Memo ADM 11/17

employment and support allowance and universal credit: response to the Appeal tribunal

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introduction and background

1 This memo provides guidance on the Department’s responsibilities in preparing a response to the Appeal Tribunal where an award of Employment and Support Allowance or Universal Credit has been superseded following a second or subsequent Work Capability Assessment.

2 This guidance is issued as a result of a decision of a three Judge panel of the Great Britain Upper Tribunal (equivalent to a Tribunal of Commissioners in Northern Ireland).

1 [2016] AACR 24 (FN v SSWP (ESA) [2015] UKUT 670 (AAC)

3 In reaching its decision the Upper Tribunal considered a number of previous Upper Tribunal decisions and a Northern Ireland Commissioner’s decision that have been made in this area of law1.

1 ST v SSWP (ESA) [2012] UKUT 469 (AAC); AM v SS [2013] UKUT 458 (AAC); JC v Department for Social Development (IB) [2011] NICom 177; [2014] AACR 30

4 The Upper Tribunal endorsed the previous case law and decided that regulations1 authorise a supersession decision following receipt of medical evidence from a Health Care Professional. There is no requirement to identify a change of circumstances. However, the decision, whether made by the decision maker or the Tribunal should be made after an assessment of all relevant evidence. This will include making decisions on whether the substantive tests of Limited Capability for Work were satisfied.

1 UC,PIP,JSA,ESA(D&A)Regs, reg 26(1)

the Department’s responsibilities

5 In a previous decision of the Upper Tribunal 1 the Judge (equivalent to Commissioner in Northern Ireland) concluded that the Secretary of State (the Department in Northern Ireland) is obliged to provide all **relevant** information in relation to the decision and that the decision making chronology and history is clear. The Judge drew reference from rule 24(4)(b) of the Tribunal Procedure Rules 2008 where the Secretary of State is obliged to provide the First Tier Tribunal (equivalent to Appeal Tribunal in Northern Ireland) with all relevant documents in his possession (see ADM A5333). The three-Judge panel agreed with that approach.

1 ST v SSWP (ESA) [2012] UKUT 469 (AAC)

6 For example, if a claimant appeals against a supersession decision to disallow Employment and Support Allowance following the application of the Work Capability Assessment but they had been previously awarded Employment and Support Allowance by a Tribunal, which was never appealed, the Department should explicitly document this in the decision making history. It will then be clear that the Tribunal replaced a decision of the decision maker with its own decision and so there will be no relevant findings of fact or reasons for the Tribunal’s decision.

7 From this sequence of events the Tribunal will be aware that only the decision notice will be available and that the value of that evidence is minimal. This will assist the Tribunal in deciding whether an adjournment is necessary to call for other evidence.

8 If the claimant asserts that their medical condition has not changed since it was previously determined that they had Limited Capability for Work and where there has been no relevant supervening event such as a change in the law or successful medical operation, the Department must provide the Tribunal with previous medical reports concerning the claimant. The Department should say why the contents of the new ESA 85 or UC 85 as appropriate, whether accepted with or in preference to other relevant evidence, establish that the claimant does not have Limited Capability for Work.

9 If medical reports are no longer in the decision maker’s possession, the Tribunal should be made aware of this. It should be clear from the decision making history that they did exist together with the decision(s) made subsequent to them. The emphasis here is on the Department’s duty but is limited to documents **relevant** to the decision under appeal.

10 The three Judge panel (Tribunal of Commissioners in Northern Ireland) held that the requirements imposed on the Secretary of State (Department) by previous case law1 were binding and it was for the Secretary of State (Department) to ensure compliance with them.

1 ST v SSWP (ESA) [2012] UKUT 469 (AAC)

11 The duties and obligations that apply to the Department also apply to appellants and representatives. Representatives have to be proactive in alerting Tribunals to evidence which it is submitted is relevant to the issues arising in the appeal and where it is possible to do so to seek that evidence on behalf of appellants.

The Tribunal’s duty

12 Where the Department does not fulfil the obligations imposed by case law1, the three-Judge panel held that the Tribunal is entitled to call on whatever evidence it considers **relevant** to the proper determination of the issues arising in the appeal. They held that it was not necessary, **as a matter of law**, for the Tribunal to have considered the evidence of a claimant’s previous assessment for Limited Capability for Work in every case. The case law1 only applies to the duties and responsibilities of the Department in preparing a response in an Employment and Support Allowance or Universal Credit supersession appeal. There is no suggestion that the Tribunal would always be found to have erred in law where the Department fails to provide documentation following an assertion that the claimant’s medical condition was unchanged.

1 ST v SSWP (ESA) [2012] UKUT 469 (AAC)

Annotations

Please annotate the number of this memo (11/17) against ADM paragraph A5333

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