FOR STAFF AND STAKEHOLDERS

CITY OF WOLVERHAMPTON COUNCIL

Benefits Bulletin

ESA and MR New Announcement…

14th September 2020

Issue 4 [2020]

1. ESA and MR…

In Benefits Bulletin 2 [2020] ESA and Mandatory Reconsideration (4th August 2020) we brought you news of the High Court judgement in *Michael Connor v Secretary of State for Work and Pensions* which examined the lawfulness of Mandatory Reconsideration in Employment and Support Allowance cases.

Upon our reading of the judgement, it did not appear to hold directly that Mandatory Reconsideration was unlawful in itself. What it did state was that leaving people without Employment and Support Allowance during the period when Mandatory Reconsideration was being considered was unlawful.

Anyway, the Department for Work and Pensions (DWP) announced last week (on **10th September 2020**) that in light of the findings of the High Court, it was no longer going to require a Mandatory Reconsideration prior to appeal in certain Employment and Support Allowance disputed decisions.

The announcement was included within the DWP's statistical data release LINK relating to the outcomes of ESA Work Capability Assessments.

ESA

Employment and Support Allowance

The announcement stated that as a result of the High Court judgement in *Michael Connor v Secretary of State for Work and Pensions*…, "*Mandatory Reconsideration has been discontinued for any claimant who, having been found fit for work following a Work Capability Assessment would, if they appealed, be paid ESA pending the outcome of that appeal. This is known as Payment Pending Appeal.*"

The announcement went on to clarify that "*Not all claimants qualify, and it applies only to fit for work disallowance decisions, not decisions such as disallowance due to failure to return a questionnaire or failure to attend a Work Capability Assessment*".

Therefore, now when a person has been held to not have 'limited capability for work' following an assessment under the Work Capability Assessment, they may submit an appeal straight away and, providing they send in a Med3 Fit Note which covers the relevant period, they may continue to get at least the basic rate of Employment and Support Allowance until the appeal is heard.

However, the position is unchanged for those who have either been refused Employment and Support Allowance or had their award ended because the DWP believes that they:

- have (without '*good reason*') failed to complete and return an ESA50 Questionnaire; or
- failed (without '*good reason*') to participate in a face-to-face assessment with a Healthcare Professional.

They must make a Mandatory Reconsideration before being able to submit an appeal. Moreover, in either situation they will not be able to get any Employment and Support Allowance until they return a completed ESA50, or attend a medical, or get the decision refusing benefit/withdrawing benefit overturned whether that is following the Mandatory Reconsideration request or Appeal.

Please be aware that despite the announcement there has been no release of any new regulations removing the Mandatory Reconsideration requirement. The presumption is that the High Court judgement (and now the DWP's announcement) makes the Mandatory Reconsideration null and void.

2. Best Advice…

It is difficult to know at this stage what advice should be given to claimants who have already made a Mandatory Reconsideration request. Should they continue to wait for the outcome of the Mandatory Reconsideration before - making an appeal? Should they simply submit an appeal at the earliest opportunity?

Quite possibly the best advice should be to:

- write to the DWP, submitting a Med3 Fit Note (with a backdated Med5 Fit Note if necessary covering any retrospective period) and asking that in light of *Michael Connor v SSWP* it puts in place an award of Employment and Support Allowance until a determination on the Mandatory Reconsideration request is known; and
- make an appeal without delay whilst also submitting to the DWP a Med3 Fit Note from their doctor.

Submitting a **Med3 Fit Note** at the appeal stage is important. Without it no Employment and Support Allowance 'pending the appeal' will be awarded.

If a person cannot get a Med3 Fit Note from their doctor (or other health professional) then they will still be able to continue with any Mandatory Reconsideration or appeal. However, they will not be able to get an award of Employment and Support Allowance (at the basic amount) during the period leading up to the Mandatory Reconsideration and/or appeal. They will only then get Employment and Support Allowance if the Mandatory Reconsideration or appeal proves successful.

Further Information and Advice: If you need further information or advice on how best to proceed (or what the options are) in any particular case then do get in touch with the Specialist Support Team. You can email them at wrs@wolverhampton.gov.uk or ring them on (01902) 555351.

3. Advice to Those Seeking an Appeal…

If someone has already made an appeal then providing they are submitting Med3 Fit Notes to the DWP, they should be paid at least the basic amount of Employment and Support Allowance. If someone has not yet submitted an appeal but is going to do so:

- using the Online Appeal Form then they should click that they do not have a Mandatory Reconsideration (see Making an Appeal Online opposite) and go on to explain that they are relying on *Michael Connor v SSWP* and the announcement from the DWP.

- using the new SSCS1 PE Form then on the form simply explain that a Mandatory Reconsideration will not be sought and that the person will be relying on *Michael Connor v SSWP* and the announcement from the DWP.

Remember that in all cases where an appeal has been made, the DWP has the power to revise the decision under appeal in favour of the appellant. This is why it is important that if a person has further supporting evidence, particularly if it is medical evidence, they seek to submit it with the appeal. The appeal and the additional evidence will go to the DWP for it to prepare its case. At this stage, the DWP may decide that the appeal is not necessary. It may agree with the appellant that they are entitled to Employment and Support Allowance after all. In such a situation the appeal will lapse.

