

**Annex 1**

<p><b>ESA Directorate Strategy, Policy &amp; Analysis Group</b></p>	<p><b>Explanatory Memorandum for the Social Security Advisory Committee</b></p>	
	<p><b>The Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendment) Regulations 2015</b></p>	
<p><b>For the Social Security Advisory Committee 14 November 2015</b></p>	<p><b>DWP</b> Department for Work and Pensions</p>	

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# 1. Introduction

1.1 This Explanatory Memorandum covers amendments to:

- regulation 30 of the Employment and Support Allowance Regulations 2008 (SI 2008/794); and
- regulation 26 of the Employment and Support Allowance Regulations 2013 (SI 2013/379).

The amendments have the same effect for both sets of Regulations. [The differences between the Regulations are that the 2008 Regulations include both contributory and income-related Employment and Support Allowance (ESA) but the 2013 Regulations do not, reflecting the replacement of income-related ESA by Universal Credit.]

1.2 Further changes (to be confirmed) to both sets of ESA Regulations will be required, along with consequential amendments to other regulations including:

- the Claims and Payments Regulations 1987 (SI 1987/1968),
- the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380), and
- the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No.2) Regulations 2010..

1.3 The original Equality Assessment considered the implications of the proposal to withdraw the 6 month time limit from claimants who, following a determination that they do not have limited capability for work (LCW), reapply for ESA but fail to produce any evidence that their condition has substantially worsened or that they have developed a new condition.

1.4 This Equality Assessment is an updated version to consider the implications of the additional proposal to remove payments pending appeal from this same group of claimants. It is considered that the effects on claimants who will no longer receive ESA after they have appealed will be much the same as for claimants who, under the original proposal, will not be entitled to ESA following a reclaim until a fresh determination has been made as to whether or not they have LCW. Jobseeker's Allowance (JSA) will be available for some to provide financial support and claimants will particularly benefit from being closer to the labour market.

## 2. Commencement and application of the proposed changes

2.1 The proposed changes are intended to come into force on 30 March 2015. They will apply to all new claims for Employment and Support Allowance (ESA) made from the commencement date.

### 3. Explanation, purpose and effect of the proposed changes

3.1 Under the current system, a determination, made following the application of a Work Capability Assessment (WCA), that a claimant does not have limited capability for work (LCW) is valid for six months. Where a new claim is made within this period, supported by a fit note, claimants cannot be treated as having LCW until a fresh determination has been made as to whether or not they have LCW, unless their condition has substantially worsened or a new condition has developed. In the circumstances where the Department does not make an immediate decision on LCW because further evidence is needed, the claimant is referred for a new WCA, and they are not paid ESA in the interim.

3.2 However, where a new claim is made more than six months after the last fit for work decision then, subject to the other qualifying conditions, the claimant is treated as having LCW and ESA is awarded pending a fresh WCA, even where the claimant provides no evidence to suggest that their condition has substantially changed. One unwanted effect of this policy is that even where a First-tier Tribunal (FTT) has upheld a fit for work decision, if the appeal process has taken longer than six months, a claimant can immediately make a new (repeat) claim for ESA on the basis of exactly the same condition, and will be entitled to receive ESA at the assessment phase rate pending a new WCA. The whole process then begins again and if they are once more found fit for work they can, after mandatory reconsideration, lodge an appeal and become entitled to a further award of ESA pending the outcome of the appeal. This looping around the system is not only bad for the claimant who is likely to get little or no support to return to work but also imposes a costly administrative burden on DWP.

3.3 Under these proposals, it is intended that claimants will no longer be treated as having LCW if they were found 'fit for work' following their most recent WCA regardless of the period of time which has since elapsed unless they can demonstrate that there has been a significant worsening in their health condition or that a new health condition has developed. Since entitlement to ESA depends on the claimant having, or been treated as having, LCW, this change will mean that claimants in these circumstances will (unless they can demonstrate that there has been a significant worsening in their health condition or that a new health condition has developed) not be awarded ESA pending a fresh WCA. This change applies equally to those who are not treated as fit for work for other reasons such as failing to attend their medical assessment. This should stop people looping around the ESA system instead of claiming JSA and receiving the help and support they need to return to work. It would also bring the conditionality arrangements for such claimants broadly into line with those for Universal Credit.<sup>1</sup>

