

DMG Memo Vol 1/84, 2/22, 3/78, 8/25 & 9/12

INCAPACITY FOR WORK, INCAPACITY BENEFIT, SEVERE DISABLEMENT ALLOWANCE AND EMPLOYMENT AND SUPPORT ALLOWANCE: SS (MISCELLANEOUS AMENDMENTS NO. 4) REGULATIONS (NORTHERN IRELAND) 2010

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INTRODUCTION

1. This memo gives guidance on the SS (Miscellaneous Amendments No. 4) Regulations (NI) 2010¹. The regulations come into force on 28.6.10.

1 SS (Misc Amdt No. 4) Regs (NI) S.R 2010 No.200

SUMMARY OF CHANGES

2. The regulations
 1. amend the provision which allows a claimant to be entitled to Employment and Support Allowance without making a claim where they appeal a decision embodying a determination that they do not have limited capability for work
 2. allow arrears of Employment and Support Allowance in youth to be offset against payment of Child Benefit
 3. change the rules for Adult Dependency increases of Incapacity Benefit and Severe Disablement Allowance as part of the equalisation of state pension age
 4. amend the definition of medical evidence for the purposes of incapacity for work
 5. allow the decision maker to treat a person as capable of work, or as not having limited capability for work, where medical evidence ends
 6. make changes to the exempt work provisions for the purposes of incapacity for work and Employment and Support Allowance
 7. make changes to the revision and supersession rules for the purposes of calculating payment of a component of Employment and Support Allowance in linked periods of limited capability for work cases
 8. change the meaning of periods of limited capability for work to exclude periods outside the time for claiming, other than for Employment and Support Allowance in youth
 9. add Employment and Support Allowance to the list of benefits where information supplied by an administering authority is used in connection with claims or awards of specified benefits
 10. amend the rules for ending the assessment phase in Employment and Support Allowance cases
 11. amend the rules for modifying the benefit year in Employment and Support Allowance cases

12. amend the provision for treating a person as having limited capability for work where an Employment and Support Allowance claim is made within 6 months of an adverse incapacity for work determination
13. change the rules about where a work-focused health-related assessment takes place
14. make changes to the good cause provisions for Employment and Support Allowance claimants who fail to take part in a work-focused interview or work-focused health-related assessment
15. introduce new provisions for claimants entitled to Employment and Support Allowance after making an appeal against a decision which embodies a determination that they do not have limited capability for work
16. amend the rules about the effect on Employment and Support Allowance of a temporary absence abroad
17. amend the housing costs rules
18. change the disregards for earnings and income other than earnings for Employment and Support Allowance.

INCAPACITY FOR WORK

Definition of medical evidence

3. The definition of medical evidence¹ is amended to mean evidence from a health care professional approved by the Department. See DMG 13353, 13643 and 13650 for guidance on when medical evidence is required².

1 SS (IW) (Gen) Regs (NI), reg 2(1); 2 reg 10(2)(e) & 27

Treated as capable of work – end of medical evidence

4. A person may be treated as capable of 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. they have 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 incapacity for work determined.

1 SS (IW) (Gen) Regs (NI), reg 16A; 2 reg 28(2)(a)

- 5. 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 SS (IW) (Gen) Regs (NI), reg 16A(d)

- 6. 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 capable of work from the day after the medical evidence expired. The decision is effective from the date of the change¹, which is the date from which the claimant is treated as capable of work.

1 SS CS (D&A) Regs (NI), reg 7(2)(c)(v)

Example

Sophia's current medical certificate provides her with evidence of incapacity up to and including 19.5.10. A reminder that further medical evidence will be required is issued on 12.5.10. The six weeks period ends on 30.6.10, and Sophia does not contact the Department by then. She is treated as capable from 20.5.10, the day after the medical evidence ends.

- 7. Where the person
 - 1. fails to provide further medical evidence **and**
 - 2. asks for incapacity for work to be determined

the decision maker should continue to follow the guidance in DMG 04450 - 04456 and 13635.

Exempt work – Community Interest Companies

8. The definition of Supported Permitted Work¹ is amended to include work carried out under the supervision of a person employed by a Community Interest Company (CIC) as established under relevant legislation².

