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DRAFT STATUTORY INSTRUMENTS

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**2013 No.**

**The Employment and Support Allowance Regulations 2013**

**PART 4**

**Limited Capability for Work**

**Determination of limited capability for work**

**15.**—(1) For the purposes of Part 1 of the Act, whether a claimant's capability for work is limited by the claimant's physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require the claimant to work is to be determined on the basis of a limited capability for work assessment of the claimant in accordance with this Part.

(2) The limited capability for work assessment is an assessment of the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 2 or is incapable by reason of such disease or bodily or mental disablement of performing those activities.

(3) Subject to paragraph (6), for the purposes of Part 1 of the Act a claimant has limited capability for work if, by adding the points listed in column (3) of Schedule 2 against each descriptor listed in that Schedule which applies in the claimant's case, the claimant obtains a total score of at least—

- (a) 15 points whether singly or by a combination of descriptors specified in Part 1 of that Schedule;
- (b) 15 points whether singly or by a combination of descriptors specified in Part 2 of that Schedule; or
- (c) 15 points by a combination of descriptors specified in Parts 1 and 2 of that Schedule.

(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,
- (b) wearing or using any aid or appliance which is normally, or could reasonably be expected to be, worn or used.

(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; or

- (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.
- (6) Where more than one descriptor specified for an activity applies to a claimant, only the descriptor with the highest score in respect of each activity which applies is to be counted.
- (7) Where a claimant—
  - (a) has been determined to have limited capability for work; or
  - (b) is to be treated as having limited capability for work under regulation 16, 21, 22 or 25,
 the Secretary of State may, if paragraph (8) applies, determine afresh whether the claimant has or is to be treated as having limited capability for work.
- (8) This paragraph applies where—
  - (a) the Secretary of State wishes to determine whether there has been a relevant change of circumstances in relation to the claimant's physical or mental condition;
  - (b) the Secretary of State wishes to determine whether the previous determination of limited capability for work or that the claimant is to be treated as having limited capability for work, was made in ignorance of, or was based on a mistake as to, some material fact; or
  - (c) at least three months have passed since the date on which the claimant was determined to have limited capability for work or to be treated as having limited capability for work.

#### **Certain claimants to be treated as having limited capability for work**

- 16.—**(1) A claimant is to be treated as having limited capability for work if—
- (a) the claimant is terminally ill;
  - (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;
  - (c) the claimant is—
    - (i) excluded or abstains from work pursuant to a request or notice in writing lawfully made or given under an enactment; or
    - (ii) otherwise prevented from working pursuant to an enactment,
 by reason of it being known or reasonably suspected that the claimant is infected or contaminated by, or has been in contact with a case of, a relevant infection or contamination;
  - (d) in the case of a pregnant woman, there is a serious risk of damage to her health or to the health of her unborn child if she does not refrain from work;
  - (e) in the case of a pregnant woman, she—
    - (i) is within the maternity allowance period (which has the meaning it has in section 35(2) of the Contributions and Benefits Act); and

- (ii) is entitled to a maternity allowance under section 35(1) of the Contributions and Benefits Act(1);
  - (f) in the case of a pregnant woman whose expected or actual date of confinement has been certified in accordance with the Medical Evidence Regulations, on any day in the period—
    - (i) beginning with the first date of the 6th week before the expected week of her confinement or the actual date of her confinement, whichever is earlier; and
    - (ii) ending on the 14th day after the actual date of her confinement,if she would have no entitlement to a maternity allowance or statutory maternity pay were she to make a claim in respect of that period;
  - (g) the claimant meets any of the descriptors at paragraph 15 or 16 of Schedule 3 in accordance with regulation 30(2), (3) and (6) where applicable; or
  - (h) the claimant is entitled to universal credit and it has previously been determined that the claimant has limited capability for work on the basis of an assessment under Part 5 of the Universal Credit Regulations 2013(2).
- (2) In this regulation, “relevant infection or contamination” means—
- (a) in England and Wales—
    - (i) any incidence or spread of infection or contamination, within the meaning of section 45A(3) of the Public Health (Control of Disease) Act 1984(3) in respect of which regulations are made under Part 2A of that Act (public health protection) for the purpose of preventing, protecting against, controlling or providing a public health response to, such incidence or spread; or
    - (ii) tuberculosis or any infectious disease which regulation 9 of the Public Health (Aircraft) Regulations 1979 (powers in respect of persons leaving aircraft)(4) applies or to which regulation 10 of the Public Health (Ships) Regulations 1979 (powers in respect of certain persons on ships)(5) applies; and
  - (b) in Scotland, any—
    - (i) infectious disease within the meaning of section 1(5) of the Public Health etc (Scotland) Act 2008(6), or exposure to an organism causing that disease; or
    - (ii) contamination within the meaning of section 1(5) of that Act, or exposure to a contaminant,to which sections 56 to 58 of that Act (compensation) apply.

