

Employment and Support Allowance

Information Guide 6: For Residents and Advisers

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www.wolverhampton.gov.uk

1. Background

Historically the Social Security benefit system put people of working age in to one of two camps. There were benefits for those who were unemployed and benefits for those who were too sick to work. Those who were:

- unemployed where expected to claim unemployment benefits and show that they were available for work and looking for work
- too sick to work were required to claim sickness benefits and evidence their incapacity for work by showing that there was no work they could reasonably be expected to do or more recently that they met the conditions of an 'All Work' test

Employment and Support Allowance (ESA) was introduced in October 2008 as a new benefit for those who could be considered as being 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.

With Employment and Support Allowance came the new Work Capability Assessment which instead of assessing people's incapacity for work assessed whether they had:

- 'limited capability for work'; or
- 'limited capability for work-related activity'

The concept was (and remains) that those who had 'limited capability for work' had some ability to work albeit limited and should be put into a 'work-related activity group' and encouraged and supported back into employment. Whereas, those who had 'limited capability for work-related activity' should be put into a 'support group' and not expected to undertake steps that might lead to a return to work. People who did not at least have limited capability to work were not entitled to Employment and Support Allowance.



2. Two Types of ESA...

There are two forms of ESA:

- **Contributory ESA (CESA)** which is a 'contributory benefit' (meaning entitlement is subject to the claimant's NI stamp contributions record) which is paid at a basic rate of £73.10 per week plus either (but not both) a £29.05 per week 'work-related activity component'* or a £37.65 per week 'support component'
- **Income-related ESA (IRESA)** which is a 'means-tested benefit' (meaning entitlement is subject to the assessed income and capital of the claimant/partner) which is paid at a basic rate of £73.10 per week for single people and £114.85 per week for couples plus either (but not both) a £29.05 per week 'work-related activity component'* or a £37.65 per week 'support component'. In cases where the 'support component' is paid, then the claimant will also get a £16.40 per week 'enhanced disability premium'. It is also possible for a 'carer's premium' worth £36.00 per week to be paid where the claimant (or their partner) claims Carer's Allowance and a 'severe disability premium' worth £64.30 per week where the claimant gets DLA (middle or higher rate care component) or Personal Independence Payment (daily living component) and no-one gets Carer's Allowance for looking after them, and they may be deemed to be living alone.

Some people may qualify for both CESA and IRESA whereas others may only qualify for one or the other depending on their contributions record and financial circumstance. The rates of payment can vary during the first 13 weeks (so called 'assessment phase') of a claim. This is because during this period people aged under 25 will normally receive a basic payment of £57.90 per week (not £73.10 per week). Also, the 'work-related activity component' and 'support component' do not normally become payable during the 'assessment phase'.

Further, it is important to note that CESA may only be paid for a period of 365 days unless the claimant qualifies for the 'support component'. Do seek further information and advice as necessary.

***Note:** Since 3rd April 2017 the 'limited capability for work' component (worth £29.05 per week) has been removed for new claimants of ESA. Transitional protection rules mean that people who claimed ESA prior to 3.4.2017 or who have been getting the component prior to 3.4.2017 may continue to be entitled to it beyond 3.4.2017.

Universal Credit: Has now replaced Income-related ESA (but not Contributory ESA which has been rebranded 'New Style ESA') for those living in **Universal Credit FULL SERVICE** areas. This means that people who live in these areas who are too sick to work will normally be expected to claim Universal Credit (and New Style ESA), not Income-related ESA. Under Universal Credit, a person's incapacity to work will be assessed under the 'Work Capability Assessment' (see 3. The WCA) in a similar way to how it would have been assessed under Employment and Support Allowance. If someone has been assessed as having 'limited capability for work' or 'limited capability for work-related activity' under New Style ESA then they will be treated as having 'limited capability for work' or 'limited capability for work-related activity' for Universal Credit purposes. Please refer to our Information Guide 5: Universal Credit - Work Capability Assessment for more information on how 'limited capability for work' or 'limited capability for work-related activity' is assessed under Universal Credit.