Making an Appeal Online…

It is not known how long it will take for the Online Appeal Form to be adjusted by HMCTS to cater for the new approach to be taken with Employment and Support Allowance appeals. Therefore, until the system is updated the best advice we can give is to be aware that when using it you will be asked if you have a 'Mandatory Reconsideration Notice'.

If you answer '**YES**' here, then the system will ask you for the date of the Mandatory Reconsideration Notice. Without it you will not be able to proceed.

If you answer '**NO**' to this then you will be asked whether contact has been made over this. If you answer '**NO**' (*I haven't contacted DWP about the decision*) then the system will not let you proceed. The system will tell you that you can only appeal after you have asked the DWP to reconsider its decision.

However, if you answer '**YES**' here the system will take you to a box in which you can explain why you do not have a Mandatory Reconsideration Notice. This box would normally be used to enable people who have lost their Mandatory Reconsideration Notice to say so. In such cases HMCTS would follow the matter up with the DWP checking whether a Mandatory Reconsideration request had indeed been made / a Mandatory Reconsideration Notice issued, etc. You can use this box to explain that given the recent events you believe that you do not need a Mandatory Reconsideration Notice to appeal. You can enter something along the lines of:

"*I am appealing against a decision that I do not have 'limited capability for work'. I do not have a Mandatory Reconsideration Notice (MRN). Given Connor v SSWP (High Court) and the DWP's announcement on this matter I believe that I do not need a MRN to appeal.*"

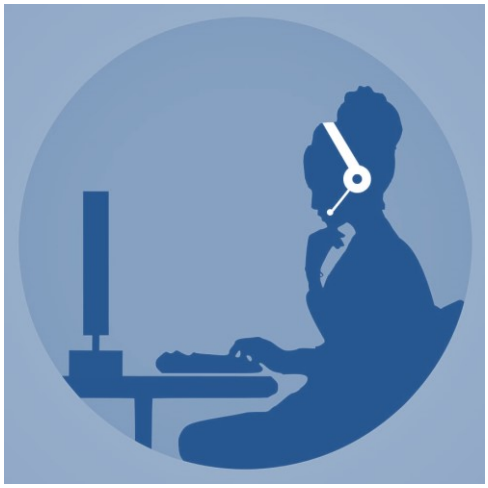
This will allow you to submit the appeal. If there is a problem further down the line then HMCTS will contact the appellant.

IMPORTANT NOTE: It is well known that in some appeal cases the DWP contacts the appellant before the actual hearing in an attempt to broker a deal. The caller might, for example, say "*We will* assess *you as having 'limited capability for work' if you are prepared to withdraw your assertion that you have 'limited capability for work' and 'limited capability for work-related activity'. How does that sound?*". Whilst it takes place, such practice is unlawful. Of course, if a person is arguing that they have 'limited capability for work' (and there is no argument that they also have 'limited capability for work-related activity') then the DWP is within its rights to contact them to advise that the decision under appeal is going to revise and therefore there will be no need for an appeal.

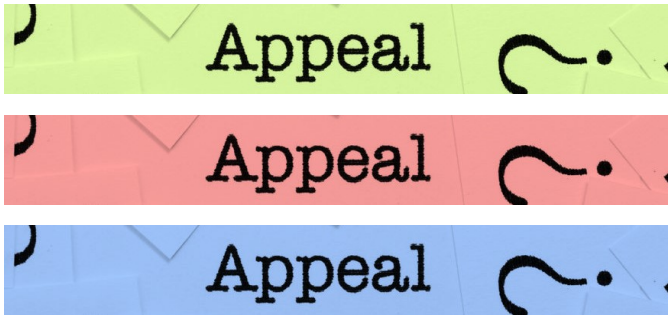
However, if a person is arguing that they have both 'limited capability for work' and 'limited capability for work-related activity' (to get into the Support Group) then the DWP should not be contacting them in an attempt to cut a deal. If the DWP believes that the person has 'limited capability for work' but not 'limited capability for work-related activity' then it should revise the decision under appeal partly in the person's favour. This would mean that the appeal would lapse. This would happen whether the appellant liked it or not. The DWP should then issue the person with a fresh decision which would carry new right of Mandatory Reconsideration and/or appeal. At that point it would be up to the person whether or not to pursue a Mandatory Reconsideration/ appeal against the revised decision.

We see similar practices with Personal Independence Payment (and Disability Living Allowance) whereby the DWP will seek to negotiate a deal. The caller might, for example, say "If you agree to drop your appeal for both the 'daily living component' and 'mobility component', we will award you the daily living component. How does that sound?" This practice is contrary to the rules.

Obviously, when this happens it is easy to see why a person would grab the offer with both hands. Who could blame them? Any offer could be difficult to resist when you consider you will get the money there and then, no further waiting and no need to attend an appeal hearing. It is even more tempting when you consider that all could be lost at the appeal. It is the person's decision to make.



All we would advise is that should the DWP contact someone to make such an offer and the person chooses not to take it then they should keep a record of the call and when it took place. They should ask for the name of the person who is making the call and the office they work from. They should then seek to tell the First-tier Tribunal of the offer - in writing before the appeal hearing if possible or at least at the appeal hearing. They should ask the First-tier Tribunal to make an award in keeping with the offer of the DWP and for it to only consider those points on which they and the DWP could not agree.



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