

## **EXPLANATORY MEMORANDUM**

### **THE EMPLOYMENT AND SUPPORT ALLOWANCE (REPEAT ASSESSMENTS AND PENDING APPEAL AWARDS) (AMENDMENT) REGULATIONS (NORTHERN IRELAND) 2015**

**S.R. 2015 No. 185**

#### **1. Introduction**

- 1.1 This Explanatory Memorandum has been prepared by the Department for Social Development to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.
- 1.2 The Statutory Rule is made under powers conferred by the Social Security Administration (Northern Ireland) Act 1992 and the Welfare Reform Act (Northern Ireland) 2007 and is subject to the negative resolution procedure.

#### **2. Purpose**

- 2.1 This Statutory Rule amends the Employment and Support Allowance Regulations (Northern Ireland) 2008 (“the 2008 Regulations”), the Claims and Payments Regulations (Northern Ireland) 1987 and the Employment and Support Allowance (Transitional Provisions and Housing Benefit) (Existing Awards) Regulations (Northern Ireland) 2010.
- 2.2 Where an Employment and Support Allowance (ESA) claimant is found fit for work or not to have Limited Capability for Work (LCW) entitlement to benefit ends. Currently claimants are able to make a repeat claim to ESA after six months and there is no barrier to a repeat award of ESA even where the claimant provides no evidence to suggest that their condition has substantially deteriorated, or that they have a new health condition.
- 2.3 This Statutory Rule removes the six month rule and provides that claimants previously found fit for work who make a repeat claim for ESA will not be treated as having LCW and thus entitled to benefit at the assessment rate pending determination of the claim unless they can demonstrate that there has been a significant deterioration in their health condition or a new health condition has developed.
- 2.4 The Statutory Rule also provides that ESA payments pending appeal will not be made to claimants previously found fit for work who are found not to have LCW on their repeat claim.
- 2.5 Making these changes will end an unintended consequence where claimants can make repeated claims to ESA despite no significant deterioration in their health condition to ensure these claimants get the

appropriate help and support to return to work through claiming Jobseeker's Allowance (JSA).

### **3. Background**

- 3.1 ESA is a benefit for claimants who have LCW because of a health condition or disability. The legislation governing entitlement to ESA is primarily the Employment and Support Allowance Regulations (Northern Ireland) 2008 (S.R. 2008 No. 280).
- 3.2 These amendment regulations give effect to the policy intent of preventing payments of ESA where a claimant's condition has not significantly changed since the previous claim and also prevent payments pending appeal where claimants are found fit for work on a repeat claim.
- 3.3 The 2008 Regulations provide that a determination that a claimant does not have LCW (and is thus not entitled to ESA) normally has validity for six months. This means that where a new claim is made within this period supported by medical evidence in the form of a fit note from the GP, claimants cannot be treated as having LCW until a fresh determination has been made as to whether or not they have LCW, unless their condition has significantly worsened or a new condition has developed. In the circumstances where the Department does not make an immediate decision on LCW because further evidence is needed, the claimant is referred for a new Work Capability Assessment (WCA), and is not paid ESA in the interim. The WCA is a functional assessment of how a claimant's health condition or disability affects their capability for work
- 3.4 Where a new claim is made more than six months after the last fit for work decision then, subject to the other qualifying conditions, the claimant is treated as having LCW and ESA is awarded pending a fresh WCA, even where no evidence is provided to suggest that the claimant's condition has significantly worsened. One unwanted effect of this policy is that even where an Appeal Tribunal has upheld a fit for work decision, if the appeal process has taken longer than six months, a claimant can immediately make a new (repeat) claim for ESA on the basis of exactly the same condition, and will be entitled to receive ESA at the assessment phase rate (the same rate as JSA) pending a new WCA. The cycle between the ESA claim, WCA and disallowance starts again
- 3.5 It is therefore intended that claimants making repeat claims for ESA will no longer be treated as having LCW if they were found 'fit for work' following their most recent WCA regardless of the period of time which has since elapsed unless they can demonstrate that there has been a significant worsening in their health condition or that a new health condition has developed. Since entitlement to ESA depends on the claimant having, or being treated as having, LCW, this change will mean that claimants in these circumstances will (unless they can demonstrate that there has been a significant worsening in their health condition or that

a new health condition has developed) not be awarded ESA pending a fresh WCA. This should prevent people claiming ESA instead of JSA through which they will receive the help and support they need to return to work.

- 3.6 It is also intended that, where the repeat claim is allowed and results in a fit for work decision and, after mandatory reconsideration, the claimant lodges an appeal, they should not become entitled to receive ESA pending the outcome of the appeal. For these claimants, this serves to align ESA with what happens for all other social security benefits where if a claimant is found not to be entitled, no benefit is paid whilst awaiting the outcome of the appeal. We believe this is reasonable because in their previous claim, the claimant will have had the opportunity to appeal to a tribunal if they disagreed with the decision. Claimants will instead be signposted to JSA as it is the appropriate benefit for someone who has been found fit for work. JSA provides claimants with personalised support to return to work taking into account their health condition or disability. It is acknowledged that not all ESA claimants will be eligible for JSA because they may not meet the conditions of entitlement.

#### **4. Consultation**

- 4.1 DWP did not undertake a formal consultation exercise as part of the legislative process as the changes will affect a small number of claimants.

#### **5. Equality Impact**

- 5.1 In accordance with its duty under section 75 of the Northern Ireland Act 1998, the Department has conducted a screening exercise on these legislative proposals and has concluded that the proposals do not have significant implications for equality of opportunity. In light of this, the Department considers that an equality impact assessment is not necessary.

#### **6. Regulatory Impact**

- 6.1 These Regulations do not require a Regulatory Impact Assessment as they do not impose any new costs on business, charities or voluntary bodies.

#### **7. Financial Implications**

- 7.1 There are no significant costs to the Department to implement these proposals.

## **8. Section 24 of the Northern Ireland Act 1998**

- 8.1 The Department has considered section 24 of the Northern Ireland Act 1998 and is satisfied the Rule—
- (a) is not incompatible with any of the Convention rights,
  - (b) is not incompatible with Community law,
  - (c) does not discriminate against a person or class of person on the ground of religious belief or political opinion, and
  - (d) does not modify an enactment in breach of section 7 of the Northern Ireland Act 1998.

## **9. EU Implications**

- 9.1 Not applicable.

## **10. Parity or Replicatory Measure**

- 10.1 The corresponding Great Britain Regulations are the Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendment) Regulations 2015 (S.I. 2015/437). The enclosed regulations are therefore being made to ensure parity with amending regulations that are being made in Great Britain.
- 10.2 Parity of timing and substance is an integral part of the maintenance of single systems of social security, pensions and child support provided for in section 87 of the Northern Ireland Act 1998.