A claim for Employment and Support Allowance may be made by ringing 0800 055 6688 (Telephone Claim Line).

3. The WCA...

The Work Capability Assessment is the gateway to entitlement to both Contributory ESA and Income-related ESA. It is the tool used to establish whether a person may be considered to have 'limited capability for work' and 'limited capability for work-related activity'. A person will not be entitled to Employment and Support Allowance unless they are assessed as at least having 'limited capability for work'.

The Work Capability Assessment introduced a different and much tougher incapacity for work threshold than had previously existed. Since its introduction, the assessment has undergone a number of changes. The way 'limited capability for work' and 'limited capability for work-related activity' was assessed was substantially overhauled from 28th March 2011 and then tweaked from 28th January 2013 and again from 29th October 2013. This now means that the physical and mental health threshold is now significantly more stringent than previous. As a result, many people who could previously qualify for benefit on grounds that they were too sick to work or had 'limited capability for work' may no longer. This has resulted in large numbers of people in poor health having to rely on Jobseeker's Allowance and being expected to look for work which they have no realistic prospects of getting.



See 8. LCW and LCWRA for more information on the operation of the Work Capability Assessment.



4. The Assessment Phase and Main Phase

There are two distinct parts to a person's claim for Employment and Support Allowance - the '**Assessment Phase**' (from week 1 to week 13) and the '**Main Phase**' (from week 14 onwards).

The **Assessment Phase** is the period during which the DWP will seek to gather information about the claimant's ill-health and disability. During this period the DWP will expect the claimant to complete an ESA50 form confirming details of their ill-health and disability. The DWP will also expect the claimant to attend a face-to-face medical with a Healthcare Professional who will produce an ESA85 report on their findings on the person's physical and mental capability and limitations. Once the DWP have this information they will proceed to determine whether under the Work Capability Assessment the claimant has 'limited capability for work' and 'limited capability for work-related activity'. After the Assessment Phase the claimant will enter the **Main Phase** provided that the findings of the Work Capability Assessment are that they have 'limited capability for work'.

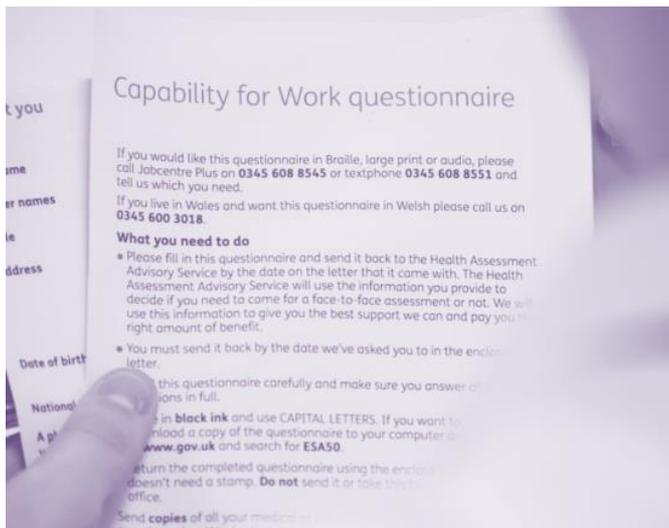
During the Assessment Phase a person will normally be paid Employment and Support Allowance at the basic level. It is only during the Main Phase that a person will receive payment of any eligible 'work-related activity component' or 'support component'. The Assessment Phase is meant to last 13 weeks but in reality, can take longer due to delays in arranging a person's face-to-face medical and delays with DWP decision making.

Should this happen any arrears of Employment of Support Allowance (e.g. payment of the 'support component') would be backdated accordingly.

Please see 5. The ESA50 for more information about completing the ESA50 form and 6. Attending Medical and ESA85 Report for more information on the face-to-face medical.

