Chapter 42 - Limited capability for work and limited capability for work-related activity

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Regular treatment categories Appendix

Statutes commonly referred to in Chapter 42

|  |  |
| --- | --- |
| **Full title** | **Abbreviation** |
| Social Security Contribution and Benefits (Northern Ireland) Act 1992 | SS C&B (NI) Act 92 |
| Welfare Reform Act (Northern Ireland) 2007 | WR Act (NI) 07 |

Statutory Rules commonly referred to in Chapter 42

|  |  |  |
| --- | --- | --- |
| **Short description** | **Full title** | **Abbreviation** |
| Employment and Support Allowance Regulations | The Employment and Support Allowance Regulations (Northern Ireland) 2008 No. 280 | ESA Regs (NI) |
| Medical Evidence Regulations  | Social Security (Medical Evidence) Regulations (Northern Ireland) 1976 No. 175 as amended | SS (Med Ev) Regs (NI) |

Chapter 42 - Limited capability for work and limited capability for work-related activity

Introduction

42001 The work capability assessment describes the end to end medical process comprising of 2 elements to help the decision maker decide

**1.** whether a claimant has limited capability for work and is entitled to Employment and Support Allowance

**2.** whether

**2.1** a claimant who has limited capability for work also has limited capability for work-related activity and is entitled to the support component **or**

**2.2** does not have limited capability for work-related activity and is entitled to the work-related activity component.

Benefits affected

42002 Whether a claimant has limited capability for work and limited capability for work-related activity must be determined using the following guidance1.

1 WR Act (NI) 07 Part 1

42003 A determination on whether a claimant

**1.** has or does not have **or**

**2.** is to be treated as having or not having

 limited capability for work for entitlement to any benefit, allowance or advantage is conclusive for other decisions on any other benefit, allowance or advantage for the same period where limited capability for work is relevant to entitlement to that benefit, allowance or advantage1.

1 SS & CS (D&A) Regs (NI), reg 10

42004 The benefits and allowances affected include Employment and Support Allowance1, Jobseeker’s Allowance2 and National Insurance credits3.

1 ESA Regs (NI); 2 WR Act (NI) 07, Sch 3, para 6(6); 3 SS (Credits) Regs (NI) 1975, reg 8B

Scope of this chapter and definitions

42005 This chapter contains guidance on

**1.** determination of limited capability for work (see DMG 42020)

**2.** certain claimants to be treated as having limited capability for work (see DMG 42030)

**3.** evidence and information required for determining limited capability for work (see DMG 42140)

**4.** limited capability for work assessment (see DMG 42170)

**5.** exceptional circumstances (see DMG 42310)

**6.** treated as having limited capability for work until assessment (see DMG 42350)

**7.** treated as not having limited capability for work (see DMG 42450)

**8.** work or training beneficiary (see DMG 42880)

**9.** limited capability for work-related activity (see DMG 42610).

Meaning of a health care professional

42006 A health care professional1 means

**1.** a registered medical practitioner **or**

**2.** a registered nurse **or**

**3.** a registered occupational therapist or physiotherapist2.

1 ESA Regs (NI), reg 2(1); 2 Health Act 1999 sec 60

Meaning of claimant

42007 Claimant means a person who has claimed Employment and Support Allowance1.

1 WR Act (NI) 07, sec 24(1)

 42008 – 42019

Determination of limited capability for work

42020 To be entitled to Employment and Support Allowance a claimant must have limited capability for work1. This means that the claimant‘s capability for work is limited by their physical or mental condition and it is not reasonable to require them to work2.

1 WR Act (NI) 07, sec 1(3)(a); 2 sec 1(4)

42021 The question of limited capability for work must be decided first in the work capability assessment process as this determines entitlement to benefit. This is normally by questionnaire and face to face assessment at a medical. This part of the work capability assessment process is referred to as the limited capability for work assessment.

42022 A claimant can be treated as having limited capability for work pending a determination of limited capability for work provided certain conditions are satisfied1 (see DMG 42350 et seq).

1 ESA Regs (NI), reg 30

42023 Certain claimants are treated as having limited capability for work and do not have to undergo a limited capability for work assessment1 (see DMG 42031). However some claimants who do not have to be assessed for limited capability for work will still have to be assessed for limited capability for work-related activity (see DMG 42610 et seq).

1 ESA Regs (NI), reg 20

 42024 – 42029

Certain claimants to be treated as having limited capability for work

42030 A claimant is treated as having limited capability for work if the claimant

**1.** satisfies certain conditions1 (see DMG 42031)

**2.** is a hospital in-patient2 (see DMG 42070)

**3.**  is receiving certain regular treatments3 (see DMG 42090)

**4.** has limited capability for work for part of a day4 (see DMG 42100)

**5.** is not a qualifying young person and is receiving education in certain circumstances5 (see DMG 42125)

**6.** has exceptional circumstances6 (see DMG 42310).

1 ESA Regs (NI), reg 20; 2 reg 25; 3 reg 26; 4 reg 27; 5 reg 33; 6 reg 29

Certain conditions

42031 Claimants are treated as having limited capability for work and do not have to undergo the limited capability for work assessment if any of the circumstances in DMG 42032 apply to them1 unless they are treated as not having limited capability for work because they are working2 (see DMG 42600 et seq).

1 ESA Regs (NI), reg 20; 2 reg 40 & 44

42032 For the purposes of DMG 42031 the circumstances are that a claimant1

**1.** is terminally ill (see DMG 42035 et seq)

**2.** is

**2.1** receiving **or**

**2.2** likely to receive **or**

**2.3** recovering from

 treatment for cancer by way of chemotherapy or radiotherapy and the decision maker is satisfied that the claimant should be treated as having limited capability for work (see DMG 42050 - 42052)

**3.** is known or reasonably suspected to be a carrier, or to have been in contact with a case of a relevant infection or contamination **and**

**3.1** is excluded or abstains from work in accordance with a request or notice in writing in accordance with legislation **or**

**3.2** is otherwise prevented from working in accordance with legislation (see DMG 42060)

**4.** is a pregnant woman (see DMG 42061 for further guidance)

**4.1** where 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 **or**

**4.2** who is in the Maternity Allowance period and is entitled to Maternity Allowance **or**

**4.3** whose expected week of confinement or actual date of confinement has been certified2 on any day in the period

**4.3.a** beginning with the first date of the 6th week before the expected week of confinement or the actual date of confinement, whichever is earlier **and**

**4.3.b** ending on the 14th day after the actual date of 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

**5.** satisfies any of the descriptors in the limited capability for work-related activity activities about

**5.1** conveying food or drink to the mouth **or**

**5.2** chewing or swallowing food or drink3.

1 ESA Regs (NI), reg 20; 2 SS (Med Ev) Regs (NI) 1976, reg 2(3);
3 ESA Regs (NI), Sch 3, para 15 or 16

 42033 – 42034

Terminally ill

42035 “Terminally ill” is defined as a claimant who is suffering from a progressive disease and death in consequence of that disease can be reasonably expected within 6 months1.

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

42036 Claimants claiming under special rules are terminally ill as diagnosed by a General Practitioner or other health care professional.

42037 A claimant who is terminally ill and has made

**1.** a claim expressly on the ground of being terminally ill **or**

**2.** an application for supersession or revision expressly on the ground of being terminally ill

 is entitled to the support component or work-related activity component without the assessment phase having ended1.

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

 42038 – 42049

Cancer treatment

42050 A claimant can be treated as having limited capability for work if1

**1.** they are

**1.1** receiving treatment for cancer by way of chemotherapy or radiotherapy **or**

**1.2** likely to receive treatment as in **1.1** within six months after the date of the limited capability for work determination **or**

**1.3** recovering from treatment as in **1.1** **and**

**2.** the decision maker is satisfied that the claimant should be treated as having limited capability for work.

1 ESA Regs (NI), reg 20(1)(b)

42051 The claimant is asked in the questionnaire (form ESA50) to ensure that their health care professional completes page 20 of the form, giving details of the diagnosis, treatment including how long it is likely to last, and the expected recovery period, as well as an opinion on the effects on the claimant’s ability to work. The claimant is asked to complete the form as normal if other health conditions are present.

 **Note:** See DMG 42455 et seq for guidance on when the claimant does not return the questionnaire.

42052 The decision maker should take into account the debilitating effects in DMG 42050 **1.** when considering whether the claimant should be treated as having limited capability for work. The presumption is that claimants who fall within DMG 42050 **1.** will be treated as having limited capability for work, where the cancer treatment has work limiting side effects, and those effects are likely to limit all forms of work.

 **Example 1**

 Martin is diagnosed with cancer of the oesophagus, and has a course of chemotherapy to reduce to reduce the size of the tumour. Once the treatment starts, Martin becomes too ill to work, and claims and is awarded Employment and Support Allowance. He is referred for the work capability assessment. In the ESA50, Martin’s oncologist states that the chemotherapy will continue for 3 months, after which it is hoped to remove the tumour surgically. He will probably require a course of radiotherapy after that. The treatment so far has left Martin feeling very tired, nauseous and weak, as well as giving him difficulties with speaking, eating and drinking. The health care professional recommends that Martin is treated as having limited capability for work for 9 months, before referring for a further work capability assessment to see if Martin’s condition has improved. The decision maker accepts the advice, and determines that Martin has limited capability for work.

 **Example 2**

 Jay has exploratory surgery as a day patient to remove a lump in his groin. He is diagnosed with non-Hodgkin’s lymphoma. He starts a course of chemotherapy, and is awarded Employment and Support Allowance after the second treatment leaves him unable to work.

 Jay is referred for the work capability assessment. In the ESA50, his oncologist says that Jay will have up to 8 chemotherapy treatments by injection every three weeks. Jay is often too weak to get out of bed as a result of the treatment. He has loss of sensation in his hands and feet, and is prone to falling. He has twice been admitted to hospital for treatment for dehydration due to vomiting and diarrhoea. If the side effects continue, the chemotherapy treatment may stop and be replaced by radiotherapy over a longer period. He is likely to take at least six months to recover from the chemotherapy.

 Medical advice is that Jay should be treated as having limited capability for work, with a review after a year. The decision maker accepts the advice.

 **Example 3**

 Heather is diagnosed with primary breast cancer following a mammogram. She is admitted to hospital for surgery to remove the tumour, and is required to stay in hospital for 24 hours or longer. She claims and is awarded Employment and Support Allowance. Heather is referred for the work capability assessment. On the ESA50, Heather’s oncologist states that Heather will start a course of radiotherapy in about 4 weeks. The radiotherapy will be likely to make her very tired for several months as the treatment progresses, and after it has ended. The health care professional recommends that Heather should be treated as having limited capability for work for 6 months, with a further review to check on progress. The decision maker determines that Heather is treated as having limited capability for work.

 **Example 4**

 Rachel has difficulties with mobility, standing and sitting and reaching as a result of generalised arthritis. A small spot on her nose is diagnosed as a melanoma or skin cancer. The melanoma is surgically removed under local anaesthetic. She claims and is awarded Employment and Support Allowance.

 Rachel is referred for the work capability assessment. Her General Practitioner completes the statement in the ESA50 to say that Rachel had facial pain, bruising and swelling for two weeks after the surgery. She will be referred for a single session of radiotherapy, but this is unlikely to affect her ability to work. Rachel completes the rest of the questionnaire to give details about how her arthritis affects her ability to work.

 Rachel is required to attend for medical examination. The health care professional is of the opinion that Rachel does not satisfy any of the limited capability for work descriptors, and should not be treated as having limited capability for work, because although she is due to have radiotherapy treatment, this is not likely to have any debilitating effects. The decision maker accepts the advice, and determines that Rachel does not have, and is not treated as having limited capability for work.

 42053 – 42059

Meaning of relevant infection or contamination

42060 Infection or contamination1 means an infectious disease to which certain legislation2 applies.

1 ESA Regs (NI), reg 2(1); 2 Public Health Act (NI) 1967, sec 15(1);
Public Health (Aircraft) Regs (NI) 1971, reg 8 & 9; Public Health (Ships) Regs (NI) 1971, reg 9 & 10

Pregnant women

42061 A pregnant woman can be treated as having limited capability for work in certain circumstances1 (see DMG 42032 **4.**).

1 ESA Regs (NI), reg 20 (d), (e) & (f)

42062 “Sickness of pregnancy”, which can also be described as “emesis”, “hyperemesis”, “hyperemesis gravidarum”, or “morning sickness”, comes within the definition of a disease. This condition usually occurs between the 29th and 34th weeks before the week of confinement but can also be accepted outside that period when it may include a complication in the pregnancy.

 **Note:** “Pregnancy” itself does not come within the definition of a disease.

42063 Unless a woman can be treated as having limited capability for work because of pregnancy as in DMG 42032 **4.**, she should provide other evidence of limited capability for work, for example

**1.** a complication in the pregnancy **or**

**2.** a medical condition not related to pregnancy.

42064 – 42069

Hospital in-patient

42070 Claimants are treated as having limited capability for work where they are

**1.** undergoing medical or other treatment as a patient in a hospital or similar institution **or**

**2.** recovering from treatment as in **1.**1.

1 ESA Regs (NI), reg 25(1)

 **Note:** Further guidance on ‘hospital or similar institution’ can be found in DMG Chapter 54.

1 ESA Regs (NI), reg 25(1); 2 regs 40 & 44

42071 A claimant is regarded as undergoing treatment as in DMG 42070 **1.** where they attend a residential programme of rehabilitation for the treatment of drug or alcohol abuse1.

1 ESA Regs (NI), reg 25(2)

42072 A claimant is regarded as undergoing treatment as in DMG 42070 **1.** only where they have been advised by a health care professional to stay for a period of 24 hours or longer following that treatment1. This applies even if the claimant disregards that advice and returns home within 24 hours.

1 ESA Regs (NI), reg 25(3)

 **Example**

 Sarah is admitted to hospital for surgery involving a general anaesthetic. She was told before the surgery that she should bring a night bag in case she has to stay overnight. Sarah’s surgery goes well and she is discharged the same day. As Sarah was not advised to stay overnight, she cannot be treated as having limited capability for work. Sarah will need to be assessed for limited capability for work in the normal way by completing a questionnaire and attending for medical if necessary.

42073 “Day of recovery” means a day on which a claimant is recovering from treatment as an in-patient in a hospital or similar institution and the decision maker is satisfied that the claimant should be treated as having limited capability for work on that day1.

1 ESA Regs (NI), reg 25(2)

42074 A hospital in-patient can be treated as having limited capability for work even if admitted only for investigation of symptoms unless the investigation reveals that admission was due to another factor such as a personality disorder1.

1 R(S) 1/58; R(S) 6/59

 42075

42076 Where

**1.** on consideration of all of the evidence after application of the work capability assessment , the decision maker is of the opinion that the claimant would not have, or would not be treated as having limited capability for work **and**

**2.** either

 **2.1** the health care professional advises that the claimant is about to go into hospital for treatment within 21 days of the medical examination **or**

 **2.2** the claimant subsequently provides evidence that they are about to go into hospital within 21 days of the date when **1.** applies

 the decision maker should defer making a determination as to whether the claimant has limited capability for work until it is confirmed that the claimant has become a hospital in-patient.

Planned admission postponed

42077 If

**1.** the claimant is not admitted to hospital as planned **and**

**2.** a new date for admission is provided **and**

**3.** the claimant continues to provide evidence of limited capability for work (see DMG 42145 et seq)

 the decision maker should continue to defer making a determination on limited capability for work as in DMG 42076.

Planned admission cancelled

42078 Where a planned admission to hospital is cancelled and no new date is proposed, the decision maker should determine whether the claimant has limited capability for work as normal.

 42079 – 42089

Receiving regular treatment

42090 Claimants are treated as having limited capability for work when they

**1.** receive

**1.1** regular weekly treatment by way of haemodialysis for chronic renal failure **or**

**1.2** treatment by way of plasmapheresis or by way of radiotherapy **or**

**1.3** regular weekly treatment by way of total parenteral nutrition for gross impairment of enteric function1 **and**

**2.** satisfy the condition in DMG 420932

 unless they are treated as not having limited capability for work because they are working3 (see DMG 42600 et seq).

1 ESA Regs (NI), reg 26(1); 2 reg 26(2); 3 reg 40 & 44

42091 An explanation of the treatments in DMG 42090 is in the Appendix to this Chapter1.

1 ESA Regs (NI), reg 26

42092 Subject to DMG 42093 a claimant referred to in DMG 42090 is to be treated as having limited capability for work during any week in which that claimant is engaged in treatment or has a day of recovery from that treatment1.

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

42093 Claimants who receive the treatment in DMG 42090 **1.** are only treated as having limited capability for work from the first week of treatment where they have no fewer than

**1.** 2 days of treatment **or**

**2.** 2 days of recovery from that treatment **or**

**3.** 1 day of treatment and 1 day of recovery from that treatment

 but the days of treatment or recovery or both need not be consecutive1.

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

42094 The condition in DMG 42093 must be satisfied during the period of the current claim for Employment and Support Allowance. Where the condition was satisfied before the date of the current claim, and is not satisfied at the date of that claim, the claimant cannot be treated as having limited capability for work under the regular treatment rules.

42095 There are no linking rules for periods of regular treatment. If

**1.** a claimant has been treated as having limited capability for work as in DMG 42090 **and**

**2.** entitlement to Employment and Support Allowance ends (for example because the treatment ends) **and**

**3.** a further award of Employment and Support Allowance is made from a later date when treatment begins again

 the claimant must satisfy the condition in DMG 42093 again before they can be treated as having limited capability for work.

42096 A “day of recovery”1 means a day on which the claimant is recovering from any of the forms of treatment listed at DMG 42090, and the decision maker is satisfied the claimant should be treated as having limited capability for work on that day.

1 ESA Regs (NI), reg 26(3)

42097 Where a claimant is in receipt of income-related Employment and Support Allowance, normal rules for exempt work apply (see DMG 42600 et seq). This means that if the claimant works during a week and their work does not fit within exempt work rules they cannot be treated as having limited capability for work1.

1 ESA Regs (NI), reg 44(3)(a)

42098 Where a claimant is

**1.** in receipt of contribution-based Employment and Support Allowance **and**

**2.** treated as having limited capability for work as per DMG 42092 **and**

**3.** working on any day during a week when he is receiving regular treatment or recovering from it

 the work does not affect the claimant’s entitlement to contribution-based Employment and Support Allowance1. But the claimant is only paid contribution-based Employment and Support Allowance for the days of receiving or recovering from treatment if they are not days of work2 (see DMG Chapter 46 for further guidance).

1 ESA Regs (NI), reg 46; 2 reg 169

 42099

Claimants treated as having limited capability for work throughout a day

42100 If a claimant

**1.** has limited capability for work at the start of a day but becomes capable later that day **or**

**2.** is capable of work at the start of the day but develops limited capability for work during the day

 the whole day is treated as a day of limited capability for work if no work is done on that day1.

 **Note:** The exception to this would be where the night shift worker provision applies (see DMG 42105).

1 ESA Regs (NI), reg 27

42101 This provision applies where there is a sudden onset of, or recovery from, an incapacitating condition. It does not provide that a claimant with a variable condition that incapacitates them for part of each day has limited capability for work throughout the whole of every day.

42102 When decision makers determine that a claimant has limited capability for work they can consider if this provision applies to treat the claimant as having limited capability for work for the day at the beginning or end of the period of illness.

42103 Even if a claimant is treated as having limited capability for work under this provision any work that they do on that day or on another day in that week may mean that they are to be treated as not having limited capability for work. A day cannot be a day of limited capability for work if they have undertaken work on that day1. The normal rules for exempt work2 apply.

