

EXPLANATORY MEMORANDUM TO

THE EMPLOYMENT AND SUPPORT ALLOWANCE (LIMITED CAPABILITY FOR WORK AND LIMITED CAPABILITY FOR WORK-RELATED ACTIVITY) (AMENDMENT) REGULATIONS 2011

2011 No. 228

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to amend the Schedules in the Employment and Support Assessment Regulations 2008 (“the ESA Regulations”) which deal with the assessment of limited capability for work and limited capability for work-related activity, known as the Work Capability Assessment (WCA). This assessment is used to determine entitlement to Employment and Support Allowance (ESA), the amount of benefit and the level of conditionality which may be imposed on a claimant.
- 2.2 The instrument also makes changes to the ESA Regulations dealing with persons who are to be treated as having limited capability for work, or limited capability for work-related activity, without needing to go through the WCA process.

3. Matters of Special interest to the Joint Committee on Statutory Instruments

None.

4. Legislative Background

- 4.1 Employment and Support Allowance, including the Work Capability Assessment, was introduced in October 2008. In order to be entitled to ESA, a person must have limited capability for work. A person who also has limited capability for work-related activity will be in the “support group”. A member of the support group will receive a higher amount of ESA and will not be subject to conditionality requirements. A person who only has limited capability for work will be in the work-related activity group. (Conditionality is used to describe the steps that a claimant may be required to undertake in order to bring them closer to a return to work. The present requirement is to take part in work-focused interviews, though the Government intends make regulations shortly to impose also work-related activity requirements).
- 4.2 In March 2010 a Department-led review of the WCA was published. These Regulations implement the recommendations of that review.¹
- 4.3 The Department-led review began in March 2009 and engaged with medical and other experts as well as disability organisations. The review investigated two principal questions:
- how effectively the WCA is identifying work capability amongst individuals; and
 - how it could be modified to take better account of an individual’s adaptation to their condition.
- 4.4 The results, published in a report on 29 March 2010, showed that the WCA is generally operating according to design, but also made some recommendations for how it could be refined.

¹ <http://www.dwp.gov.uk/docs/work-capability-assessment-review.pdf>

- 4.5 Accordingly, these Regulations amend the descriptors used in the WCA as set out in the Employment and Support Allowance Regulations 2008. They also make changes to the rules about who is to be treated as having limited capability for work and limited capability for work-related activity.

5. Territorial Extent and Application

The Regulations extend to England, Wales and Scotland.

6. The European Convention On Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy Background

What is being done and why

- 7.1 The WCA looks at an individual's functional capability in a range of areas to assess whether they have limited capability for work (LCW) and limited capability for work-related activity (LCWRA)
- 7.2 The descriptors used for the WCA are set out in Schedules to the ESA Regulations. These Regulations amend those descriptors.
- 7.3 The ESA Regulations provide that in certain circumstances a person will be treated as having LCW or LCWRA and so do not need to go through the full WCA process. These Regulations make certain amendments to those provisions.
- 7.4 The principal aim of the changes is to ensure that the WCA is an accurate test of these matters, including by taking account of the fact that certain functions can be performed with the help of aids, such as a wheelchair or other forms of assistance. The changes also deal more accurately with fluctuating conditions. Some of the changes aim to make the activities and descriptors clearer and simpler. Others are made to ensure that the descriptors accurately reflect the requirements of a modern workplace

Accounting for adaptation

- 7.5 The Department-led review was tasked with looking at how the policy - to have an objective functional assessment of capability for work - could be further developed by assessing how an individual had adapted to their condition. Consequently, these Regulations amend a number of descriptors to focus more carefully on functional ability and to account for adaptation.
- 7.6 In particular, the intention of the mobility descriptor in the WCA is to identify an individual's mobility in and around the workplace. This descriptor has been changed to reflect the fact that mobility can be achieved through a variety of means, of which walking is only one. This will lead to a more accurate measure of a person's capability for work.
- 7.7 The Sensory Function descriptors have been amended to make them more functionally focused – instead of assessing someone's ability to see, hear and speak they look at ability to navigate safely, understand messages and communicate with people.

Fluctuating conditions

- 7.8 To improve the assessment of fluctuating conditions, some of the descriptors now recognise the limiting effect of 'significant discomfort or exhaustion.'

More accurately reflecting the requirements of the modern workplace

- 7.9 In order to more accurately reflect the requirements of the modern work place, the amendments remove the descriptor relating to bending and kneeling and, instead of looking at someone's ability to remain seated or remain standing, look at their ability to 'remain at a workstation.'
- 7.10 Changes are also made to the current descriptors identifying upper limb disabilities so as to ensure that they more accurately measure capability for work. Descriptors identifying functional limitation in one hand, or relating to co-ordinated activity involving two hands, have been removed as they are inappropriate in the assessment of limited capability for work. Descriptors which do not represent a significant limitation of functional capability in relation to the workplace – such as turning a star-headed tap – have been removed.

