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STATUTORY INSTRUMENTS

2011 No. 228

SOCIAL SECURITY

The Employment and Support Allowance (Limited Capability for Work and Limited Capability for Work-Related Activity) (Amendment) Regulations 2011

Made - - - - 8th February 2011

Laid before Parliament 16th February 2011

Coming into force - - 28th March 2011

The Secretary of State for Work and Pensions makes the following Regulations in exercise of the powers conferred by sections 8(1), 9(1), 24(1)(1) and 25(5) of, and paragraphs 1 and 9 of Schedule 2 to, the Welfare Reform Act 2007(2).

In accordance with section 172(1) of the Social Security Administration Act(3) the Secretary of State referred the proposals for these Regulations to the Social Security Advisory Committee.

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Employment and Support Allowance (Limited Capability for Work and Limited Capability for Work-Related Activity) (Amendment) Regulations 2011 and shall come into force on 28th March 2011.

(2) In these Regulations:—

“the ESA Regulations” means the Employment and Support Allowance Regulations 2008(4);

“the Reassessment Regulations” means the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No.2) Regulations 2010(5).

(1) Section 24(1) is an interpretation provision and is cited because of the meaning it gives to the words “prescribed” and “regulations”.

(2) 2007 c.5.

(3) 1992 c.5.

(4) S.I. 2008/794.

(5) S.I. 2010/1907.

Application

2.—(1) These Regulations apply to:—

- (a) a person who makes a claim for an employment and support allowance on or after 28 March 2011 (including a claim in respect of any period before that date);
- (b) subject to paragraphs (2) and (3), a person who made a claim for an employment and support allowance before 28 March 2011 in respect of whom a determination is made on or after that date as to whether that person has or is to be treated as having limited capability for work under Part 5 of the ESA Regulations or as to whether that person has or is to be treated as having limited capability for work-related activity under Part 6 of those Regulations;
- (c) subject to paragraphs (2) and (3), a person who is entitled to an employment and support allowance immediately before 28 March 2011 in respect of whom, on or after that date—
 - (i) the Secretary of State determines afresh under regulation 19(7) of the ESA Regulations whether the person has or is to be treated as having limited capability for work;
 - (ii) the Secretary of State determines afresh under regulation 34(4) of the ESA Regulations whether the person has or is to be treated as having limited capability for work-related activity; and
- (d) subject to paragraphs (2) and (3), a notified person as defined by regulation 4 of the Reassessment Regulations⁽⁶⁾ in respect of whom a determination is made on or after 28 March 2011 as to whether that person has or is to be treated as having limited capability for work under Part 5 of the ESA Regulations⁽⁷⁾ or as to whether that person has or is to be treated as having limited capability for work-related activity under Part 6 of the ESA Regulations.

(2) Where, before 28 March 2011, a questionnaire relating to the previous version of Schedule 2 to the ESA Regulations was issued to a person in accordance with regulation 21(1)(b) of those Regulations (information required for determining capability for work), regulation 4(1) does not apply to that person for the purposes of making a determination as to limited capability for work under Part 5 of the ESA Regulations;

(3) Where, before 28 March 2011, a questionnaire relating to the previous version of Schedule 3 to the ESA Regulations was issued to a person in accordance with regulation 36(1)(a) of those Regulations (information required for determining capability for work-related activity) regulation 4(2) does not apply to that person for the purposes of making a determination as to limited capability for work-related activity under Part 6 of the ESA Regulations.

(4) In this regulation “the previous version of Schedule 2 to the ESA Regulations” and “the previous version of Schedule 3 to the ESA Regulations” mean those Schedules as they have effect immediately before the date on which these Regulations come into force.

(5) The provisions of paragraphs (2) to (4) do not apply to any determination made on or after 28 September 2011.

Amendment of the ESA Regulations

3.—(1) The ESA Regulations are amended as follows.

