

Chapter U7: Employment and Support Allowance award made pending appeal

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Legislation Used in Chapter U7

Abbreviation	Full Title
WR Act (NI) 07	Welfare Reform Act (Northern Ireland) 2007
ESA Regs (NI) 16	The Employment and Support Allowance Regulations (Northern Ireland) 2016 No. 219
UC, PIP, JSA & ESA (C&P) Regs (NI) 16	The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations (Northern Ireland) 2016 No. 220
UC, PIP, JSA & ESA (D&A) Regs (NI) 16	The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations (Northern Ireland) 2016 No. 221

Chapter U7: Employment and Support Allowance award made pending appeal

Introduction

U7001 This Chapter gives guidance on

1. when a claimant can be awarded Employment and Support Allowance pending an appeal (“the payment pending appeal award”) against a relevant decision which includes a determination that the claimant does not have limited capability for work
2. how to deal with changes of circumstances before the appeal is heard
3. what action to take when the appeal has been determined.

U7002 In this Chapter references to Employment and Support Allowance mean new style Employment and Support Allowance which is being gradually phased in from 29.4.13. See ADM Chapter M5 (Claims for Universal Credit) for guidance on the meaning of new style Employment and Support Allowance.

U7003 – U7004

Claimant treated as having limited capability for work

U7005 Where the conditions in U7006 - U7007 are satisfied, a claimant who makes and pursues an appeal to the tribunal can be

1. treated as having limited capability for work¹ **and**
2. exempt from the requirement to claim before being awarded Employment and Support Allowance²

where the appeal is lodged against a relevant decision (see U7010) made or treated as made on a claim.

Note 1: This does **not** apply where an Employment and Support Allowance claimant is treated as not having limited capability for work for failure to return the questionnaire or failure to attend or submit to a medical examination.

Note 2: Decision makers are reminded that even if the Employment and Support Allowance claimant claims or is already entitled to Universal Credit, they can still be awarded Employment and Support Allowance pending the outcome of the appeal subject to the 365 day time limit. See U7025

1 ESA Regs (NI) 16, reg 26(1); 2 UC, PIP, JSA & ESA (C&P) Regs (NI) 16, reg 6(1)

U7006 The conditions in U7005 are that¹

1. entitlement to Employment and Support Allowance is disallowed or terminated in a relevant decision following a determination that the claimant does not have limited capability for work after application of the work capability assessment **and**
2. following mandatory reconsideration where appropriate (see U7020 - U7025), the claimant makes an appeal to the tribunal against the disallowance **and**
3. the claimant provides or continues to provide medical evidence **and**
4. no claim for Jobseeker's Allowance is made.

Note 1: See ADM Chapters A3 and A6 for guidance on mandatory reconsideration and appeals.

Note 2: This does not apply where the claimant makes an appeal to the Commissioner.

1 ESA Regs (NI) 16, reg 26(1), (2)(a) & (3); 2 UC, PIP, JSA & ESA (C&P) Regs (NI) 16, reg 6(1)

U7007 The claimant must also satisfy the other conditions of entitlement

1. the basic conditions¹ - see ADM Chapter U1 **and**
2. the time limits² - see ADM Chapter V2.

1 WR Act (NI) 07, sec 1(3); 2 sec 1A

U7008 Decision makers should note that the award made pending determination of the appeal is a **new** award, and **not** a reinstatement of the previous award which is the subject of the appeal. Nor is there any provision enabling the appeal to be treated as a claim. See U7090 where a claim is made at the same time as the appeal.

U7009 Decision makers should also note that the condition of entitlement which must be satisfied in order to make the award is that the claimant has, or is treated as having, limited capability for work¹. Making an appeal is **not** a condition of entitlement, nor does it enable the claimant to be treated as having limited capability for work in its own right. Instead, it allows the claimant to be exempted from the rule about the effect of previous limited capability for work determinations, which would otherwise mean that they could not be treated as having limited capability for work².

Note: See ADM Chapter U2 (limited capability for work & limited capability for work-related activity) for detailed guidance on the rule.

1 WR Act (NI) 07, sec 1(3) (a); 2 ESA Regs (NI) 16, reg 26(2)(b) & (3)

U7010 A relevant decision¹ is a decision made on a claim made or treated as made on or after that embodies

1. the first determination by the decision maker that the claimant does not have limited capability for work **or**
2. the first determination by the decision maker that the claimant does not have limited capability for work since a previous determination that the claimant does have limited capability for work.

Note: A determination that the claimant is treated as having limited capability for work pending determination of limited capability for work² is not a determination that the claimant does have limited capability for work.

