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DRAFT STATUTORY INSTRUMENTS

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**2013 No.**

**The Employment and Support Allowance Regulations 2013**

**PART 11**

**Supplementary provisions**

**Waiting days**

**85.**—(1) The number of days prescribed for the purposes of paragraph 2 of Schedule 2 to the Act (days during which a person is not entitled to an employment and support allowance at the beginning of a period of limited capability for work) is three.

(2) Paragraph 2 of Schedule 2 to the Act does not apply where—

- (a) the claimant's entitlement to an employment and support allowance commences within 12 weeks of the claimant's entitlement to income support, incapacity benefit, severe disablement allowance, state pension credit, a jobseeker's allowance, a carer's allowance, statutory sick pay or a maternity allowance coming to an end;
- (b) the claimant is terminally ill and has—
  - (i) made a claim expressly on the ground of being terminally ill; or
  - (ii) made an application for supersession or revision in accordance with the Decisions and Appeals Regulations 1999 or the Decisions and Appeals Regulations 2013 which contains an express statement that the claimant is terminally ill;
- (c) the claimant has been discharged from being a member of Her Majesty's forces and three or more days immediately before that discharge were days of sickness absence from duty, which are recorded by the Secretary of State; or
- (d) the claimant is entitled to an employment and support allowance by virtue of section 1B of the Act (further entitlement after time-limiting).

**Linking period**

**86.** Any period of limited capability for work which is separated from another such period by not more than 12 weeks is to be treated as a continuation of the earlier period.

**Claimants appealing a decision**

**87.**—(1) This regulation applies where a claimant has made and is pursuing an appeal against a decision of the Secretary of State that embodies a determination that the claimant does not have limited capability for work under these Regulations.

(2) Subject to paragraph (3), where this regulation applies, a determination of limited capability for work by the Secretary of State under regulation 15 must not be made until the appeal is determined by the First-tier Tribunal.

(3) Paragraph (2) does not apply where either—

- (a) the claimant suffers from some specific disease or bodily or mental disablement from which the claimant was not suffering when entitlement began; or
  - (b) a disease or bodily or mental disablement from which the claimant was suffering when entitlement began has significantly worsened.
- (4) Where this regulation applies and the Secretary of State makes a determination—
- (a) in a case to which paragraph (3) applies (including where the determination is not the first such determination) that the claimant does not have or, by virtue of regulation 18 or 19, is to be treated as not having limited capability for work; or
  - (b) subsequent to a determination that the claimant is to be treated as having limited capability for work by virtue of a provision of these Regulations other than regulation 26, that the claimant is no longer to be so treated,

this regulation and regulation 26 have effect as if that determination had not been made.

- (5) Where this regulation applies and—
- (a) the claimant is entitled to an employment and support allowance by virtue of being treated as having limited capability for work in accordance with regulation 26;
  - (b) neither of the circumstances in paragraph (3) applies, or, subsequent to the application of either of those circumstances, the claimant has been determined not to have limited capability for work; and
  - (c) the claimant's appeal is dismissed, withdrawn or struck out,

the claimant is to be treated as not having limited capability for work with effect from the day specified in paragraph (6).

(6) The day specified for the purposes of paragraph (5) is the first day of the benefit week following the date on which the Secretary of State receives the First-tier Tribunal's notification that the appeal is dismissed, withdrawn or struck out.

(7) Where a claimant's appeal is successful, subject to paragraph (8), any finding of fact or other determination embodied in or necessary to the decision of the First-tier Tribunal or on which the First-tier Tribunal's decision is based is to be conclusive for the purposes of the decision of the Secretary of State, in relation to an award made in a case to which this regulation applies, as to whether the claimant has limited capability for work or limited capability for work-related activity.

(8) Paragraph (7) does not apply where, due to a change of circumstances after entitlement began, the Secretary of State is satisfied that it is no longer appropriate to rely on such finding or determination.

### **Absence from Great Britain**

**88.**—(1) A claimant who is entitled to an employment and support allowance is to continue to be so entitled during a period of temporary absence from Great Britain only in accordance with regulations 89 to 92.

