

## **EXPLANATORY MEMORANDUM**

### **THE EMPLOYMENT AND SUPPORT ALLOWANCE (AMENDMENT) REGULATIONS (NORTHERN IRELAND) 2013 S.R. 2013 No. 2**

#### **1. Introduction**

- 1.1 This Explanatory Memorandum has been prepared by the Department for Social Development to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.
- 1.2 The Statutory Rule is made under section 8(1), (2), (3) and (5), 9(1), (2) and (3), 25(2) and 28(2) of, and paragraphs 1 and 9 of Schedule 2 to, the Welfare Reform Act (Northern Ireland) 2007 and is subject to the negative resolution procedure.

#### **2. Purpose**

- 2.1 These Regulations amend the Employment and Support Allowance Regulations (Northern Ireland) 2008 (the “Employment and Support Regulations”) to expand the categories of cancer treatments in relation to which a person may be treated as having limited capability for work or limited capability for work-related activity without being required to attend a face-to-face examination.
- 2.2 The Statutory Rule also amends a number of provisions of the Employment and Support Allowance Regulations in order to more accurately reflect the existing policy intent where current drafting has given rise to ambiguity, and to clarify the legislation where case law has challenged the existing or intended interpretation of it.

#### **3. Background**

- 3.1 Employment and Support Allowance was introduced in October 2008 to replace Incapacity Benefit for new claims. It was accompanied by a new functional health assessment to determine entitlement – the Work Capability Assessment. The Work Capability Assessment is used to determine limited capability for work and limited capability for work-related activity.
- 3.2 There is a commitment to continuously improve the Work Capability Assessment and a statutory commitment to independently review the Work Capability Assessment annually for the first five years of operation. Professor Malcolm Harrington, a highly respected Occupational Physician has carried out three reviews of the Work Capability Assessment to date. As part of his second review, Professor Harrington asked Macmillan Cancer Support (Macmillan) to look in detail at how the Work Capability Assessment assesses people with cancer in order to provide him with recommendations for further improvements.

- 3.3 Following proposals provided by Macmillan the Department for Work and Pensions conducted an informal consultation 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. This informal consultation took place in Northern Ireland from 5 January 2012 to 20 February 2012.
- 3.4 As a result of the evidence gathered from the consultation process the Department for Work and Pensions 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.
- 3.5 Under current legislation 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 or limited capability for work-related activity. 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. Instead, they can be treated as having limited capability for work or limited capability for work-related activity 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 Employment and Support Allowance and are likely to be placed in the Support Group. Claimants in the Support Group receive a higher top-up on the basic rate Employment and Support Allowance than claimants who are found to have limited capability for work, and who are considered capable of returning to work in due course with the appropriate support.
- 3.6 Macmillan proposed that the categories of treatment for cancer in the work capability assessment 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;
  - 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;
  - 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 or limited capability for work-related activity and to be placed into the Support Group or the Work-related Activity Group, respectively

- 3.7 The Department for Work and Pensions having considered the evidence gathered during the consultation process adopted a slightly different approach to improving the Work Capability Assessment for claimants undergoing treatment for cancer. The revised proposals expand the categories of cancer treatments in the work capability assessment 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 be treated as having limited capability for work or limited capability for work-related activity.
- 3.8 Determinations about limited capability for work or limited capability for work-related activity will be 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 determinations will be 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 limited capability for work-related activity and placed straight into the Support Group.
- 3.9 The site-specific approach to people awaiting, receiving or recovering from radiotherapy proposed by Macmillan was challenged by cancer specialists and others. The Department for Work and Pensions 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 it was 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.
- 3.10 As part of the programme of continuous improvement of the Work Capability Assessment this rule is also amending several other provisions in the Employment and Support Allowance Regulations. 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 in paragraphs 3.11 to 3.18 below.

### **Regulation 19(5) and Regulation 34(3A) – Schedules 2 and 3 Descriptors**

- 3.11 At present it is unclear whether an individual with a physical condition can score points on mental function descriptors based purely 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. Currently an individual may be able to score on both physical and mental health descriptors.

The amendment clarifies that mental function descriptors can only apply where the claimant's incapability arises directly from a mental 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**

- 3.12 There is no definition of the term 'in-patient' in the current legislation. Policy intent is that an individual whose condition is so serious that an overnight or longer-term stay in hospital is advised by a healthcare professional should be eligible to be treated as having limited capability for work.

