

# **DMG Chapter 42: Limited Capability for Work and Limited Capability for Work-Related Activity**

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# Introduction 42001 - 42019

## Introduction

42001 The WCA describes the end to end medical process comprising of two elements to help the DM decide

**1.** whether a claimant has LCW and is entitled to ESA

**2.** whether

**2.1** a claimant who has LCW also has LCWRA and is entitled to the support component **or**

**2.2** does not have LCWRA and is entitled to the WRAC.

## Benefits affected

42002 Whether a claimant has LCW and LCWRA must be determined using the following guidance.

42003 A determination on whether a claimant

**1.** has or does not have **or**

**2.** is to be treated as having or not having

LCW for entitlement to any benefit, allowance or advantage is conclusive for other decisions on any other benefit, allowance or advantage for the same period where LCW is relevant to entitlement to that benefit, allowance or advantage<sup>1</sup>.

1 SS CS (D&A) Regs, reg 10

42004 The benefits and allowances affected include ESA<sup>1</sup>, JSA<sup>2</sup>, NI credits<sup>3</sup>, HB and CTB.

1 ESA Regs; 2 WR Act 07, Sch 3, 12(6); 3 SS (Credits) Regs, reg 8B

## Scope of this chapter and definitions

42005 This chapter contains guidance on

- Determination of LCW (see DMG 42020)
- Certain claimants to be treated as having LCW (see DMG 42030)
- Evidence and Information required for determining LCW (see DMG 42140)

- LCWA (see DMG 42170)
- Exceptional Circumstances (see DMG 42310)
- Treated as having LCW until assessment (see DMG 42350)
- Treated as not having LCW (see DMG 42450)
- LCWRA (see DMG 42610).

### **Meaning of a health care professional**

42006 A HCP means<sup>1</sup>

- 1.** a registered medical practitioner **or**
- 2.** a registered nurse **or**
- 3.** a registered occupational therapist or physiotherapist<sup>2</sup>.

1 ESA Regs, reg 2(1); 2 Health Act 1999, s 60

### **Meaning of claimant**

42007 Claimant means a person who has claimed ESA<sup>1</sup>.

1 WR Act 07, s 24(1)

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## Determination of limited capability for work 42020 - 42029

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42020 To be entitled to ESA a claimant must have LCW<sup>1</sup>. This means that the claimant's capability for work is limited by their physical or mental condition and it is not reasonable to require them to work<sup>2</sup>.

1 WR Act 07, s 1(3)(a); 2 s 1(4)(a) & (b)

42021 The question of LCW must be decided first in the WCA process as this determines entitlement to benefit. The medical examination may be conducted in person, by telephone or by video. This part of the WCA process is referred to as the LCWA.

42022 A claimant can be treated as having LCW pending a determination of LCW provided certain conditions are satisfied<sup>1</sup> (see DMG 42350 et seq).

1 ESA Regs, reg 30

42023 Certain claimants are treated as having LCW and do not have to undergo the LCWA<sup>1</sup> (see DMG 42030). However some claimants who do not have to be assessed for LCW will still have to be assessed for LCWRA (see DMG 42610 et seq).

1 ESA Regs, reg 20(1)

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# Certain claimants to be treated as having limited capability for work

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42030 A claimant is treated as having LCW if the claimant

1. satisfies certain conditions<sup>1</sup> (see DMG 42031) **or**
2. is a hospital patient<sup>2</sup> (see DMG 42070) **or**
3. is receiving certain regular treatments<sup>3</sup> (see DMG 42090) **or**
4. has LCW for part of a day<sup>4</sup> (see DMG 42100) **or**
5. is not a qualifying young person and is receiving education in certain circumstances<sup>5</sup> (see DMG 42125) **or**
6. has exceptional circumstances<sup>6</sup> (see DMG 42310).

1 ESA Regs, reg 20(1); 2 reg 25; 3 reg 26; 4 reg 27; 5 reg 33(2); 6 reg 29

### Certain conditions

42031 Claimants are treated as having LCW and do not have to undergo the LCWA if any of the circumstances in DMG 42032 apply to them<sup>1</sup> unless they are treated as not having LCW because they are working<sup>2</sup> (see DMG 42600 et seq).

1 ESA Regs, reg 20(1); 2 regs 40 & 44

42032 For the purposes of DMG 42031 the circumstances are that a claimant<sup>1</sup>

**1.** is terminally ill (see DMG 42035 et seq)

**2.** is

**2.1** receiving **or**

**2.2** likely to receive **or**

**2.3** recovering from

treatment for cancer by way of chemotherapy or radiotherapy and the DM is satisfied that the claimant should be treated as having LCW (see DMG 42050 - 42052)

**3.** is known or reasonably suspected to be a carrier, or to have been in contact with a case, of a relevant infection or contamination **and**

**3.1** is excluded or abstains from work in accordance with a request or notice in writing in accordance with legislation **or**

**3.2** is otherwise prevented from working in accordance with legislation (see DMG 42060)

**4.** is a pregnant woman (see DMG 42061 et seq)

**4.1** where there is a serious risk of damage to her health or to the health of her unborn child if she does not refrain from work **or**

**4.2** who is in the MAP and is entitled to MA **or**

**4.3** whose EWC or ADC has been certified<sup>2</sup> on any day in the period

**4.3.a** beginning with the first day of the 6th week before the EWC or the ADC, whichever is earlier **and**

**4.3.b** ending on the 14th day after the ADC

if she would have no entitlement to a MA or SMP were she to make a claim in respect of that period

**5.** satisfies any of the descriptors in the LCWRA activities about

**5.1** conveying food or drink to the mouth **or**

**5.2** chewing or swallowing food or drink<sup>3</sup>.

42033 - 42034

### **Terminally ill**

42035 “Terminally ill” is defined as a claimant who is suffering from a progressive disease and death in consequence of that disease can be reasonably expected within 12 months<sup>1</sup>.

1 ESA Regs, reg 2(1)

42036 Claimants claiming under special rules are terminally ill as diagnosed by a GP or other HCP.

42037 A claimant who is terminally ill and has made

- 1.** a claim expressly on the ground of being terminally ill **or**
- 2.** an application for supersession or revision expressly on the ground of being terminally ill

is entitled to the support component or WRAC without the assessment phase having ended<sup>1</sup>. See DMG Chapter 44 for further details.

1 ESA Regs, reg 7(1)

42038 - 42049

### **Cancer treatment**

42050 A claimant can be treated as having LCW if<sup>1</sup>

- 1.** they are
  - 1.1** receiving treatment for cancer by way of chemotherapy or radiotherapy **or**
  - 1.2** likely to receive treatment as in **1.1** within six months after the date of the LCW determination **or**
  - 1.3** recovering from treatment as in **1.1 and**
- 2.** the DM is satisfied that the claimant should be treated as having LCW.

1 ESA Regs, reg 20(1)(b)

42051 The claimant is asked in the questionnaire (form ESA50) to ensure that their health care professional completes page 20 of the form, giving details of the diagnosis, treatment including how long it is likely to last, and the expected recovery period, as well as an opinion on the effects on the claimant’s ability to work. The claimant is asked to complete the form as normal if other health conditions

are present.

**Note:** See DMG 42455 et seq for guidance on when the claimant does not return the questionnaire.

42052 The DM should take into account the debilitating effects of the treatment in DMG 42050 **1.** when considering whether the claimant should be treated as having LCW. The presumption is that claimants who fall within DMG 42050 **1.** will be treated as having LCW, where the cancer treatment has work limiting side effects, and those effects are likely to limit all forms of work.

### **Example 1**

Martin is diagnosed with cancer of the oesophagus, and has a course of chemotherapy to reduce the size of the tumour. Once the treatment starts, Martin becomes too ill to work, and claims and is awarded ESA. He is referred for the WCA. In the ESA50, Martin's oncologist states that the chemotherapy will continue for 3 months, after which it is hoped to remove the tumour surgically. He will probably require a course of radiotherapy after that. The treatment so far has left Martin feeling very tired, nauseous and weak, as well as giving him difficulties with speaking, eating and drinking. The HCP recommends that Martin is treated as having LCW for 9 months, before referring for a further WCA to see if Martin's condition has improved. The DM accepts the advice, and determines that Martin has LCW.

### **Example 2**

Jay has exploratory surgery as a day patient to remove a lump in his groin. He is diagnosed with non-Hodgkin's lymphoma. He starts a course of chemotherapy, and is awarded ESA after the second treatment leaves him unable to work.

Jay is referred for the WCA. In the ESA50, his oncologist says that Jay will have up to 8 chemotherapy treatments by injection every three weeks. Jay is often too weak to get out of bed as a result of the treatment. He has loss of sensation in his hands and feet, and is prone to falling. He has twice been admitted to hospital for treatment for dehydration due to vomiting and diarrhoea. If the side effects continue, the

chemotherapy treatment may stop and be replaced by radiotherapy over a longer period. He is likely to take at least six months to recover from the chemotherapy.

Medical advice is that Jay should be treated as having LCW, with a review after a year. The DM accepts the advice.

### **Example 3**

Heather is diagnosed with primary breast cancer following a mammogram. She is admitted to hospital for surgery to remove the tumour, and is required to stay in hospital for 24 hours or longer. She claims and is awarded ESA. Heather is referred for the WCA. On the ESA50, Heather's oncologist states that Heather will start a course of radiotherapy in about 4 weeks. The radiotherapy will be likely to make her very tired for several months as the treatment progresses, and after it has ended. The HCP recommends



that Heather should be treated as having LCW for 6 months, with a further review to check on progress. The DM determines that Heather is treated as having LCW.

#### **Example 4**

Rachel has difficulties with mobility, standing and sitting and reaching as a result of generalised arthritis. A small spot on her nose is diagnosed as a melanoma or skin cancer. The melanoma is surgically removed under local anaesthetic. She claims and is awarded ESA.

Rachel is referred for the WCA. Her GP completes the statement in the ESA50 to say that Rachel had facial pain, bruising and swelling for two weeks after the surgery. She will be referred for a single session of radiotherapy, but this is unlikely to affect her ability to work. Rachel completes the rest of the questionnaire to give details about how her arthritis affects her ability to work.

Rachel is required to attend for medical examination. The HCP is of the opinion that Rachel does not satisfy any of the LCW descriptors, and should not be treated as having LCW, because although she is due to have radiotherapy treatment, this is not likely to have any debilitating effects. The DM accepts the advice, and determines that Rachel does not have, and is not treated as having, LCW.

42053 - 42059

#### **Meaning of relevant infection or contamination**

42060 The following definitions apply<sup>1</sup>:

- 1.** in Scotland, the term “contamination” is the same as defined in legislation<sup>2</sup>.
- 2.** in England and Wales, the term “infection or contamination” shall be read in accordance with legislation<sup>3</sup>.
- 3.** in Scotland, the term “infectious disease” is the same as defined in legislation<sup>4</sup>.
- 4.** in England and Wales, the term “relevant infection or contamination” means
  - 4.1** any incidence or spread of infection or contamination, in respect of which certain legislation applies<sup>5</sup>, for the purpose of preventing, protecting against, controlling or providing a public health response
  - 4.2** any disease, food poisoning, infection, infectious disease or notifiable disease to which certain legislation applies<sup>6</sup>.
- 5.** in Scotland, the term “relevant infection or contamination” means
  - 5.1** any infectious disease or exposure to an organism causing that disease, **or**

**5.2** contamination or exposure to a contaminant to which certain legislation applies<sup>7</sup>.

1 SS (IW) (Gen) Regs, reg 11(2); ESA Regs, reg 20(2); 2 Public Health etc (Scotland) Act 2008, s 1(5);

3 Health and Social Care Act 2008, s 45A(3); 4 Public Health etc (Scotland) Act 2008, s 1(5);

5 Public Health (Control of Disease) Act 1984, Part 2A; 6 Public Health (Aircraft) Regulations 1979, reg 9 & Public Health (Ships) Regulations 1979, reg 10; 7 Public Health etc (Scotland) Act 2008, s 56 to

58

## **Pregnant women**

42061 A pregnant woman can be treated as having LCW in certain circumstances<sup>1</sup> (see DMG 42032 **4.**).

1 ESA Regs, reg 20(1)(d), (e) & (f)

42062 “Sickness of pregnancy”, which can also be described as “emesis”, “hyperemesis”, “hyperemesis gravidarum”, or “morning sickness”, comes within the definition of a disease. This condition usually occurs between the 29th and 34th weeks before the EWC but can also be accepted outside that period when it may include a complication in the pregnancy.

**Note:** “Pregnancy” itself does not come within the definition of a disease.

42063 Unless a woman can be treated as having LCW because of pregnancy as in DMG 42032 **4.**, she should provide other evidence of LCW, for example

**1.** a complication in the pregnancy **or**

**2.** a medical condition not related to pregnancy.

42064 - 42069

## **Hospital patient**

42070 Claimants are treated as having LCW where they are

**1.** undergoing medical or other treatment as a patient in a hospital or similar institution **or**

**2.** recovering from treatment as in **1.**<sup>1</sup>.

**Note:** Further guidance on ‘hospital or similar institution’ can be found in DMG Chapter 54.

1 ESA Regs, reg 25(1); 2 regs 40 & 44

42071 A claimant is regarded as undergoing treatment as in DMG 42070 **1.** where they attend a residential programme of rehabilitation for the treatment of drug or alcohol abuse<sup>1</sup>.

1 ESA Regs, reg 25(2)

42072 A claimant is regarded as undergoing treatment as in DMG 42070 **1.** only where they have been advised by a health care professional to stay for a period of 24 hours or longer following that treatment<sup>1</sup>. This applies even if the claimant disregards that advice and returns home within 24 hours.

**Note:** Where the claimant is undergoing major surgery with a hospital stay of less than 24 hours please consult the [WCA Handbook](#) for advice.

1 ESA Regs, reg 25(3)

### Example

Sarah is admitted to hospital for surgery involving a general anaesthetic. She was told before the surgery that she should bring a night bag in case she has to stay overnight. Sarah's surgery goes well, and she is discharged the same day. As Sarah was not advised to stay overnight, she cannot be treated as having LCW. Sarah will need to be assessed for LCW in the normal way by completing a questionnaire and attending for medical examination if necessary.

42073 "Day of recovery" means a day on which a claimant is recovering from treatment which was undertaken as a patient in a hospital or similar institution and the DM is satisfied that the claimant should be treated as having LCW on that day<sup>1</sup>. The days of recovery themselves would not need to be spent as a patient in a hospital or similar institution.

1 ESA Regs, reg 25(4)

42074 A hospital patient can be treated as having LCW even if admitted only for investigation of symptoms unless the investigation reveals that admission was due to another factor such as a personality disorder<sup>1</sup>.

1 R(S) 1/58; R(S) 6/59

42075

42076 Where

**1.** on consideration of all the evidence after application of the WCA, the DM is of the opinion that the claimant would not have, or would not be treated as having, LCW **and**

**2.** either

**2.1** the HCP advises that the claimant is about to go into hospital for treatment within 21 days of the medical examination **or**

**2.2** the claimant subsequently provides evidence that they are about to go into hospital within 21 days of the date when **1.** applies

the DM should defer making a determination as to whether the claimant has LCW until it is confirmed that the claimant has become a hospital patient.

### **Planned admission postponed**

42077 If

- 1.** the claimant is not admitted to hospital as planned **and**
- 2.** a new date for admission is provided **and**
- 3.** the claimant continues to provide evidence of LCW (see DMG 42145 et seq)

the DM should continue to defer making a determination on LCW as in DMG 42076.

### **Planned admission cancelled**

42078 Where a planned admission to hospital is cancelled and no new date is proposed, the DM should determine whether the claimant has LCW as normal.

42079 - 42089

### **Receiving regular treatment**

42090 Claimants are treated as having LCW when they

- 1.** receive
  - 1.1.** regular weekly treatment by way of haemodialysis for chronic renal failure **or**
  - 1.2.** treatment by way of plasmapheresis **or**
  - 1.3.** regular weekly treatment by way of total parenteral nutrition for gross impairment of enteric function<sup>1</sup> **and**
- 2.** satisfy the condition in DMG 42093<sup>2</sup>

unless they are treated as not having LCW because they are working<sup>3</sup> (see DMG 42600 et seq).

1 ESA Regs, reg 26(1); 2 reg 26(2); 3 regs 40 & 44

42091 An explanation of the treatments in DMG 42090 is in Appendix 1 to this Chapter<sup>1</sup>.

1 ESA Regs, reg 26

42092 Subject to DMG 42093 a claimant referred to in DMG 42090 is to be treated as having LCW

during any week in which that claimant is engaged in receiving treatment or has a day of recovery from that treatment<sup>1</sup>.

1 ESA Regs, reg 26(1)

42093 Claimants who receive the treatment in DMG 42090 **1.** are only treated as having LCW from the first week of treatment where they have no fewer than

**1.** two days of treatment **or**

**2.** two days of recovery from that treatment **or**

**3.** one day of treatment and one day of recovery from that treatment

but the days of treatment or recovery or both need not be consecutive<sup>1</sup>.

1 ESA Regs, reg 26(2)

42094 The condition in DMG 42093 must be satisfied during the period of the current claim for ESA. Where the condition was satisfied before the date of the current claim, and is not satisfied at the date of that claim, the claimant cannot be treated as having LCW under the regular treatment rules.

42095 There are no linking rules for periods of regular treatment. If

**1.** a claimant has been treated as having LCW as in DMG 42090 **and**

**2.** entitlement to ESA ends (for example because the treatment ends) **and**

**3.** a further award of ESA is made from a later date when treatment begins again

the claimant must satisfy the condition in DMG 42093 again before they can be treated as having LCW.

42096 A “day of recovery” means a day on which the claimant is recovering from any of the forms of treatment listed at DMG 42090 and the DM is satisfied the claimant should be treated as having LCW on that day<sup>1</sup>.

1 ESA Regs, reg 26(3)

42097 Where a claimant is in receipt of ESA(IR) normal rules for exempt work apply (see DMG 42600 et seq). This means that if the claimant works during a week and their work does not fit within exempt work rules they cannot be treated as having LCW<sup>1</sup>.

1 ESA Regs, reg 44(3)(a)

42098 Where a claimant is

**1.** in receipt of ESA(Cont) **and**

**2.** treated as having LCW as per DMG 42092 **and**

**3.** working on any day during a week when he is receiving regular treatment or recovering from it

the work does not affect the claimant's entitlement to ESA(Cont)<sup>1</sup>. But the claimant is only paid ESA(Cont) for the days of receiving or recovering from treatment if they are not days of work<sup>2</sup> (see DMG Chapter 46 for further guidance).

1 ESA Regs, reg 46; 2 reg 169

42099

### **Claimants treated as having limited capability for work throughout a day**

42100 If a claimant

**1.** has LCW at the start of a day but becomes capable later that day **or**

**2.** is capable of work at the start of the day but develops LCW during the day

the whole day is treated as a day of LCW if no work is done on that day<sup>1</sup>.

**Note:** The exception to this would be where the night shift worker provision applies (see DMG 42105).

1 ESA Regs, reg 27

42101 This provision applies where there is a sudden onset of, or recovery from, an incapacitating condition. It does not provide that a claimant with a variable condition that incapacitates them for part of each day has LCW throughout the whole of every day.

42102 When DMs determine that a claimant has LCW they can consider if this provision applies to treat the claimant as having LCW for the day at the beginning or end of the period of illness.

42103 Even if a claimant is treated as having LCW under this provision any work that they do on that day or on another day in that week may mean that they are to be treated as not having LCW. A day cannot be a day of LCW if they have undertaken work on that day<sup>1</sup>. The normal rules for exempt work<sup>2</sup> apply.

**Note:** For guidance on exempt work see DMG Chapter 41.

1 ESA Regs, reg 27; 2 reg 45

### **Example**

If a claimant works 9am to 5pm from Monday to Friday, and on the Wednesday has an accident at work

at 11am resulting in them being unable to continue with that

day's work this will not be treated as a day of LCW. The first day of LCW will be the day following the accident if they do not return to work on that day.

42104

## Night shift workers

42105 Night shift workers are claimants who work for a period of employment which begins on one day and extends over midnight into the next day. It is necessary to establish how many hours are worked before and after midnight. The hours of work on any other occasion are not relevant<sup>1</sup>.

1 R(I) 31/55

42106 The day on which the lesser hours are worked is treated as a day of LCW if<sup>1</sup>

1. a claimant works on a night shift for a continuous period over midnight **and**
2. the claimant has LCW for the rest of that day.

1 ESA Regs, reg 28(1)

42107 The second day of a night shift is treated as a day of LCW if<sup>1</sup>

1. the hours before and after midnight are equal **and**
2. the night shift is at the beginning of the PLCW.

1 ESA Regs, reg 28(2)(a)

42108 The first day of the shift is treated as a day of LCW if<sup>1</sup>

1. the hours before and after midnight are equal **and**
2. the night shift is at the end of a PLCW.

1 ESA Regs, reg 28(2)(b)

42109 The provisions do not apply to claimants whose employment lasts for more than 24 hours on either side of midnight<sup>1</sup>. For example, it would not apply to continuous employment from 6 pm on Monday to 2 am on Wednesday. In this example the Wednesday cannot be treated as a day of LCW.

1 R(U) 18/56

42110 A night worker paid by the shift is normally paid for a meal break and this should be included in the

calculation of the total time worked.

42111 A night worker paid by the hour is not normally paid for a meal interval. This should be deducted from the shift hours to arrive at the actual hours worked. The shift is still regarded as one continuous period of employment because the meal break is a normal break.

42112 - 42119

## **Qualifying young claimants to be treated as having limited capability for work in certain circumstances**

42120 To help satisfy the condition relating to youth claimants can be treated as having LCW for days on which they are entitled to SSP<sup>1</sup> (see DMG Chapter 41).

1 ESA Regs, reg 33(1)

42121 - 42124

## **Disabled students treated as having limited capability for work**

42125 For the purposes of ESA(IR) a claimant is treated as having LCW<sup>1</sup> where the claimant is

- 1.** not a qualifying young person **and**
- 2.** receiving education **and**
- 3.** entitled to DLA, AFIP or PIP<sup>2</sup>.

**Note:** See DMG Chapter 41 for further guidance on education.

1 ESA Regs, reg 33(2); 2 reg 18

42126 DMs should note that a qualifying young person ceases to be a qualifying young person where they are in receipt of ESA<sup>1</sup>. See DMG Chapter 41 for where a qualifying young person can be entitled to ESA(IR).

1 CHB (Gen) Regs, reg 2(4) & 8

42127 - 42139



# Evidence and information for limited capability for work 42140 - 42169

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42140 Information or evidence is needed to determine whether a claimant has LCW<sup>1</sup>.

1 ESA Regs, reg 21

42141 - 42144

## Evidence

42145 Evidence of LCW should be provided for the day or days of LCW until the claimant has undergone the LCWA. Evidence may be<sup>1</sup>

- 1.** self-certification<sup>2</sup> (see DMG 42146) **or**
- 2.** a statement from a doctor or health professional<sup>3</sup> (see DMG 42148) **or**
- 3.** if it is unreasonable to require such a statement, other evidence which is sufficient to show that the claimant is limited by their physical or mental condition and it is not reasonable to expect them to work because of some specific disease or bodily or mental disablement<sup>4</sup>.

1 ESA Regs reg 21(1)(a); 2 SS (Med Ev) Regs, reg 5; 3 reg 2(1); 4 reg 2(1A)

## Self-certification

42146 Evidence of LCW for a spell of less than eight days, or for the first seven days of a longer spell, may be self-certification<sup>1</sup>. Self-certification is only appropriate for the first seven days of a PLCW.

**Note:** Where PLCWs link (see DMG Chapter 41), a claimant can self-certify for the first seven days of each PLCW even if they are treated as a continuation of an earlier PLCW.

1 SS (Med Ev) Regs, reg 5(1)

42147 A self-certificate is<sup>1</sup>

**1.** a declaration made in writing by the claimant, in a form approved by the Secretary of State **or**

**2.** a verbal declaration by the claimant in such cases where the DM allows (for example where the claim to ESA is made by telephone).

**Note:** It should include the information that they have been unfit for work from a date or for a period. It may also include a statement that the claimant expects to continue to be unfit for work.

1 SS (Med Ev) Regs, reg 5(2)

### **Doctor's or Health Professional's statements**

42148 A doctor's statement is a statement given in writing by a doctor. They are made on an approved form or in a form to like effect<sup>1</sup>.