*1 ESA Regs (NI) 16, reg 26(5); UC, PIP, JSA & ESA (C&P) Regs (NI) 16, reg 6(2);
2 ESA Regs (NI) 16, reg 26(2)*

U7011 In U7010 2., the previous determination is one made by the

1. decision makers **or**
2. Tribunal **or**
3. Commissioners **or**

4. Court of Appeal **or**
5. Court of Session **or**
6. Supreme Court¹.

1 ESA Regs (NI) 16, reg 26(6); UC, PIP, JSA & ESA (C&P) Regs (NI) 16, reg 6(2)

U7012 Where the conditions in U7005 - U7007 are not satisfied, the claimant would need to

1. make a repeat claim for Employment and Support Allowance **and**
2. satisfy the conditions of entitlement to Employment and Support Allowance

in the normal way whether or not they make an appeal to the tribunal. This includes considering whether the claimant needs to be referred for a further work capability assessment, and if so, whether they can be treated as having limited capability for work. The claimant cannot be awarded Employment and Support Allowance solely on the basis that they have made and are pursuing an appeal.

U7013 Where the claimant

1. is found not to have limited capability for work on a repeat claim which was made following a previous determination that they did not have limited capability for work **and**
2. lodges an appeal to the tribunal against the decision made on the repeat claim

they can be entitled to Employment and Support Allowance as in U7005 - U7007, even though the appeal is against a second determination that the claimant does not have limited capability for work. This is because the second determination is not a relevant determination as in U7010.

Example 1

Rory claimed Employment and Support Allowance on 7.5.17, and is found not to have limited capability for work following application of the work capability assessment. Rory lodges an appeal with the tribunal. In his appeal he asks for Employment and Support Allowance to be paid, and he sends a fit note. The decision maker treats Rory as having limited capability for work, and awards Employment and Support Allowance pending the outcome of the appeal.

Rory's appeal is dismissed, and the decision maker treats him as not having limited capability for work, terminating the award of Employment and Support Allowance. Rory makes a further claim for Employment and Support Allowance on 2.4.18, and the decision maker determines that Rory does not have limited capability for work, using the evidence provided for the previous limited capability for work determination

as upheld by the tribunal, as there is no evidence of a change since then. The decision to disallow the new claim is not revised following mandatory reconsideration and Rory lodges a further appeal. He cannot be treated as having limited capability for work and paid Employment and Support Allowance solely on the grounds of the appeal. In order to become entitled to Employment and Support Allowance again, Rory would need to claim Employment and Support Allowance and provide evidence that he had a new or worse condition, or that he satisfied one of the other conditions for being treated as having limited capability for work.

Example 2

Yasmin claimed Employment and Support Allowance in June 2017, and her award is terminated following application of the work capability assessment. She lodges an appeal and is awarded Employment and Support Allowance. Her appeal is allowed by the tribunal, which finds that Yasmin has limited capability for work but does not have limited capability for work-related activity. The tribunal recommends that Yasmin is referred for a further work capability assessment after 12 months. The decision maker revises the award made pending the outcome of the appeal, and Yasmin is placed in the work-related activity group.

After a further work capability assessment, Yasmin is again found not to have limited capability for work, and again lodges an appeal. If she sends in fit notes, she can be treated as having limited capability for work and paid Employment and Support Allowance pending the outcome of the appeal, without being required to submit a claim.

Example 3

Alan's award of Employment and Support Allowance is terminated following application of the work capability assessment. Alan lodges an appeal and is awarded employment and Support Allowance. The appeal is dismissed, and the Employment and Support Allowance award is terminated.

Alan makes a further claim for Employment and Support Allowance after he was admitted to hospital for two days following routine surgery for a pre-existing condition. The decision maker treats Alan as having limited capability for work on the basis that his condition is likely to have deteriorated, and refers for a work capability assessment. The health care professional advises that recovery from surgery should take about three months, but Alan should be capable of undertaking work-related activity. The decision maker accepts the advice, and places Alan in the work-related activity group.

Alan is referred for a further work capability assessment, and the health care professional advises that Alan has recovered from the surgery. In the health care professional's opinion Alan does not score any points, and the decision maker finds that Alan does not have limited capability for work. As Alan was previously treated as having limited capability for work on the grounds that he was recovering from surgery and had been required to stay in hospital for more than 24 hours, the determination that he does not have limited capability for work is embodied in a relevant decision. Alan lodges an appeal and is entitled to an award of Employment and Support Allowance.

Alan's appeal is successful, and the tribunal finds that he scores 15 points and should be placed in the work-related activity group. The tribunal decision is implemented. Alan's award of Employment and Support Allowance made pending the outcome of the appeal is revised.

Example 4

Krystal's award of Employment and Support Allowance is terminated after she is found not to have limited capability for work. She is paid Employment and Support Allowance pending the outcome of an appeal to the tribunal. Her appeal is dismissed, and the award made pending the appeal is terminated.