### **Information required for determining capability for work**

17.—(1) Subject to paragraphs (2) and (3), the information or evidence required to determine whether a claimant has limited capability for work is—

- (a) evidence of limited capability for work in accordance with the Medical Evidence Regulations (which prescribe the form of doctor’s statement or other evidence required in each case);
- (b) any information relating to a claimant’s capability to perform the activities referred to in Schedule 2 as may be requested in the form of a questionnaire; and

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(1) Section 35(1) was substituted by section 53 of the Welfare Reform and Pensions Act 1999 (c.30) and amended by paragraph 4 of Schedule 7 to the Employment Act 2002 (c.22) and section 63 of the Welfare Reform Act 2012.

(2) S.I. 2013/XXX

(3) 1984 c.22. Section 45A and Part 2A were inserted by section 129 of the Health Act 2008 (c.14).

(4) S.I. 1979/1434.

(5) S.I. 1979/1435. Regulation 10 was amended by S.I.s 2007/1446 and 1901.

(6) 2008 asp 5.

(c) any such additional information as may be requested.

(2) Where the Secretary of State is satisfied that there is sufficient information to determine whether a claimant has limited capability for work without the information specified in paragraph (1) (b), that information must not be required for the purposes of making the determination.

(3) Paragraph (1) does not apply in relation to a determination whether a claimant is to be treated as having limited capability for work under any of regulations 16 (certain claimants to be treated as having limited capability for work), 21 (hospital in-patients) and 22 (claimants receiving certain treatment).

#### **Failure to provide information in relation to limited capability for work**

**18.**—(1) Where a claimant fails without good cause to comply with the request referred to in regulation 17(1)(b), that claimant is, subject to paragraph (2), to be treated as not having limited capability for work.

(2) Paragraph (1) does not apply unless—

- (a) the claimant was sent a further request at least three weeks after the date of the first request; and
- (b) at least one week has passed since the further request was sent.

#### **Claimant may be called for a medical examination to determine whether the claimant has limited capability for work**

**19.**—(1) Where it falls to be determined whether a claimant has limited capability for work, that claimant may be called by or on behalf of a health care professional approved by the Secretary of State to attend for a medical examination.

(2) Subject to paragraph (3), where a claimant fails without good cause to attend for or to submit to an examination mentioned in paragraph (1), the claimant is to be treated as not having limited capability for work.

(3) Paragraph (2) does not apply unless—

- (a) written notice of the date, time and place for the examination was sent to the claimant at least seven days in advance; or
- (b) that claimant agreed to accept a shorter period of notice whether given in writing or otherwise.

#### **Matters to be taken into account in determining good cause in relation to regulations 18 or 19**

**20.** The matters to be taken into account in determining whether a claimant has good cause under regulation 18 (failure to provide information in relation to limited capability for work) or 19 (failure to attend a medical examination to determine limited capability for work) include—

- (a) whether the claimant was outside Great Britain at the relevant time;
- (b) the claimant's state of health at the relevant time; and
- (c) the nature of any disability the claimant has.

#### **Hospital patients**

**21.**—(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 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 overnight or for a longer period following medical or other treatment.

(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 as referred to in paragraph (1) and the Secretary of State is satisfied that the claimant should be treated as having limited capability for work on that day.

### **Claimants receiving certain treatment**

**22.**—(1) Subject to paragraph (2), a claimant receiving—

- (a) regular weekly treatment by way of haemodialysis for chronic renal failure;
- (b) treatment by way of plasmapheresis; or
- (c) regular weekly treatment by way of total parenteral nutrition for gross impairment of enteric function,

is to be treated as having limited capability for work during any week in which that claimant is engaged in receiving that treatment or has a day of recovery from that treatment.

(2) A claimant who receives the treatment referred to in paragraph (1) is only to be treated as having limited capability for work from the first week of treatment in which the claimant undergoes no fewer than—

- (a) two days of treatment;
- (b) two days of recovery from any of the forms of treatment listed in paragraph (1)(a) to (c); or
- (c) one day of treatment and one day of recovery from that treatment,

but the days of treatment or recovery from that treatment or both need not be consecutive.

(3) For the purpose of this regulation “day of recovery” means a day on which a claimant is recovering from any of the forms of treatment listed in paragraph (1)(a) to (c) and the Secretary of State is satisfied that the claimant should be treated as having limited capability for work on that day.

### **Claimant to be treated as having limited capability for work throughout a day**

**23.** A claimant who, at the commencement of any day has, or after that develops, limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work on that day.

### **Night workers**

**24.**—(1) Where a claimant works for a continuous period which extends over midnight into the following day, that claimant is to be treated as having limited capability for work on the day on which the lesser part of that period falls if that claimant had limited capability for work for the remainder of that day.

(2) Where, in relation to a period referred to in paragraph (1), the number of hours worked before and after midnight is equal—

- (a) if the days in question fall at the beginning of a period of limited capability for work, the claimant is to be treated as having limited capability on the second day; and

- (b) if the days in question fall at the end of a period of limited capability for work, the claimant is to be treated as having limited capability for work on the first day.

### **Exceptional circumstances**

**25.**—(1) A claimant who does not have limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work if paragraph (2) applies to the claimant.

