

St Clements House, 2-16 Colegate, Norwich NR3 1BQ

Tel 01603 496623

Fax 01603 618230

Email info@ncls.co.uk

Website www.ncls.co.uk

**NORFOLK
COMMUNITY
LAW SERVICE**

“Providing Access to Justice & Equality”

The Committee Secretary
Social Security Advisory Committee
5th Floor
Caxton House
Tothill Street
London
SW1H 9NA

9 December 2014

Dear Sirs

Employment and Support Allowance: Government proposals to close a loophole about repeat claims

1. Norfolk Community Law Service has a specialist welfare rights team that deals with appeals against all types of social security benefits. We assist clients with lodging their requests for mandatory reconsideration, through to representation at the First-tier Tribunal and Upper Tribunal. Appeals against negative work-capability assessment (“WCA”) decisions for Employment and Support Allowance (“ESA”) claims make up approximately 60% of our caseload.
2. We have read the Government’s proposals and the draft regulations.¹ We wish to make the following comments:

Appeals process

3. The first concern we have is that, for first-time claimants of ESA, the initial appeals process will have increased importance at a time when there is substantially decreased availability of legal advice in this area of law.

¹ The Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendment) Regulations 2015

4. The most recent statistic from the First-tier Tribunal is that 51% of ESA decisions are overturned on appeal.² This infers a degree of poor decision making by the Department for Work and Pensions (“DWP”).
5. Under the current law, a claimant is barred from making a repeat claim for ESA (where their health is unchanged) for six months.³ If a claimant is not able to get the advice necessary to appeal the initial negative WCA decision, this failure to appeal is not critical. The claimant can either make a late request for a mandatory reconsideration, hoping that the DWP accepts the grounds for lateness, or they can wait six months and make a new claim.
6. Under the proposed law, a claimant will be seriously dis-incentivised from making a repeat claim for ESA (where their health is unchanged). If a claimant fails to get the advice necessary to appeal the initial negative WCA decision, this failure *will* be critical. The claimant can still make a late request for a mandatory reconsideration, hoping that the DWP accepts the grounds for lateness. However, if that request is refused and the claimant chooses to claim again, they will receive no assessment-phase payments at all whilst the DWP process the claim. Potentially this claim could proceed all the way through the appeals system. In our experience it is not uncommon for this entire process to take 12 months.

Record keeping

7. The second concern we have is that the DWP will have difficulties in effectively administering the proposed law.
8. If a claimant asserts that there has been a significant worsening of an existing condition or that they now suffer from a new condition, the DWP’s Decision Maker is currently only required to assess whether this legal test has been passed if the claimant was refused ESA within the last six months.

² <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2014>

³ The Employment and Support Allowance Regulations 2008 reg. 30

9. Under the proposed law, if a claimant asserts that there has been a significant worsening of an existing condition or that they now suffer from a new condition, the Decision Maker will have to look back through every one of the claimant's previous claims where a negative WCA decision was made after 30 March 2015.
10. In our experience, the DWP's record keeping regarding ESA decision making is poor. In many of our clients' cases, ESA50 claim forms, medical assessment reports and medical evidence has been lost or destroyed in accordance with data protection policies. We believe that, in the future, the DWP's Decision Makers will find it increasingly difficult to decide whether or not a claimant's condition has significantly worsened or is a new condition, particularly if there has been a significant period of time between the refused ESA claim and the new ESA claim.

Evidence required

11. The third concern we have is that claimants suffering with a significant worsening of an existing condition or suffering from a new condition will find it difficult to evidence this.
12. We believe that this is the case currently for ESA claims in general. In our experience, our clients struggle with obtaining supporting medical evidence. Very few GP's surgeries in Norfolk will provide either records or a supporting letter for free.
13. The proposed law seeks to introduce an extra hurdle if the claimant has had a previous negative WCA decision (after 30 March 2015). The Decision Maker will have to be satisfied that there has been a significant worsening of an existing condition or the development of a new condition, and we believe that our clients will struggle to obtain the evidence required.

Delays

14. The final concern we have is that the proposed law will introduce further delays in the decision making process.

15. In our experience, our clients who have made new claims under the current 'significant worsening or new condition' test have faced substantially longer delays than those making claims after waiting six months. Those clients have found the process to be complex and difficult.
16. We believe that this is likely due to the problems with the DWP's record keeping and difficulties in obtaining medical evidence, as discussed above.

Conclusion

17. We do not believe that the current law contains a 'loophole'. Rather, it correctly balances the risk of meritless repeat claims against the risk of an otherwise-entitled claimant not being able to access ESA.

Samuel Willis

Tribunal Advocate & Legal Assistant