¹ SS (IW) (Gen) Regs (NI), reg 17(3)(b)

² The Companies (Audit, Investigations and Community Enterprise) (Northern Ireland) Order 2005

9. A Community Interest Company, although a profit-making company, is restricted to using its assets and profits for the benefit of the community rather than for the benefit of the owners of the company. See [here](#) for a list of current Community Interest Companies.

Exempt work – calculation of a period of specified work

10. Specified work¹ is work that is done for less than 16 hours a week, for which earnings in any week do not exceed the set limit and is done during a period of specified work, provided that
 1. the person has not previously done specified work **or**
 2. since the beginning of the last period of specified work, the person has ceased to be entitled to a relevant benefit for a continuous period exceeding 8 weeks **or**
 3. not less than 52 weeks have elapsed since the last period of specified work.

¹ SS (IW) (Gen) Regs (NI), reg 17(4)(a)

11. For the purposes of the permitted work period, a period of specified work begins on the first day on which any specified work is undertaken and continues for a period of 52 weeks, whether or not any further specified work is undertaken during that period¹. See DMG 13920 for guidance on the meaning of permitted work period.

¹ SS (IW) (Gen) Regs (NI), reg 17(9)

Example

John is in receipt of Incapacity Benefit. On 20.8.09 he starts working for 10 hours a week with earnings of £60.00 a week. This is specified work. Therefore his permitted work period runs from 20.8.09 to 18.8.10. John last works on 20.11.09 but his permitted work period continues until 18.8.10 even if no further work is done.

INCAPACITY BENEFIT AND SEVERE DISABLEMENT ALLOWANCE - INCREASE FOR A SPOUSE OR CIVIL PARTNER

12. The weekly rate of Incapacity Benefit and Severe Disablement Allowance can be increased¹ for any period for which
1. the claimant is residing with a spouse or civil partner **and** either²
 - 1.1 that spouse or civil partner has reached their qualifying age **or**
 - 1.2 the claimant is entitled to Child Benefit in respect of a child or qualifying young person **or**
 2. the claimant has a spouse or civil partner who has reached their qualifying age and who is not residing with them but the beneficiary is contributing to the maintenance of that spouse or civil partner at a weekly rate not less than the amount of the Adult Dependency Increase³.

See DMG 77032 and Ch 77 Appendix 1 for detailed guidance.

¹ SS C & B Act (NI) 92, sec 86A

² SS(Incapacity Benefit - Increases for Dependants) Regs (NI) 9(1)(a)

³ reg 9(1)(b)

EMPLOYMENT AND SUPPORT ALLOWANCE

Offsetting – Employment and Support Allowance in youth and Child Benefit

13. Regulations¹ provide for benefit originally awarded to be treated as paid on account of the benefit subsequently awarded. This is known as offsetting. Of the 5 specific cases where an offset can apply², decision makers should note that awards of Employment and Support Allowance in youth³ have been added to the case⁴ which deals with offsetting and awards of Child Benefit.

¹ SS (POR) Regs (NI), reg 5(1); ² reg 5(2); ³ Welfare Reform Act (NI) 2007, Schedule 1, para 4

⁴ SS (POR) Regs (NI), reg 5(2) Case 3

Example

David becomes entitled to Employment and Support Allowance in youth from 10 January. However, his mother Sally has been paid Child Benefit up to and including 19 January. The amount of Child Benefit paid to Sally for the period from 10 January to 19 January should be treated as paid on account of the Employment and Support Allowance in youth now awarded to David for the period from 10 January to 19 January.

Claims and Information

14. When a claimant supplies information to an administering authority for the purpose of claiming Housing Benefit and this information is passed to the Department, the Department must use it without verifying its accuracy¹. The information can be used for the purpose of a claim for, or award of, a specified benefit². Employment and Support Allowance is now added to the list of specified benefits³.

1 SS (C&I) Regs (NI), reg 3(2), 2 reg 3(1) (b); 3 reg 1(3)

Meaning of period of limited capability for work

15. The definition of a period of limited capability for work¹ is amended to clarify that periods outside the time for claiming² in DMG 2344 are excluded. This ensures that, when considering whether the contributions conditions in DMG 41027 - 41031 are satisfied, the relevant benefit year is decided on the basis of the date from which Employment and Support Allowance is claimed providing it falls within the 3 month time limit for claiming benefit.