(2) Subject to paragraph (3), this paragraph applies if—

- (a) the claimant is suffering from a life-threatening disease in relation to which—
- (i) there is medical evidence that the disease is uncontrollable, or uncontrolled, by a recognised therapeutic procedure; and
  - (ii) in the case of a disease that is uncontrolled, there is a reasonable cause for it not to be controlled by a recognised therapeutic procedure; or
- (b) the claimant suffers from some specific disease or bodily or mental disablement and, by reason of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work.

(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.

(4) In this regulation “medical evidence” means—

- (a) evidence from a health care professional approved by the Secretary of State; and
- (b) evidence (if any) from any health care professional or a hospital or similar institution,

or such part of such evidence as constitutes the most reliable evidence available in the circumstances.

### **Conditions for treating a claimant as having limited capability for work until a determination about limited capability for work has been made**

**26.**—(1) A claimant is, if the conditions set out in paragraph (2) are met, to be treated as having limited capability for work until such time as it is determined—

- (a) whether or not the claimant has limited capability for work;
- (b) whether or not the claimant is to be treated as having limited capability for work otherwise than in accordance with this regulation; or
- (c) whether the claimant falls to be treated as not having limited capability for work in accordance with regulation 18 (failure to provide information in relation to limited capability for work) or 19 (failure to attend a medical examination to determine limited capability for work).

(2) The conditions are—

- (a) that the claimant provides evidence of limited capability for work in accordance with the Medical Evidence Regulations; and
- (b) that it has not, within the six months preceding the date of claim for employment and support allowance, been determined, in relation to the claimant’s entitlement to any benefit, allowance or advantage which is dependent on the claimant having limited capability for work, that the claimant does not have limited capability for work or is to

be treated as not having limited capability for work under regulation 18 or 19 unless paragraph (4) applies.

(3) Paragraph (2)(b) does not apply where a claimant has made and is pursuing an appeal against a decision that embodies a determination that the claimant does not have limited capability for work and that appeal has not yet been determined by the First-tier Tribunal.

(4) This paragraph applies where—

- (a) the claimant is suffering from some specific disease or bodily or mental disablement from which the claimant was not suffering at the time of that determination;
- (b) a disease or bodily or mental disablement from which the claimant was suffering at the time of that determination has significantly worsened; or
- (c) in the case of a claimant who was treated as not having limited capability for work under regulation 18 (failure to provide information), the claimant has since provided the information requested under that regulation.

### **Certain claimants to be treated as not having limited capability for work**

27.—(1) A claimant who is or has been a member of Her Majesty's forces is to be treated as not having limited capability for work on any day which is recorded by the Secretary of State as a day of sickness absence from duty.

(2) A claimant is to be treated as not having limited capability for work on any day on which the claimant attends a training course in respect of which the claimant is paid a training allowance or premium pursuant to arrangements made under section 2 of the Employment and Training Act 1973 or section 2(3) of the Enterprise and New Towns (Scotland) Act 1990.

(3) Paragraph (2) is not to apply—

- (a) for the purposes of any claim to an employment and support allowance for a period commencing after the claimant ceased attending the training course in question; or
- (b) where any training allowance or premium paid to the claimant is paid for the sole purpose of travelling or meal expenses incurred or to be incurred under the arrangements made under section 2 of the Employment and Training Act 1973 or section 2(3) of the Enterprise and New Towns (Scotland) Act 1990.

(4) A claimant is to be treated as not having limited capability for work where—

- (a) it has previously been determined, within the six months preceding the date of claim for employment and support allowance, on the basis of an assessment under Part 5 of the Universal Credit Regulations 2013, that the claimant does not have limited capability for work; and
- (b) it appears to the Secretary of State that—
  - (i) the determination was not based on ignorance of, or mistake as to, a material fact; and
  - (ii) there has been no relevant change of circumstances in relation to the claimant's physical or mental condition since the determination.

### **Claimants to be treated as not having limited capability for work at the end of the period covered by medical evidence**

28.—(1) Where the Secretary of State is satisfied that it is appropriate in the circumstances of the case, a claimant may be treated as not having limited capability for work if—

- (a) the claimant has supplied medical evidence;
- (b) the period for which medical evidence was supplied has ended;

- (c) the Secretary of State has requested further medical evidence; and
  - (d) the claimant has not, before whichever is the later of either the end of the period of six weeks beginning with the date of the Secretary of State’s request or the end of six weeks beginning with the day after the end of the period for which medical evidence was supplied
    - 
    - (i) supplied further medical evidence; or
    - (ii) otherwise made contact with the Secretary of State to indicate that they wish to have the question of limited capability for work determined.
- (2) In this regulation “medical evidence” means evidence provided under regulation 2 or 5 of the Medical Evidence Regulations.

**Additional circumstances where claimants are to be treated as having limited capability for work**

**29.** For the purposes of paragraph 4(1)(d)(ii) of Schedule 1 to the Act, a claimant is to be treated as having limited capability for work on any day in respect of which that claimant is entitled to statutory sick pay.