

## ESA: REPEAT ASSESSMENTS AND PENDING APPEAL AWARDS

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### INTRODUCTION

- 1 This memo gives guidance on the ESA (Repeat Assessments and Pending Appeal Awards) (Amendment) Regs 2015<sup>1</sup>, which come into force on 30.3.15.

**Note:** This memo should be read with Memo DMG 9/15, which gives guidance on the extension of short periods of sickness for JSA claimants from 30.3.15<sup>2</sup>.

*1 ESA (RA and PAA) (Amdt) Regs; SI 2015 No. 437;*

*2 The Jobseeker's Allowance (Extended Period of Sickness) Amendment Regulations 2015; SI 2015 No. 339*

- 2 The regulations make changes<sup>1</sup> to the conditions for treating a claimant as having LCW pending<sup>2</sup>

1. a determination as to whether the claimant has, or is treated as having, LCW<sup>3</sup>  
**or**
2. an appeal to the FtT against a decision which embodies a determination that the claimant does not have LCW<sup>4</sup>

when the claimant makes a repeat claim for ESA following the most recent previous determination that they do not have LCW.

*1 ESA (RA and PAA) (Amdt) Regs, reg 3; 2 ESA Regs, reg 30(1);*

*3 reg 19, 20, 25, 26, 29 & 33(2); 4 reg 30(3)*

## WHO THE CHANGES APPLY TO

- 3 The changes apply to claimants who
  1. make, or are treated as having made, a claim for ESA on or after 30.3.15 **or**
  2. make and are pursuing an appeal to the FtT against a DM's decision on a claim made on or after 30.3.15 which embodies a determination that the claimant does not have LCW<sup>1</sup>.

**Note:** See DMG Chapter 02 for guidance on when a claim for ESA is treated as made.

*1 ESA (RA and PAA) (Amdt) Regs, reg 2*

## REPEAT CLAIMS

### Current guidance

- 4 DMG 42201 explains that, where the conditions in DMG 42202 – 42203 (see paragraph 5 below) are satisfied, the claimant can be treated as having LCW until it can be determined<sup>1</sup>
  1. whether or not the claimant has, or can be treated as having, LCW<sup>2</sup> **or**
  2. whether the claimant should be treated as not having LCW because they have failed without good cause
    - 2.1 to return the questionnaire **or**
    - 2.2 to attend or submit to a medical examination<sup>3</sup>.

*1 ESA Regs, reg 30(1); 2 reg 19; 3 reg 20, 25, 26, 29 & 33(2)*

5 At present, the conditions are that

1. the claimant provides evidence of LCW<sup>1</sup> **and**
2. within the six months preceding the date of claim, it has not been determined that the claimant does not have, or is treated as not having, LCW<sup>2</sup> (but see paragraph 6 for exceptions).

*1 ESA Regs, reg 30(2)(a); SS (Med Ev) Regs; 2 ESA Regs, reg 30(2)(b)*

6 Paragraph 5 **2.** does not apply if the claimant

1. is suffering from a new or significantly worse condition since the date of the previous LCW determination<sup>1</sup> **or**
2. returns the questionnaire where they had failed to do so<sup>2</sup>.

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

7 Where paragraph 6 applies, the claimant

1. is referred for the WCA **and**
2. can be treated as having LCW as in paragraph 4 and 5 **1. and**
3. can be awarded ESA

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

8 It should be noted that the guidance in paragraphs 4 – 5 does **not** apply where LCW can be determined immediately.

9 DMG 42206 – 42207 and DMG 42331 – 42334 give guidance on considering whether sufficient evidence is already held to determine LCW following a previous LCW determination. If the information provided with the repeat claim shows that the question of whether or not a claimant has LCW can be determined immediately without gathering further evidence, the claimant cannot be treated as having LCW as in paragraph 5 for any period before a decision is made on the claim.

10 The current practice is that, where a claim for ESA is made more than six months after a determination that the claimant does not have, or is treated as not having, LCW, they are referred for a further WCA, regardless of whether there has been any change

in the claimant's health condition since the previous determination that they did not have LCW.

## The change

- 11 The conditions for being treated as having LCW pending a determination are **amended**<sup>1</sup> to remove the six months period in paragraph 5 **2.** where the claim is made, or treated as made, on or after 30.3.15.

