# Draft Employment and Support Allowance (Repeat Assessments) (Amendment) Regulations

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CPAG's response to the Social Security Advisory Committee

December 2014

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*Introduction*

1. Child Poverty Action Group (CPAG) has worked for almost 50 years to prevent and relieve poverty among children and families in the UK. We have particular expertise in the functioning of the social security system through our welfare rights, training and policy research. Each year, we author and publish *The Welfare Rights Handbook*, the authoritative guide to social security in the UK, provide specialist advice to first tier advisers, and are currently providing frontline welfare rights advice to food bank users in London.

2. CPAG's has grave concerns about the Draft Employment and Support Allowance (Repeat Assessments) (Amendment) Regulations 2015 (henceforth "the regulations"). The regulations propose two changes to the current ESA process, the implications of which we consider in turn.

*Proposal to withdraw the 6 month time limit on new claims for ESA*

3. CPAG notes that rather than closing a loophole, the removal of the right that claimants currently have to make a fresh claim for ESA after six months has elapsed from an original 'fit for work' determination opens up a number of potential black holes in the social security system.

4. As numerous commentators, official and otherwise, have pointed out, the ESA assessment process is flawed in many ways.[1] It is complicated to navigate and requires claimants to know how to present evidence effectively. It is simply not designed to take account of the fact that many people applying for ESA will have fluctuating health conditions, mental health issues or other cognitive problems, all of which can be further compounded by literacy or language problems. For those who struggle with the process in the first instance, the right to submit a new claim for ESA after a suitable period has elapsed is key.

5. This is particularly the case for those claimants who have been found fit for work not as a result of a work capability assessment (WCA), but simply because of a procedural failure on their part such as missing an appointment, filling in a form incorrectly, or forgetting to append relevant documents. For claimants who find themselves in this position, removing the right to reclaim ESA after six months leaves them with no chance of being properly assessed at any future point, unless their condition deteriorates or a new health condition emerges.

6. A case from CPAG's advice line illustrates how devastating the knock-on effects of this situation can be.

> *A woman with mental health problems had her ESA stopped after failing to return the ESA50 questionnaire. She was dissuaded from claiming again by DWP advice that a new claim would not be paid pending assessment because her condition had not deteriorated.*

[1] See, for example, the Work and Pensions Committee, *First Report: Employment and Support Allowance and Work Capability Assessments*, July 2014

*At the same time, and possibly informed by the reduced household income, her disabled son was temporarily taken into care by the social work department who decided the family could not adequately care for him.*

7. CPAG also notes that the regulations are unclear as to how disputes about whether a claimant has a new medical condition or has experienced a significant deterioration in an existing condition will be adjudicated. There is no formal outcome decision in the event that a DWP decision maker indicates there is not sufficient evidence to prove either a worsening or a new health condition. As a result, there is no decision which can be appealed, leaving the claimant with no recourse except through judicial review. Given that a worsening or new condition are the only circumstances in which a new ESA claim can be lodged under the proposed regulations, clarifying how claimants could challenge such decisions is of critical importance.

8. Again, a case from CPAG's advice line illustrates how hard it is under the current system to prove a new or worsening condition, particularly for those with mental health issues.

*A person with mental health problems failed the WCA and was unsuccessful at appeal. After that his condition deteriorated and he tried without success for over a year to reclaim ESA, each time being refused on the basis that his condition was the same. At no point did he manage to reach a further appeal.*

9. Cases received on CPAG's advice line also highlight that some claimants find it difficult or indeed impossible to furnish medical evidence of changing conditions because beleaguered GPs are unwilling or unable to provide certificates and ins some circumstances, charge for producing evidence.

*An adviser reported that a local medical council had instructed GPs not to write letters for benefit claimants regardless of whether the GP was paid or not as this took time away from patient care. Similarly, in another case, a disabled woman on ESA seeking evidence from her GP to support an appeal was told that the local medical council had flatly advised GPs not to provide any letters for patients for benefit purposes.*

10. Finally, there are practical problems with the assumption that a fit for work finding remains valid indefinitely. Critically, the Department does not keep documents forever so neither they nor the claimant may have access to the records they may need at a later date as a point of comparison. Moreover, given widespread acknowledgment of the problems with the Work Capability Assessment (WCA) itself, and indeed the many changes to activities and descriptors already made, it is possible that it may be made less stringent in the future. Yet under this proposed change, a claimant who would qualify for ESA under a revised test would have no way of making a fresh claim.

*Removal of ESA between mandatory reconsideration and appeal*

11. CPAG is also concerned about the proposal to remove the right from claimants appealing their fit for work decision to receive ESA during the period they wait for their appeal to be heard. Instead, as the explanatory memorandum makes clear, they are expected to claim job seekers allowance (JSA) during this period.