Krystal makes a further claim for Employment and Support Allowance, providing evidence that she has a new condition since the previous determination that she did not have limited capability for work. The decision maker treats Krystal as having limited capability for work and awards Employment and Support Allowance, referring for a work capability assessment. The decision maker accepts the health care professional's advice that Krystal scores 6 points for the new condition. As this is less than 15 points, the decision maker determines that Krystal does not have limited capability for work, and terminates the Employment and Support allowance award.

As the latest determination is not made following a determination that Krystal had limited capability for work, she cannot be awarded Employment and Support Allowance if she lodges an appeal.

U7014 – U7019

Time for appealing where Employment and Support Allowance awarded pending an appeal

- U7020 Normally a claimant can only appeal to a tribunal where the decision maker has first considered an application for revision of the original decision¹. Where the conditions are potentially met for an award of Employment and Support Allowance pending a

limited capability for work appeal, mandatory reconsideration is **not** required² (but see U7021 if the claimant applies for revision). The claimant should be notified that

1. they have one month after the date they were sent notice of the decision being challenged in which to appeal³ **or**
2. if a written statement of reasons for the decision was requested within that one month period, the time within which to appeal is 14 days after the later of
 - 2.1 the end of that month **or**
 - 2.2 the date on which the written statement of reasons was provided⁴.

Note: See Chapter A3 (Revision) for guidance on revision and Chapter A5 (Appeals) for guidance on appeals.

1 SS (NI) Order 98, art 13(3A); 2 [2020] EWHC 1999 (Admin);

3 TP (Fit) (SEC) Rules, rule 22(2)(d)(ii), Sch (1), para 5(a); 4 para 5(b)(i) & (ii)

Application for revision received

U7021 The mandatory reconsideration process is no longer mandatory where an Employment and Support Allowance claimant would be eligible for payment pending appeal. However, a claimant may still make an application for revision of the decision which is being challenged. If an application for revision is received from the claimant within the application period, the decision maker should re-examine the facts of the case, the law used and any further evidence that may be available. The claimant should be notified of the decision. If the application is unsuccessful, the time for appealing to a tribunal is one month after the date on which notice that the decision is not revised is sent to the claimant¹.

1 TP (Fit) (SEC) Rules, rule 22(2)(d)(ii), Sch (1), para 5(c)(iv)

U7022 If the claimant appeals against the decision in accordance with U7020, normal rules apply in respect of the power to revise and lapse the appeal¹. This applies in respect of a claimant's application for revision and where the Department acts on their own initiative.

1 UC, PIP, JSA & ESA (D&A) Regs (NI) 16, reg 11(1)

Time limit for appealing where Employment and Support Allowance not awarded pending an appeal

- U7023 Where the claimant has no potential entitlement to a payment pending appeal, mandatory reconsideration is required. The claimant should be notified that they have one month after the date they were sent notice of the result of the mandatory reconsideration in which to appeal¹.

1 TP (Fit) (SEC) Rules, rule 22(2)(d)(i)

Dual claims

- U7024 An Employment and Support Allowance claimant may also be entitled to Universal Credit. The claimant should receive separate notifications of each work capability assessment outcome for both benefits. It is important to note that the guidance at U7020 only applies to the Employment and Support Allowance work capability assessment notification. This means that the claimant must apply for mandatory reconsideration of the Universal Credit decision in the normal way, but not the Employment and Support Allowance decision if the claimant would be eligible for a payment pending an appeal.

Note: Where the decision is revised or changed on appeal for one benefit, the decision for the other benefit may be reconsidered and revised. Any appeal will lapse only if the decision is to the claimant's advantage.

- U7025 Where a claimant is entitled to Universal Credit and Employment and Support Allowance, Employment and Support Allowance including any award made pending an appeal is taken into account as unearned income for the purposes of Universal Credit¹.

1 WR (NI) Order 15, art 13(3)(b); UC Regs (NI) 16, reg 66(1)(b)(ii)

Example 1

Chidi has been entitled to Employment and Support Allowance since 23.8.19. It is his first claim for Employment and Support Allowance. He is referred for the work capability assessment, but this is delayed after a number of appointments were cancelled. Chidi's award of Employment and Support Allowance ended on 22.8.20 due to the 365 day time limit, although he remained entitled to National Insurance Credits as he continued to provide medical evidence.

Following assessment the decision maker determines on 23.9.20 that Chidi does not have limited capability for work, and terminates the award of National Insurance Credits. As Chidi would not be entitled to any further award of Employment and

Support Allowance, he will need to apply for mandatory reconsideration if he wishes to dispute the Employment and Support Allowance decision.