1 SS (Med Ev) Regs, reg 2(1) & Sch 1, Pt 1 & Pt 2

42149 A doctor means a registered medical practitioner and includes a medical practitioner outside the UK who is asked for a medical opinion by the Secretary of State. Doctors must be registered or recognised as such in the country in which they pursue a medical practice<sup>1</sup>.

1 ESA Regs, reg 2(1)

42150 From 6.4.22 a statement from a health professional is sufficient and this can be completed electronically without a signature on an approved form or in a form to like effect<sup>1</sup>. A health professional is a

1. registered medical practitioner or
2. registered nurse or
3. registered occupational therapist or
4. registered physiotherapist or
5. registered pharmacist<sup>2</sup>.

1 SS (Med Ev) Regs, reg 2(1) & Sch 1, Pt 1, Pt 2 & Pt 2A; 2 reg 1(2) & Pharmacy Order 2010, art 3

### **Other evidence**

42151 Evidence other than on an approved form or from a health professional can be accepted<sup>1</sup> if

- 1.** it is unreasonable to require a doctor's or health professional's statement **and**
- 2.** the evidence shows that the claimant is incapable of work or have limited capability for work so that

they should refrain (or should have refrained) from work by reason of some specific disease or bodily or mental disablement.

1 SS (Med Ev) Regs, reg 2(1A)

42152 The DM decides what is reasonable in each case. For example, evidence from alternative therapists such as chiropractors, osteopaths, etc can be accepted if the claimant is usually treated by them as well as, or instead of, a GP.

42153 Depending on the circumstances<sup>1</sup> a declaration that a claimant is incapable of following a particular occupation and is receiving non-medical treatment such as Christian Science treatment (i.e. treatment through prayer) may be sufficient proof of LCW.

1 R(S) 9/51

42154 An employer's certificate which only confirms absence from work is not sufficient evidence<sup>1</sup>.

1 R(S) 13/51

42155 - 42159

## Information

42160 The DM can ask for any additional information to help determine whether a claimant has LCW<sup>1</sup>.

**Note:** See DMG 42192 - 42194 for guidance on the role of medical services in information gathering.

1 ESA Regs, reg 21(1)(c)

42161 Any information relating to the claimant's ability to perform certain activities<sup>1</sup> may be requested in the form of a questionnaire<sup>2</sup> unless

**1.** there is already sufficient information to determine the question<sup>3</sup> **or**

**2.** a claimant is to be treated as having LCW<sup>4</sup> because they

**2.1** satisfy certain conditions (see DMG 42031) **or**

**2.2** are a hospital patient (see DMG 42070) **or**

**2.3** receive certain regular treatments (see DMG 42090) **or**

**2.4** are a young person in certain circumstances (see DMG 42120).

1 ESA Regs, reg 34 & Sch 3; 2 reg 21(1)(b); 3 reg 21(2); 4 reg 21(3)

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## Introduction

42170 The LCWA is the part of the WCA process that assesses LCW. It will normally be completed during the assessment phase of ESA<sup>1</sup> and determines entitlement to benefit beyond the assessment phase.

1 WR Act 07, s 8(1) & (2)

42171 Whether a claimant's capability for work is limited by their physical or mental condition and the limitation is such that it is not reasonable to require that claimant to work is determined on the basis of a LCWA<sup>1</sup>.

1 ESA Regs, reg 19(1)

42172 Satisfying the LCWA depends on the ability to perform certain functions reliably and repeatedly<sup>1</sup>.

1 ESA Regs, reg 19(2)

42173 When assessing the extent of the claimant's LCW, it is a condition that the claimant's inability to perform<sup>1</sup>

**1.** physical descriptors<sup>2</sup> arises

**1.1** from a specific bodily (i.e. physical) disease or disablement **or**

**1.2** as a direct result of treatment by a registered medical practitioner for such a condition **and**

**2.** mental descriptors<sup>3</sup> arises

**2.1** from a specific mental illness or disablement **or**

**2.2** as a direct result of treatment by a registered medical practitioner for such a condition.

The level of each activity is measured by points which must reach a set total for entitlement to benefit.

1 ESA Regs, reg 19(5); 2 Sch 2, Part 1; 3 Sch 2, Part 2

### **Example 1**

Brian suffers from rheumatoid arthritis in his hands and knees, and claims ESA. In the questionnaire Brian states that due to cognitive and mental impairment he has difficulty with learning tasks, awareness of hazards and completing personal actions. At the medical examination, Brian explains that the high level of painkillers he takes for his arthritis makes him too tired to concentrate. The HCP advises that Brian is mentally disabled by the medication, but not sufficiently to satisfy any mental health descriptors. Brian scores 6 points for mobility problems.

### **Example 2**

Rita is injured in an accident which leaves her with significant mobility problems and facial scarring. Rita also suffers from depression and social anxiety disorder as a result of the accident. Meeting people outside her immediate family brings on a panic attack, so she avoids this. She scores 6 points for mobility problems arising from her physical health condition, and 9 points for coping with social engagement arising from her mental health condition.

### **Example 3**

Ailsa suffers from mechanical back pain. She states that she has difficulties with mobilising as well as getting about unless she has someone with her. The HCP advises that Ailsa's need for assistance with getting about is only due to her physical problems. The DM determines that Ailsa does not score any points for mental health descriptors.

42174 Certain claimants can be treated as having LCW without undergoing the LCWA (see DMG 42030 et seq).

42175 Claimants who are not treated as having LCW as per DMG 42174 and so have to undergo the LCWA can be treated as having LCW pending actual assessment, provided certain conditions are satisfied<sup>1</sup> (see DMG 42350 et seq).

42176 As part of the assessment, claimants who are not treated as having LCW may be required to complete a questionnaire (see DMG 42161) and if necessary attend a medical examination. If they fail without good cause to do either, they can be treated as not having LCW<sup>1</sup> (see DMG 42450 et seq).

1 ESA Regs, regs 22 & 23

42177 A claimant will have LCW if, by adding the points scored against each descriptor, a score of at least 15 points is reached<sup>1</sup> (see DMG 42218).

1 ESA Regs, reg 19(3)

42178 - 42189

## **Application of the assessment**

42190 The questionnaire is not required if the claimant

- 1.** satisfies certain conditions (see DMG 42032) **or**
- 2.** is a hospital patient (see DMG 42070) **or**
- 3.** receives certain regular treatment<sup>1</sup> (see DMG 42090) **or**
- 4.** the DM is satisfied that there is sufficient information to decide whether a claimant has LCW without it<sup>2</sup>.

All other claimants will be sent the questionnaire (ESA50) during the assessment phase of their award of ESA.

1 ESA Regs, reg 21(3); 2 reg 21(2)

42191 The questionnaire is designed for the claimant to give as much information about their condition, how it affects them in their daily functioning, and how they manage their condition.

42192 Medical services will

- 1.** scrutinise evidence regarding a claimant's condition and give an opinion as to whether
  - 1.1** they are treated as having LCW
  - 1.2** in second or subsequent referrals they actually have LCW without requiring a LCWA
- 2.** provide impartial medical advice on request.

42193 Medical services are responsible for gathering any information required to support the WCA

process. This includes

1. sending the questionnaire (ESA50)
2. sending a reminder if the claimant does not reply within 3 weeks
3. deciding if further medical evidence is required from the claimant's GP or HCP.

42194 Medical services will arrange for a HCP to provide an opinion on LCW on either an

1. ESA85 if the claimant has been examined **or**
2. ESA85A if the claimant has not been examined.

42195 Medical services will provide an independent medical opinion on the claimant's condition, functionality and their ability to perform activities related to work. They do not provide a diagnostic examination. Their focus is on a claimant's abilities rather than their disabilities. HCPs should provide relevant information and good justification for their recommendations with regard to LCW.

42196 In the main, medical reports will be completed electronically. There is no requirement for the report to be signed by the examining HCP<sup>1</sup>. However the report must identify the status of the HCP, i.e. whether he/she is a doctor, a registered nurse, or a registered occupational therapist or physiotherapist.

1 R(IB) 7/05

42197 The personalised summary statement forms part of the report form ESA85 where that is produced electronically, and is also produced as a separate form ESA85(S). It is part of the evidence considered by the DM when making determinations as to whether the claimant has LCW, and if so, whether they have LCWRA.

42198 The personalised summary statement is a statement of facts and findings made by the HCP, and is personal to the claimant. It gives the HCP the opportunity to

1. justify their recommendation on the LCW and LCWRA activities and descriptors **and**
2. explain where the recommendation conflicts with the claimant's view of their condition.

42199 The personalised summary statement should refer to all of the claimant's health conditions, and consider the combined impact where multiple conditions are present. This should reflect the consensus of medical opinion. It should not introduce new information not already in form ESA85.

42200 The questionnaire, the medical report, and any other medical evidence obtained by medical services, are referred to the DM to consider whether the claimant has LCW. There may be differences between the answers from the claimant and the HCP.

### **Example**



On the questionnaire Kevin indicates he can walk on level ground but cannot walk 200 metres. He also indicates on the form that he can walk about 50 metres before he has to stop due to severe pain. On the medical report the HCP should collect more evidence to identify the actual distance the claimant can walk and the amount of pain and discomfort experienced and how that affects the daily functioning.

The DM then considers the merit of each answer and any other evidence to determine an overall score<sup>1</sup> (see DMG 42215). As with all evidence DMs have to decide what weight to give to the content of the medical report.

**Note:** The report should be read as a whole and any concerns over inconsistent or improbable entries addressed before a determination of LCW is made.

1 ESA Regs, reg 19(3)

42201 There should be no changes made to the content of the medical report other than of a very minor nature e.g. a typing error, and these are to be carried out by the same HCP who completed the original wherever possible. It is permissible for another approved HCP to make the amendment, having consulted the author of the original report, for example to avoid unnecessary delay. However the HCP making the amendment should make it clear that it has been made following consultation. Any other additions or alterations should be provided in a separate document.

42202 A claimant may not have returned a questionnaire. The DM can proceed without it if satisfied that there is sufficient information for a determination to be made whether the claimant has LCW without it<sup>1</sup>. For example the claimant is considered to be in a vulnerable group, i.e. there is a diagnosis of a mental health condition. A decision to

treat as not having LCW due to non return of the questionnaire would not be made but the claimant referred for assessment.

1 ESA Regs, reg 21(2)

42203 The medical report includes an opinion of a HCP approved by the Secretary of State on whether any prescribed exceptional circumstances apply. The DM should consider that opinion when deciding whether a claimant can be treated as having LCW if they do not satisfy the test from the descriptors<sup>1</sup> (see DMG 42323 et seq).

1 ESA Regs, reg 29

42204 - 42209

## Qualifying conditions

42210 The LCWA is an assessment of the extent of a claimant's LCW because of some specific bodily disease or disablement, a specific mental illness or disablement or as a direct result of treatment

provided by a registered medical practitioner for such a disease or disablement to perform specified **activities**<sup>1</sup>. The performance of activities is measured by **descriptors** the points from which have to reach a set total for the claimant to have LCW<sup>2</sup>. If the required number of points is not reached the claimant does not have LCW. The assessment is of a person's ability to perform specified functional activities, rather than their ability to perform functions related to any specific work they might previously have been doing.

1 ESA Regs, reg 19(2) & Sch 2, Column 1; 2 reg 19(3) & Sch 2, Column 2

42211 The level of each activity is measured by points. Part 1 contains activities characterising physical function which are broken down into descriptors. Part 2 contains activities characterising mental, cognitive and intellectual function which are also broken down into descriptors. The extent to which a claimant can or cannot carry out an activity is determined by which descriptor applies to that claimant.

42212 - 42214

## Calculation of score

42215 Where a claimant meets a descriptor points will be awarded corresponding to that descriptor.

42216 Where more than one descriptor specified for an activity applies to a claimant, only the descriptor with the highest score in respect of each activity which applies can be counted<sup>1</sup>.

1 ESA Regs, reg 19(6)

42217 Other than as in DMG 42241, there is no scoring limitation based on the claimant's specific disease or bodily disablement. So, for example, a claimant who cannot walk up and down 2 steps even with the support of a handrail because of their defective sight can score points both for the activity of vision and that of walking<sup>1</sup>.

1 R(IB) 3/98

42218 A claimant has LCW when

**1.** one or more of the descriptors in the physical disabilities<sup>1</sup> or mental, cognitive and intellectual functions<sup>2</sup> apply **and**

**2.** a total is reached of at least 15 points<sup>3</sup> from the descriptors

**2.1** specified in Part 1 **or**

**2.2** specified in Part 2 **or**

**2.3** in both categories.

42219 - 42229

## **Use of aids and appliances**

### **General application**

42230 A claimant will be assessed as if

- 1.** fitted with or wearing any prosthesis with which that claimant is normally fitted or normally wears (such as an artificial limb) **or**
- 2.** wearing or using any aid or appliance which is normally, or could reasonably be expected to be, worn or used (such as a hearing aid)<sup>1</sup>.

Normal use of an aid or appliance applies to the assessment of all of the physical activities in the WCA. It is not restricted to those activities that make specific reference to aids or appliances.

1 ESA Regs, reg 19(4)

42231 Four of the physical activities<sup>1</sup> refer specifically to the use of aids. Activity 1 (mobilising) and Activity 7 (understanding communication) refer to the reasonableness of the use of an aid, while Activity 8 (navigation) and Activity 9 (continence), refer to aids that are normally used. The DM should apply the test in a way that displays consistency between the WCA as a whole and the assessment of each descriptor in particular.

1 ESA Regs, Sch 2 Pt 1

42232 - 42234

### **Aid or appliance prescribed or advised**

42235 The DM should establish whether the claimant normally uses an aid or appliance, and if not, whether the use of it has been prescribed or advised.

42236 If the claimant does not have an aid or appliance which they have been prescribed or advised to use, the DM should establish

- 1.** whether it would help the claimant
- 2.** why they are not using one
- 3.** whether the explanation is reasonable.

### **Example 1**

Billy has been advised by his GP to use a walking stick to help with balance problems when walking and standing. He states that he doesn't like the idea of a walking stick because it makes him look old. The DM considers that it would be reasonable to expect Billy to use a walking stick, and assesses LCW as if he is using it.

## **Example 2**

Annie lives in a one bedroom apartment on the upper storey of a two storey block. There is no lift. She has been advised by her GP that a wheelchair would help her to mobilise over longer distances and that a wheelchair could be provided on request. Annie states that she could not get a wheelchair into her apartment, and could not store a wheelchair, either in her apartment or elsewhere. The DM considers that it would not be reasonable to expect Annie to use a wheelchair, and assesses LCW without it.

## **Aid or appliance not prescribed or advised**

42237 The WCA should be applied in the context of a notional employer in a modern workplace who is prepared to make reasonable adjustments<sup>1</sup> to enable the claimant to work.

1 Equality Act 2010

42238 **All** the circumstances of the individual claimant should be taken into account when considering whether it would be reasonable to assess them as using an aid or appliance that has not been prescribed or that they have not been advised to use. An example would be whether it would be reasonable to expect a claimant to mobilise using a manual wheelchair<sup>1</sup>.

1 [2015] AACR 5

42239 Factors include whether

- 1.** the claimant possesses the aid or appliance
- 2.** the claimant was given specific medical advice about managing their condition, and it is reasonable for them to continue following that advice (see DMG 42250)
- 3.** the claimant would be advised to use an aid or appliance if they raised it with the appropriate authority such as a GP or occupational therapist (advice may only be given on request)
- 4.** it is medically reasonable for them to use an aid or appliance
- 5.** the health condition or disability is likely to be of short duration
- 6.** an aid or appliance is widely available (see DMG 42253)
- 7.** an aid or appliance is affordable in the claimant's circumstances (people are not routinely required to buy equipment where it can be prescribed.)

**8.** the claimant is able to use and store the aid or appliance (see DMG 42252)

**9.** the claimant is unable to use an aid or appliance due to their physical or mental health condition, for example they are unable to use a walking stick or manual wheelchair due to a cardiac, respiratory, upper body or mental health condition.

### **Example 1**

Miranda has significantly reduced mobility due to arthritis of the right hip and is on the waiting list for a hip replacement. She uses a walking stick to help with balance, but this does not enable her to walk any further than 200 metres before she experiences pain. She has not been advised to use a wheelchair. The HCP advises that she has no other health problems, and in their opinion based on clinical experience, would be provided with a manual wheelchair if she asked her consultant about this. If she had a wheelchair, she would be able to mobilise over longer distances. The DM decides that it would be reasonable, having considered all relevant factors, for Miranda to use a manual wheelchair, and that none of the Activity 1 descriptors apply.

### **Example 2**

Gary has problems standing due to a condition which affects his balance. He would normally be helped by the use of a walking stick. However, the HCP advises that due to arthritis of the hands, Gary would have difficulty using a stick because he has reduced grip. The DM determines that it would not be reasonable to assess Gary taking a walking stick into account.

42240 Where it is considered that the claimant should be assessed using an aid or appliance they do not have, the DM must give a clear explanation of how it could help the claimant. In the majority of cases the HCP will give advice on their use in the medical report. If not, or if the advice is not clear, the DM should seek further advice as to how reasonable it is to expect the claimant to use or benefit from the aid or appliance.

42241 The aid or appliance must be relevant to the activity being assessed. For example, when assessing activity 5, manual dexterity, it is not appropriate to consider the use of devices, such as a grabber, which substitute for the hands, other than prosthetic hands.

42242 DMs are additionally reminded that some activities and descriptors specify that the person must be assessed without the help of another person.

42243 - 42249

## **Use of manual wheelchair**

### **Medical factors**

42250 All medical considerations affecting an ability to use a manual wheelchair need to be taken into

account, including any potential consequences such as muscle wasting. However, it should be noted that use of a wheelchair need only be for short distances and for limited periods.

**Note:** See DMG 42239 **2.** – **5.** and **9.** for examples of medical factors which should be considered.

42251 These considerations apply to all aspects of using a manual wheelchair, including getting in and out, propelling, and being able to control it. It may be that some of the reasons for not being able to use a wheelchair are relevant to other functional descriptors, for example inability to move from one seated position to another unaided.

## **Home environment**

42252 The claimant's domestic environment is potentially relevant – see DMG 42239 **8.**. However, given

**1.** the underlying purpose of the WCA **and**

**2.** the circumstances in the modern workplace

an inability to use or store the wheelchair at home, due to factors such as inaccessible doors or stairs, is unlikely to be important, as the wheelchair could be stored at the workplace as part of the employer's duty to make reasonable adjustments.

## **Availability of manual wheelchairs**

42253 The availability of manual wheelchairs is a question of fact requiring evidence of how they could be obtained, including local knowledge. There is no requirement for an NHS wheelchair assessment before considering whether the claimant could reasonably use a manual wheelchair, although such evidence would be useful if it existed.

42254 It should be possible for the Secretary of State to

**1.** provide evidence about ways of obtaining inexpensive manual wheelchairs, such as from private companies or charities, if one is required to enable the claimant to work **or**

**2.** ensure that the availability of manual wheelchairs is not an issue through a DWP scheme.

42255 The DM will therefore need to explain in decisions, and responses to the FtT, how the claimant could obtain a manual wheelchair if that is required to enable them to take up employment.

## **Evidence**

42256 The DM should consider requesting advice from disability employment advisers about what provision is available in the claimant's area, including under any DWP Scheme, such as Access to Work, or the Flexible Support Fund, that would enable the claimant to take up an offer of employment.

42257 For more generic evidence, the FtT could be referred to on-line NHS or local authority guidance

about provision of wheelchairs. The DM should also consider whether a manual wheelchair could be made available on rental terms.

### **Reasons for DM's decision**

42258 DMs in decisions, and responses to the FtT, should explain, based on evidence specific to the claimant, and generic published evidence, why it is considered that

- 1.** it is reasonable to assess the claimant's ability to mobilise with a manual wheelchair if they do not have one **and**
- 2.** the use of a manual wheelchair by the claimant promotes the underlying purpose of ESA.

42259 The underlying purpose of ESA is to assess a person's functionality i.e. what they can do in the modern workplace, and enable them to engage in the labour market where appropriate. People who can use aids such as a manual wheelchair to mobilise, if working in a fully accessible area, are not limited in their capability for some types of work if they are unable to walk. Manual wheelchairs are widely available. It is therefore reasonable to assess a person as if using a manual wheelchair for the required distances where appropriate.

### **Example 1**

Vincent has mobility problems after an accident at work affecting his right foot. He also suffers from asthma, diabetes and depression. He claimed ESA after being medically retired from his job as a van driver. At the face-to-face assessment, Vincent told the HCP that the pain in his ankle stopped him from walking more than short distances using crutches. He went round the supermarket slowly leaning on a shopping trolley, or using an electric wheelchair trolley. When on holiday recently he had been given a wheelchair to get around the airport which his wife had pushed, and he spent his holiday at the hotel or on coach trips. He had not asked to be assessed for a wheelchair as he had nowhere to keep it; he lived in a first floor flat over a shop.

The HCP advises that Vincent has no upper body problem, and the asthma and diabetes are controlled by medication. He should not have any difficulty using a manual wheelchair independently for more than 200 metres. Although Vincent claimed he had problems with standing and sitting, he was able to sit for more than an hour without significant discomfort. His depression is treated with mild anti-depressants, and did not affect his functions to the extent that any mental or cognitive descriptor applied. The DM determines that it was reasonable to assess Vincent's mobility as if he had a manual wheelchair, and there was no reason why he could not obtain one through the NHS wheelchair service if he needed one to use at work, where it could be stored. Vincent is found not to have LCW, and his ESA award is terminated.

### **Example 2**

Sasje suffered from injuries to her head and legs in a road traffic accident. She claimed ESA after being discharged from hospital. At the face-to-face assessment, her mother told the HCP that Sasje is still

unable to walk more than a few steps. She pushes Sasje about in a manual wheelchair supplied by the NHS wheelchair service. Sasje was not given a self-propelled wheelchair, as the wheelchair assessment had identified that she had poor road safety and spatial awareness, possibly as a result of the head injury.

The DM accepts the HCP's recommendation that Sasje is unable to mobilise 50 metres without help, and also requires supervision when in the wheelchair to ensure she does not put herself or others in danger. The DM determines that Sasje satisfies Sch 2 Activity 1(a)(i) (15 points) and 12(c) (6 points), as well as Sch 3 Activity 1(a). She is placed in the support group.

42260 - 42269

## **Determination of the limited capability for work assessment**

42270 The DM determines whether the assessment is satisfied from

- 1.** the questionnaire if one is available (see DMG 42161) **and**
- 2.** a statement from the GP<sup>1</sup> if one is available **and**
- 3.** the medical report of the claimant's ability to perform the specified functions **and**
- 4.** the personalised summary statement **and**
- 5.** any other relevant evidence.

1 SS (Med Ev) Regs, reg 2(1)

42271 The normal principles apply to considering the evidence (see DMG Chapter 01).

42272 The LCWA does not have to be satisfied in respect of each day<sup>1</sup>. A claimant should satisfy the test throughout a period. A claimant whose condition varies from day to day and who would easily satisfy the LCWA on three days a week and would nearly satisfy it on the other four days might have LCW for the whole week.

1 R(IB) 2/99

42273 A claimant may have long periods of illness separated by periods of remission lasting some weeks, during which he or she suffers no significant disablement; such a claimant might have LCW during the periods of illness but not have LCW during the periods of remission. This is so even if the periods of illness are longer than the periods of remission<sup>1</sup>.

1 R(IB) 2/99

42274 The test of whether a claimant cannot perform an activity is not whether or not they are physically incapable of performing it. Matters such as pain, discomfort and repeatability are taken into



account. A claimant is not capable of carrying out an activity if they can only do so with severe pain or, if having done it once, they are unable to repeat it for hours or days. The extent of a claimant's ability to repeat the activity in a single stretch and of the intervals at which the claimant would be able to repeat the performance should be identified. A decision can then be made on whether the claimant can perform the relevant descriptor with reasonable regularity.

42275 There is no specific requirement that a claimant must be able to perform the activity in question with "reasonable regularity". Even so regard should be had to some such concept. The real issue is whether, taking an overall view of the claimant's limited capability to perform the activity in question, they should reasonably be considered to be incapable of performing it. The fact that they might occasionally manage to accomplish it, would be of no consequence if, for most of the time, and in most circumstances, they could not do so<sup>1</sup>.

1 R(IB) 2/99

42276 Where relevant descriptors are expressed in terms that the claimant "cannot" perform the activity, one should not stray too far from an arithmetical approach that considers what the claimant's abilities are most of the time<sup>1</sup>.