 **Note:** For guidance on exempt work see DMG Chapter 41.

1 ESA Regs (NI), reg 27; 2 reg 45

 **Example**

 If a claimant works 9am to 5pm from Monday to Friday, and on the Wednesday has an accident at work at 11am resulting in them being unable to continue with that day’s work this will not be treated as a day of limited capability for work. The first day of limited capability for work will be the day following the accident if they do not return to work on that day.

 42104

Night shift workers

42105 Night shift workers are claimants who work for a period of employment which begins on one day and extends over midnight into the next day. It is necessary to establish how many hours are worked before and after midnight. The hours of work on any other occasion are not relevant1.

1 R(I) 31/55

42106 The day on which the lesser hours are worked is treated as a day of limited capability for work if1

**1.** a claimant works on a night shift for a continuous period over midnight **and**

**2.** the claimant has limited capability for work for the rest of that day.

1 ESA Regs (NI), reg 28(1)

42107 The second day of a night shift is treated as a day of limited capability for work if1

**1.** the hours before and after midnight are equal **and**

**2.** the night shift is at the beginning of the period of limited capability for work.

1 ESA Regs (NI), reg 28(2)(a)

42108 The first day of the shift is treated as a day of limited capability for work if1

**1.** the hours before and after midnight are equal **and**

**2.** the night shift is at the end of a period of limited capability for work.

1 ESA Regs (NI), reg 28(2)(b)

42109 The provisions do not apply to claimants whose employment lasts for more than 24 hours on either side of midnight1. For example, it would not apply to continuous employment from 6 pm on Monday to 2 am on Wednesday. In this example the Wednesday cannot be treated as a day of limited capability for work.

1 R(U) 18/56

42110 A night worker paid by the shift is normally paid for a meal break and this should be included in the calculation of the total time worked.

42111 A night worker paid by the hour is not normally paid for a meal interval. This should be deducted from the shift hours to arrive at the actual hours worked. The shift is still regarded as one continuous period of employment because the meal break is a normal break.

 42112 – 42119

Qualifying young claimants to be treated as having limited capability for work in certain circumstances

42120 To help satisfy the condition relating to youth claimants can be treated as having limited capability for work for days on which they are entitled to Statutory Sick Pay1 (see DMG Chapter 41).

1 ESA Regs (NI), reg 33(1)

 42121 – 42124

Disabled students treated as having limited capability for work

42125 In addition for the purposes of income-related Employment and Support Allowance a claimant is treated as having limited capability for work where the claimant is

**1.** not a qualifying young person **and**

**2.** receiving education **and**

**3.** entitled to a Disability Living Allowance, Armed Forces Independence Payment or Personal Independence Payment1.

 **Note:** See DMG Chapter 41 for further guidance on qualifying young persons.

1 ESA Regs (NI), reg 18 & 33(2)

42126 Decision makers should note that a qualifying young person ceases to be a qualifying young person where they are in receipt of Employment and Support Allowance1. See DMG Chapter 41 for where a qualifying young person can be entitled to income-related Employment and Support Allowance.

1 CHB (Gen) Regs, reg 2(4) & 8

 42127 – 42139

Evidence and information for limited capability for work

General

42140 Information or evidence is needed to determine whether a claimant has limited capability for work1.

1 ESA Regs (NI), reg 21

 42141 – 42144

Evidence

42145 Evidence of limited capability for work should be provided for the day or days of limited capability for work until the claimant has undergone the limited capability for work assessment. Evidence may be1

**1.** self-certification2 (see DMG 42146) **or**

**2.** a statement from a doctor3 (see DMG 42148) **or**

**3.** if it is unreasonable to require such a statement, other evidence which is sufficient to show that the claimant is limited by their physical or mental condition and it is not reasonable to expect them to work because of some specific disease or bodily or mental disablement4.

1 ESA Regs (NI), reg 21(1)(a); 2 SS (Med Ev) Regs (NI), reg 5; 3 reg 2(1)(a), (b) & (c); 4 reg 2(1)(1A)

Self-certification

42146 Evidence of limited capability for work for a spell of less than 8 days, or for the first 7 days of a longer spell, may be self-certification1. Self-certification is only appropriate for the first 7 days of a period of limited capability for work.

 **Note:** Where periods of limited capability for work link (see DMG Chapter 41), a claimant can self-certify for the first seven days of each period of limited capability of work even if they are treated as a continuation of an earlier period of limited capability for work.

1 SS (Med Ev) Regs (NI), reg 5(1)

42147 A self-certificate is1

**1.** a declaration made in writing by the claimant, in a form approved by the Department **or**

**2.** a verbal declaration by the claimant in such cases where the decision maker allows (for example where the claim to Employment and Support Allowance is made by telephone).

 **Note:** It should include the information that they have been unfit for work from a date or for a period. It may also include a statement that the claimant expects to continue to be unfit for work.

1 SS (Med Ev) Regs (NI), reg 5(2)

Doctor’s statements

42148 A doctor’s statement is a statement given in writing by a doctor. They are made on an approved form1.

1 SS (Med Ev) Regs (NI), reg 2(1) & Sch 1, Pt 2

42149 A doctor1 means a registered medical practitioner and includes a medical practitioner outside the UK who is asked for a medical opinion by the Department. Doctors must be registered or recognised as such in the country in which they pursue a medical practice.

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

Other evidence

42150 Evidence other than on an approved form or from a registered medical practitioner can be accepted1 if

**1.** it is unreasonable to require a doctor's statement **and**

**2.** the evidence shows that the claimant is unfit for work because of a disease or disablement.

1 SS (Med Ev) Regs (NI), reg 2(1)(d)

42151 The decision maker decides what is reasonable in each case. For example, evidence from alternative therapists such as chiropractors, osteopaths, etc can be accepted if the claimant is usually treated by them as well as, or instead of, a General Practitioner.

42152 Depending on the circumstances1 a declaration that a claimant is incapable of following a particular occupation and is receiving non-medical treatment such as Christian Science treatment (i.e. treatment through prayer) may be sufficient proof of limited capability for work.

1 R(S) 9/51

42153 An employer's certificate which only confirms absence from work is not sufficient evidence1.

1 R(S) 13/51

 42154 – 42159

Information

42160 The decision maker can ask for any additional information to determine whether a claimant has limited capability for work1.

 **Note:** See DMG 42192 – 42194 for guidance on the role of medical services in information gathering.

1 ESA Regs (NI), reg 21(1)(c)

42161 Any information relating to the claimant’s ability to perform certain activities1 may be requested in the form of a questionnaire2 unless

**1.** there is already sufficient information to determine the question3

**2.** a claimant is to be treated as having limited capability for work4 because they

**2.1** satisfy certain conditions (see DMG 42031) **or**

**2.2** are a hospital patient (see DMG 42070) **or**

**2.3** receive certain regular treatments (see DMG 42090) **or**

**2.4** are a young person in certain circumstances (see DMG 42120).

1 ESA Regs (NI), reg 34; 2 reg 21(1)(b); 3 reg 21(2); 4 reg 21(3)

 42162 – 42169

Limited capability for work assessment

Introduction

42170 The limited capability for work assessment is the part of the work capability assessment process that assesses limited capability for work. It will normally be completed during the assessment phase of Employment and Support Allowance1 and determines entitlement to benefit beyond the assessment phase.

1 WR Act (NI) 07, sec 8(1) & (2)

42171 Whether a claimant’s capability for work is limited by physical or mental condition and the limitation is such that it is not reasonable to require that claimant to work is determined on the basis of a limited capability for work assessment1.

1 ESA Regs (NI), reg 19(1)

42172 Satisfying the test for limited capability for work depends on the ability to perform certain functions1, reliably and repeatedly.

1 ESA Regs (NI), reg 19(2)

42173 When assessing the extent of the claimant’s limited capability for work, it is a condition that the claimant’s inability to perform1

**1.** physical descriptors2 arises

**1.1** from a specific bodily (i.e. physical) disease or disablement **or**

**1.2** as a direct result of treatment by a registered medical practitioner for such a condition **and**

**2.** mental descriptors3 arises

**2.1** from a specific mental illness or disablement **or**

**2.2** as a direct result of treatment by a registered medical practitioner for such a condition.

 The level of each activity is measured by points which must reach a set total for entitlement to benefit.

1 ESA Regs (NI), reg 19(5); 2 Sch 2, Part 1; 3 Sch 2, Part 2

 **Example 1**

 Brian suffers from rheumatoid arthritis in his hands and knees, and claims Employment and Support Allowance. In the questionnaire Brian states that due to cognitive and mental impairment he has difficulty with learning tasks, awareness of hazards and completing personal actions. At the medical examination, Brian explains that the high level of painkillers he takes for his arthritis makes him too tired to concentrate. The health care professional advises that Brian is mentally disabled by the medication, but not sufficiently to satisfy any mental health descriptors. Brian scores 6 points for mobility problems.

 **Example 2**

 Rita is injured in an accident which leaves her with significant mobility problems and facial scarring. Rita also suffers from depression and social anxiety disorder as a result of the accident. Meeting people outside her immediate family brings on a panic attack, so she avoids this. She scores 6 points for mobility problems arising from her physical health condition, and 9 points for coping with social engagement arising from her mental health condition.

 **Example 3**

 Alisa suffers from mechanical back pain. She states that she has difficulties with mobilising as well as getting about unless she has someone with her. The health care professional advises that Alisa’s need for assistance with getting about is only due to her physical problems. The decision maker determines that Alisa does not score any points for mental health descriptors.

42174 Certain claimants can be treated as having limited capability for work without undergoing the limited capability for work assessment (see guidance at DMG 42030).

42175 Claimants who are not treated as having limited capability for work as per DMG 42174 and so have to undergo the limited capability for work assessment can be treated as having limited capability for work pending actual assessment, provided certain conditions are satisfied (see DMG 42350 et seq)1.

1 ESA Regs (NI), reg 30

42176 As part of the assessment, claimants who are not treated as having limited capability for work may be required to complete a questionnaire (see DMG 42161) and if necessary attend a medical examination. If they fail without good cause to do either, they can be treated as not having limited capability for work1 (see DMG 42450 et seq).

1 ESA Regs (NI), reg 22 & 23

42177 A claimant will have limited capability for work if, by adding the points scored against any descriptor, a score of at least 15 points is reached1 (see DMG 42218).

1 ESA Regs (NI), reg 19(3)

 42178 – 42189

Application of the assessment

42190 The questionnaire is not required if the claimant

**1.** satisfies certain conditions (see DMG 42032) **or**

**2.** is a hospital patient (see DMG 42070) **or**

**3.** receives certain regular treatment (see DMG 42090)1 **or**

**4.** the decision maker is satisfied that there is sufficient information to decide whether a claimant has limited capability for work without it2.

 All other claimants will be sent the questionnaire (ESA50) during the assessment phase of their award of Employment and Support Allowance.

1 ESA Regs (NI), reg 21(3); 2 reg 21(2)

42191 The questionnaire is designed for the claimant to give as much information about their condition and how it affects them in their daily functioning and how they manage their condition.

42192 Medical services will

**1.** scrutinise evidence regarding a claimant’s condition and give an opinion as to whether

**1.1** they are treated as having limited capability for work

**1.2** in second or subsequent referrals if they have limited capability for work without requiring a limited capability for work assessment

**2.** provide impartial medical advice on request.

42193 Medical services are responsible for gathering any information required to support the work capability assessment process. This includes

**1.** sending the questionnaire (ESA50)

**2.** sending a reminder if the claimant does not reply within 28 days

**3.** deciding if further medical evidence is required from the claimant’s General Practitioner or health care professional.

42194 Medical services will arrange for a health care professional to provide an opinion on limited capability for work on either an

**1.** ESA85 if the claimant has been examined **or**

**2.** ESA85A if the claimant has not been examined.

42195 Medical services will provide an independent medical opinion on the claimant’s condition, functionality and their ability to perform activities related to work. They do not provide a diagnostic examination. Their focus is on a claimant’s abilities rather than their disabilities. Health care professionals should provide relevant information and good justification for their recommendations with regard to limited capability for work.

42196 In the main, medical reports will be completed electronically. There is no requirement for the report to be signed by the examining health care professional1. However the report must identify the status of the health care professional, i.e. whether he/she is a doctor, a registered nurse or a registered occupational therapist or physiotherapist.

1 R(IB) 7/05

42197 The personalised summary statement forms part of the report form ESA85 where that is produced electronically, and is also produced as a separate form ESA85(S). It is part of the evidence considered by the decision maker when making determinations as to whether the claimant has limited capability for work, and if so, whether they have limited capability for work-related activity.

42198 The personalised summary statement is a statement of facts and findings made by the health care professional, and is personal to the claimant. It gives the health care professional the opportunity to

**1.** justify their recommendation on the limited capability for work and limited capability for work-related activity activities and descriptors **and**

**2.** explain where the recommendation conflicts with the claimant’s view of their condition.

42199 The personalised summary statement should refer to all of the claimant’s health conditions, and consider the combined impact where multiple conditions are present. This should reflect the consensus of medical opinion. It should not introduce new information not already in form ESA85.

42200 The questionnaire, the medical report, and any other medical evidence obtained by medical services, are referred to the decision maker to consider whether the claimant has limited capability for work. There may be differences between the answers from the claimant and the health care professional.

 **Example**

 On the questionnaire Kevin indicates he can walk on level ground but cannot walk 200 metres. He also indicates on the form that he can walk about 50 metres before he has to stop due to severe pain. On the medical report the health care professional should collect more evidence to identify the actual distance the claimant can walk and the amount of pain and discomfort experienced and how that affects the daily functioning.

 The decision maker then considers the merit of each answer and any other evidence to determine an overall score (see DMG 42215)1. As with all evidence decision makers have to decide what weight to give to the content of the medical report.

 **Note:** The report should be read as a whole and any concerns over inconsistent or improbable entries addressed before a determination of limited capability for work is made.

1 ESA Regs (NI), reg 19(3)

42201 There should be no changes made to the content of the medical report other than of a very minor nature e.g. a typing error, and these are to be carried out by the same health care professional who completed the original wherever possible. It is permissible for another approved health care professional to make the amendment, having consulted the author of the original report, for example to avoid unnecessary delay. However the health care professional making the amendment should make it clear that it has been made following consultation. Any other additions or alterations should be provided in a separate document.

42202 A claimant may not have returned a questionnaire. The decision maker can proceed without it if they are satisfied that there is sufficient information for a determination to be made whether the claimant has limited capability for work without it1. For example the claimant is considered to be in a vulnerable group, i.e. there is a diagnosis of a mental health condition. A decision to treat as not having limited capability for work due to non return of the questionnaire would not be made but the claimant referred for assessment.

1 ESA Regs (NI), reg 21(2)

42203 The medical report includes an opinion of a health care professional approved by the Department on whether any prescribed exceptional circumstances apply. The decision maker should consider that opinion when deciding whether a claimant can be treated as having limited capability for work if they do not satisfy the test from the descriptors (see DMG 42310 et seq)1.

1 ESA Regs (NI), reg 29

 42204 – 42209

Qualifying conditions

42210 The limited capability for work assessment is a test of the extent of a claimant’s limited capability for work because of some specific bodily disease or disablement, a specific mental illness or disablement or as a direct result of treatment provided by a registered medical practitioner for such a disease or disablement to perform specified activities1. The performance of activities is measured by descriptors the points from which have to reach a set total for the claimant to have limited capability for work2. If the required number of points is not reached the claimant does not have limited capability for work. The assessment is of a person’s ability to perform specified functional activities, rather than their ability to perform functions related to any specific work they might previously have been doing.

1 ESA Regs (NI), reg 19(2), Sch 2, Column 1; 2 reg 19(3), Sch 2, Column 2

42211 The level of each activity is measured by points. Part 1 contains activities characterising physical function which are broken down into descriptors. Part 2 contains activities characterising mental, cognitive and intellectual function which are also broken down into descriptors. The extent to which a claimant can or cannot carry out an activity is determined by which descriptor applies to that claimant.

 42212 – 42214

Calculation of score

42215 Where a claimant meets a descriptor points will be awarded corresponding to that descriptor.

42216 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 can be counted1.

1  ESA Regs (NI), reg 19(6)

42217 Other than as in DMG 42241, there is no scoring limitation based on the claimant’s specific disease or bodily disablement. So, for example, a claimant who cannot walk up and down 2 steps even with the support of a handrail because of their defective sight can score points both for the activity of vision and that of walking1.

1 R(IB) 3/98

42218 A claimant has limited capability for work when

**1.** one or more of the descriptors in the physical disabilities1 or mental, cognitive and intellectual functions2 apply **and**

**2.** a total is reached of at least 15 points3 from the descriptors

**2.1** specified in Part 1 **or**

**2.2** specified in Part 2 **or**

**2.3** in both categories.

1 ESA Regs (NI), Sch 2, Part 1; 2 Sch 2, Part II; 3 reg 19(3)

 42219 – 42229

Use of aids and appliances

General application

42230 A claimant will be assessed as if

**1.** fitted with or wearing any prosthesis with which that claimant is normally fitted or normally wears (such as an artificial limb) **or**

**2.** wearing or using any aid or appliance which is normally, or could reasonably be expected to be, worn or used (such as a hearing aid)1.

 Normal use of an aid or appliance applies to the assessment of all of the physical activities in the work capability assessment. It is not restricted to those activities that make specific reference to aids or appliances.

1 ESA Regs (NI), reg 19(4)

42231 Four of the physical activities1 refer specifically to the use of aids. Activity 1 (mobilising) and Activity 7 (understanding communication) refer to the reasonableness of the use of an aid, while Activity 8 (navigation) and Activity 9 (continence), refer to aids that are normally used. The decision maker should apply the test in a way that displays consistency between the work capability assessment as a whole and the assessment of each descriptor in particular.

1 ESA Regs (NI), Sch 2, Part 1

 42232 – 42234

Aid or appliance prescribed or advised

42235 The decision maker should establish whether the claimant normally uses an aid or appliance, and if not, whether the use of it has been prescribed or advised.

42236 If the claimant does not have an aid or appliance which they have been prescribed or advised to use, the decision maker should establish

 **1.** whether it would help the claimant

 **2.** why they are not using one

 **3.** whether the explanation is reasonable.

 **Example 1**

 Billy has been advised by his General Practitioner to use a walking stick to help with balance problems when walking and standing. He states that he doesn’t like the idea of a walking stick because it makes him look old. The decision maker considers that it would be reasonable to expect Billy to use a walking stick, and assesses limited capability for work as if he is using it.

 **Example 2**

 Annie lives in a one bedroom apartment on the upper storey of a two storey block. There is no lift. She has been advised by her General Practitioner that a wheelchair would help her to mobilise over longer distances and that a wheelchair could be provided on request. Annie states that she could not get a wheelchair into her apartment, and could not store a wheelchair, either in her apartment or elsewhere. The decision maker considers that it would not be reasonable to expect Annie to use a wheelchair, and assesses limited capability for work without it.

Aid or appliance not prescribed or advised

42237 The work capability assessment should be applied in the context of a notional employer in a modern workplace who is prepared to make reasonable adjustments1 to enable the claimant to work.

1 Equality Act 2010

42238 **All** the circumstances of the individual claimant should be taken into account when considering whether it would be reasonable to assess them as using an aid or appliance that has not been prescribed or that they have not been advised to use. An example would be whether it would be reasonable to expect a claimant to mobilise using a manual wheelchair1.