1 ESA Regs (NI), reg 2(1); 2 SS (C&P) Regs (NI), reg 19(1) & Sch 4

16. The change to the definition of period of limited capability for work does not apply when considering the qualifying period for the purposes of Employment and Support Allowance in youth¹ - see DMG 41047 - 41048.

1 WR Act (NI) 07, Sch 1 para 4(1)(d)(ii); ESA Regs (NI), reg 2(4A)

Modification of the relevant benefit year

17. DMG 41025 – 41026 gives guidance on modifying the meaning of “relevant benefit year”¹, which is intended to enable a claimant to become entitled to Employment and Support Allowance in a subsequent benefit year where they now satisfy the contribution conditions, but an earlier claim for Employment and Support Allowance was disallowed because they did not satisfy one or both of the contribution conditions when the period of limited capability for work began. At present it is not possible to modify the relevant benefit year unless there is a break in the period of limited capability for work.

1 WR Act (NI) 07, Sch 1 para 3(1)(f); ESA Regs (NI), reg 13

18. The regulations are amended¹ to remove the requirement for a break in the period of limited capability for work.

1 SS (Misc Amdt No. 4) Regs (NI) 2010, reg 9(7)

Employment and Support Allowance claim made following incapacity for work determination

19. DMG Memo Vol 8/22 gives guidance on the action to take where
1. a person makes an appeal against a decision which embodies a determination that they are, or are treated as, capable of work **and**
 2. a person makes a claim for Employment and Support Allowance **and**
 3. the appeal is successful.

The memo explains that a person is not prevented from claiming Employment and Support Allowance and being treated as having limited capability for work while they have made and are pursuing an incapacity for work appeal.

20. The regulations are amended so that a person claiming Employment and Support Allowance cannot be treated as having limited capability for work where, within 6 months before the date of the Employment and Support Allowance claim, a determination was made that the claimant was, or was treated as, capable of work¹ unless
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 capable of work for failure to provide information has since provided the information requested by the Department².

1 SS (IW)(Gen) Regs (NI), reg 7, 8 or 24; 2 ESA Regs (NI), reg 30(2)(c)

21. Where the claimant cannot be treated as having limited capability for work as in paragraph 20, the decision maker should refer for immediate application of the work capability assessment as in DMG 42206.
22. If the claimant is entitled to Employment and Support Allowance, and the incapacity for work appeal succeeds, the decision maker should continue to follow the guidance in DMG Memo Vol 8/22.

Treated as having limited capability for work - end of medical evidence

23. 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.

1 ESA Regs (NI), reg 32A; 2 reg 30(2)(a)

24. 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(d)

25. 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 six 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.

26. Where the person
1. fails to provide further medical evidence **and**

2. asks for limited capability of work to be determined

the decision maker should continue to follow the guidance in DMG 42208 - 42213.

Exempt work – Community Interest Companies

27. The definition of supported permitted work¹ is amended to include work carried out under the supervision of a person employed by a Community Interest Company as established under relevant legislation².

¹ ESA Regs, reg 45(3)(b);

² The Companies (Audit, Investigations and Community Enterprise) (NI) Order 2005

28. A Community Interest Company, although a profit-making company, is restricted to using its assets and profits for the benefit of the community rather than for the benefit of the owners of the company. See [here](#) for a list of current Community Interest Companies.

Exempt work – calculation of a period of specified work

29. Specified work¹ is work that is done for less than 16 hours a week, for which earnings in any week do not exceed the set limit, and is done during a period of specified work, provided that

1. the person has not previously done specified work **or**
2. since the beginning of the last period of specified work, the person has ceased to be entitled to a relevant benefit for a continuous period exceeding 12 weeks **or**
3. not less than 52 weeks have elapsed since the last period of specified work.

¹ ESA Regs (NI), reg 45(4)(a) & (10)

30. For the purposes of the permitted work period, a period of specified work begins on the first day on which any specified work is undertaken and continues for a period of 52 weeks, whether or not any further specified work is undertaken during that period¹. See DMG 41251 for guidance on the meaning of permitted work period.