1 R(IB) 2/99

42277 Descriptors which state that "none of the above apply" to their ability to carry out the activity or where they do not apply mean that the claimant has no problem performing the activity or has less of a problem than would satisfy any of the other descriptors for that activity.

### **Example**

Activity 1 descriptor (f) is "none of the above apply". Descriptor (e) is "cannot walk more than 200 metres on level ground without stopping or severe discomfort". "None of the above apply" means the claimant has no walking problem or less of a problem than would satisfy the penultimate descriptor 1(e) and would score no points for that activity.

42278 Where a descriptor refers to a claimant being able to use a tool or implement, the use referred to is the use to which the tool or implement is normally put. The activity relates to hand function and is intended to reflect the ability to manipulate objects in order to carry out work-related tasks.

### **Example**

Ability to use a pen or pencil is intended to reflect the physical use of the object not reflect a claimant's level of literacy. The same concept applies to the use of a computer keyboard or mouse.

42279 The DM should decide which descriptor applies to each activity. Provided the determination is sufficiently supported by evidence, for each activity the DM can select the descriptor from the medical report (ESA85), the evidence provided by the claimant (including the ESA50 questionnaire), or a

different descriptor. Satisfaction of the test is decided on the total number of points from the final selection of individual descriptors (see DMG 42177).

42280 The DM must record the final scores for each descriptor and the reasons for the decision. Guidance on burden of proof is in DMG Chapter 01.

42281 If the required number of points is not reached a claimant does not have LCW<sup>1</sup>.

1 ESA Regs, reg 19(3)

42282 - 42289

## **Determining limited capability for work afresh**

42290 Where it has been determined that a claimant

**1.** has LCW **or**

**2.** is treated as having LCW

**2.1** in certain conditions (see DMG 42031) **or**

**2.2** as a hospital patient (see DMG 42070) **or**

**2.3** due to receiving certain regular treatment (see DMG 42090) **or**

**2.4** in exceptional circumstances (see DMG 42310) **or**

**2.5** as a claimant who is not a qualifying young person and is receiving education in certain circumstances (see DMG 42125)

the DM can determine afresh whether the claimant still has LCW<sup>1</sup>.

1 ESA Regs, reg 19(7)

42291 DMG 42290 applies where<sup>1</sup>

**1.** the DM wishes to determine whether there has been a relevant change of circumstances in relation to the claimant's physical or mental condition **or**

**2.** the DM wishes to determine whether the previous determination was made in ignorance of, or based on a mistake as to some material fact **or**

**3.** at least 3 months have passed since the date of the previous determination.

1 ESA Regs, reg 19(8)

## **Second or subsequent referrals**

42292 The medical report includes advice on the period of time that should pass before a claimant is reconsidered for the next WCA process. This advice is given in all cases but the DM can determine afresh whether the claimant still has LCW in prescribed circumstances (see DMG 42290). This may be at a different time to the advice given on the medical report.

42293 In second and subsequent referrals medical services will

- 1.** provide confirmation of the assessments which reach or exceed the threshold to satisfy LCW **or**
- 2.** arrange for a HCP to examine all claimants who do not reach the threshold and provide a medical report on their ability to perform the specified activities **or**
- 3.** provide a recommendation on whether they fall into the support group criteria (see guidance in DMG 42610 et seq).

42294 Not all claimants require a LCWA in subsequent referrals. Medical services will decide if LCW can be assessed on scrutiny of the available evidence. However it may be necessary to call the claimant for examination on subsequent referrals to assess LCWRA (see DMG 42732).

## **Recommendation by First-tier Tribunal**

42295 In cases where the claimant has been successful at appeal, the FtT may recommend when the claimant should next be referred for a WCA. This should only be altered where there is strong justification.

42296 The DM should apply the recommendation of the FtT as to when the next WCA should take place, from the date of the original decision unless the FtT specifies otherwise. This is because the FtT was looking at the claimant's circumstances as at that date<sup>1</sup> and not the date of the hearing. However, where the FtT advises that the next WCA should take place on a date calculated from the date of the FtT hearing then the DM should accept that.

1 SS Act 98, s 12(8)(b)

### **Example 1**

Judy's appeal has been upheld by the FtT and as a result she is entitled to ESA. The appeal hearing took place on 2.6.14. Judy's claim to ESA was made on 3.3.14. In making its decision the FtT has indicated that Judy should have another WCA in 12 months time but without specifying from which date. The DM decides that for Judy, the next WCA should be in March 2015 because this is 12 months from the date of the decision under appeal.

### **Example 2**

Alex's appeal against the DM's decision that he was not entitled to ESA on the grounds of not having

LCW has been allowed by the FtT on 11.9.14. The DM has implemented the decision of the FtT that Alex is entitled to ESA. In making its decision, the FtT has indicated that Alex's next WCA should be 12 months from the date of the hearing. The DM accepts this and preparations are made for Alex to have his next WCA in 12 months time in September 2015.

42297 Where a claimant's appeal to the FtT is successful, there should be a minimum period of eight months between the date of the appeal decision and a subsequent WCA, unless

- 1.** there are good grounds for believing that an earlier review is required **or**
- 2.** the FtT has recommended a longer review period.

42298 Where the FtT recommends that the next WCA should take place at a date earlier than the minimum review period then the DM should, unless there are good reasons not to, apply the minimum review period. Where the FtT recommends a review period which is in excess of the minimum review period then the DM should abide by that recommendation.

### **Example 1**

Alex's appeal against the DM's decision that he was not entitled to ESA on the grounds of not having LCW has been allowed by the FtT on 1.9.14. The DM has implemented the decision of the FtT that Alex is entitled to ESA. In making its decision, the FtT has indicated that Alex should have a second WCA nine months from the date of the appeal hearing. The DM also accepts this and preparations are made for Alex to have his next WCA in nine months time in June 2015.

### **Example 2**

Ben's appeal at the FtT has been successful. The hearing was held on 10.10.14. In making its decision, the FtT did not indicate when Ben should have his next WCA. The DM decides that for Ben, the WCA process should commence in June 2015 with a recall notice being issued in April 2015. In doing so the DM has applied an eight month minimum review period between the FtT hearing and the next WCA.

42299 There may be occasions where, for example, following a successful appeal the FtT recommends that the next WCA should take place in 24 months time but it has already taken 20 months for the appeal to be heard. As the FtT recommendation is applied from the original date of decision unless otherwise stated, without applying the minimum review period the claimant will be reviewed in four months time. However by applying the minimum review period between a successful appeal hearing and the next WCA the customer will not be seen until eight months time.

### **Example**

Nazyah's claim for ESA was refused on 20.7.12. She appealed against the decision and the appeal was finally heard on 7.10.14. The appeal was allowed by the FtT and it was recommended that Nazyah should have her next WCA in 18 months time. As the Tribunal recommendation is applied from the original date of decision, in this case 18 months from July 2012 would result in Nazyah being seen in January 2015. To

ensure Nazyah is not seen within three months of a successful appeal a minimum review period of eight months is applied meaning Nazyah will not be seen for her next WCA until June 2015.

42300 DMs should, unless there are circumstances which indicate otherwise, use a minimum period of eight months as the point when the claimant should undertake a subsequent WCA following a successful appeal. This means that recall notices should be issued after six months inviting claimants to attend a WCA.

42301 There may be circumstances where it will be reasonable to request that the claimant has another WCA within a shorter time frame than the minimum period of eight months. For instance, there may have been a change of circumstances affecting the claimant's health since the original decision and the DM may wish for a claimant to have another WCA in order to assess the situation.

42302 - 42309

## Exceptional circumstances 42310 - 42349

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[Uncontrolled or uncontrollable disease 42315 - 42319](#)

[Substantial risk 42320 - 42349](#)

42310 Claimants who do not satisfy the LCWA by having enough points must be treated as having LCW<sup>1</sup> if they

**1.** are suffering from a life threatening disease for which

**1.1** there is medical evidence (see DMG 42316) that the disease is uncontrollable, or uncontrolled by a recognised therapeutic procedure **and**

**1.2** in the case of a disease that is uncontrolled, there is a reasonable cause for it not to be controlled by a recognised therapeutic procedure **or**

**2.** are suffering from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk (see DMG 42320) to the mental or physical health of any person if they were found not to have LCW

unless they are treated as not having LCW because they are working<sup>2</sup> (see DMG 42600 et seq).

1 ESA Regs, reg 29; 2 regs 40 & 44

42311 - 42314

### Uncontrolled or uncontrollable disease

42315 There should be evidence that the disease is either uncontrolled or uncontrollable. The DM should establish that there is a reasonable cause for it not being controlled by medication or other recognised therapeutic procedure.

#### Medical evidence

42316 Medical evidence means evidence<sup>1</sup>

**1.** from a HCP approved by the Secretary of State **and**

**2.** from any HCP, hospital or similar institution **or**

**3.** that constitutes the most reliable evidence available in the circumstances.

**Note:** This definition does not apply to DMG 42553 - 42554.

1 ESA Regs, reg 29(4)

42317 - 42319

## **Substantial risk**

42320 'Substantial' is not defined and should be given its ordinary meaning. What amounts to 'substantial' is a question which must be determined using all the available evidence and taking account of all the circumstances.

42321 The substantial risk can be to the claimant or to any other person. For example, the claimant's mental health may be such that they may self-harm or self-neglect or may be violent to others.

42322 A claimant's anxiety or concern about their ability to cope with the demands of work or a return to work alone does not constitute a substantial risk.

42323 A Court of Appeal judgment<sup>1</sup> has said that substantial risk must be determined, not only in the context of work undertaken or in the workplace itself, but also the journey to and from work.

1 Charlton v Secretary of State for Work and Pensions [2009] EWCA Civ 42; R(IB) 2/09

42324 In cases where the claimant scores points in respect of Activity 15 (Getting About), but not enough to establish LCW, the DM must consider whether there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have LCW. In this risk assessment, the DM should consider

- 1.** the workplace itself,
- 2.** the journey to and from the workplace,
- 3.** the consequences of being found not to have LCW, including travelling to the Jobcentre and job interviews in familiar or unfamiliar places, **and**
- 4.** whether a third party is in fact available to
  - 4.1** accompany the claimant on a journey **or**
  - 4.2** help the claimant become familiar with a journey by doing one or more trial runs in advance.<sup>1</sup>

1 [2021] AACR 6

42325 Under operational guidance that has been in place since 12 September 2016, the ESA85 (the

HCP's full health assessment report and recommendation) for a claimant who has been placed in the WRAG should be shared with the work coach. This is to allow the work coach to have a properly-informed understanding of the claimant's capability for work when deciding a WRA.

### **Example 1**

Laura suffers from severe anxiety. She experiences severe panic attacks when required to go to an unfamiliar place unless she is accompanied by a close friend or family member. She scores 6 points for descriptor 15(c). This is insufficient to be found to have LCW. When considering whether there would be a substantial risk for WCA purposes, the DM takes into account that any job interviews Laura may be required to attend could be in unfamiliar places. Laura tells the DM that her husband is retired and is always on hand to accompany her to any appointments she has in unfamiliar places. He therefore would be available to take her to any job interviews she may have in unfamiliar locations. The DM therefore decides that Laura should not be treated as having LCW as there would not be a substantial risk to the health of any person if she were found not to have LCW.

### **Example 2**

Kevin suffers from panic disorder and is unable to get to an unfamiliar place without being accompanied. He scores 6 points for descriptor 15(c). This is insufficient to be found to have LCW. Kevin is able to get to familiar places such as the supermarket and his GP surgery on his own but is unable to get to unfamiliar places without the help of his wife. Kevin tells the DM that his wife works part-time. During her 4 days off each week she would be available and willing to take him to any unfamiliar places he needs to go. She would also help him do a few trial runs so he can familiarise himself with the journey. He has recently started to attend a counselling session that was in an unfamiliar part of town. His wife was unable to go with him as she was required to work on Tuesdays when the session was held. However, she helped him be able to attend these weekly sessions on his own by arranging to do a couple of trial runs on her day off beforehand. She has also done this several times in the past when he has had to attend a hospital appointment on a day she was working. The DM determines that although there may be a substantial risk to Kevin's mental health if he were required to attend a job interview or Jobcentre in an unfamiliar location, this risk can be mitigated as his wife would either accompany him if it fell on her day off or help him carry out trial runs beforehand. The DM therefore decides Kevin should not be treated as having LCW.

### **Example 3**

Monica has severe anxiety and depression. She is unable to get to unfamiliar places without being accompanied by another person and scores 6 points for descriptor 15(c). She does not go anywhere unfamiliar without her sister, who lives two hours away. Her sister works and is only able to visit Monica on average once a month. When her sister visits she encourage Monica to go out to unfamiliar places and has taken her on a few day trips to other cities. When considering whether there would be a substantial risk if Monica were found not to have LCW, the DM takes into account that any job interviews Monica may be required to attend could be in unfamiliar places. After making enquiries with Monica, the DM



establishes that Monica doesn't have any other family members or friends, apart from her sister, who would be able to accompany her to these interviews. As her sister is only available once a month on a weekend, the DM finds that there would be a substantial risk to the health of Monica if she were found not to have LCW as there would be nobody to reliably accompany her to job interviews in unfamiliar locations and therefore finds that she should be treated as having LCW. The DM does not, however, find that she should be treated as having LCWRA. The DM considers that because the Jobcentre is in a familiar location, Monica would be able to attend on her own to meet with her work coach. Monica's work coach will tailor any work-related activity set in light of the HCP's recommendation that she should not be asked to attend unfamiliar places without accompaniment.

#### **Example 4**

Mohammed suffers from severe anxiety. He is unable to attend familiar places without being accompanied and scores 9 points for descriptor 15(b). He has a brother who will accompany him to appointments at the hospital and GP. His brother also takes him shopping twice a month to the local supermarket. Mohammed often experiences stress as a result of having to rely on his brother for support. Moreover, he has missed some GP appointments because he does not wish to impose on his brother or his brother's work or family commitments meant he was not available to help. Given that Mohammed's brother is not always available to accompany Mohammed, the DM finds there would be a substantial risk to the health of Mohammed if he were found not to have LCW, there being no one who could reliably accompany him to job interviews in unfamiliar locations. The DM finds that Mohammed should be treated as having LCW and LCWRA.

#### **Risk at work**

42326 The judgment states that the DM must consider whether a substantial risk arises in the light of the work which the person might be expected to perform in the workplace he might find himself in. In making this assessment, the DM need only identify a broad range of duties that the person could be capable of, taking into account any training given, the person's aptitude and their disease or disablement.

#### **Example 1**

Peter is 27 years old and suffers from alcohol dependency syndrome. He has never worked and says that his condition prevents him from undertaking any kind of work. The DM identifies that Peter could undertake straightforward and unstructured, unskilled work without substantial risk to himself or any person. The DM need not identify a particular type of work that Peter could be capable of.

#### **Example 2**

Phillip is 22 years old and has recently been diagnosed as suffering from epilepsy. Since the age of 18 he has worked as a roofer and scaffolding erector. Phillip says that if he were to return to this work, his health would be at substantial risk as he was often expected to work at great height. The DM determines that Phillip could now undertake closely supervised, indoor or outdoor work, at ground level without risk to himself or any person. The DM need not identify a particular type of work that Phillip could be capable

of.

### **Risk associated with travelling to and from work**

42327 In assessing risk associated with journeys to and from work, the DM may find it useful to examine evidence of the person's daily life to identify if travel is undertaken and what, if any, risks that travel poses. For example when

- 1.** going shopping **or**
- 2.** visiting friends **or**
- 3.** attending appointments e.g. at a hospital.

### **Allergic health conditions**

42328 Claimants suffering from an allergic health condition may contend that there would be a substantial risk to their health if they were found capable of work. In such cases, the DM may need to refer to the HCP's medical report or obtain further evidence from the claimant to determine whether or not a substantial risk exists. The following are examples of further evidence which may inform the decision making process–

- 1.** What are the precise details of the substances or materials that the claimant is allergic to?
- 2.** What, if any, further investigations have been undertaken to establish the cause of the claimant's allergy?
- 3.** What has been the result of those investigations?
- 4.** Has the claimant been prescribed any emergency medicine to deal with the effects of an allergic reaction? i.e. a self-administered adrenaline syringe, commonly known as an Epipen.
- 5.** Is the claimant able to self-administer emergency medication successfully?
- 6.** Has the claimant ever suffered an anaphylactic reaction?
- 7.** If so, what are the details? i.e. when did it occur? what were its after effects and was the claimant hospitalised as a result?
- 8.** What type(s) of work, if any, has the claimant previously undertaken when suffering from their stated allergic condition?
- 9.** How were the effects of the claimant's allergic condition accommodated when undertaking that

work? i.e. were any reasonable adjustments made in the workplace?

**10.** What precautions does the claimant take in their daily life to avoid contact with the substances or materials in question?

**11.** Why would it not be possible to take such precautions in the workplace?

### **Other health conditions**

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**1.** What are the precise details of the claimant's health condition?

**2.** What, if any, investigations have been undertaken into the claimant's health condition?

**3.** What has been the result of those investigations?

**4.** Has the claimant been prescribed any medication to deal with their health condition? i.e. an angina sufferer who has been prescribed a GTN spray to relieve their symptoms.

**5.** Is the claimant able to self-administer their medication successfully?

**6.** Has the claimant ever suffered an emergency in connection with their stated health condition?

**7.** If so, what are the details? i.e. when did it occur? what were its after effects and was the claimant hospitalised as a result?

**8.** What type(s) of work, if any, has the claimant previously undertaken when suffering from their stated health condition?

**9.** How was the claimant's health condition accommodated when undertaking that work? i.e. were any reasonable adjustments made in the workplace?

**10.** What precautions does the claimant take in their daily life to accommodate their health condition?

**11.** Why would it not be possible to take such precautions within the workplace?

## Reduction of risk

42330 A claimant cannot be treated as having LCW as in DMG 42310 **2.** if the risk could be significantly reduced by

- 1.** reasonable adjustments being made to the claimant's workplace **or**
- 2.** the claimant taking medication prescribed by their GP to manage their condition<sup>1</sup>.

1 ESA Regs, reg 29(3)

### Example 1

Khaled suffers from back pain, and claims ESA. His previous employment was office work. Following application of the WCA, the DM determines that he scores 6 points

for standing and sitting. Khaled argues that he satisfies the substantial risk rules, as he cannot sit at a desk for lengthy periods without exacerbating his condition. The DM determines that the risk to his health could be alleviated by reasonable adjustments to his workstation, such as a desk which can rise and fall to allow working in standing and sitting positions, and taking breaks away from his workstation. The DM determines that Khaled does not have LCW, and cannot be treated as having LCW. The award of ESA is terminated.

### Example 2

Lucy is at risk of potentially fatal anaphylactic shock if she comes into contact with products containing latex, which is a risk at work and in the journey to and from work. There is no suggestion that she satisfies any of the descriptors. The DM determines that the risk could be substantially reduced if Lucy carried an adrenaline auto-injector which has been prescribed for her, and a medical alert bracelet.

42331 - 42349

## Risk at work

42325 The judgment states that the DM must consider whether a substantial risk arises in the light of the work which the person might be expected to perform in the workplace he might find himself in. In making this assessment, the DM need only identify a broad range of duties that the person could be capable of, taking into account any training given, the person's aptitude and their disease or disablement.

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Peter is 27 years old and suffers from alcohol dependency syndrome. He has never worked and says that his condition prevents him from undertaking any kind of work. The DM identifies that Peter could undertake straightforward and unstructured, unskilled work without substantial risk to himself or any person. The DM need not identify a particular type of work that Peter could be capable of.

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**10.** What precautions does the claimant take in their daily life to accommodate their health condition?

**11.** Why would it not be possible to take such precautions within the workplace?

### **Reduction of risk**

42329 A claimant cannot be treated as having LCW as in DMG 42310 **2.** if the risk could be significantly reduced by

**1.** reasonable adjustments being made to the claimant's workplace **or**

**2.** the claimant taking medication prescribed by their GP to manage their condition<sup>1</sup>.

1 ESA Regs, reg 29(3)

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Khaled suffers from back pain, and claims ESA. His previous employment was office work. Following application of the WCA, the DM determines that he scores 6 points

for standing and sitting. Khaled argues that he satisfies the substantial risk rules, as he cannot sit at a desk for lengthy periods without exacerbating his condition. The DM determines that the risk to his health could be alleviated by reasonable adjustments to his workstation, such as a desk which can rise and fall to allow working in standing and sitting positions, and taking breaks away from his workstation. The DM determines that Khaled does not have LCW, and cannot be treated as having LCW. The award of ESA is terminated.

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Lucy is at risk of potentially fatal anaphylactic shock if she comes into contact with products containing latex, which is a risk at work and in the journey to and from work. There is no suggestion that she satisfies any of the descriptors. The DM determines that the risk could be substantially reduced if Lucy carried an adrenaline auto-injector which has been prescribed for her, and a medical alert bracelet.

42330 - 42349

## Treated as having limited capability for work until assessment is carried out 42350 - 42449

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42350 A claimant can be treated as having LCW until such time as it has been determined whether the claimant<sup>1</sup>

**1.** has LCW **or**

**2.** is to be treated as having LCW **or**

**3.** is to be treated as not having LCW because they fail without good cause to provide the required information for the LCWA or to attend or submit for examination (see DMG 42450 et seq)

unless they are treated as not having LCW because they are working<sup>2</sup> (see DMG 42600 et seq).

1 ESA Regs, reg 30(1); 2 regs 40 & 44

### Conditions

42351 Where there is evidence of LCW (see DMG 42145 et seq) and DMG 42352 does not apply the claimant is treated as having LCW<sup>1</sup> until

**1.** actual assessment **or**

**2.** they are treated as having LCW **or**

**3.** they are treated as not having LCW because they fail without good cause to

**3.1** provide the information in the questionnaire **or**

**3.2** attend for or submit to a medical examination.

1 ESA Regs, reg 30(2)(a); SS (Med Ev) Regs, regs 2 & 5

42352 A claimant is not treated as having LCW if



**1.** in the last determination before the date of the ESA claim, it has been determined that the claimant did not have LCW<sup>1</sup> **or**

**2.** in the six months preceding the date of the ESA claim it has been determined that the claimant was treated as not having LCW because of a failure without good cause

**2.1** to provide the required information **or**

**2.2** to attend or submit for examination<sup>2</sup>

unless any of the conditions in DMG 42353 apply<sup>3</sup>.

**Note:** See DMG 42370 et seq for detailed guidance.

1 ESA Regs, reg 30(2)(b)(i); 2 reg 30(2)(b)(ii); 3 reg 30(4)

42353 The conditions in DMG 42352 are that

**1.** the claimant is suffering from some specific disease or bodily or mental disablement from which the claimant was not suffering at the time of that determination **or**

**2.** a disease or bodily or mental disablement from which the claimant was suffering at the time of that determination has significantly worsened **or**

**3.** a claimant who was treated as not having LCW for failure to provide information has since provided the information requested by the DM<sup>2</sup>.

**Note 1:** See DMG Chapter 02 for guidance on the date of claim. DMs should note that this may be different from the date from which the claim is made.

**Note 2:** Where the FtT dismisses an appeal against a decision which includes a determination that a claimant does not have LCW, the date of the LCW determination is still that made by the DM.

1 ESA Regs, reg 30(4)

42354 The conditions at DMG 42352 **1.** do not apply where

**1.** a claimant has made and is pursuing an appeal against a relevant decision that the claimant does not have LCW after application of the WCA **and**

**2.** that appeal has not yet been determined by a FtT<sup>1</sup>.

See DMG 42790 et seq for detailed guidance.

**Note:** This guidance does not apply where the claimant makes a further appeal to the UT against a FtT

decision.

1 ESA Regs, reg 2(1) & 30(3) & (5); TCE Act 07, s 3(1)

42355 Advice can be obtained from medical services on whether the reason for LCW is new or the previous medical condition has significantly worsened if this is not clear from the available evidence.

42356 - 42369

## **Further claim after determination that claimant does not have LCW**

### **General**

42370 A claimant may make a further claim and provide medical statements after the DM has determined that they do not have LCW. The DM, if possible, applies the LCWA.

**Note:** See DMG 42410 et seq where a claim is made after the DM has determined that the claimant is treated as not having LCW as in DMG 42351 **3.**

42371 The DM may already have sufficient information with which to carry out a new LCWA. This could include

- 1.** medical evidence from the previous medical examination
- 2.** medical evidence provided to support the new claim **and**
- 3.** any other evidence received by the DM relevant to assessment of the LCWA on the new claim.

