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STATUTORY INSTRUMENTS

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**2008 No. 794**

**The Employment and Support Allowance Regulations 2008**

**PART 5**

**LIMITED CAPABILITY FOR WORK**

**Determination of limited capability for work**

**19.**—(1) For the purposes of Part 1 of the Act, whether a claimant's capability for work is limited by the claimant's physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require the claimant to work is to be determined on the basis of a limited capability for work assessment of the claimant in accordance with this Part.

(2) The limited capability for work assessment is an assessment of the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 2 or is incapable by reason of such disease or bodily or mental disablement of performing those activities.

(3) Subject to paragraph (6), for the purposes of Part 1 of the Act a claimant has limited capability for work if, by adding the points listed in column (3) of Schedule 2 against any descriptor listed in that Schedule, the claimant obtains a total score of at least—

- (a) 15 points whether singly or by a combination of descriptors specified in Part 1 of that Schedule;
- (b) 15 points whether singly or by a combination of descriptors specified in Part 2 of that Schedule; or
- (c) 15 points by a combination of descriptors specified in Parts 1 and 2 of that Schedule.

(4) In assessing the extent of a claimant's capability to perform any activity listed in Part 1 of Schedule 2, the claimant is to be assessed as if wearing any prosthesis with which the claimant is fitted or, as the case may be, wearing or using any aid or appliance which is normally worn or used.

(5) In assessing the extent of a claimant's capability to perform any activity listed in Schedule 2, it is a condition that the claimant's incapability to perform the activity arises from—

- (a) a specific bodily disease or disablement;
- (b) a specific mental illness or disablement; or
- (c) as a direct result of treatment provided by a registered medical practitioner, for such a disease, illness or disablement.

(6) Where more than one descriptor specified for an activity apply to a claimant, only the descriptor with the highest score in respect of each activity which applies is to be counted.

(7) Where a claimant—

- (a) has been determined to have limited capability for work; or
- (b) is to be treated as having limited capability for work under regulations 20, 25, 26, 29 or 33(2),

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the Secretary of State may, if paragraph (8) applies, determine afresh whether the claimant has or is to be treated as having limited capability for work.

- (8) This paragraph applies where—
- (a) the Secretary of State wishes to determine whether there has been a relevant change of circumstances in relation to the claimant's physical or mental condition;
  - (b) the Secretary of State wishes to determine whether the previous determination of limited capability for work or that the claimant is to be treated as having limited capability for work, was made in ignorance of , or was based on a mistake as to, some material fact; or
  - (c) at least 3 months have passed since the date on which the claimant was determined to have limited capability for work or to be treated as having limited capability for work.

### **Certain claimants to be treated as having limited capability for work**

- 20.** A claimant is to be treated as having limited capability for work if—
- (a) the claimant is terminally ill;
  - (b) the claimant is—
    - (i) receiving treatment by way of intravenous, intraperitoneal or intrathecal chemotherapy; or
    - (ii) recovering from that treatment and the Secretary of State is satisfied the claimant should be treated as having limited capability for work;
  - (c) the claimant is—
    - (i) excluded or abstains from work, or from work of such a kind, pursuant to a request or notice in writing lawfully made under an enactment; or
    - (ii) otherwise prevented from working pursuant to an enactment,
 by reason of the claimant being a carrier, or having been in contact with a case, of a relevant disease;
  - (d) in the case of a pregnant woman, 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;
  - (e) in the case of a pregnant woman, she—
    - (i) is within the maternity allowance period; and
    - (ii) is entitled to a maternity allowance under section 35(1) of the Contributions and Benefits Act <sup>F1</sup>;
  - (f) in the case of a pregnant woman whose expected or actual date of confinement has been certified in accordance with the Medical Evidence Regulations, on any day in the period—
    - (i) beginning with the first date of the 6th week before the expected week of her confinement or the actual date of her confinement, whichever is earlier; and
    - (ii) ending on the 14th day after the actual date of her 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.