*1 ESA (RA and PAA) (Amdt) Regs, reg 3(2)*

- 12 The effect of this change is that the guidance in paragraphs 8 – 9 applies whenever
1. a repeat claim for ESA is made **and**
  2. the most recent previous determination made following the WCA was that the claimant did not have LCW.

**Note:** See paragraphs 14 – 28 which expands the guidance at DMG 42206 – 42207 and DMG 42331 – 42334.

## Exception

- 13 This change does **not** apply to claims made following a determination that the claimant is treated as not having LCW because they have failed without good cause
1. to return the questionnaire **or**
  2. to attend for or to submit to a medical examination<sup>1</sup>.

This means that, where a repeat claim is made more than six months after a previous determination that the claimant is treated as not having LCW, the practice in paragraph 10 of awarding ESA at the assessment phase rate where medical evidence is provided on a repeat claim continues.

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

## Determining LCW

- 14 Where the claimant makes a claim for ESA after a previous determination that they do not have LCW, the DM should consider whether they have sufficient evidence from the most recent previous determination to determine whether or not the claimant has LCW.
- 15 Previous evidence could be

1. the questionnaire (form ESA50)
  2. the HCP report (form ESA85)
  3. further medical evidence, such as
    - 3.1 a GP report (form ESA113)
    - 3.2 a hospital report
    - 3.3 letters from the GP or consultant
  4. information from someone who provides the claimant with care, support or treatment.
- 16 Where the previous determination is unchanged following mandatory reconsideration or an appeal to the FtT, any evidence or information provided for the DM or FtT should also be considered.
- 17 The DM should not assume without further investigation that there has been no change since the last determination of LCW. 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.
- 18 The claimant may have been awarded JSA after the previous determination that they did not have LCW, for example
1. during the mandatory reconsideration process
  2. after any appeal to the FtT was dismissed
  3. while awaiting determination of a repeat claim for ESA.
- 19 Although JSA is awarded on the condition that the claimant does not have LCW<sup>1</sup>, no determination of LCW has been made for the period of the JSA award, and there is no presumption that the claimant does not have LCW for the purposes of the ESA repeat claim. It should be noted that the claimant may have been sending in evidence of LCW for the purposes of a JSA EPS<sup>2</sup> – see Memo DMG 9/15 for further details.
- 1 JS Act 95, s 1(2)(f); 2 JSA Regs, reg 55ZA; JSA Regs 13, reg 46A*
- 20 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 LCW<sup>1</sup>, for example they have been in hospital.

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

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

- 21 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 WCA.

- 22 The DM should consider all the claimant's circumstances from the date of the previous LCW determination to the date of determination of the repeat ESA 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 LCW determination. The FtT is not permitted to consider any changes since the decision embodying that determination was made<sup>1</sup>. The fact that the FtT upheld that determination should not be considered conclusive for the repeat claim.

*1 SS Act 98, s 12(8)(b)*

- 23 If the DM determines that

1. the previous evidence cannot be relied on to make a further determination of LCW **and**
2. the claimant should be referred for a further WCA

they should consider whether the claimant can be treated as having LCW pending the WCA<sup>1</sup>. This means considering whether the claimant has a new or significantly worse health condition since the most recent LCW determination was made.

**Note:** The DM is reminded that, if it is determined that the claimant does not have a new or significantly worse health condition, the ESA claim cannot be decided until a further LCW determination is made – see DMG 42206.

*1 ESA Regs, reg 30(2)*

### **Meaning of new or significantly worse health condition**

- 24 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 LCW.
- 25 The evidence need not be a requirement to obtain evidence from a GP 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:** DMs are reminded that the claimant's evidence does not require corroboration unless it is inherently improbable or self-contradictory – see DMG 01380.

- 26 Where the DM accepts that there is a new or significantly worse condition, the claimant should be
1. treated as having LCW<sup>1</sup> in the normal way as in paragraph 5 **1. and**
  2. referred for a further WCA.

*1 ESA Regs, reg 30(2)*

### **New health condition**

- 27 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 LCW determination.

### **Significantly worse health condition**

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

## **Examples**

### **Example 1**

Felicity was awarded ESA after sending in fit notes showing she had low back pain. Her award was terminated after she was found not to have LCW following application of the WCA. No other conditions were assessed by the HCP. Her subsequent appeal was dismissed by the FtT, and the ESA award made pending the outcome of that appeal was terminated. Felicity makes a further claim for ESA on the basis that she is suffering from depression. The DM decides to treat Felicity as having LCW pending a further assessment, and awards ESA at the assessment phase rate.