1 [2015] AACR 5

42239 Factors include whether

**1.** the claimant possesses the aid or appliance

**2.** the claimant was given specific medical advice about managing their condition, and it is reasonable for them to continue following that advice (see DMG 42250)

**3.** the claimant would be advised to use an aid or appliance if they raised it with the appropriate authority such as a General Practitioner or occupational therapist (advice may only be given on request)

**4.** it is medically reasonable for them to use an aid or appliance

**5.** the health condition or disability is likely to be of short duration

**6.** an aid or appliance is widely available (see DMG 42253)

**7.** an aid or appliance is affordable in the claimant’s circumstances (people are not routinely required to buy equipment where it can be prescribed)

**8.** the claimant is able to use and store the aid or appliance (see DMG 42252)

**9.** the claimant is unable to use an aid or appliance due to their physical or mental health condition, for example they are unable to use a walking stick or manual wheelchair due to a cardiac, respiratory, upper body or mental health condition.

 **Example 1**

 Miranda has significantly reduced mobility due to arthritis of the right hip and is on the waiting list for a hip replacement. She uses a walking stick to help with balance, but this does not enable her to walk any further than 200 metres before she experiences pain. She has not been advised to use a wheelchair. The health care professional advises that she has no other health problems, and in their opinion based on clinical experience, would be provided with a manual wheelchair if she asked her consultant about this. If she had a wheelchair, she would be able to mobilise over longer distances. The decision maker decides that it would be reasonable, having considered all relevant factors, for Miranda to use a manual wheelchair, and that none of the Activity 1 descriptors apply.

 **Example 2**

 Gary has problems standing due to a condition which affects his balance. He would normally be helped by the use of a walking stick. However, the health care professional advises that due to arthritis of the hands, Gary would have difficulty using a stick because he has reduced grip. The decision maker determines that it would not be reasonable to assess Gary taking a walking stick into account.

42240 Where it is considered that the claimant should be assessed using an aid or appliance they do not have, the decision maker must give a clear explanation of how it could help the claimant. In the majority of cases the health care professional will give advice on their use in the medical report. If not, or if the advice is not clear, the decision maker should seek further advice as to how reasonable it is to expect the claimant to use or benefit from the aid or appliance.

42241 The aid or appliance must be relevant to the activity being assessed. For example, when assessing activity 5, manual dexterity, it is not appropriate to consider the use of devices, such as a grabber, which substitute for the hands, other than prosthetic hands.

42242 Decision makers are additionally reminded that some activities and descriptors specify that the person must be assessed without the help of another person.

 42243 – 42249

Use of manual wheelchair

Medical factors

42250 All medical considerations affecting an ability to use a manual wheelchair need to be taken into account, including any potential consequences such as muscle wasting. However, it should be noted that use of a wheelchair need only be for short distances and for limited periods.

 **Note:** See DMG 42239 **2.** - **6.** for examples of medical factors which should be considered.

42251 These considerations apply to all aspects of using a manual wheelchair, including getting in and out, propelling, and being able to control it. It may be that some of the reasons for not being able to use a wheelchair are relevant to other functional descriptors, for example inability to move from one seated position to another unaided.

Home environment

42252 The claimant’s domestic environment is potentially relevant. However, given

**1.** the underlying purpose of the work capability assessment **and**

**2.** the circumstances in the modern workplace

 an inability to use or store the wheelchair at home, due to factors such as inaccessible doors or stairs, is unlikely to be important, as the wheelchair could be stored at the workplace as part of the employer’s duty to make reasonable adjustments.

Availability of manual wheelchairs

42253 The availability of manual wheelchairs is a question of fact requiring evidence of how they could be obtained, including local knowledge. There is no requirement for a National Health Service wheelchair assessment before considering whether the claimant could reasonably use a manual wheelchair, although such evidence would be useful if it existed.

42254 It should be possible for the Department to

**1.** provide evidence about ways of obtaining inexpensive manual wheelchairs, such as from private companies or charities, if one is required to enable the claimant to work **or**

**2.** ensure that the availability of manual wheelchairs is not an issue through a scheme.

42255 The decision maker will therefore need to explain in decisions, and responses to the Appeal Tribunal, how the claimant could obtain a manual wheelchair if that is required to enable them to take up employment.

Evidence

42256 The decision maker should consider requesting advice from disability employment advisers about what provision is available in the claimant’s area, including under any scheme such as Access to Work, or the Flexible Support Fund, that would enable the claimant to take up an offer of employment.

42257 For more generic evidence, the Appeal Tribunal could be referred to on-line National Health Service or local authority guidance about provision of wheelchairs. The decision maker should also consider whether a manual wheelchair could be made available on rental terms.

Reasons for decision maker’s decision

42258 Decision makers in decisions, and responses to the Appeal Tribunal, should explain, based on evidence specific to the claimant, and generic published evidence, why it is considered that

**1.** it is reasonable to assess the claimant’s ability to mobilise with a manual wheelchair if they do not have one **and**

**2.** the use of a manual wheelchair by the claimant promotes the underlying purpose of Employment and Support Allowance.

42259 The underlying purpose of Employment and Support Allowance is to assess a person’s functionality i.e. what they can do in the modern workplace, and enable them to engage in the labour market where appropriate. People who can use aids such as a manual wheelchair to mobilise, if working in a fully accessible area, are not limited in their capability for some types of work if they are unable to walk. Manual wheelchairs are widely available. It is therefore reasonable to assess a person as if using a manual wheelchair for the required distances where appropriate.

 **Example 1**

 Vincent has mobility problems after an accident at work affecting his right foot. He also suffers from asthma, diabetes and depression. He claimed Employment and Support Allowance after being medically retired from his job as a van driver. At the face-to-face assessment, Vincent told the health care professional that the pain in his ankle stopped him from walking more than short distances using crutches. He went round the supermarket slowly leaning on a shopping trolley, or using an electric wheelchair trolley. When on holiday recently he had been given a wheelchair to get around the airport which his wife had pushed, and he spent his holiday at the hotel or on coach trips. He had not asked to be assessed for a wheelchair as he had nowhere to keep it; he lived in a first floor flat over a shop.

 The health care professional advises that Vincent has no upper body problem, and the asthma and diabetes are controlled by medication. He should not have any difficulty using a manual wheelchair independently for more than 200 metres. Although Vincent claimed he had problems with standing and sitting, he was able to sit for more than an hour without significant discomfort. His depression is treated with mild anti-depressants, and did not affect his functions to the extent that any mental or cognitive descriptor applied. The decision maker determines that it was reasonable to assess Vincent’s mobility as if he had a manual wheelchair, and there was no reason why he could not obtain one through the National Health Service wheelchair service if he needed one to use at work, where it could be stored. Vincent is found not to have limited capability for work, and his Employment and Support Allowance award is terminated.

 **Example 2**

 Sasje suffered from injuries to her head and legs in a road traffic accident. She claimed Employment and Support Allowance after being discharged from hospital. At the face-to-face assessment, her mother told the health care professional that Sasje is still unable to walk more than a few steps. She pushes Sasje about in a manual wheelchair supplied by the National Health Service wheelchair service. Sasje was not given a self-propelled wheelchair, as the wheelchair assessment had identified that she had poor road safety and spatial awareness, possibly as a result of the head injury.

 The decision maker accepts the health care professional’s recommendation that Sasje is unable to mobilise 50 metres without help, and also requires supervision when in the wheelchair to ensure she does not put herself or others in danger. The decision maker determines that Sasje satisfies Sch 2 Activity 1(a)(i) (15 points) and 12(c) (6 points), as well as Sch 3 Activity 1(a). She is placed in the support group.

 42260 – 42269

Determination of the limited capability for work assessment

42270 The decision maker determines whether the assessment is satisfied from

**1.** the questionnaire if one is available (see DMG 42161) **and**

**2.** a statement from the General Practitioner1 if one is available **and**

**3.** the medical report of the claimant’s ability to perform the specified functions **and**

**4.** the personalised summary statement **and**

**5.** any other relevant evidence.

1 SS (Med Ev) Regs (NI), reg 2(1)(c)

42271 The normal principles apply to considering the evidence (see DMG Chapter 1).

42272 The limited capability for work assessment does not have to be satisfied in respect of each day1. A claimant should satisfy the conditions throughout a period. A claimant whose condition varies from day to day and who would easily satisfy the limited capability for work assessment on 3 days a week and would nearly satisfy it on the other 4 days might have limited capability for work for the whole week.

1 R(IB) 2/99

42273 A claimant may have long periods of illness separated by periods of remission lasting some weeks, during which he or she suffers no significant disablement, such a claimant might have limited capability for work during the periods of illness but not have limited capability for work during the periods of remission. This is so even if the periods of illness are longer than the periods of remission1.

1 R(IB) 2/99

42274 The test of whether a claimant cannot perform an activity is not whether or not they are physically incapable of performing it. Matters such as pain, discomfort and repeatability are taken into account. A claimant is not capable of carrying out an activity if they can only do so with severe pain or, if having done it once, they are unable to repeat it for hours or days. The extent of a claimant’s ability to repeat the activity in a single stretch and of the intervals at which the claimant would be able to repeat the performance should be identified. A decision can then be made on whether the claimant can perform the relevant descriptor with reasonable regularity.

42275 There is no specific requirement that a claimant must be able to perform the activity in question with “reasonable regularity”. Even so regard should be had to some such concept. The real issue is whether, taking an overall view of the claimant’s limited capability to perform the activity in question, they should reasonably be considered to be incapable of performing it. The fact that they might occasionally manage to accomplish it, would be of no consequence if, for most of the time, and in most circumstances, they could not do so1.

1 R(IB) 2/99

42276 Where relevant descriptors are expressed in terms that the claimant “cannot” perform the activity, one should not stray too far from an arithmetical approach that considers what the claimant’s abilities are most of the time1.

1 R(IB) 2/99

42277 Descriptors which state that “none of the above apply” to their ability to carry out the activity or where they do not apply mean that the claimant has no problem performing the activity or has less of a problem than would satisfy any of the other descriptors for that activity.

 **Example**

 Activity 1 descriptor (f) is “none of the above apply”. Descriptor (e) is “cannot walk more than 200 metres on level ground without stopping or severe discomfort”. “None of the above apply” means the claimant has no walking problem or less of a problem than would satisfy the penultimate descriptor 1(e) and would score no points for that activity.

42278 Where a descriptor refers to a claimant being able to use a tool or implement, the use referred to is the use to which the tool or implement is normally put. The activity relates to hand function and is intended to reflect the ability to manipulate objects in order to carry out work-related tasks.

 **Example**

 Ability to use a pen or pencil is intended to reflect the physical use of the object not reflect a claimant’s level of literacy. The same concept applies to the use of a computer keyboard or mouse.

42279 The decision maker should decide which descriptor applies to each activity. Provided the determination is sufficiently supported by evidence, for each activity the decision maker can select the descriptor from the medical report (ESA85), the evidence provided by the claimant (including the ESA50 questionnaire), or a different descriptor. Satisfaction of the test is decided on the total number of points from the final selection of individual descriptors (see DMG 42177).

42280 The decision maker must record the final scores for each descriptor and the reasons for the decision. Guidance on burden of proof is in DMG Chapter 1.

42281 If the required number of points is not reached a claimant does not have limited capability for work1.

1 ESA Regs (NI), reg 19(3)

 42282 – 42289

Determining limited capability for work afresh

42290 Where it has been determined that a claimant

**1**. has limited capability for work **or**

**2.** is treated as having limited capability for work

**2.1** in certain conditions (see DMG 42031) **or**

**2.2** as a hospital patient (see DMG 42070) **or**

**2.3** due to receiving certain regular treatment (see DMG 42090) **or**

**2.4** inexceptional circumstances (see DMG 42310) **or**

**2.5** as a claimant who is not a qualifying young person and is receiving education in certain circumstances (see DMG 42125)

 the decision maker can determine afresh whether the claimant still has limited capability for work1.

1 ESA Regs (NI), reg 19(7)

42291 DMG 42290 applies where1

**1.** the decision maker wishes to determine whether there has been a relevant change of circumstances in relation to the claimant’s physical or mental condition **or**

**2.** the decision maker wishes to determine whether the previous determination was made in ignorance of, or was based on a mistake as to some material fact **or**

**3.** at least 3 months have passed since the date of the previous determination

1 ESA Regs (NI), reg 19(8)

Second or subsequent referrals

42292 The medical report includes advice on the period of time that should pass before a claimant is reconsidered for the next work capability assessment process. This advice is given in all cases but the decision maker can determine afresh whether the claimant still has limited capability for work in prescribed circumstances (see DMG 42290). This may be at a different time to the advice given on the medical report.

42293 In second and subsequent referrals medical services will

**1.** provide confirmation of the assessments which reach or exceed the threshold to satisfy limited capability for work **or**

**2.** arrange for a health care professional to examine all claimants who do not reach the threshold and provide a medical report on their ability to perform the specified activities **or**

**3.** provide a recommendation on whether they fall into the support group criteria (see guidance in DMG 42610 et seq).

42294 Not all claimants require a limited capability for work assessment in subsequent referrals. Medical services will decide if limited capability for work can be assessed on scrutiny of the available evidence. However it may be necessary to call the claimant for examination on subsequent referrals to assess limited capability for work assessment (see DMG 42732).

Recommendation by the Appeal Tribunal

42295 In cases where the claimant has been successful at appeal, the Appeal Tribunal may recommend when the claimant should next be referred for a work capability assessment. This should only be altered where there is strong justification.

42296 The decision maker should apply the recommendation of the Appeal Tribunal as to when the next work capability assessment should take place, from the date of the original decision unless the Appeal Tribunal specifies otherwise. This is because the Appeal Tribunal was looking at the claimant’s circumstances as at that date1 and not the date of the hearing. However, where the Appeal Tribunal advises that the next work capability assessment should take place on a date calculated from the date of the Appeal Tribunal hearing then the decision maker should accept that.

1 SS (NI) Order 98, art 13

 **Example 1**

 Judy’s appeal has been upheld by the Appeal Tribunal and as a result she is entitled to Employment and Support Allowance. The appeal hearing took place on 2.6.14. Judy’s claim to Employment and Support Allowance was made on 3.3.14. In making its decision the Appeal Tribunal has indicated that Judy should have another work capability assessment in 12 months time but without specifying from which date. The decision maker decides that for Judy, the next work capability assessment should be in March 2015 because this is 12 months from the date of the decision under appeal.

 **Example 2**

 Alex’s appeal against the decision maker’s decision that he was not entitled to Employment and Support Allowance on the grounds of not having limited capability for work has been allowed by the Appeal Tribunal on 11.9.14. The decision maker has implemented the decision of the Appeal Tribunal that Alex is entitled to Employment and Support Allowance. In making its decision, the Appeal Tribunal has indicated that Alex’s next work capability assessment should be 12 months from the date of the hearing. The decision maker accepts this and preparations are made for Alex to have his next work capability assessment in 12 months time in September 2015.

42297 Where a claimant’s appeal to the Appeal Tribunal is successful, there should be a minimum period of eight months between the date of the appeal decision and a subsequent work capability assessment, unless

**1.** there are good grounds for believing that an earlier review is required **or**

**2.** the Appeal Tribunal has recommended a longer review period.

42298 Where the Appeal Tribunal recommends that the next work capability assessment should take place at a date earlier than the minimum review period then the decision maker should, unless there are good reasons not to, apply the minimum review period. Where the Appeal Tribunal recommends a review period which is in excess of the minimum review period then the decision maker should abide by that recommendation.

 **Example 1**

 Alex’s appeal against the decision maker’s decision that he was not entitled to Employment and Support Allowance on the grounds of not having limited capability for work has been allowed by the Appeal Tribunal on 1.9.14. The decision maker has implemented the decision of the Appeal Tribunal that Alex is entitled to Employment and Support Allowance. In making its decision, the Appeal Tribunal has indicated that Alex should have a second work capability assessment nine months from the date of the appeal hearing. The decision maker also accepts this and preparations are made for Alex to have his next work capability assessment in nine months time in June 2015.

 **Example 2**

 Ben’s appeal at the Appeal Tribunal has been successful. The hearing was held on 10.10.14. In making its decision, the Appeal Tribunal did not indicate when Ben should have his next work capability assessment. The decision maker decides that for Ben, the work capability assessment process should commence in June 2015 with a recall notice being issued in April 2015. In doing so the decision maker has applied an eight month minimum review period between the Appeal Tribunal hearing and the next work capability assessment.

42299 There may be occasions where, for example, following a successful appeal the Appeal Tribunal recommends that the next work capability assessment should take place in 24 months time but it has already taken 20 months for the appeal to be heard. As the Appeal Tribunal recommendation is applied from the original date of decision unless otherwise stated, without applying the minimum review period the claimant will be reviewed in four months time. However by applying the minimum review period between a successful appeal hearing and the next work capability assessment the customer will not be seen until eight months time.

 **Example**

 Nazyah’s claim for Employment and Support Allowance was refused on 20.7.12. She appealed against the decision and the appeal was finally heard on 7.10.14. The appeal was allowed by the Appeal Tribunal and it was recommended that Nazyah should have her next work capability assessment in 18 months time. As the Tribunal recommendation is applied from the original date of decision, in this case 18 months from July 2012 would result in Nazyah being seen in January 2015. To ensure Nazyah is not seen within three months of a successful appeal a minimum review period of eight months is applied meaning Nazyah will not be seen for her next work capability assessment until June 2015.

42300 Decision makers should, unless there are circumstances which indicate otherwise, use a minimum period of eight months as the point when the claimant should undertake a subsequent work capability assessment following a successful appeal. This means that recall notices should be issued after six months inviting claimants to attend a work capability assessment.

42301 There may be circumstances where it will be reasonable to request that the claimant has another work capability assessment within a shorter time frame than the minimum period of eight months. For instance, there may have been a change of circumstances affecting the claimant’s health since the original decision and the decision maker may wish for a claimant to have another work capability assessment in order to assess the situation.

 42302 – 42309

Exceptional circumstances

42310 **[See DMG Memo 8/90]** Claimants who do not satisfy the limited capability for work assessment by having enough points must be treated as having limited capability for work1 if they

**1.** are suffering from a life threatening disease for which

**1.1** there is medical evidence (see DMG 42316) that the disease is uncontrollable, or uncontrolled by a recognised therapeutic procedure **and**

**1.2** 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**

**2.** are suffering from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk (see DMG 42320) to the mental or physical health of any person if they were found not to have limited capability for work

 unless they are treated as not having limited capability for work because they are working2 (see DMG 42600 et seq).

1 ESA Regs (NI), reg 29; 2 regs 40 & 44

 42311 – 42314

Uncontrolled or uncontrollable disease

42315 There should be evidence that the disease is either uncontrolled or uncontrollable. The decision maker should establish that there is a reasonable cause for it not being controlled by medication or other recognised therapeutic procedure.

Medical evidence

42316 Medical evidence means evidence1

**1.** from a health care professional approved by the Department **and**

**2.** from any health care professional, hospital or similar institution **or**

**3.** that constitutes the most reliable evidence available in the circumstances.

**Note:** This definition does not apply to DMG 42553 - 42554.

1 ESA Regs (NI), reg 29(4)

 42317 – 42319

Substantial risk

42320 ‘Substantial’ is not defined and should be given its ordinary meaning. What amounts to ‘substantial’ is a question which must be determined using all the available evidence and taking account of all the circumstances.

42321 The substantial risk can be to the claimant or to any other person. For example, the claimant’s mental health may be such that they may self-harm or self-neglect or may be violent to others.

42322 A claimant’s anxiety or concern about their ability to cope with the demands of work or a return to work alone does not constitute a substantial risk.

42323 A Court of Appeal judgment1 has said that substantial risk must be determined, not only in the context of work undertaken or in the workplace itself, but also the journey to and from work.

1 Charlton v Secretary of State for Work and Pensions [2009] EWCA Civ 42; R(IB) 2/09

 42324

Risk at work

42325 The judgment states that the decision maker must consider whether a substantial risk arises in the light of the work which the person might be expected to perform in the workplace he might find himself in. In making this assessment, the decision maker need only identify a broad range of duties that the person could be capable of, taking into account any training given, the person’s aptitude and their disease or disablement.