(2) A claimant who continues to be entitled to an employment and support allowance during a period of temporary absence is not disqualified for receiving that allowance during that period under section 18(4) of the Act<sup>(1)</sup>.

### **Short absence**

**89.** A claimant is to continue to be entitled to an employment and support allowance during the first four weeks of a temporary absence from Great Britain if—

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(1) Section 18(4) was amended by paragraph 26 of Schedule 3 to the Welfare Reform Act 2012.

- (a) the period of absence is unlikely to exceed 52 weeks; and
- (b) while absent from Great Britain, the claimant continues to satisfy the other conditions of entitlement to that employment and support allowance.

#### **Absence to receive medical treatment**

**90.**—(1) A claimant is to continue to be entitled to an employment and support allowance during the first 26 weeks of a temporary absence from Great Britain if—

- (a) the period of absence is unlikely to exceed 52 weeks;
- (b) while absent from Great Britain, the claimant continues to satisfy the other conditions of entitlement to that employment and support allowance;
- (c) the claimant is absent from Great Britain only—
  - (i) in connection with arrangements made for the treatment of the claimant for a disease or bodily or mental disablement directly related to the claimant’s limited capability for work which commenced before leaving Great Britain; or
  - (ii) because the claimant is accompanying a dependent child (which means any child or qualifying young person who is treated as the responsibility of the claimant or the claimant’s partner, where that child or young person is a member of the claimant’s household) in connection with arrangements made for the treatment of that child for a disease or bodily or mental disablement; and
- (d) those arrangements relate to treatment—
  - (i) outside Great Britain;
  - (ii) during the period whilst the claimant is temporarily absent from Great Britain; and
  - (iii) by, or under the supervision of, a person appropriately qualified to carry out that treatment.

(2) In this regulation, “appropriately qualified” means qualified to provide medical treatment, physiotherapy or a form of treatment which is similar to, or related to, either of those forms of treatment.

#### **Absence in order to receive NHS treatment**

**91.** A claimant is to continue to be entitled to an employment and support allowance during any period of temporary absence from Great Britain if—

- (a) while absent from Great Britain, the claimant continues to satisfy the other conditions of entitlement to that employment and support allowance; and
- (b) that period of temporary absence is for the purpose of the claimant receiving treatment at a hospital or other institution outside Great Britain where the treatment is being provided—
  - (i) under section 6(2) of the Health Service Act (Performance of functions outside England)<sup>(2)</sup> or section 6(2) of the Health Service (Wales) Act (Performance of functions outside Wales);
  - (ii) pursuant to arrangements made under section 12(1) of the Health Service Act (Secretary of State’s arrangements with other bodies)<sup>(3)</sup>, section 10(1) of the Health Service (Wales) Act (Welsh Ministers’ arrangements with other bodies), paragraph 18 of Schedule 4 to the Health Service Act (joint exercise of functions)<sup>(4)</sup> or

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<sup>(2)</sup> Section 6(2) was amended by paragraph 2 of Schedule 4 to the Health and Social Care Act 2012 (c.7).

<sup>(3)</sup> Section 12 was amended by paragraph 8 of Schedule 4 to the Health and Social Care Act 2012.

<sup>(4)</sup> Paragraph 18 of Schedule 4 was amended by paragraph 8 of Schedule 4 to the Health and Social Care Act 2012.

paragraph 18 of Schedule 3 to the Health Service (Wales) Act (joint exercise of functions)<sup>(5)</sup>; or

(iii) under any equivalent provision in Scotland or pursuant to arrangements made under such provision.

**Absence of member of family of member of Her Majesty’s forces**

**92.**—(1) A claimant is to continue to be entitled to an employment and support allowance during any period of temporary absence from Great Britain if the claimant is a member of the family of a member of Her Majesty’s forces and temporarily absent from Great Britain by reason only of the fact that the claimant is living with that member.

(2) In this regulation “member of the family of a member of Her Majesty’s forces” means the spouse, civil partner, son, daughter, step-son, step-daughter, father, father-in-law, step-father, mother, mother-in-law or step-mother of such a member.

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(5) Paragraph 18 of Schedule 3 was amended by paragraph 40 of Schedule 21 to the Health and Social Care Act 2012.