#### **Textual Amendments**

**F1** 1992 c. 4. Amended by section 53 of the [Welfare Reform and Pensions Act 1999 \(c. 30\)](#).

### **Information required for determining capability for work**

**21.**—(1) Subject to paragraphs (2) and (3), the information or evidence required to determine whether a claimant has limited capability for work is—

- (a) evidence of limited capability for work in accordance with the Medical Evidence Regulations (which prescribe the form of doctor's statement or other evidence required in each case);
- (b) any information relating to a claimant's capability to perform the activities referred to in Schedule 2 as may be requested in the form of a questionnaire; and
- (c) any such additional information as may be requested.

(2) Where the Secretary of State is satisfied that there is sufficient information to determine whether a claimant has limited capability for work without the information specified in paragraph (1) (b), that information will not be required for the purposes of making the determination.

(3) Paragraph (1) does not apply in relation to a determination whether a claimant is to be treated as having limited capability for work under any of regulations 20 (certain claimants to be treated as having limited capability for work), 25 (hospital in-patients), 26 (claimants receiving certain regular treatment) and 33(2) (additional circumstances in which a claimant is to be treated as having limited capability for work).

### **Failure to provide information in relation to limited capability for work**

**22.**—(1) Where a claimant fails without good cause to comply with the request referred to in regulation 21(1)(b), that claimant is, subject to paragraph (2), to be treated as not having limited capability for work.

(2) Paragraph (1) does not apply unless—

- (a) at least 6 weeks have passed since the claimant was sent the first request for the information; and
- (b) the claimant was sent a further request at least 4 weeks after the date of the first request, and at least 2 weeks have passed since the further request was sent.

### **Claimant may be called for a medical examination to determine whether the claimant has limited capability for work**

**23.**—(1) Where it falls to be determined whether a claimant has limited capability for work, that claimant may be called by or on behalf of a health care professional approved by the Secretary of State to attend for a medical examination.

(2) Subject to paragraph (3), where a claimant fails without good cause to attend for or to submit to an examination listed in paragraph (1), the claimant is to be treated as not having limited capability for work.

(3) Paragraph (2) does not apply unless written notice of the time and place for the examination was sent to the claimant at least 7 days in advance, or unless that claimant agreed to accept a shorter period of notice whether given in writing or otherwise.

### **Matters to be taken into account in determining good cause in relation to regulations 22 or 23**

**24.** The matters to be taken into account in determining whether a claimant has good cause under regulations 22 (failure to provide information in relation to limited capability for work) or 23 (failure to attend a medical examination to determine limited capability for work) include—

- (a) whether the claimant was outside Great Britain at the relevant time;

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- (b) the claimant's state of health at the relevant time; and
- (c) the nature of any disability the claimant has.

### **Hospital in-patients**

**25.**—(1) A claimant is to be treated as having limited capability for work on any day on which that claimant is undergoing medical or other treatment as an in-patient in a hospital or similar institution, or which is a day of recovery from that treatment.

(2) For the purposes of this regulation, “day of recovery” means a day on which a claimant is recovering from treatment as an in-patient in a hospital or equivalent under paragraph (1) and the Secretary of State is satisfied that the claimant should be treated as having limited capability for work on that day.

### **Claimants receiving certain regular treatment**

**26.**—(1) Subject to paragraph (2), a claimant receiving—

- (a) regular weekly treatment by way of haemodialysis for chronic renal failure;
- (b) treatment by way of plasmapheresis or by way of radiotherapy; or
- (c) regular weekly treatment by way of total parenteral nutrition for gross impairment of enteric function,

is to be treated as having limited capability for work during any week in which that claimant is engaged in that treatment or has a day of recovery from that treatment.