Making the descriptors simpler and clearer

- 7.11 The descriptors relating to continence, learning tasks, awareness of hazards, completing personal action, coping with change, social situations and getting about have been changed to make them simpler and clearer. In some instances, descriptors have been amalgamated in recognition of the fact that they reflect the same functional impairment as each other. For some descriptors, the indicators used to determine level of functional impairment have been changed (for example looking at the complexity of the task an individual can learn or the level of supervision required) in order to more accurately reflect the level of impairment. Some of the language, for example around social situations, has been amended and concepts such as 'appropriate' behaviour have been clarified as 'behaviour that would be unreasonable in any workplace'.

Changes to the "treated as" regulations

- 7.12 The Regulations clarifies that the existing provision which allows hospital in-patients to be treated as having limited capability for work (LCW) includes claimants attending a residential programme of rehabilitation for the treatment of drug or alcohol misuse.
- 7.13 The Regulations extend the existing provision which allow people receiving certain types of chemotherapy to be treated as having limited capability for work and for work-related activity to also include people awaiting or in-between courses of such chemotherapy.

Change to criteria for assessment of limited capability for work-related activity

- 7.14 In recognition of the variety of functional impairments which could give a claimant limited capability for work-related activity (LCWRA) a number of new criteria are being added to the LCWRA assessment. These are new ways in which a claimant can qualify for the support group and in particular will ensure that the assessment applies more appropriately to people with severe communication difficulties.
- 7.15 These criteria are: understanding communication; awareness of hazard; coping with change; coping with social engagement; and appropriateness of behaviour with other people. These are functions in which we feel that a severe level of impairment would limit an individual's capability for work-related activity.

Ensuring that where limited capability for work-related activity (LCWRA) is demonstrated, limited capability for work (LCW) is also demonstrated

- 7.16 This instrument amends the existing Regulations to correct an anomaly in the assessment of impairments related to eating and drinking. Where a claimant has the specified impairments that qualify them as having limited capability for work-related activity, they will be treated as also having limited capability for work.

Expanding the Support Group in relation to chemotherapy

7.17 The existing Regulations allow for claimants receiving certain types of chemotherapy to be treated as having both limited capability for work and limited capability for work-related activity. In the light of experience it is considered that there is a further group who should also fall into this category, namely people who have just been diagnosed with cancer or who are part way through treatment. The instrument therefore amends the Regulations to enable individuals who are likely to receive chemotherapy within the next 6 months to be treated as having limited capability for work and work-related activity.

Inclusion of residential rehabilitation

7.18 The existing Regulations ensure that in-patients in a hospital or similar institution can be treated as having limited capability for work but does not include residential rehabilitation centres for drug and alcohol misuse where there are no on-site medical staff. As individuals on such residential programmes are unlikely to be able to work at that time, this instrument broadens the definition so that they can also be treated as having limited capability for work.

Application of the Regulations

7.19 The Regulations apply to all people who claim ESA after the date the Regulations come into force. They also apply to everyone who is notified under the incapacity benefit reassessment process after that date. The Regulations also apply to people who claimed ESA before the Regulations came into force, or were notified before that date, but have not yet had their capability for work or work-related activity assessed. However, the old version of the Regulations and the relevant Schedules will apply where the claimant was sent a questionnaire (as to their capability for work or for work-related activity) based on the un-amended provisions before that date. This is for operational reasons and to avoid causing unnecessary confusion.

7.20 The position for ESA claimants who are called for a re-assessment under the Regulations is similar.

7.21 Where a person would now benefit from the more generous “treated as” rules (e.g. a person awaiting chemotherapy) that will be possible whether or not the previous version of the questionnaire was sent out.

7.22 This is subject to a six month limit after which all assessments will be made under the amended provisions.

Consolidation

7.23 Informal consolidation of this instrument will be included in due course in the Department’s ‘the law relating to social security’ (the blue volumes) which are available at no cost to the public on the internet at:

<http://www.dwp.gov.uk/publications/specialist-guides/law-volumes/the-law-relating-to-social-security/>

8. Consultation

8.1 In July 2008, the Green Paper ‘No-One Written Off: Reforming Welfare to Reward Responsibility’² consulted publicly on whether the WCA should be reviewed. This consultation received over 1,100 responses. The concept of reviewing WCA was welcomed, and the ensuing White Paper ‘Raising Expectations’³, published in December 2008, announced that the Government would review it.