3.4 It is also intended that, where the repeat claim results in a fit for work finding and, after mandatory reconsideration, the claimant lodges an appeal, they should not become entitled to receive ESA pending the outcome of the appeal. For these claimants, this serves to align ESA with what happens for all other social security benefits where if a claimant is found not to be entitled, no benefit is paid whilst awaiting the outcome of the appeal. We believe that is reasonable because the claimant in their previous claim will

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<sup>1</sup> In Universal Credit, both before and after the WCA determination, a claimant who does not have, or is not treated as having, LCW is subject to the full conditionality regime, although account is taken of the claimant's health in doing so.

have had the opportunity to appeal to a tribunal if they disagreed with the decision. Claimants will instead be signposted to JSA as it is the appropriate benefit for someone who has been found fit for work. JSA provides claimants with personalised support to return to work taking into account their health condition or disability. It is acknowledged that not all ESA claimants will be eligible for JSA because they may not meet the conditions of entitlement.

3.5 We intend to amend the guidance issued to DWP operational staff and Decision Makers, so that it is clear what evidence should be sought from claimants who make a repeat claim with the same condition as their previous ESA claim. This should help to ensure that Decision Makers will have the evidence they need to determine whether the claimant meets the requirements to re-qualify for ESA. We would consider each case on its merits and there would not be an automatic assumption that benefit should be refused without any investigation of the facts, which might also include a referral for further advice from a health care professional, or arranging for a further WCA. In addition to that, claimants will have the normal right to a mandatory reconsideration of the decision and ultimately an appeal to a First-tier Tribunal if they continue to dispute the decision.

3.6 Analysis indicates that around 230,000 of the 700,000 new ESA claims made in 2013 were repeat claims, and of these 30-40,000 - around 15% - are estimated to make a repeat claim using the same broad health condition as at the previous WCA determination.

3.7 To summarise this change is expected to:

- discourage claimants looping around the system going from ESA to JSA and back to ESA with the same health condition;
- prevent payment of ESA for this *particular group of claimants* until a further WCA has been carried out and a fresh determination made as to whether they now have LCW
- prevent payment of ESA for this *particular group of claimants* in the period between the date of an appeal and the resolution of that appeal, if they are found fit for work and, after mandatory reconsideration, appeal;
- provide consistent support to help claimants (who are fit-for-work but may still have a health condition) return to work; and
- improve overall efficiency whilst not denying anyone the appropriate benefit, and broadly align conditionality arrangements with Universal Credit where the person claims JSA.

## 4. Impacts of the proposed changes

4.1 To meet the requirements of the Equality Act 2010, the Department for Work and Pensions has carried out an Equality Analysis on this measure and has updated it further to consider and include the implications of removing payments pending appeal from this group. Such an assessment considers the potential impact of the proposed policies in terms of the protected characteristics (disability, ethnicity and gender), and the additional protected characteristics (age, gender reassignment, sexual orientation, religion or belief, marriage and civil partnership, and pregnancy and maternity) and helps to ensure that the Department has due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations when developing strategies policies and services.

4.2 In respect of the proposed change, the analysis (**Annex 3**) identified that there is an effect on disabled people who would otherwise have reclaimed after 6 months of an adverse decision, been treated as having LCW (upon production of medical evidence) and become entitled to ESA. However, in view of the extensive safeguards in place to ensure that decisions relating to LCW are correctly made, we believe that this change is a proportionate means of meeting the legitimate aim of ensuring that sick and disabled people found fit for work can get access to the support earlier than if they reclaimed ESA, to help them return to work thereby advancing equality of opportunity.

4.3 Mitigation for this adverse impact includes the extensive safeguards in place to ensure that decisions on entitlement to ESA following a WCA are correctly made, and support and alternative benefits are available for claimants as outlined below.

4.4 In recognition of the vulnerability of claimants with mental health conditions the WCA includes activities related to mental, cognitive and intellectual function. These include coping with social situations and dealing with other people. In addition special consideration is given to claimants with mental health conditions throughout the WCA process. For example, people who claim ESA are asked to complete a questionnaire (ESA50) as part of the claim process. The ESA50 was designed with input from technical working groups including Mencap and the National Autistic Society, to ensure a properly structured series of questions to guide a claimant to provide a full explanation of any mental health issues. However, if someone with a mental health condition does not return their ESA50 within the required 4 week period, their case is still considered by a health care professional, instead of being returned to DWP for a decision on whether benefit entitlement can continue.

4.5 The healthcare professionals carrying out the assessments are trained in disability assessment medicine in order to assess the capability of an individual to engage in work. They are given specific training in assessing individuals with mental health conditions and receive continuing professional education in order to remain up to speed with developments in the field of disability medicine.