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- (6) Regulation 4 of the Reassessment Regulations defines a notified person as a person to whom a notice is issued. A notice commences the conversion phase under the Reassessment Regulations for persons who are entitled to an existing award. An existing award is an award of incapacity benefit, severe disablement allowance, or income support on the grounds of incapacity (see paragraph 11 of Schedule 4 to the Welfare Reform Act 2007 (2007 c.5)).
 - (7) Regulation 19(1) is applied by virtue of regulation 6 of the Reassessment Regulations (for pre-conversion purposes) and regulation 16 of those regulations (for post conversion purposes).

- (2) In regulation 20 (certain claimants to be treated as having limited capability for work):—
- (a) at the end of sub-paragraph (b)(i), after “chemotherapy”, insert “, or is likely to receive such treatment within 6 months after the date of the determination under this sub-paragraph”; and
- (b) after paragraph (f) insert:—
- “(g) any of the descriptors at paragraph 15 or 16 of Schedule 3 apply to the claimant.”.
- (3) In regulation 25 (hospital in-patients), after paragraph (1) insert:—
- “(1A) 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.”.
- (4) In regulation 35(1) (certain claimants to be treated as having limited capability for work-related activity) at the end of sub-paragraph (b)(i), after “chemotherapy”, insert “, or is likely to receive such treatment within 6 months after the date of the determination under this sub-paragraph”.

Substitution of Schedules 2 and 3 to the ESA Regulations

- 4.—(1) For the provisions in Schedule 2 to the ESA Regulations (assessment of whether a claimant has limited capability for work) substitute the provisions in Schedule 1.
- (2) For the provisions in Schedule 3 to the ESA Regulations (assessment of whether a claimant has limited capability for work-related activity) substitute the provisions in Schedule 2.

Signed by authority of the Secretary of State for Work and Pensions.

8th February 2011

C Grayling
Minister of State,
Department for Work and Pensions

“SCHEDULE 2

ASSESSMENT OF WHETHER A CLAIMANT HAS LIMITED CAPABILITY FOR WORK

Physical disabilities

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Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

(1)Activity	(2) Descriptors	(3)Points
	<ul style="list-style-type: none"> (i) standing unassisted by another person (even if free to move around); or (ii) sitting (even in an adjustable chair) for more than 30 minutes, before needing to move away in order to avoid significant discomfort or exhaustion. (c) Cannot, for the majority of the time, remain at a work station, either: <ul style="list-style-type: none"> (i) standing unassisted by another person (even if free to move around); or (ii) sitting (even in an adjustable chair) for more than an hour before needing to move away in order to avoid significant discomfort or exhaustion. (d) None of the above apply 	<p>6</p> <p>0</p>
3. Reaching.	<ul style="list-style-type: none"> (a) Cannot raise either arm as if to put something in the top pocket of a coat or jacket. (b) Cannot raise either arm to top of head as if to put on a hat. (c) Cannot raise either arm above head height as if to reach for something. (d) None of the above apply. 	<p>15</p> <p>9</p> <p>6</p> <p>0</p>
4. Picking up and moving or transferring by the use of the upper body and arms.	<ul style="list-style-type: none"> (a) Cannot pick up and move a 0.5 litre carton full of liquid. (b) Cannot pick up and move a one litre carton full of liquid. (c) Cannot transfer a light but bulky object such as an empty cardboard box. (d) None of the above apply. 	<p>15</p> <p>9</p> <p>6</p> <p>0</p>
5. Manual dexterity.	<ul style="list-style-type: none"> (a) Cannot either: <ul style="list-style-type: none"> (i) press a button, such as a telephone keypad; or (ii) turn the pages of a book with either hand. (b) Cannot pick up a £1 coin or equivalent with either hand. (c) Cannot use a pen or pencil to make a meaningful mark. (d) Cannot use a suitable keyboard or mouse. (e) None of the above apply. 	<p>5</p> <p>15</p> <p>15</p> <p>9</p> <p>0</p>
6. Making self understood through speaking, writing, typing, or other	<ul style="list-style-type: none"> (a) Cannot convey a simple message, such as the presence of a hazard. 	<p>6</p> <p>15</p>

