

**EXPLANATORY MEMORANDUM TO  
THE EMPLOYMENT AND SUPPORT ALLOWANCE (AMENDMENT)  
REGULATIONS 2012**

**2012 No. 3096**

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. **Purpose of the instrument**

2.1 This instrument amends the Employment and Support Allowance Regulations 2008 (ESA Regulations 2008)<sup>1</sup> to expand the categories of cancer treatments in relation to which a person may be treated as having limited capability for work (LCW) or limited capability for work-related activity (LCWRA) without being required to attend a face-to-face medical examination.

2.2 This instrument also amends a number of provisions of the ESA Regulations 2008 to clarify the law, in order to more accurately reflect policy intent, and in response to case law which has challenged the intended/existing interpretation. As an example of such case law, is where a patient under going day surgery, was incorrectly viewed as satisfying Regulation 25 which covers individuals who are hospital-in patients. The intention is in this instance to revise the Regulation to overturn case law and ensure that this provision applies only to someone who requires a hospital stay of 24 hours or longer term.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

None

4. **Legislative Context**

4.1 The Work Capability Assessment (WCA) was introduced by the ESA Regulations 2008 in October 2008. It is an assessment designed to determine whether or not a claimant has LCW, which will in turn inform the Department's decision about whether a claimant is eligible to receive Employment and Support Allowance (ESA).

4.2 The Department has a statutory commitment to independently review the WCA annually for the first five years of its operation. Professor Malcolm Harrington, a highly respected Occupational Physician, has carried out three reviews of the WCA to date.

4.3 As a result of his second review, Professor Harrington has made a number of recommendations to the Department to improve the WCA. These

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<sup>1</sup> the Employment and Support Allowance Regulations 2008 (ESA Regulations 2008) can be found at <http://www.dwp.gov.uk/policy/welfare-reform/legislation-and-key-documents/employment-and-support-allowance/>

recommendations necessitate a change in policy, which in turn requires secondary legislation to take effect. This instrument is implementing recommendations that have been made to improve the Work Capability Assessment (WCA) for claimants who are undergoing treatment for cancer.

4.4 As part of the programme of continuous improvement of the WCA, the Department is also using this instrument to amend a number of provisions of the Employment and Support Allowance (ESA) Regulations 2008 in order to: clarify the law to more accurately reflect the existing policy intent where current drafting has given rise to ambiguity; and also to clarify the law where case law has challenged the existing or intended interpretation of it.

## **5. Territorial Extent and Application**

This instrument applies to Great Britain only.

## **6. European Convention on Human Rights**

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

- **What is being done and why**

7.1 The changes to the ESA regulations are intended to expand the current categories of cancer treatments in relation to which a person may be treated as having Limited Capability for Work (LCW) or Limited Capability for Work-Related Activity (LCWRA) without being required to attend a face-to-face medical examination.

7.2 As part of this package of Regulatory changes, we also intend to amend several current non cancer related secondary legislation to clarify the original policy intent where it has been perceived to be ambiguous or has been challenged by case law, interpreting the law in a different way, rather than make changes to existing policy.

### ***Consultation on cancer treatments***

7.3 As part of his second review of the WCA, Professor Harrington asked Macmillan Cancer Support (Macmillan) to investigate how the WCA assesses people being treated for cancer and to provide him with recommendations for improvements.

7.4 Following the proposals provided by Macmillan, the Department conducted an informal consultation in order to gather a wider range of views from stakeholders, including individuals, their family and carers as well as cancer specialists and healthcare professionals, employers and representative organisations. The consultation period ran from 16 December 2011 to 9th March 2012. The Department received an excellent response to the consultation and also found the meetings held with stakeholders very useful.

7.5 The consultation generated in the region of 90 responses. The responses indicated considerable variation in the effects of different cancer treatments. However, there was general agreement from the respondents for a requirement to change the way the Work Capability Assessment (WCA) assesses people awaiting, receiving or recovering from cancer treatment. Although there were in the region of 20 negative consultation responses, these related to the WCA in general rather than the proposed changes specifically.

7.6 As a result of the consultation the Department amended its original proposals by expanding the categories of cancer treatments under which a claimant may be treated as having Limited Capability for Work Related Activity (LCWRA). The detail of this is covered in paras 7.9 et seq.