5. The ESA50

A person will be asked to complete and return an ESA50 form shortly after claiming Employment and Support Allowance. This form is designed to enable the claimant to provide details of their ill-health and disability (and any medication they are taking) and explain in their own words how it affects them on a day-to-day basis.



It is important that the ESA form be completed as accurately and as fully as possible. This is because the Healthcare Professional will have regard to the information contained in the ESA50 form when conducting the face-to-face medical and the DWP will refer to it when making the decision on 'limited capability for work' and 'limited capability for work-related activity'. Further, if the person needs to appeal a decision relating to these issues then the appeal tribunal (First-tier Tribunal) will have regard to the information provided together with any other submitted information and evidence.

The ESA50 form asks for details of a person's physical and mental limitations on the themes (so call 'activities') which make up the 'limited capability for work' and 'limited capability for work-related activity' assessments.

When assessing a person's ability to undertake a particular activity the issue is not simply whether they can or cannot do it but whether or not they are able to do it safely and to an acceptable standard and as often as may normally be required. Another factor to take into account is the degree of pain, discomfort or fatigue that might involve. If undertaking a particular activity causes too much pain or discomfort, then the person should be treated as though they are unable to do it. Also, when assessing a person's ability to undertake a particular activity it is important to bear in mind that the assessment should take into account how they would manage using any aid or appliance (including any prosthesis) which they would normally use or which it would be reasonable to expect them to use.

If a person's condition fluctuates (they have good days and bad days) then it is important that they explain this. It is important that it is made clear that the limitations of their ability is dependent upon how they are feeling and that they provide some indication as to how their condition may vary day-to-day.

The ESA50 form is long and in some cases, could take between 1 hour and 1.5 hours to complete. It is therefore a good idea to complete the form in stages. It is also a good idea, when completed, to read through the information being provided at least once before returning the form just to make sure nothing has been missed or forgotten. It is also a good idea to get a photocopy of the form (or to take photos of pages of the completed form using a mobile phone) once completed. At least that way the person will have something that they can refer back to before attending their face-to-face medical with the Healthcare Professional. At the very least it may prove helpful should, at a later date, there be a dispute about what information was actually provided.

People who are unable to read English or write in English will find the form difficult to complete. In such situations, a person will need to get help. If they are unable to find someone to complete the form on their behalf, then they will simply have to complete the form to the best of their ability. If someone feels that they have not been able to fully describe the limits of their ill-health/ disability for this reason (or any other reason), then they should explain so on the form.

If the person's first language is not English and they would need an interpreter at any eventual Healthcare Professional medical, then it would be wise to point this out on the ESA50 form.

A person will normally be given four weeks to complete and return the ESA50 form. If they fail to do so (without 'good cause' (good reason) then they will be treated as not having 'limited capability for work' and refused entitled to Employment and Support Allowance. If the ESA50 form is being returned late then it is a good idea to point this out and explain the reasons for this on the form.

See 7. Failing to Complete ESA50 or Attend Medical for more information.

6. Attending Medical and ESA85 Report

Once the DWP have received a completed ESA50 they will make arrangements for the person to attend a face-to-face medical with a Healthcare Professional. The Healthcare Professional could be a doctor, nurse, physiotherapist or occupational therapist.



All the ESA medicals for people living in Wolverhampton are undertaken by a company called **MAXIMUS** at one of their Medical Centers or if needed (e.g. because a person is unable to travel) at the person's own home.

MAXIMUS Telephone: 0800 3288 8777

If a person does not attend (without 'good cause') or attends but fails to participate in the medical (without 'good cause') then they will be treated as not having 'limited capability for work' and so not entitled to Employment and Support Allowance. See 7. Failing to Complete ESA50 or Attend Medical for more information.

The purpose of the medical is to allow a Healthcare Professional to examine the person and prepare an ESA85 report outlining their views on the person's abilities and limitations in relation to the 'limited capability for work' and 'limited capability for work-related activity' assessment. When completed the ESA85 report will go to the DWP and be used (together with the information the person has provided in their ESA50 and any other medical evidence) to decide if the person has 'limited capability for work' and 'limited capability for work-related activity'.