[<sup>F2</sup>(2) A claimant who receives the treatment referred to in paragraph (1) is only to be treated as having limited capability for work from the first week of treatment in which the claimant undergoes no fewer than—

- (a) two days of treatment;
- (b) two days of recovery from any of the forms of treatment listed in paragraph 1(a) to (c); or
- (c) one day of treatment and one day of recovery from that treatment,

but the days of treatment or recovery from that treatment or both need not be consecutive.]

(3) For the purpose of this regulation “day of recovery” means a day on which a claimant is recovering from any of the forms of treatment listed in paragraph (1)(a) to (c) and the Secretary of State is satisfied that the claimant should be treated as having limited capability for work on that day.

#### **Textual Amendments**

**F2** Reg. 26(2) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **5(1)**

### **Claimant to be treated as having limited capability for work throughout a day**

**27.** A claimant who at the commencement of any day has, or thereafter develops, limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work throughout that day.

### **Night workers**

**28.**—(1) Where a claimant works for a continuous period which extends over midnight into the following day, that claimant is to be treated as having limited capability for work on the day on which

the lesser part of that period falls if that claimant had limited capability for work for the remainder of that day.

(2) Where, in relation to a period referred to in paragraph (1), the number of hours worked before and after midnight is equal—

- (a) if the days in question fall at the beginning of a period of limited capability for work, the claimant is to be treated as having limited capability on the second day; and
- (b) if the days in question fall at the end of a period of limited capability for work, the claimant is to be treated as having limited capability for work on the first day.

### **Exceptional circumstances**

**29.**—(1) A claimant who does not have limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work if paragraph (2) applies to the claimant.

(2) This paragraph applies if—

- (a) the claimant is suffering from a life threatening disease in relation to which—
  - (i) there is medical evidence that the disease is uncontrollable, or uncontrolled, by a recognised therapeutic procedure; and
  - (ii) 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
- (b) the claimant suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work.

### **Conditions for treating a claimant as having limited capability for work until a determination about limited capability for work has been made**

**30.**—(1) A claimant is, if the conditions set out in paragraph (2) are met, to be treated as having limited capability for work until such time as it is determined—

- (a) whether or not the claimant has limited capability for work;
- (b) whether or not the claimant is to be treated as having limited capability for work otherwise than in accordance with this regulation; or
- (c) whether the claimant falls to be treated as not having limited capability for work in accordance with regulation 22 (failure to provide information in relation to limited capability for work) or 23 (failure to attend a medical examination to determine limited capability for work).

(2) The conditions are—

- (a) that the claimant provides evidence of limited capability for work in accordance with the Medical Evidence Regulations; and
- (b) that it has not, within the 6 months preceding the date of claim, been determined, in relation to the claimant's entitlement to any benefit, allowance or advantage which is dependent on the claimant having limited capability for work, that the claimant does not have limited capability for work or is to be treated as not having limited capability for work under regulation 22 or 23 unless—
  - (i) 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;

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- (ii) a disease or bodily or mental disablement from which the claimant was suffering at the time of that determination has significantly worsened; or
  - (iii) in the case of a claimant who was treated as not having limited capability for work under regulation 22 (failure to provide information), the claimant has since provided the information requested under that regulation<sup>[F3]</sup>; or]
- <sup>[F3]</sup>(c) that it has not, within the 6 months preceding the date of claim, been determined, in relation to the claimant's entitlement to any benefit, allowance or advantage, which is dependent upon the claimant being incapable of work, that the claimant is capable of work, or is to be treated as capable of work under regulation 7 or 8 of the Social Security (Incapacity for Work) (General) Regulations 1995 ("the 1995 Regulations"), unless—
- (i) 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,
  - (ii) a disease or bodily or mental disablement from which the claimant was suffering at the time of that determination has significantly worsened, or
  - (iii) in the case of a claimant who was treated as capable of work under regulation 7 of the 1995 Regulations (failure to provide information), the claimant has since provided the information requested by the Secretary of State under that regulation.]
- (3) Paragraph (2)(b) does not apply where a claimant has made and is pursuing an appeal against a decision that embodies a determination that the claimant does not have limited capability for work and that appeal has not yet been determined by an appeal tribunal constituted under Chapter 1 of Part 1 of the Social Security Act 1998 <sup>F4</sup>.

