

# Benefits Bulletin

## ESA Too Sick to Work...

4<sup>th</sup> April 2018

Issue **15**

### 1. Introduction

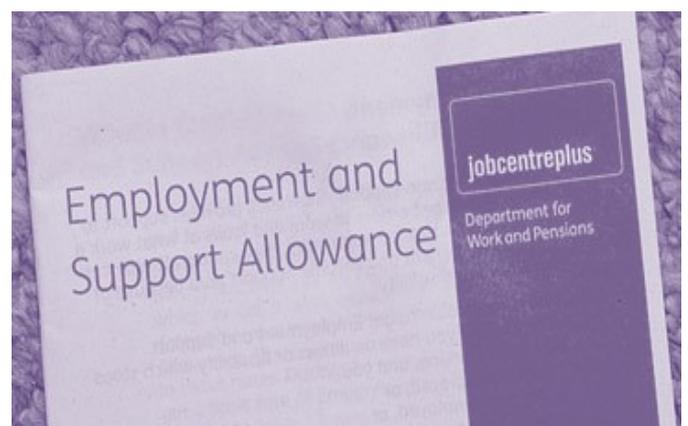
This Benefits Bulletin provides important information about what challenges people who are living in a Universal Credit FULL SERVICE area face if they are presently getting Employment and Support Allowance and found fit for work. In short, the only option available to most people will be to claim Universal Credit. However, in doing so they could end up financially worse off. This is primarily because Universal Credit is worked out differently to Employment and Support Allowance. If someone wishes to dispute the decision that they are fit for work then there may be good reason that they resist claiming Universal Credit altogether.

*Those who are too sick to work risk losing up to £62.45 (£64.30 - April 2018/2019) and more in some cases! per week in benefit by being forced to claim Universal Credit...*

Since **14<sup>th</sup> February 2018** most parts of Wolverhampton are now Universal Credit FULL SERVICE areas.

### 2. ESA...

Employment and Support Allowance (ESA) was introduced in October 2008 as a benefit for those who could be considered to be too sick to work. It replaced the sickness benefits - Incapacity Benefit, Severe Disablement Allowance and Income Support for those whose entitlement was based upon incapacity for work.



There are/have been two forms of ESA:

- **Income-related ESA** a benefit designed to provide a minimum amount of money for day-to-day living where entitlement is assessed according to a person's income and savings; and

- **Contributory ESA** a flat rate benefit designed to compensate for the loss of earnings whilst a person was out of work where entitlement is based upon a person's National Insurance contributions record.

Unlike Income-related ESA, Contributory ESA is normally only paid for a maximum period of 12 months. Contributory ESA is referred to as 'new style ESA' if it has been claimed by someone living in a Universal Credit FULL SERVICE area.



Although many people in Wolverhampton receive Employment and Support Allowance, it is no longer possible for people living in Universal Credit FULL SERVICE area to claim Income-related ESA. This is because it has been replaced by Universal Credit. Whilst Contributory ESA remains (now called 'new style ESA') where in past it was possible for people to get this plus Income-related ESA as a top up, now people may only get Contributory ESA plus Universal Credit as a top-up.

## 2. The WCA...

The Work Capability Assessment (WCA) is the name given to the process for determining whether a person may be regarded as being too sick for work for Employment and Support Allowance and now also Universal Credit. Following a medical, it is possible for a person to be assessed as having:

- **'limited capability for work'** - they are not able to work but are able to undertake 'work-related activity'; or
- **'limited capability for work-related activity'** - they have no ability to work or undertake 'work-related activity'

The WCA normally starts when the DWP send a person a **'Capability for Work Questionnaire'** (known as a ESA50) to complete and return. The ESA50 is not a claim form. It is a form designed to enable the person to tell the DWP about their health problems and how they affect them. Most people will need to attend a medical assessment with a Healthcare Professional who will prepare a report (known as a ESA85) about the person's health and perceived limitations. It will then be up to a none medically qualified Decision Maker within the DWP to, studying all the available information, decide on the person's ability to work and ability to undertake work-related activity.