Whilst the DWP should make an independent decision and base its decision on all the relevant information and evidence available in practice it is unusual for the DWP to go against findings in ESA85 report. This is rather less so when the matter is being considered by an appeal tribunal (First-tier Tribunal).

In the medical the Healthcare Professional should take into account what the person has said about how their ill-health disability affects them in their ESA50 form, what the person tells them during the medical and their appearance and behavior during the medical.

The Healthcare Professional should enquire into the person's medication and how their ill-health and disability affects them in a typical week. The Healthcare Professional should also ask about any fluctuations in a person's abilities due to them having good and bad days.

A person may bring a companion (e.g. a carer, relative or friend) with them to the face-to-face medical. It may be advantageous to do this if it would enable the person to make the journey to the MAXIMUS Medical Center or make them feel more at ease during the examination. It may prove particularly valuable if such a companion is able to give useful information about the person's ill-health and disability and how it affects them. In cases involving people with mental health conditions or a learning disability the role of a companion could be very important. Any actual physical examination would not normally be done in the presence of the companion, but with the claimant's consent, and if it appears a reasonable request, then the companion should be allowed to be present.

If a person is not sufficiently fluent in English meaning they would need an interpreter at their face-to-face medical, then this should be pointed out to MAXIMUS. It could be that all the person need do is take a friend or family member with them to interpret on their behalf. If this is not possible then they should ask MAXIMUS to provide an interpreter or to arrange (if possible) for the face-to-face medical to be carried out by a Healthcare Professional who speaks the same language as they do. A face-to-face medical should not be conducted if an interpreter is needed but one is not present.

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Whilst it is possible for the DWP to assess a person's entitlement to Employment and Support Allowance without the need for a face-to-face medical this is quite rare and is dependent on the circumstances of the individual case and the strength of the medical evidence which is available. It is therefore important if someone is asked to attend a face-to-face medical that they attend.

If someone is too anxious or ill to travel, then they should contact MAXUMUS and ask if arrangements could be made for them to be examined at home.

Failure to attend (or participate in) a face-to-face medical would result in the claimant being treated as not having 'limited capability for work' and being refused Employment and Support Allowance. See 6. Failing to Complete ESA50 or Attend Medical.

7. Failing to Complete ESA50 or Attend Medical

If a person fails without 'good cause' (good reason) to:

- complete and return an ESA50 form on time; or
- take part in a face-to-face medical with a DWP Healthcare Professional,

then they will be held not to have 'limited capability for work' and refused Employment and Support Allowance

This situation would be maintained until they did so. If a person is unable to complete an ESA50 form in time or attend a medical on a particular date, then they should contact the DWP or MAXIMUS and explain why and ask for more time or another appointment date. Similarly, if a person misses the deadline for completing the ESA50 form or overlooks the date on which they should have attended a medical then they should contact the DWP or MAXIMUS straightaway.



A decision on whether or not a person had 'good cause' (good reason) is one that may be challenged by way of 'mandatory reconsideration' and then appeal if needed. If the DWP refuse to alter the decision on the 'good cause' (good reason) question, then in addition to appealing this decision the person should consider making a fresh claim. However, do note that even where a repeat claim is made, no award of Employment and Support Allowance would be made until such time as an ESA50 form was completed or the person attended a medical. Do seek further information and advice as necessary.



8. LCW and LCWRA

Under the Work Capability Assessment, a person will be assessed as to whether they have:

- **Limited Capability for Work** and placed into the **Work-related Activity Group** and expected to participate in Work-focused Interviews and work-related activity to identify barriers to work and get them job ready
- **Limited Capability for Work and Limited Capability for Work-related Activity** and placed into the 'Support Group' and not expected to participate in Work-focused Interviews and work-related activity.