Example 2

Jason's entitlement to Employment and Support Allowance ended on 4.12.19 after the decision maker determined that he did not have limited capability for work following application of the work capability assessment. Jason made a further claim to Employment and Support Allowance from 26.2.20 after declaring a new health condition, and he is referred for the work capability assessment again. The decision maker determines that Jason does not have limited capability for work despite the new health condition. As this is the second determination that Jason does not have limited capability for work, he would not be entitled to an award of Employment and Support Allowance pending the outcome of any appeal, he will need to apply for mandatory reconsideration if he wishes to dispute the Employment and Support Allowance decision.

Example 3

Tahani has been entitled to Employment and Support Allowance and Universal Credit since 11.2.20. It is her first claim for Employment and Support Allowance. She is referred for the work capability assessment, and following assessment the Universal Credit decision maker determines on 23.9.20 that Tahani does not have limited capability for work. The Employment and Support Allowance decision maker uses the same evidence to determine that Tahani does not have limited capability for work for the purposes of Employment and Support Allowance and terminates her award of Employment and Support Allowance from and including 6.10.20, the date of the Employment and Support Allowance decision.

If Tahani wishes to dispute the Universal Credit and Employment and Support Allowance decisions, she must apply for mandatory reconsideration of the Universal Credit decision in the normal way. She can lodge an appeal against the Employment and Support Allowance decision without applying for mandatory reconsideration, as she is eligible for payment of Employment Support Allowance pending the outcome of the appeal.

Tahani's award of Employment Support Allowance pending the appeal begins on 6.10.20 and ends on 10.2.21 due to time limiting.

U7026 – U7049

Date award begins

U7050 As there is no requirement to make a claim for the award to be made following an appeal as in U7005 - U7007¹, the claimant does not specify the period for which they wish to claim Employment and Support Allowance. The decision maker should normally begin the award on the day

1. after the last day of entitlement of the award which is the subject of the appeal
or
2. the medical evidence begins if later.

Note 1: See U7052 if the appeal follows a claim on which no award was made.

Note 2: See U7095 et seq where another benefit is claimed while the appeal is awaiting hearing.

1 UC, PIP, JSA & ESA (C&P) Regs (NI) 16, reg 6

U7051 The guidance in U7050 also applies where the appeal is admitted outside the one month time limit for appealing.

Note: See ADM Chapter A6 for guidance on appeal time limits.

U7052 Where

1. a claim is disallowed on which no award has been made after application of the work capability assessment **and**
2. the claimant makes an appeal and is awarded Employment and Support Allowance as in U7005 - U7007

the guidance in U7050 does not apply. Instead, the award begins on the day following the last day of the disallowance.

Example

Colin's award of Employment and Support Allowance is terminated from 15.8.17 after he fails without good cause to attend a medical examination. He submits a further claim from 15.8.17, but cannot be treated as having limited capability for work (see ADM Chapter U2). After application of the work capability assessment, the decision maker determines that Colin does not have limited capability for work for the whole period covered by the claim, and on 9.10.17 disallows the claim from 15.8.17. Colin makes an appeal against the decision on the claim, and sends in doctor's statements. He can be treated as having limited capability for work and awarded Employment and Support Allowance from 10.10.17.

U7053 – U7059

Late appeals

U7060 Where

1. a late appeal is admitted, either by the decision maker or the tribunal **and**
2. the conditions for making an award pending the outcome of the appeal are satisfied (see U7005 - U7007)

the decision maker should award Employment and Support Allowance as in U7050. If the claimant had claimed and been awarded Jobseeker's Allowance before the late appeal was admitted, the decision maker should consider the guidance at U7095 et seq.

Example

Rosie's award of Employment and Support Allowance is terminated from 23.6.18 following application of the work capability assessment. She claims and is awarded Jobseeker's Allowance from 2.7.18. She then lodges an appeal on 5.8.18 against the decision terminating Employment and Support Allowance, which is admitted by the tribunal. She also sends a doctor's statement for three months from 23.6.18. Her award of Jobseeker's Allowance ends on 7.8.18, and the decision maker awards them Employment and Support Allowance for the period 23.6.18 - 1.7.18, and from 8.8.18. If Rosie's appeal is successful, the decision maker should offset the Jobseeker's Allowance paid against any Employment and Support Allowance arrears due.

U7061 – U7079

Prisoners

U7080 Where a claimant is

1. entitled to Employment and Support Allowance pending an appeal **and**
2. imprisoned or detained in legal custody

the normal rules as to how this affects entitlement to and payment of Employment and Support Allowance apply¹.

Note: See ADM Chapter U6 (Disqualification) for guidance on prisoners.

1 ESA Regs (NI) 16, reg 95 - 97

U7081 Where

1. Employment and support Allowance entitlement ends as a result of a period of imprisonment **and**
2. the claimant's appeal is allowed

the decision maker should follow U7155 but only for the period of entitlement.

