
STATUTORY RULES OF NORTHERN IRELAND

2016 No. 219

The Employment and Support Allowance
Regulations (Northern Ireland) 2016

PART 4

LIMITED CAPABILITY FOR WORK

Determination of limited capability for work

15.—(1) For the purposes of Part 1 of the Act, whether a claimant's capability for work is limited by the claimant's physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require the claimant to work is to be determined on the basis of a limited capability for work assessment of the claimant in accordance with this Part.

(2) The limited capability for work assessment is an assessment of the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 2 or is incapable by reason of such disease or bodily or mental disablement of performing those activities.

(3) Subject to paragraph (6), for the purposes of Part 1 of the Act a claimant has limited capability for work if, by adding the points listed in column (3) of Schedule 2 against each descriptor listed in that Schedule which applies in the claimant's case, the claimant obtains a total score of at least—

- (a) 15 points whether singly or by a combination of descriptors specified in Part 1 of that Schedule;
- (b) 15 points whether singly or by a combination of descriptors specified in Part 2 of that Schedule; or
- (c) 15 points by a combination of descriptors specified in Parts 1 and 2 of that Schedule.

(4) In assessing the extent of a claimant's capability to perform any activity listed in Part 1 of Schedule 2, the claimant is to be assessed as if—

- (a) fitted with or wearing any prosthesis with which the claimant is normally fitted or normally wears; or, as the case may be,
- (b) wearing or using any aid or appliance which is normally, or could reasonably be expected to be, worn or used.

(5) In assessing the extent of a claimant's capability to perform any activity listed in Schedule 2, it is a condition that the claimant's incapability to perform the activity arises—

- (a) in respect of any descriptor listed in Part 1 of Schedule 2, from a specific bodily disease or disablement;
- (b) in respect of any descriptor listed in Part 2 of Schedule 2, from a specific mental illness or disablement; or
- (c) in respect of any descriptor or descriptors listed in—

- (i) Part 1 of Schedule 2, as a direct result of treatment provided by a registered medical practitioner for a specific physical disease or disablement, or
 - (ii) Part 2 of Schedule 2, as a direct result of treatment provided by a registered medical practitioner for a specified mental illness or disablement.
- (6) 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 is to be counted.
- (7) Where a claimant—
- (a) has been determined to have limited capability for work; or
 - (b) is to be treated as having limited capability for work under regulation 16, 21, 22 or 25,
- the Department may, if paragraph (8) applies, determine afresh whether the claimant has or is to be treated as having limited capability for work.
- (8) This paragraph applies where—
- (a) the Department wishes to determine whether there has been a relevant change of circumstances in relation to the claimant's physical or mental condition;
 - (b) the Department wishes to determine whether the previous determination of limited capability for work or that the claimant is to be treated as having limited capability for work, was made in ignorance of, or was based on a mistake as to, some material fact; or
 - (c) at least 3 months have passed since the date on which the claimant was determined to have limited capability for work or to be treated as having limited capability for work.

Certain claimants to be treated as having limited capability for work

- 16.—**(1) A claimant is to be treated as having limited capability for work if—
- (a) the claimant is terminally ill;
 - (b) the claimant is—
 - (i) receiving treatment for cancer by way of chemotherapy or radiotherapy,
 - (ii) likely to receive such treatment within 6 months after the date of the determination of capability for work, or
 - (iii) recovering from such treatment,and the Department is satisfied that the claimant should be treated as having limited capability for work;
 - (c) the claimant is—
 - (i) excluded or abstains from work pursuant to a request or notice in writing lawfully made under a statutory provision, or
 - (ii) otherwise prevented from working pursuant to a statutory provision,by reason of it being known or reasonably suspected that the claimant is infected or contaminated by, or has been in contact with a case of, a relevant disease;
 - (d) in the case of a pregnant woman, 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;
 - (e) in the case of a pregnant woman, she—
 - (i) is within the maternity allowance period (which has the meaning it has in the Contributions and Benefits Act), and