This will be done during the Assessment Phase and once the DWP have the person's completed ESA50 form (providing their account of how their ill-health/disability affects them) and the Healthcare Professional's ESA85 report (providing details of how the Healthcare Professional views the person's ill-health/disability).

During the Assessment Phase a person will be treated as having 'limited capability to work' if they are able to submit a doctor's Med3 Fit Note stating that in the doctor's opinion they are not fit for work due to ill-health/ disability. This will enable them to be paid at least the basic amount of Employment and Support Allowance at least until the Work Capability Assessment has been completed.

If a person is unable to provide a Med3 Fit Note (e.g. because their General Practitioner will not support their claim that they are too sick to work), then the DWP will not be able to treat them as having 'limited capability for work'. In this situation, no Employment and Support Allowance would be paid. This would then remain the position until the outcome of the Work Capability Assessment is known.

The following provides a guide to how Limited Capability for Work and Limited Capability for Work-related Activity are assessed. For more information please see our Information Guide 4: Work Capability Assessment Toolkit.

Limited Capability for Work (LCW): The process of assessing 'limited capability for work' (putting a person in the Work-related Activity Group) involves assessing the claimant's physical and mental health within the range of the following activities:

Physical Activity Areas (Part 1):

1. mobilising
2. standing and sitting
3. reaching
4. picking-up and moving objects
5. manual dexterity
6. making self understood
7. understanding communication
8. navigating and maintaining safety
9. loss of control of bowel/bladder
10. lost consciousness

Mental Activity Areas (Part 2):

11. learning tasks
12. awareness of everyday hazards
13. initiating and completing personal actions

14. coping with change
15. getting about
16. coping with social engagement
17. appropriateness of behaviour

Subject to the nature and level of impairment different point scores (ranging from 6 points, 9 points and 15 points) may be awarded. If the person achieves a point score equal to (or greater than) the required 15-point threshold, then they will be treated as having 'limited capability for work'.

If the person fails to get at least 15 points they will be considered not to have 'limited capability for work'. In this situation (under Regulation 29), the DWP must then go on to consider whether the implications of such a decision would pose a '**substantial risk**' to the person's physical or mental health (or the physical or mental health of another person) - a risk to health from the rigors of working or being expected to look for work. If such a risk exists then the person will be held to have 'limited capability for work'.



Limited Capability for Work-related Activity (LCWRA): The assessment for 'limited capability for work-related activity' (putting people into the 'Support Group') only follows if a person has been held to have 'limited capability for work'. The assessment operates on similar lines to the 'limited capability for work' assessment only there is no point score requirement. All that matters is whether the person is able to undertake the relevant physical or mental tasks involved.

Even at this stage (under Regulation 35), if a person is held not to have 'limited capability for work-related activity' then the DWP are obliged to consider whether such an outcome would pose a 'substantial risk' to the person's physical or mental health (or the physical or mental health of another person) - a risk to health arising from the requirement to take part in Work-focused Interviews and work-related activity. If such a risk exists then the person will be held to have 'limited capability for work-related activity'.



Treated as Having LCW and LCWRA: Aside from above provisions, there are some situations in which a person may be regarded as having 'limited capability for work'. This includes:

- where a person is in hospital and receiving medical treatment
- where a person is actually recovering from hospital treatment (as opposed to being in hospital)

A person who is considered to be 'terminally ill' (because their life expectancy is likely to be less than 6 months due a progressive disease) may be treated as though they have 'limited capability for work' and 'limited capability for work-related activity'.

Similarly, those who are about to undergo (or who are undergoing or recovering from) treatment for cancer may also be treated as though they have 'limited capability for work' and 'limited capability for work-related activity' if it is reasonable to do so in the circumstance because it would be unreasonable to expect them to work, look for work, attend 'work-focused interviews' or undertake work-related activity.

9. Appeal Rights...

If a person fails the work capability assessment then (i.e. they are assessed as not having 'limited capability for work') then depending on their circumstances they may be entitled to Jobseeker's Allowance or Universal Credit.