### **Example 2**

Jermaine was entitled to ESA 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 DM accepts the HCP'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 ESA is terminated. His appeal is dismissed.

Jermaine makes a further claim for ESA, stating that his condition has significantly worsened since the last LCW determination. His GP writes a letter to say that Jermaine's knees have got worse after unsuccessful surgical intervention, and his walking distance has reduced significantly. The DM 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 LCW pending a further WCA.

### **Example 3**

Sadie's award of ESA was terminated after she was found not to have LCW. 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 DM establishes that Sadie's left arm is not affected, and determines that Sadie would be unlikely to score any further points. The DM finds that Sadie does not have LCW, using the evidence provided for the repeat claim, as well as the previous LCW determination and the claim is disallowed. Sadie is not treated as having LCW for the period before the claim is decided, and is not referred for a further WCA.



#### **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 ESA, but the award was terminated following application of the WCA. On appeal, the FtT 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 ESA, providing evidence that his medication for back pain and depression had been increased, as his back problems had worsened due to degenerative change. His GP states that Hassan's mobility is restricted, and he had been referred to the pain clinic. Hassan tells the DM 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 DM 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 LCW determination continues to show that Hassan does not score any points, and does not have LCW. Hassan's claim is disallowed.

#### **Example 5**

Molly was entitled to ESA while she was recovering from surgery for a fracture of her right leg. She is referred for a WCA 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 DM accepts the HCP's advice that Molly could mobilise repeatedly for lengthy distances using a manual wheelchair, and finds that she does not have LCW. Molly's award of ESA 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 DM disallows the repeat claim, because although Molly's health condition had deteriorated, this did not change the finding made as part of the previous LCW determination that she could reliably and repeatedly mobilise with a manual wheelchair.

## Example 6

Darren's award of ESA is terminated in June 2014 when he is found not to have LCW. 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 DM concludes that, as Parkinson's disease is a degenerative condition, it would not be reasonable to determine whether or not Darren has LCW on the basis of the evidence used to make the previous LCW determination. Darren is referred for a further WCA. In the absence of any information that Darren's condition has significantly worsened, he cannot be treated as having LCW while he is referred for the WCA.

## APPEALS

### Current guidance

- 29 DMG 44204 currently advises that the condition in paragraph 5 **2.** does not apply where
1. the claimant has made and is pursuing an appeal to the FtT against a decision that the claimant does not have LCW after application of the WCA **and**
  2. the appeal has not yet been determined by the FtT<sup>1</sup>.

This means that the claimant can be treated as having LCW where they lodge an appeal and provide medical evidence as in paragraph 5 **1.**.

*1 ESA Regs, reg 30(3)*

- 30 Where paragraph 29 applies, there is currently no requirement to claim ESA for an award to be made<sup>1</sup> – see DMG 02009 **15.**.

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

### The change

- 31 From 30.3.15, a claimant who makes and pursues an appeal to the FtT can be
1. treated as having LCW<sup>1</sup> **and**
  2. exempt from the requirement to claim before being awarded ESA<sup>2</sup>

only where the appeal is lodged against a relevant decision (see paragraph 32) made on a claim made or treated as made on or after 30.3.15.

**Note:** Where medical evidence is provided, this means that the claimant can be awarded ESA at the assessment phase rate pending the outcome of the appeal – see DMG 42445 et seq for detailed guidance.

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

32 A relevant decision<sup>1</sup> 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 DM that the claimant does not have LCW **or**
2. the first determination by the DM that the claimant does not have LCW since a previous determination that the claimant does have LCW.

**Note:** A determination that the claimant is treated as having LCW as in paragraph 5 is not a determination that the claimant does have LCW.

*1 ESA Regs, reg 30(5); SS (C&P) Regs, reg 3(2)*

33 In paragraph 32 **2.**, the previous determination is one made by the

1. DM **or**
2. FtT **or**
3. UT **or**
4. Court of Appeal **or**
5. Court of Session **or**
6. Supreme Court<sup>1</sup>.

