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STATUTORY INSTRUMENTS

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**2012 No. 3096**

**SOCIAL SECURITY**

**The Employment and Support Allowance  
(Amendment) Regulations 2012**

*Made* - - - - *13th December 2012*  
*Laid before Parliament* *17th December 2012*  
*Coming into force* - - *28th January 2013*

The Secretary of State for Work and Pensions makes the following Regulations in exercise of the powers conferred by sections 8(1), (2), (3) and (5), 9(1), (2) and (3), 24(1) and 25(2) and (5) of, and paragraphs 1 and 9 of Schedule 2 to, the Welfare Reform Act 2007<sup>(1)</sup>.

In accordance with section 173(1)(b) of the Social Security Administration Act 1992<sup>(2)</sup>, the Secretary of State has obtained the agreement of the Social Security Advisory Committee that proposals in respect of these Regulations should not be referred to them.

**Citation, commencement and interpretation**

1.—(1) These Regulations may be cited as the Employment and Support Allowance (Amendment) Regulations 2012 and come into force on 28th January 2013.

(2) In these Regulations —

“the ESA Regulations” means the Employment and Support Allowance Regulations 2008<sup>(3)</sup>; and

“the commencement date” means the date on which these Regulations come into force.

**Application, transitional and savings provisions**

2.—(1) Subject to paragraphs (2) and (3), these Regulations apply to—

(a) a person who makes a claim for an employment and support allowance on or after the commencement date (including a claim in respect of any period beginning before that date);

(b) a person who made a claim for an employment and support allowance before the commencement date in respect of whom a determination is made on or after that date—

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(1) 2007 c.5  
(2) 1992 c.5  
(3) S.I. 2008/794

- (i) 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
- (ii) 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) a person who is entitled to an employment and support allowance immediately before the commencement date 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, or;
  - (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) a notified person within the meaning of regulation 4 of the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No. 2) Regulations 2010(4) in respect of whom a determination is made on or after the commencement date as to whether that person—
  - (i) has or is to be treated as having limited capability for work under Part 5 of the ESA Regulations, or
  - (ii) is to be treated as having limited capability for work-related activity under Part 6 of those Regulations.

(2) Where a person has been issued with a questionnaire which relates to the provisions of Schedule 2 of the ESA Regulations as they had effect immediately before the commencement date, regulation 5 does not apply for the purposes of making a determination on or after that date as to that person's limited capability for work under Part 5 of the ESA Regulations and, for those purposes, the provisions of Schedule 2 of the ESA Regulations are to continue to apply in respect of that person as they had effect immediately before the commencement date.

(3) Where a person has been issued with a questionnaire which relates to the provisions of Schedule 3 of the ESA Regulations as they had effect immediately before the commencement date, regulation 6 does not apply for the purposes of making a determination on or after that date as to that person's limited capability for work under Part 6 of the ESA Regulations and, for those purposes, the provisions of Schedule 3 of the ESA Regulations are to continue to apply in respect of that person as they had effect immediately before the commencement date.

(4) The provisions of paragraphs (2) to (3) do not apply to any determination made in respect of a person on or after 28<sup>th</sup> July 2013.

### **Amendment of Part 5 of the ESA Regulations**

- 3.—**(1) Part 5 of the ESA Regulations (Limited Capability for Work) is amended as follows.
- (2) In regulation 19 (determination of limited capability for work)—
- (a) for paragraph (4), substitute—
    - “(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,

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(4) [S.I. 2010/1907](#). Regulation 4 provides that a notified person is a person to whom a notice is issued. A notice may be issued to any person who is entitled to an existing award. The issue of the notice begins the conversion phase in relation to that person with effect from the date of issue. An existing award is an award of incapacity benefit, severe disablement allowance, or income support on the grounds of incapacity (as defined by paragraph 11 of Schedule 4 to the [Welfare Reform Act 2007 \(2007c.5\)](#)).

- (b) wearing or using any aid or appliance which is normally, or could reasonably be expected to be, worn or used.”; and
- (b) for paragraph (5) substitute—
  - “(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;
      - (ii) Part 2 of Schedule 2, as a direct result of treatment provided by a registered medical practitioner for a specific mental illness or disablement.”.
- (3) In regulation 20 (certain claimants to be treated as having limited capability for work)(5), for paragraph (b) substitute—
  - “(b) the claimant is—
    - (i) receiving treatment for cancer by way of chemotherapy or radiotherapy;
    - (ii) likely to receive such treatment within six months after the date of the determination of capability for work; or
    - (iii) recovering from such treatment,and the Secretary of State is satisfied that the claimant should be treated as having limited capability for work.”.
- (4) For regulation 25 (hospital in-patients) substitute—

**“Hospital patients**

- 25.—**(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 in a hospital or similar institution for a period of 24 hours or longer.
- (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 and the Secretary of State is satisfied that the claimant should be treated as having limited capability for work on that day.”.
- (5) In regulation 26(1)(b) (claimants receiving certain regular treatment), after “plasmapheresis” omit “or by way of radiotherapy”.
- (6) In regulation 29 (exceptional circumstances)—

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(5) Regulation 20 was amended by the Employment and Support Allowance (Limited Capability for Work and Limited Capability for Work-Related Activity) (Amendment) Regulations 2011 (S.I. 2011/228), reg. 3(2)(a).

