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STATUTORY INSTRUMENTS

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**2010 No. 840**

**The Social Security (Miscellaneous  
Amendments) (No. 3) Regulations 2010**

**Amendment of the Employment and Support Allowance Regulations 2008**

- 9.—(1) The Employment and Support Allowance Regulations 2008(1) are amended as follows.
- (2) In regulation 2 (interpretation)—
- (a) in paragraph (1)—
- (i) omit the definition of “medical examination centre”;
- (ii) in the definition of “period of limited capability for work” for “a period throughout which a person has, or is treated as having, limited capability for work” substitute “except in paragraph (5), a period throughout which a person has, or is treated as having, limited capability for work, and does not include a period which is outside the prescribed time for claiming as specified in regulation 19 of the Social Security (Claims and Payments) Regulations 1987(2)”; and
- (b) after paragraph (4) insert—
- “(5) For the purposes of paragraph 4 of Schedule 1 to the Act (condition relating to youth) “period of limited capability for work” means a period throughout which a person has, or is treated as having, limited capability for work.”.
- (3) In regulation 4(1) (end of assessment phase) for “regulations 5 and 6” substitute “regulation 5”.
- (4) In regulation 5 (the assessment phase-previous claimants)—
- (a) in paragraph (1)(b) for “regulation 6” substitute “(4)”;
- (b) in paragraph (2)(a)(ii) omit “and” where it is mentioned on the second occasion;
- (c) in paragraph (2)(a)(iii) for “or” substitute “and”;
- (d) after paragraph (2)(a)(iii) insert—
- “(iv) the period for which the claimant was previously entitled was no more than 13 weeks; or”;
- (e) in paragraph (2)(b)(i) omit “and”;
- (f) at the end of paragraph (2)(b)(ii) add “and”;
- (g) after paragraph (2)(b)(ii) insert—
- “(iii) the period for which the claimant was previously entitled was no more than 13 weeks;”;
- (h) after paragraph (3) add—

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(1) [S.I. 2008/794](#). Regulation 2 was amended by [S.I. 2008/2428](#), [2009/583](#) and [2009/2655](#). The amounts specified in regulation 45 and paragraphs 5, 6 and 7 of Schedule 7 were most recently amended by [S.I. 2008/2428](#). Regulation 61 was amended by [S.I. 2009/2655](#).

(2) [S.I. 1987/1968](#).

“(4) Where a person has made and is pursuing an appeal against a decision of the Secretary of State that embodies a determination that the claimant does not have limited capability for work—

- (a) paragraph (3) does not apply; and
- (b) paragraph (1) does not apply to any period of limited capability for work to which regulation 147A(2) applies until a determination of limited capability for work has been made following the determination of the appeal by the First-tier Tribunal.”.

(5) Omit regulation 6 (the assessment phase – claimants appealing against a decision).

(6) In regulation 7 (circumstances where the condition that the assessment phase has ended before entitlement to the support component or the work-related activity component arises does not apply)

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- (a) in paragraph (1)(b)(iii), after “allowance” insert “or that period was more than 13 weeks;”; and
  - (b) in paragraph (2) for “where the claimant is appealing a decision which embodies a determination that the claimant does not have limited capability for work” substitute “to any period of limited capability for work to which regulation 147A(2) applies until the determination of limited capability for work has been made following the determination of the appeal by the First-tier Tribunal”.

(7) For regulation 13 (modification of the relevant benefit year) substitute—

**“Modification of the relevant benefit year**

**13.**—(1) Where paragraph (2) applies, sub-paragraph (1)(f) of paragraph 3 of Schedule 1 to the Act has effect as if “relevant benefit year” is any benefit year which includes all or part of the period of limited capability for work which includes the relevant benefit week.

(2) This paragraph applies where a claimant has made a claim to employment and support allowance but does not satisfy—

- (a) the first contribution condition;
- (b) the second contribution condition; or
- (c) both contribution conditions,

but would satisfy those conditions if the modified definition of “relevant benefit year” provided in paragraph (1) applied.”.

(8) In regulation 30 (conditions for treating a claimant as having limited capability for work until a determination about limited capability for work has been made) at the end of paragraph (2)(b) insert “; or” and the following sub-paragraph—

- “(c) that it has not, within the 6 months preceding the date of claim, been determined, in relation to the claimant’s entitlement to any benefit, allowance or advantage, which is dependent upon the claimant being incapable of work, that the claimant is capable of work, or is to be treated as capable of work under regulation 7 or 8 of the Social Security (Incapacity for Work) (General) Regulations 1995 (“the 1995 Regulations”)(3), unless—
  - (i) 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,

- (ii) a disease or bodily or mental disablement from which the claimant was suffering at the time of that determination has significantly worsened, or
  - (iii) in the case of a claimant who was treated as capable of work under regulation 7 of the 1995 Regulations (failure to provide information), the claimant has since provided the information requested by the Secretary of State under that regulation.”.
- (9) After regulation 32 (certain claimants to be treated as not having limited capability for work) insert—

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

**32A.** Where the Secretary of State is satisfied that it is appropriate in the circumstances of the case then a claimant may be treated as not having limited capability for work if—

- (a) the claimant has supplied medical evidence in accordance with regulation 30(2)(a);
  - (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 6 weeks beginning with the date of the Secretary of State’s request or the end of 6 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.”.
- (10) In regulation 45 (exempt work)—
- (a) in paragraph (3)(b) before “voluntary” insert “by a” and after “organisation” insert “or community interest company(4)”;
  - (b) for paragraph (4)(a) substitute—
    - “(a) is done during a period of specified work, provided that—
      - (i) the claimant has not previously done specified work,
      - (ii) since the beginning of the last period of specified work, the claimant has ceased to be entitled to a relevant benefit for a continuous period exceeding 12 weeks, or
      - (iii) not less than 52 weeks have elapsed since the last period of specified work; or”;
  - (c) after sub-paragraph (b) insert—
    - “(c) for the purposes of this regulation, a period of specified work begins on the first day on which any specified work is undertaken and continues for a period of 52 weeks, whether or not any further specified work is undertaken during that period.”.
- (11) In regulation 49 (notification of the assessment) after paragraph (2) insert—
- “(3) A claimant may be required to take part in a work-focused health-related assessment either by attendance in person or by telephone.”.