- (ii) is entitled to a maternity allowance under section 35(1) or 35B(1) of the Contributions and Benefits Act(1);
 - (f) in the case of a pregnant woman whose expected or actual date of confinement has been certified in accordance with the Medical Evidence Regulations, on any day in the period—
 - (i) beginning with the first date of the 6th week before the expected week of her confinement or the actual date of her confinement, whichever is earlier, and
 - (ii) ending on the 14th day after the actual date of her confinement,if she would have no entitlement to a maternity allowance or statutory maternity pay were she to make a claim in respect of that period.
 - (g) the claimant meets any of the descriptors at paragraph 15 or 16 of Schedule 3 in accordance with regulation 30(2), (3) and (6) where applicable; or
 - (h) the claimant is entitled to universal credit and it has previously been determined that the claimant has limited capability for work on the basis of an assessment under Part 5 of the Universal Credit Regulations(2).
- (2) In this regulation, “relevant disease” means an infectious disease to which—
- (a) section 15(1) of the Public Health Act (Northern Ireland) 1967(3) (power to require person in contact with infectious disease to discontinue employment and compensation therefor.) applies;
 - (b) regulations 8 and 9 of the Public Health (Ships) Regulations (Northern Ireland) 2008(4) (examination etc., of persons on ships and powers in respect of persons leaving ships) apply; or
 - (c) regulations 7 and 8 of the Public Health (Aircraft) Regulations (Northern Ireland) 2008(5) (examination etc., of persons on aircraft and powers in respect of persons leaving aircraft) apply.

Information required for determining capability for work

17.—(1) Subject to paragraphs (2) and (3), the information or evidence required to determine whether a claimant has limited capability for work is—

- (a) evidence of limited capability for work in accordance with the Medical Evidence Regulations (which prescribe the form of doctor’s statement or other evidence required in each case);
- (b) any information relating to a claimant’s capability to perform the activities referred to in Schedule 2 as may be requested in the form of a questionnaire; and
- (c) any such additional information as may be requested.

(2) Where the Department is satisfied that there is sufficient information to determine whether a claimant has limited capability for work without the information specified in paragraph (1)(b), that information must not be required for the purposes of making the determination.

(1) Section 35(1) was substituted by Article 50(1) of the Welfare Reform and Pensions (Northern Ireland) Order 1999 (S.I. 1999/3147 (N.I. 11)) and amended by paragraph 2(a) of Schedule 1 to the Social Security Act (Northern Ireland) 2002 (c. 10 (N.I.)) and Article 68(2) of the Welfare Reform (Northern Ireland) Order 2015. Section 35B(1) was inserted by regulation 2(5) of S.R. 2014 No. 102 and amended by paragraph 16 of Schedule 1 to the National Insurance Contributions Act 2015 (c. 5)

(2) S.R. 2016 No. 216

(3) 1967 c. 36: section 15(1) was amended by paragraph 75(c) of Schedule 16 to the Health and Personal Social Services (Northern Ireland) Order 1972 (S.I. 1972/1265 (N.I. 14)) and Article 32(1) and (2)(c) of the Health and Personal Social Services (Northern Ireland) Order 1991 (S.I. 1991/194 (N.I. 1))

(4) S.R. 2008 No. 333

(5) S.R. 2008 No. 436

(3) Paragraph (1) does not apply in relation to a determination whether a claimant is to be treated as having limited capability for work under any of regulations 16 (certain claimants to be treated as having limited capability for work), 21 (hospital patients) and 22 (claimants receiving certain treatment).

Failure to provide information in relation to limited capability for work

18.—(1) Where a claimant fails without good cause to comply with the request referred to in regulation 17(1)(b), the claimant is, subject to paragraph (2), to be treated as not having limited capability for work.

(2) Paragraph (1) does not apply unless—

- (a) the claimant was sent a further request at least 3 weeks after the date of the first request; and
- (b) at least 1 week has passed since the further request was sent.

Claimant may be called for a medical examination to determine whether the claimant has limited capability for work

19.—(1) Where it falls to be determined whether a claimant has limited capability for work, that claimant may be called by or on behalf of a health care professional approved by the Department to attend for a medical examination.

(2) Subject to paragraph (3), where a claimant fails without good cause to attend for or to submit to an examination mentioned in paragraph (1), the claimant is to be treated as not having limited capability for work.

(3) Paragraph (2) does not apply unless—

- (a) written notice of the date, time and place for the examination was sent to the claimant at least 7 days in advance; or
- (b) that claimant agreed to accept a shorter period of notice whether given in writing or otherwise.