#### Textual Amendments

- F3** Reg. 30(2)(c) inserted (28.6.2010) by The Social Security (Miscellaneous Amendments) (No. 3) Regulations 2010 (S.I. 2010/840), regs. 1, 9(8)
- F4** 1998 c. 14.

#### Claimant who claims jobseeker's allowance to be treated as not having limited capability for work

- 31.**—(1) A claimant who—
- (a) claims a jobseeker's allowance; and
  - (b) is able to show a reasonable prospect of obtaining employment,
- is, throughout the period of that claim, to be treated as not having limited capability for work.
- (2) Paragraph (1) applies even though it has been determined that the claimant—
- (a) has limited capability for work; or
  - (b) is to be treated as having limited capability for work under any of regulations 20 (certain claimants to be treated as having limited capability for work), 25 (hospital in-patients), 26 (claimants undergoing certain regular treatment) or 29 (exceptional circumstances).

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

**32.**—<sup>[F5]</sup>(1) A claimant <sup>[F6]</sup>who is or has been a member of Her Majesty's forces] is to be treated as not having limited capability for work on any day which is recorded by the Secretary of State for Defence as a day of sickness absence from duty.

[<sup>F7</sup>(2) A claimant is to be treated as not having limited capability for work on any day on which the claimant attends a training course in respect of which the claimant is paid a training allowance or premium pursuant to arrangements made under section 2 of the Employment and Training Act 1973 or section 2(3) of the Enterprise and New Towns (Scotland) Act 1990.

(3) Paragraph (2) is not to apply—

- (a) for the purposes of any claim to employment and support allowance for a period commencing after the claimant ceased attending the training course in question; or
- (b) where any training allowance or premium paid to the claimant is paid for the sole purpose of travelling or meal expenses incurred or to be incurred under the arrangement made under section 2 of the Employment and Training Act 1973 or section 2(3) of the Enterprise and New Towns (Scotland) Act 1990.]

#### Textual Amendments

- F5** Reg. 32(1): reg 32 renumbered as reg. 32(1) (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **5(2)(a)**
- F6** Words in reg. 32(1) inserted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **5(2)(b)**
- F7** Reg. 32(2)(3) added (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **5(2)(c)**

#### [<sup>F8</sup>Claimants to be treated as not having limited capability for work at the end of the period covered by medical evidence

**32A.** Where the Secretary of State is satisfied that it is appropriate in the circumstances of the case then a claimant may be treated as not having limited capability for work if—

- (a) the claimant has supplied medical evidence in accordance with regulation 30(2)(a);
- (b) the period for which medical evidence was supplied has ended;
- (c) the Secretary of State has requested further medical evidence; and
- (d) the claimant has not, before whichever is the later of either the end of the period of 6 weeks beginning with the date of the Secretary of State's request or the end of 6 weeks beginning with the day after the end of the period for which medical evidence was supplied—
  - (i) supplied further medical evidence, or
  - (ii) otherwise made contact with the Secretary of State to indicate that they wish to have the question of limited capability for work determined.]

#### Textual Amendments

- F8** Reg. 32A inserted (28.6.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2010 \(S.I. 2010/840\)](#), regs. 1, **9(9)**

#### Additional circumstances where claimants are to be treated as having limited capability for work

**33.—(1)** For the purposes of paragraph 4(1)(d)(ii) of Schedule 1 to the Act, a claimant is to be treated as having limited capability for work on any day in respect of which that claimant is entitled to statutory sick pay.

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(2) For the purposes of an income-related allowance, a claimant is to be treated as having limited capability for work where—

- (a) that claimant is not a qualifying young person;
- (b) that claimant is receiving education; and
- (c) paragraph 6(1)(g) of Schedule 1 to the Act does not apply in accordance with regulation 18.



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