Example

Jackie is entitled to Employment and Support Allowance pending an appeal against a decision terminating Employment and Support Allowance following application of the work capability assessment. Jackie is sentenced to 18 months in prison, and after 6 weeks the decision maker treats her as not having limited capability for work from the first day of imprisonment, as the period of disqualification exceeded 6 weeks.

Jackie is released after 6 months. Her appeal still hasn't been heard, and therefore she is not required to make a claim in order to become entitled to Employment and Support Allowance. She is awarded Employment and Support Allowance from the date of release from prison after sending in evidence of limited capability for work from that date.

Her appeal is successful, and the decision maker awards them arrears if applicable, other than for the period when they were not entitled while they were in prison.

U7082 – U7089

Further Employment and Support Allowance claims

U7090 Where a person

1. makes an appeal against a disallowance and becomes entitled to Employment and Support Allowance as in U7005 - U7007 **and**
2. makes a claim for Employment and Support Allowance

the claim cannot be decided. This is because the claim is for a benefit which has already been awarded. See ADM Chapter A1 (Principles of decision making and evidence) for further guidance.

Note: Where the claim or accompanying evidence shows a deterioration or new condition, see U7121.

U7091 – U7094

Jobseeker's Allowance awarded before appeal made

U7095 Where the claimant

1. is awarded Jobseeker's Allowance after the Employment and Support Allowance award is terminated **and**
2. makes an appeal against the Employment and Support Allowance disallowance

the claimant can only be awarded Employment and Support Allowance as in U7005 - U7007 from the date that Jobseeker's Allowance ends if they relinquish the award of Jobseeker's Allowance, or that award otherwise ends. This is because a person cannot be entitled to Employment and Support Allowance if they are entitled to Jobseeker's Allowance¹.

Note: See ADM Chapter A4 (Supersession) for guidance on relinquishment, and Chapter U1 for guidance on Employment and Support Allowance conditions of entitlement.

1 WR Act (NI) 07, sec 1(3)

U7096 Where U7095 applies, the Employment and Support Allowance award begins on the day

1. after the award of Jobseeker's Allowance ends **or**
2. from which medical evidence is provided where this is later

but excludes any period for which they were entitled to Jobseeker's Allowance.

Example

David's award of Employment and Support Allowance is terminated from 8.5.18 after they fail the work capability assessment. He claims Jobseeker's Allowance on 17.5.18 after receiving the Employment and Support Allowance decision, and is awarded Jobseeker's Allowance from 8.5.18. On 7.7.18, he decides to make an appeal against the Employment and Support Allowance disallowance, and submits medical evidence from the date their entitlement to Employment and Support allowance ended. The tribunal admits the appeal. David's entitlement to Jobseeker's Allowance ends on 21.7.18. David is treated as having limited capability for work from 22.7.18 and is awarded Employment and Support Allowance from that date.

U7097 Decision makers are reminded that the prescribed time for claiming Jobseeker's Allowance can be extended for up to a month¹ where certain conditions apply². See ADM Chapter A2 for further guidance.

1 UC, PIP, JSA & ESA (C&P) Regs (NI) 16, reg 28(4); 2 reg 28(5)(d)

U7098 – U7119

Referral for work capability assessment

- U7120 The decision maker should not make a determination about limited capability for work until the appeal is determined by the tribunal¹. This means that the claimant should not be referred for the work capability assessment. But see U7121 et seq where there is a change of circumstances before the appeal is heard.

1 ESA Regs (NI) 16, reg 87(2)

Change of circumstances

U7121 Where

1. the claimant suffers from some specific disease or bodily or mental disablement from which they were not suffering when entitlement began **or**
2. a disease or bodily or mental disablement from which the claimant was suffering at that date has significantly worsened

they should be referred for the work capability assessment as normal even though the appeal has not been heard¹.

Note: In the case of a dual claim, the referral for the work capability assessment may be completed by Employment and Support Allowance or Universal Credit dependent as to which benefit the relevant change of circumstance was reported.

1 ESA Regs (NI) 16, reg 87(3)

U7122 Where, following application of the work capability assessment, the decision maker determines that the claimant has limited capability for work and limited capability for work-related activity and awards a component, the guidance about ending the assessment phase in ADM Chapter V6 applies. The payment pending appeal award is treated as a period of limited capability for work linking to an earlier period of limited capability for work under the 12-week linking rule¹.

Note: Where the earlier period of limited capability for work had lasted for more than 13 weeks the payment pending appeal award is revised to pay the support component from the first day of entitlement². Where the assessment phase had not ended in the previous period of limited capability for work, the payment pending appeal award is superseded to pay the support component from the date the assessment phase would have ended in respect of the earlier period of limited capability for work³.