42372 If the DM considers there is sufficient information they should carry out the LCWA (see DMG 42170). If the information provided with the repeat claim shows that the question of whether or not a claimant has LCW can be determined immediately without gathering further evidence, the claimant cannot be treated as having LCW as in DMG 42350 et seq for any period before a decision is made on the claim.

42373 If the DM considers there is insufficient information to carry out the LCWA they should consider whether the claimant can be treated as having LCW until the LCWA is carried out<sup>1</sup> (see DMG 42350 et seq).

42374 If the claimant cannot be treated as having LCW because DMG 42352 applies, and they do not have a new or worse health condition, their claim cannot be decided until the LCWA is carried out.

42375 - 42379

## **Determining LCW**

42380 Where the claimant makes a claim for ESA after a previous determination that they do not have LCW, the DM should consider whether they have sufficient evidence from the most recent previous determination to determine whether or not the claimant has LCW.

42381 Previous evidence could be

- 1.** the questionnaire (form ESA50)
- 2.** the HCP report (form ESA85)
- 3.** further medical evidence, such as
  - 3.1** a GP report (form ESA113)
  - 3.2** a hospital report
  - 3.3** letters from the GP or consultant
- 4.** information from someone who provides the claimant with care, support or treatment.

42382 Where the previous determination is unchanged following mandatory reconsideration or an appeal to the FtT, any evidence or information provided for the DM or FtT should also be considered.

42383 The DM should not assume without further investigation that there has been no change since the last determination of LCW. The evidence provided by the claimant as part of their repeat claim, including any information given by telephone, should be considered carefully, together with the evidence provided when the previous determination was made.

42384 The claimant may have been awarded JSA after the previous determination that they did not have LCW, for example

- 1.** during the mandatory reconsideration process

**2.** after any appeal to the FtT was dismissed

**3.** while awaiting determination of a repeat claim for ESA.

42385 Although JSA is awarded on the condition that the claimant does not have LCW<sup>1</sup>, no determination of LCW has been made for the period of the JSA award, and there is no presumption that the claimant does not have LCW for the purposes of the ESA repeat claim. It should be noted that the claimant may have been sending in evidence of LCW for the purposes of a JSA EPS<sup>2</sup> – see DMG Chapter 20 for further details.

1 JS Act 95, s 1(2)(f); 2 JSA Regs, reg 55ZA; JSA Regs 13, reg 46A

42386 It may not be appropriate to rely on the previous evidence, for example because

**1.** the evidence has been lost or routinely destroyed

**2.** the claimant states that they have a new or significantly worse condition

**3.** the claimant's health condition is one which is expected to deteriorate

**4.** the claimant provides evidence with the repeat claim which might indicate that they should be treated as having LCW<sup>1</sup>, for example they have been in hospital.

**Note:** This list is not exclusive.

1 ESA Regs, reg 20, 25, 26 & 33(2)

42387 The mere passage of time since previous evidence was obtained does not of itself show that it cannot be relied on as evidence of the claimant's current health condition. For example, where

**1.** a condition was previously reported to be stable **or**

**2.** the previous evidence had taken variability into account

and there is no evidence of any change, there may be no reason to refer the claimant for a further WCA.

42388 The DM should consider all the claimant's circumstances from the date of the previous LCW determination to the date of determination of the repeat ESA claim. For example, where the repeat claim is made after an appeal has been dismissed, there may have been a considerable elapse of time since the original LCW determination. The FtT is not permitted to consider any changes since the decision embodying that determination was made<sup>1</sup>. The fact that the FtT upheld that determination should not be

considered conclusive for the repeat claim.

1 SS Act 98, s 12(8)(b)

42389 If the DM determines that

- 1.** the previous evidence cannot be relied on to make a further determination of LCW **and**
- 2.** the claimant should be referred for a further WCA

they should consider whether the claimant can be treated as having LCW pending the WCA<sup>1</sup>. This means considering whether the claimant has a new or significantly worse health condition since the most recent LCW determination was made.

**Note:** The DM is reminded that, if it is determined that the claimant does not have a new or significantly worse health condition, the ESA claim cannot be decided until a further LCW determination is made – see DMG 42374.

1 ESA Regs, reg 30(2)

42390 - 42399

### **Meaning of new or significantly worse health condition**

42400 If the claimant states that they have a new or significantly worse condition since the previous determination was made, they should be asked if they have further information or evidence of this. In the case of deterioration, the claimant should be asked how it affects their ability to perform the functional descriptors since the previous determination that they had LCW.

42401 The evidence need not be a requirement to obtain evidence from a GP or other health care professional treating the claimant. For example, it could be information provided by the claimant, or by someone who knows them well, such as a carer, social worker or support worker.

**Note:** DMs are reminded that the claimant's evidence does not require corroboration unless it is inherently improbable or self-contradictory – see DMG 01380.

42402 Where the DM accepts that there is a new or significantly worse condition, the claimant should be

- 1.** treated as having LCW<sup>1</sup> in the normal way as in DMG 42350 **1. and**
- 2.** referred for a further WCA.

42403 Whether or not the claimant has a new health condition should be determined in relation to the evidence used to make the most recent previous LCW determination.

42404 Where the claimant states that their health condition has deteriorated since their last assessment, the DM should consider whether this change would be likely to be sufficient to score 15 points or more.

### **Example 1**

Felicity was awarded ESA after sending in fit notes showing she had low back pain. Her award was terminated after she was found not to have LCW following application of the WCA. No other conditions were assessed by the HCP. Her subsequent appeal was dismissed by the FtT, and the ESA award made pending the outcome of that appeal was terminated. Felicity makes a further claim for ESA on the basis that she is suffering from depression. The DM decides to treat Felicity as having LCW pending a further assessment, and awards ESA at the assessment phase rate.

### **Example 2**

Jermaine was entitled to ESA at the assessment phase rate, on the basis that he was suffering from problems as a result of injuries to his back, knees and elbows. The DM accepts the HCP's recommendation that 6 points are awarded for problems with mobilising, and a further 6 points for difficulties with standing and sitting. As the score is less than 15 points, Jermaine's award of ESA is terminated. His appeal is dismissed.

Jermaine makes a further claim for ESA, stating that his condition has significantly worsened since the last LCW determination. His GP writes a letter to say that Jermaine's knees have got worse after unsuccessful surgical intervention, and his walking distance has reduced significantly. The DM determines that Jermaine might score at least 9 points for Activity 1, which would be sufficient to score at least 15 points, and treats him as having LCW pending a further WCA.

### **Example 3**

Sadie's award of ESA was terminated after she was found not to have LCW. She had difficulties with her right arm which restricted her ability to reach and to pick up objects, but was able to manage these functions with her left arm.

Sadie makes a further claim and states that her condition has deteriorated. Her right hand is now worse, and she is not able to use her mobile phone or read a book. The DM establishes that Sadie's left arm is not affected, and determines that Sadie would be unlikely to score any further points. The DM finds that Sadie does not have LCW, using the evidence provided for the repeat claim, as well as the previous LCW determination and the claim is disallowed. Sadie is not treated as having LCW for the period before the

claim is decided, and is not referred for a further WCA.

#### **Example 4**

Hassan has suffered from back pain and depression for over 20 years following a road traffic accident. He gave up his job as a hospital porter due to back pain. He is awarded ESA, but the award was terminated following application of the WCA. On appeal, the FtT found that Hassan could reasonably and repeatedly walk at least 400 metres before needing to stop, and could sit and stand for at least an hour without significant discomfort. Although he suffered from low mood, he did not score points in relation to any of the mental health descriptors. The appeal was dismissed.

Hassan made a further claim for ESA, providing evidence that his medication for back pain and depression had been increased, as his back problems had worsened due to degenerative change. His GP states that Hassan's mobility is restricted, and he had been referred to the pain clinic. Hassan tells the DM that he walks to the nearby shops 200 metres away most days, sitting for a few minutes to relieve pain before completing his shopping, and returning home. The increased medication for depression was helping, and he was unable to provide any examples which might show a mental health descriptor was satisfied. The DM determines that the worsening in Hassan's condition is not significant, and that the new evidence together with the evidence provided for the most recent previous LCW determination continues to show that Hassan does not score any points, and does not have LCW. Hassan's claim is disallowed.

#### **Example 5**

Molly was entitled to ESA while she was recovering from surgery for a fracture of her right leg. She is referred for a WCA after three months. Molly says that although she has been discharged from hospital out-patients, she still has mobilising problems. She uses crutches to get about, but cannot manage to walk very far due to pain. She has no other health condition. The DM accepts the HCP's advice that Molly could mobilise repeatedly for lengthy distances using a manual wheelchair, and finds that she does not have LCW. Molly's award of ESA is terminated, and a subsequent appeal is dismissed.

Molly makes a repeat claim stating that her mobilising problem had got worse, because she had found using crutches too difficult, and she now had a wheelchair to get about. The DM disallows the repeat claim, because although Molly's health condition had deteriorated, this did not change the finding made as part of the previous LCW determination that she could reliably and repeatedly mobilise with a manual wheelchair.

#### **Example 6**

Darren's award of ESA is terminated in June 2014 when he is found not to have LCW. His health condition at the time was diagnosed as early stage Parkinson's disease. Darren makes a further claim in May 2015 with the same health condition. He does not respond to requests for information about whether there have been any changes since June 2014 in how his health condition affects him.

The DM concludes that, as Parkinson's disease is a degenerative condition, it would not be reasonable to determine whether or not Darren has LCW on the basis of the evidence used to make the previous LCW determination. Darren is referred for a further WCA. In the absence of any information that Darren's condition has significantly worsened, he cannot be treated as having LCW while he is referred for the WCA.

42405 - 42409

## **Further claim after claimant treated as not having LCW**

42410 The guidance at DMG 42370 et seq does **not** apply to claims made following a determination that the claimant is treated as not having LCW because they have failed without good cause

- 1.** to return the questionnaire **or**
- 2.** to attend for or to submit to a medical examination<sup>1</sup>.

The claimant should be referred for the WCA in the normal way.

1 ESA Regs, reg 22, 23 & 30(2)

42411 Where the claim is made within six months of the determination in DMG 42410, the claimant cannot be treated as having LCW as in DMG 42350 unless they

- 1.** are suffering from a new or significantly worse condition since the date of the previous LCW determination<sup>1</sup> **or**
- 2.** return the questionnaire where they had failed to do so<sup>2</sup>.

1 ESA Regs, reg 30(4)(a) & (b); 2 reg 22 & 30(4)(c)

42412 Where DMG 42411 applies, the claimant

- 1.** is referred for the WCA **and**
- 2.** can be treated as having LCW as in DMG 42350 **and**
- 3.** can be awarded ESA

pending determination of whether or not they have, or are treated as having, LCW, even though they have previously been found not to have, or were treated as not having, LCW.

42413 Where a repeat claim is made more than six months after a previous determination that the



claimant is treated as not having LCW, the practice of awarding ESA at the assessment phase rate where medical evidence is provided on a repeat claim continues.

### **Example**

Craig's award of ESA is terminated on 3.4.15 after he is found not to have LCW. He makes a further claim on 18.6.15 with evidence of a new health condition, and is awarded ESA as the DM treats him as having LCW. On 3.9.15 Craig is treated as not having LCW after he fails without good cause to return the questionnaire. Craig makes a further claim for ESA on 8.3.16. Craig is treated as having LCW pending assessment, as the claim is made more than six months after the determination that he was treated as not having LCW.

42414 - 42429

## **Gap in medical evidence**

### **Contact with claimant not lost**

42430 If a claimant fails to provide doctor's statements in the period pending a determination of LCW, and contact with the claimant has not been lost, payment of benefit may be suspended<sup>1</sup> (see DMG Chapter 04 for further guidance on suspension of the payment of benefit).

1 SS CS (D&A) Regs, reg 16

42431 In such cases, the DM must apply the WCA in the normal way (see DMG 42170 et seq).

**Note:** The DM should consider whether the claimant has LCW from the day after the last day for which medical evidence is provided down to the date of the decision.

42432 The test may need to be applied on the balance of probabilities using all the available evidence, including evidence from the previous claim where appropriate. For example, it might not be possible to refer the claimant for medical examination where they have returned to work or claimed JSA. Where there is little or no evidence, the DM may draw adverse inferences. Advice should be sought from medical services in cases of doubt. Insufficient evidence does not mean that the WCA cannot be applied.

42433 Where a claimant stops submitting the required medical evidence this does not count as a change of circumstances to justify a decision to supersede the entitlement decision. The DM can suspend paying the claimant benefit because of the failure to provide medical evidence but cannot conclude they are not entitled to ESA without carrying out the WCA<sup>1</sup>. The determination on LCW gives the grounds for supersession, not the lack of medical evidence.

42434 This applies even in cases where the claimant is treated as not having LCW because they fail to return the questionnaire or fail to attend or submit for examination.

### **Example 1**

Derek is treated as having LCW while submitting doctor's statements. On 11.3.13 medical evidence expires and despite reminders no further medical evidence is received. Derek asks for the LCW assessment to be applied. The questionnaire is issued on 2.4.13 but is not returned. A reminder is issued on 17.4.13. On 2.5.13 the DM determines that Derek is treated as not having LCW from 25.4.13. They also make a determination that for the period from 12.3.13 to 24.4.13 Derek scores 0 points for the purposes of the LCWA and does not have LCW. The decision awarding ESA or credits is superseded to terminate entitlement from 12.3.13.

### **Example 2**

Joan is treated as having LCW while submitting doctor's statements. On 1 November medical evidence expires and after reminders Joan notifies that she resumed work on 5 November. The DM determines that for the period between 1 and 5 November Joan scored 0 points for the purposes of the LCWA and does not have LCW.

42435 In all cases the effective date of the supersession to end entitlement to ESA or credits is the date from which the claimant does not have LCW<sup>1</sup>. This is because the later determination about LCW showed there had been a change of circumstances when the claimant was no longer treated as having LCW<sup>2</sup>.

1 SS CS (D&A) Regs, reg 6(2)(a) & Sch 3C, paras 2 & 3(a); 2 ESA Regs, reg 30

### **Contact lost with claimant**

42436 For cases where medical evidence ceases and contact with the claimant is lost, see DMG 42553 et seq.

42437 - 42449

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## General

42450 A claimant can be treated as not having LCW if

**1.** they fail without good cause to provide information, attend or submit to examination<sup>1</sup> (see DMG 42455 et seq)

**2.** they are certain claimants who

**2.1** have a day of sick absence from duty recorded by the Secretary of State<sup>2</sup> (see DMG 42550)

**2.2** are attending a training course for which a training allowance or premium is paid<sup>3</sup> (see DMG 42551)

**2.3** cease to supply medical evidence<sup>4</sup> (see DMG 42553 et seq)

**2.4** are disqualified for receiving ESA during a period of imprisonment or detention in legal custody<sup>5</sup> (see DMG 42580)

**3.** they are not entitled to ESA by reason of working<sup>6</sup> (see DMG 42600).

1 ESA Regs, reg 22 & 23; 2 reg 32(1); 4; 3 reg 32(2); 4 reg 32A(1); 5 reg 159; 6 reg 40

42451 - 42454

## **Failure to return the questionnaire**

42455 A claimant can be required to

**1.** provide certain information asked for by the DM including the return of the questionnaire (see DMG 42457) **and**

**2.** attend and submit to a medical examination for the LCWA (see DMG 42480)

If they fail without good cause to do either, claimants are treated as not having LCW<sup>1</sup>.

1 ESA Regs, regs 22 & 23

42456 Before a claimant can be treated as not having LCW, the DM has to be satisfied that the prescribed conditions are met. These include the way in which the information or attendance was requested and the amount of notice given.

42457 A claimant who is subject to the LCWA can be asked to provide information<sup>1</sup> relating to their ability to perform certain activities<sup>2</sup>. This information is usually asked for by sending the claimant a questionnaire.

1 ESA Regs, reg 21(1)(b); 2 Sch 2

42458 The questionnaire is not required in certain circumstances<sup>1</sup> (see DMG 42161). All other claimants will be sent the questionnaire.

1 ESA Regs, reg 21(3)

42459 It is not appropriate to treat a claimant as not having LCW for non-return of the questionnaire if a claimant fails to return the form but the DM has exercised discretion to proceed without it<sup>1</sup>.

1 ESA Regs, reg 21(2)

42460 A claimant is treated as not having LCW for failure to return the questionnaire without good cause if the Secretary of State can show that

- 1.** the questionnaire was sent **and**
- 2.** the claimant was sent a further request to return the questionnaire at least three weeks after the date of the first request<sup>1</sup> **and**
- 3.** at least one week has passed since the further request was sent<sup>2</sup> **and**
- 4.** good cause has not been accepted for delay beyond the period stated in **2.** and **3.** above<sup>3</sup>.

1 ESA Regs, reg 22(2)(a); 2 reg 22 (2)(b); 3 reg 22(1)

42461 - 42464

### **The Secretary of State's duty**

42465 The DM needs to make sure that the Secretary of State has complied with the duty set out in the legislation<sup>1</sup> to send the questionnaire and the reminder to the claimant. The DM can accept that it has been sent if there is a record of its issue and no indication that it was not properly addressed, stamped and posted.

1 Inte Act 78, s 7

### **Has the questionnaire been sent**

42466 Care must be taken to identify the date the questionnaire was sent. The date of its issue is only an indication of the date on which it was posted. The DM should consider whether the questionnaire actually left the issuing office and was put into the external mail on the date recorded<sup>1</sup>.

1 R(IB) 1/00

42467 - 42469

### **Has the correct amount of time passed**

42470 The correct period of time must have passed since the first questionnaire was sent. The period of time starts on the day after the questionnaire is sent and ends at

midnight on the last day provided for. If the questionnaire is posted to the claimant's last known address, the date on which it is sent is the date it was posted<sup>1</sup>.

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

### **Example**

A questionnaire was sent to Jack on 7.11.11. A reminder is due and sent on 29.11.11. If he still does not return the questionnaire, the first day on which the DM can consider whether he should be treated as not having LCW is 7.12.11.

### **Good cause**

42471 If the DM concludes that the Secretary of State has complied with the duty set out in the legislation, they may then go on to consider whether the claimant had good cause for their failure to return the questionnaire<sup>1</sup> (see DMG 42500).

1 ESA Regs, reg 24

### **Questionnaire returned before good cause considered**

42472 As in DMG 42465 the law imposes time limits on the Secretary of State in relation to the sending of the questionnaire and the reminder. However, there is no law imposing a time limit on the claimant for the return of the questionnaire. Sometimes the questionnaire is returned **after** the time limit imposed on the Secretary of State but **before** the DM has considered whether there was good cause for the earlier failure to return the questionnaire. In these circumstances, the determination cannot be made because it cannot be held that the claimant has failed to return the questionnaire. Instead, normal WCA action should resume.

### **Example**

A questionnaire was sent to Jayne on 1.5.12. This was not returned so a reminder was sent to her on 23.5.12. If the questionnaire is not returned, the first day on which the DM could consider making a determination treating Jayne as not having LCW is 31.5.12. The DM obtains the case on 11.6.12 to make the determination, but notes that the questionnaire had been received in the office on 6.6.12. The DM cannot make the determination treating Jayne as not having LCW because she has not failed to return the questionnaire. Instead, normal WCA action resumes.

42473 - 42479

### **Failure to attend or submit to a medical examination**

#### **General**

42480 Claimants may be called to attend a medical examination by a HCP approved by the Secretary of State where it has to be determined whether they have LCW<sup>1</sup>. The

purpose of the medical examination is to enable the DM with the benefit of a medical opinion to determine whether a claimant meets the threshold for LCW. The medical examination may be conducted in person, by telephone or by video.

42481 Claimants can be treated as not having LCW if

**1.** they fail without good cause to attend or submit to a medical examination<sup>1</sup> **and**

**2.** they

**2.1** had at least seven days' written notice of the examination<sup>2</sup> **or**

**2.2** agreed to accept a shorter period of notice whether given in writing or otherwise<sup>3</sup>.

1 ESA Regs, reg 23(2); 2 reg 23(3)(a); 3 reg 23(3)(b)

42482 Medical services will contact the claimant by telephone to arrange an appointment for the examination and will keep a detailed record of the date, time and place of the examination agreed with the claimant and written notice will be issued to confirm the arrangement. The claimant can agree to accept a shorter period of notice than seven days.

### **The Secretary of State's duty**

42483 Unless the claimant has agreed to accept a shorter period of notice whether given in writing or by telephone (see DMG 42862 and DMG 42485), when considering whether a claimant should be treated as not having LCW, the DM has to be satisfied that the Secretary of State has complied with the duty set out in the legislation<sup>1</sup>, that

**1.** a written notice was sent **and**

**2.** the notice included the time and place of the examination **and**

**3.** the notice was sent at least seven days before the date of the examination **and**

**4.** the examination had not been cancelled.

1 ESA Regs, reg 23(3)

42484 If, after calculating the period of time which passed between the date the written notice was sent and the time of the examination, the DM decides that seven days had not elapsed<sup>1</sup>, they should consider whether the claimant has agreed to accept a shorter period of notice whether given in writing or by telephone. If there is no evidence that the claimant had agreed to accept a shorter period of notice the claimant cannot be treated as not having LCW.

1 ESA Regs, reg 23(3)

42485 Where the claimant has agreed to accept a shorter period of notice the DM considers the appropriate amount of time agreed between medical services and the claimant<sup>1</sup>. Medical services always send a confirmation of the date, time and venue of the appointment whether or not this has been agreed in a telephone call with the claimant.

1 ESA Regs, reg 23(3)

42486 Only one rescheduled appointment can be offered during a WCA referral. If the claimant cannot attend the rescheduled appointment, medical services will record that the customer has failed to attend. The DM will have to consider the reasons why the claimant cannot attend and consider good cause (see DMG 42500 et seq).

42487 If the DM cannot confirm that the provisions in DMG 42483 were met, the claimant cannot be treated as not having LCW.

**Note:** Medical services can provide evidence of notification for requests from DMs who are considering revision or supersession of disallowance determinations and appeal submissions.

### **Has notice been sent**

42488 The DM needs to be sure that the claimant has been sent notice. The DM can accept that it has been sent if there is a record of its issue and no indication that it was not properly addressed, stamped and posted<sup>1</sup>. In addition the DM should make sure that the notice was in writing and included the time and place of the medical examination unless the claimant had agreed to accept a shorter period of notice whether given in writing or otherwise. Medical services always send a confirmation of the date, time and venue of the appointment whether or not this has been agreed in a telephone call with the claimant.

1 Inte Act 78, s 7

### **Have seven days passed**

42489 Where there is no evidence that the claimant agreed to accept a shorter period of notice whether in writing or otherwise, the DM needs to be sure that the correct period of notice has been given. The DM has to decide when the notice was sent. The day after is day one. Seven clear days of notice have to pass before the date of the examination<sup>1</sup>.

1 R(IB) 1/00

### **Example 1**

A letter giving the time and place of a medical examination is prepared and placed in the post tray at 3pm on Friday 1st. Because of the timing of the internal post collection it does not reach the post room until Monday lunchtime and leaves the office into the external mail on Monday at 5pm. The appointment is



timed for Monday 11th. The recipient does not attend. It is not possible to treat the claimant as not having LCW because if Tuesday 5th is Day one, Monday 11th is Day seven and they have not received seven days clear notice.

## **Example 2**

A letter giving the time and place of a medical examination leaves the office on Wednesday 6th. The appointment is timed for Thursday 14th. The recipient does not attend. Subject to good cause the claimant is treated as not having LCW because Thursday 7th is Day one, Thursday 14th is Day eight and they have received at least seven days clear notice.

## **Has the appointment been cancelled**

42490 Claimants cannot fail to attend the medical examination if the appointment had already been cancelled by medical services. The DM should investigate any indications that the claimant had made contact with the issuing office before the time of the examination. This is so that they can satisfy themselves that the appointment had been left open for the claimant.

## **Good cause**

42491 If the DM concludes that the Secretary of State has complied with the duty set out in DMG 42483 they may go on to consider whether the claimant had good cause for their failure to attend to medical examination (see DMG 42500).

## **Failure to submit**

42492 Where a claimant attends a LCWA but fails to participate in the process the assessment is terminated. This may happen where a claimant

- 1.** refuses to be examined **or**
- 2.** poses a threat to staff or others **or**
- 3.** shows inappropriate or threatening behaviour **or**
- 4.** shows intoxication from alcohol or substance abuse **or**
- 5.** is persistently uncooperative.