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(4) As established under the Companies (Audit, Investigations and Community Enterprise) Act 2004 c.27.

(12) Omit regulation 50 (determination of the place of the work-focused health-related assessment).

(13) In regulation 53(3) (failure to take part in a work-focused health-related assessment)—

(a) for sub-paragraph (b) substitute—

“(b) that the physical or mental health or condition of the claimant made it impracticable for the claimant to take part in a work-focused health-related assessment;”;

(b) in sub-paragraph (c) omit “and”; and

(c) after sub-paragraph (c) insert—

“(ca) that the claimant had caring responsibilities in relation to a child and childcare was not reasonably available or was unsuitable due to the particular needs of the claimant or the child; and”.

(14) In regulation 61(3) (failure to take part in a work-focused interview) —

(a) for sub-paragraph (i) substitute—

“(i) that the physical or mental health or condition of the claimant made it impracticable for the claimant to attend at the time and place fixed for the interview;”;

(b) after sub-paragraph (j) insert—

“(ja) that the claimant had caring responsibilities in relation to a child and child care was not reasonably available or was unsuitable due to the particular needs of the claimant or the child; and”.

(15) After regulation 147 insert—

**“Claimants appealing a decision**

**147A.**—(1) This regulation applies where a claimant has made and is pursuing an appeal against a decision of the Secretary of State that embodies a determination that the claimant does not have limited capability for work.

(2) Subject to paragraph (3), where this regulation applies, a determination of limited capability for work by the Secretary of State under regulation 19 shall not be made until the appeal is determined by the First-tier Tribunal.

(3) Paragraph (2) does not apply where either—

(a) the claimant suffers from some specific disease or bodily or mental disablement from which the claimant was not suffering when entitlement began; or

(b) a disease or bodily or mental disablement from which the claimant was suffering at that date has significantly worsened.

(4) Where this regulation applies and the Secretary of State makes a determination—

(a) in a case to which paragraph (3) applies (including where the determination is not the first such determination) that the claimant does not have or, by virtue of regulation 22 or 23, is to be treated as not having limited capability for work; or

(b) subsequent to a determination that the claimant is to be treated as having limited capability for work by virtue of a provision of these Regulations other than regulation 30, that the claimant is no longer to be so treated,

this regulation and regulation 30 apply as if that determination had not been made.

(5) Where this regulation applies and—

- (a) the claimant is entitled to an employment and support allowance by virtue of being treated as having limited capability for work in accordance with regulation 30;
- (b) neither of the circumstances in paragraph (3) applies, or, subsequent to the application of either of those circumstances, the claimant has been determined not to have limited capability for work; and
- (c) the claimant's appeal is dismissed, withdrawn or struck out,

the claimant is to be treated as not having limited capability for work with effect from the beginning of the first day of the benefit week following the date on which the Secretary of State was notified by the First-tier Tribunal that the appeal is dismissed, withdrawn or struck out.

(6) Where a claimant's appeal is successful, subject to paragraph (7), any finding of fact or other determination embodied in or necessary to the decision of the First-tier Tribunal or on which the First-tier Tribunal's decision is based shall be conclusive for the purposes of the decision of the Secretary of State, in relation to an award made in a case to which this regulation applies, as to whether the claimant has limited capability for work or limited capability for work-related activity.

(7) Paragraph (6) does not apply where, due to a change of circumstances after entitlement to which this regulation applies began, the Secretary of State is satisfied that it is no longer appropriate to rely on such finding or determination.”.

(16) In regulation 154 (absence in order to receive NHS treatment) omit paragraph (c) and the word “and” immediately preceding it.

(17) In regulation 155(1) (absence of member of family of member of Her Majesty's forces) omit sub-paragraph (b) and the word “and” immediately preceding it.

(18) In paragraph 10(1)(a) of Schedule 6 (general exclusions from paragraphs 8 and 9) for “the claimant's partner” substitute “the claimant or the claimant's partner”.

(19) After paragraph 5 of Schedule 7 (sums to be disregarded in the calculation of earnings) insert—

“**5A.** In the case of a claimant who receives a payment to which regulation 92(2) applies, £20, except where regulation 45(2) to (4) applies to the claimant, in which case the amounts specified in paragraph 6 shall apply, but only up to a maximum of £20.”.

(20) In Schedule 8 (sums to be disregarded in the calculation of income other than earnings)—

(a) in paragraph 7, after sub-paragraph (2) add—

“(3) An increase under section 80 or 90 of the Contributions and Benefits Act(5).”; and

(b) in paragraph 15(1)(a) after “employment and support allowance” insert “or a jobseeker's allowance”.

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(5) Section 80 was repealed by section 60 of the Tax Credits Act 2002 (c. 21), subject to savings as set out in Article 3 of S.I. 2003/938. Section 90 was repealed by sections 15(1)(b), 58(1) and 2(a) of the Welfare Reform Act 2009 (c.24), subject to transitional provision in sections 15(2) and (3) thereof.