Matters to be taken into account in determining good cause in relation to regulation 18 or 19

20. The matters to be taken into account in determining whether a claimant has good cause under regulation 18 (failure to provide information in relation to limited capability for work) or 19 (failure to attend a medical examination to determine limited capability for work) include—

- (a) whether the claimant was outside Northern Ireland at the relevant time;
- (b) the claimant's state of health at the relevant time; and
- (c) the nature of any disability the claimant has.

Hospital patients

21.—(1) A claimant is to be treated as having limited capability for work on any day on which that claimant is undergoing medical or other treatment as a patient in a hospital or similar institution, or on any day which is a day of recovery from that treatment.

(2) The circumstances in which a claimant is to be regarded as undergoing treatment falling within paragraph (1) include where the claimant is attending a residential programme of rehabilitation for the treatment of drug or alcohol addiction.

(3) For the purposes of this regulation, a claimant is to be regarded as undergoing treatment as a patient in a hospital or similar institution only if that claimant has been advised by a health care professional to stay for a period of 24 hours or longer following medical or other treatment.

(4) For the purposes of this regulation, “day of recovery” means a day on which a claimant is recovering from treatment as a patient in a hospital or similar institution as referred to in paragraph (1) and the Department is satisfied that the claimant should be treated as having limited capability for work on that day.

Claimants receiving certain treatment

22.—(1) Subject to paragraph (2), a claimant receiving—

- (a) regular weekly treatment by way of haemodialysis for chronic renal failure;
- (b) treatment by way of plasmapheresis; or
- (c) regular weekly treatment by way of total parenteral nutrition for gross impairment of enteric function,

is to be treated as having limited capability for work during any week in which that claimant is engaged in receiving that treatment or has a day of recovery from that treatment.

(2) A claimant who receives the treatment referred to in paragraph (1) is only to be treated as having limited capability for work from the first week of treatment in which the claimant undergoes no fewer than—

- (a) two days of treatment;
- (b) two days of recovery from any of the forms of treatment listed in paragraph (1)(a) to (c); or
- (c) one day of treatment and one day of recovery from that treatment,

but the days of treatment or recovery from that treatment or both need not be consecutive.

(3) For the purpose of this regulation “day of recovery” means a day on which a claimant is recovering from any of the forms of treatment listed in paragraph (1)(a) to (c) and the Department is satisfied that the claimant should be treated as having limited capability for work on that day.

Claimant to be treated as having limited capability for work throughout a day

23. A claimant who, at the commencement of any day has, or after that develops, limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work throughout that day.

Night workers

24.—(1) Where a claimant works for a continuous period which extends over midnight into the following day, that claimant is to be treated as having limited capability for work on the day on which the lesser part of that period falls if that claimant had limited capability for work for the remainder of that day.

(2) Where, in relation to a period referred to in paragraph (1), the number of hours worked before and after midnight is equal—

- (a) if the days in question fall at the beginning of a period of limited capability for work, the claimant is to be treated as having limited capability on the second day; and
- (b) if the days in question fall at the end of a period of limited capability for work, the claimant is to be treated as having limited capability for work on the first day.

Exceptional circumstances

25.—(1) A claimant who does not have limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work if paragraph (2) applies to the claimant.

- (2) Subject to paragraph (3), this paragraph applies if—
- (a) the claimant is suffering from a life threatening disease in relation to which—
 - (i) there is medical evidence that the disease is uncontrollable, or uncontrolled, by a recognised therapeutic procedure, and
 - (ii) 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
 - (b) the claimant suffers from some specific disease or bodily or mental disablement and, by reason of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work.
- (3) Paragraph (2)(b) does not apply where the risk could be reduced by a significant amount by—
- (a) reasonable adjustments being made in the claimant’s workplace; or
 - (b) the claimant taking medication to manage the claimant’s condition where such medication has been prescribed for the claimant by a registered medical practitioner treating the claimant.
- (4) In this regulation “medical evidence” means—
- (a) evidence from a health care professional approved by the Department; and
 - (b) evidence (if any) from any health care professional or a hospital or similar institution,
- or such part of such evidence as constitutes the most reliable evidence available in the circumstances.

