

PART 5

CAPABILITY FOR WORK OR WORK-RELATED ACTIVITY

Limited capability for work

- 40.**—(1) A claimant has limited capability for work if—
- (a) it has been determined that the claimant has limited capability for work on the basis of an assessment under this Part or under Part 4 of the ESA Regulations, or
 - (b) the claimant is to be treated as having limited capability for work (see paragraph (6)).
- (2) An assessment under this Part is an assessment as to the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 6 or is incapable by reason of such disease or bodily or mental disablement of performing those activities.
- (3) A claimant has limited capability for work on the basis of an assessment under this Part if, by adding the points listed in column (3) of Schedule 6 against each descriptor listed in column (2) of that Schedule that applies in the claimant's case, the claimant obtains a total score of at least—
- (a) 15 points whether singly or by a combination of descriptors specified in Part 1 of that Schedule,
 - (b) 15 points whether singly or by a combination of descriptors specified in Part 2 of that Schedule, or
 - (c) 15 points by a combination of descriptors specified in Parts 1 and 2 of that Schedule.
- (4) In assessing the extent of a claimant's capability to perform any activity listed in Schedule 6, it is a condition that the claimant's incapability to perform the activity arises—
- (a) in respect of any descriptor listed in Part 1 of that Schedule, from a specific bodily disease or disablement,
 - (b) in respect of any descriptor listed in Part 2 of that Schedule, from a specific mental illness or disablement, or
 - (c) in respect of any descriptor or descriptors listed in—
 - (i) Part 1 of that Schedule, as a direct result of treatment provided by a registered medical practitioner for a specific physical disease or disablement, or
 - (ii) Part 2 of that Schedule, as a direct result of treatment provided by a registered medical practitioner for a specific mental illness or disablement.
- (5) Where more than one descriptor specified for an activity applies to a claimant, only the descriptor with the highest score in respect of each activity which applies is to be counted.
- (6) Subject to paragraph (7) a claimant is to be treated as having limited capability for work if any of the circumstances set out in Schedule 8 applies.
- (7) Where the circumstances set out in paragraph 4 or 5 of Schedule 8 apply, a claimant may only be treated as having limited capability for work if the claimant does not have limited capability for work as determined in accordance with an assessment under this Part.

Limited capability for work and work-related activity

- 41.**—(1) A claimant has limited capability for work and work-related activity if—
- (a) it has been determined that—
 - (i) the claimant has limited capability for work and work-related activity on the basis of an assessment under this Part, or
 - (ii) the claimant has limited capability for work-related activity on the basis of an assessment under Part 5 of the ESA Regulations, or

- (b) the claimant is to be treated as having limited capability for work and work-related activity (see paragraph (5)).
- (2) A claimant has limited capability for work and work-related activity on the basis of an assessment under this Part if, by reason of the claimant's physical or mental condition—
 - (a) at least one of the descriptors set out in Schedule 7 applies to the claimant,
 - (b) the claimant's capability for work and work-related activity is limited, and
 - (c) the limitation is such that it is not reasonable to require that claimant to undertake such activity.
- (3) In assessing the extent of a claimant's capability to perform any activity listed in Schedule 7, it is a condition that the claimant's incapability to perform the activity arises—
 - (a) in respect of descriptors 1 to 8, 15(a), 15(b), 16(a) and 16(b)—
 - (i) from a specific bodily disease or disablement, or
 - (ii) as a direct result of treatment provided by a registered medical practitioner for a specific physical disease or disablement, or
 - (b) in respect of descriptors 9 to 14, 15(c), 15(d), 16(c) and 16(d)—
 - (i) from a specific mental illness or disablement, or
 - (ii) as a direct result of treatment provided by a registered medical practitioner for a specific mental illness or disablement.
- (4) A descriptor applies to a claimant if that descriptor applies to the claimant for the majority of the time or, as the case may be, on the majority of the occasions on which the claimant undertakes or attempts to undertake the activity described by that descriptor.
- (5) Subject to paragraph (6), a claimant is to be treated as having limited capability for work and work-related activity if any of the circumstances set out in Schedule 9 applies.
- (6) Where the circumstances set out in paragraph 4 of Schedule 9 apply, a claimant may only be treated as having limited capability for work and work-related activity if the claimant does not have limited capability for work and work-related activity as determined in accordance with an assessment under this Part.