 **Example 1**

 Peter is 27 years old and suffers from alcohol dependency syndrome. He has never worked and says that his condition prevents him from undertaking any kind of work. The decision maker identifies that Peter could undertake straightforward and unstructured, unskilled work without substantial risk to himself or any person. The decision maker need not identify a particular type of work that Peter could be capable of.

 **Example 2**

 Phillip is 22 years old and has recently been diagnosed as suffering from epilepsy. Since the age of 18 he has worked as a roofer and scaffolding erector. Phillip says that if he were to return to this work, his health would be at substantial risk as he was often expected to work at great height. The decision maker determines that Phillip could now undertake closely supervised, indoor or outdoor work, at ground level without risk to himself or any person. The decision maker need not identify a particular type of work that Phillip could be capable of.

Risk associated with travelling to and from work

42326 In assessing risk associated with journeys to and from work, the decision maker may find it useful to examine evidence of the person’s daily life to identify if travel is undertaken. For example when

**1.** going shopping **or**

**2.** visiting friends **or**

**3.** attending appointments e.g. at a hospital.

 **Example**

 Kim suffers from contact dermatitis and says that any contact with certain metals causes her condition to flare up uncontrollably. She says that there would be a substantial risk to her health if exposed to these metals when travelling to and from work. Evidence of Kim’s daily life shows that she drives to and from the shops, takes her children to school in the car and that she used the bus to travel to the medical examination centre. The decision maker determines that there would be no substantial risk in travelling to and from work.

Allergic health conditions

42327 Claimants suffering from an allergic health condition may contend that there would be a substantial risk to their health if they were found capable of work. In such cases, the decision maker may need to refer to the health care professional’s medical report or obtain further evidence from the claimant to determine whether or not a substantial risk exists. The following are examples of further evidence which may inform the decision making process.

**1.** What are the precise details of the substances or materials that the claimant is allergic to?

**2.** What, if any, further investigations have been undertaken to establish the cause of the claimant’s allergy?

**3.** What has been the result of those investigations?

**4.** Has the claimant been prescribed any emergency medicine to deal with the effects of an allergic reaction? i.e. a self-administered adrenaline syringe, commonly known as an Epipen.

**5.** Is the claimant able to self-administer emergency medication successfully?

**6.** Has the claimant ever suffered an anaphylactic reaction?

**7.** If so, what are the details? i.e. when did it occur? What were its after effects and was the claimant hospitalised as a result?

**8.** What type(s) of work, if any, has the claimant previously undertaken when suffering from their stated allergic condition?

**9.** How were the effects of the claimant’s allergic condition accommodated when undertaking that work? i.e. were any reasonable adjustments made in the workplace?

**10.** What precautions does the claimant take in their daily life to avoid contact with the substances or materials in question?

**11.** Why would it not be possible to take such precautions in the workplace?

Other health conditions

42328 Claimants suffering from other health conditions may contend that there would be a substantial risk to their health if they were found capable of work. In such cases, the decision maker may need to refer to the health care professional’s medical report or obtain further evidence from the claimant to determine whether or not a substantial risk exists. The following are examples of further evidence which may inform the decision making process

**1.** What are the precise details of the claimant’s health condition?

**2.** What, if any, investigations have been undertaken into the claimant’s health condition?

**3.** What has been the result of those investigations?

**4.** Has the claimant been prescribed any medication to deal with their health condition? i.e. an angina sufferer who has been prescribed a GTN spray to relieve their symptoms.

**5.** Is the claimant able to self-administer their medication successfully?

**6.** Has the claimant ever suffered an emergency in connection with their stated health condition?

**7.** If so, what are the details? i.e. when did it occur? what were its after effects and was the claimant hospitalised as a result?

**8.** What type(s) of work, if any, has the claimant previously undertaken when suffering from their stated health condition?

**9.** How was the claimant’s health condition accommodated when undertaking that work, i.e. were any reasonable adjustments made in the workplace?

**10.** What precautions does the claimant take in their daily life to accommodate their health condition?

**11.** Why would it not be possible to take such precautions within the workplace?

Reduction of risk

42329 **[See DMG Memo 8/90]** A claimant cannot be treated as having limited capability for work as in DMG 42310 **2.** if the risk could be significantly reduced by

**1.** reasonable adjustments being made to the claimant’s workplace **or**

**2.** the claimant taking medication prescribed by their General Practitioner to manage their condition1.

1 ESA Regs (NI), reg 29(3)

 **Example 1**

 Khaled suffers from back pain, and claims Employment and Support Allowance. His previous employment was office work. Following application of the work capability assessment, the decision maker determines that he scores 6 points for standing and sitting. Khaled argues that he satisfies the substantial risk rules, as he cannot sit at a desk for lengthy periods without exacerbating his condition. The decision maker determines that the risk to his health could be alleviated by reasonable adjustments to his workstation, such as a desk which can rise and fall to allow working in standing and sitting positions, and taking breaks away from his workstation. The decision maker determines that Khaled does not have limited capability for work, and cannot be treated as having limited capability for work. The award of Employment and Support Allowance is terminated.

 **Example 2**

 Lucy is at risk of potentially fatal anaphylactic shock if she comes into contact with products containing latex, which is a risk at work and in the journey to and from work. There is no suggestion that she satisfies any of the descriptors. The decision maker determines that the risk could be substantially reduced if Lucy carried an adrenaline auto–injector which has been prescribed for her, and a medical alert bracelet.

 42330 – 42349

Treated as having limited capability for work until assessment is carried out

42350 A claimant can be treated as having limited capability for work until such time as it has been determined whether the claimant1

**1.** has limited capability for work **or**

**2.** is to be treated as having limited capability for work **or**

**3.** is to be treated as not having limited capability for work because they fail without good cause to provide the required information for the limited capability for work assessment or to attend or submit for examination (see DMG 42450 et seq)

 unless they are treated as not having limited capability for work because they are working2 (see DMG 42600 et seq).

1 ESA Regs (NI), reg 30(1); 2 reg 40 & 44

Conditions

42351 Where there is acceptable evidence (see DMG 42145 et seq) of limited capability for work and DMG 42352 does not apply the claimant is treated as having limited capability for work1 until

**1.** actual assessment **or**

**2.** they are treated as having limited capability for work **or**

**3.** they are treated as not having limited capability for work because they fail without good cause to

**3.1** provide the information in the questionnaire **or**

**3.2** attend for or submit to a medical examination.

1 ESA Regs (NI), reg 30(2)(a) & SS (Med Ev) Regs (NI), reg 2 & 5

42352 A claimant is not treated as having limited capability for work if

**1.** in the last determination before the date of the Employment and Support Allowance claim, it has been determined that the claimant did not have limited capability for work1 **or**

**2.** in the six months preceding the date of the Employment and Support Allowance claim it has been determined that the claimant was treated as not having limited capability for work because of a failure without good cause

**2.1** to provide the required information **or**

**2.2** to attend or submit for examination2

 unless any of the conditions in DMG 42353 apply3.

 **Note:** See DMG 42370 et seq for detailed guidance.

1 ESA Regs (NI), reg 30(2)(b)(i); 2 reg 30(2)(b)(ii); 3 reg 30(4)

42353 The conditions in DMG 42352 are that

**1.** 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 **or**

**2.** a disease or bodily or mental disablement from which the claimant was suffering at the time of that determination has significantly worsened **or**

**3.** a claimant who was treated as not having limited capability for work for failure to provide information has since provided the information requested by the decision maker1.

 **Note 1:** See DMG Chapter 02 for guidance on the date of claim. Decision makers should note that this may be different from the date from which the claim is made.

 **Note 2:** Where the Appeal Tribunal dismisses an appeal against a decision which includes a determination that a claimant does not have limited capability for work, the date of the limited capability for work determination is still that made by the decision maker.

1 ESA Regs (NI), reg 30(4)

42354 The conditions at DMG 42352 **1.** do not apply where

**1.** a claimant has made and is pursuing an appeal against a relevant decision that the claimant does not have limited capability for work after application of the work capability assessment **and**

**2.** that appeal has not yet been determined by an Appeal Tribunal1.

 See DMG 42790 et seq for detailed guidance.

 **Note:** This guidance does not apply where the claimant makes a further appeal to the Commissioner against an Appeal Tribunal decision.

1 ESA Regs (NI), reg 2(1) & 30(3) & (5); SS & CS (D&A) Regs (NI), reg 36

42355 Advice can be obtained from medical services on whether the reason for limited capability for work is new or the previous medical condition has significantly worsened if this is not clear from the available evidence.

 42356 – 42369

Further claim after determination that claimant does not have limited capability for work

General

42370 A claimant may make a further claim and provide medical statements after the decision maker has determined that they do not have limited capability for work. The decision maker, if possible, applies the limited capability for work assessment.

 **Note:** See DMG 42410 et seq where a claim is made after the decision maker has determined that the claimant is treated as not having limited capability for work as in DMG 42351 **3.**.

42371 The decision maker may already have sufficient information with which to carry out a new limited capability for work assessment. This could include

**1.** medical evidence from the previous medical examination

**2.** medical evidence provided to support the new claim **and**

**3.** any other evidence received by the decision maker relevant to assessment of the limited capability for work assessment on the new claim.

42372 If the decision maker considers there is sufficient information they should carry out the limited capability for work assessment (see DMG 42170). If the information provided with the repeat claim shows that the question of whether or not a claimant has limited capability for work can be determined immediately without gathering further evidence, the claimant cannot be treated as having limited capability for work as in DMG 42350 et seq for any period before a decision is made on the claim.

42373 If the decision maker considers there is insufficient information to carry out the limited capability for work assessment they should consider whether the claimant can be treated as having limited capability for work until the limited capability for work assessment is carried out1 (see DMG 42350 et seq).

1 ESA Regs (NI), reg 30

42374 If the claimant cannot be treated as having limited capability for work because DMG 42352 applies, and they do not have a new or worse health condition, their claim cannot be decided until the limited capability for work assessment is carried out.

 42375 – 42379

Determining limited capability for work

42380 Where the claimant makes a claim for Employment and Support Allowance after a previous determination that they do not have limited capability for work, the decision maker should consider whether they have sufficient evidence from the most recent previous determination to determine whether or not the claimant has limited capability for work.

42381 Previous evidence could be

**1.** the questionnaire (form ESA50)

**2.** the health care professional report (form ESA85)

**3.** further medical evidence, such as

**3.1** a General Practitioner’s report (form ESA113)

**3.2** a hospital report

**3.3** letters from the General Practitioner or consultant

**4.** information from someone who provides the claimant with care, support or treatment.

42382 Where the previous determination is unchanged following mandatory reconsideration or an appeal to the Appeal Tribunal, any evidence or information provided for the decision maker or the Appeal Tribunal should also be considered.

42383 The decision maker should not assume without further investigation that there has been no change since the last determination of limited capability for work. The evidence provided by the claimant as part of their repeat claim, including any information given by telephone, should be considered carefully, together with the evidence provided when the previous determination was made.

42384 The claimant may have been awarded Jobseeker’s Allowance after the previous determination that they did not have limited capability for work, for example

**1.** during the mandatory reconsideration process

**2.** after any appeal to the Appeal Tribunal was dismissed

**3.** while awaiting determination of a repeat claim for Employment and Support Allowance.

42385 Although Jobseeker’s Allowance is awarded on the condition that the claimant does not have limited capability for work1, no determination of limited capability for work has been made for the period of the Jobseeker’s Allowance award, and there is no presumption that the claimant does not have limited capability for work for the purposes of the Employment and Support Allowance repeat claim. It should be noted that the claimant may have been sending in evidence of limited capability for work for the purposes of a Jobseeker’s Allowance extended period of sickness2 - see DMG Chapter 20 for further details.

1 JS (NI) Order 95, art 1(3)(f); 2 JSA Regs (NI), reg 55ZA; JSA Regs (NI) 16, reg 46

42386 It may not be appropriate to rely on the previous evidence, for example because

**1.** the evidence has been lost or routinely destroyed

**2.** the claimant states that they have a new or significantly worse condition

**3.** the claimant’s health condition is one which is expected to deteriorate

**4.** the claimant provides evidence with the repeat claim which might indicate that they should be treated as having limited capability for work1, for example they have been in hospital.

 **Note:** This list is not exclusive.

1 ESA Regs (NI), reg 20, 25, 26 & 33(2)

42387 The mere passage of time since previous evidence was obtained does not of itself show that it cannot be relied on as evidence of the claimant’s current health condition. For example, where

**1.** a condition was previously reported to be stable **or**

**2.** the previous evidence had taken variability into account

 and there is no evidence of any change, there may be no reason to refer the claimant for a further work capability assessment.

42388 The decision maker should consider all the claimant’s circumstances from the date of the previous limited capability for work determination to the date of determination of the repeat Employment and Support Allowance claim. For example, where the repeat claim is made after an appeal has been dismissed, there may have been a considerable elapse of time since the original limited capability for work determination. The Appeal Tribunal is not permitted to consider any changes since the decision embodying that determination was made1. The fact that the Appeal Tribunal upheld that determination should not be considered conclusive for the repeat claim.

1 SS (NI) Order 98, art 13

42389 If the decision maker determines that

**1.** the previous evidence cannot be relied on to make a further determination of limited capability for work **and**

**2.** the claimant should be referred for a further work capability assessment

 they should consider whether the claimant can be treated as having limited capability for work pending the work capability assessment1. This means considering whether the claimant has a new or significantly worse health condition since the most recent limited capability for work determination was made.

 **Note:** The decision maker is reminded that, if it is determined that the claimant does not have a new or significantly worse health condition, the Employment and Support Allowance claim cannot be decided until a further limited capability for work determination is made - see DMG 42374.

1 ESA Regs (NI), reg 30(2)

 42390 – 42399

Meaning of new or significantly worse health condition

42400 If the claimant states that they have a new or significantly worse condition since the previous determination was made, they should be asked if they have further information or evidence of this. In the case of deterioration, the claimant should be asked how it affects their ability to perform the functional descriptors since the previous determination that they had limited capability for work.

42401 The evidence need not be a requirement to obtain evidence from a General Practitioner or other health care professional treating the claimant. For example, it could be information provided by the claimant, or by someone who knows them well, such as a carer, social worker or support worker.

 **Note:** Decision makers are reminded that the claimant’s evidence does not require corroboration unless it is inherently improbable or self-contradictory - see DMG 1380.

42402 Where the decision maker accepts that there is a new or significantly worse condition, the claimant should be

**1.** treated as having limited capability for work1 in the normal way as in DMG 42350 **1.** **and**

**2.** referred for a further work capability assessment.

1 ESA Regs (NI), reg 30(2)

42403 Whether or not the claimant has a new health condition should be determined in relation to the evidence used to make the most recent previous limited capability for work determination.

42404 Where the claimant states that their health condition has deteriorated since their last assessment, the decision maker should consider whether this change would be likely to be sufficient to score 15 points or more.

 **Example 1**

 Felicity was awarded Employment and Support Allowance after sending in fit notes showing she had low back pain. Her award was terminated after she was found not to have limited capability for work following application of the work capability assessment. No other conditions were assessed by the health care professional. Her subsequent appeal was dismissed by the Appeal Tribunal, and the Employment and Support Allowance award made pending the outcome of that appeal was terminated. Felicity makes a further claim for Employment and Support Allowance on the basis that she is suffering from depression. The decision maker decides to treat Felicity as having limited capability for work pending a further assessment, and awards Employment and Support Allowance at the assessment phase rate.

 **Example 2**

 Jermaine was entitled to Employment and Support Allowance at the assessment phase rate, on the basis that he was suffering from problems as a result of injuries to his back, knees and elbows. The decision maker accepts the health care professional’s recommendation that 6 points are awarded for problems with mobilising, and a further 6 points for difficulties with standing and sitting. As the score is less than 15 points, Jermaine’s award of Employment and Support Allowance is terminated. His appeal is dismissed.

 Jermaine makes a further claim for Employment and Support Allowance, stating that his condition has significantly worsened since the last limited capability for work determination. His General Practitioner writes a letter to say that Jermaine’s knees have got worse after unsuccessful surgical intervention, and his walking distance has reduced significantly. The decision maker determines that Jermaine might score at least 9 points for Activity 1, which would be sufficient to score at least 15 points, and treats him as having limited capability for work pending a further work capability assessment.

 **Example 3**

 Sadie’s award of Employment and Support Allowance was terminated after she was found not to have limited capability for work. She had difficulties with her right arm which restricted her ability to reach and to pick up objects, but was able to manage these functions with her left arm.

 Sadie makes a further claim and states that her condition has deteriorated. Her right hand is now worse, and she is not able to use her mobile phone or read a book. The decision maker establishes that Sadie’s left arm is not affected, and determines that Sadie would be unlikely to score any further points. The decision maker finds that Sadie does not have limited capability for work, using the evidence provided for the repeat claim, as well as the previous limited capability for work determination and the claim is disallowed. Sadie is not treated as having limited capability for work for the period before the claim is decided, and is not referred for a further work capability assessment.

 **Example 4**

 Hassan has suffered from back pain and depression for over 20 years following a road traffic accident. He gave up his job as a hospital porter due to back pain. He is awarded Employment and Support Allowance, but the award was terminated following application of the work capability assessment. On appeal, the Appeal Tribunal found that Hassan could reasonably and repeatedly walk at least 400 metres before needing to stop, and could sit and stand for at least an hour without significant discomfort. Although he suffered from low mood, he did not score points in relation to any of the mental health descriptors. The appeal was dismissed.

 Hassan made a further claim for Employment and Support Allowance, providing evidence that his medication for back pain and depression had been increased, as his back problems had worsened due to degenerative change. His General Practitioner states that Hassan’s mobility is restricted, and he had been referred to the pain clinic. Hassan tells the decision maker that he walks to the nearby shops 200 metres away most days, sitting for a few minutes to relieve pain before completing his shopping, and returning home. The increased medication for depression was helping, and he was unable to provide any examples which might show a mental health descriptor was satisfied. The decision maker determines that the worsening in Hassan’s condition is not significant, and that the new evidence together with the evidence provided for the most recent previous limited capability for work determination continues to show that Hassan does not score any points, and does not have limited capability for work. Hassan’s claim is disallowed.

 **Example 5**

 Molly was entitled to Employment and Support Allowance while she was recovering from surgery for a fracture of her right leg. She is referred for a work capability assessment after three months. Molly says that although she has been discharged from hospital out-patients, she still has mobilising problems. She uses crutches to get about, but cannot manage to walk very far due to pain. She has no other health condition. The decision maker accepts the health care professional’s advice that Molly could mobilise repeatedly for lengthy distances using a manual wheelchair, and finds that she does not have limited capability for work. Molly’s award of Employment and Support Allowance is terminated, and a subsequent appeal is dismissed.

 Molly makes a repeat claim stating that her mobilising problem had got worse, because she had found using crutches too difficult, and she now had a wheelchair to get about. The decision maker disallows the repeat claim, because although Molly’s health condition had deteriorated, this did not change the finding made as part of the previous limited capability for work determination that she could reliably and repeatedly mobilise with a manual wheelchair.

 **Example 6**

 Darren’s award of Employment and Support Allowance is terminated in June 2014 when he is found not to have limited capability for work. His health condition at the time was diagnosed as early stage Parkinson’s disease. Darren makes a further claim in May 2015 with the same health condition. He does not respond to requests for information about whether there have been any changes since June 2014 in how his health condition affects him.

 The decision maker concludes that, as Parkinson’s disease is a degenerative condition, it would not be reasonable to determine whether or not Darren has limited capability for work on the basis of the evidence used to make the previous limited capability for work determination. Darren is referred for a further work capability assessment. In the absence of any information that Darren’s condition has significantly worsened, he cannot be treated as having limited capability for work while he is referred for the work capability assessment.