² <http://www.dwp.gov.uk/docs/noonewrittenoff-complete.pdf>

³ <http://www.dwp.gov.uk/docs/fullversion.pdf>

- 8.2 A Department-led review of the WCA commenced in March 2009, with the remit of establishing whether it accurately identifies capability for work, whether the content is appropriate, and how it could be amended to better take into account how individuals adapt to their conditions.
- 8.3 Due to the technical nature of the review, the Department did not launch an open public consultation. The Department did, however, engage closely with a wide range of experts in the fields of physical, mental and occupational health, representatives of employers, specialist disability and wider customer representative organisations.
- 8.4 In October 2009, the review concluded and produced an initial set of proposals. Following publication of the report, and in response to representations from disability organisations that some of the review recommendations had not adequately addressed their concerns, a further technical review was undertaken by the Department's Chief Medical Advisor. At further meetings with the disability organisations, these concerns were explored. This led to the production of an addendum, which proposed further amendments and addressed a number of the concerns.⁴
- 8.5 These Regulations implement the recommendations of the Department-led review and the further technical review (addendum). In August 2010, the Regulations were referred to the Social Security Advisory Committee (SSAC) which decided to refer them for public consultation.⁵ This concluded on 10th September. SSAC received 164 responses to its consultation, which were summarised in a detailed report to the Department.⁶
- 8.6 Whilst the Regulations in question relate to a number of specific changes to the descriptors used in the WCA, many of the submissions to SSAC, and the comments of the Committee, related to wider issues about the nature and operation of the current work capability regime. The Department is committed to an ongoing process of review and improvement. and therefore pleased that SSAC's comments were submitted to the Independent Review of the WCA undertaken by Professor Malcolm Harrington, which had a much broader remit.
- 8.7 The Welfare Reform Act 2007 committed the Government to commissioning an independent review of the WCA annually for the first five years of its operation. The first of these reviews⁷, led by Professor Malcolm Harrington, an Occupational Health expert, from June 2010 until November 2010, included a public Call for Evidence that elicited 400 responses; meetings with around 100 key organisations including disability organisations, providers, representative groups, unions and employers; and evidence from DWP staff, Atos Healthcare (which conducts Work Capability Assessments on behalf of the Department) and the Tribunal Service.
- 8.8 Professor Harrington published his independent report on 23rd Nov 2010. It identified a number of ways in which the WCA is not working as well as it should, and made a substantial series of recommendations for improving it. The Government have accepted all of these recommendations⁸ and is now working to implement them as quickly as possible. This can be done within the legislative framework provided by these Regulations. Taking forward the recommendations of this review will also address many of the concerns raised by SSAC in their detailed report.
- 8.9 Professor Harrington also set out a programme of work for the second independent review. He has agreed to conduct the second independent review and has started work on reviewing the descriptors in relation to mental health and fluctuating conditions.

⁴ <http://www.dwp.gov.uk/docs/work-capability-assessment-review-addendum.pdf>

⁵ <http://ssac.org.uk/pdf/esa-amendment-regulations-2011.pdf>

⁶ <http://www.official-documents.gov.uk>

⁷ <http://www.dwp.gov.uk/docs/wca-review-2010.pdf>

⁸ <http://www.dwp.gov.uk/docs/wca-review-2010-response.pdf>

9. Guidance

- 9.1 Staff in Jobcentre Plus (JCP) and Atos Healthcare have received information and additional training to understand the changes to the WCA and the impact they may have on customers. Decision-Makers will receive updated guidance explaining the changes to the WCA and all training delivered to JCP advisors is being updated to reflect and explain changes to the WCA. JCP staff are able to access more detailed information on the intranet. Atos assessors will be required to complete a 3 hour pre - course reading module, to be followed by a one day trainer-led course including the requirement to pass a multiple choice questionnaire and successfully complete a test case.
- 9.2 Stakeholder groups, including disability organisations, have been closely involved in reviewing the WCA and the Department maintains close engagement with disability organisations in order that they fully understand the changes. Information about the review and its recommendations are available on the Department's website which also contains a Q&A aimed at healthcare professionals wanting to know more about the training.
- 9.3 It is expected that these changes will result in a different decision in about 5.5% of cases. Information is available to the general public on the Department's website, and staff at the Jobcentre can answer queries raised by customers wanting to know how the changes might affect them. When a customer has had a Work Capability Assessment, they receive a letter explaining what decision has been made and why, which will reflect the changes to the Assessment. In addition, we have accepted Professor Harrington's recommendation to improve the way we communicate by customers by ensuring that JCP staff speak to customers to explain how the process works, explain the result of their WCA and explain what support is available.

10. Impact

- 10.1 This instrument has no impact on the private sector or civil society organisations
- 10.2 The instrument will increase costs on the public sector.
- 10.3 An impact assessment is attached to this memorandum.

11. Regulating small business

The legislation does not apply to small business

12. Monitoring and review

- 12.1 The Department and Atos Healthcare gather detailed management information and administrative data which is used to analyse outcomes of the WCA.
- 12.2 Section 10 of the Welfare Reform Act 2007 imposes on the Government a statutory duty to commission an independent review of the operation of the WCA annually for the first five years of its operation. The first of these reviews has just concluded, and the Government have accepted all of its recommendations. The Department has confirmed that the second independent review will be carried out by Professor Malcolm Harrington, who has already begun work on reviewing some of the descriptors. This process of ongoing review and improvement will ensure that these changes are monitored and further improvements made if necessary.

13 Contact

Any queries regarding this instrument should be directed to James Bolton at the Department for Work and Pensions e-mail dwphalthandwork.enq@dpw.gsi.gov.uk