1 ESA Regs (NI) 16, reg 86; 2 UC, PIP, JSA & ESA (D&A) Regs (NI) 16, reg 15(4); 3 reg 35(7)

See U7144 et seq for the further action to take after the appeal is heard.

U7123 Where the claimant can be treated as having limited capability for work¹ (other than the payment pending appeal award itself) for example where they are admitted to hospital, the decision maker should make the appropriate determination. This means that the claimant is no longer required to submit medical evidence. Where the claimant may be treated as having limited capability for work and work-related activity² the guidance at U7122 applies. See ADM Chapter U2 for guidance on treating the claimant as having limited capability for work and limited capability for work and work-related activity.

1 ESA Regs (NI) 16, regs 16, 21, 22 or 25; 2 reg 31

Payment of component

U7124 Where a claimant is

1. entitled to a payment pending appeal award pending an appeal **and**
2. becomes entitled to a component as in U7122 or U7123

the guidance on when the component is payable applies, regardless of when the change in the claimant's health condition occurred¹. The component will be payable either from the first day of the award of Employment and Support Allowance pending appeal (if the assessment phase was served in the period of limited capability for work) or from the date the assessment phase would have ended (if the previous period of limited capability for work terminated prior to that date).

1 ESA Regs (NI) 16, reg 5, 6 & 7(1); UC, PIP, JSA & ESA (D&A) Regs (NI) 16, reg 15(4), 26(1) & 35(7) or (8)

Example 1

Jane has been entitled to a payment pending appeal award since 8.5.25. Her previous award, which did not include a component, was for more than 13 weeks. She was admitted to hospital after suffering a stroke on 17.9.25. Following application of the work capability assessment, the decision maker determines that Jane has limited capability for work and limited capability for work-related activity. The payment pending appeal award is revised to award the support component from 8.5.25, the date the Pa Pending Appeal award began.

Example 2

Jennifer's award of Employment and Support Allowance was terminated after ten weeks following application of the work capability assessment. She makes an appeal and becomes entitled to a payment pending appeal award from the date her previous entitlement ended. She reports a worsening in her health and is referred for a further work capability assessment. Following application of the work capability assessment, the decision maker determines Jennifer has limited capability for work and limited capability for work-related activity. The assessment phase ends after week three of the current period of limited capability for work. The decision maker supersedes the decision to award Employment and Support Allowance pending the appeal, awarding the support component from the fourth week of the award.

Example 3

Jason's award of Employment and Support Allowance was terminated from 15.11.25 after he failed to attend a medical examination. He made a further Employment and Support Allowance claim from 15.11.25 and is referred for a work capability assessment. On 10.3.26 the decision maker determines that Jason does not have limited capability for work and disallows the claim from 15.11.25. Jason appeals and becomes entitled to a payment pending appeal award from 10.3.26.

Jason's health deteriorates, and he is referred for a further work capability assessment. The decision maker determines that Jason has limited capability for work and limited capability for work-related activity. The pending appeal award is superseded to award the support component from 9.6.26.

U7125 Where

1. the decision maker determines that the claimant
 - 1.1 can no longer be treated as having limited capability for work and/or limited capability for work-related activity as in U7123 **and**
 - 1.2 does not have limited capability for work following application of the work capability assessment **and**
2. the appeal has not been heard

the claimant can still be treated as having limited capability for work as part of their payment pending appeal award. Any decision awarding the component should be superseded to remove it¹.

¹ *ESA Regs (NI) 16, reg 26(3) & 87(4); UC, PIP, JSA & ESA (D&A) Regs (NI) 16, reg 26(1)*

Example

Daisy is entitled to a payment pending appeal award having appealed against a decision terminating her award of Employment and Support Allowance following application of the work capability assessment. She notifies she is pregnant and under consultant lead care. The decision maker treats Daisy as having limited capability for work and limited capability for work-related activity on the basis that she is pregnant and 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-related activity. The payment pending appeal award is superseded to include the support component.

Following the birth of her child Daisy is referred for a further work capability assessment. The Health Care Professional advised that Daisy does not satisfy any of the limited capability for work descriptors. The decision maker supersedes the award to remove the component from the date of the decision. Any further action depends on the outcome of the appeal.

U7126 The guidance at U7125 also applies where the claimant was awarded a component following a change in their health condition as in U7121 et seq.

U7127 Where U7124 or U7125 applies, U7144 et seq should be followed once the outcome of the appeal is known.

U7128 Where the decision maker makes a determination that the claimant

1. does not have limited capability for work following application of the work capability assessment as in U7121 **or**
2. is treated as not having limited capability for work because they have failed without good cause to return the questionnaire or attend for medical examination¹ **or**
3. is no longer treated as having limited capability for work as in U7125

the determination is treated as not made until the appeal is heard². This enables the claimant to continue to be treated as having limited capability for work as in U7005 - U7007³. The claimant must continue sending in medical certificates for entitlement to continue⁴.