42493 Medical services will record a full and detailed account of the claimant's behaviour and a full report will be completed and referred to the DM to decide whether the claimant should be treated as not having LCW due to a failure to submit to an examination.

42494 If a claimant makes it clear that they will not be medically examined then that constitutes a failure to submit to an examination. Going to the examination but refusing to be examined constitutes attendance but is a failure to submit<sup>1</sup>.

1 R(IB) 1/01

42495 A claimant fails to submit to an examination not only by refusing to be examined but also if that claimant seeks to impose as a condition of being examined a term which would render the examination useless for the purpose for which it is required.

### **Example**

The claimant requests the medical report should not be passed to a layman, including a DM, insisting on complete confidentiality. By imposing such a condition the examination becomes useless for the purposes for which it was required (see DMG 42480) and the claimant is failing to submit to an examination.

### **Good cause**

42496 If the DM concludes that the Secretary of State has complied with the duty set out in DMG 42483 they may go on to consider whether the claimant had good cause for their failure to submit to a medical examination (see DMG 42500).

42497 - 42499

### **Consideration of good cause**

42500 When a claimant fails to return the questionnaire or fails to attend or submit to examination, consideration of good cause includes

- 1.** whether the claimant was outside GB at the relevant time **and**
- 2.** the claimant's state of health at the relevant time **and**
- 3.** the nature of any disability the claimant has<sup>1</sup>.

**Note:** The list is not exhaustive (see DMG 42501 - 42543 for further guidance on good cause).

1 ESA Regs, reg 24

42501 The claimant will have been asked to give the reasons for not complying with the Secretary of State's request for information or to attend or submit for examination. The DM should bear in mind the guidance about evidence, including corroboration, in DMG Chapter 01.

42502 The list is not exhaustive; the regulations state "include". The onus of proving good cause lies with the claimant who fails to comply. The test of good cause is whether the DM judges the reason for non-return or non-attendance or failure to submit to be reasonable and likely on the balance of probabilities. See DMG Chapter 01 for guidance. The DM needs to ascertain the precise facts and apply the concept of "good cause".

42503 The DM may determine that a claimant is treated as not having LCW if

1. they have failed to return the questionnaire **or**
2. they have failed to attend or submit for examination **and**
3. have not replied to enquiries **or**
4. the reasons given do not amount to good cause.

### **General considerations**

42504 When considering whether the claimant showed good cause, the DM should ensure that they fully explain how they made their determination by recording

1. findings about the claimant's state of health at the time and the nature of their disability
2. what evidence was considered
3. what findings were made on the evidence
4. what steps they took to contact the claimant
5. whether the claimant is vulnerable
6. whether there were previous failures and whether good cause was accepted

7. the reasons for their determination on good cause.

### **Claimant's state of health**

42505 The claimant may state that they were unable to attend a face-to-face assessment due to the state of their health on the date of the appointment (see DMG 42532). Claimants may have difficulty in producing further medical evidence to support their statement, as GPs are not obliged to provide this. Failure to provide such evidence is not of itself a reason for refusing to accept that good cause was shown.

42506 The DM should consider whether the stated health problem prevented the claimant from contacting Medical Services to re-arrange the appointment. The DM should also consider the nature of the claimant's health condition and whether it could reasonably have lead to the claimant being, for example, incapacitated, forgetful, confused, unmotivated or too anxious to comply with the process because of their health condition.

#### **Example 1**

Luke has an appointment for an examination on 5.8.13. He contacts Medical Services to say that he cannot attend as he has flu, and arranges another appointment for 19.9.13. Luke fails to attend the new appointment. He returns the BF223 form explaining that the reason he did not attend was because he still had flu.

Luke's recent fit note shows low back pain as the reason for LCW. The DM determines that good cause was not shown. Flu is incapacitating but usually only lasts for a week where there are no complications. It was unlikely that he still had flu since the previous appointment, and in any event it should not have prevented him from contacting Medical Services.

#### **Example 2**

Katie has an appointment for an examination on 2.10.13, but fails to attend. She states on the BF223 form that she woke up on the day of the appointment with severe dental pain, and had to wait in the dentist's surgery for an emergency appointment. She required root canal treatment, and was prescribed a 5 day course of antibiotics for an infected wisdom tooth. As a result she was unable to attend the appointment. The DM accepts that good cause was shown for the failure to attend.

### **Nature of claimant's disability**

42507 DMs are reminded that the nature of the claimant's disability is a factor that must be taken into account when considering whether good cause is shown (see DMG 42500). The DM should make every

effort to ensure that all sources of evidence are considered before making a determination on good cause. Evidence about the claimant's health may be obtained from

1. form BF223 (good cause enquiry form)
2. any fit notes supplied
3. ESA1 claim form
4. ESA50 questionnaire where one is available
5. any evidence previously submitted that is relevant
6. ESA85 report where one is available.

42508 This may be particularly relevant in cases where the claimant has

1. mental health conditions affecting memory or concentration
2. a learning difficulty, for example where this affects comprehension
3. medication which affects memory or concentration
4. a sensory impairment, such as being registered blind.

### **Example 1**

Jack claims ESA. His fit note states that he has problems with his feet. Jack fails to return form ESA50, and did not give any reasons for this failure. The award of ESA was terminated. Jack's social worker returned the form which had been completed for him, and explained that Jack had significant difficulties understanding correspondence, and often delayed seeking help as he panicked. Good cause is accepted, and ESA is reinstated.

Jack then fails to attend an examination on 24.9.13, and does not reply when the BF223 form is issued. The evidence in the questionnaire is that Jack has severe learning difficulties. He has limited literacy skills and lives alone. The DM accepts that Jack had good cause for failure to attend the examination, as due to the nature of his disability he is unable to comply with the process. The DM determines that Jack is likely to need on-going support for his benefit claims and refers for consideration of appointee action. They also request that Medical Services arranges a home visit.

### **Example 2**

Tamara is required to attend for an examination on 13.9.13. She rings the examination centre and says that she is due to attend an out-patient clinic at the same time. She is offered and accepts a further

appointment for 24.9.13, which she fails to attend.

Tamara does not return form BF223, or respond to attempts to phone her. There is no evidence in the claim form, fit note or ESA50 which indicates that her health condition is likely to impact her ability to attend the appointment. The DM determines that Tamara did not have good cause for the failure to attend, and treats her as not having LCW.

### **Example 3**

Alex claims ESA, stating that he suffers from agoraphobia, anxiety and depression. He does not return the questionnaire. Alex contacts Medical Services to ask for a home visit after being asked to attend the examination centre. The appointment is rearranged, and he is advised to get a supporting letter from his GP. Alex fails to attend an examination 15.8.13. In the BF223 form he states that his GP had told him he would fax a letter to the examination centre requesting a home visit. He had no copy of the letter, and was struggling to keep organised. There is no information on the Medical Services computer system about a request for home visits, but the DM has no reason to doubt Alex's explanation. The DM accepts that Alex had good cause for his failure to attend. The DM also asks Medical Services to arrange a home visit.

### **Previous WCA attended**

42509 The fact that the claimant has previously attended the WCA and been found to have LCW is not sufficient reason that good cause has not been shown for a subsequent failure to attend. The DM should consider each case on its merits.

### **Example**

Lorraine, who has mental health problems, is placed in the SG following previous application of the WCA. She is referred for a further WCA 18 months later, and does not return the questionnaire. She also fails to attend for examination.

In response to the BF223 form, Lorraine's CPN says that due to the strength of the medication taken for several years for paranoid schizophrenia, Lorraine often forgets to carry out daily tasks or attend appointments. The fact that Lorraine had previously managed to attend for examination despite her memory problems is not of itself sufficient to show that there was no good cause for the current failure.

### **Repeated failures**

42510 Where a claimant repeatedly fails to attend an examination, and good cause is accepted, the DM should consider the previous reasons given critically. It may be appropriate to require further evidence to support any explanation for the subsequent failure. Wherever possible the DM should contact the

claimant to discuss the importance of attendance.

42511 However, the fact that good cause was previously accepted is not a reason for concluding that the claimant should be aware of the requirement to attend a subsequent appointment. The same reasons for the failure may continue to demonstrate that good cause is shown, such as in the case of a claimant who has a long term mental health problem, who can only intermittently comply with the processes necessary to manage their benefit claim due to effects of their condition and its treatment.

### **Example**

Viktor failed to attend for an examination. He did not respond to the BF223 form, and his ESA award was terminated. He subsequently provided evidence that on the day of the appointment he had a panic attack on his way to the assessment centre. He was taken to hospital, and discharged later in the day. The DM accepts that good cause was shown, and ESA is reinstated.

Viktor fails to attend the subsequent appointment. He replies on the BF223 form, saying that he had a panic attack and felt unable to leave the house on the day of the appointment, and was too anxious to explain this at the time. The DM accepts that good cause was shown, and asks Medical Services to consider a home visit.

42512 The DM may wish to consider whether it would be possible to ensure that the claimant does not fail to attend future appointments, where the nature of the claimant's health condition is the reason for good cause being accepted, and the health condition is likely to be long term. For example, if the evidence shows that the claimant is not capable of arranging their own affairs, is appointee action appropriate? Should a home visit be recommended?

42513 - 42529

### **Good cause - some scenarios**

42530 Any reasons given for the non-return of the questionnaire should be judged on the balance of probabilities. Whether the reasons for delay amount to good cause depends upon whether the DM considers, for example,

- 1.** it was reasonable not to return the questionnaire on this occasion **or**
- 2.** if non receipt by the office or claimant was more probable than not.

42531 If a claimant says that they were too ill to attend because of the nature of their disability, the DM should ask for evidence to support this. If the claimant is usually able to get out, for example to the doctor or hospital, good cause should only be accepted if it is unreasonable to expect the claimant to have attended on that occasion. Exceptionally, a claimant may be examined at home if they are unable to travel.

42532 A claimant may say they were too ill to attend because of a condition unrelated to their disability, for example they may say that they had flu at the time of the appointment. If the DM accepts the evidence, the claimant has shown good cause for their non-attendance.

42533 Good cause was not accepted in a case where a claimant had tried to avoid attending several examinations by submitting final certificates. In the particular circumstances the final certificate was irrelevant because it was replaced by an open statement which included the day of the examination<sup>1</sup>.

1 R(S) 12/59

42534 If the claimant contends that they did not receive the notice of the appointment, DMs should satisfy themselves that the notice was sent. The DM should give consideration to the date on which the written notice was posted, the time sufficient to show whether or not it would have been collected from the post box, the address to which it was posted and whether by first or second class post. The DM should also be satisfied the letter has not been returned undelivered.

42535 The DM will normally need better evidence of the address to which it was posted than a later computer generated print out showing the address on the file at that later date. If there is no evidence to show whether first or second class post was used the DM should assume that second class post was used. If it was sent it can be assumed it was delivered unless there is evidence to the contrary.

42536 Where the claimant says the postal difficulties are specific to them or their address, all of their circumstances are to be given fair consideration. They will have to show that they have done enough to ensure as far as is reasonably possible that they receive their mail, special care may be expected in the cases of accommodation addresses and premises in multiple occupation.

42537 Sometimes it may be right to reject a claimant's allegation of non-receipt where the excuse extends to a number of letters, or is coupled with suspicious circumstances, or if the non-receipt of mail is selective so that only certain letters are not received. However the uncontradicted evidence of the



non-receipt of a single letter in plausible circumstances, such as the communal delivery of mail to a particular premises where another person went through the mail before the claimant had a chance to do so, may establish good cause.

42538 DMs can see all changes of address and when the changes were effective from in the relevant medical services computer system to help them decide where the questionnaire was sent and when.

42539 If a claimant attends but refuses to have a physical examination, for example because of genuinely held religious beliefs, the DM should normally accept good cause unless it is evident that the refusal is based on a prejudice against or distaste for the examination rather than because of a particular belief<sup>1</sup>.

1 R(S) 9/51

42540 It is possible for the DM to consider that a claimant did not have good cause for failure to submit to an examination because of drunkenness, drug abuse or other problem behaviour. However if the behaviour is a symptom of the stated medical condition such as alcoholism rather than an isolated occurrence, the claimant may have good cause.

42541 A claimant did not attend for medical examination because a consultant advised that attendance was not necessary. It was held that, irrespective of a medical advisor's opinion as to LCW, a claimant is obliged to abide by the rules for claiming benefit. None of the matters that have to be taken into account when considering good cause applied and the claimant had not shown good cause for failing to attend for medical examination.

42542 A failure to comply with a notice to attend a medical examination will be deliberate, except in cases where the claimant is unable to make a choice between attendance and non-attendance. The question is whether there is good cause for the deliberate failure to comply with the notice.

42543 A claimant who fails to attend an examination for LCWRA can only be treated as not having LCWRA. A claimant cannot be treated as not having LCW if their failure was to not attend or participate in the LCWRA part of the WCA.

42544 - 42549

## Certain claimants to be treated as not having limited capability for work

### Member of HM Forces

42550 A claimant who is or has been a member of HMF<sup>1</sup> is treated as not having LCW on any day which is recorded by the Secretary of State as a day of sickness absence from duty<sup>2</sup>. See DMG Chapter 41 for guidance on the meaning of HMF.

1 ESA Regs, reg 2(1); 2 reg 32(1)

### Training Course

42551 A claimant is treated as not having LCW on any day on which they<sup>1</sup>

1. attend a training course **and**
2. are paid a training allowance or premium under certain provisions<sup>2</sup>.

1 ESA Regs, reg 32(2); 2 E & T Act 73, s 2(1); Enterprise & New Towns (Scotland) Act 1990, s 2(3)

42552 DMG 42551 does not apply

1. where the ESA claim is made for a period which begins after the claimant ceased attending the training course **or**
2. where any training allowance or premium paid to the claimant is paid for the sole purpose of travelling and meal expenses incurred as part of the training course<sup>1</sup>.

1 ESA Regs, reg 32(3)

### Medical evidence ends

42553 A person may be treated as not having LCW<sup>1</sup> if

1. they have supplied medical evidence in accordance with legislation<sup>2</sup> **and**
2. the period covered by that medical evidence has ended **and**
3. the Secretary of State has requested further medical evidence **and**
4. the person has not, within six weeks

**4.1** supplied further medical evidence **or**

**4.2** otherwise made contact with the Secretary of State to indicate that they wish to have the question of LCW determined.

**Note:** The definition of medical evidence at DMG 42316 does not apply. See DMG 42145 for further guidance.

1 ESA Regs, reg 32A(1); 2 reg 32A(2); SS (Med Ev) Regs, reg 2 or 5

42554 The six week period begins on

- 1.** the date of the Secretary of State's initial request for further medical evidence **or**
  - 2.** the day after the date on which the period covered by the medical evidence has ended
- whichever is the later<sup>1</sup>.

1 ESA Regs, reg 32A(1)(d)

42555 If at the end of the six weeks no further medical evidence is received, or the claimant does not contact the DWP, the DM should treat the claimant as not having LCW from the day after the medical evidence expires. The decision is effective from the date of the change<sup>1</sup>, which is the date from which the claimant is treated as not having LCW.

1 SS CS (D&A) Regs, Sch 3C, para 2 & 3(a)

### **Example**

Graham's current medical certificate provides him with evidence of LCW up to and including 19.5.10. A reminder that further medical evidence will be required is issued on 12.5.10. The six weeks period ends on 30.6.10, and Graham does not contact the DWP by then. He is treated as not having LCW from 20.5.10, the day after the medical evidence ends.

42556 Where the person

- 1.** fails to provide further medical evidence **and**
- 2.** asks for LCW to be determined

the DM should continue to follow the guidance in DMG 42430 - 42435.

### **Example**

William is covered by a doctor's statement up until 5.7.10. On 13.7.10 the local office receives a letter from him stating that he became fit enough to start work on 12.7.10. The DM may accept this as a

request from William for his LCW to be determined for the period from 6.7.10 to 11.7.10.

42557 - 42569

## **Medical evidence ceases before appeal heard - contact with claimant lost**

42570 Where

- 1.** a claimant is entitled to ESA pending an appeal **and**
- 2.** medical evidence ceases **and**
- 3.** the claimant does not respond to reminders requesting further medical evidence

the DM should consider whether the guidance at DMG 42553 - 42556 about treating the claimant as not having LCW and terminating the award applies<sup>1</sup>.

1 ESA Regs, reg 32A

## **Appeal allowed**

42571 Where

- 1.** an award is terminated as in DMG 42570 **and**
- 2.** the FtT allows the appeal

the DM should award arrears of ESA as appropriate up to the date of the termination of the pending appeal award<sup>1</sup>.

1 ESA Regs, reg 147A(6) & (7)

42572 - 42574

## **Medical evidence ceases before appeal heard - contact with claimant not lost**

42575 Where

- 1.** a claimant is entitled to ESA pending an appeal **and**
- 2.** medical evidence ceases **and**
- 3.** the claimant states that he is unable to provide further medical evidence but wishes LCW to be determined

the guidance at DMG 42431 - 42435 about determining LCW does not apply while the appeal is awaiting

hearing. This is because the claimant cannot be referred for a WCA unless they have a new or worse health condition - see DMG 42850.

42576 Payment of ESA should be suspended pending the outcome of the appeal<sup>1</sup>.

1 SS CS (D&A) Regs, reg 16

### **Appeal allowed**

42577 Where the appeal is allowed, the suspension should be lifted and the guidance at DMG 42866 - 42867 applied as normal.

### **Appeal withdrawn, struck out or dismissed**

42578 Where the appeal is withdrawn, struck out or dismissed, the guidance at DMG 42431 - 42435 and 42860 - 42865 should be applied.

### **Example**

Karen has been entitled to ESA since 5.10.11 pending an appeal against the decision terminating her award of ESA following application of the WCA. On 15.3.12 medical evidence expires, and Karen states that she is unable to supply further doctor's statements. The DM suspends payment of ESA. Karen does not make a claim for another benefit.

On 26.6.12 Karen's appeal is dismissed. The DM treats Karen as not having LCW from 4.7.12, and also determines that for the period 16.3.12 - 3.7.12, on the balance of probabilities she scores 0 points for the purposes of the WCA. The award of ESA is terminated from 16.3.12.

42579

### **Detention in legal custody**

42580 A claimant is to be treated as not having LCW if disqualified for receiving ESA(Cont) during a period of imprisonment or detention in legal custody if that disqualification is for more than six weeks<sup>1</sup>. Payment of ESA(Cont) is suspended from the first day of imprisonment or detention in legal custody. If a decision is subsequently made to disqualify the claimant for receiving ESA(Cont), that decision will apply from the first day of imprisonment or detention in legal custody. Therefore, unless it is for a period of six weeks or less, the claimant will be treated as not having LCW from the first day of imprisonment or detention in legal custody.

**Note:** See DMG Chapter 53 for guidance on disqualification for imprisonment or detention in legal

custody for ESA(Cont).

1 ESA Regs, reg 159(1)

### **Example**

Kenneth is detained in legal custody on 1.2.10 and payment of his ESA(Cont) is suspended. On 1.4.10 the DM decides that Kenneth should be disqualified for receiving ESA(Cont) from 1.2.10 because he has been sentenced to a period of imprisonment for a period exceeding six weeks. There is also a determination that Kenneth is treated as not having LCW from 1.2.10.

42581 If the claimant is entitled to ESA(IR) as a prisoner during a period of imprisonment or detention in legal custody where they are awaiting trial or sentencing<sup>1</sup>, they are treated as not having LCW from the day after they cease to be so entitled<sup>2</sup>.

**Note:** See DMG Chapter 54 for guidance on entitlement to ESA(IR) during a period of imprisonment or detention in legal custody.

1 ESA Regs, Sch 5, para 3; 2 reg 159(2)

### **Example**

Jackie is entitled to ESA(IR) while she is on remand awaiting sentencing, with her applicable amount being the amount of her housing costs. On 11.4.18 she is sentenced to a term of imprisonment. The DM supersedes the award of ESA(IR) and decides that Jackie's entitlement ends on 11.4.18 because her applicable amount is nil. There is also a determination that Jackie is treated as not having LCW from 12.4.18.

42582 If the claimant is entitled to ESA(Cont) and ESA(IR) the DM should consider both DMG 42580 and DMG 42581.

### **Example**

Christian is entitled to ESA(Cont) and ESA(IR) which includes an amount for housing costs. On 12.4.10 he is detained in legal custody. The DM suspends payment of ESA(Cont). The DM also supersedes the award of ESA(IR) and decides that Christian's applicable amount for ESA(IR) is the amount of his housing costs. On 6.9.10 Christian is sentenced to a term of imprisonment. The DM decides that Christian should be disqualified for receiving ESA(Cont) from 12.4.10 because he has been sentenced to a period of imprisonment for a period exceeding six weeks. There is also a determination that Christian is treated as not having LCW for ESA(Cont) purposes from 12.4.10. In addition, the DM supersedes the award of ESA(IR) and decides that Christian has no entitlement to it from 6.9.10 because his applicable amount is

nil. There is also a determination that Christian is treated as not having LCW for ESA(IR) purposes from 7.9.10.

42583 - 42599

## **Claimants who are treated as not entitled to ESA by reason of working to be treated as not having limited capability for work**

42600 For guidance on the effect of working on a claim or an award of ESA see DMG Chapter 41.

42601 Claimants who are treated as not entitled to ESA by reason of working are treated as not having LCW<sup>1</sup> unless the claimant remains entitled to ESA(Cont) but is not entitled to ESA(IR)<sup>2</sup>.

1 ESA Regs, reg 44(1); 2 reg 44(2)

42602 DMG 42601 applies even if it is determined that the claimant has or is to be treated as having LCW because they

- 1.** satisfy certain conditions<sup>1</sup> (see DMG 42031) **or**
- 2.** are a hospital patient<sup>2</sup> (see DMG 42070) **or**
- 3.** are receiving certain regular treatments<sup>3</sup> (see DMG 42090) **or**
- 4.** have exceptional circumstances<sup>4</sup> (see DMG 42310) **or**
- 5.** satisfy the conditions pending assessment<sup>5</sup> (see DMG 42350).

1 ESA Regs, reg 20(1); 2 reg 25; 3 reg 26; 4 reg 29; 5 reg 30

## **Date of determination**

42603 Where a claimant is in receipt of ESA the determination to treat someone as not having LCW applies to the whole week during which the work is done. However that person is only treated as not having LCW on the days on which they actually work in the week in which they

- 1.** first have LCW<sup>1</sup> **or**
- 2.** start or return to work<sup>2</sup>.

1 ESA Regs, reg 40(4)(a); 2 reg 40(4)(b)

42604 See DMG 42105 for guidance on the day or days in a week on which a night shift worker works<sup>1</sup>.

1 ESA Regs, reg 40(6)

42605 See DMG 42097 et seq for guidance on the effect of work on claimants who are receiving or recovering from regular treatment.

42606 - 42609



## Limited capability for work-related activity 42610 - 42789

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### General

42610 A determination has to be made whether a claimant who has LCW also has LCWRA at the end of the assessment phase<sup>1</sup>.

1 WR Act 07, s 9(1) & (2)

42611 Where it is determined a claimant has LCW the claimant will receive an ESA component during the main phase of ESA entitlement. Which component they receive depends on whether or not they also have LCWRA.

**Note:** See DMG Chapter 44 for guidance on amounts payable.

42612 Claimants with the most severe illnesses or disabilities who have LCWRA will receive the support component<sup>1</sup> without conditionality although they may participate in work-related activity on a voluntary basis if they so wish.

1 WR Act 07, s 2(2) & 4(4)

42613 Claimants who do not have LCWRA will receive the WRAC<sup>1</sup>. These claimants are required to engage in the Wfl and WRA regime in the main phase of their ESA entitlement.

**Note:** For further guidance on Wfls and WRA see DMG Chapter 53.

42614 - 42619

## **Entitlement ends before limited capability for work-related activity is determined**

42620 In cases where an award of ESA ends during the assessment phase, a claimant may request arrears of a component to be paid, even though no determinations about LCW and LCWRA have been made before entitlement ends.

**Note:** But see DMG 42626 - 42627 where the ESA award ends because the person claims UC.

42621 Where

- 1.** a claimant's entitlement to ESA ends, for example because they have returned to work, after the 13<sup>th</sup> week of entitlement but before the WCA has been carried out **and**
- 2.** the claimant asks for arrears of a component to be paid from week 14

the DM should make a decision not to supersede the decision which awarded entitlement, or any later superseding decision, on the grounds that the conditions allowing supersession are not satisfied. See DMG – Chapter 04 for guidance on making a decision not to supersede. The decision carries the right of appeal to a FtT<sup>1</sup>.