The Decision Maker will make one of three possible decisions:

1. **The Person Has LCW:** If a person is deemed to have 'limited capability for work' then they will be placed into the 'work-related activity group'. Under Employment and Support Allowance, this is known as the WRAG Group. People in this group are not expected to find work. However, they are expected to attend Work-focused Interviews and undertake Work Preparation designed to support a return to work.



## 4. Treated as Having LCW...

During a claim for Employment and Support Allowance there are a number of situations in which a person may be treated as having 'limited capability for work'. This includes the period whilst:

- **Awaiting the WCA decision** - a person is awaiting the outcome of their Work Capability Assessment and they have submitted a Med3 Fit Note
- **Appealing the WCA decision** - a person has submitted an appeal against a DWP that they do not have LWC

This means that people have been able to be paid Employment and Support Allowance whilst they have been awaiting the outcome of their WCA or appeal.

However, as a person must first request a mandatory reconsideration before they are able to appeal, this creates a 'gap' in the period during which a person may be treated as having 'limited capability for work'. This 'gap' starts from the date a person is notified of the DWP's decision that they do not have 'limited capability for work' and spans to the date when their appeal is received. Inevitably a person will not be entitled to any ESA during this period.

### When a person has been able to get ESA:

Awaiting outcome of Work Capability Assessment	Able to be paid ESA because <u>treated</u> as too sick to work when sending in Med3 Fit Notes.
Awaiting outcome of Mandatory Reconsideration request	Not able to be paid ESA. Historically been required to claim Jobseeker's Allowance.
Awaiting outcome of Appeal	Able to be paid ESA because <u>treated</u> as too sick to work.

Historically, most people have been forced to apply for Income-based Jobseeker's Allowance during this period save having no benefit income at all. However, things changed with the rollout of Universal Credit FULL SERVICE. This is because those now living in a Universal Credit FULL SERVICE area are not (Please see Note about families with 3 or more children) able to apply for Income-based Jobseeker's Allowance.



## 5. Universal Credit - Dilemma for Claimants...

As described above in 'Section 4. Treated as Having LCW...', whereas at one time people could claim Income-based Jobseeker's Allowance in the period between failing the WCA and submitting an appeal against that decision, this is no longer an option for those people living in a Universal Credit FULL SERVICE area. This is because in these areas Universal Credit has replaced Income-based Jobseeker's Allowance. This leaves claimants with 2 options:

### Option 1: Claim Universal Credit:

By claiming Universal Credit, a person will at least get some benefit whilst they wait for the outcome of any mandatory reconsideration/appeal against the Work Capability Assessment decision.

As part of the claim for Universal Credit the person would need to have a new Universal Credit WCA to assess if they have 'limited capability for work' or 'limited capability for work-related activity' under Universal Credit. The Universal Credit WCA is virtually the same as the Employment and Support Allowance WCA but it is not identical.

The difficulty is once a person has claimed Universal Credit it involves them moving fully on to Universal Credit and in doing so giving up rights to 'Income-related ESA' (and any other so called 'legacy benefits) they may already have been getting (e.g. Housing Benefit and Child Tax Credit) and having these replaced by Universal Credit. In doing so, the person must understand that they will move on to Universal Credit as part of the 'natural migration' rules. It means that they will be unable to return to 'Income-related ESA' even if they win their WCA appeal. This could prove extremely costly and problematic for some people.

People need to be aware that there are differences between the way 'Income-related ESA' and Universal Credit are calculated. This means that in swapping from 'Income-related ESA' to Universal Credit there will be winners and losers. The 'winners' will be those who are deemed to have 'limited capability for work-related activity' (i.e. those in the Support Group). They stand to gain up to £20.95 per week (£21.70 per week - April 2018/2019). The biggest losers could be those who are getting the 'severe disability premium' worth up to £62.45 per week (£64.30 - April 2018/2019 per week). This is because there is no 'severe disability premium' under Universal Credit. Further, there is no system of 'transitional protection' in place to protect the incomes of those who move from 'Income-related ESA' (or 'legacy benefits' in general) to Universal Credit. See case study below.