Note: Where the appeal is allowed, the decision maker takes action as in U7155 et seq. No further action is taken on the previous work capability assessment referral, subject to the normal work capability assessment review process (see ADM Chapter U2).

1 ESA Regs (NI) 16, reg 18 or 19; 2 reg 87(4); 3 reg 26; 4 reg 26(2)(a)

U7129 Where the claimant starts work which is not exempt work, they should be treated as not having limited capability for work in the normal way even though the appeal has not been heard. If the appeal succeeds, see U7155 et seq for guidance on the action to take.

Note: See ADM Chapter V3 for guidance on the effect of work on Employment and Support Allowance entitlement.

U7130 – U7139

Change in claimant's health condition

- U7140 Where U7121 - U7124 applies and the work capability assessment is not completed by the time the appeal is heard, the action to take depends on the outcome of the appeal.

Appeal dismissed

- U7141 The guidance at U7144 - U7146 should **not** be followed. The claimant can continue to be treated as having limited capability for work pending application of the work capability assessment¹. See ADM Chapter U2 for further guidance.

1 ESA Regs (NI) 16, reg 26(2)

Appeal allowed

- U7142 If the appeal is allowed and the tribunal determines that the claimant does not have limited capability for work-related activity, the guidance at U7155 should be followed as normal, and arrears of the work-related activity component awarded if appropriate. However, the work capability assessment should still be carried out to establish whether the change in the claimant's health condition means that they now have limited capability for work-related activity.
- U7143 If the appeal is allowed and the tribunal determines that the claimant has or should be treated as having limited capability for work-related activity, the guidance at U7155 should be followed as normal, and arrears of the support component awarded as appropriate. The work capability assessment referral should be cancelled subject to the normal review process.

Note: See ADM Chapter U2 (limited capability for work & limited capability for work-related activity) for further guidance on the work capability assessment process.

Appeal withdrawn, struck out or dismissed

U7144 Where

1. the claimant is entitled to Employment and Support Allowance after making an appeal **and**
2. they are treated as having limited capability for work while providing medical statements **and**
3. either
 - 3.1 there is no change of circumstances (see U7121) **or**
 - 3.2 following a change of circumstances, the claimant is treated as having limited capability for work where they have been found not to have limited capability for work after application of the work capability assessment (see U7124) **and**
4. the appeal is withdrawn, struck out or dismissed

the claimant is treated as not having limited capability for work as in U7145¹.

Note 1: This does not apply where the claimant is found to have limited capability for work as in U7122 or is treated as having limited capability for work as in U7123 (see U7149).

Note 2: See U7160 for guidance if an appeal is reinstated.

Note 3: See U7161 for guidance if an appeal is remitted.

1 ESA Regs (NI) 16, reg 26; reg 87(5)

U7145 Where U7144 applies, the claimant is treated as not having limited capability for work from the first day of the benefit week following the date on which the decision maker receives the tribunal notification that the appeal is withdrawn, struck out or dismissed¹.

1 ESA Regs (NI) 16, reg 87(6)

U7146 The decision awarding Employment and Support Allowance is superseded on the grounds of a relevant change of circumstances¹, and is effective from the date of change². The change is that the claimant is treated as not having limited capability for work.

1 UC, PIP, JSA & ESA (D&A) Regs (NI) 16, reg 23(1); 2 Sch 1, para 1 & 4

Example

Heather's entitlement to Employment and Support Allowance ends when she fails the work capability assessment. She appeals, and Employment and Support Allowance is awarded from the date of disallowance. Her appeal is dismissed. The tribunal decision notice is received in the office administering her award of Employment and Support Allowance on 5.7.18. Heather's benefit week ends on Monday. The decision maker treats her as not having limited capability for work from 11.7.18, the first day of the next benefit week. The decision awarding Employment and Support Allowance is superseded and terminated from 18.7.18.

U7147 Decision makers should note that where the claimant makes an appeal against the decision made as in U7144 et seq, a further claim is required in order to consider entitlement to Employment and Support Allowance. The claimant cannot be treated as having limited capability for work as in U7005 - U7007 even if they make an appeal.

U7148 The condition about not being treated as having limited capability for work within six months of a determination that the claimant does not have limited capability for work only applies to a determination made

1. following application of the work capability assessment **or**
2. where the claimant is treated as not having limited capability for work for a failure to return the questionnaire or attend for medical examination.

It does not apply to a determination that the claimant is treated as not having limited capability for work as in U7144 et seq.

Note: See ADM Chapter U2 (limited capability for work and limited capability for work-related activity) for guidance on where a claimant is treated as not having limited capability for work.