 42405 – 42409

Further claim after claimant treated as not having limited capability for work

42410 The guidance at DMG 42370 et seq does **not** apply to claims made following a determination that the claimant is treated as not having limited capability for work because they have failed without good cause

**1.** to return the questionnaire **or**

**2.** to attend for or to submit to a medical examination1.

 The claimant should be referred for the work capability assessment in the normal way.

1 ESA Regs (NI), reg 22, 23 & 30(2)

42411 Where the claim is made within six months of the determination in DMG 42410, the claimant cannot be treated as having limited capability for work as in DMG 42350 unless they

**1.** are suffering from a new or significantly worse condition since the date of the previous limited capability for work determination1 **or**

**2.** return the questionnaire where they had failed to do so2.

1 ESA Regs (NI), reg 30(4)(a) & (b); 2 reg 22 & 30(4)(c)

42412 Where DMG 42411 applies, the claimant

**1.** is referred for the work capability assessment **and**

**2.** can be treated as having limited capability for work as in DMG 42350 **and**

**3.** can be awarded Employment and Support Allowance

 pending determination of whether or not they have, or are treated as having, limited capability for work, even though they have previously been found not to have, or were treated as not having, limited capability for work.

42413 Where a repeat claim is made more than six months after a previous determination that the claimant is treated as not having limited capability for work, the practice of awarding Employment and Support Allowance at the assessment phase rate where medical evidence is provided on a repeat claim continues.

 **Example**

 Craig’s award of Employment and Support Allowance is terminated on 3.4.15 after he is found not to have limited capability for work. He makes a further claim on 18.6.15 with evidence of a new health condition, and is awarded Employment and Support Allowance as the decision maker treats him as having limited capability for work. On 3.9.15 Craig is treated as not having limited capability for work after he fails without good cause to return the questionnaire. Craig makes a further claim for Employment and Support Allowance on 8.3.16. Craig is treated as having limited capability for work pending assessment, as the claim is made more than six months after the determination that he was treated as not having limited capability for work.

 42414 – 42429

Gap in medical evidence

Contact with claimant not lost

42430 If a claimant fails to provide doctor’s statements in the period pending a determination of limited capability for work and contact with the claimant has not been lost, payment of benefit may be suspended1 (see DMG Chapter 4 for further guidance on suspension of the payment of benefit).

1 SS & CS (D&A) Regs (NI), reg 16

42431 In such cases the decision maker must apply the work capability assessment in the normal way (see DMG 42170 et seq).

 **Note:** The decision maker should consider whether the claimant has limited capability for work from the day after the last day for which medical evidence is provided down to the date of the decision.

42432 The test may need to be applied on the balance of probabilities using all the available evidence, including evidence from the previous claim where appropriate. For example, it might not be possible to refer the claimant for medical examination where they have returned to work or claimed Jobseeker’s Allowance. Where there is little or no evidence, the decision maker may draw adverse inferences. Advice should be sought from medical services in cases of doubt. Insufficient evidence does not mean that the work capability assessment cannot be applied.

42433 Where a claimant stops submitting the required medical evidence this does not count as a change of circumstances to justify a decision to supersede the entitlement decision. The decision maker can suspend paying the claimant benefit because of the failure to provide medical evidence but not conclude they are not entitled to Employment and Support Allowance without carrying out the work capability assessment1. The determination on limited capability for work gives the grounds for supersession not the lack of medical evidence.

1 R(IB)1/05

42434 This applies even in cases where the claimant is treated as not having limited capability for work because they fail to return the questionnaire or fail to attend or submit for examination.

 **Example 1**

 Derek is treated as having limited capability for work while submitting doctor’s statements. On 11.3.13 medical evidence expires and despite reminders no further medical evidence is received. Derek asks for the limited capability for work assessment to be applied. The questionnaire is issued on 2.4.13 but is not returned. A reminder is issued on 17.4.13. On 2.5.13 the decision maker determines that Derek is treated as not having limited capability for work from 25.4.13. They also make a determination that for the period from 12.3.13 to 24.4.13 Derek scores 0 points for the purposes of the limited capability for work assessment and does not have limited capability for work. The decision awarding Employment and Support Allowance or credits is superseded to terminate entitlement from 12.3.13.

 **Example 2**

 Joan is treated as having limited capability for work while submitting doctor’s statements. On 1 November medical evidence expires and after reminders Joan notifies that she resumed work on 5 November. The decision maker determines that for the period between 1 and 5 November Joan scored 0 points for the purposes of the limited capability for work assessment and does not have limited capability for work.

42435 In all cases the effective date of the supersession to end entitlement to Employment and Support Allowance or credits is the date from which the claimant does not have limited capability for work1. This is because the later determination about limited capability for work showed there had been a change of circumstances when the claimant was no longer treated as having limited capability for work2.

1 SS CS (D & A) Regs (NI), Sch 2C, para 2 & 3(a); 2 ESA Regs (NI), reg 30

Contact lost with claimant

42436 For cases where medical evidence ceases and contact with the claimant is lost, see DMG 42553 et seq.

 42437 – 42449

Treated as not having limited capability for work

General

42450 A claimant can be treated as not having limited capability for work if

**1.** they fail without good cause to provide information, attend or submit examination1 (see DMG 42455 et seq)

**2**. they are certain claimants who

**2.1** have a day of sick absence from duty recorded by the Secretary of State for Defence2 (see DMG 42550)

**2.2** are attending a training course for which a training allowance or premium is paid3 (see DMG 42551)

**2.3** cease to supply medical evidence4 (see DMG 42553 et seq)

**2.4** are disqualified for receiving Employment and Support Allowance during a period of imprisonment or detention in legal custody5 (see DMG 42580)

**3.** they are not entitled to Employment and Support Allowance by reason of working6 (see DMG 42600).

1 ESA Regs (NI), reg 22 & 23; 2 reg 32(1); 3 reg 32(2); 4 reg 32A; 5 reg 159; 6 reg 40

 42451 – 42454

Failure to return the questionnaire

42455 A claimant can be required to

**1.** provide certain information asked for by the decision maker including the return of the questionnaire (see DMG 42457) **and**

**2.** attend and submit to a medical examination for the limited capability for work assessment (see DMG 42480).

 If they fail without good cause to do either, claimants are treated as not having limited capability for work1.

1 ESA Regs (NI), reg 22 & 23

42456 Before a claimant can be treated as not having limited capability for work, the decision maker has to be satisfied that the prescribed conditions are met. These include the way in which the information or attendance was requested and the amount of notice given.

42457 A claimant who is subject to the limited capability for work assessment can be asked to provide information1 relating to their ability to perform certain activities2. This information is usually asked for by sending the claimant a questionnaire.

1 ESA Regs (NI), reg 21(1)(b); 2 Sch 2

42458 The questionnaire is not required in certain circumstances1 (see DMG 42161). All other claimants will be sent the questionnaire.

1 ESA Regs (NI), reg 21(3)

42459 It is not appropriate to treat a claimant as not having limited capability for work for non-return of the questionnaire if a claimant fails to return the form but the decision maker has exercised discretion to proceed without it1.

1 ESA Regs (NI), reg 21(2)

42460 A claimant is treated as not having limited capability for work for failure to return the questionnaire without good cause if the decision maker can show that

**1.** the questionnaire was sent **and**

**2.** the claimant was sent a further request to return the questionnaire at least three weeks after the date of the first request1 **and**

**3.** at least one week has passed since the further request was sent2 **and**

**4.** good cause has not been accepted for delay beyond the period stated in **2.** and **3.** above3.

1 ESA Regs (NI), reg 22(2)(a); 2 reg 22 (2)(b); 3 reg 22(1)

 42461 – 42464

The Department’s duty

42465 The decision maker needs to make sure that the Department has complied with the duty set out in the legislation1 to send the questionnaire and the reminder to the claimant. The decision maker can accept that it has been sent if there is a record of its issue and no indication that it was not properly addressed, stamped and posted.

1 Interpretation Act (NI) 54, sec 24

Has the questionnaire been sent

42466 Care must be taken to identify the date the questionnaire was sent. The date of its issue is only an indication of the date on which it was posted. The decision maker should consider whether the questionnaire actually left the issuing office and was put into the external mail on the date recorded1.

1 R(IB) 1/00

 42467 – 42469

Has the correct amount of time passed

42470 The correct period of time must have passed since the first questionnaire was sent. The period of time starts on the day after the questionnaire is sent and ends at midnight on the last day provided for. If the questionnaire is posted to the claimant’s last known address, the date on which it is sent is the date it was posted1.

1 SS & CS (D&A) Regs (NI), reg 2(b)

 **Example**

 A questionnaire was sent to Jack on 7.11.11. A reminder is due and sent on 29.11.11. If he still does not return the questionnaire, the first day on which the decision maker can consider whether he should be treated as not having limited capability for work is 7.12.11.

Good cause

42471 If the decision maker concludes that the Department has complied with the duty set out in the legislation, they may then go on to consider whether the claimant had good cause for their failure to return the questionnaire1 (see DMG 42500).

1 ESA Regs (NI), reg 24

Questionnaire returned before a good cause considered

42472 As in DMG 42465 the law imposes time limits on the Department in relation to the sending of the questionnaire and the reminder. However, there is no law imposing a time limit on the claimant for the return of the questionnaire. Sometimes the questionnaire is returned after the time limit imposed on the Department but before the decision maker has considered whether there was good cause for the earlier failure to return the questionnaire. In these circumstances, the determination cannot be made because it cannot be held that the claimant has failed to return the questionnaire. Instead, normal work capability assessment action should resume.

 **Example**

 A questionnaire was sent to Jayne on 1.5.12. This was not returned so a reminder was sent to her on 23.5.12. If the questionnaire is not returned, the first day on which the decision maker could consider making a determination treating Jayne as not having limited capability for work is 31.5.12. The decision maker obtains the case on 11.6.12 to make the determination, but notes that the questionnaire had been received in the office on 6.6.12. The decision maker cannot make the determination treating Jayne as not having limited capability for work because she has not failed to return the questionnaire. Instead, normal work capability assessment action resumes.

 42473 – 42479

Failure to attend or submit to a medical examination

General

42480 Claimants may be called to attend a medical examination by a health care professional approved by the Department where it has to be determined whether they have limited capability for work1. The purpose of the medical examination is to enable the decision maker with the benefit of a medical opinion to determine whether a claimant meets the threshold for limited capability for work.

1 ESA Regs (NI), reg 23(1)

42481 Claimants can be treated as not having limited capability for work if

**1.** they fail without good cause to attend or submit to a medical examination1 **and**

**2.** they

**2.1** had at least 7 days written notice of the examination **or**

**2.2** agreed to accept a shorter period of notice whether given in writing or otherwise2.

1 ESA Regs (NI), reg 23(2); 2 reg 23(3)

42482 Medical services will contact the claimant by telephone to arrange an appointment for the examination and will keep a detailed record of the date, time and place of the examination agreed with the claimant and written notice will be issued to confirm the arrangement. The claimant can agree to accept a shorter period of notice than 7 days.

The Department’s duty

42483 Unless the claimant has agreed to accept a shorter period of notice whether given in writing or by telephone (see DMG 42862 and DMG 42485), when considering whether a claimant should be treated as not having limited capability for work, the decision maker has to be satisfied that the Department has complied with the duty set out in the legislation1, that

1. a written notice was sent **and**

**2.** the notice included the time and place of the examination **and**

**3.** the notice was sent at least 7 days before the date of the examination**and**

**4.** the examination had not been cancelled.

1 ESA Regs (NI), reg 23(3)

42484 If, after calculating the period of time which passed between the date the written notice was sent and the time of the examination, the decision maker decides that 7 days had not elapsed1, they should consider whether the claimant has agreed to accept a shorter period of notice whether given in writing or by telephone. If there is no evidence that the claimant had agreed to accept a shorter period of notice the claimant cannot be treated as not having limited capability for work.

1 ESA Regs (NI), reg 23(3)

42485 Where the claimant has agreed to accept a shorter period of notice the decision maker considers the appropriate amount of time agreed between medical services and the claimant1. Medical services always send confirmation of the date, time and venue of the appointment whether or not this has been agreed in a telephone call with the claimant.

1 ESA Regs (NI), reg 23(3)

42486 Only one rescheduled appointment can be offered during a work capability assessment referral. If the claimant cannot attend the rescheduled appointment, medical services will record that the customer has failed to attend. The decision maker will have to consider the reasons why the claimant cannot attend and consider good cause (see DMG 42500 et seq).

42487 If the decision maker cannot confirm that the provisions in DMG 42483 were met, the claimant cannot be treated as not having limited capability for work.

 **Note:** Medical services can provide evidence of notification for requests from decision makers who are considering revision or supersession of disallowance determinations and appeal submissions.

Has notice been sent

42488 The decision maker needs to be sure that the claimant has been sent notice. The decision maker can accept that it has been sent if there is a record of its issue and no indication that it was not properly addressed, stamped and posted1. In addition the decision maker should make sure that the notice was in writing and included the time and place of the medical examination unless the claimant had agreed to accept a shorter period of notice whether given in writing or otherwise. Medical services always send a confirmation of the date, time and venue of the appointment whether or not this has been agreed in a telephone call with the claimant.

1 Interpretation Act (NI) 1954, sec 24

Have seven days passed

42489 Where there is no evidence that the claimant agreed to accept a shorter period of notice whether in writing or otherwise, the decision maker needs to be sure that the correct period of notice has been given. The decision maker has to decide when the notice was sent. The day after is day one. Seven clear days of notice have to pass before the date of the examination1.

1 R(IB) 1/00

 **Example 1**

 A letter giving the time and place of a medical examination is prepared and placed in the post tray at 3pm on Friday 1st. Because of the timing of the internal post collection it does not reach the post room until Monday lunchtime and leaves the office into the external mail on Monday at 5pm. The appointment is timed for Monday 11th. The recipient does not attend. It is not possible to treat the claimant as not having limited capability for work because if Tuesday 5th is Day one, Monday 11th is Day seven and they have not received 7 days clear notice.

 **Example 2**

 A letter giving the time and place of a medical examination leaves the office on Wednesday 6th. The appointment is timed for Thursday 14th. The recipient does not attend. Subject to good cause the claimant is treated as not having limited capability for work because Thursday 7th is Day one, Thursday 14th is Day eight and they have received at least 7 days clear notice.

Has the appointment been cancelled

42490 Claimants cannot fail to attend the medical examination if the appointment had already been cancelled by medical services. The decision maker should investigate any indications that the claimant had made contact with the issuing office before the time of the examination. This is so that they can satisfy themselves that the appointment had been left open for the claimant.

Good cause

42491 If the decision maker concludes that the Department has complied with the duty set out in DMG 42483 they may go on to consider whether the claimant had good cause for their failure to attend a medical examination (see DMG 42500).

Failure to submit

42492 Where a claimant attends a limited capability for work assessment but fails to participate with the process the assessment is terminated. This may happen where a claimant

**1.** refuses to be examined

**2.** poses a threat to staff or others

**3.** shows inappropriate or threatening behaviour

**4.** shows intoxication from alcohol or substance abuse

**5.** is persistently uncooperative.

42493 Medical services will record a full and detailed account of the claimant’s behaviour and a full report will be completed and referred to the decision maker to decide whether the claimant should be treated as not having limited capability for work due to a failure to submit to an examination.

42494 If a claimant makes it clear that they will not be medically examined then that constitutes a failure to submit to an examination. Going to the examination but refusing to be examined constitutes attendance but is a failure to submit1.

1 R(IB) 1/01

42495 A claimant fails to submit to an examination not only by refusing to be examined but also if that claimant seeks to impose as a condition of being examined a term which would render the examination useless for the purpose for which it is required.

 **Example**

 The claimant requests the medical report should not be passed to a layman, including a decision maker, insisting on complete confidentiality. By imposing such a condition the examination becomes useless for the purposes for which it was required (see DMG 42860) and the claimant is failing to submit to an examination.

Good cause

42496 If the decision maker concludes that the Department has complied with the duty set out in DMG 42483 they may go on to consider whether the claimant had good cause for their failure to submit to a medical examination (see DMG 42500).

 42497 – 42499

Consideration of good cause

42500 When a claimant fails to return the questionnaire or fails to attend or submit to an examination, consideration of good cause includes

**1.** whether the claimant was outside Northern Ireland at the relevant time **and**

**2.** the claimant’s state of health at the relevant time **and**

**3.** the nature of any disability the claimant has1.

 **Note:** The list is not exhaustive (see DMG 42501 - 42543 for further guidance on good cause).

1 ESA Regs (NI), reg 24

42501 The claimant will have been asked to give the reasons for not complying with the Department’s request for information or to attend or submit for examination. The decision maker should bear in mind the guidance about considering evidence in DMG Chapter 1.

42502 The list is not exhaustive, the regulations state “include”. The onus of proving good cause lies with the claimant who fails to comply. The test of good cause is whether the decision maker judges the reason for non-attendance or failure to submit to be reasonable and likely on the balance of probabilities. See DMG Chapter 1 for guidance. The decision maker needs to ascertain the precise facts and apply the concept of “good cause”.

42503 The decision maker may determine that a claimant is treated as not having limited capability for work if

**1.** they have failed to return the questionnaire **or**

**2.** they have failed to attend or submit for examination **and**

**3.** have not replied to enquiries **or**

**4.** the reasons given do not amount to good cause.

General considerations

42504 When considering whether the claimant showed good cause, the decision maker should ensure that they fully explain how they made their determination by recording

**1.** findings about the claimant’s state of health at the time and nature of their disability

**2.** what evidence was considered

**3.** what findings were made on the evidence

**4.** what steps they took to contact the claimant

**5.** whether the claimant is vulnerable

**6.** whether there were previous failures and whether good cause was accepted

**7.** the reasons for their determination on good cause.

Claimant’s state of health

42505 The claimant may state that they were unable to attend a face-to-face assessment due to the state of their health on the date of the appointment (see DMG 42532). Claimants may have difficulty in producing further medical evidence to support their statement, as General Practitioners are not obliged to provide this. Failure to provide such evidence is not of itself a reason for refusing to accept that good cause was shown.

42506 The decision maker should consider whether the stated health problem prevented the claimant from contacting Medical Services to re-arrange the appointment. The decision maker should also consider the nature of the claimant’s health condition and whether it could reasonably have lead to the claimant being, for example, incapacitated, forgetful, confused, unmotivated or too anxious to comply with the process because of their health condition.

 **Example 1**

 Luke has an appointment for an examination on 5.8.13. He contacts Medical Services to say that he cannot attend as he has the flu, and arranges another appointment for 19.9.13. Luke fails to attend the new appointment. He returns the BF223 form explaining that the reason he did not attend was because he still had flu.

 Luke’s recent fit note shows low back pain as the reason for limited capability for work. The decision maker determines that good cause was not shown. Flu is incapacitating but usually only lasts for a week where there are no complications. It was unlikely that he still had flu since the previous appointment, and in any event it should not have prevented him from contacting Medical Services.

 **Example 2**

 Katie has an appointment for an examination on 2.10.13, but fails to attend. She states on the BF223 form that she woke up on the day of the appointment with severe dental pain, and had to wait in the dentist’s surgery for an emergency appointment. She required root canal treatment, and was prescribed a 5 day course of antibiotics for an infected wisdom tooth. As a result she was unable to attend the appointment. The decision maker accepts that good cause was shown for the failure to attend.