¹ ESA Regs (NI), reg 45(11)

Claims

31. In general, it is a condition of entitlement to benefit that a claim is made, or is treated as made, in the time and manner specified for that benefit in the regulations¹. A claim to Employment and Support Allowance is not required where

1. the claimant has made and is pursuing an appeal against a decision that embodies a determination that they do not have limited capability for work **and**
2. that appeal relates to a decision to terminate or not to award a benefit for which a claim was made².

1 SS A (NI) Act 92 sec 1(1); 2 SS (C&P) Regs (NI), reg 3(j)

32. This means that where a claimant is entitled to Employment and Support Allowance without a claim because they have made an appeal (see paragraph 34 and DMG 42201), and that entitlement is ended without a work capability assessment where the appeal is dismissed (see paragraphs 50 - 51), a claim is required in order to establish further entitlement to Employment and Support Allowance, even if the claimant appeals the decision ending entitlement to Employment and Support Allowance.

Employment and Support Allowance awarded pending limited capability for work appeal

33. DMG Memo Vol 8/21 gives guidance on the action to take where a claimant is awarded Employment and Support Allowance where they make an appeal against a decision which embodies a determination that they do not have limited capability for work. The guidance is **cancelled** from 28.6.10. Decision makers should follow the guidance at paragraphs 34 - 60 of this memo instead.

Claimant treated as having limited capability for work

34. Where
 1. entitlement to Employment and Support Allowance is terminated on supersession following a determination that the claimant does not have limited capability for work after application of the work capability assessment **and**
 2. the claimant makes an appeal against the disallowance **and**
 3. the claimant submits medical evidence **and**
 4. no claim for Income Support or Jobseeker's Allowance is made

the claimant can be treated as having limited capability for work until a determination of limited capability for work is made (see DMG 42201) while making and pursuing the appeal¹, and can be entitled to Employment and Support Allowance without making a claim². The

claimant must also satisfy the other conditions of entitlement as in DMG 41012, 41021 and 41091.

1 ESA Regs (NI), reg 30(1), (2)(a) & (3); 2 SS (C&P) Regs (NI), reg 3(j)

35. 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 paragraph 39 where a claim is made at the same time as the appeal.
36. 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 six months rule in DMG 42203, which would otherwise mean that they could not be treated as having limited capability for work².

1 WR Act (NI) 07, s1(3)(a); 2 ESA Regs (NI), reg 30(2)(b) & (3)

Date award begins

37. As there is no requirement to make a claim for the award to be made following an appeal¹, 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(but see paragraphs 40 - 43 where another benefit is claimed while the appeal is awaiting hearing).

1 SS (C&P) Regs (NI), reg 3(j)

38. The guidance in paragraph 37 also applies where the appeal is admitted outside the one month time limit for appealing (see DMG Chapter 06 for guidance on appeal time limits).

Further Employment and Support Allowance claims

39. Where a person
 1. makes an appeal against a disallowance and becomes entitled to Employment and Support Allowance as in paragraph 34 **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 01213 for further guidance.

Note: Where the claim or accompanying evidence shows a deterioration or new condition, see paragraph 45.

Income Support or Jobseeker's Allowance awarded before appeal made

40. Where

1. the claimant 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

the claimant can only be awarded Employment and Support Allowance as in paragraph 34 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 04 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, s1(3)

41. Where paragraph 40 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.

42. Decision makers are reminded that the prescribed time for claiming Income Support or Jobseeker's Allowance can be extended for up to a month where certain conditions apply¹. See DMG 2374 - 2375 for further guidance.

1 SS (C&P) Regs (NI), reg 19(7)(d)

43. Decision makers should note that where the claimant

1. makes a claim for Jobseeker's Allowance **and**
2. has a reasonable prospect of obtaining employment

they are treated as not having limited capability for work for the period of that claim, even if they have been or could be treated as having limited capability for work¹ (see DMG 42281). If the claimant has been awarded Jobseeker's Allowance, they cannot be awarded arrears of Employment and Support Allowance for the same period even if they make an appeal against the Employment and Support Allowance disallowance, or the Appeal Tribunal allows the appeal.

1 ESA Regs (NI), reg 31(1)

Referral for Work Capability Assessment

44. 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 paragraphs 45 - 49 where there is a change of circumstances before the appeal is heard.