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(1)Activity	(2) Descriptors	(3)Points
means normally used, unaided by another person.	(b) Has significant difficulty conveying a simple message to strangers.	15
	(c) Has some difficulty conveying a simple message to strangers.	6
	(d) None of the above apply.	0
7. Understanding 7 communication by both verbal means (such as hearing or lip reading) and non-verbal means (such as reading 16 point print) using any aid it is reasonable to expect them to use, unaided by another person.	(a) Cannot understand a simple message due to sensory impairment, such as the location of a fire escape.	15
	(b) Has significant difficulty understanding a simple message from a stranger due to sensory impairment.	15
	(c) Has some difficulty understanding a simple message from a stranger due to sensory impairment.	6
	(d) None of the above apply.	0
8. Navigation and 8 maintaining safety, using a guide dog or other aid if normally used.	(a) Unable to navigate around familiar surroundings, without being accompanied by another person, due to sensory impairment.	15
	(b) Cannot safely complete a potentially hazardous task such as crossing the road, without being accompanied by another person, due to sensory impairment.	15
	(c) Unable to navigate around unfamiliar surroundings, without being accompanied by another person, due to sensory impairment.	9
	(d) None of the above apply.	0
9. Absence or loss 9 of control leading to extensive evacuation of the bowel and/or bladder, other than enuresis (bed-wetting) despite the presence of any aids or adaptations normally used.	(a) At least once a month experiences: (i) loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder; or (ii) substantial leakage of the contents of a collecting device sufficient to require cleaning and a change in clothing.	15
	(b) At risk of loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder, sufficient to require cleaning and a change in clothing, if not able to reach a toilet quickly.	6
	(c) None of the above apply.	0
10. Consciousness 10 during waking moments.	(a) At least once a week, has an involuntary episode of lost or altered consciousness resulting in significantly disrupted awareness or concentration.	15

(1)Activity	(2) Descriptors	(3)Points
	(b) At least once a month, has an involuntary episode of lost or altered consciousness resulting in significantly disrupted awareness or concentration.	6
	(c) None of the above apply.	0.

PART 2

Mental, cognitive and intellectual function assessment

11. Learning tasks.	11	(a) Cannot learn how to complete a simple task, such as setting an alarm clock.	15
		(b) Cannot learn anything beyond a simple task, such as setting an alarm clock.	9
		(c) Cannot learn anything beyond a moderately complex task, such as the steps involved in operating a washing machine to clean clothes.	6
		(d) None of the above apply.	0
12. Awareness of everyday hazards (such as boiling water or sharp objects).	12	(a) Reduced awareness of everyday hazards leads to a significant risk of: (i) injury to self or others; or (ii) damage to property or possessions such that they require supervision for the majority of the time to maintain safety.	15
		(b) Reduced awareness of everyday hazards leads to a significant risk of: (i) injury to self or others; or (ii) damage to property or possessions such that they frequently require supervision to maintain safety.	9
		(c) Reduced awareness of everyday hazards leads to a significant risk of: (i) injury to self or others; or (ii) damage to property or possessions such that they occasionally require supervision to maintain safety.	6
		(d) None of the above apply.	0
13. Initiating and completing personal action (which means planning, organisation, problem solving,	13	(a) Cannot, due to impaired mental function, reliably initiate or complete at least 2 sequential personal actions.	15
		(b) Cannot, due to impaired mental function, reliably initiate or complete at least 2 personal actions for the majority of the time.	9