Nature of claimant’s disability

42507 Decision makers are reminded that the nature of the claimant’s disability is a factor that must be taken into account when considering whether good cause is shown (see DMG 42500). The decision maker should make every effort to ensure that all sources of evidence are considered before making a determination on good cause. Evidence about the claimant’s health may be obtained from

**1.** form BF223 (good cause enquiry form)

**2.** any fit notes supplied

**3.** ESA1 claim form

**4.** ESA50 questionnaire where one is available

**5.** any evidence previously submitted that is relevant

**6.** ESA85 report where one is available.

42508 This may be particularly relevant in cases where the claimant has

**1.** mental health conditions affecting memory or concentration

**2.** a learning difficulty, for example where this affects comprehension

**3.** medication which affects memory or concentration

**4.** a sensory impairment, such as being registered blind.

 **Example 1**

 Jack claims Employment and Support Allowance. His fit note states that he has problems with his feet. Jack fails to return form ESA50, and did not give any reasons for this failure. The award of Employment and Support Allowance was terminated. Jack’s social worker returned the form which had been completed for him, and explained that Jack had significant difficulties understanding correspondence, and often delayed seeking help as he panicked. Good cause is accepted, and Employment and Support Allowance is reinstated.

 Jack then fails to attend an examination on 24.9.13, and does not reply when the BF223 form is issued. The evidence in the questionnaire is that Jack has severe learning difficulties. He has limited literacy skills and lives alone. The decision maker accepts that Jack had good cause for failure to attend the examination, as due to the nature of his disability he is unable to comply with the process. The decision maker determines that Jack is likely to need on-going support for his benefit claims and refers for consideration of appointee action. They also request that Medical Services arranges a home visit.

 **Example 2**

 Tamara is required to attend for an examination on 13.9.13. She rings the examination centre and says that she is due to attend an out-patient clinic at the same time. She is offered and accepts a further appointment for 24.9.13, which she fails to attend.

 Tamara does not return form BF223, or respond to attempts to phone her. There is no evidence in the claim form, fit note or ESA50 which indicates that her health condition is likely to impact her ability to attend the appointment. The decision maker determines that Tamara did not have good cause for the failure to attend, and treats her as not having limited capability for work.

 **Example 3**

 Alex claims Employment and Support Allowance, stating that he suffers from agoraphobia, anxiety and depression. He does not return the questionnaire. Alex contacts Medical Services to ask for a home visit after being asked to attend the examination centre. The appointment is rearranged , and he is advised to get a supporting letter from his General Practitioner. Alex fails to attend an examination on 15.8.13. In the BF223 form he states that his General Practitioner had told him he would fax a letter to the examination centre requesting a home visit. He had no copy of the letter, and was struggling to keep organised. There is no information on the Medical Services computer system about a request for home visits, but the decision maker has no reason to doubt Alex’s explanation. The decision maker accepts that Alex had good cause for his failure to attend. The decision maker also asks Medical Services to arrange a home visit.

Previous work capability assessment attended

42509 The fact that the claimant has previously attended the work capability assessment and been found to have limited capability for work is not sufficient reason that good cause has not been shown for a subsequent failure to attend. The decision maker should consider each case on its merits.

 **Example**

 Lorraine, who has mental health problems, is placed in the support group following previous application of the work capability assessment. She is referred for a further work capability assessment 18 months later, and does not return the questionnaire. She also fails to attend for examination.

 In response to the BF223 form, Lorraine’s community psychiatric nurse says that due to the strength of the medication taken for several years for paranoid schizophrenia, Lorraine often forgets to carry out daily tasks or attend appointments. The fact that Lorraine had previously managed to attend for examination despite her memory problems is not of itself sufficient to show that there was no good cause for the current failure.

Repeated failures

42510 Where a claimant repeatedly fails to attend an examination, and good cause is accepted, the decision maker should consider the previous reasons given critically. It may be appropriate to require further evidence to support any explanation for the subsequent failure. Wherever possible the decision maker should contact the claimant to discuss the importance of attendance.

42511 However, the fact that good cause was previously accepted is not a reason for concluding that the claimant should be aware of the requirement to attend a subsequent appointment. The same reasons for the failure may continue to demonstrate that good cause is shown, such as in the case of a claimant who has a long term mental health problem, who can only intermittently comply with the processes necessary to manage their benefit claim due to effects of their condition and its treatment.

 **Example**

 Viktor failed to attend for an examination. He did not respond to the BF223 form, and his Employment and Support Allowance award was terminated. He subsequently provided evidence that on the day of the appointment he had a panic attack on his way to the assessment centre. He was taken to hospital, and discharged later in the day. The decision maker accepts that good cause was shown, and Employment and Support Allowance is reinstated.

 Viktor fails to attend the subsequent appointment. He replies on the BF223 form, saying that he had a panic attack and felt unable to leave the house on the day of the appointment, and was too anxious to explain this at the time. The decision maker accepts that good cause was shown, and asks Medical Services to consider a home visit.

42512 The decision maker may wish to consider whether it would be possible to ensure that the claimant does not fail to attend future appointments, where the nature of the claimant’s health condition is the reason for good cause being accepted, and the health condition is likely to be long term. For example, if the evidence shows that the claimant is not capable of arranging their own affairs, is appointee action appropriate? Should a home visit be recommended?

 42513 – 42529

Good cause - some scenarios

42530 Any reasons given for the non-return of the questionnaire should be judged on the balance of probabilities. Whether the reasons for delay amount to good cause depends upon whether the decision maker considers, for example

**1.** it was reasonable not to return the questionnaire on this occasion **or**

**2.** if non receipt by the office or claimant was more probable than not.

42531 If a claimant says that they were too ill to attend because of the nature of their disability, the decision maker should ask for evidence to support this. If the claimant is usually able to get out, for example to the doctor or hospital, good cause should only be accepted if it is unreasonable to expect the claimant to have attended on that occasion. Exceptionally, a claimant may be examined at home if they are unable to travel.

42532 A claimant may say they were too ill to attend because of a condition unrelated to their disability, for example they may say that they had flu at the time of the appointment. If the decision maker accepts the evidence, the claimant has shown good cause for their non-attendance.

42533 Good cause was not accepted in a case where a claimant had tried to avoid attending several examinations by submitting final certificates. In the particular circumstances the final certificate was irrelevant because it was replaced by an open statement which included the day of the examination1.

1 R(S) 12/59

42534 If the claimant contends that they did not receive the notice of the appointment, decision makers should satisfy themselves that the notice was sent. The decision maker should give consideration to the date on which the written notice was posted, the time sufficient to show whether or not it would have been collected from the post box, the address to which it was posted and whether by first or second class post. The decision maker should also be satisfied the letter has not been returned undelivered.

42535 The decision maker will normally need better evidence of the address to which it was posted than a later computer generated print out showing the address on the file at that later date. If there is no evidence to show whether first or second class post was used the decision maker should assume that second class post was used. If it was sent it can be assumed it was delivered unless there is evidence to the contrary.

42536 Where the claimant says the postal difficulties are specific to them or their address, all of their circumstances are to be given fair consideration. They will have to show that they have done enough to ensure as far as is reasonably possible that they receive their mail, special care may be expected in the cases of accommodation addresses and premises in multiple occupation.

42537 Sometimes it may be right to reject a claimant’s allegation of non-receipt where the excuse extends to a number of letters, or is coupled with suspicious circumstances, or if the non-receipt of mail is selective so that only certain letters are not received. However the uncontradicted evidence of the non-receipt of a single letter in plausible circumstances, such as the communal delivery of mail to particular premises where another person went through the mail before the claimant had a chance to do so may establish good cause.

42538 Decision makers can see all changes of address and when the changes were effective from in the relevant medical services computer system to help them decide where the questionnaire was sent and when.

42539 If a claimant attends but refuses to have a physical examination, for example because of genuinely held religious beliefs, the decision maker should normally accept good cause unless it is evident that the refusal is based on a prejudice against or distaste for the examination rather than because of a particular belief1.

1 R(S) 9/51

42540 It is possible for the decision maker to consider that a claimant did not have good cause for failure to submit to an examination because of drunkenness, drug abuse or other problem behaviour. However if the behaviour is a symptom of the stated medical condition such as alcoholism rather than an isolated occurrence, the claimant may have good cause.

42541 A claimant did not attend for medical examination because a consultant advised that attendance was not necessary. It was held that, irrespective of a medical advisor’s opinion as to limited capability for work, a claimant is obliged to abide by the rules for claiming benefit. None of the matters that have to be taken into account when considering good cause applied and the claimant had not shown good cause for failing to attend for medical examination.

42542 A failure to comply with a notice to attend a medical examination will be deliberate, except in cases where the claimant is unable to make a choice between attendance and non-attendance. The question is whether there is good cause for the deliberate failure to comply with the notice.

42543 A claimant who fails to attend an examination for limited capability for work-related activity can only be treated as not having limited capability for work-related activity. A claimant cannot be treated as not having limited capability for work if their failure was to not attend or participate in the limited capability for work-related activity part of the work capability assessment.

 42544 – 42549

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

Member of Her Majesty’s Forces

42550 A claimant who is or has been a member of Her Majesty’s forces1 is 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 duty2. See DMG Chapter 41 for guidance on the meaning of Her Majesty’s forces.

1 ESA Regs (NI), reg 2(1); 2 reg 32(1)

Training course

42551 A claimant is treated as not having limited capability for work on any day on which they1

**1.** attend a training course **and**

**2.** are paid a training allowance or premium under certain provisions2.

1 ESA Regs (NI), reg 32(2); 2 E & T Act (NI) 1950, sec 1 & 3

42552 DMG 42551 does not apply

**1.** where the Employment and Support Allowance claim is made for a period which begins after the claimant ceased attending the training course **or**

**2.** where any training allowance or training premium paid to the claimant is paid for the sole purpose of travelling and meal expenses incurred as part of the training course1.

1 ESA Regs (NI), reg 32(3)

Medical evidence ends

42553 A person may be treated as not having limited capability for work1 if

**1.** they have supplied medical evidence in accordance with legislation2 **and**

**2.** the period covered by that medical evidence has ended **and**

**3.** the Department has requested further medical evidence **and**

**4.** the person has not, within 6 weeks

**4.1** supplied further medical evidence **or**

**4.2** otherwise made contact with the Department to indicate that they wish to have the question of limited capability for work determined.

 **Note:** The definition of medical evidence at DMG 42316 does not apply. See DMG 42145 for further guidance.

1 ESA Regs (NI), reg 32A(1); 2 reg 32(A)(2)

42554 The 6 week period begins on

**1.** the date of the Department’s initial request for further medical evidence **or**

**2.** the day after the date on which the period covered by the medical evidence has ended

 whichever is the later1.

1 ESA Regs (NI), reg 32A(1)(d)

42555 If at the end of the 6 weeks no further medical evidence is received, or the claimant does not contact the Department, the decision maker should treat the claimant as not having limited capability for work from the day after the medical evidence expires. The decision is effective from the date of the change1, which is the date from which the claimant is treated as not having limited capability for work.

1 SS & CS (D&A) Regs (NI), Sch 2C, para 2 & 3(a)

 **Example**

 Graham’s current medical certificate provides him with evidence of limited capability for work up to and including 19.5.10. A reminder that further medical evidence will be required is issued on 12.5.10. The 6 weeks period ends on 30.6.10, and Graham does not contact the Department by then. He is treated as not having limited capability for work from 20.5.10, the day after the medical evidence ends.

42556 Where the person

**1.** fails to provide further medical evidence **and**

**2.** asks for limited capability for work to be determined

 the decision maker should continue to follow the guidance in DMG 42430 - 42435.

 **Example**

 William is covered by a doctor’s statement up until 5.7.10. On 13.7.10 the local office receives a letter from him stating that he became fit enough to start work on 12.7.10. The decision maker may accept this as a request from William for his limited capability for work to be determined for the period from 6.7.10 to 11.7.10.

 42557 – 42569

Medical evidence ceases before appeal heard - contact with claimant lost

42570 Where

**1.** a claimant is entitled to Employment and Support Allowance pending an appeal **and**

**2.** medical evidence ceases **and**

**3.** the claimant does not respond to reminders requesting further medical evidence

 the decision maker should consider whether the guidance at DMG 42553 - 42556 about treating the claimant as not having limited capability for work and terminating the award applies1.

1 ESA Regs (NI), reg 32A

Appeal allowed

42571 Where

**1.** an award is terminated as in DMG 42570 **and**

**2.** the Appeal Tribunal allows the appeal

 the decision maker should award arrears of Employment and Support Allowance as appropriate up to the date of the termination of the pending appeal award1.

1 ESA Regs (NI), reg 147A(6) & (7)

 42572 – 42574

Medical evidence ceases before appeal heard - contact with claimant lost

42575 Where

**1.** a claimant is entitled to Employment and Support Allowance pending an appeal **and**

**2.** medical evidence ceases **and**

**3.** the claimant states that he is unable to provide further medical evidence but wishes limited capability for work to be determined

 the guidance at DMG 42431 - 42435 about determining limited capability for work does not apply while the appeal is awaiting hearing. This is because the claimant cannot be referred for a work capability assessment unless they have a new or worse health condition - see DMG 42850.

42576 Payment of Employment and Support Allowance should be suspended pending the outcome of the appeal1.

1 SS & CS (D&A) Regs (NI), reg 16

Appeal allowed

42577 Where the appeal is allowed, the suspension should be lifted and the guidance at DMG 42866 - 42867 applied as normal.

Appeal withdrawn, struck out or dismissed

42578 Where the appeal is withdrawn, struck out or dismissed, the guidance at DMG 42431 - 42435 and 42860 - 42865 should be applied.

 **Example**

 Karen has been entitled to Employment and Support Allowance since 5.10.11 pending an appeal against the decision terminating her award of Employment and Support Allowance following application of the work capability assessment. On 15.3.12 medical evidence expires, and Karen states that she is unable to supply further doctor’s statements. The decision maker suspends payment of Employment and Support Allowance. Karen does not make a claim for another benefit.

 On 26.6.12 Karen’s appeal is dismissed. The decision maker treats Karen as not having limited capability for work from 4.7.12, and also determines that for the period 16.3.12 - 3.7.12, on the balance of probabilities she scores 0 points for the purposes of the work capability assessment. The award of Employment and Support Allowance is terminated from 16.3.12.

 42579

Detention in legal custody

42580 A claimant is to be treated as not having limited capability for work if disqualified for receiving contribution-based Employment and Support Allowance during a period of imprisonment or detention in legal custody if that disqualification is for more than 6 weeks1. Payment of contribution-based Employment and Support Allowance is suspended from the first day of imprisonment or detention in legal custody. If a decision is subsequently made to disqualify the claimant for receiving contribution-based Employment and Support Allowance, that decision will apply from the first day of imprisonment or detention in legal custody. Therefore, unless it is for a period of 6 weeks or less, the claimant will be treated as not having limited capability for work from the first day of imprisonment or detention in legal custody.

 **Note:** See DMG Chapter 53 for guidance on disqualification for imprisonment or detention in legal custody for contribution-based Employment and Support Allowance.

1 ESA Regs (NI), reg 159(1)

 **Example**

 Kenneth is detained in legal custody on 1.2.10 and payment of his contribution-based Employment and Support Allowance is suspended. On 1.4.10 the decision maker decides that Kenneth should be disqualified for receiving contribution-based Employment and Support Allowance from 1.2.10 because he has been sentenced to a period of imprisonment for a period exceeding 6 weeks. There is also a determination that Kenneth is treated as not having limited capability for work from 1.2.10.

42581 If the claimant is entitled to income-related Employment and Support Allowance as a prisoner during a period of imprisonment or detention in legal custody where they are awaiting trial or sentencing1, they are treated as not having limited capability for work from the day after they cease to be so entitled2.

 **Note:** See DMG Chapter 54 for guidance on entitlement to income-related Employment and Support Allowance during a period of imprisonment or detention in legal custody.

1 ESA Regs (NI), Sch 5, para 3; 2 reg 159(2)

 **Example**

 Jackie is entitled to income-related Employment and Support Allowance while she is on remand awaiting sentencing, with her applicable amount being the amount of her housing costs. On 21.4.10 she is sentenced to a term of imprisonment. The decision maker supersedes the award of income-related Employment and Support Allowance and decides that Jackie has no entitlement to it from 21.4.10 because her applicable amount is nil. There is also a determination that Jackie is treated as not having limited capability for work from 22.4.10.

42582 If the claimant is entitled to contribution-based Employment and Support Allowance and income-related Employment and Support Allowance the decision maker should consider both DMG 42580 and DMG 42581.

 **Example**

 Christian is entitled to contribution-based Employment and Support Allowance and income-related Employment and Support Allowance which includes an amount for housing costs. On 12.4.10 he is detained in legal custody. The decision maker suspends payment of contribution-based Employment and Support Allowance. The decision maker also supersedes the award of income-related Employment and Support Allowance and decides that Christian’s applicable amount for income-related Employment and Support Allowance is the amount of his housing costs. On 6.9.10 Christian is sentenced to a term of imprisonment. The decision maker decides that Christian should be disqualified for receiving contribution-based Employment and Support Allowance from 12.4.10 because he has been sentenced to a period of imprisonment for a period exceeding 6 weeks. In addition, the decision maker supersedes the award of income-related Employment and Support Allowance and decides that Christian has no entitlement to it from 6.9.10 because his applicable amount is nil. There is also a determination that Christian is treated as not having limited capability for work for income-related Employment and Support Allowance purposes from 7.9.10.

 42583 – 42599

Claimants who are treated as not entitled to Employment and Support Allowance by reason of working to be treated as not having limited capability for work

42600 For guidance on the effect of working on a claim or an award of Employment and Support Allowance see DMG Chapter 41.

42601 Claimants who are treated as not entitled to Employment and Support Allowance by reason of working are treated as not having limited capability for work1 unless the claimant remains entitled to contribution-based Employment and Support Allowance but is not entitled to income-related Employment and Support Allowance2.

1 ESA Regs (NI), reg 44(1); 2 reg 44(2)

42602 DMG 42601 applies even if it is determined that the claimant has or is to be treated as having limited capability for work because they

**1.** satisfy certain conditions1 (see DMG 42031)

**2.** are a hospital in-patient2 (see DMG 42070)

**3.** are receiving certain regular treatments3 (see DMG 42090)

**4.** have exceptional circumstances4 (see DMG 42310)

**5.** satisfy the conditions pending assessment5 (see DMG 42350).

1 ESA Regs (NI), reg 20(1); 2 reg 25; 3 reg 26; 4 reg 29; 5 reg 30

Date of determination

42603 Where a claimant is in receipt of Employment and Support Allowance the determination to treat someone as not having limited capability for work applies to the whole week during which the work is done. However that person is only treated as not having limited capability for work on the days on which they actually work in the week in which they

**1.** first have limited capability for work1 **or**

**2.** start or return to work2.

1 ESA Regs (NI), reg 40(4)(a); 2 reg 40(4)(b)

42604 See DMG 42105 for guidance on the day or days in a week on which a night shift worker works1.

1 ESA Regs (NI), reg 40(6)

42605 See DMG 42097 et seq for guidance on the effects of work on claimants who are receiving or recovering from regular treatment.

 42606 – 42609

Limited capability for work-related activity

General

42610 A determination has to be made whether a claimant who has limited capability for work also has limited capability for work-related activity at the end of the assessment phase1.

1 WR Act (NI) 07, sec 9(1) & (2)

42611 Where it is determined a claimant has limited capability for work the claimant will receive an Employment and Support Allowance component during the main phase of Employment and Support Allowance entitlement. Which component they receive depends on whether or not they also have limited capability for work-related activity.

 **Note:** See DMG Chapter 44 for guidance on amounts payable.

42612 Claimants with the most severe illnesses or disabilities who have limited capability for work-related activity will receive the support component1 without conditionality although they may participate in work-related activity on a voluntary basis if they so wish.