7.7 Under current legislation, namely Regulations 20(b) and 35(1)(b) of the Employment and Support Allowance (ESA) Regulations 2008, claimants who are receiving non-oral chemotherapy (or who are likely to receive it within 6 months) can currently be “treated as” having limited capability for work (LCW) or limited capability for work-related activity (LCWRA). In practice this means that, when identified, they do not have to attend a face-to-face medical examination in order for a determination to be made about whether they have LCW or LCWRA. Instead, they can be treated as having LCW or LCWRA by virtue of the fact that they are, or are likely, to receive non-oral chemotherapy for cancer. This in turn means that they are eligible to receive ESA and are likely to be placed in the Support Group (which is for claimants who have LCWRA and cannot work at all; the claimants in the Support Group receive a higher top-up on the basic rate ESA than claimants who are found to have LCW, and who are considered capable of returning to work in due course with the appropriate support).

7.8 Macmillan proposed that the categories of treatment for cancer in the WCA should be expanded to allow individuals who are:

- awaiting, receiving or recovering from treatment by way of **oral chemotherapy**, except when the therapy is continuous for a period of more than six months; or
- awaiting, receiving or recovering from treatment by way of **chemotherapy irrespective of route**, except when that therapy is continuous for a period of more than six months; or
- awaiting, receiving or recovering from **combined chemo-irradiation**; or
- awaiting, receiving or recovering from **radiotherapy** in the treatment of cancer in one or more of the following sites:
  - head and neck
  - brain
  - lung
  - gastro-intestinal
  - pelvic

to be treated as having limited capability for work (LCW) or limited capability for work-related activity (LCWRA) and to be placed into the support group or the work-related activity group, respectively.

7.9 Having considered the evidence gathered during the consultation process, the Department intends to adopt a slightly different approach to improving the Work Capability Assessment (WCA) for claimants undergoing treatment for cancer. This revised approach will involve expanding the categories of cancer treatments in the WCA to allow individuals who are:

- awaiting, receiving or recovering from treatment by way of chemotherapy irrespective of route; or
- awaiting, receiving or recovering from radiotherapy to any site

to be treated as having LCW or LCWRA. However, the Secretary of State will retain discretion when applying these regulations.

7.10 The Department will ensure that determinations about LCW or LCWRA are made on the basis of evidence about a claimant's condition, its impact on their ability to work and nature of the treatment the individual is receiving. The discretion highlighted above will ensure that determinations are based on the effects of such treatment on a claimant's ability to work – rather than the mere fact that the claimant is receiving such treatment - however the presumption is that, subject to confirmatory evidence, the vast majority of claimants undergoing these treatments will be treated as having LCWRA and placed straight into the Support Group.

7.11 The site-specific approach to people awaiting, receiving or recovering from radiotherapy proposed by Macmillan was challenged by cancer specialists and others. The Department accepted their arguments and will assess radiotherapy in the same way as chemotherapy, considering the general impact of the treatment on the individual rather than singling out specific tumour sites. For the same reason the Department has also decided to remove the condition that treatment must be continuous for a period of more than six months. Ultimately it is the impact of treatment, not the duration, which should be the final determinant.

7.12 Additional evidence received during the consultation confirmed that a combination of chemotherapy and radiotherapy often has a more debilitating effect than either treatment administered singly, with some respondents suggesting that it may require particular consideration. However, the Department considers that the proposed categories will be sufficient to accommodate those receiving combined therapy.

7.13 Guidance is being developed for operational staff, as well as Atos Healthcare professionals who carry out the face-to-face examination. The relevant guidance will be available before this instrument comes into force.

### ***Other provisions***

7.14 As part of the Department's programme of continuous improvement of the Work Capability Assessment (WCA), this instrument is also amending several other provisions in the Employment and Support Allowance Regulations 2008. These amendments are intended to clarify the original policy intent where it has been perceived to be ambiguous or has been challenged by case law interpreting the law in a different way, rather than make changes to existing policy. These amendments are detailed below:

Regulation 19(5) and Regulation 34(3A) - Schedules 2 and 3 Descriptors

*Cause* – At present it is unclear whether an individual with a physical condition can score points on mental function descriptors purely based on the effects of a physical condition. (For example, where, a person with back pain indicates that they are unable to think properly due to the pain in their back.). Also, if someone with a mental function condition can score points on physical descriptors purely based on the effects of a mental function condition.