1 ESA Regs (NI), reg 147A(2)

Change of circumstances

45. 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)

46. 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 paragraphs 60 - 63 applies. See paragraphs 50 - 56 for the further action to take after the appeal is heard.
47. Where the claimant can be treated as having limited capability for work¹ other than in DMG 42201 - 42204, 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 42017 et seq for guidance on treating the claimant as having limited capability for work.

1 ESA Regs (NI), regs 20, 25, 26, 29 or 33(2)

48. 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 paragraph 45 **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 paragraph 47

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 42204³. The claimant must continue sending in medical certificates for entitlement to continue⁴.

1 ESA Regs (NI), reg 22 or 23; 2 reg 147A(4); 3 reg 30; 4 reg 30(2)(a)

49. Where the claimant makes a claim for Jobseeker's Allowance (see paragraph 43), or 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 41121 et seq for guidance on the effect of work on Employment and Support Allowance entitlement. If the appeal succeeds, see paragraphs 55 – 56 for guidance on the action to take.

Appeal withdrawn, struck out or dismissed

50. 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 paragraph 45) **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 paragraph 48) **and**
4. the appeal is withdrawn, struck out or dismissed

the claimant is treated as not having limited capability for work from the first day of the benefit week following the date on which the decision maker is notified by the Appeal Tribunal that the appeal is withdrawn, struck out or dismissed¹.

Note: this does **not** apply where the claimant is treated as having limited capability for work as in paragraph 47.

1 ESA Regs (NI), reg 30; reg 147A(5)

51. 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 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.

52. Decision makers should note that where the claimant makes an appeal against the decision made as in paragraphs 50 - 51, 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 42204 and paragraph 34 even if they make an appeal.

- 53 The condition in DMG 42203 about not being treated as having limited capability for work within 6 months of 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 paragraph 50.

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 six 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 six 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.

Claim for Jobseeker's Allowance after appeal dismissed

54. Where, following the unsuccessful appeal
1. a claim for Jobseeker's Allowance is made **and**
 2. a fresh limited capability for work determination has not yet been made

the decision maker should supersede on the grounds of a relevant change of circumstances, namely that the claimant is treated as not having limited capability for work (see paragraph 43), and terminate the

Employment and Support Allowance award from the date that the claimant is awarded Jobseeker's Allowance.

Appeal allowed

55. 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 paragraph 56 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.

56. 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 paragraph 45 **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 1

Lewis's entitlement to Employment and Support Allowance ends after 18 weeks following application of the work capability assessment, and he makes an appeal. He becomes entitled to Employment and Support Allowance again after submitting medical certificates. Later he notifies that his condition has deteriorated, and is referred for the work capability assessment. The decision maker determines that he does not have limited capability for work, but does not supersede the decision awarding Employment and Support Allowance after the appeal was made, as the appeal has not yet been heard. The Appeal Tribunal allows the appeal,

finding that Lewis should be placed in the work-related activity group. The Appeal Tribunal decision is implemented to pay arrears of the work-related activity component up to date of the decision under appeal. The decision maker revises the decision awarding Employment and Support Allowance after the appeal was made to award the work-related activity component, and then supersedes the decision as revised to take account of the limited capability for work determination, and disallows Employment and Support Allowance from the date of the supersession decision¹.

1 SS CS (D&A) Regs (NI), reg 6(2)(q); SS (NI) Order 98, art 11(5)

Example 2

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 to Commissioner by the claimant or the Department

57. 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 paragraphs 50 – 51.
58. 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 paragraph 34. 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)

59. Where Decision Making Services on behalf of the Department applies to the Appeal Tribunal or Commissioner for permission or is granted permission to appeal to the Commissioner, payment of both awards of Employment and Support Allowance should be suspended¹ pending the outcome of the application or appeal. See DMG Chapter 4 for guidance on suspension, and DMG Chapter 6 for guidance on appeals.

1 SS CS (D&A) Regs (NI), reg 16(3)

Ending the assessment phase – linked periods of limited capability for work

60. The provision that the assessment phase ends when the appeal is heard in a case where the claimant is entitled to Employment and Support Allowance after making an appeal has been removed¹. The guidance at DMG 44022 is **cancelled**. Decision makers should apply the guidance at paragraphs 61 – 63 instead.