U7149 Where

1. the claimant is
 - 1.1 found to have limited capability for work following application of the work capability assessment (see U7122) **or**
 - 1.2. treated as having limited capability for work (see U7123) **and**
2. the appeal is withdrawn, struck out or dismissed (see U7144)

the claimant is not treated as not having limited capability for work as in U7144 et seq. Entitlement to Employment and Support Allowance is not affected by the outcome of the tribunal appeal.

U7150 – U7154

Appeal allowed

U7155 Where the appeal is successful, the tribunal's findings of fact and determination are conclusive for the purposes of whether the claimant has limited capability for work or limited capability for work-related activity in their current entitlement to Employment and Support Allowance¹. But see U7156 where there is a change of circumstances before the appeal is determined.

1 ESA Regs (NI) 16, reg 87(7)

Example

Jack was entitled to Employment and Support Allowance from 13.5.18 after making an appeal against a decision which embodied a determination that he did not have limited capability for work. His appeal is allowed, and the tribunal finds that he should be placed in the work-related activity group. As the previous entitlement to Employment and Support Allowance ended after more than 13 weeks, arrears of the work-related activity component are paid up to 12.5.18 if appropriate. The decision maker makes determinations that Jack has limited capability for work but does not have limited capability for work-related activity in relation to his current entitlement, and revises the decision awarding Employment and Support Allowance from 13.5.18.

U7156 The tribunal's findings or determinations do not apply where

1. there was a change of circumstances after entitlement to Employment and Support Allowance began as in U7121 **and**
2. the decision maker is satisfied that as a result it is no longer appropriate to rely on the tribunal's findings or determinations¹.

1 ESA Regs (NI) 16, reg 87(8)

Example

Pearl's entitlement to Employment and Support Allowance is ended after ten weeks following application of the work capability assessment, and makes an appeal. She is awarded Employment and Support Allowance after submitting medical certificates. Later she becomes pregnant with complications, and the decision maker treats her as having limited capability for work and limited capability for work-related activity. Pearl is placed in the support group from the 4th week of her current entitlement. The appeal is allowed, the tribunal placing her in the work-related activity group. The decision maker determines that the tribunal's findings should not be followed and takes no further action on the award made pending the appeal.

U7157 – U7159

Appeal reinstated

- U7160 Where an appeal which has been struck out is subsequently reinstated, the decision maker should consider whether a further pending appeal award can be made, in the same way as for a late appeal. See ADM Chapter A6 for guidance on reinstatement of appeals.

Appeal remitted

- U7161 Where an appeal is dismissed but is subsequently remitted by the tribunal or the Commissioner for rehearing, the decision maker should consider whether a further pending appeal award can be made, in the same way as for a late appeal (see U7166).

Note: See ADM Chapter A6 (Appeals) for guidance on remitted appeals.

Example 1

Roger's award of Employment and Support Allowance is terminated when his appeal against termination of the Employment and Support Allowance following application of the work capability assessment is dismissed by the tribunal. Roger is awarded Jobseeker's Allowance. The Commissioner sets aside the tribunal decision, and remits the appeal for rehearing. Roger can be awarded Employment and Support Allowance if he gives up his Jobseeker's Allowance award and provide doctor's statements.

Example 2

Mick's award of Employment and Support Allowance is terminated from 1.10.18 following application of the work capability assessment. He is awarded Employment and Support Allowance pending an appeal against the termination. The tribunal dismisses the appeal on 19.5.19, and the Employment and Support Allowance award is terminated from 27.5.19. Mick immediately makes a further claim for Employment and Support Allowance, and is treated as having limited capability for work pending application of the work capability assessment, as it is more than 6 months since the previous limited capability for work determination was made.

On 24.7.19 the tribunal decision is set aside by the Commissioner, and the appeal is listed for rehearing. As Mick is already entitled to Employment and Support Allowance, there is no need to make a further award pending the outcome of the appeal. The decision maker is not prevented from carrying out the work capability assessment as normal.

U7162 – U7164

Appeal to Commissioner by the claimant or the Department

U7165 If the tribunal dismisses the appeal, and the claimant applies for permission to appeal to the Commissioner, the decision maker should make a determination about limited capability for work and end the award as in U7144 et seq.

U7166 Where the Commissioner allows the appeal and remits it to a tribunal, the decision maker may need to revise¹ the decision in order to reinstate the award, as it may be possible to treat the claimant as having limited capability for work as in U7005 - U7007. However, this depends on any benefit awarded or other changes which may have occurred since the appeal to the tribunal was initially heard.

1 UC, PIP, JSA & ESA (D&A) ESA Regs (NI) 16, reg 5(1)(a)

U7167 – U7999

The content of the examples in this document (including use of imagery) is for illustrative purposes only