1 WR Act (NI) 07, sec 4(4)

42613 The majority of claimants who will be determined not to have limited capability for work-related activity will receive a work-related activity component1. These claimants are required to engage in the work focused interview regime in the main phase of their Employment and Support Allowance claim.

 **Note:** For further guidance on work-focused interviews see DMG Chapter 53.

1 WR Act (NI) 07, sec 2(3) & 4(5)

 42614 – 42619

Entitlement ends before limited capability for work-related activity is determined

42620 In cases where an award of Employment and Support Allowance ends during the assessment phase, a claimant may request arrears of a component to be paid, even though no determinations about limited capability for work and limited capability for work-related activity have been made before entitlement ends.

42621 Where

**1.** a claimant’s entitlement to Employment and Support Allowance ends, for example because they have returned to work, after the 13th week of entitlement but before the work capability assessment has been carried out **and**

**2.** the claimant asks for arrears of a component to be paid from week 14

 the decision maker should make a decision not to supersede the decision which awarded entitlement, or any later superseding decision, on the grounds that the conditions allowing supersession are not satisfied. See DMG 4019 - 4020 for guidance on making a decision not to supersede. The decision carries the right of appeal to an appeal tribunal1.

1 SS (NI) Order 98, sec 12(1); R(DLA) 1/03

42622 **[See DMG Memo Vol 1/105, 4/127 & 8/66]** A claimant cannot be awarded a component until the assessment phase has ended1, and this is

**1.** the last day of a period of 13 weeks starting with the date of the award2 **or**

**2.** when a determination about limited capability for work has been made if later3.

 This means that if the limited capability for work determination is not made within the 13 week period, the assessment phase cannot end until it is made. See DMG Chapter 44 for guidance on ending the assessment phase.

1 WR Act (NI) 07, sec 2(2)(a) & (3)(a); sec 4(4)(a) & (5)(a); 2 ESA Regs (NI), reg 4(1); 3 reg 4(2)

42623 If the claimant has limited capability for work, a determination is also required as to whether they have limited capability for work-related activity1. This determines whether the claimant is paid the work-related activity component or the support group component, and when the main phase begins2.

1 ESA Regs (NI), reg 34; 2 reg 2(1) definition of “main phase”

42624 These determinations cannot be made without evidence, and the claimant cannot be given the benefit of the doubt. Even if the decision maker had sufficient evidence, for example from the questionnaire (ESA50), to make the necessary determinations without a medical report, the supersession effective date rules do not permit arrears of the component to be paid from week 14 in such cases. This is because the rule allowing backdating to week 14 only applies where the component is awarded following receipt of a report from a health care professional1.

1 SS & CS (D&A) Regs (NI), reg 6(2)(q) & 7(37)

42625 That means that the normal effective date rules for a change of circumstances would apply1. The change would be making the determinations, and as this occurred after entitlement to Employment and Support Allowance ended it would not be relevant to the decision which awarded entitlement. The decision maker could not supersede for a relevant change of circumstances to change that outcome, as, in this context, further entitlement following a disallowance requires a claim2.

1 SS & CS (D&A) Regs (NI), Sch 2C; 2 SS (NI) Order 98, art 9(2)(b)

Claim for Universal Credit

42626 Where

 **1.** an award of Employment and Support Allowance ends when a claim is made for Universal Credit **and**

 **2.** the Employment and Support Allowance assessment phase has not ended **and**

 **3.** it is determined that the claimant has, or is treated as having, limited capability for work or limited capability for work-related activity for the purposes of Universal Credit

the decision maker should determine whether, using the evidence obtained for the Universal Credit work capability assessment outcome, the claimant had limited capability for work and if so, whether they had limited capability for work-related activity, for the purposes of Employment and Support Allowance.

 **Note :** The limited capability for work and limited capability for work-related activity descriptors for Universal Credit and Employment and Support Allowance are identical, as are most of the conditions for treating a claimant as having limited capability for work or limited capability for work-related activity. See ADM Chapters G2 and G3 for further details.

42627 Where the decision maker makes determinations about limited capability for work and limited capability for work-related activity as in DMG 42626, the decision awarding Employment and Support Allowance should be superseded1 and the appropriate component awarded as normal up to the day before the date of the Universal Credit claim. See DMG Chapter 04 for detailed guidance on supersession.

 **Note :** See DMG Chapter 44 Appendix 10 for guidance on when the work-related activity component can be included in an award of Employment and Support Allowance.

1 SS & CS (D&A) Regs (NI), reg 6(2)(q) & 7(38) or (39)

 42628 – 42669

Determination of limited capability for work-related activity

42670 Whether a claimant’s capability for work-related activity is limited by the claimant’s physical or mental condition and the limitation is such that it is not reasonable to require the claimant to undertake such activity is determined if one or more of the descriptors are met1.

1 ESA Regs (NI), reg 34(1), Sch 3

42671 **[See DMG Memo Vol 8/81]** A descriptor applies to a claimant if that descriptor applies to the claimant for the majority of the time or on the majority of occasions on which the claimant carries out or attempts to carry out the activity described by that descriptor1.

1 ESA Regs (NI), reg 34(2)

42672 A claimant will be assessed as if

**1.** fitted with or wearing any prosthesis with which that claimant is normally fitted or normally wears (such as an artificial limb) **or**

**2.** wearing or using any aid or appliance which is normally, or could reasonably be expected to be, worn or used (such as a hearing aid)1.

1 ESA Regs (NI), reg 34(3)

42673 When assessing the extent of the claimant’s limited capability for work-related assessment, it is a condition that the claimant’s inability to perform1

**1.** physical descriptors2 arises

**1.1** from a specific bodily (i.e. physical) disease or disablement **or**

**1.2** as a direct result of treatment by a registered medical practitioner for such a condition **and**

**2.** mental descriptors3 arises

**2.1** from a specific mental illness or disablement **or**

**2.2** as a direct result of treatment by a registered medical practitioner for such a condition.

1 ESA Regs (NI), reg 34(6); 2 Sch 3, descriptors 1-8, 15(a) & (b), 16(a) & (b);
3 Sch 3, descriptors 9-14, 15(c) & (d), 16(c) & (d)

 42674 – 42679

Certain claimants treated as having limited capability for work-related activity

42680 A claimant is treated as having limited capability for work-related activity if they are1

**1.** terminally ill **or**

**2.** is

**2.1** receiving **or**

**2.2** likely to receive **or**

**2.3** recovering from

 treatment for cancer by way of chemotherapy or radiotherapy and the decision maker is satisfied that the claimant should be treated as having limited capability for work-related activity (see DMG 42050 - 42052 for further guidance) **or**

**3.** in the case of a woman, she is pregnant and there is a serious risk of damage to her health or the health of her unborn child if she does not refrain from work-related activity.

1 ESA Regs (NI), reg 35(1)

42681 A claimant who does not have limited capability for work-related activity is treated as having limited capability for work-related activity if

**1.** the claimant suffers from some specific disease or bodily or mental disablement **and**

**2.** by reasons of such disease or disablement, there would be a substantial risk (see DMG 42320) to the mental or physical health of any person if that claimant were found not to have limited capability for work-related activity1.

1 ESA Regs (NI), reg 35(2)

 42682 – 42739

Information required for determining capability for work-related activity

42740 The information required to determine whether a claimant has limited capability for work-related activity is1

**1.** any information relating to the descriptors that may be requested in the form of a questionnaire **and**

**2.** any additional information as may be requested.

1 ESA Regs (NI), reg 36(1)

42741 Where the decision maker is satisfied there is sufficient information to determine whether a claimant has limited capability for work-related activity without the questionnaire that information will not be required1. For example the claimant is considered to be in a vulnerable group, i.e. there is a diagnosis of a mental health condition. A decision to treat as not having limited capability for work-related activity due to non return of the questionnaire would not be made but the claimant referred for assessment.

1 ESA Regs (NI), reg 36(2)

42742 Certain claimants who are treated as having limited capability for work (see DMG 42030 et seq) are not required to complete a questionnaire for the purposes of determining limited capability for work but will be required to provide information relating to the descriptors for limited capability for work-related activity unless they are also treated as having limited capability for work-related activity (see DMG 42673).

42743 Medical services are responsible for gathering any information required to support the work capability assessment process. This includes

**1.** sending the questionnaire (ESA50A)

**2.** sending a reminder if the claimant does not reply within 28 days.

 **Note:** This could be any such additional information as the decision maker requires to determine whether a claimant has limited capability for work-related activity1.

1 ESA Regs (NI), reg 36(1)

42744 It will not be necessary to obtain completion of an ESA50A for limited capability for work-related activity in every case where the claimant has already provided information on an ESA50 for limited capability for work. The health care professional should obtain additional information regarding the descriptors at the medical examination for limited capability for work in order to provide an opinion on limited capability for work-related activity (see DMG 42771).

 **Note:** There will be no need for a medical examination if a health care professional can confirm on the basis of paper evidence that the claimant is, or is not, in the support group. If both limited capability for work and limited capability for work-related activity can be assessed from the same piece of evidence then there is no need to obtain further information.

Failure to provide information

42745 A claimant is treated as not having limited capability for work-related activity if

**1.** the questionnaire was sent **and**

**2.** the claimant was sent a further request to return the questionnaire at least 3 weeks after the date of the first request **and**

**3.** at least one week has passed since the further request was sent2 **and**

**4.** good cause has not been accepted for the delay beyond the period stated in **2.** and **3.** above3.

1 ESA Regs (NI), reg 37(2)(a); 2 reg 37(2)(b); 3 reg 37(1)

42746 The decision maker needs to make sure that the Department has complied with the duty set out in the legislation1 to send the questionnaire and the reminder to the claimant. The decision maker can accept that it has been sent if there is a record of its issue and no indication that it was not properly addressed, stamped and posted.

1 Interpretation Act (NI) 54, sec 24

42747 If the decision maker concludes that the Department has complied with the duty set out in the legislation, they may then go on to consider whether the claimant had good cause for their failure to return the questionnaire1 (see DMG 42760).

1 ESA Regs (NI), reg 39

42748 Any reasons given for the non-return should be judged on the balance of probabilities. Whether the reasons for delay amount to good cause depends upon whether the decision maker considers, for example

**1.** it was reasonable not to return the questionnaire on this occasion **or**

**2.** if non receipt by the office or claimant was more probable than not.

42749 See DMG 42760 et seq for guidance on good cause where a claimant fails to return a questionnaire for a determination of limited capability for work-related activity. The general principles in DMG 42466 to 42472 to be considered when determining limited capability for work also apply to limited capability for work-related activity.

 **Note:** A claimant who fails to provide information for limited capability for work-related activity can only be treated as not having limited capability for work-related activity. A claimant cannot be treated as not having limited capability for work if their failure was to not provide information in respect of the limited capability for work-related activity part of the work capability assessment.

 42750 – 42754

Claimants who may be called for examination

42755 Claimants may be called to attend a medical examination by a health care professional approved by the Department where it has to be determined whether or not they have limited capability for work-related activity1.

1 ESA Regs (NI), reg 38(1)

42756 Claimants can be treated as not having limited capability for work-related activity if

**1.** they fail without good cause to attend or submit to a medical examination1 and

**2.** they

**2.1** had at least 7 days written notice of the examination or

**2.2** agreed to accept a shorter period of notice whether given in writing or otherwise2.

1 ESA Regs (NI), reg 38(2); 2 reg 38(3)

42757 The general principles in DMG 42482 - 42496 to be considered when determining limited capability for work also apply to limited capability for work-related activity.

 **Note:** A claimant who fails to attend or submit for examination for limited capability for work-related activity can only be treated as not having limited capability for work-related activity. A claimant cannot be treated as not having limited capability for work if their failure to attend or submit for examination was in respect of the limited capability for work-related activity part of the work capability assessment.

42758 Where a claimant fails without good cause to attend or submit for examination the claimant can be treated as not having limited capability for work-related activity1 (see DMG 42756).

1 ESA Regs (NI), reg 38(2)

42759 If the decision maker concludes that the Department has complied with the duty set out in DMG 42756 they may go on to consider whether the claimant had good cause for their failure to attend or submit to a medical examination (see DMG 42760).

Consideration of good cause

42760 When a claimant fails to provide information or to attend or submit to an examination, consideration of good cause includes

**1.** whether the claimant was outside Northern Ireland at the relevant time **and**

**2.** the claimant’s state of health at the relevant time **and**

**3.** the nature of any disability the claimant has1.

1 ESA Regs (NI), reg 39

42761 The list is not exhaustive, the regulations state “include”. The onus of proving good cause lies with the claimant who fails to comply. The test of good cause is whether the decision maker judges the reason for non-attendance or failure to attend or submit to examination to be reasonable and likely on the balance of probabilities. See DMG Chapter 1 for guidance. The decision maker needs to ascertain the precise facts and apply the concept of “good cause”.

42762 See DMG 42504 - 42543 for further guidance on consideration of whether a claimant has good cause. This guidance is general on the principles of good cause and applies to consideration of both limited capability for work and limited capability for work-related activity.

 **Note:** A claimant who fails to return information, attend or submit for an examination for limited capability for work-related activity can only be treated as not having limited capability for work-related activity. A claimant cannot be treated as not having limited capability for work if their failure was to not return information, attend or participate in the limited capability for work-related activity part of the work capability assessment.

42763 Where there is no evidence of good cause or the reasons provided are not accepted as good cause, the decision maker should determine that the claimant is treated as not having limited capability for work-related activity.

 42764 – 42769

Determination of whether a claimant has limited capability for work-related activity

42770 The decision maker determines whether a claimant has limited capability for work-related activity from

**1.** the questionnaire if one is available **and**

**2.** a statement from the General Practitionerif one is available **and**

**3.** the medical opinionfrom the health care professional including the personalised summary statement **and**

**4.** any other relevant evidence.

42771 Health care professionals should provide relevant information and good justification for their recommendations with regard to limited capability for work-related activity on a medical report form on either an

**1.** ESA85 if the claimant has been examined for limited capability for work and the recommendation is that the claimant does not have limited capability for work-related activity **or**

**2.** ESA85A if the claimant

**2.1** has not been examined **or**

**2.2** has been examined for limited capability for work and the recommendation is that the claimant has limited capability for work-related activity **or**

**2.3** is treated as having limited capability for work and has been called for examination for assessment of limited capability for work-related activity only.

 **Note:** For the purposes of **2.2** if limited capability for work-related activity is identified at examination the decision maker will get two reports. An ESA85 for limited capability for work and an ESA85A for limited capability for work-related activity.

42772 In the main, medical reports will be completed electronically. There is no requirement for the report to be signed by the examining health care professional1. However the report must identify the status of the health care professional, i.e. whether he/she is a doctor or registered nurse.

42773 The medical report includes an opinion of a health care professional on whether any prescribed exceptional circumstances apply. The decision maker should consider that opinion when deciding whether a claimant can be treated as having limited capability for work-related activity if they do not satisfy the test for limited capability for work-related activity from the descriptors1 (see DMG 42681).

1 ESA Regs (NI), reg 35(2)

42774 The normal principles apply to considering the evidence. Guidance is in DMG Chapter 1.

 42775 – 42779

Second or subsequent referrals

42780 The medical report also includes advice on the period of time that should pass before a claimant is reconsidered for the next work capability assessment process. This advice is given in all cases but the decision maker can determine afresh whether the claimant still has or can be treated as having limited capability for work-related activity in prescribed circumstances (see DMG 42785). This may be at a different time to the advice given on the medical report.

42781 In second and subsequent referrals medical services will provide a recommendation on whether a claimant has limited capability for work-related activity.

42782 Not all claimants require a limited capability for work assessment in subsequent referrals. Medical services will decide if limited capability for work can be assessed on scrutiny of the available evidence however it may be necessary to call the claimant for examination on subsequent referrals to assess capability for work-related activity.

42783 Medical conditions can improve with treatment or they may decline. Depending on the outcome of future assessments claimants who are placed in the work-related activity group may be removed from that group and placed in the support group and vice versa.

 42784

Determining limited capability for work-related activity afresh

42785 Where it has been determined a claimant

**1**. has limited capability for work-related activity **or**

**2.** is treated as having limited capability for work-related activity **or**

**3.** is treated as not having limited capability for work-related activity

 the decision maker can determine afresh whether the claimant still has or is treated as having limited capability for work-related activity1.

1 ESA Regs (NI), reg 34(4)

42786 DMG 42785 applies where1

**1.** the decision maker wishes to determine whether there has been a relevant change of circumstances in relation to the claimant’s physical or mental condition **or**

**2.** the decision maker wishes to determine whether the previous determination was made in ignorance of, or based on a mistake as to some material fact **or**

**3.** at least 3 months have passed since the date of the previous determination.

1 ESA Regs (NI), reg 34(5)

 42787 – 42789

Employment and Support Allowance awarded pending limited capability for work appeal

Claimant treated as having limited capability for work

42790 Where the conditions in DMG 42791 - 42792 are satisfied, a claimant who makes and pursues an appeal to the Appeal 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 DMG 42795) made on a claim made or treated as made on or after 30.3.15.

1 ESA Regs (NI), reg 30(3)(c); 2 SS (C&P) Regs (NI), reg 3(1)(j)

42791 The conditions in DMG 42790 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, the claimant makes an appeal to the Appeal Tribunal against the disallowance **and**

**3.** the claimant provides or continues to provide medical evidence **and**

**4.** no claim for Income Support or Jobseeker’s Allowance is made.

 **Note 1:** See DMG Chapters 03 and 06 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), reg 30(1), (2)(a) & (3); 2 SS (C&P) Regs (NI), reg 3(1)(j)

42792 The claimant must also satisfy the other conditions of entitlement

**1.** the basic conditions1 - see DMG 41012 **and**

**2.** for

**2.1** contribution-based Employment and Support Allowance, the time limits2 - see DMG 41021 **or**

**2.2.** income-related Employment and Support Allowance, the financial conditions3 - see DMG 41091.

1 WR Act (NI) 07, sec 1(3); 2 sec 1A; 3 sec 1(2)(b) & Sch 1, Part 2, para 6(1)

42793 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 DMG 42840 where a claim is made at the same time as the appeal.

 **Note:** Decision makers are reminded that for income-related Employment and Support Allowance, the award includes any premiums and housing costs as appropriate.

42794 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 in DMG 42354, which would otherwise mean that they could not be treated as having limited capability for work2.

1 WR Act (NI) 07, sec 1(3)(a); 2 ESA Regs (NI), reg 30(2)(b) & (3)

42795 A relevant decision1 is a decision made on a claim made or treated as made on or after 30.3.15 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 as in DMG 42351 is not a determination that the claimant does have limited capability for work.

1 ESA Regs (NI), reg 30(5); SS (C&P) Regs (NI), reg 3(2)

42796 In DMG 42795 **2.**, the previous determination is one made by the

**1.** decision maker **or**

**2.** Appeal Tribunal **or**

**3.** Commissioner **or**

**4.** Court of Appeal **or**

**5.** Court of session **or**

**6.** Supreme Court1.

1 ESA Regs (NI), reg 30(6); SS (C&P) Regs (NI), reg 3(2)

42797 Where the conditions in DMG 42790 - 42792 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 Appeal 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, as in DMG 42370 et seq. The claimant cannot be awarded Employment and Support Allowance solely on the basis that they have made and are pursuing an appeal.

42798 Where the claimant

**1.** is found not to have limited capability for work on a repeat claim which was made before 30.3.15 following a previous determination that they did not have limited capability for work **and**

**2.** lodges an appeal to the Appeal Tribunal against the decision made on the repeat claim

 they can be entitled to Employment and Support Allowance as in DMG 42790 - 42792, 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 DMG 42795.