- (a) in paragraph (2), insert “Subject to paragraph (3)” at the beginning of the paragraph; and
- (b) after paragraph (2) insert—
  - “(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.”.

#### **Amendment of Part 6 of the ESA Regulations**

4.—(1) Part 6 of the ESA Regulations (Limited Capability for Work-Related Activity) is amended as follows.

- (2) In regulation 34 (determination of limited capability for work-related activity)—
  - (a) for paragraph (3), substitute—
    - “(3) In determining whether a descriptor applies to the claimant, the claimant is to be assessed as if—
      - (a) the claimant were 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.”; and
  - (b) after paragraph (3) insert—
    - “(3A) In determining whether a descriptor applies, it is a condition that the claimant’s incapability arises—
      - (a) in respect of descriptors 1 to 8, 15(a), 15(b), 16(a) and 16 (b), from a specific bodily disease or disablement;
      - (b) in respect of descriptors 9 to 14, 15(c), 15(d), 16(c) and 16 (d), from a specific mental illness or disablement; or
      - (c) in respect of—
        - (i) descriptors 1 to 8, 15(a), 15(b), 16(a) and 16 (b), as a direct result of treatment provided by a registered medical practitioner for a specific physical disease or disablement;
        - (ii) descriptors 9 to 14, 15(c), 15(d), 16(c) and 16 (d), as a direct result of treatment provided by a registered medical practitioner for a specific mental illness or disablement.”.
- (3) In regulation 35(1) (certain claimants to be treated as having limited capability for work-related activity)(6), for sub-paragraph (b) substitute—
  - “(b) the claimant is-
    - (i) receiving treatment for cancer by way of chemotherapy or radiotherapy;
    - (ii) likely to receive such treatment within six months after the date of the determination of capability for work-related activity; or
    - (iii) recovering from such treatment,

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(6) Regulation 35(1) was amended by [Employment and Support Allowance \(Limited Capability for Work and Limited Capability for Work-Related Activity\) \(Amendment\) Regulations 2011/228](#), reg. 3(4).

and the Secretary of State is satisfied that the claimant should be treated as having limited capability for work-related activity; or”.

### **Amendment of Schedule 2 to the ESA Regulations**

**5.—(1)** In Part 1 of Schedule 2 to the ESA Regulations (Assessment of whether a Claimant has Limited Capability for Work)(7)—

- (a) in Activity 1, for the wording in column 1 substitute—

“1 Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid is normally, or could reasonably be, worn or used.”;
- (b) in Activity 2, in column 2—
  - (i) in paragraph 2(b)(ii) after “(even in an adjustable chair)” insert—

“; or

(iii) a combination of (i) and (ii),”;
  - (ii) in paragraph 2(c)(ii) after “(even in an adjustable chair)” insert—

“; or

(iii) “ a combination of (i) and (ii),”;
- (c) in Activity 5, in column 2, in paragraph 5(d), after “Cannot”, insert “single-handedly”;
- (d) in Activity 6, for the wording in column 1 substitute—

“6 Making self understood through speaking, writing, typing, or other means which are normally, or could reasonably be, used, unaided by another person.”;
- (e) in Activity 7, for the wording in column 1, substitute—

“7 Understanding communication by—

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

using any aid that is normally, or could reasonably be, used, unaided by another person.”;
- (f) in Activity 8, for the wording in column 1, substitute—

“8 Navigation and maintaining safety, using a guide dog or other aid if either or both are normally, or could reasonably be, used.”;
- (g) in Activity 9—
  - (i) for the wording in column 1, substitute—

“9 Absence or loss of control whilst conscious leading to extensive evacuation of the bowel and/or bladder, other than enuresis (bed-wetting), despite the wearing or use of any aids or adaptations which are normally, or could reasonably be, worn or used.”;
  - (ii) in column 2, in paragraph 9(b), for “At risk” substitute “The majority of the time is at risk”; and

(2) In Part 2 of Schedule 2 to the ESA Regulations (Mental, Cognitive and Intellectual Function Assessment), in Activity 15, in column 2, for the wording in paragraph (a) substitute—

- “(a) Cannot get to any place outside the claimant’s home with which the claimant is familiar.”.