**Case Study:** Penny is single. She suffers with depression. She lives alone in rented accommodation in a Universal Credit FULL SERVICE area. She has been getting Income-related ESA and Personal Independence Payment (standard daily living component and enhanced mobility component) for 2 years.

Her rent has been paid by Housing Benefit and she has had help towards her council tax through the Council Tax Reduction scheme. Penny's Income-related ESA has included the 'work-related activity component' (worth £29.05 per week) and the 'severe disability premium' (worth £62.45 per week) because she gets PIP for her daily living and she lives alone and no one claims Carer's Allowance as her carer. The DWP have now determined that Jenny no longer satisfies the WCA and her Income-related ESA payments have stopped. Penny has no savings. She cannot live off her PIP money alone. Penny must claim Universal Credit whilst she disputes the WCA decision. In doing so she must give up her Housing Benefit. Help towards her rent will now be provided through her Universal Credit claim. Even if Penny wins her WCA she cannot return on to Income-related ESA. Her Universal Credit will not include payment of the 'severe disability premium' or the 'work-related activity component'. Therefore, Penny stands to lose up to £91.50 per week. Further, until Penny's WCA appeal is decided her Job Centre Work Coach will determine what she is expected to do in terms of looking for work and being available for work.



Therefore, a person could win their WCA appeal not be allowed to return to Income-related ESA and find that the amount of Universal Credit paid to them is far less than they were previously paid by way of Income-related ESA.

## Option 2: Do Not Claim Universal Credit

This option is about avoiding Universal Credit. It is only really available to people who have sufficient resources to live off during the period between when their Income-related ESA is stopped because it is considered that they no longer have LCW and the date on which their appeal is received or won.

It could take between 2 or 4 weeks to get a decision back from the DWP following a mandatory reconsideration request. But once they have this the person can then submit an appeal. Once their appeal is received (not heard/concluded) then they can ask the DWP to put them back on Income-related ESA. No new claim for Income-related ESA is needed. This is what enables them to avoid Universal Credit - because they can go back onto Income-related ESA without a claim and because they may be treated as meeting the WCA 'pending appeal' – until their appeal is determined by a First-tier Tribunal. It is the fact that the person has not sought to claim Income-based Jobseeker's Allowance or Income-related ESA which means they escape Universal Credit.

It may take up to 12 months until the WCA appeal is determined by a First-tier Tribunal. However, if this approach is taken and the WCA decision is fully overturned on appeal (or earlier at the mandatory reconsideration stage), then the person will remain an Income-related ESA claimant. They will get an arrears payment of Income-related ESA dating back to the date when the DWP made the WCA decision. They will avoid a move to Universal Credit for now.

**Case Study:** Jim is single. He has had problems with his health since having a stroke 4 years ago. He lives alone in rented accommodation which is situated in a Universal Credit FULL SERVICE area. He has been getting Income-related ESA and Personal Independence Payment (enhanced daily living component and enhanced mobility component) for some years.

His rent has been paid by Housing Benefit and he has had help towards his council tax through the Council Tax Reduction scheme. Jim's Income-related ESA has included the 'work-related activity component' (worth £29.05 per week) and the 'severe disability premium' (worth £62.45 per week) because he gets PIP for his daily living and he lives alone and no one claims Carer's Allowance as his carer. The DWP have now determined that Jim no longer satisfies the WCA and his Income-related ESA payments have been stopped. Jim has savings of £4,300. He is confident that he meets the conditions of the WCA. Jim decide to live off his PIP and savings whilst he is disputing the WCA decision. Although Jim's Income-related ESA has stopped he can continue to get maximum Housing Benefit and Council Tax Reduction. Jim's mandatory reconsideration request was turned down. The DWP have refused to alter the WCA decision. Jim has made an appeal against this decision. His appeal has been received. Jim has asked the DWP to put him back on Income-related ESA, albeit on the basic amount 'pending appeal'. If Jim wins his WCA appeal his Income-related ESA will be fully reinstated and he would be awarded an arrears payment. Jim has avoided claiming Universal Credit and thus losing out. If Jim were to lose his WCA appeal then his Income-related ESA payments would stop. He might at this stage need to claim Universal Credit otherwise he will have no benefit income apart from his Personal Independence Payments, Housing Benefit and Council Tax Reduction.