4.6 DWP is committed to ensuring that the WCA accurately assesses the capability of people with conditions affecting mental function and the Department has made considerable efforts to ensure that the special needs of persons with mental health conditions are met as part of the assessment process. This is why following Professor Harrington's recommendation, a full complement of mental function champions have been in place since July 2011 as a resource to support the assessment of individuals with mental health conditions.

4.7 Prior to making a decision that someone is fit for work the DWP Decision Maker attempts to contact the claimant to explain that based on the evidence available they are likely to find them fit for work and ask if there is further evidence that they wish to be considered. If the claimant is still unhappy with the decision they can request a Mandatory Reconsideration which is undertaken by a different Decision Maker. Finally there is also the option to appeal the decision if it is not changed following mandatory reconsideration, and some claimants may claim JSA during the mandatory reconsideration and appeal period, on the basis that the ESA award has ended as a result of the fit for work decision. It is intended that, in these circumstances, ESA will not be paid during the appeal period.

4.8 There are also statutory provisions for claimants with a physical or mental health condition claiming JSA which enable them to restrict their availability for work - provided

the restrictions are reasonable in the light of their physical or mental health condition. For example, a person with emphysema could restrict the:

- type of work - to avoid working in smoke or fumes;
- number of hours worked in a week;
- number of hours in a shift.

4.9 Where the claimant imposes acceptable restrictions because of their physical or mental health condition they do not have to show they have reasonable prospects of getting a job. However, they must show all the restrictions are reasonable and are connected with their health condition. A claimant may also restrict their travel time if they have a physical or mental health condition, which affects their ability to travel.

4.10 In these situations jobcentre staff will consider the claimant's availability and any restrictions which may be appropriate in light of their health condition and review and amend the claimant's Jobseeker's Agreement as appropriate.

4.11 Minimal changes are expected to be required to Departmental IT systems.

4.12 Changes to guidance will be developed with input from Operational staff.

4.13 Input from the partial informal consultation with the Disability Charities Consortium will feed into the external communications plans.

4.14 The Department does not consider that this proposal would have any impact on business or charities.

4.15 The Department does not consider that the proposals would have any impact on the sustainability of rural communities.

## **5. Consultation on the proposed changes**

5.1 Although there has been no formal consultation on the measure, Department officials discussed the changes – apart from the proposal to stop payments pending appeal for this group – with members of the Disability Charities Consortium on Tuesday 7 October 2014. They advised that many ESA claimants have difficulties in dealing with the claims system because of their health issues. They said that it is therefore essential that information is provided to advisers and claimants setting out what evidence is needed as part of the claim. This will enable Decision Makers to deal with each claim on its merits. The Department should also not assume that the GP is the most appropriate individual to provide the evidence needed, other health care workers may have a better knowledge of the effects of a claimant's condition. There was also concern in the past that new rules were interpreted in a "harsher blanket way" despite the policy intent. It was important that internal DWP guidance made it clear that this was not the policy intent. This input will be used to inform changes to operational guidance, learning and development for staff and new claimant communications.

5.2 DWP operational staff have also been consulted about the change. They identified the need for effective communications for claimants, advice agencies, GPs and staff to ensure that all were aware of the change, what it means, and what they need to do if

affected. Their views will inform changes to operational guidance, staff learning and development requirements, operational process and performance management issues.

## **6. Information and communications strategy for the proposed changes**

6.1 DWP has identified the importance of ensuring that claimants, advice agencies, GPs and DWP staff are aware of the proposed change and will feed the advice from the informal consultation session into the external communications developed.

6.2 The communications approach for DWP staff will include raising awareness through existing communications channels such as, Decision Maker's Guide Memoranda, Operational Senior Leaders Brief, Change and You, DWP Headline News, Advisory Bulletins, together with more targeted operational communications through implementation updates and operational guidance at the appropriate time.

6.3 For external advisers, stakeholders and intermediaries, we will provide information about the change in articles within the DWP Stakeholder Bulletin and Touchbase publication, and update Gov.uk.

6.4 Informal consultation on some of the proposed changes took place with the Disability Charities Consortium on 7 October.

6.5 MPs, Members of the Scottish Parliament and Welsh Assembly Members will also be made aware of the changes.

## **7. Monitoring and evaluation of the proposed changes**

7.1 DWP is committed to monitoring the impact of all its policies. We will therefore be developing plans for monitoring the actual impact of this change on those groups who share protected characteristics under the Equality Act 2010.