### **Amendment of Schedule 3 to the ESA Regulations**

**6.** In Schedule 3 to the ESA Regulations (Assessment of whether a Claimant has Limited Capability for Work-Related Activity)(**8**)—

- (a) in Activity 1, for the wording in column 1 substitute—  
“1 Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid is normally, or could reasonably be, worn or used.”;
- (b) in Activity 6, for the wording in column 1 substitute—  
“6 Making self understood through speaking, writing, typing, or other means which are normally, or could reasonably be, used, unaided by another person.”;
- (c) in Activity 7, for the wording in column 1 substitute—  
“7 Understanding communication by:  
(i) verbal means (such as hearing or lip reading) alone,  
(ii) non-verbal means (such as reading 16 point print or Braille) alone, or  
(iii) a combination of (i) and (ii),  
using any aid that is normally, or could reasonably be, used, unaided by another person.”;  
and
- (d) in Activity 8, for the wording in column 1, substitute—  
“8 Absence or loss of control whilst conscious leading to extensive evacuation of the bowel and/or voiding of the bladder, other than enuresis (bed-wetting), despite the wearing or use of any aids or adaptations which are normally, or could reasonably be, worn or used.”.

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

13th December 2012

*Steve Webb*  
Minister of State  
Department for Work and Pensions

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(8) Schedule 3 was substituted by [S.I. 2011/228](#), regulation 4(2), Schedule 2.

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## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations amend the Employment and Support Allowance Regulations 2008 (S.I. 2008/794) (“the ESA Regulations”). They amend the provisions of the ESA Regulations which deal with the determination of limited capability for work, or limited capability for work-related activity; the provisions which allow a person to be treated as having limited capability for work, or limited capability for work-related activity; and the descriptors applied to determine capability for work, or for work-related activity.

Regulation 2 deals with the application of the Regulations. The Regulations apply to—

- claims for ESA made on or after the date that they come into force (“the commencement date”).
- persons who claim ESA before the commencement date but in relation to whom a determination as to limited capability for work or work-related activity is not made until after that date;
- persons in respect of whom a fresh determination of limited capability for work or work-related activity is made after the commencement date; and
- persons who have been notified as part of the incapacity benefit re-assessment process in relation to whom a determination as to limited capability for work or work-related activity is not made until after the commencement date.

Regulation 2 also makes an exception from the general rules about application in relation to cases where a person is issued with a questionnaire relating to the Schedules 2 (limited capability for work) and 3 (limited capability for work-related activity) to the ESA Regulations as those Schedules had effect before the amendments made by these Regulations. In such cases, for the purposes of any determination as to that person’s capability for work or for work-related activity, the provisions in Schedules 2 and 3 as they had effect immediately before that date are to continue to apply. This is subject to a six month limit after which all assessments will be made under the amended provisions.

Regulation 3 makes the following amendments to Part 5 (Assessment of Limited Capability for Work) of the ESA Regulations-

- Paragraph (2) amends regulation 19 so that the assessment of a claimant’s capability to perform any activity listed in Part 1 of Schedule 2 will be on the basis that the claimant is wearing any prosthesis with which they are fitted, or that claimants are wearing or using any aid or appliance which they can normally, or could reasonably be expected to, wear or use.
- Paragraph (2) also amends regulation 19 so that, when being considered in relation to a descriptor under Part 1 of Schedule 2 (physical disabilities), any limitation on a claimant’s capability for work must stem from a specific bodily disease or disablement or as a direct result of treatment for that disease or disablement by a registered medical practitioner. Similar amendments are made in relation to Part 2 of Schedule 2 (mental, cognitive and intellectual functional ability).
- Paragraph (3) amends regulation 20 to widen the group of claimants receiving treatment for cancer who may be treated as having limited capability for work so that all types of chemotherapy or radiotherapy are included.
- Paragraph (4) substitutes regulation 25 so as to change the circumstances in which claimants who undergo treatment as a patient in a hospital or similar institution may be treated as having limited capability for work.

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

- Paragraph (5) amends regulation 26 so that claimants receiving radiotherapy are no longer treated under that regulation as having limited capability for work.
- Paragraph (6) amends regulation 29 (exceptional circumstances where a person may be treated as having limited capability for work) so that the definition of “substantial risk” in regulation 29(2)(b) excludes circumstances where the risk to health could be significantly reduced by reasonable adjustments being made in the workplace or by the claimant taking prescribed medication.

Regulation 4 makes similar amendments to Part 6 (Assessment of Limited Capability for Work-Related Activity) of the ESA Regulations.

Regulation 5 amends a number of the descriptors used in Schedule 2 to the ESA Regulations to determine whether or not a claimant has limited capability for work.

Regulation 6 amends a number of the descriptors used in Schedule 3 to the ESA Regulations to determine whether or not a claimant has limited capability for work-related activity.

A full impact assessment has not been produced for this instrument as it has no impact on the private sector and civil society organisations.