## 6. Unsuccessful MR / Appeal...

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If a WCA decision under Employment and Support Allowance or Universal Credit is not overturned at the mandatory reconsideration or appeal stage, then a person could find themselves in a difficult situation. This is because the rules do not allow for a repeat claim for Employment and Support Allowance or Universal Credit on grounds of being too sick to work unless the person can show that they are suffering from some new medical condition or an existing condition has significantly worsened. This provision was introduced to prevent people from making multiple repeat claims for Employment and Support Allowance or seeking repeat Work Capability Assessments under Universal Credit following previous refusals.

If the person has developed a new condition then this should be relatively straightforward to show - a Med3 Fit Note stating the new condition should suffice. Establishing that a person's medical condition has significantly worsened could prove more problematic. Some robust medical evidence may be required.

## 7. JSA...

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As explained in 'Section 4. Treated as Having LCW...', historically (i.e. before the introduction of Universal Credit FULL SERVICE) people who were getting Income-related ESA who had been found fit for work would need to first challenge the decision by way of mandatory reconsideration and then appeal. Whilst waiting for the mandatory reconsideration to be determined they would not have been able to remain on Income-related ESA. It was only once their appeal was received that they could return to getting Income-related ESA albeit at the basic rate.

They would then remain on Income-related ESA at least until their appeal was determined. This then created a 'gap' between the claimant being refused Income-related ESA and their appeal being received when no (Income-related ESA could be paid. During this period people relied on claiming Income-based Jobseeker's Allowance.



In doing so they often sent in sick notes and this excluded them from any job search and work availability requirements. In these cases, if someone has found themselves getting Income-based Jobseeker's Allowance yet now living in a Universal Credit FULL SERVICE area then it is understood that they can return on to Income-related ESA once their appeal has been received or should they win their challenge against the decision that held that they were fit for work (i.e. they did not have 'limited capability for work') providing that at no time do they claim Universal Credit. It is understood that this is possible because they can be treated as remaining under the 'legacy benefit' system. Do seek further information and advice as necessary.

## 8. Failure to Attend a Medical

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During the course of the WCA, a person will normally be required to submit an ESA50 form (UC50 form in the case of Universal Credit) to the DWP and take part in a medical assessment with a Healthcare Professional.



Note: Please note that families with 3 or more children will not normally be able to apply for Universal Credit until 1.2.2019. If you have two families where one is getting Universal Credit and the other not (or two families who both get Universal Credit) and they merge then they will get Universal Credit even if combined they have 3 or more children.

In the case of Employment and Support Allowance, failure to submit information to the DWP (including a failure to complete and return the UCESA form) or to take part in a medical assessment without 'good cause' would result in a person being treated as though they DO NOT have Limited Capability for Work or Limited Capability for Work-related Activity. This would result in any award of ESA being suspended until the relevant information was submitted or they attend and submit to a medical assessment.

In Universal Credit cases, a failure to submit information to the DWP (including a failure to complete and return the UC50 form) or attend a medical assessment with a Healthcare Professional without 'good reason' would result in the Work Capability Assessment being paused until such time as the DWP receive a completed UC50 form or the person attends a medical assessment. It could also result in the Work Capability Assessment being discontinued altogether.

**Good reason:** Good reason is not defined in law, but 'good cause' and 'just cause' are considered in case law. They include facts which would probably have caused a reasonable person to act as the claimant did. The principles established are equally applicable to good reason. For instance, if the claimant had been taken ill on the day of the medical assessment, it may be that he or she had 'good reason' for not attending. If 'good reason' is accepted in such a case, the failure to attend will have no negative consequences for the claimant and the DWP should look to re-arrange the medical assessment.

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