Conditions for treating a claimant as having limited capability for work until a determination about limited capability for work has been made

26.—(1) A claimant is, if the conditions set out in paragraph (2) are met, to be treated as having limited capability for work until such time as it is determined—

- (a) whether or not the claimant has limited capability for work;
 - (b) whether or not the claimant is to be treated as having limited capability for work otherwise than in accordance with this regulation; or
 - (c) whether the claimant falls to be treated as not having limited capability for work in accordance with regulation 18 (failure to provide information in relation to limited capability for work) or 19 (failure to attend a medical examination to determine limited capability for work).
- (2) The conditions are—
- (a) that the claimant provides evidence of limited capability for work in accordance with the Medical Evidence Regulations; and
 - (b) in relation to the claimant’s entitlement to any benefit, allowance or advantage which is dependent on the claimant having limited capability for work, it has not been determined—
 - (i) in the last determination preceding the date of claim for an employment and support allowance, that the claimant does not have limited capability for work, or
 - (ii) within the 6 months preceding the date of claim for an employment and support allowance, that the claimant is to be treated as not having limited capability for work under regulation 18 or 19,
 unless paragraph (4) applies.

(3) Paragraph (2)(b) does not apply where a claimant has made and is pursuing an appeal against a relevant decision of the Department, and that appeal has not yet been determined by an appeal tribunal.

- (4) This paragraph applies where—
- (a) 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;
 - (b) a disease or bodily or mental disablement from which the claimant was suffering at the time of that determination has significantly worsened; or
 - (c) in the case of a claimant who was treated as not having limited capability for work under regulation 18, the claimant has since provided the information requested under that regulation.
- (5) In this regulation a “relevant decision” means—
- (a) a decision that embodies the first determination by the Department that the claimant does not have limited capability for work; or
 - (b) a decision that embodies the first determination by the Department that the claimant does not have limited capability for work since a previous determination by the Department or appellate authority that the claimant does have limited capability for work.
- (6) In this regulation “appellate authority” means an appeal tribunal, a Commissioner (as defined in section 167 of the Social Security Administration (Northern Ireland) Act 1992), the Court of Appeal or the Supreme Court.

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

27.—(1) A claimant who is or has been a member of Her Majesty’s forces is to be treated as not having limited capability for work on any day which is recorded by the Secretary of State as a day of sickness absence from duty.

(2) A claimant is to be treated as not having limited capability for work on any day on which the claimant attends a training course in respect of which the claimant is paid a training allowance or premium pursuant to arrangements made under section 1 or 3 of the Employment and Training Act.

- (3) Paragraph (2) is not to apply—
- (a) for the purposes of any claim to an employment and support allowance for a period commencing after the claimant ceased attending the training course in question; or
 - (b) where any training allowance or premium paid to the claimant is paid for the sole purpose of travelling or meal expenses incurred or to be incurred under the arrangements made under section 1 or 3 of the Employment and Training Act.
- (4) A claimant is to be treated as not having limited capability for work where—
- (a) it has previously been determined, within the 6 months preceding the date of claim for employment and support allowance, on the basis of an assessment under Part 5 of the Universal Credit Regulations, that the claimant does not have limited capability for work; and
 - (b) it appears to the Department that—
 - (i) the determination was not based on ignorance of, or mistake as to, a material fact, and
 - (ii) there has been no relevant change of circumstances in relation to the claimant’s physical or mental condition since the determination.

Claimants to be treated as not having limited capability for work at the end of the period covered by medical evidence

28.—(1) Where the Department is satisfied that it is appropriate in the circumstances of the case, a claimant may be treated as not having limited capability for work if—

- (a) the claimant has supplied medical evidence;
 - (b) the period for which medical evidence was supplied has ended;
 - (c) the Department has requested further medical evidence; and
 - (d) the claimant has not, before whichever is the later of either the end of the period of 6 weeks beginning with the date of the Department’s request or the end of 6 weeks beginning with the day after the end of the period for which medical evidence was supplied—
 - (i) supplied further medical evidence, or
 - (ii) otherwise made contact with the Department to indicate that they wish to have the question of limited capability for work determined.
- (2) In this regulation “medical evidence” means evidence provided under regulation 2 or 5 of the Medical Evidence Regulations.

Additional circumstances where claimants are to be treated as having limited capability for work

29. For the purposes of paragraph 4(1)(d)(ii) of Schedule 1 to the Act, a claimant is to be treated as having limited capability for work on any day in respect of which that claimant is entitled to statutory sick pay.