1 SS Act 98, s 12(1); R(DLA) 1/03

42622 A claimant cannot normally be awarded a component until the assessment phase has ended<sup>1</sup>, and this is

- 1.** the last day of a period of 13 weeks starting with the date of the award<sup>2</sup> **or**
- 2.** when a determination about LCW has been made **if later**<sup>3</sup>.

This means that if the LCW determination is not made within the 13 week period, the assessment phase cannot end until it is made. See DMG – Chapter 44 for guidance on ending the assessment phase.

1 WR Act 07, s 2(2)(a) & (3)(a); s 4(4)(a) & (5)(a); 2 ESA Regs, reg 4(1); 3 reg 4(2)

42623 If the claimant has LCW, a determination is also required as to whether they have LCWRA<sup>1</sup>. This determines whether the claimant is paid the WRAC or the support group component, and when the main phase begins<sup>2</sup>.

42624 These determinations cannot be made without evidence, and the claimant cannot be given the benefit of the doubt. Even if the DM had sufficient evidence, for example from the questionnaire (ESA50), to make the necessary determinations without a medical report, the supersession effective date rules do not permit arrears of the component to be paid from week 14 in such cases. This is because the rule allowing backdating to week 14 only applies where the component is awarded following receipt of a report from a HCP<sup>1</sup>.

1 SS CS (D&A) Regs, reg 6(2)(r) & 7(38)

42625 That means that the normal effective date rules for a change of circumstances would apply<sup>1</sup>. The change would be making the determinations, and as this occurred after entitlement to ESA ended it would not be relevant to the decision which awarded entitlement. The DM could not supersede for a relevant change of circumstances to change that outcome, as, in this context, further entitlement following a disallowance requires a claim<sup>2</sup>.

1 SS CS (D&A) Regs, Sch 3C; 2 SS Act 98, s 8(2)(b)

## **Claim for UC**

42626 Where

- 1.** an award of ESA ends when a claim is made for UC **and**
- 2.** the ESA assessment phase has not ended **and**
- 3.** it is determined that the claimant has, or is treated as having, LCW or LCWRA for the purposes of UC

the DM should determine whether, using the evidence obtained for the UC WCA, the claimant had LCW and if so, whether they had LCWRA, for the purposes of ESA.

**Note:** The LCW and LCWRA descriptors for UC and ESA are identical, as are most of the conditions for treating a claimant as having LCW or LCWRA. See ADM Chapters G2 and G3 for further details.

42627 Where the DM makes determinations about LCW and LCWRA as in DMG 42626, the decision awarding ESA should be superseded<sup>1</sup> and the appropriate component awarded as normal up to the day before the date of the UC claim. See DMG Chapter 04 for detailed guidance on supersession.

**Note:** See DMG Chapter 44 Appendix 10 for guidance on when the WRAC can be included in an award of ESA.

1 SS CS (D&A) Regs, reg 6(2)(r) & 7(38) or (40)

42628 - 42669

## Determination of limited capability for work-related activity

42670 Whether a claimant's capability for work-related activity is limited by the claimant's physical or mental condition and the limitation is such that it is not reasonable to require the claimant to undertake such activity is determined if one or more of the descriptors are met<sup>1</sup>.

1 ESA Regs, reg 34(1) & Sch 3

42671 A descriptor applies to a claimant if that descriptor applies to the claimant for the majority of the time or on the majority of the occasions on which the claimant carries out or attempts to carry out the activity described by that descriptor<sup>1</sup>.

1 ESA Regs, reg 34(2)

42672 A claimant will be assessed as if

**1.** fitted with or wearing any prosthesis with which that claimant is normally fitted or normally wears (such as an artificial limb) **or**

**2.** wearing or using any aid or appliance which is normally, or could reasonably be expected to be, worn or used (such as a hearing aid)<sup>1</sup>.

1 ESA Regs, reg 34(3)

42673 When assessing the extent of the claimant's LCWRA, it is a condition that the claimant's inability to perform<sup>1</sup>

**1.** physical descriptors<sup>2</sup> arises

**1.1** from a specific bodily (i.e. physical) disease or disablement **or**

**1.2** as a direct result of treatment by a registered medical practitioner for such a condition **and**

**2.** mental descriptors<sup>3</sup> arises

**2.1** from a specific mental illness or disablement **or**

**2.2** as a direct result of treatment by a registered medical practitioner for such a condition.

1 ESA Regs, reg 34(6); 2 Sch 3, descriptors 1–8, 15(a) & (b), 16(a) & (b);  
3 Sch 3, descriptors 9–14, 15(c) & (d), 16(c) & (d)

42674 - 42679

## Certain claimants treated as having limited capability for work-related activity

42680 A claimant is treated as having LCWRA if they are<sup>1</sup>

**1.** terminally ill **or**

**2.** is

**2.1** receiving **or**

**2.2** likely to receive **or**

**2.3** recovering from

treatment for cancer by way of chemotherapy or radiotherapy and the DM is satisfied that the claimant should be treated as having LCWRA (see DMG 42050 – 42052 for further guidance) **or**

**3.** in the case of a woman, she is pregnant and there is a serious risk of damage to her health or the health of her unborn child if she does not refrain from work-related activity.

1 ESA Regs, reg 35(1)

42681 [\[See Memo DMG 01/18 at Appendix 2 of this Chapter\]](#) A claimant who does not have LCWRA is treated as having LCWRA if

**1.** the claimant suffers from some specific disease or bodily or mental disablement **and**

**2.** by reasons of such disease or disablement, there would be a substantial risk (see DMG 42320) to the mental or physical health of any person if that claimant were found not to have LCWRA<sup>1</sup>.

1 ESA Regs, reg 35(2)

42682 - 42739

## Information required for determining capability for work-related activity

42740 The information required to determine whether a claimant has LCWRA is<sup>1</sup>

**1.** any information relating to the descriptors that may be requested in the form of a questionnaire **and**

**2.** any additional information as may be requested.

1 ESA Regs, reg 36(1)

42741 Where the DM is satisfied there is sufficient information to determine whether a claimant has LCWRA without the questionnaire that information will not be required<sup>1</sup>. For example the claimant is

considered to be in a vulnerable group, i.e. there is a diagnosis of a mental health condition. A decision to treat as not having LCWRA due to non-return of the questionnaire would not be made but the claimant referred for assessment.

1 ESA Regs, reg 36(2)

42742 Certain claimants who are treated as having LCW (see DMG 42030 et seq) are not required to complete a questionnaire for the purposes of determining LCW but will be required to provide information relating to the descriptors for LCWRA unless they are also treated as having LCWRA (see DMG 42673).

42743 Medical services are responsible for gathering any information required to support the WCA process. This includes

1. sending the questionnaire (ESA50A)
2. sending a reminder if the claimant does not reply within 28 days.

**Note:** This could be any such additional information as the DM requires to determine whether a claimant has LCWRA<sup>1</sup>.

1 ESA Regs, reg 36(1)

42744 It will not be necessary to obtain completion of an ESA50A for LCWRA in every case where the claimant has already provided information on an ESA50 for LCW. The HCP should obtain additional information regarding the descriptors at the medical examination for LCW in order to provide an opinion on LCWRA (see DMG 42771).

**Note:** There will be no need for a medical examination if medical services can confirm on the basis of paper evidence that the claimant is, or is not, in the support group. If both LCW and LCWRA can be assessed from the same piece of evidence then there is no need to obtain further information.

### **Failure to provide information**

42745 A claimant is treated as not having LCWRA if

1. the questionnaire was sent **and**
2. the claimant was sent a further request to return the questionnaire at least three weeks after the date of the first request<sup>1</sup> **and**

**3.** at least one week has passed since the further request was sent<sup>2</sup> **and**

**4.** good cause has not been accepted for the delay beyond the period stated in the **2.** and **3.** above<sup>3</sup>.

1 ESA Regs, reg 37(2)(a), 2 reg 37(2)(b), 3 reg 37(1)

42746 The DM needs to make sure that the Secretary of State has complied with the duty set out in the legislation<sup>1</sup> to send the questionnaire and the reminder to the claimant. The DM can accept that it has been sent if there is a record of its issue and no indication that it was not properly addressed, stamped and posted.

1 Inte Act 78, s 7

42747 If the DM concludes that the Secretary of State has complied with the duty set out in the legislation, they may then go on to consider whether the claimant had good cause for their failure to return the questionnaire<sup>1</sup> (see DMG 42760).

1 ESA Regs, reg 39

42748 Any reasons given for the non-return should be judged on the balance of probabilities. Whether the reasons for delay amount to good cause depends upon whether the DM considers, for example,

**1.** it was reasonable not to return the questionnaire on this occasion **or**

**2.** if non receipt by the office or claimant was more probable than not.

42749 See DMG 42760 et seq for guidance on good cause where a claimant fails to return a questionnaire for a determination of LCWRA. The general principles in DMG 42466 - 42472 to be considered when determining LCW also apply to LCWRA.

**Note:** A claimant who fails to provide information for LCWRA can only be treated as not having LCWRA. A claimant cannot be treated as not having LCW if their failure was to not provide information in respect of the LCWRA part of the WCA.

42750 - 42754

## **Claimants who may be called for examination**

42755 Claimants may be called to attend a medical examination by a HCP approved by the Secretary of State where it has to be determined whether or not they have LCWRA<sup>1</sup>. The medical examination may be conducted in person, by telephone or by video.

1 ESA Regs, reg 38(1)

42756 Claimants can be treated as not having LCWRA if

**1.** they fail without good cause to attend or submit to a medical examination<sup>1</sup> **and**

**2.** they

**2.1** had at least seven days' written notice of the examination **or**

**2.2** agreed to accept a shorter period of notice whether given in writing or otherwise<sup>2</sup>.

1 ESA Regs, reg 38(2); 2 reg 38(3)

42757 The general principles in DMG 42482 - 42496 to be considered when determining LCW also apply to LCWRA.

**Note:** A claimant who fails to attend or submit for examination for LCWRA can only be treated as not having LCWRA. A claimant cannot be treated as not having LCW if their failure to attend or submit for examination was in respect of the LCWRA part of the WCA.

42758 Where a claimant fails without good cause to attend or submit for examination the claimant can be treated as not having LCWRA<sup>1</sup> (see DMG 42756).

1 ESA Regs, reg 38(2)

42759 If the DM concludes that the Secretary of State has complied with the duty set out in DMG 42756 they may go on to consider whether the claimant had good cause for their failure to attend or submit to a medical examination (see DMG 42760).

## **Consideration of good cause**

42760 When a claimant fails to provide information or to attend or submit to an examination, consideration of good cause includes

**1.** whether the claimant was outside GB at the relevant time **and**

**2.** the claimant's state of health at the relevant time **and**

**3.** the nature of any disability the claimant has<sup>1</sup>.

1 ESA Regs, reg 39

42761 The list is not exhaustive; the regulations state "include". The onus of proving good cause lies with



the claimant who fails to comply. The test of good cause is whether the DM judges the reason for non-attendance or failure to attend or submit to examination to be reasonable and likely on the balance of probabilities. See DMG Chapter 01 for guidance. The DM needs to ascertain the precise facts and apply the concept of “good cause”.

42762 See DMG 42504 - 42543 for further guidance on consideration of whether a claimant has good cause. This guidance is general on the principles of good cause and applies to consideration of both LCW and LCWRA.

**Note:** A claimant who fails to return information, attend or submit for an examination for LCWRA can only be treated as not having LCWRA. A claimant cannot be treated as not having LCW if their failure was to not return information, attend or participate in the LCWRA part of the WCA.

42763 Where there is no evidence of good cause or the reasons provided are not accepted as good cause, the DM should determine that the claimant is treated as not having LCWRA.

42764 - 42769

## **Determination of whether a claimant has limited capability for work-related activity**

42770 The DM determines whether a claimant has LCWRA from

- 1.** the questionnaire if one is available **and**
- 2.** a statement from the GP if one is available **and**
- 3.** the medical opinion from the HCP including the personalised summary statement **and**
- 4.** any other relevant evidence.

42771 HCPs should provide relevant information and good justification for their recommendations with regard to LCWRA on a medical report form on either an

- 1.** ESA85 if the claimant has been examined for LCW and the recommendation is that the claimant does not have LCWRA **or**
- 2.** ESA85A if the claimant

**2.1** has not been examined **or**

**2.2** has been examined for LCW and the recommendation is that the claimant has LCWRA **or**

**2.3** is treated as having LCW and has been called for examination for assessment of LCWRA only.

**Note:** For the purposes of **2.2** if LCWRA is identified at examination the DM will get two reports: an ESA85 for LCW and an ESA85A for LCWRA.

42772 In the main, medical reports will be completed electronically. There is no requirement for the report to be signed by the examining HCP<sup>1</sup>. However the report must identify the status of the HCP, i.e. whether he/she is a doctor or a registered nurse.

1 R(IB 7/05)

42773 [\[See Memo DMG 01/18 at Appendix 2 to this chapter\]](#) The medical report includes an opinion of a HCP on whether any prescribed exceptional circumstances apply. The DM should consider that opinion when deciding whether a claimant can be treated as having LCWRA if they do not satisfy the test for LCWRA from the descriptors<sup>1</sup> (see DMG 42681).

1 ESA Regs, reg 35(2)

42774 The normal principles apply to considering the evidence. Guidance is in DMG Chapter 01.

42775 - 42779

## **Second or subsequent referrals**

42780 The medical report also includes advice on the period of time that should pass before a claimant is reconsidered for the next WCA process. This advice is given in all cases but the DM can determine afresh whether the claimant still has or can be treated as having LCWRA in prescribed circumstances (see DMG 42785). This may be at a different time to the advice given on the medical report.

42781 In second and subsequent referrals medical services will provide a recommendation on whether a claimant has LCWRA.

42782 Not all claimants require a LCWA in subsequent referrals. Medical services will decide if LCW can be assessed on scrutiny of the available evidence however it may be necessary to call the claimant for

examination on subsequent referrals to assess LCWRA.

42783 Medical conditions can improve with treatment or they may decline. Depending on the outcome of future assessments claimants who are placed in the WRAG may be removed from that group and placed in the support group and vice versa.

42784

### **Determining limited capability for work-related activity afresh**

42785 Where it has been determined a claimant

- 1.** has LCWRA **or**
- 2.** is treated as having LCWRA **or**
- 3.** is treated as not having LCWRA

the DM can determine afresh whether the claimant still has or is to be treated as having LCWRA<sup>1</sup>.

1 ESA Regs, reg 34(4)

42786 DMG 42785 applies where<sup>1</sup>

- 1.** the DM wishes to determine whether there has been a relevant change of circumstances in relation to the claimant's physical or mental condition **or**
- 2.** the DM wishes to determine whether the previous determination was made in ignorance of, or based on a mistake as to some material fact **or**
- 3.** at least three months have passed since the date of the previous determination.

1 ESA Regs, reg 34(5)

42787 - 42789

## ESA awarded pending LCW appeal 42790 - 42999

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### Claimant treated as having LCW

42790 Where the conditions in DMG 42791 - 42792 are satisfied, a claimant who makes and pursues an appeal to the FtT can be

1. treated as having LCW<sup>1</sup> **and**
2. exempt from the requirement to claim before being awarded ESA<sup>2</sup>

where the appeal is lodged against a relevant decision (see DMG 42795) made on a claim made or treated as made on or after 30.3.15.

**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(2)(b); 2 SS (C&P) Regs, reg 3(1)(j)

42791 The conditions in DMG 42790 are that<sup>1</sup>

**1.** entitlement to ESA is disallowed or terminated in a relevant decision following a determination that the claimant does not have LCW after application of the WCA **and**

**2.** following mandatory reconsideration where appropriate (see DMG 42810 - 42813), the claimant makes an appeal to the FtT against the disallowance **and**

**3.** the claimant provides or continues to provide medical evidence **and**

**4.** no claim for IS or JSA is made.

**Note 1:** See DMG Chapters 03 and 06 for guidance on mandatory reconsideration and appeals.

**Note 2:** This does not apply where the claimant makes an appeal to the UT.

1 ESA Regs, reg 30(1), (2)(a) & (3); 2 SS (C&P) Regs, reg 3(j)

42792 The claimant must also satisfy the other conditions of entitlement:

**1.** the basic conditions<sup>1</sup> - see DMG 41012 **and**

**2.** for

**2.1** ESA(Cont), the time limits<sup>2</sup> - see DMG 41021 **or**

**2.2.** ESA(IR), the financial conditions<sup>3</sup> - see DMG 41091.

1 WR Act 07, s 1(3); 2 s 1A; 3 s 1(2)(b) & Sch 1, Part 2, para 6(1)

42793 DMs should note that the award made pending determination of the appeal is a new award, and not a reinstatement of the previous award which is the subject of the appeal. Nor is there any provision enabling the appeal to be treated as a claim. See DMG 42840 where a claim is made at the same time as the appeal.

**Note:** DMs are reminded that for ESA(IR), the award includes any premiums and housing costs as appropriate.

42794 DMs should also note that the condition of entitlement which must be satisfied in order to make the award is that the claimant has, or is treated as having, LCW<sup>1</sup>. Making an appeal is not a condition of entitlement, nor does it enable the claimant to be treated as having LCW in its own right. Instead, it allows the claimant to be exempted from the rule in DMG 42354, which would otherwise mean that they could not be treated as having LCW<sup>2</sup>.

1 WR Act 07, s 1(3)(a); 2 ESA Regs, reg 30(2)(b) & (3)

42795 A relevant decision<sup>1</sup> is a decision made on a claim made or treated as made on or after 30.3.15 that embodies

1. the first determination by the DM that the claimant does not have LCW **or**
2. the first determination by the DM that the claimant does not have LCW since a previous determination that the claimant does have LCW.

**Note:** A determination that the claimant is treated as having LCW as in DMG 42351 is not a determination that the claimant does have LCW.

1 ESA Regs, reg 30(5); SS (C&P) Regs, reg 3(2)

42796 In DMG 42795 **2.**, the previous determination is one made by the

1. DM **or**
2. FtT **or**
3. UT **or**
4. Court of Appeal **or**
5. Court of Session **or**
6. Supreme Court<sup>1</sup>.

1 ESA Regs, reg 30(6); SS (C&P) Regs, reg 3(2)

42797 Where the conditions in DMG 42790 - 42792 are not satisfied, the claimant would need to

1. make a repeat claim for ESA **and**
2. satisfy the conditions of entitlement to ESA

in the normal way whether or not they make an appeal to the FtT. This includes considering whether the

claimant needs to be referred for a further WCA, and if so, whether they can be treated as having LCW, as in DMG 42370 et seq. The claimant cannot be awarded ESA solely on the basis that they have made and are pursuing an appeal.

42798 Where the claimant

**1.** is found not to have LCW on a repeat claim which was made before 30.3.15 following a previous determination that they did not have LCW **and**

**2.** lodges an appeal to the FtT against the decision made on the repeat claim

they can be entitled to ESA as in DMG 42790 - 42792, even though the appeal is against a second determination that the claimant does not have LCW. This is because the second determination is not a relevant determination as in DMG 42795.

### **Example 1**

Rory claimed ESA on 7.5.14, and is found not to have LCW following application of the WCA. Rory lodges an appeal with the FtT. In his appeal he asks for ESA to be paid, and he sends a fit note. The DM treats Rory as having LCW, and awards ESA pending the outcome of the appeal.

Rory's appeal is dismissed, and the DM treats him as not having LCW, terminating the award of ESA. Rory makes a further claim for ESA on 2.4.15, and the DM determines that Rory does not have LCW, using the evidence provided for the previous LCW determination as upheld by the FtT, as there is no evidence of a change since then. The decision to disallow the new claim is not revised following mandatory reconsideration, and Rory lodges a further appeal. He cannot be treated as having LCW and paid ESA solely on the grounds of the appeal. In order to become entitled to ESA again, Rory would need to claim ESA and provide evidence that he had a new or worse condition, or that he satisfied one of the other conditions for being treated as having LCW.

### **Example 2**

Yasmin claimed ESA in June 2014, and her award is terminated following application of the WCA. She lodges an appeal and is awarded ESA. Her appeal is allowed by the FtT, which finds that Yasmin has LCW but does not have LCWRA. The FtT recommends that Yasmin is referred for a further WCA after 12 months. The DM revises the award made pending the outcome of the appeal, and Yasmin is placed in the WRAG.

After a further WCA, Yasmin is again found not to have LCW, and again lodges an appeal. If she sends in fit notes, she can be treated as having LCW and paid ESA pending the outcome of the appeal, without being required to submit a claim.

### **Example 3**

Alan's award of ESA is terminated following application of the WCA. Alan lodges an appeal and is awarded ESA. The appeal is dismissed, and the ESA award is terminated.

Alan makes a further claim for ESA after he was admitted to hospital for two days following routine surgery for a pre-existing condition. The DM treats Alan as having LCW on the basis that his condition is likely to have deteriorated, and refers for a

WCA. The HCP advises that recovery from surgery should take about three months, but Alan should be capable of undertaking WRA. The DM accepts the advice, and places Alan in the WRAG.

Alan is referred for a further WCA, and the HCP advises that Alan has recovered from the surgery. In the HCP's opinion Alan does not score any points, and the DM finds that Alan does not have LCW. As Alan was previously treated as having LCW on the grounds that he was recovering from surgery and had been required to stay in hospital for more than 24 hours, the determination that he does not have LCW is embodied in a relevant decision. Alan lodges an appeal and is entitled to an award of ESA.

Alan's appeal is successful, and the FtT finds that he scores 15 points and should be placed in the WRAG. The FtT decision is implemented to award the WRAC from week 14 of the repeat claim. Alan's award of ESA made pending the outcome of the appeal is revised to include the WRAC from the first day of that award.

#### **Example 4**

Krystal's award of ESA is terminated after she is found not to have LCW. She is paid ESA pending the outcome of an appeal to the FtT. Her appeal is dismissed, and the award made pending the appeal is terminated.

Krystal makes a further claim for ESA, providing evidence that she has a new condition since the previous determination that she did not have LCW. The DM treats Krystal as having LCW and awards ESA, referring for a WCA. The DM accepts the HCP's advice that Krystal scores 6 points for the new condition. As this is less than 15 points, the DM determines that Krystal does not have LCW, and terminates the ESA award.

As the latest determination is not made following a determination that Krystal had LCW, she cannot be awarded ESA if she lodges an appeal.

42799 - 42809

#### **Time for appealing where ESA awarded pending an appeal**

42810 Normally a claimant can only appeal to a FtT where the DM has first considered an application for revision of the original decision<sup>1</sup>. Where the conditions are potentially met for an award of ESA pending a LCW appeal, mandatory reconsideration is not required<sup>2</sup> (but see DMG 42811 if the claimant applies for revision). 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 appeal<sup>3</sup> 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 provided<sup>4</sup>.

**Note:** See DMG Chapter 03 for guidance on revision and Chapter 06 for guidance on appeals.

1 SS Act 98, s 12(3A); 2 [2020] EWHC 1999 (Admin); 3 TP (FtT) (SEC) Rules, rule 22(2)(d)(ii), Sch (1), para 5(a); 4 para 5(b)(i) & (ii)

### **Application for revision received**

42811 The mandatory reconsideration 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, 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 claimant<sup>1</sup>.

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

42812 If the claimant appeals against the decision in accordance with DMG 42810, normal rules apply in respect of the power to revise and lapse the appeal<sup>1</sup>. This applies in respect of a claimant's application for revision and where the Secretary of State acts on their own initiative.

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

### **Time limit for appealing where ESA not awarded pending an appeal**

42813 Where the claimant has no potential entitlement to a payment pending appeal, mandatory reconsideration is required. The claimant should be notified that they have one month after the date they were sent notice of the result of the mandatory reconsideration in which to appeal<sup>1</sup>.

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

### **Example 1**

Chidi has been entitled to ESA 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 and UC since 11.2.20. It is her first claim for ESA. She is referred for the WCA, and following assessment the UC DM determines on 23.9.20 that Tahani does not have LCW. The ESA DM uses the same evidence to determine that Tahani does not have LCW for the purposes of ESA, and terminates her award of ESA from and including 6.10.20, the date of the ESA decision.