1 ESA Regs (NI), reg 6; SS (Misc Amdt No. 4) Regs (NI), reg 9(5)

Previous period of limited capability for work less than 13 weeks

61. The provisions for ending the assessment phase in a linked period of limited capability for work are amended so that where
1. the claimant was previously entitled to Employment and Support Allowance for no more than 13 weeks **and**
 2. the assessment phase had not ended in the previous Employment and Support Allowance award **and**
 3. the claimant's current period of limited capability for work is treated as a continuous period of limited capability for work

the assessment phase ends on the day when the continuous period of limited capability for work is 13 weeks or the date of the determination that the claimant has, or is treated as having limited capability for work (other than in accordance with DMG 42201 - 42204) where that is later¹. See DMG 41111 - 41115 for guidance on linking periods of limited capability for work, and 44019 - 44021 for guidance on ending the assessment phase.

Note: see paragraph 78 for guidance on supersession and the effective date rule.

1 ESA Regs (NI), reg 5(2) & (3)

Previous period of limited capability for work more than 13 weeks

62. DMG 44636 **2.** gives guidance on the circumstances where the component can be paid immediately even though the assessment phase has not ended in the current period of limited capability for work, provided the assessment phase had ended in the previous period of limited capability for work where that links.
63. The circumstances are amended so that, where the claimant is found to have limited capability for work after the work capability assessment, they can be awarded the component before the assessment phase ends where the previous linked period of limited capability for work was longer

than 13 weeks, even if the assessment phase had not ended for that period of limited capability for work¹.

Note: see paragraph 76 for guidance on revision.

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

Example

Jasmine's entitlement to Employment and Support Allowance ended after 18 weeks when she returned to work. The assessment phase had not ended as Jasmine had not been referred for the work capability assessment before entitlement ended. Two months later her condition deteriorates and she claims Employment and Support Allowance again. Following application of the work capability assessment, she is found to have limited capability for work and placed in the work – related activity group. The work-related activity component is paid from the beginning of her current entitlement to Employment and Support Allowance.

Employment and Support Allowance awarded following appeal

64. Where the claimant

1. has made and is pursuing an appeal against a decision which embodies a determination that the claimant does not have limited capability for work **and**
2. is entitled to Employment and Support Allowance

DMG 44636 and the rules in paragraphs 61 - 63 do not apply to the period of limited capability for work until a determination of limited capability for work is made as in paragraphs 55 - 56 after the Appeal Tribunal has heard the appeal¹. But see paragraph 65 where there is a change of circumstances before the appeal is heard.

1 ESA Regs (NI), reg 5(4) & 7(2)

Example

Emile's award of Employment and Support Allowance began on 12.2.10 and was terminated from 20.4.10 following application of the work capability assessment. He makes an appeal on 11.5.10, and is awarded Employment and Support Allowance from 20.4.10. On 8.9.10 his appeal is allowed, the Appeal Tribunal finding that he has limited capability for work and should be placed in the work-related activity group. The Appeal Tribunal determinations are binding on the decision maker. The decision awarding Employment and Support Allowance from 20.4.10 is superseded to award the work-related activity component from 14.5.10, the 14th week of the combined period of limited capability for work.

65. Paragraph 64 does not apply where there is a change of circumstances which leads the decision maker to make a determination that the claimant
 1. has limited capability for work following application of the work capability assessment **or**
 2. is treated as having limited capability for work other than in DMG 42022.

The guidance in paragraphs 61 - 63 applies instead.

Example 1

Robin's award of Employment and Support Allowance was terminated after 10 weeks following application of the work capability assessment. He makes an appeal, and is awarded Employment and Support Allowance from the date his previous entitlement ended. Two months later he is admitted to hospital, and the decision maker treats him as having limited capability for work in accordance with DMG 42041. The assessment phase ends after week three of the current period of limited capability for work. However, no component can be awarded until Robin is assessed for limited capability for work-related activity. The component is awarded from week 4 of the current period of limited capability for work where Robin is found to have limited capability for work and a component is awarded by the Appeal Tribunal, or following application of the work capability assessment if that takes place before the Appeal Tribunal hears the appeal.