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| prioritising or switching tasks). | (c) | Frequently cannot, due to impaired mental function, reliably initiate or complete at least 2 personal actions. | 6 |
| | (d) | None of the above apply. | 0 |
| 14. Coping with change. | (a) | Cannot cope with any change to the extent that day to day life cannot be managed. | 15 |
| | (b) | Cannot cope with minor planned change (such as a pre-arranged change to the routine time scheduled for a lunch break), to the extent that overall day to day life is made significantly more difficult. | 9 |
| | (c) | Cannot cope with minor unplanned change (such as the timing of an appointment on the day it is due to occur), to the extent that overall, day to day life is made significantly more difficult. | 6 |
| | (d) | None of the above apply. | 0 |
| 15. Getting about. | (a) | Cannot get to any specified place with which the claimant is familiar. | 15 |
| | (b) | Is unable to get to a specified place with which the claimant is familiar, without being accompanied by another person. | 9 |
| | (c) | Is unable to get to a specified place with which the claimant is unfamiliar without being accompanied by another person. | 6 |
| | (d) | None of the above apply. | 0 |
| 16. Coping with social engagement due to cognitive impairment or mental disorder. | (a) | Engagement in social contact is always precluded due to difficulty relating to others or significant distress experienced by the individual. | 15 |
| | (b) | Engagement in social contact with someone unfamiliar to the claimant is always precluded due to difficulty relating to others or significant distress experienced by the individual. | 9 |
| | (c) | Engagement in social contact with someone unfamiliar to the claimant is not possible for the majority of the time due to difficulty relating to others or significant distress experienced by the individual. | 6 |
| | (d) | None of the above apply. | 0 |
| 17. Appropriateness of behaviour with other people, due to cognitive impairment or mental disorder. | (a) | Has, on a daily basis, uncontrollable episodes of aggressive or disinhibited behaviour that would be unreasonable in any workplace. | 15 |

- (b) Frequently has uncontrollable episodes of 15 aggressive or disinhibited behaviour that would be unreasonable in any workplace.
- (c) Occasionally has uncontrollable episodes of 9 aggressive or disinhibited behaviour that would be unreasonable in any workplace.
- (d) None of the above apply. 0.”

SCHEDULE 2

“SCHEDULE 3

Regulation 34(1)

ASSESSMENT OF WHETHER A CLAIMANT HAS LIMITED CAPABILITY FOR WORK RELATED ACTIVITY

<i>Activity</i>	<i>Descriptors</i>
1. Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid can reasonably be used.	Cannot either: (a) mobilise more than 50 metres on level ground without stopping in order to avoid significant discomfort or exhaustion; or (b) repeatedly mobilise 50 metres within a reasonable timescale because of significant discomfort or exhaustion.
2. Transferring from one seated position to another.	Cannot move between one seated position and another seated position located next to one another without receiving physical assistance from another person.
3. Reaching.	Cannot raise either arm as if to put something in the top pocket of a coat or jacket.
4. Picking up and moving or transferring by the use of the upper body and arms (excluding standing, sitting, bending or kneeling and all other activities specified in this Schedule).	Cannot pick up and move a 0.5 litre carton full of liquid.
5. Manual dexterity.	Cannot either: (a) press a button, such as a telephone keypad; or (b) turn the pages of a book with either hand.
6. Making self understood through speaking, writing, typing, or other means normally used.	Cannot convey a simple message, such as the presence of a hazard.
7. Understanding communication by hearing, lip reading, reading 16 point print or using any aid if reasonably used.	Cannot understand a simple message due to sensory impairment, such as the location of a fire escape.
8. Absence or loss of control over extensive evacuation of the bowel and/or voiding of the	At least once a week experiences:

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<i>Activity</i>	<i>Descriptors</i>
bladder, other than enuresis (bed-wetting), despite the presence of any aids or adaptations normally used.	<p>(a) loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder; or</p> <p>(b) substantial leakage of the contents of a collecting device sufficient to require the individual to clean themselves and change clothing.</p>
9. Learning tasks.	Cannot learn how to complete a simple task, such as setting an alarm clock, due to cognitive impairment or mental disorder.
10. Awareness of hazard.	<p>Reduced awareness of everyday hazards, due to cognitive impairment or mental disorder, leads to a significant risk of:</p> <p>(a) injury to self or others; or</p> <p>(b) damage to property or possessions such that they require supervision for the majority of the time to maintain safety.</p>
11. Initiating and completing personal action (which means planning, organisation, problem solving, prioritising or switching tasks).	Cannot, due to impaired mental function, reliably initiate or complete at least 2 sequential personal actions.
12. Coping with change.	Cannot cope with any change, due to cognitive impairment or mental disorder, to the extent that day to day life cannot be managed.
13. Coping with social engagement, due to cognitive impairment or mental disorder.	Engagement in social contact is always precluded due to difficulty relating to others or significant distress experienced by the individual.
14. Appropriateness of behaviour with other people, due to cognitive impairment or mental disorder.	Has, on a daily basis, uncontrollable episodes of aggressive or disinhibited behaviour that would be unreasonable in any workplace.
15. Conveying food or drink to the mouth.	<p>(a) Cannot convey food or drink to the claimant's own mouth without receiving physical assistance from someone else;</p> <p>(b) Cannot convey food or drink to the claimant's own mouth without repeatedly stopping, experiencing breathlessness or severe discomfort;</p> <p>(c) Cannot convey food or drink to the claimant's own mouth without receiving regular prompting given by someone else in the claimant's physical presence; or</p> <p>(d) Owing to a severe disorder of mood or behaviour, fails to convey food or drink to the claimant's own mouth without receiving:</p> <p>(i) physical assistance from someone else; or</p>