*Effect* - This clarifies that mental function descriptors can **only apply** where the claimant’s incapability arises directly from a mental health condition or as a direct result of treatment provided by a registered medical practitioner for a specific mental illness or disablement. In the same way, physical descriptors can only apply where the claimant’s incapability arises directly from a physical condition or as a direct result of treatment provided by a registered medical practitioner for a specific physical disease or disablement.

Regulation 25 - In-patient:

*Cause* – There is no definition of the term ‘in-patient’ in the current Regulations. The policy intent is that an individual whose condition is so serious that an overnight or longer-term stay in a hospital or similar institution is advised by a healthcare professional should be eligible to be treated as having Limited Capability for Work (LCW). The current ‘treat as’ provision has led to the unintended inclusion of individuals with less serious conditions that were not intended to benefit from the provision such as an individual who has received minor day surgery / treatment.

*Effect* – This overturns case law and ensures that this provision applies only to someone who requires a hospital stay of 24 hours or longer term.

Regulation 29 (Substantial risk):

*Cause* – As currently drafted there is a degree of ambiguity regarding the satisfaction of regulation 29. There have been examples where substantial risk test has been judged as being satisfied, but where that risk may have been greatly reduced either by a workplace adjustment or other intervention.

*Effect* – This clarifies that if the substantial risk can be reduced by a significant amount by reasonable adjustments in the workplace, or other interventions, e.g. self-administered adrenalin, the provision would not be satisfied.

Schedule 2 Part 1 Physical Disabilities - Activity 2 (Standing and sitting):

*Cause* – As currently drafted descriptors 2(b) and 2(c) of Schedule 2 (standing and sitting) can be satisfied where a person cannot remain at a workstation by either standing **or** sitting for specified periods of time.

*Effect* – This removes any perceived ambiguity and clarifies that this activity looks at the ability to remain at a workstation by sitting, or standing, or a **combination** of both, for specified periods of time.

Schedule 2 Part 1 Physical Disabilities - Activity 5 (Manual dexterity):

*Cause* – As currently drafted descriptor 5(d) of Schedule 2 (manual dexterity) tests whether a person “Cannot use a suitable keyboard or mouse”. The policy intent for this activity is to examine hand and wrist function and for this task to be tested whilst being performed single-handed. While it is clear that this is so for the mouse, it is less explicit for use of a keyboard since using a keyboard is usually bimanual.

*Effect* - This clarifies that the descriptor refers to the single-handed use of a keyboard or a mouse.

Activity 7(Understanding communication):

*Cause* – The current wording "Understanding communication by both verbal means (such as hearing or lip reading) and non-verbal means (such as reading 16 point print)" could be misinterpreted as meaning that the person has to have both a hearing impairment and a visual impairment in combination in order to score.

The policy intent is that this activity should examine the ability to understand communication sufficiently clearly to be able to comprehend a simple message by either verbal or non-verbal means or both. The descriptors may therefore apply if a claimant has hearing impairment alone, visual impairment alone or a combination of hearing and visual impairment.

*Effect* – We are therefore changing the wording to understanding communication by:

- (i) verbal means (such as hearing or lip reading) alone, or
  - (ii) non-verbal means (such as reading 16 point print or braille) alone,
- or
- (iii) a combination of (i) and (ii)”

Schedule 2 Part 1 Physical Disabilities - Activity 9 (Continence):

*a.) Cause* – As currently drafted descriptor 9(b) of schedule 2 (relating to continence) states, “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.” The term “at risk” is being interpreted in a very broad sense.

*Effect* – This clarifies that the term **at risk** is to be interpreted in a way consistent with the policy intent of applying to those who the likelihood of loss of control is very high.

*b.) Cause* – The current wording of this descriptor, while referring to nocturnal enuresis, commonly known as bedwetting, does not make reference to the claimant having to be actually "awake" during the evacuation of the bladder or bowel. This means that at the present time, individuals who become incontinent when they are not awake – such as those who become incontinent during a ‘fit’ may double score under the ‘continence’ activity as well as under the ‘consciousness’ activity for their fits.

*Effect* – This ensures that the activity accounts only for continence problems while an individual is awake.