Example 2

Denise's award of Employment and Support Allowance is terminated after 20 weeks following application of the work capability assessment, and she makes an appeal. She is awarded Employment and Support Allowance from the date her previous entitlement ended. Several weeks later Denise produces evidence that her condition has deteriorated, and she is referred for the work capability assessment. The decision maker determines that she has limited capability for work, and is placed in the work-related activity group. The work-related activity component is paid from the first day of the award made after the appeal was lodged, even though her appeal has yet to be heard.

Taking part in a work-focused health-related assessment

66. From 28.6.10, the claimant may be required to take part in a work-focused health-related assessment either by attending in person, or by telephone¹.

1 ESA Regs (NI), reg 49(3)

Good cause for failure to take part in a work-focused interview or work-focused health-related assessment

67. The matters which must be taken into account when considering whether a claimant had good cause for a failure to take part in a work-focused interview or work-focused health-related assessment are amended so that instead of considering the claimant's state of health at the time of the work-focused interview or work-focused health related assessment, the decision maker should consider whether the claimant's physical or mental health or condition made it impracticable for the claimant to take part¹.

1 ESA Regs (NI), reg 53(3)(b); reg 61(3)(i)

68. The decision maker should also consider whether the claimant had good cause because
1. they had caring responsibilities for a child **and**
 2. childcare
 - 2.1 was not reasonably available **or**
 - 2.2 was unsuitable due to the particular needs of the claimant or the child¹.

1 ESA Regs (NI), reg 53(3)(ca); reg 61(3)(ja)

Temporary absence abroad

69. It is a condition of entitlement to Employment and Support Allowance that a claimant is in Northern Ireland¹ but benefit may continue for periods of temporary absence from Northern Ireland if certain conditions are met. DMG 071143 and 071144 provide guidance on continued entitlement to Employment and Support Allowance when a claimant goes abroad to receive Health Service treatment², or where a claimant is accompanying a family member who is a member of the forces serving abroad³. The conditions have been amended to remove the need for the claimant to obtain prior permission from the Department before leaving Northern Ireland⁴.

*1 WR Act (NI) 07, s1(3)(d); 2 ESA Regs (NI), reg 154
3 reg 155; 4 SS (Misc Amdt No. 4) Regs (NI), reg 9(16) & (17)*

Housing costs

70. Where the claimant's partner has reached the qualifying age for State Pension Credit, all new or existing housing costs are paid in full from the first day of entitlement to income-related Employment and Support Allowance. This provision has been extended to include claims where it

is the claimant who has reached the qualifying age for State Pension Credit¹.

1 ESA Regs (NI), Sch 6, para 10(1)(a)

Treatment of payments of royalties, copyright payments and Public Lending Right payments

71. DMG 50073 gives guidance on how to treat earnings from royalties, copyright payments and public lending right payments. Decision makers should apply a weekly disregard of £20¹ when the earnings are received. This disregard applies regardless of when the work in question was actually performed.

1 ESA Regs (NI), Sch 7 para 5A

Example

Steve wrote a song 15 years ago which occasionally generates royalties. He has not written anything since. On 1.7.10 Steve receives a royalty payment in respect of the song. The decision maker follows the guidance at DMG 50073 et seq and applies a weekly disregard of £20 to the payment.

72. Where there is already a disregard for exempt work limits¹ the total amount to be disregarded shall depend on how far below the permitted work limits that the claimant's earnings are. The maximum that can be disregarded from the earnings is £20 per week².

1 ESA Regs (NI), reg 45(2) – (4); 2 Sch 7 para 5A

Example

Jack works in exempt work (permitted work higher limit) and earns £80 per week. These earnings are below the permitted work limits for that category of work. Jack wrote a book several years ago which occasionally generates royalties. On 1.6.10 he receives a royalty payment in respect of the book. The decision maker disregards £13 of the weekly earnings from the royalty payment. This is the difference between the maximum amount under the exempt work limits and the amount actually earned up to £20.

Disregard for child dependant increases

73. DMG 51233 provides guidance on the disregard of Child Benefit and Child Tax Credit when calculating income other than earnings for income-related Employment and Support Allowance. Decision makers should also disregard¹ any increases for child dependants paid with

1. Carer's Allowance

2. Retirement Pension
3. Incapacity Benefit
4. Severe Disablement Allowance
5. Widowed Mother's Allowance
6. Widowed Parent's Allowance.