 **Example 1**

 Rory claimed Employment and Support allowance on 7.5.14, and is found not to have limited capability for work following application of the work capability assessment. The decision is not revised following mandatory reconsideration, and he lodges an appeal with the Appeal’s Service. 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 2.4.15, 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 Appeal Tribunal, as there is no evidence of a change since then. The decision to disallow the new claim is not revised, 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 2014, and her award is terminated following application of the work capability assessment. She lodges an appeal and is awarded Employment and Support Allowance after the decision is not revised following mandatory reconsideration. Her appeal is allowed by the Appeal Tribunal, which finds that Yasmin has limited capability for work but does not have limited capability for work-related activity. The Appeal 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 after mandatory reconsideration. 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. The decision is not revised following mandatory reconsideration. 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 is entitled to an award of Employment and Support Allowance pending an appeal made after the decision is not revised following for mandatory reconsideration.

 Alan’s appeal is successful, and the Appeal Tribunal finds that he scores 15 points and should be placed in the work-related activity group. The Appeal Tribunal decision is implemented to award the work-related activity component from week 14 of the repeat claim. Alan’s award of Employment and Support Allowance made pending the outcome of the appeal is revised to include the work-related activity component from the first day of that award.

 **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 Appeal 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.

 42799 – 42819

Claimant awarded component during appeal

42820 The guidance on treating a claimant as having limited capability for work (DMG 42030 - 42098) also applies where a claimant is entitled to Employment and Support Allowance pending an appeal. Examples of when that guidance applies are that a claimant is

**1.** a hospital in-patient **or**

**2.** receiving other treatment1.

 Therefore a component can be awarded in the normal way where a claimant is entitled to Employment and Support Allowance pending an appeal.

1 ESA Regs (NI), reg 20, 25, 26 & 33(2)

42821 Where

**1.** the decision maker determines that

**1.1** the claimant

**1.1.a** can no longer be treated as having limited capability for work as in DMG 42820 **and**

**1.1.b** 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 pending the appeal1 (see DMG 42854). The decision awarding the component should be superseded to remove it2.

1 ESA Regs (NI), reg 30(3) & 147A(4); 2 SS (NI) Order 98, art 11(5); SS & CS (D&A) Regs (NI), reg 6(2)(q)

 **Example**

 Dave is entitled to Employment and Support Allowance pending an appeal against a decision terminating his award of Employment and Support Allowance following application of the work capability assessment. He notifies that he was admitted to hospital for 2 days for minor surgery. Dave is referred for a further work capability assessment, and the health care professional advises that Dave should have recovered from the surgery within 3 weeks. The decision maker treats Dave as having limited capability for work, and determines that he does not have limited capability for work-related activity. The pending appeal award is superseded to include the work-related activity component.

 Dave is referred for a further work capability assessment, and the health care professional advises that he is fully recovered from his operation. In the health care professional’s opinion, Dave 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.

42822 The guidance at DMG 42821 also applies where the claimant was awarded a component following a change in their health condition as in DMG 42851 - 42854.

42823 Where DMG 42821 or 42822 applies, DMG 42860 - 42867 should be followed once the outcome of the appeal is known.

Payment of component

42824 Where a claimant is

**1.** entitled to an Employment and Support Allowance award pending an appeal **and**

**2.** becomes entitled to a component as in DMG 42821 - 42822

 DMG 44636 et seq applies, regardless of when the change in the claimant’s health condition occured1.

1 ESA Regs (NI), reg 4, 5 & 7(1); SS & CS (D&A) Regs (NI), reg 3(5F), 6(2)(q) & 7(37) or (39)

 **Example 1**

 Jane has been entitled to Employment and Support Allowance pending an appeal against a decision terminating Employment and Support Allowance from 8.12.11. Her previous award, which did not include a component, was for more than 13 weeks. She is admitted to hospital after suffering a stroke on 18.5.12. 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 pending appeal award is revised to award the support component from 8.12.11, the date the pending appeal award began.

 **Example 2**

 Jason’s award of Employment and Support Allowance was terminated from 16.11.11 after he failed to attend a medical examination. He makes a further Employment and Support Allowance claim from 16.11.11, and is referred for a work capability assessment. On 8.3.12 the decision maker determines that Jason does not have limited capability for work, and disallows the claim from 16.11.11. Jason appeals, and is awarded Employment and Support Allowance from 8.3.12.

 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, but does not have limited capability for work-related activity. The pending appeal award is superseded to award the work-related activity component from 7.6.12.

Date award begins

42825 As there is no requirement to make a claim for the award to be made following an appeal as in DMG 427901, 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 DMG 42827 if the appeal follows a claim on which no award was made.

 **Note 2:** See DMG 42845 - 42847 where another benefit is claimed while the appeal is awaiting hearing).

1 SS (C&P) Regs (NI), reg 3(j)

42826 The guidance in DMG 42825 also applies where the appeal is admitted outside the one month time limit for appealing (see DMG Chapter 6 for guidance on appeal time limits).

42827 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 DMG 42790

 the guidance in DMG 42825 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 16.8.11 after he fails without good cause to attend a medical examination. He submits a further claim from 16.8.11, but cannot be treated as having limited capability for work (see DMG 42203). 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 11.10.11 disallows the claim from 16.8.11. 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 12.10.11.

Late appeals

42828 Where

**1.** a late appeal is admitted, either by the decision maker or the Appeal Tribunal **and**

**2.** the conditions for making an award pending the outcome of the appeal are satisfied (see DMG 42790)

 the decision maker should award Employment and Support Allowance as in DMG 42825. If the claimant had claimed and been awarded Income Support or Jobseeker’s Allowance before the late appeal was admitted, the decision maker should consider the guidance at DMG 42845 - 42856.

 **Example**

 Rosie’s award of Employment and Support Allowance is terminated from 20.4.12 following application of the work capability assessment. Rosie claims and is awarded Jobseeker’s Allowance from 2.5.12. She then lodges an appeal on 5.6.12 against the decision terminating Employment and Support Allowance, which is admitted by the Appeal Tribunal. She also sends a doctor’s statement for three months from 20.4.12. Rosie’s Jobseeker’s Allowance award ends on 7.6.12, and the decision maker awards Rosie Employment and Support Allowance for the period 20.4.12 - 1.5.12, and from 8.6.12. If Rosie’s appeal is successful, the decision maker should offset the Jobseeker’s Allowance paid against any Employment and Support Allowance arrears due.

Prisoners

42829 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 (see DMG 53110 et seq for contribution-based Employment and Support Allowance and DMG 54197 et seq for income-related Employment and Support Allowance).

1 ESA Regs (NI), reg 69 & 159-161

42830 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 DMG 42866 but only for the period of entitlement.

 **Example**

 Jackie is entitled to contribution-based 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. Jackie 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.

 Jackie’s appeal is successful, and the decision maker awards her arrears of the work-related activity component, other than for the period when Jackie was not entitled while she was in prison.

 42831 – 42839

Further Employment and Support Allowance claims

42840 Where a person

**1.** makes an appeal against a disallowance and becomes entitled to Employment and Support Allowance as in DMG 42790 **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 DMG 1213 for further guidance.

 **Note:** Where the claim or accompanying evidence shows a deterioration or new condition, see DMG 42851.

 42841 – 42844

Income Support or Jobseeker’s Allowance awarded before appeal made

42845 Where the claimant

**1.** is awarded Income Support or Jobseeker’s Allowance after the Employment and Support Allowance award is terminated **and**

**2.** makes an appeal against the Employment and Support Allowance disallowance following mandatory reconsideration

 the claimant can only be awarded Employment and Support Allowance as in DMG 42790 from the date that Income Support or Jobseeker’s Allowance ends if they relinquish the award of Income Support or Jobseeker’s Allowance, or that award otherwise ends (see DMG Chapter 4 for guidance on relinquishment). This is because a person cannot be entitled to Employment and Support Allowance if they are entitled to Income Support or Jobseeker’s Allowance1 (see DMG 41012).

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

42846 Where DMG 42845 applies, the Employment and Support Allowance award begins on the day

**1.** after the award of Income Support or 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 Income Support or Jobseeker’s Allowance.

 **Example**

 David’s award of Employment and Support Allowance is terminated from 8.2.10 after he fails the work capability assessment. He claims Jobseeker’s Allowance on 17.2.10 after receiving the Employment and Support Allowance decision, and is awarded Jobseeker’s Allowance from 8.2.10. On 7.4.10, he decides to make an appeal against the Employment and Support Allowance disallowance, and submits medical evidence from the date his entitlement to Employment and Support Allowance ended. The Appeal Tribunal admits the appeal. David’s entitlement to Jobseeker’s Allowance ends on 20.4.10. David is treated as having limited capability for work from 21.4.10 and is awarded Employment and Support Allowance from that date.

42847 Decision makers are reminded that the prescribed time for claiming Income Support or Jobseeker’s Allowance can be extended for up to a month1 where certain conditions apply2. See DMG 2374 - 2375 for further guidance.

1 SS (C&P) Regs (NI), reg 19(6); 2 reg 19(7)

 42848 – 42849

Referral for work capability assessment

42850 The decision maker should not make a determination about limited capability for work until the appeal is determined by the Appeal Tribunal1. This means that the claimant should not be referred for the work capability assessment. But see DMG 42851 - 42855 where there is a change of circumstances before the appeal is heard.

1 ESA Regs (NI), reg 147A(2)

Change of circumstances

42851 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.

1 ESA Regs (NI), reg 147A(3)

42852 Where, following application of the work capability assessment, the decision maker determines that the claimant has limited capability for work and awards a component, the guidance about ending the assessment phase in DMG Chapter 44 applies. See DMG 42860 - 42867 for the further action to take after the appeal is heard.

42853 Where the claimant can be treated as having limited capability for work1 other than in DMG 42350 et seq, 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. See DMG 42030 et seq for guidance on treating the claimant as having limited capability for work.

1 ESA Regs (NI), reg 20, 25, 26, 29 or 33(2)

42854 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 DMG 42851 **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 DMG 42853

 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 DMG 423543. 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 DMG 42866 - 42867. No further action is taken on the previous work capability assessment referral, subject to the normal work capability assessment review process (see DMG 42290 et seq).

1 ESA Regs (NI), reg 22 or 23; 2 reg 147A(4); 3 reg 30; 4 reg 30(2)(a)

42855 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. See DMG Chapter 41 for guidance on the effect of work on Employment and Support Allowance entitlement. If the appeal succeeds, see DMG 42865 - 42867 for guidance on the action to take.

Change in claimant’s health condition

42856 Where DMG 42851 - 42854 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

42857 The guidance at DMG 42860 - 42862 should **not** be followed. The claimant can continue to be treated as having limited capability for work pending application of the work capability assessment as in DMG 423511.

1 ESA Regs (NI), reg 30(2)

Appeal allowed

42858 If the appeal is allowed and the Appeal Tribunal determines that the claimant does not have limited capability for work-related activity, the guidance at DMG 42866 should be followed as normal, and arrears of the work-related activity component awarded as 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.

42859 If the appeal is allowed and the Appeal Tribunal determines that the claimant has or should be treated as having limited capability for work-related activity, the guidance at DMG 42866 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 (see DMG 42290 et seq).

Appeal withdrawn, struck out or dismissed

42860 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 DMG 42851) **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 DMG 42854) and

**4.** the appeal is withdrawn, struck out or dismissed

 the claimant is treated as not having limited capability for work as in DMG 428511.

 **Note 1:** This does not apply where the claimant is found to have limited capability for work as in DMG 42852 or is treated as having limited capability for work as in DMG 42853 (see DMG 42865).

 **Note 2:** See DMG 42868 for guidance if an appeal is reinstated.

 **Note 3:** See DMG 42869 for guidance if an appeal is remitted.

1 ESA Regs (NI), reg 30 & 147A(5)

42861 Where DMG 42860 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 maker1

**1.** receives the Appeal Tribunal notification that the appeal is withdrawn, struck out or dismissed **or**

**2.** discontinues action on the appeal2.

1 ESA Regs (NI), reg 147A(5A); 2 SS & CS (D&A) Regs (NI), reg 33(9)

42862 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 SS & CS (D&A) Regs (NI), reg 6(2)(a); 2 Sch 2C, para 2 & 3(a)

 **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 the disallowance. Her appeal is dismissed. The Appeal Tribunal decision notice is received in the office administering her award of Employment and Support Allowance on 13.7.10. Heather’s benefit week ends on Monday. The decision maker treats her as not having limited capability for work from 20.7.10, the first day of the next benefit week. The decision awarding Employment and Support Allowance is superseded and terminated from 20.7.10.

42863 Decision makers should note that where the claimant makes an appeal against the decision made as in DMG 42860 - 42862, 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 DMG 42354 and 42790 even if they make an appeal.

42864 The condition in DMG 42354 about not being treated as having limited capability for work following a determination that the claimant does not have limited capability for work only applies to a determination made following application of the work capability assessment, or 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 DMG 42860 - 42862.

 **Example 1**

 Ewan’s entitlement to Employment and Support Allowance is terminated on 6.7.10 after application of the work capability assessment. He makes an appeal, and is awarded Employment and Support Allowance from 7.7.10. His appeal is dismissed on 18.11.10, and the decision maker treats him as not having limited capability for work, terminating his award of Employment and Support Allowance from 14.12.10. Ewan makes a further claim for Employment and Support Allowance on 30.12.10. As this is within 6 months of the decision maker’s determination of 6.7.10 that he did not have limited capability for work following application of the work capability assessment, Ewan cannot be treated as having limited capability for work pending application of the work capability assessment.

 **Example 2**

 Amy’s award of Employment and Support Allowance is disallowed from 7.7.10 after application of the work capability assessment. She becomes entitled to Employment and Support Allowance from 7.7.10 after making an appeal against the disallowance. Her appeal is dismissed on 15.12.10, and the decision maker treats her as not having limited capability for work from 5.1.11. Amy makes a further claim for Employment and Support Allowance on 10.1.11. This is more than 6 months after the previous determination that she did not have limited capability for work following application of the work capability assessment. Amy is treated as having limited capability for work pending application of the work capability assessment.

42865 Where

**1.** the claimant is

**1.1** found to have limited capability for work following application of the work capability assessment (see DMG 42852) **or**

**1.2** treated as having limited capability for work (see DMG 42853) **and**

**2.** the appeal is withdrawn, struck out or dismissed (see DMG 42860)

 the claimant is not treated as not having limited capability for work as in DMG 42860 - 42862. Entitlement to Employment and Support Allowance is not affected by the outcome of the Appeal Tribunal.

Appeal allowed

42866 Where the appeal is successful, the Appeal 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 DMG 42867 where there is a change of circumstances before the appeal is determined.

1 ESA Regs (NI), reg 147A(6)

 **Example**

 Jack was entitled to Employment and Support Allowance from 8.3.10 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 Appeal 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 7.3.10 as 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 8.3.10 to pay the work-related activity component from that date.

42867 The Appeal 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 DMG 42851 **and**

**2.** the decision maker is satisfied that as a result it is no longer appropriate to rely on the Appeal Tribunal’s findings or determinations1.

1 ESA Regs (NI), reg 147A(7)

 **Example**

 Pearl’s entitlement to Employment and Support Allowance is ended after 10 weeks following application of the work capability assessment, and she makes an appeal. She is awarded Employment and Support Allowance after submitting medical certificates. Later she becomes pregnant with complications, and the decision maker finds that she is treated 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 Appeal Tribunal placing her in the work-related activity group. The decision maker determines that the Appeal Tribunal’s findings should not be followed and takes no further action.

Appeal reinstated

42868 Where an appeal which has been struck out1 and 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 DMG Chapter 6 for guidance on reinstatement of appeals.

1 ESA Regs (NI), reg 147A(5)(c) & (5A)

 **Example**

 Warren’s award of Employment and Support Allowance is terminated from 14.3.12 following application of the work capability assessment. He makes an appeal, and is awarded Employment and Support Allowance from 14.3.12. He fails to return the TAS1, and his appeal is struck out on 29.5.12. The Employment and Support Allowance award is terminated from 6.6.12. Warren claims and is awarded Jobseeker’s Allowance from 6.6.12. On 3.7.12 Warren’s appeal is reinstated. He provides a doctor’s statement and gives up his award of Jobseeker’s Allowance from 11.7.12. The decision maker awards Employment and Support Allowance from 11.7.12. If Warren’s appeal is successful, the decision maker should offset the Jobseeker’s Allowance paid against any Employment and Support Allowance arrears due.

Appeal remitted

42869 Where an appeal is dismissed1 but is subsequently remitted by the Appeal 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 DMG 42871). See DMG Chapter 6 for guidance on remitted appeals.

1 ESA Regs (NI), reg 147A(5)(c)

 **Example 1**

 Roger’s award of Employment and Support Allowance is terminated from 12.1.11 when his appeal against termination of the Employment and Support Allowance following application of the work capability assessment is dismissed by the Appeal Tribunal. Roger is awarded Jobseeker’s Allowance from 12.1.11. On 6.8.12 the Commissioner sets aside the Appeal 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 provides doctor’s statements.

 **Example 2**

 Mick’s award of Employment and Support Allowance is terminated from 29.9.11 following application of the work capability assessment. He is awarded Employment and Support Allowance pending an appeal against the termination. The Appeal Tribunal dismisses the appeal on 17.5.12 and the Employment and Support Allowance award is terminated from 24.5.12. 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 24.7.12 the Appeal Tribunal decision is set aside by the Appeal Tribunal 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.

Appeal to the Commissioner by the claimant or the Department

42870 If the Appeal 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 DMG 42860 - 42861.

42871 Where the Commissioner allows the appeal and remits it to an Appeal 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 DMG 42790. However, this depends on any benefit awarded or other changes which may have occurred since the appeal to the Appeal Tribunal was initially heard.

1 SS & CS (D&A) Regs (NI), reg 3(1)(a)

 42872 – 42999

Appendix

Regular treatment categories (DMG 42090 et seq)

Explanation of treatments

 **Plasmapheresis**

 Plasmapheresis is a process by which harmful substances can be removed from the bloodstream. Blood is taken from the person's vein, and the fluid part (plasma) containing the harmful substance is separated from the blood cells and removed. The blood cells are then mixed with an appropriate substitute fluid and returned to the person.

 **Radiotherapy**

 Radiotherapy is the use of X-rays to kill cancer cells. It is given as a series of administrations, with varying intervals between doses. Persons undergoing radiotherapy often feel very unwell for a few days after each dose.

 **Renal dialysis**

 Renal dialysis is used in the treatment of kidney (renal) failure. It is the process whereby waste products, which would usually be excreted in the main by the kidneys, are artificially removed from the body. There are two forms of dialysis: haemodialysis and peritoneal dialysis.

 In haemodialysis, blood is circulated from the person's arm into a machine which removes the waste substances; the cleansed blood is then returned to the person. Haemodialysis is usually carried out two or three times a week.

 In peritoneal dialysis the process involves introducing fluid into the abdomen through a permanently-positioned tube (an indwelling catheter). Harmful waste products are removed from the blood into this fluid through the inner lining of the abdomen (the peritoneum). After some hours, the fluid is drained from the abdomen and replaced with a fresh volume, and the cycle is repeated on a continuous basis.

 **Total parenteral nutrition**

 Total parenteral nutrition is a recent development in the treatment of serious intestinal conditions such as Crohn's disease. It is a way of ensuring adequate nutrition when normal absorption of food and fluid from the gut is impossible as a result of severe disease.

 A fine tube (catheter) is inserted into a major vein in the neck, and is held in permanent position, its end is capped when not in use. A special feeding solution, 3 to 5 litres in all, is pumped through the catheter using a special pump mounted on a stand. The process takes 8 to 14 hours, and is usually carried out overnight.

 For most people, the need for total parenteral nutrition will be life-long.