If Tahani wishes to dispute the UC and ESA decisions, she must apply for mandatory reconsideration of the UC decision in the normal way. She 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. Tahani's award of ESA pending the appeal begins on 6.10.20, and ends on 10.2.21 due to time limiting.

42814 - 42819

## **Claimant awarded component during appeal**

42820 The guidance on treating a claimant as having LCW (DMG 42030 - 42098) also applies where a claimant is entitled to ESA pending an appeal. Examples of when that guidance applies are that a claimant is

- 1.** a hospital patient **or**
- 2.** receiving other treatment<sup>1</sup>.

Therefore a component can be awarded in the normal way where a claimant is entitled to ESA pending an appeal.

<sup>1</sup> ESA Regs, reg 20(1), 25, 26 & 33(2)

42821 Where

- 1.** the DM determines that
  - 1.1** the claimant

**1.1.a** can no longer be treated as having LCW as in DMG 42820 **and**

**1.1.b.** does not have LCW following application of the WCA **and**

**2.** the appeal has not been heard

the claimant can still be treated as having LCW pending the appeal<sup>1</sup> (see DMG 42854). The decision awarding the component should be superseded to remove it<sup>2</sup>.

1 ESA Regs, reg 30(3) & 147A(4); 2 SS Act 98, s 10(5); SS CS (D&A) Regs, reg 6(2)(r)

### **Example**

Dave is entitled to ESA pending an appeal against a decision terminating his award of ESA following application of the WCA. He notifies that he was admitted to hospital for 2 days for minor surgery. Dave is referred for a further WCA, and the HCP advises that Dave should have recovered from the surgery within 3 weeks. The DM treats Dave as having LCW, and determines that he does not have LCWRA. The pending appeal award is revised to include the WRAC.

Dave is referred for a further WCA, and the HCP advises that he is fully recovered from his operation. In the HCP's opinion, Dave does not satisfy any of the LCW descriptors. The DM supersedes the award to remove the component from the date of the decision. Any further action depends on the outcome of the appeal.

42822 The guidance at DMG 42821 also applies where the claimant was awarded a component following a change in their health condition as in DMG 42851 - 42854.

42823 Where DMG 42821 or 42822 applies, DMG 42860 – 42867 should be followed once the outcome of the appeal is known.

### **Payment of component**

42824 Where a claimant is

**1.** entitled to an ESA award pending an appeal **and**

**2.** becomes entitled to a component as in DMG 42821 or 42822

DMG 44636 et seq applies, regardless of when the change in the claimant's health condition occurred<sup>1</sup>.

### **Example 1**

Jane has been entitled to ESA pending an appeal against a decision terminating ESA from 8.12.11. Her previous award, which did not include a component, was for more than 13 weeks. She is admitted to hospital after suffering a stroke on 18.5.12. Following application of the WCA, the DM determines that Jane has LCW and LCWRA. The pending appeal award is revised to award the support component from 8.12.11, the date the pending appeal award began.

### **Example 2**

Jason's award of ESA was terminated from 16.11.11 after he failed to attend a medical examination. He makes a further ESA claim from 16.11.11, and is referred for a WCA. On 8.3.12 the DM determines that Jason does not have LCW, and disallows the claim from 16.11.11. Jason appeals, and is awarded ESA from 8.3.12.

Jason's health deteriorates, and he is referred for a further WCA. The DM determines that Jason has LCW, but does not have LCWRA. The pending appeal award is superseded to award the WRAC from 7.6.12.

## **Date award begins**

42825 As there is no requirement to make a claim for the award to be made following an appeal as in DMG 42790<sup>1</sup>, the claimant does not specify the period for which they wish to claim ESA. The DM should normally begin the award on the day

- 1.** after the last day of entitlement of the award which is the subject of the appeal **or**
- 2.** the medical evidence begins if later.

**Note 1:** See DMG 42827 if the appeal follows a claim on which no award was made.

**Note 2:** See DMG 42845 - 42847 where another benefit is claimed while the appeal is awaiting hearing.

1 SS (C&P) Regs, reg 3(j)

42826 The guidance in DMG 42825 also applies where the appeal is admitted outside the one month time limit for appealing (see DMG Chapter 06 for guidance on appeal time limits).

42827 Where

**1.** a claim is disallowed on which no award has been made after application of the WCA **and**

**2.** the claimant makes an appeal and is awarded ESA as in DMG 42790

the guidance in DMG 42825 does not apply. Instead, the award begins on the day following the last day of the disallowance.

### **Example**

Colin's award of ESA is terminated from 16.8.11 after he fails without good cause to attend a medical examination. He submits a further claim from 16.8.11, but cannot be treated as having LCW (see DMG 42354). After application of the WCA, the DM determines that Colin does not have LCW for the whole period covered by the claim, and on 11.10.11 disallows the claim from 16.8.11. Colin makes an appeal against the decision on the claim, and sends in doctor's statements. He can be treated as having LCW and awarded ESA from 12.10.11.

## **Late appeals**

42828 Where

**1.** a late appeal is admitted, either by the DM or the FtT **and**

**2.** the conditions for making an award pending the outcome of the appeal are satisfied (see DMG 42790)

the DM should award ESA as in DMG 42825. If the claimant had claimed and been awarded IS or JSA before the late appeal was admitted, the DM should consider the guidance at DMG 42845 – 42846.

### **Example**

Rosie's award of ESA is terminated from 20.4.12 following application of the WCA. Rosie claims and is awarded JSA from 2.5.12. She then lodges an appeal on 5.6.12 against the decision terminating ESA, which is admitted by the FtT. She also sends a doctor's statement for three months from 20.4.12. Rosie's JSA award ends on 7.6.12, and the DM awards Rosie ESA for the period 20.4.12 – 1.5.12, and from 8.6.12. If Rosie's appeal is successful, the DM should offset the JSA paid against any ESA arrears due.

## **Prisoners**

42829 Where a claimant is

**1.** entitled to ESA pending an appeal **and**

## 2. imprisoned or detained in legal custody

the normal rules as to how this affects entitlement to and payment of ESA apply<sup>1</sup> (see DMG 53110 et seq for ESA(Cont) and DMG 54197 et seq for ESA(IR)).

1 ESA Regs, reg 69 & 159-161

42830 Where

**1.** ESA entitlement ends as a result of a period of imprisonment **and**

**2.** the claimant's appeal is allowed

the DM should follow [DMG 42866](#) but only for the period of entitlement.

### Example

Jackie is entitled to ESA(Cont) pending an appeal against a decision terminating ESA following application of the WCA. Jackie is sentenced to 18 months in prison, and after 6 weeks the DM treats her as not having LCW from the first day of imprisonment, as the period of disqualification exceeded 6 weeks.

Jackie is released after 6 months. Her appeal still hasn't been heard, and therefore she is not required to make a claim in order to become entitled to ESA. Jackie is awarded ESA from the date of release from prison after sending in evidence of LCW from that date.

Jackie's appeal is successful, and the DM awards her arrears of the WRAC, other than for the period when Jackie was not entitled while she was in prison.

42831 - 42839

## Further ESA claims

42840 Where a person

**1.** makes an appeal against a disallowance and becomes entitled to ESA as in DMG 42790 **and**

**2.** makes a claim for ESA

the claim cannot be decided. This is because the claim is for a benefit which has already been awarded. See DMG Chapter 01 for further guidance.

**Note:** Where the claim or accompanying evidence shows a deterioration or new condition, see DMG 42851.

## **IS or JSA awarded before appeal made**

42845 Where the claimant

- 1.** is awarded IS or JSA after the ESA award is terminated **and**
- 2.** following mandatory reconsideration, makes an appeal against the ESA disallowance

the claimant can only be awarded ESA as in DMG 42790 from the date that IS or JSA ends if they relinquish the award of IS or JSA, or that award otherwise ends (see DMG Chapter 04 for guidance on relinquishment). This is because a person cannot be entitled to ESA if they are entitled to IS or JSA<sup>1</sup> (see DMG Chapter 41).

1 WR Act 07, s 1(3)

42846 Where DMG 42845 applies, the ESA award begins on the day

- 1.** after the award of IS or JSA ends **or**
- 2.** from which medical evidence is provided where this is later

but excludes any period for which they were entitled to IS or JSA.

### **Example**

David's award of ESA is terminated from 8.2.10 after he fails the WCA. He claims JSA on 17.2.10 after receiving the ESA decision, and is awarded JSA from 8.2.10. On 7.4.10, he decides to make an appeal against the ESA disallowance, and submits medical evidence from the date his entitlement to ESA ended. The FtT admits the appeal. David's entitlement to JSA ends on 20.4.10. David is treated as having LCW from 21.4.10 and is awarded ESA from that date.

42847 DMs are reminded that the prescribed time for claiming IS or JSA can be extended for up to a month<sup>1</sup> where certain conditions apply<sup>2</sup>. See DMG –Chapter 02 for further guidance.

1 SS (C&P) Regs, reg 19(6); 2 reg 19(7)(d)

## Referral for WCA

42850 The DM should not make a determination about LCW until the appeal is determined by the FtT<sup>1</sup>. This means that the claimant should not be referred for the WCA. But see DMG 42851 - 42855 where there is a change of circumstances before the appeal is heard.

1 ESA Regs, reg 147A(2)

## Change of circumstances

42851 Where

**1.** the claimant suffers from some specific disease or bodily or mental disablement from which they were not suffering when entitlement began **or**

**2.** a disease or bodily or mental disablement from which the claimant was suffering at that date has significantly worsened

they should be referred for the WCA as normal even though the appeal has not been heard<sup>1</sup>.

1 ESA Regs, reg 30(2)(b) & (3) and 147A(3)

42852 Where, following application of the WCA, the DM determines that the claimant has LCW and awards a component, the guidance about ending the assessment phase in DMG Chapter 44 applies. See DMG 42860 - 42867 for the further action to take after the appeal is heard.

42853 Where the claimant can be treated as having LCW<sup>1</sup> other than in DMG 42350 et seq, for example where they are admitted to hospital, the DM should make the appropriate determination. This means that the claimant is no longer required to submit medical evidence. See DMG 42030 et seq for guidance on treating the claimant as having LCW.

1 ESA Regs, regs 20, 25, 26, 29 or 33(2)

42854 Where the DM makes a determination that the claimant

**1.** does not have LCW following application of the WCA as in DMG 42851 **or**

**2.** is treated as not having LCW because they have failed without good cause to return the questionnaire or attend for medical examination<sup>1</sup> **or**

**3.** is no longer treated as having LCW as in DMG 42853

the determination is treated as not made until the appeal is heard<sup>2</sup>. This enables the claimant to continue



to be treated as having LCW as in DMG 42354<sup>3</sup>. The claimant must continue sending in medical certificates for entitlement to continue<sup>4</sup>.

**Note:** Where the appeal is allowed, the DM takes action as in DMG 42866 – 42867. No further action is taken on the previous WCA referral, subject to the normal WCA review process (see DMG 42290 et seq).

1 ESA Regs, reg 22 or 23; 2 reg 147A(4); 3 reg 30; 4 reg 30(2)(a)

42855 Where the claimant starts work which is not exempt work, they should be treated as not having LCW in the normal way even though the appeal has not been heard. See DMG Chapter 41 for guidance on the effect of work on ESA entitlement. If the appeal succeeds, see DMG 42865 - 42867 for guidance on the action to take.

## **Change in claimant's health condition**

42856 Where DMG 42851 – 42854 applies and the WCA is not completed by the time the appeal is heard, the action to take depends on the outcome of the appeal.

## **Appeal dismissed**

42857 The guidance at DMG 42860 – 42862 should **not** be followed. The claimant can continue to be treated as having LCW pending application of the WCA as in DMG 42351<sup>1</sup>.

1 ESA Regs, reg 30(2)

## **Appeal allowed**

42858 If the appeal is allowed and the FtT determines that the claimant does not have LCWRA, the guidance at DMG 42866 should be followed as normal, and arrears of the WRAC awarded as appropriate. However, the WCA should still be carried out to establish whether the change in the claimant's health condition means that they now have LCWRA.

42859 If the appeal is allowed and the FtT determines that the claimant has or should be treated as having LCWRA, the guidance at DMG 42866 should be followed as normal, and arrears of the support component awarded as appropriate. The WCA referral should be cancelled subject to the normal review process (see DMG 42290 et seq).

## Appeal withdrawn, struck out or dismissed

42860 Where

1. the claimant is entitled to ESA after making an appeal **and**
2. they are treated as having LCW while providing medical statements **and**
3. either
  - 3.1 there is no change of circumstances (see DMG 42851) **or**
  - 3.2 following a change of circumstances, the claimant is treated as having LCW where they have been found not to have LCW after application of the WCA (see DMG 42854) **and**
4. the appeal is withdrawn, struck out or dismissed

the claimant is treated as not having LCW as in DMG 42851<sup>1</sup>.

**Note 1:** This does not apply where the claimant is found to have LCW as in DMG 42852 or is treated as having LCW as in DMG 42853 (see DMG 42865).

**Note 2:** See DMG 42868 for guidance if an appeal is reinstated.

**Note 3:** See DMG 42869 for guidance if an appeal is remitted.

1 ESA Regs, reg 30; reg 147A(5)

42861 Where DMG 42860 applies, the claimant is treated as not having LCW from the first day of the benefit week following the date on which the DM<sup>1</sup>

1. receives the FtT notification that the appeal is withdrawn, struck out or dismissed **or**
2. discontinues action on the appeal<sup>2</sup>.

1 ESA Regs, reg 147A(5A); 2 SS CS (D&A) Regs, reg 33(10)

42862 The decision awarding ESA is superseded on the grounds of a relevant change of circumstances<sup>1</sup>, and is effective from the date of change<sup>2</sup>. The change is that the claimant is treated as not having LCW.

1 SS CS (D&A) Regs, reg 6(2)(a); 2 Sch 3C, para 2 & 3(a)

### Example

Heather's entitlement to ESA ends when she fails the WCA. She appeals, and ESA is awarded from the date of disallowance. Her appeal is dismissed. The FtT decision notice is received in the office

administering her award of ESA on 13.7.10. Heather's benefit week ends on Monday. The DM treats her as not having LCW from 20.7.10, the first day of the next benefit week. The decision awarding ESA is superseded and terminated from 20.7.10.

42863 DMs should note that where the claimant makes an appeal against the decision made as in DMG 42860 - 42862, a further claim is required in order to consider entitlement to ESA. The claimant cannot be treated as having LCW as in DMG 42354 and 42790 even if they make an appeal.

42864 The condition in DMG 42354 about not being treated as having LCW following a determination that the claimant does not have LCW only applies to a determination made following application of the WCA, or where the claimant is treated as not having LCW for a failure to return the questionnaire or attend for medical examination. It does not apply to a determination that the claimant is treated as not having LCW as in DMG 42860 - 42862.

42865 Where

**1.** the claimant is

**1.1** found to have LCW following application of the WCA (see DMG 42852) **or**

**1.2.** treated as having LCW (see DMG 42853) **and**

**2.** the appeal is withdrawn, struck out or dismissed (see DMG 42860)

the claimant is not treated as not having LCW as in DMG 42860 - 42862. Entitlement to ESA is not affected by the outcome of the FtT appeal.

## **Appeal allowed**

42866 Where the appeal is successful, the FtT's findings of fact and determination are conclusive for the purposes of whether the claimant has LCW or LCWRA in their current entitlement to ESA<sup>1</sup>. But see DMG 42867 where there is a change of circumstances before the appeal is determined.

1 ESA Regs, reg 147A(6)

## **Example**

Jack was entitled to ESA from 8.3.10 after making an appeal against a decision which embodied a

determination that he did not have LCW. His appeal is allowed, and the FtT finds that he should be placed in the WRAG. As the previous entitlement to ESA ended after more than 13 weeks, arrears of the WRAC are paid up to 7.3.10 as appropriate. The DM makes determinations that Jack has LCW but does not have LCWRA in relation to his current entitlement, and revises the decision awarding ESA from 8.3.10 to pay the WRAC from that date.

42867 The FtT's findings or determinations do not apply where

- 1.** there was a change of circumstances after entitlement to ESA began as in DMG 42851 **and**
- 2.** the DM is satisfied that as a result it is no longer appropriate to rely on the FtT's findings or determinations<sup>1</sup>.

1 ESA Regs, reg 147A(7)

### **Example**

Pearl's entitlement to ESA is ended after ten weeks following application of the WCA, and she makes an appeal. She is awarded ESA after submitting medical certificates. Later she becomes pregnant with complications, and the DM finds that she is treated as having LCW and LCWRA. Pearl is placed in the support group from the 4th week of her current entitlement. The appeal is allowed, the FtT placing her in the WRAG. The DM determines that the FtT's findings should not be followed and takes no further action

### **Appeal reinstated**

42868 Where an appeal which has been struck out<sup>1</sup> and is subsequently reinstated, the DM should consider whether a further pending appeal award can be made, in the same way as for a late appeal. See DMG Chapter 06 for guidance on reinstatement of appeals.

1 ESA Regs, reg 147A(5)(c) & (5A)

### **Example**

Warren's award of ESA is terminated from 14.3.12 following application of the WCA. He makes an appeal, and is awarded ESA from 14.3.12. He fails to return the TAS1, and his appeal is struck out on 29.5.12. The ESA award is terminated from 6.6.12. Warren claims and is awarded JSA from 6.6.12. On 3.7.12 Warren's appeal is reinstated. He provides a doctor's statement and gives up his award of JSA from 11.7.12. The DM awards ESA from 11.7.12. If Warren's appeal is successful, the DM should offset the JSA paid against any ESA arrears due.

## Appeal remitted

42869 Where an appeal is dismissed<sup>1</sup> but is subsequently remitted by the FtT or the UT for rehearing, the DM should consider whether a further pending appeal award can be made, in the same way as for a late appeal (see DMG 42871). See DMG Chapter 06 for guidance on remitted appeals.

1 ESA Regs, reg 147A(5)(c)

### Example 1

Roger's award of ESA is terminated from 12.1.11 when his appeal against termination of the ESA following application of the WCA is dismissed by the FtT. Roger is awarded JSA from 12.1.11. On 6.8.12 the UT Judge sets aside the FtT decision, and remits the appeal for rehearing. Roger can be awarded ESA if he gives up his JSA award and provides doctor's statements.

### Example 2

Mick's award of ESA is terminated from 29.9.11 following application of the WCA. He is awarded ESA pending an appeal against the termination. The FtT dismisses the appeal on 17.5.12, and the ESA award is terminated from 24.5.12. Mick immediately makes a further claim for ESA, and is treated as having LCW pending application of the WCA, as it is more than 6 months since the previous LCW determination was made.

On 24.7.12 the FtT decision is set aside by the FtT, and the appeal is listed for rehearing. As Mick is already entitled to ESA, there is no need to make a further award pending the outcome of the appeal. The DM is not prevented from carrying out the WCA as normal.

## Appeal to UT by the claimant or the Secretary of State

42870 If the FtT dismisses the appeal, and the claimant applies for permission to appeal to the UT, the DM should make a determination about LCW and end the award as in DMG 42860 - 42861.

42871 Where the UT allows the appeal and remits it to a FtT, the DM may need to revise<sup>1</sup> the decision in order to reinstate the award, as it may be possible to treat the claimant as having LCW as in DMG 42790. However, this depends on any benefit awarded or other changes which may have occurred since the appeal to the FtT was initially heard.

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



# Appendix 1

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## Regular treatment categories

(see DMG 42090 et seq)

### Explanation of treatments

#### Plasmapheresis

Plasmapheresis is a process by which harmful substances can be removed from the bloodstream. Blood is taken from the person's vein, and the fluid part (plasma) containing the harmful substance is separated from the blood cells and removed. The blood cells are then mixed with an appropriate substitute fluid and returned to the person.

#### Radiotherapy

Radiotherapy is the use of X-rays to kill cancer cells. It is given as a series of administrations, with varying intervals between doses. Persons undergoing radiotherapy often feel very unwell for a few days after each dose.

#### Renal dialysis

Renal dialysis is used in the treatment of kidney (renal) failure. It is the process whereby waste products, which would usually be excreted in the main by the kidneys, are artificially removed from the body. There are two forms of dialysis: haemodialysis and peritoneal dialysis.

In haemodialysis, blood is circulated from the person's arm into a machine which removes the waste substances; the cleansed blood is then returned to the person. Haemodialysis is usually carried out two or three times a week.

In peritoneal dialysis the process involves introducing fluid into the abdomen through a permanently-positioned tube (an indwelling catheter). Harmful waste products are removed from the blood into this fluid through the inner lining of the abdomen (the peritoneum). After some hours, the fluid is drained from the abdomen and replaced with a fresh volume, and the cycle is repeated on a continuous basis.

#### Total parenteral nutrition

Total parenteral nutrition is a recent development in the treatment of serious intestinal conditions such as Crohn's disease. It is a way of ensuring adequate nutrition when normal absorption of food and fluid from the gut is impossible as a result of severe disease.

A fine tube (catheter) is inserted into a major vein in the neck, and is held in permanent position; its end is capped when not in use. A special feeding solution, three to five litres in all, is pumped through the catheter using a special pump mounted on a stand. The process takes eight to fourteen hours, and is usually carried out overnight.

For most people, the need for total parenteral nutrition will be life-long.

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



## Appendix 2 - DMG Memo 1-18: ESA: Work Related Activity and Substantial Risk

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## Introduction

**1** This memo gives guidance on

1. considering substantial risk in the context of whether a claimant should be treated as having LCWRA<sup>1</sup> **and**
2. in particular, what evidence of WRA is required in order to determine this question

in the light of a number of UT decisions<sup>2</sup>.

*1* *ESA Regs, reg 35(2)*; *2* [AH v SSWP \(ESA\) \[2013\] UKUT 118 \(AAC\)\(link is external\)](#); [2013] AACR 32;  
[ML v SSWP \(ESA\) \[2013\] UKUT 174 \(AAC\)\(link is external\)](#); [2013] AACR 33;  
[IM v SSWP \(ESA\) \[2014\] UKUT 412 \(AAC\)\(link is external\)](#); [2015] AACR 10

**2.** The memo amends and **replaces** Memo DMG 17/15 which is **cancelled**. This is to take account of

- 1.** further UT decisions<sup>1</sup> (see paragraphs 12 - 13) **and**
- 2.** changes in the provision of WRA from 3.4.17 (see paragraph 40).

*1* *KC & MC v SSWP (ESA) [2017] UKUT 94 (AAC)*; *YA & SA v SSWP (ESA) [2017] UKUT 80 (AAC)*

**3.** The guidance in this memo is for the attention of all ESA DMs and includes specific guidance for DRT staff in relation to dealing with requests for mandatory reconsideration and preparing responses to the FtT. In cases where a claimant has requested mandatory reconsideration of, or lodged an appeal against, a decision made following application of the WCA, examples of how the guidance should be applied are at the end of the memo.

**Note:** It is important that staff read **all** the guidance contained in this memo.

## BACKGROUND

**4.** Where a claimant is found to have LCW<sup>1</sup>, or is treated as having LCW<sup>2</sup>, the DM is required to determine whether or not the claimant has LCWRA<sup>3</sup>, or should be treated as having LCWRA<sup>4</sup>, in order to determine

- 1.** whether the WRAC or support component should be included in the award<sup>5</sup> **and**
- 2.** whether the claimant is required to

**2.1** take part in one or more Wfl<sup>6</sup> **and**

**2.2** undertake WRA<sup>7</sup> **and**

**3.** in the case of an award of ESA(Cont), whether the award is limited to 365 days<sup>8</sup>.

*1 ESA Regs, reg 19; 2 reg 20, 25, 26, 29 & 33; 3 reg 34; 4 reg 35;*

*5 WR Act 07, s 2(1)(b) & 4(2)(b); 6 s 12; 7 s 13; 8 s 1A*

**Note:** Whether WRAC is payable as in 4.1 above is dependant upon when the date of claim was in any particular case as the WRAC was removed for any claims made on or after 3.4.17.

**5.** Where the claimant is found not to have LCWRA because

**1.** none of the LCWRA descriptors apply<sup>1</sup> **and**

**2.** they cannot be treated as having LCWRA<sup>2</sup> as in [DMG 42680\(link is external\)](#)

the DM should consider whether, as a result of being found not to have LCWRA, there would be a substantial risk to the physical or mental health of the claimant or any other person<sup>3</sup>.