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<i>Activity</i>	<i>Descriptors</i>
	(ii) regular prompting given by someone else in the claimant's presence.
16. Chewing or swallowing food or drink.	(a) Cannot chew or swallow food or drink; (b) Cannot chew or swallow food or drink without repeatedly stopping, experiencing breathlessness or severe discomfort; (c) Cannot chew or swallow food or drink without repeatedly receiving regular prompting given by someone else in the claimant's presence; or (d) Owing to a severe disorder of mood or behaviour, fails to: <ul style="list-style-type: none"> (i) chew or swallow food or drink; or (ii) chew or swallow food or drink without regular prompting given by someone else in the claimant's presence."

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Employment and Support Allowance Regulations 2008. They substitute the descriptors and criteria applied to determine capability for work, or work-related activity, and amend provisions which allow a person to be treated as having limited capability for work, or work-related activity, without an assessment in certain circumstances.

Regulation 2 sets out who the Regulations apply to. It provides that they apply to all persons who claim Employment and Support Allowance on or after the date these Regulations come into force. The Regulations also apply to persons who claim before that date, and persons who have been notified under the re-assessment process (under which those on incapacity benefit, severe disablement allowance or income support on grounds of incapacity are assessed to determine whether they are entitled to Employment and Support Allowance), who have their capability for work or work-related activity determined (including a determination as to whether they are to be treated as capable for work or work-related activity) on or after that date. Finally, the Regulations apply to persons who are re-assessed on or after that date. However, these Regulations do not apply to a person who was sent a questionnaire (as to their capability for work or for work-related activity) before the date on which these Regulations come into force and in respect of whom a determination is made as to that person's capability for work after that date. Instead the determination will be based on the un-amended provisions. This is subject to a six month limit after which all assessments will be made under the amended provisions (regulation 2(5)). A determination made after the date these Regulations come into force as to whether a person is to be treated as being capable for work is subject to the provisions of these Regulations irrespective of when that person was sent the questionnaire.

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Regulation 3 amends the provisions in Regulations 20 (certain claimants to be treated as having limited capability for work), 25 (hospital in-patients) and 35 (certain claimants to be treated as having limited capability for work-related activity). Paragraph (2) adds to those who are to be treated as having limited capability for work persons who are likely to receive chemotherapy treatment within 6 months after the date on which the determination is made, and those who meet the eating and drinking descriptors in paragraphs 15 and 16 of Schedule 3. Paragraph (3) makes clear that a person who attends residential rehabilitation for the treatment of drug or alcohol addiction is regarded as receiving treatment within the terms of regulation 25. Paragraph (4) makes similar provision to paragraph (2) for persons likely to receive chemotherapy treatment within 6 months after the date of the determination as to whether the person is to be treated as having limited capability for work-related activity.

Regulation 4 substitutes Schedules 2 and 3 which, respectively, set out the criteria for the assessment of whether a person has limited capability for work or for work-related activity.

These regulations have no impact on the private sector and civil society organisations. An assessment of the impact of these regulations on the public sector has been made. Copies of this impact assessment are available in the libraries of both Houses of Parliament, and may also be obtained from the Better Regulation Unit of the Department for Work and Pensions, 6B Caxton House, Tothill Street, London SW1H 9NA, or from the DWP website:

<http://www.dwp.gov.uk/resourcecentre/ria.asp>.