The amendment 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**

- 3.13 There is currently a degree of ambiguity regarding the term 'substantial risk' when determining if an individual can be treated as having limited capability for work. This amendment clarifies that if substantial risk can be reduced by a significant amount by reasonable adjustments in the workplace or other interventions, for example, self administered adrenalin, the provision would not be satisfied.

### **Schedule 2 Part 1 Physical Disabilities – Activity 2 (Standing and sitting)**

- 3.14 As currently drafted descriptors can be satisfied where a person cannot remain at a workstation by either standing or sitting for specified periods of time.

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

### **Schedule 2 Part 1 Physical Disabilities – Activity 5 (Manual dexterity)**

- 3.15 As currently drafted descriptor 5(d) 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.

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

### **Schedule 2 Part 1 Physical Disabilities – Activity 7 (Understanding communication)**

- 3.16 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.

This amendment clarifies the policy intent 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 a hearing impairment alone, visual impairment alone or a combination of hearing and visual impairment.

### **Schedule 2 Part 1 Physical Disabilities – Activity 9 (Contenance)**

- 3.17 As currently drafted this descriptor 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.

This amendment clarifies the term “at risk” is interpreted in a way consistent with the policy intent of applying to those who the likelihood of loss of control is very high.

The current wording of this descriptor 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 ‘contenance’ activity as well as under the ‘consciousness’ activity for their fits.

This amendment ensures that the activity accounts only for continence problems experienced while an individual is awake.

**Schedule 2 Part 2 Mental, Cognitive and Intellectual Function – Activity 15**  
**(Getting about)**

- 3.18 The policy intent of this activity is to reflect inability to travel unaccompanied for those individuals who are severely affected by a mental health condition.

This amendment clarifies that the need is based on most places a claimant cannot get to rather than a single specified place.

**4. Consultation**

- 4.1 The Department for Work and Pensions carried out a consultation on detailed proposals for changing the way individuals may be assessed during their treatment for cancer. This informal consultation took place in Northern Ireland from 5 January 2012 to 20 February 2012. The proposed changes to expand the categories of cancer treatments under which a claimant may be treated as having limited capability for work-related activity have been developed as a result of the evidence gathered from this consultation process.

- 4.2 As the Regulations make in relation to Northern Ireland, only provision corresponding to provision contained in Regulations made by the Secretary of State for Work and Pensions in relation to Great Britain they do not have to be submitted to the Social Security Advisory Committee.

**5. Equality Impact**

- 5.1 The Regulations make amendments to revise the content of the Work Capability Assessment for Employment and Support Allowance. All claimants awaiting, receiving or recovering from treatment by way of chemotherapy irrespective of route and awaiting, receiving or recovering from radiotherapy will be treated equally. The changes are of universal application and are expected to affect all claimants fairly and equally irrespective of age, gender, religion, disability, dependants, political opinion, racial group, marital status or sexual orientation.

- 5.2 In relation to the clarification measures, as these are merely confirming the original policy intent, and are designed to improve the consistency of decision-making rather than altering entitlement to Employment and Support Allowance, it is not considered that these proposals would have any impact on claimants. These clarifications to the Work Capability Assessment are not targeting any particular group of claimants with health conditions in relation to their condition. The assessment is based on the severity of functional limitation caused by a condition, not on the basis of the condition itself, as different people may be affected in different ways by the same condition.

5.3 In accordance with its duty under section 75 of the Northern Ireland Act 1998, the Department has conducted a screening exercise on these legislative proposals and has concluded that the proposals do not have significant implications for equality of opportunity. In light of this, the Department considers that an equality impact assessment is not necessary

## **6. Regulatory Impact**

6.1 These Regulations do not require a Regulatory Impact Assessment as they do not impose any new costs on business, charities or voluntary bodies.

## **7. Financial Implications**

7.1 There are no significant costs to the Department to implement these proposals.

## **8. Section 24 of the Northern Ireland Act 1998**

8.1 The Department has considered section 24 of the Northern Ireland Act 1998 and is satisfied the Rule—

- (a) is not incompatible with any of the Convention rights,
- (b) is not incompatible with Community law,
- (c) does not discriminate against a person or class of person on the ground of religious belief or political opinion, and
- (d) does not modify an enactment in breach of section 7 of the Northern Ireland Act 1998.

## **9. EU Implications**

9.1 Not applicable.

## **10. Parity or Replicatory Measure**

10.1 The corresponding Great Britain Regulations are the Employment and Support Allowance (Amendment) Regulations 2012 and come into force on 28 January 2013. Parity of timing and substance is an integral part of the maintenance of single systems of social security, pensions and child support provided for in section 87 of the Northern Ireland Act 1998.