*1 ESA Regs, reg 30(6); SS (C&P) Regs, reg 3(2)*

34 Where the conditions in paragraph 31 are **not** satisfied, the claimant would need to

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

in the normal way whether or not they make an appeal to the FtT. This includes considering whether the claimant needs to be referred for a further WCA, and if so, whether they can be treated as having LCW, as in paragraphs 14 – 28. The claimant

**cannot** be awarded ESA solely on the basis that they have made and are pursuing an appeal.

35 Where the claimant

1. is found not to have LCW on a repeat claim which was made **before** 30.3.15 following a previous determination that they did not have LCW **and**
2. lodges an appeal to the FtT against the decision made on the repeat claim

they can be entitled to ESA as in paragraphs 29 – 31, even though the appeal is against a second determination that the claimant does not have LCW. This is because the second determination is not a relevant determination as in paragraph 32.

## **Examples**

### **Example 1**

Rory claimed ESA on 7.5.14, and is found not to have LCW following application of the WCA. The decision is not revised following mandatory reconsideration, and he lodges an appeal with the FtT. In his appeal he asks for ESA to be paid, and he sends a fit note. The DM treats Rory as having LCW, and awards ESA pending the outcome of the appeal.

Rory's appeal is dismissed, and the DM treats him as not having LCW, terminating the award of ESA. Rory makes a further claim for ESA on 2.4.15, and the DM determines that Rory does not have LCW, using the evidence provided for the previous LCW determination as upheld by the FtT, 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 LCW and paid ESA solely on the grounds of the appeal. In order to become entitled to ESA again, Rory would need to claim ESA 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 LCW.

### **Example 2**

Yasmin claimed ESA in June 2014, and her award is terminated following application of the WCA. She lodges an appeal and is awarded ESA after the decision is not revised following mandatory reconsideration. Her appeal is allowed by the FtT, which finds that Yasmin has LCW but does not have LCWRA. The FtT recommends that Yasmin is referred for a further WCA after 12 months. The DM revises the award made pending the outcome of the appeal, and Yasmin is placed in the WRAG.

After a further WCA, Yasmin is again found not to have LCW, and again lodges an appeal after mandatory reconsideration. If she sends in fit notes, she can be treated as having LCW and paid ESA pending the outcome of the appeal, without being required to submit a claim.

### **Example 3**

Alan's award of ESA is terminated following application of the WCA. The decision is not revised following mandatory reconsideration. Alan lodges an appeal and is awarded ESA. The appeal is dismissed, and the ESA award is terminated.

Alan makes a further claim for ESA after he was admitted to hospital for two days following routine surgery for a pre-existing condition. The DM treats Alan as having LCW on the basis that his condition is likely to have deteriorated, and refers for a WCA. The HCP advises that recovery from surgery should take about three months, but Alan should be capable of undertaking WRA. The DM accepts the advice, and places Alan in the WRAG.

Alan is referred for a further WCA, and the HCP advises that Alan has recovered from the surgery. In the HCP's opinion Alan does not score any points, and the DM finds that Alan does not have LCW. As Alan was previously treated as having LCW 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 LCW is embodied in a relevant decision. Alan is entitled to an award of ESA pending an appeal made after the decision is not revised following for mandatory reconsideration.

Alan's appeal is successful, and the FtT finds that he scores 15 points and should be placed in the WRAG. The FtT decision is implemented to award the WRAC from week 14 of the repeat claim. Alan's award of ESA made pending the outcome of the appeal is revised to include the WRAC from the first day of that award.

### **Example 4**

Krystal's award of ESA is terminated after she is found not to have LCW. She is paid ESA pending the outcome of an appeal to the FtT. Her appeal is dismissed, and the award made pending the appeal is terminated.

Krystal makes a further claim for ESA, providing evidence that she has a new condition since the previous determination that she did not have LCW. The DM treats Krystal as having LCW and awards ESA, referring for a WCA. The DM accepts the HCP's advice that Krystal scores 6 points for the new condition. As this is less than 15 points, the DM determines that Krystal does not have LCW, and terminates the ESA award.

As the latest determination is not made following a determination that Krystal had LCW, she cannot be awarded ESA if she lodges an appeal.

## **ANNOTATIONS**

Please annotate the number of this memo (Memo DMG 10/15) against the following DMG paragraphs:

DMG 42201 heading, 42206 heading, 42331 heading, 42445 main heading.

## **CONTACTS**

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 1S25, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in [Memo DMG 03/13](#) - Obtaining legal advice and guidance on the Law.

**DMA Leeds: March 2015**