
STATUTORY INSTRUMENTS

2008 No. 794

The Employment and Support Allowance Regulations 2008

PART 6

LIMITED CAPABILITY FOR WORK-RELATED ACTIVITY

Determination of limited capability for work-related activity

34.—(1) For the purposes of Part 1 of the Act, where, by reason of a claimant's physical or mental condition, at least one of the descriptors set out in Schedule 3 applies to the claimant, the claimant's capability for work-related activity will be limited and the limitation will be such that it is not reasonable to require that claimant to undertake such activity.

(2) A descriptor applies to a claimant if that descriptor applies to the claimant for the majority of the time or, as the case may be, on the majority of the occasions on which the claimant undertakes or attempts to undertake the activity described by that descriptor.

[^{F1}(3) In determining whether a descriptor applies to the claimant, the claimant is to be assessed as if—

- (a) the claimant were fitted with or wearing any prosthesis with which the claimant is normally fitted or normally wears; or, as the case may be,
- (b) wearing or using any aid or appliance which is normally, or could reasonably be expected to be, worn or used.]

[^{F2}(3A) In determining whether a descriptor applies, it is a condition that the claimant's incapability arises—

- (a) in respect of descriptors 1 to 8, 15(a), 15(b), 16(a) and 16 (b), from a specific bodily disease or disablement;
- (b) in respect of descriptors 9 to 14, 15(c), 15(d), 16(c) and 16 (d), from a specific mental illness or disablement; or
- (c) in respect of—
 - (i) descriptors 1 to 8, 15(a), 15(b), 16(a) and 16 (b), as a direct result of treatment provided by a registered medical practitioner for a specific physical disease or disablement;
 - (ii) descriptors 9 to 14, 15(c), 15(d), 16(c) and 16 (d), as a direct result of treatment provided by a registered medical practitioner for a specific mental illness or disablement.]

(4) Where a determination has been made about whether a claimant—

- (a) has limited capability for work-related activity;
- (b) is to be treated as having limited capability for work-related activity; or
- (c) is to be treated as not having limited capability for work-related activity,

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the Secretary of State may, if paragraph (5) applies, determine afresh whether the claimant has or is to be treated as having limited capability for work-related activity.

- (5) 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 about limited capability for work-related activity or about treating the claimant as having or as not having limited capability for work-related activity, 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 of the previous determination about limited capability for work-related activity or about treating the claimant as having or as not having limited capability for work-related activity.

Textual Amendments

- F1** Reg. 34(3) substituted (28.1.2013) by [The Employment and Support Allowance \(Amendment\) Regulations 2012 \(S.I. 2012/3096\)](#), regs. 1(1), **4(2)(a)**
- F2** Reg. 34(3A) inserted (28.1.2013) by [The Employment and Support Allowance \(Amendment\) Regulations 2012 \(S.I. 2012/3096\)](#), regs. 1(1), **4(2)(b)**

Certain claimants to be treated as having limited capability for work-related activity

35.—(1) A claimant is to be treated as having limited capability for work-related activity if—

- (a) the claimant is terminally ill;
- ^[F3](b) the claimant is-
 - (i) receiving treatment for cancer by way of chemotherapy or radiotherapy;
 - (ii) likely to receive such treatment within six months after the date of the determination of capability for work-related activity; or
 - (iii) recovering from such treatment,
 and the Secretary of State is satisfied that the claimant should be treated as having limited capability for work-related activity; or]
- (c) in the case of a woman, she is pregnant and 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-related activity.

(2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 34(1) is to be treated as having limited capability for work-related activity if—

- (a) the claimant suffers from some specific disease or bodily or mental disablement; and
- (b) 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-related activity.

Textual Amendments

- F3** Reg. 35(1)(b) substituted (28.1.2013) by [The Employment and Support Allowance \(Amendment\) Regulations 2012 \(S.I. 2012/3096\)](#), regs. 1(1), **4(3)**

[^{F4}Relevant linked cases – limited capability for work-related activity

- 35A.** A claimant is to be treated as having limited capability for work-related activity where—
- (a) they fall within case 1, as defined in regulation 7(1B)(a); and
 - (b) in respect of the earlier period of limited capability for work referred to in regulation 7(1B)(a)(i), they had been entitled to a support component under sections 2(2) or 4(4) of the Act.]

Textual Amendments

- F4** Reg. 35A inserted (1.5.2012) by [The Employment and Support Allowance \(Amendment of Linking Rules\) Regulations 2012 \(S.I. 2012/919\)](#), regs. 1(2), **5(5)**

Information required for determining capability for work-related activity

36.—(1) Subject to paragraph (2), the information or evidence required to determine whether a claimant has limited capability for work-related activity is—

- (a) any information relating to the descriptors set out in Schedule 3 as may be requested in the form of a questionnaire; and
- (b) 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-related activity without the information specified in paragraph (1)(a), that information will not be required for the purposes of making the determination.

Failure to provide information in relation to work-related activity

37.—(1) Where a claimant fails without good cause to comply with the request referred to in regulation 36(1)(a), the claimant is, subject to paragraph (2), to be treated as not having limited capability for work-related activity.

- (2) Paragraph (1) does not apply unless—
- (a) at least [^{F5}4 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 [^{F6}3 weeks] after the date of the first request, and at least [^{F7}1 week has] passed since the further request was sent.

Textual Amendments

- F5** Words in reg. 37(2)(a) substituted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(5)** (with reg. 2)
- F6** Words in reg. 37(2)(b) substituted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(6)(a)** (with reg. 2)
- F7** Words in reg. 37(2)(b) substituted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(6)(b)** (with reg. 2)

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Claimant may be called for a medical examination to determine whether the claimant has limited capability for work-related activity

38.—(1) Where it falls to be determined whether a claimant has limited capability for work-related activity, 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-related activity.

(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 the 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 37 or 38

39. The matters to be taken into account in determining whether a claimant has good cause under regulations 37 (failure to provide information in relation to work-related activity) or 38 (failure to attend a medical examination to determine limited capability for work-related activity) include—

- (a) whether the claimant was outside Great Britain at the relevant time;
- (b) the claimant's state of health at the relevant time; and
- (c) the nature of any disability the claimant has.

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