

ANNOTATIONS

Please annotate the number of this memo (Memo DMG 19/20) against the following DMG paragraphs 03012, 06006, 42791

CONTACTS

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 3E zone E, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in – Memo [4/19](#) Requesting case guidance from DMA Leeds for all benefits.

DMA Leeds: September 2020

The content of the examples in this document (including use of imagery) is for illustrative purposes only