1 *ESA Regs (NI), Sch 8 para 7(3)*

Payments made under employment and training law

74. DMG 51313 - 51315 provides guidance on the disregards available for certain payments made under employment and training law. DMG 51313 1. advises that a payment made as a substitute for Employment and Support Allowance cannot be disregarded. A payment made under employment and training law¹ made as a substitute for Jobseeker's Allowance should also not be disregarded².

1 *E & T Act (NI) 1950, sec 1 or 3*; 2 *ESA Regs (NI), Sch 8 para 14(1)(a)*

Decision making

Revision

75. A decision awarding Employment and Support Allowance can be revised if
1. the decision was made on the basis that the claimant has made and is pursuing an appeal against a decision that they did not have limited capability for work **and**
 2. that appeal is successful¹.

1 *SS CS (D&A) Regs (NI), reg 3(5E)*

76. A decision awarding Employment and Support Allowance can be revised¹ if
1. the claimant's current period of limited capability for work is treated as a continuation of another period of limited capability for work by virtue of the linking rules² **and**
 2. the assessment phase ended in the previous award, or the period of limited capability for work was more than 13 weeks³.

Note: see paragraphs 62 - 63 for when this provision applies.

1 *SS CS (D&A) Regs (NI), reg 3(5F)*; 2 *ESA Regs (NI), reg 145(1) & (2)*; 3 *reg 7(1)(b)*

Supersession

77. The regulation¹ which enables an award of Employment and Support Allowance to be superseded is extended so as to include those awards where, since the decision was made, the Department has made a determination that the claimant is to be treated as having limited capability for work under specified legislation².

1 SS CS (D&A) Regs (NI), reg 6(2)(q); 2 ESA Regs (NI), reg 20, 25, 26 & 33(2)

78. Where a decision¹ is made which embodies a determination that the claimant has
1. limited capability for work **or**
 2. limited capability for work-related activity **or**
 3. limited capability for work and limited capability for work-related activity

which is the first such determination then the effective date of the supersession takes effect from the beginning of the 14th week of entitlement².

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

79. This change allows the decision maker to
1. move the claimant to a higher rate of Employment and Support Allowance on age grounds **or**
 2. award a component

in cases where the claimant is not examined by a health care professional.

Example 1

Danny is aged 20, in receipt of Disability Living Allowance, and is entitled to income-related Employment and Support Allowance as a disabled student at the rate for claimants aged under 25. He is treated as having limited capability for work because he has weekly dialysis. The decision awarding Employment and Support Allowance is superseded to award the higher applicable amount from week 14 though the work capability assessment has not been carried out.

Example 2

Chloe is entitled to Employment and Support Allowance, and is undergoing chemotherapy treatment for cancer. She is treated as having limited capability for work and limited capability for work-related

activity on the basis of evidence from the consultant oncologist without being examined by a health care professional. The decision awarding Employment and Support Allowance is superseded to place Chloe in the support group from week 14.

80. Where a decision is made which embodies a determination that the claimant has
1. limited capability for work **or**
 2. limited capability for work-related activity **or**
 3. limited capability for work and limited capability for work-related activity

and specified legislation applies¹ then the effective date of the supersession takes effect from the beginning of the 14th week of entitlement².

Note: see paragraph 61 for when this provision applies.

1 ESA Regs (NI), reg 5; 2 SS CS (D&A) Regs (NI), reg 7(39)

ANNOTATIONS

Please annotate the number of this memo (DMG Memo Vol 1/84, 2/22, 3/78, 8/25 & 9/12) against the following DMG paragraphs:

02036, 02066 heading, 04450 heading, 04705 heading, 071143, 071144, 09340, 13400, 13661, 13896, 13920, 16134, 41024 heading, 41025 heading, 41048, 41199, 41251 heading, 42208 heading, 44015, 44019 heading, 44022 heading, 44634, 44635, 44636, 44642, 50073, 50470, 51233, 51313, 53007, 53015, 53042

and the following DMG Memos:

DMG Memo Vol 8/8, 9/9, 8/21 and 8/22.

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