



## **ESA: FAILURE TO ATTEND**

<b>Contents</b>	<b>Paragraphs</b>
Introduction	1
The UT decision	
Background	2 - 4
Reasons for decision	5
Application of UT decision	6 - 7
DM decision awaited	8
DM decision made before 21.2.20	9 - 11
DM decision made on or after 21.2.20	12 - 13
Annotations	
Contacts	

### **INTRODUCTION**

1. This memo gives guidance following a recent UT decision<sup>1</sup> about whether an ESA claimant can be treated as not having LCW where they fail without good cause to attend for or submit to medical examination<sup>2</sup>.

**Note:** See Chapter U2 (ESA LCW and LCWRA) for detailed guidance on treating a claimant as not having LCW.

*1 PPE v SSWP [2020] UKUT 59 (AAC); 2 ESA Regs, reg 23(2)*

### **THE UT DECISION**

#### **Background**

2. The claimant had been entitled to ESA since 21.7.11, and was referred for a further WCA. She was required to attend for medical examination on 27.9.17, but on the day her daughter phoned to say that the claimant was too ill to attend. The explanation was accepted and a further appointment arranged for 18.10.17, and



again on the day her daughter phoned to say that she could not attend due to physical health conditions.

3. The claimant was asked to explain why she did not attend, but her reply was not received until after the DM had determined that the claimant was treated as not having LCW, and therefore not entitled to ESA from 19.10.17, because she had failed without good cause to attend for medical examination. The decision of 1.11.17 was reconsidered but not revised on 13.11.17 after the claimant's reply was received. The decision of 1.11.17 was upheld by the FtT hearing the appeal on 22.3.18.
4. On a further appeal to the UT, the UT Judge allowed the appeal, setting aside the FtT decision of 22.3.18 as they had erred in law. The Judge re-made the FtT decision, and set aside the DM's decision of 1.11.17, on the basis that there were no grounds to supersede the decision awarding ESA from 21.7.11. This was because the appointment letters did not create a legal obligation to attend for medical examination, and therefore the Secretary of State had no power to treat a claimant as not having LCW and end ESA entitlement.

### **Reasons for decision**

5. The UT Judge held that
  1. a requirement to attend a medical examination imposes a legal obligation on the claimant
  2. the Secretary of State has a duty to set out the terms of the legal obligation in clear and unambiguous terms
  3. no legal obligation is imposed if the Secretary of State fails to make it clear that the claimant must attend, or merely invites, advises or encourages the claimant to attend
  4. the FtT erred in law because it did not adjourn to establish whether such a legal obligation had been imposed
  5. the appointment letter did not impose a legal obligation, as it merely invited the claimant to attend, and the ESA claim form notes and leaflets also failed to do so.

### **APPLICATION OF UT DECISION**

6. The reasons for the UT decision also apply where a claimant fails to return the ESA50 questionnaire<sup>1</sup>. This is because, in the same way as for the requirement to



attend for and submit to a medical examination, the previous letters, notes and leaflets did not create a legal obligation to return the questionnaire.

*1 ESA Regs, reg 18*

7. The Department has reviewed all forms, letters, notes and leaflets to ensure that for the current WCA process claimants are fully aware of their legal obligations, allowing good cause to be considered where necessary.

### **DM decision awaited**

8. Where

1. a case is referred to a DM for consideration of good cause **and**

2. letters as in paragraph 6 were issued

a claimant's entitlement to ESA **cannot** be terminated on the basis that they failed without good cause to return the questionnaire or to attend for or submit to medical examination. The claimant should continue on the WCA process as normal.

### **DM decision made before 21.2.20**

9. The UT decision is a relevant determination<sup>1</sup>. This means that any DM decision made before the date of the UT decision, 21.2.20, which treats a claimant as not having LCW for failure without good cause to

1. return the questionnaire **or**

2. attend for or submit to medical examination.

is **not** erroneous in law before 21.2.20<sup>2</sup>.

**Note:** See A4250 – A4252 for further guidance on relevant determinations.

*1 SS Act 98, s 27(1)(a); 2 s 27(3)*

### **Mandatory reconsideration**

10. Where the claimant has applied for mandatory reconsideration of a decision made as in paragraph 9, the decision cannot be revised. Instead, the DM should supersede for error of law to remove the disallowance effective from the date of the relevant determination<sup>1</sup> - see A4252.

*1 SS CS (D&A) Regs, reg 6(2)(b) & 7(6)*



### **Appeal lodged**

11. Where the claimant has lodged an appeal against a decision made as in paragraph 9, the DM should

1. include a copy of the appropriate letter sent to the claimant, and evidence that it was sent **and**
2. explain that the decision cannot be revised due to the restriction of arrears in the law<sup>1</sup> **and**
3. invite the FtT to allow the appeal and set aside the DM's decision in the light of the UT decision.

*1 SS Act 98, s 27(3)*

### **DM decision made on or after 21.2.20**

#### **Mandatory reconsideration**

12. Where the claimant has applied for mandatory reconsideration of a decision made on or after 21.2.20 as in paragraph 9, the DM should revise<sup>1</sup> the decision on the basis that the claimant was not under a legal obligation to return the questionnaire or to attend for or submit to medical examination.

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

### **Appeal lodged**

13. Where the claimant has lodged an appeal against a decision made as in paragraph 9, the DM should revise<sup>1</sup> the decision on the basis that the claimant was not under a legal obligation to return the questionnaire or attend for or submit to medical examination. The FtT should be notified that the appeal is lapsed<sup>2</sup>.

*1 SS CS (D&A) Regs, reg 3(4A); 2 SS Act 98, s 9(8); SS CS (D&A) Regs, reg 30(2)*

### **ANNOTATIONS**

Please annotate the number of this memo (Memo DMG mg4/20) against the following DMG paragraphs:

42450 main heading, 42496, 42500



## 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 [7/19](#) 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**