*Activity 15 (Getting about):*

*Cause* – As currently drafted descriptor 15 states that those, who "cannot get to any specified place with which the claimant is familiar," may score against the activity descriptor. Misinterpretation of the descriptor as currently worded may mean that claimants who are unable to get to a specific place for example, the library or the town hall, may be able to inappropriately score against this descriptor / measure.

*Effect* – The policy intent of this activity is to reflect inability to travel unaccompanied [by another person] for those individuals that are severely affected by a mental health condition [such as agoraphobia]. We are clarifying that the need is based on most places a claimant cannot get to rather than a single specified place.

***Consultation/Stakeholder engagement on the other provisions***

7.15 The additional non-cancer related regulatory changes are designed to restate the original Work Capability Assessment (WCA) policy intent, clarifying areas where there has been misunderstanding of the policy intention behind the provisions of the existing regulations or the assessment descriptors. As appropriate with such regulatory changes, we have consulted Social Security Advisory Committee on our proposal which has agreed that the proposed regulation changes can proceed without the need to consult further.

7.16 The original policy intent (which is now being clarified) was reviewed as part of a Department-led review which was published in March 2010. The review was set up and tasked with considering both the appropriateness of the content of the assessment and how it could be amended to better account for an individual's adaptation to their condition, enabling a more accurate reflection of their functional capability for work.

7.17 Throughout the review we consulted and engaged with medical experts, stakeholders and employers. The combined input of this expert knowledge base, analytical skills and the work and social context provided an informed forum in which to consider and compile proposals. It consisted of expert case analysis, combined with group descriptor analysis.

7.18 Based on analysis of cases, the review established that the Work Capability Assessment (WCA) was generally identifying individuals' capability for work correctly. The working group made a number of recommendations to amend current regulations at that time, which both clarified the existing descriptors and took greater account of the ways in which an individual has adapted to their health condition or disability. Accordingly, the report and further addendum made a series of recommendations which were implemented in March 2011. These changes merely reinforce the original intent on which these stakeholders were consulted.

- Consolidation

7.19 Informal consolidation of this instrument will be provided in due course in the books of *Law Relating to Social Security* (referred to as “The Blue Books”) which are regularly updated and are available to the public at no cost via the internet at: <http://www.dwp.gov.uk/publications/specialist-guides/law-volumes/the-law-relating-to-social-security/>

## **8. Consultation outcome**

As a result of the consultation the Department has revised our original proposals to remove the site specific approach deciding instead to assess on a case by cases basis and for the same reason the Department has also decided to remove the condition that treatment must be continuous for a period of more than six months. As such, it is the debilitating effects of such treatment that will determine entitlement. Each individual will wherever possible be assessed on a paper basis, with the vast majority being placed straight into the Support Group of Employment and Support Allowance.

## **9. Guidance**

The Department is developing revised guidance to reflect these changes this includes internal operational delivery guidance as well the Decision Makers Guide which is available via the internet. Affected forms/leaflets are also being revised. We are also working in partnership with Atos Healthcare to develop the necessary training and guidance for Atos Healthcare Professionals who carry out Work Capability Assessments.

## **10. Impact**

10.1 The impact on business and civil society organisations is nil.

10.2 The impact on the public sector is negligible.

10.3 These changes will improve the way people with cancer are assessed; therefore a full impact assessment has not been published for this instrument.

10.4 In light of the above and the fact that any media interest in these regulations is more likely because cancer is an emotive subject rather than because the changes we are introducing are, in themselves, controversial, a full impact assessment has not been published for this instrument.

10.5 The additional regulatory changes are intended to clarify the original policy intent of those descriptors and do not represent changes in policy, we therefore expect no direct impact following these changes.

## **11. Regulating small business**

The legislation does not apply to small business.

## **12. Monitoring & review**

The Department is committed to continuously improving the WCA and has a statutory commitment to independently review the Assessment annually for the first five years of operation. We anticipate that the changes we are introducing will be monitored and evaluated as part of this ongoing process.

## **13. Contact**

Any queries regarding this instrument should be directed to Diane Taylor at the Department for Work and Pensions (Tel: 0114 294 8265 or email: [diane.taylor@dpw.gsi.gov.uk](mailto:diane.taylor@dpw.gsi.gov.uk))