*1 ESA Regs, reg 34(1); 2 reg 35(1); 3 reg 35(2)*

**6.** The substantial risk provision ensures that, in the case of a limited number of claimants who would otherwise be required to undertake WRA, a potential and substantial risk of harm to health, which could not be ignored due to its nature and gravity, is taken into account when determining whether a particular claimant is treated as having LCWRA.

**7.** The substantial risk provision has been considered in a number of UT decisions as set out in paragraphs 8 - 13. In all the UT cases, the claimants had been found to have LCW, either by the DM, or the FtT on appeal. The remaining issue before the FtT therefore was whether the claimants had, or could be treated as having, LCWRA. The FtT held that they did not.

## **The UT decisions**

### **Reported UT decisions [2013] AACR 32 and 33**

**8.** The UT Judge held that, applying principles in case law<sup>1</sup> on the LCW equivalent provision<sup>2</sup>, the DM should assess the range or type of WRA which a claimant was capable of performing and might be expected to undertake.

*1 Charlton v SSWP [2009] EWCA Civ 42; R(IB) 2/09; 2 SS (IW) (Gen) Regs, reg 27(b); ESA Regs, reg 29(2)*

*(b)*

**9.** The substantial risk can arise from

1. the WRA itself **or**

2. the journey to and from the place where the WRA is undertaken (where relevant).

**10.** There must be appropriate evidence before the FtT of

1. the nature of the WRA (which **must** be provided by the DM) **and**

2. the claimant's health.

### **Reported UT decision [2015] AACR 10**

**11.** A three judge panel of the UT held

1. the DM is required to predict what WRA the individual claimant might be required to undertake, when considering whether there would be a risk to their health if they were so required

2. in some case it will be obvious that there is no risk, because none of the types of WRA available in the claimant's area would cause such a risk to materialise

3. the FtT should be provided with evidence about the types of WRA available in the claimant's area, whether provided by the Secretary of State or Work Programme providers, including the least and most demanding types, together with information about what the claimant might be required to undertake from that list

4. this evidence is required in appeal responses about whether the claimant has LCW as well as those about whether they have LCWRA, so that the FtT can consider risk in cases where they find that the claimant has LCW, but does not satisfy any LCWRA descriptor

5. if the Secretary of State does not provide evidence as in **3.**, the FtT can

- 5.1** use its own knowledge if that is up to date and complete **or**

- 5.2** adjourn to obtain the necessary evidence **or**

- 5.3** decide the case itself without evidence.

6. where **5.3** applies, the FtT could find that the claimant should be treated as having LCWRA.

### **KC & MC v SSWP (ESA) [2017] UKUT 94 (AAC)**

**12.** For the purposes of paragraph 11 **3.** above, the UT Judge held that

1. the FtT should be supplied with properly evidenced examples of the range of the most and least demanding types of WRA, but this need not include all the types of WRA available

**2.** the response to the FtT should

**2.1** highlight what WRA the claimant might be required to undertake by reference to the examples, the claimant's health condition and limitations **and**

**2.2.** explain which of the activities in **1.** the DM considers that it would be reasonable for the claimant to undertake

**3.** where the evidence is of WRA provided by the Secretary of State under the Jobcentre Plus Offer, the response should include an explanation of the Jobcentre Plus Offer

**4.** the FtT should be provided with evidence about what WCA information is provided to the work coach.

### **YA & SA v SSWP (ESA) [2017] UKUT 80 (AAC)**

**13.** The UT Judge held that in cases where the risk to the claimant on the journey to and from any work related activity that he may be required to attend has been raised<sup>1</sup>, evidence should be provided to the FtT as to

**1.** whether the presence of a third party would be sufficient to reduce any substantial risk

**2.** the frequency of WRA

**3.** where WRA might be required to take place **and**.

**4.** whether a third party presence would reasonably be available to accompany the claimant to and from WRA.

*1 ESA Regs, Sch 2, Act 15;*

### **When should substantial risk be considered**

**14.** The following guidance explains how the UT's decisions as summarised in paragraphs 8 - 13 should be applied by DMs dealing with

**1.** requests for mandatory reconsideration **or**

**2.** appeals to the FtT

where the decision in question incorporates a determination that the claimant does not have, and cannot be treated as having, LCWRA.

**Note:** See also paragraph 17 for guidance on appeal responses where the appeal is about whether the claimant has, or can be treated as having, LCW.

## Determining LCWRA

**15.** The question of whether there is a substantial risk to the health of the claimant or any other person should be considered where the DM finds that

- 1.** the claimant has, or is treated as having, LCW<sup>1</sup> **and**
- 2.** no LCWRA descriptors apply<sup>2</sup> **and**
- 3.** the claimant cannot otherwise be treated as having LCWRA<sup>3</sup>.

*1 ESA Regs, reg 19, 20, 25, 29 & 33(2) & Sch 2; 2 Reg 34 & Sch 3; 3 reg 35(1)*

## Mandatory reconsideration and appeals

**16.** The information in paragraphs 17 - 19 should be included in

- 1.** a decision made following mandatory reconsideration whether or not the decision is revised **and**
- 2.** responses to an appeal to the FtT

depending on whether the decision or appeal is about whether the claimant has LCW, or has LCWRA. This includes where a decision is revised after an appeal is received, and the claimant is found to have LCW, but not LCWRA.

## Claimant does not have LCW

**17.** Where a claimant is found not to have LCW, the appeal response should refer to the LCWRA provisions, but need not explain why it is considered that those provisions do not apply. This is because it will be implicit that they do not from the decision or response on why it is considered that the claimant does not have LCW.

**Note:** See paragraphs 30 - 33 for which list to include in appeal responses.

## Claimant has LCW but does not have LCWRA

**18.** Where the issue is whether the claimant has, or should be treated as having, LCWRA, the DM should explain

- 1.** why it is considered that no LCWRA descriptors (limited to those put at issue by the claimant if identified) apply **and**
- 2.** by reference to the list of types of least and most demanding WRA available in the claimant's area

**2.1** which is the most and least demanding WRA on the list for the particular claimant **and**

**2.2** which types of WRA it is considered that the claimant might be expected to undertake without substantial risk.

**Note:** See paragraphs 30 - 33 for which list to consider, and include in appeal responses.

**19.** The DM should also consider, where available, evidence of

- 1.** any Wfls attended, or WRA undertaken, **and**
- 2.** if any, the effect of the Wfl or WRA on the claimant's health

since the claimant was placed in the WRAG. This could be by production of the JCP action plan in appeal responses. Information about how the claimant has coped with Wfls and WRA may be relevant when assessing whether any risk to the claimant's or anyone else's health is likely, and if so, whether it is substantial.

**20.** The DM should remember that a Wfl is **not** WRA, and serves a different purpose. The Wfl acts as a gateway to WRA. However, as part of a WRA requirement, the claimant may be asked to attend an interview other than a Wfl, for example to discuss the effectiveness of a previous WRA requirement.

**Note:** See [DMG 53017\(link is external\)](#) for guidance on the purpose of a Wfl, and [DMG 53031\(link is external\)](#) for the meaning of WRA.

### **What is substantial risk**

**21.** Although any of the factors in paragraphs 28 - 29 may give rise to a risk to the claimant's or anyone else's health, the question is whether

- 1.** that risk is likely **and**
- 2.** if so, it arises as a result of the claimant's health condition **and**
- 3.** if so, it is substantial.

**22.** A risk is substantial where the harm or damage to the person's health would be serious, and could not be prevented or mitigated. It is not minor or trivial. It may be immediate, or in the longer term. The risk of harm has to be caused by the individual claimant's physical or mental health condition, and be triggered by being found not to have LCWRA. The DM should bear in mind that claimants may be required to take part in a Wfl, undertake WRA, and potentially have their ESA award reduced if they fail to do so without good cause.

**Note:** A person who is unable to undertake WRA, or whose award of ESA is reduced, is not automatically at risk. The nature and severity of the risk must be identified.

**23.** The DM should always consider whether a substantial risk could be prevented or mitigated, particularly where a risk is identified by the individual claimant. For example, in paragraph 25 **1.** and **2.**,

although there could be a substantial risk of harm to health if the claimant was exposed to a cold environment, the risk could be prevented or reduced if the claimant were not required to attend in person on cold days.

**24.** Where there is evidence that there is a risk to health, the DM should also consider whether any reasonable adjustments could be made to accommodate any problems the claimant may have in order to avoid the risk. For example, where the claimant has problems getting about due to panic attacks, it may be possible to undertake WRA at or from home, doing things in writing, reading, on-line or by telephone. A claimant who has difficulties with face-to-face social contact could be capable of undertaking WRA by telephone, or on-line.

### **Immediate substantial risk**

**25.** Examples of immediate substantial risk:

- 1.** Angina which is normally controlled could be exacerbated in the short term by cold environments.
- 2.** Asthma which is normally controlled could be exacerbated in the short term by cold or dusty environments, where this causes difficulty breathing which is not relieved with inhalers.
- 3.** A claimant with hypertension which is uncontrolled despite medication may be at substantial risk of a stroke or heart attack, even if they do not satisfy any of the LCWRA descriptors.
- 4.** Panic attacks could be triggered by anxiety in some situations, such as going to unfamiliar or crowded places, or meeting strangers.

### **Longer term substantial risk**

**26.** There **may** be substantial risk if it is likely that the claimant's physical or mental health condition would deteriorate in the longer term as a result of undertaking WRA. A deterioration in a medical condition might be evidenced by, for example:

- 1.** an increase in symptoms
- 2.** a change in medication
- 3.** an increase in medical input
- 4.** hospital admission
- 5.** an increase in attendance at hospital.

**27.** The examples are not conclusive that there is substantial risk. The DM should consider each case on its facts. In cases of doubt, the DM should consult Medical Services.



## **Health factors**

**28.** In assessing the likelihood of substantial risk to health, the DM should consider

- 1.** the nature and severity of the claimant's health condition
- 2.** the duration of the claimant's health condition
- 3.** whether or not the claimant's health condition has been stable
- 4.** any previous deterioration or improvement in their health condition
- 5.** what caused any deteriorations in the past and whether WRA is likely to engage any of these triggers
- 6.** whether there are several conditions which may interact with each other
- 7.** the nature and strength of any medication
- 8.** whether any risk can be mitigated.

**Note:** This list is **not** exhaustive.

## **Other factors**

**29.** Other factors which should be taken into account when considering whether a substantial risk is likely include

- 1.** was the claimant previously in work without incident despite their health condition?
- 2.** did the claimant give up work because of their health condition? If so, what was the nature of the employment? Could suitable WRA be found to ensure there is no harm to health?
- 3.** if a risk is identified, is it present throughout the day? Are there times of the day when WRA could be carried out without risk?
- 4.** does the claimant's description of their typical day indicate that they are capable of some types of WRA without risk?
- 5.** has the DM accepted that the claimant satisfies a descriptor, and therefore cannot undertake an activity which might be required as part of any WRA they would be required to undertake, and which might cause harm to health?

## **Evidence of WRA**

**30.** The DM should consider whether the claimant should be treated as having LCWRA using the appropriate list of WRA by area. In cases where it is determined that the claimant does not have, and

cannot be treated as having, LCW, this will be

**1.** where the decision under appeal was made before 3.4.17, the types of WRA provided

**1.1** through the Work Programme in the claimant's area **and**

**1.2** under the Jobcentre Plus Offer **or**

**2.** where the decision under appeal was made on or after 3.4.17, the types of WRA provided under the Jobcentre Plus Offer.

In either case, the list should identify which are the least and most demanding types of WRA.

**Note:** See the Appendix to this Memo for the Jobcentre Plus Offer list.

**31.** Where the claimant is found to have, or is treated as having, LCW, the list to use depends on

**1.** whether the claimant would in practice be required to undertake WRA (see paragraphs 43 - 46) **and**

**2.** when it is considered that the claimant should be referred for a subsequent WCA (see [DMG 42292\(link is external\)](#) - [42301\(link is external\)](#) for details).

**32.** Where the circumstances in paragraphs 43 - 46 apply, that is, where the claimant would not be required to undertake WRA, the list of WRA provided through the Jobcentre Plus Offer should be used, irrespective of when the claimant would be referred for a subsequent WCA.

**33.** In cases where the claimant would be required to undertake WRA and the period before referral for a further WCA is

**1.** 12 months or less, the list of WRA provided through the Work Programme (see paragraph 40 below for claims after 3.4.17) **or**

**2.** more than 12 months, the list for Jobcentre Plus Offer

should normally be used.

**Note 1:** This does not apply to claimants entitled to ESA(Cont) only, as they are required to undertake WRA under the Jobcentre Plus Offer.

**Note 2:** If the claimant has already been required to undertake WRA under a different programme from normal, the list for that programme should be considered, and included in the appeal response.

**34.** Although the lists do not include information as to when a particular type of WRA became available, the types of WRA on either list have not changed significantly since the requirement for ESA claimants to undertake WRA was introduced on 1.6.11.

**35.** It should be noted that the Jobcentre Plus Offer list includes

- 1.** WRA where a referral to a provider is required **and**
- 2.** discretionary WRA.

**36.** The DM should provide the FtT with examples of the most and least demanding WRA which it is considered the claimant might be required to undertake (see paragraph 37), rather than the whole list. The response to the FtT should explain that it is not practical to produce the whole list due to size constraints.

**37.** The DM should then consider what types of WRA that the claimant could undertake without risk, and which may be appropriate to help them become work-ready, given any information the DM has about the claimant's work history and skills. This could be obtained from the ESA claim information, the questionnaire (form ESA50), the HCP report where there was a face-to-face assessment, and any other information which may be available.

**Note:** See the Appendix to this Memo for the Jobcentre Plus Offer list

**38.** The DM is **not** required to consider whether the types of WRA on the list of what is available in the claimant's area, and that would be appropriate for that claimant, could be provided on the date of the decision, for example is the activity available due to operational delivery issues. Nor is this necessarily the same as the WRA which the claimant might eventually be required to undertake.

### **Jobcentre Plus Offer**

**39.** Where the Jobcentre Plus Offer WRA list is included, the appeal response should explain that the types of WRA included are available throughout GB. Where reference in the most demanding WRA list is made to attending courses, it is not possible to provide evidence of what courses are available in the claimant's area, due to the way in which information about courses is recorded.

**40.** From 3.4.17, new claimants are no longer referred to the Work Programme, and instead are referred for WRA under the Jobcentre Plus Offer. Claimants already on the Work Programme will continue to be supported under that programme.

**Note:** Referrals to the Work Programme ceased on 31.3.17 and the final participants will complete the programme on 29.3.19.

**41.** Where the decision under appeal was made before 3.4.17, the appeal response should explain that, although at the date of the decision, had the claimant been found to have LCW but not LCWRA, they would have been referred to the Work Programme, in practice only the Jobcentre Plus Offer is now available if the FtT determines that the claimant has LCW.

**42.** In all cases, paragraphs 48 and 116 of the UT decision *KC & MC v SSWP (ESA)* [2017] UKUT 94 (AAC), which set out the Secretary of State's description of the Jobcentre Plus Offer, should be brought to the

attention of the FtT.

## **WRA not required or appropriate**

**43.** Not all claimants who are placed in the WRAG are required to take part in a Wfl<sup>1</sup>, or to undertake WRA<sup>2</sup> – see DMG [53014\(link is external\)](#) and [53036\(link is external\)](#) for further details. For example, a claimant who is entitled to CA or CP cannot be required to undertake WRA<sup>3</sup>.

*1 ESA Regs, reg 54(2); 2 ESA (WRA) Regs, reg 3(2); 3 reg 3(2)(c) & (d)*

**44.** Claimants entitled to ESA(Cont) who live outside GB are not in practice required to undertake WRA, as there is no WRA programme available outside GB.

**45.** There may be claimants who could be required to undertake WRA, but for whom it would not be appropriate. For example, a claimant who has a contract of employment, and who is absent from work while recovering from medical treatment, may not be required to attend a Wfl<sup>1</sup>, or to undertake WRA<sup>2</sup>. This is because the only thing preventing a return to work is the need to recover from the treatment.

*1 ESA Regs, reg 60; 2 ESA (WRA) Regs, reg 6*

**46.** The DM should disregard the fact that the individual claimant may be exempt from the requirement to undertake WRA, or would not in practice be required to undertake WRA, when considering whether there is a substantial risk if the claimant were found not to have LCWRA. The test is a hypothetical test, and should still be considered accordingly by reference to the lists of what WRA is available.

## **EXAMPLES**

### **Example 1**

Alison suffers from chronic fatigue syndrome and anxiety, and is found to have LCW as she is unable to repeatedly mobilise 200 metres due to exhaustion, and needs to be accompanied to unfamiliar places due to anxiety and panic attacks. The HCP recommends a further WCA referral in 18 months, as Alison's condition is improving slowly. Alison spends four or more hours a day using her PC, including communicating with friends and family. She works for an hour or so a week editing a magazine on-line. She works one day a week as a volunteer at the Citizen's Advice Bureau and her family, who are always available, take her there and back. Alison states that she needs the next day to recover from the extreme exhaustion this causes.

In the area where Alison lives, the least demanding WRA for her would be courses expanding her IT skills at home via her PC, and the most demanding would be a requirement to attend infrequent short sessions at her local Jobcentre, designed to explore job opportunities which would enable her to work from home at her own pace. The DM determines that Alison's health would not be at substantial risk as the availability of her family to take her to any such sessions would reduce her anxiety levels and the infrequency of the sessions would allow her time in between to recover from any exhaustion.

## **Example 2**

Robin gave up work as a call centre operator due to stress and anxiety, and became depressed with social phobia and agoraphobia. He spent several months in hospital as a voluntary patient after attempting suicide. He had been unable to contemplate attending cognitive behavioural therapy so far, and never answered the door or phone. Medication had to be controlled by his mother in order to prevent further suicide attempts. He attended the medical examination centre with his mother, and the HCP recorded that he was visibly distressed throughout the examination; most questions had to be answered by his mother.

The DM determines that Robin has LCW as he is unable to get to familiar places unaccompanied, and is too distressed to engage in social contact with unfamiliar people, either face-to-face or by telephone. The DM also determines that any WRA would be likely to exacerbate Robin's mental health state, and places him in the support group.

## **Example 3**

Gavin has been suffering from frequent unexplained blackouts without warning. His GP states that he should avoid dangerous activity such as driving, using machinery or working at heights, due to the risk of injury. He is treated as having LCW, with a recommendation of re-referral within 12 months. The DM determines that, for the purposes of WRA, although there is a risk of injury from the blackouts, the risk can be mitigated by ensuring that a third party is present to deal with any potential incidents. WRA which does not involve any potentially hazardous activity as identified by Gavin's GP could be undertaken.

Gavin left school with no academic qualifications, and was previously employed as a fork-lift truck operator. In the area where Gavin lives, the most and least demanding types of WRA in the list include courses designed to explore the potential for changing careers including self-employment, as well as sessions on preparing for job search, and interviewing skills. Also available are sessions on IT skills and safety in the workplace. The DM determines that Gavin could be required to undertake all of these without any risk to his or anyone else's health.

## **Example 4**

Tahla has diabetic neuropathy and also suffers from anxiety. His consultant neurologist provides a report stating that he has been advised to avoid walking long distances and spending more than a few minutes outside when it is cold because of the risk of damage to the feet. Damage can take the form of ulceration of the skin, arthritis and deformity of the joints. The damage is painless because of the nerve damage to the feet so tends to be noticed at a late stage when it is severe. Poor healing is also a feature of this condition. The risk is severe damage to the foot resulting in amputation and loss of mobility. Tahla is very anxious about going out and using public transport because of the risk of damage. His wife, who is always available, takes him everywhere. He is found to have LCW scoring 6 points for mobilising and 9 points for getting about.

The DM determines that, although there is a potential for substantial risk to Tahla's health, it can be

prevented by not requiring him to undertake WRA outside the home on cold days, and ensuring anywhere he has to attend has disabled parking near the entrance. The least demanding types of WRA in Tahla's area includes getting up and dressed by a certain time each day, and keeping a log to chart progress. The most demanding types includes weekly health and well-being workshops designed to help people learn how to manage their health condition in the workplace, as well as sessions about building confidence and motivation, and the DM considers that Tahla could undertake these without risk to his health as his wife would be able to take him.

### **Example 5**

Michael suffers from mental health problems including depression, anxiety and agoraphobia. He has panic attacks if he has to go anywhere on his own, or meet people he doesn't know. Michael has fortnightly counselling sessions with a voluntary organisation at a nearby drop-in centre, but progress after 6 months has been slow. Following application of the WCA, the DM determines that Michael has LCW due to difficulties with getting about (Activity 15(b), 9 points) and coping with social engagement (Activity 16(c), 6 points). The DM determines that no LCWRA descriptors apply. The HCP recommends a further referral in 18 months.

Evidence from the voluntary organisation is that Michael has problems coping financially, and is in arrears with rent and utilities. His fears about leaving his home began when he was assaulted by someone from whom he had borrowed money. He lives alone and has no support from family or friends. Although Michael could not undertake the most demanding of the WRA offered by the local Jobcentre, as this would require attendance at the Jobcentre, the least demanding WRA on the list includes debt counselling and advice on benefits, which could be carried out by telephone to avoid any risk to his mental health. The DM determines that Michael cannot be treated as having LCWRA.

### **Example 6**

Harriet is injured while on holiday, and following surgery continues to have problems with mobilising as well as sitting and standing. Her condition is expected to improve within 3 months. She had previously had a number of temporary jobs as an office clerical assistant. The DM determines that Harriet has LCW, scoring 9 points for Sch 2 Activity 1(c) and 6 points for Activity 2(c), and that no LCWRA descriptors apply. The DM considers that Harriet should, without risk to her health, be capable of attending a wide range of WRA offered by the Work Programme provider for her area. The most demanding would be attendance at a series of short workshops designed to help her with CV preparation, interview skills and confidence building, and the least demanding would be attending an awareness session to discuss future participation and options.

### **annotations**

Please annotate the number of this memo (Memo DMG 01/18) against the following DMG paragraphs:

DMG 42366, 42394.

## 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 03/13](#) - Obtaining legal advice and guidance on the Law.

## DMA Leeds: January 2018

### appendix

#### JobCentre Plus offer types of work-related activity

Less demanding	More demanding
<b>Type of support</b>	
Getting up and dressed by a certain time each day, and keeping a log to chart progress  <b>Easy</b>	Referral to English for Speakers of Other Languages (ESOL) training  <b>Easy</b>
Finding out possible transport routes and trying them out, and keeping a log to chart progress.  <b>Medium</b>	Attend an occupational training course to get new skills needed for moving into a different type of work to that previously undertaken.  <b>Medium</b>
Look at the Expert Patient Programme online and list reasons why it could benefit you.  <b>Hard</b>	Attend a classroom-based IT course  <b>Easy</b>
Registering with and/ or visiting the local library.  <b>Medium</b>	Attend a CV drafting course  <b>Easy</b>

<p>Researching bus times, local public transport routes etc, and keeping a log to chart progress.</p> <p><b>Easy</b></p>	<p>Attend a work placement at a community hub/café/other placement of community benefit</p> <p><b>Hard</b></p>
<p>Make a list of your hobbies, things you enjoy doing, or things you used to enjoy doing.</p> <p><b>Easy</b></p>	<p>Attend basic skills course in English and Maths</p> <p><b>Medium</b></p>
<p>Updating CV / Making a list of previous employment, education and other experience.</p> <p><b>Medium</b></p>	<p>To research a potential career path, skills requirements and find out about opportunities available through local employers to discuss with work coach</p> <p><b>Medium</b></p>
<p>Making a list of transferrable skills, and any skills they would like to build up.</p> <p><b>Medium</b></p>	<p>Referral to the National Careers Service (England only), to see a careers adviser about career options.</p> <p><b>Easy</b></p>
<p>Improving digital skills: setting up an e-mail account; browsing the internet; and keeping a log to chart progress.</p> <p><b>Hard</b></p>	<p>Referral to a skills provider for a skills assessment (England and Wales only)</p> <p><b>Easy</b></p>
<p>Leaving the house every day, keeping a log to chart progress (e.g. walking around the block; going to the corner shop; going into town).</p> <p><b>Easy</b></p>	
<p>Considering referral to professional service (e.g. counselling, physiotherapy etc.) through GP or self-referral. Keep a log of any research you do, or contact</p>	



<p>that you make.</p> <p><b>Medium</b></p>	
<p>Researching local self-help centres / support groups appropriate to claimant's health condition (through library, internet, Yellow pages etc.). Keep a log of any research you do, or contact that you make.</p> <p><b>Medium</b></p>	