However, if a person wishes to challenge the decision that they do not have 'limited capability for work' and/or 'limited capability for work-related activity' then they can do so. First a person will need to ask for a 'mandatory reconsideration' of the decision. This will get the DWP to look at the decision again. If the person remains dissatisfied with the outcome of the '**mandatory reconsideration**' then they may ask for an appeal. They may ask for an appeal using the **SCSS1 Appeal Form**.

No Employment and Support Allowance may be paid during the period when the DWP are reconsidering a decision following a request for a 'mandatory reconsideration'. However, once the DWP have responded to the 'mandatory reconsideration' request the person may make an appeal. Once the appeal has been received, if at this point the person can provide the DWP with Med3 Fit Notes from their General Practitioner, then the person would be able to get an award of at least the basic rate of Income-related ESA whilst they are waiting to have their appeal determined by an appeal tribunal (First-tier Tribunal).

What is important is that a person who has been refused Income-related ESA does not apply for Universal Credit without getting specialist advice first. This is because once Universal Credit has been claimed and awarded there can be no return on to Income-related ESA. The person will have to remain on Universal Credit. This can prove extremely problematic for some people because Universal Credit does not have many of the extra premiums ESA does. Ultimately a person could be left substantially worse off under Universal Credit.

When a case goes to appeal the appeal tribunal (First-tier Tribunal) may only consider the person's situation (and entitlement to Employment and Support Allowance) at the time of the decision against which they are appealing. Therefore, should a person's condition have deteriorated or they have since contracted some new ill-health condition whilst they have been waiting for their appeal to be heard then they should seek advice. They might be able to make a fresh claim for Employment and Support Allowance or Universal Credit.

Note: New rules introduced from **30th March 2015** mean that if a claim, mandatory reconsideration or appeal fails under the 'limited capability for work' assessment then a person will not be able to reclaim Employment and Support Allowance unless either:

- their existing condition of ill-health or disability has significantly deteriorated or worsened; or
- they have contacted or developed a new physical or mental illness

since they were found not have 'limited capability for work'.

Previously people could reclaim Employment and Support Allowance after a period of six months or reclaim inside six months if they had contracted a new condition of ill-health or their existing condition had significantly worsened. It is therefore even more important now that people who are refused Employment and Support Allowance on grounds that they do not meet the 'limited capability for work' assessment dispute the decision.



Please refer to our Information Guide 19: Disputes and Appeals for more information about seeking a 'mandatory reconsideration' or making an 'appeal'.

10. Information Guides

The City of Wolverhampton Council's Welfare Rights Service produces the following guides on benefits and welfare reform:

1. Universal Credit
2. Universal Credit - Claims and Payment
3. Universal Credit - The Claimant Commitment
4. Universal Credit - Sanctions and Hardship Payments
5. Universal Credit - Work Capability Assessment - Toolkit
6. Employment and Support Allowance
7. ESA - Work Capability Assessment - Toolkit
8. Personal Independence Payment
9. Personal Independence Payment - Toolkit
10. Form Filling - PIP2 and ESA50/UC50
11. Benefits for Young People
12. The Benefit Cap
13. The Spare Room Subsidy
14. DWP Social Fund
15. Local Welfare Assistance
16. Benefits and People from Abroad
17. JSA Sanctions
18. ESA Sanctions
19. Disputes and Appeals
20. Going to Appeal: First-tier Tribunals
21. Useful Contacts and Websites

If you would like a copy of any of the above Information Guides or you are in need of information and/or advice on a benefits or welfare reform matter, then please contact our Specialist Support Team:

☎ Telephone: (01902) 555351

✉ Email: A&C.WRS@wolverhampton.gov.uk

The information contained in this Information Guide is meant to provide insight to Employment and Support Allowance and the operation of the Work Capability Assessment. It should not be treated as an authoritative statement of the law. The details may be subject to change by new regulation and/or case law. Do seek further information and advice as necessary.