Work Capability Assessment

When an assessment may be carried out

- 42.—**(1) The Department may carry out an assessment under this Part where—
- (a) it falls to be determined for the first time whether a claimant has limited capability for work or for work and work-related activity, or
 - (b) there has been a previous determination and the Department wishes to determine whether there has been a relevant change of circumstances in relation to the claimant's physical or mental condition or whether that determination was made in ignorance of, or was based on a mistake as to, some material fact,
- but subject to paragraphs (2) to (4).
- (2) If the claimant has monthly earnings that are equal to or exceed the relevant threshold, the Department may not carry out an assessment under this Part unless—
- (a) the claimant is entitled to attendance allowance, disability living allowance¹, child disability payment², adult disability payment³ or personal independence payment, or
 - (b) the assessment is for the purposes of reviewing a previous determination that a claimant has limited capability for work or for work and work-related activity that was made on the basis of an assessment under this Part or under Part 4 or 5 of the ESA Regulations,
- and, in a case where no assessment may be carried out by virtue of this paragraph, the claimant is to be treated as not having limited capability for work unless they are treated as having limited capability for work or for work and work-related activity by virtue of regulation 40(6) or 41(5).

(3) The relevant threshold for the purposes of paragraph (2) is the amount that a person would be paid at the hourly rate set out in regulation 4 of the National Minimum Wage Regulations for 16 hours per week converted to a monthly amount by multiplying by 52 and dividing by 12.

(4) If it has previously been determined on the basis of an assessment under this Part or under Part 4 or 5 of the ESA Regulations that the claimant does not have limited capability for work, no further assessment is to be carried out unless there is evidence to suggest that—

- (a) the determination was made in ignorance of, or was based on a mistake as to, some material fact, or
- (b) there has been a relevant change of circumstances in relation to the claimant's physical or mental condition.

Assessment - supplementary

43.—(1) The following provisions apply to an assessment under this Part.

(2) The claimant is to be assessed as if the claimant were fitted with or wearing any prosthesis with which the claimant is normally fitted or normally wears or, as the case may be, wearing or using any aid or appliance which is normally, or could reasonably be expected to be, worn or used.

(3) If a descriptor applies in the case of the claimant as a direct result of treatment provided by a registered medical practitioner for a specific disease, illness or disablement, it is to be treated as applying by reason of the disease, illness or disablement.

Information requirement

44.—(1) The information required to determine whether a claimant has limited capability for work or for work and work-related activity is—

- (a) any information relating to the descriptors specified in Schedule 6 or 7 requested by the Department in the form of a questionnaire, and
- (b) any additional information that may be requested by it.

(2) Where the Department is satisfied that there is enough information to make the determination without the information mentioned in paragraph (1)(a), that information is not required.

(3) Where a claimant fails without a good reason to comply with a request under paragraph (1), the claimant is to be treated as not having limited capability for work or, as the case may be, for work and work-related activity.

(4) Paragraph (3) does not apply unless the claimant was sent a further request to provide the information, at least 3 weeks after the date of the first request and at least one week has passed since the further request was sent.

Medical examinations

45.—(1) Where it falls to be determined whether a claimant has limited capability for work or for work and work-related activity, the claimant may be called by or on behalf of a health care professional approved by the Department to attend a medical examination³ in person, by telephone or by video.⁴

(2) Where a claimant who is called by or on behalf of such a health care professional to attend a medical examination fails without a good reason to attend or submit to the examination, the claimant is to be treated as not having limited capability for work or, as the case may be, for work and work-related activity.

(3) Paragraph (2) does not apply unless—

- (a) notice of the date, time and place of the examination was given to the claimant at least 7 days in advance, or
- (b) notice was given less than 7 days in advance and the claimant agreed to accept it.

REFERENCES

1. Inserted by para 5 of Schedule 12 to S.I. 2021 No. 786 as from 26th July 2021
2. Inserted by Art. 28(5) of S.I. 2022/177 as from 21st March 2022
3. Inserted by reg. 4 of S.R. 2021 No. 64 as from 25th March 2021