12. It is important to note that there is no financial benefit to be had from claiming ESA rather than JSA during this waiting period as the ESA assessment phase rate is the same as that for JSA. Hence, there are no savings to the government as a result of the proposal.[2] Rather, the rationale advanced for this policy change is that it will bring claimants closer to the labour market due to the stricter conditionality requirements placed on them under the JSA regime.

13. CPAG takes issue with this on a number of grounds, as follows:

    - The proposal fails to recognise that claimants can already be subject to work-related conditionalities while in receipt of ESA, and indeed can be required to participate in the work programme;

    - The government suggests that JSA conditionality could be relaxed for those who can show that they cannot meet the full requirements.[3] However, we often hear that Job Centre Plus (JCP) advisers refuse to, or do not understand, that they can vary requirements in this way, thus exposing claimants to inappropriate levels of conditionality and the associated risk of sanction;

    - Even more worryingly, we regularly hear of JCP advisers refusing to allow people to claim JSA when their ESA claim is proceeding through the mandatory reconsideration (MR) process, because staff do not accept the claimant has the capacity to look for work to the required degree;

    - The explanatory memorandum tacitly acknowledges this possibility, stating that "*not all ESA claimants will be eligible for JSA because they may not meet the conditions of entitlement*".[4] Likewise, the policy costings in the Autumn Statement contain an assumption that a number will not claim JSA "when the option to claim ESA is withdrawn".[5] In such situation, claimants will be left with no financial support whatsoever and it is not clear how their housing benefit would be affected;

    - Finally, many have a natural reluctance to claim JSA as they suspect this will be used to infer they are fit for work, and therefore count against them in the appeals process.

[2] It is curious to note, then, that the Autumn Statement Policy Costings estimate savings to DWP of £25 million a year. See HMG, *Autumn Statement 2014: Policy Costings*, 66

[3] DWP, *Explanatory Memorandum for the Social Security Advisory Committee: the Employment and Support Allowance (Repeat Assessment and Pending Appeal Award)(Amendment) Regulations 2015*, 14th November 2015 para 4.10.

[4] ibid para 3.4

[5] HMG, *Autumn Statement 2014: Policy Costings*, 66

14. The risk that large numbers of claimants will be subject to inappropriate and highly stressful conditionalities which significantly increase the likelihood of their being sanctioned is real and substantial. Critically:

    - Government data shows that the tribunal finds in favour of 43 per cent of claimants appealing a fit for work decision. It is fair to assume, then, that under this proposal as many claimants will be subject to inappropriate requirements;

    - Moreover, many will spend a substantial period of time in this situation. While no official data is yet available on the length of time it takes to decide an MR, according to Citizens Advice, it is taking DWP between five and twelve weeks to conduct its mandatory reconsiderations.[6] Information on the length of time it takes for an ESA appeal to be heard and decided is more readily available: parliamentary questions show that on average the tribunal takes 23 weeks to bring an appeal to conclusion.[7] Put together, the *average* wait between challenging a fit for work assessment and a decision is more than 28 weeks. In other words, half of those who challenge their ESA decision wait longer than 6 months for resolution and some, of course, wait considerably longer than this;

    - It is also important to note that 40 per cent of ESA sanctions have been imposed upon people reporting mental health conditions.[8] In CPAG's experience it is people with such conditions who are most likely to fall foul of the rules due to the difficulty of providing hard evidence of their condition, and the constraints their condition places on their ability to navigate the ESA process. We have grave concerns that those with mental health conditions will fare particularly badly under this proposal. Indeed, given that the courts have ruled that the ESA assessment process substantially disadvantaged claimants with mental health problems[9], we question whether the DWP's equality assessment is sufficient to discharge its equalities duty.[10]

*15.* The government need look no further for evidence of the damaging effects of requiring those challenging ESA decisions to claim JSA than the situation that has arisen since the introduction of mandatory reconsideration in 2013. CPAG's recent research with food bank users confirms that accessing and navigating the JSA system is often simply too much for claimants who are unwell and already embroiled in a stressful challenge process. Of the 900-plus food bank users surveyed for the research, 14 per cent had previously claimed ESA but been found fit for work, and had been left in limbo as a result.[11]

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[6] Citizens Advice, *The cost of a second opinion: The impact of mandatory reconsideration in Employment Support Allowance (ESA) on CAB clients*, June 2014

[7] HC Deb, 23 June 2014, C9W. Figure is for England only

[8] Freedom of Information request 2014-4860 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/383722/foi-2014-4860.pdf

[9] Secretary of State for Work and Pensions v MM & Anor [2013] EWCA Civ 1565

[10] Annex 3 Equality Assessment

[11] J Perry et al, *Emergency use only: Understanding and reducing the use of food banks in the UK,* November 2014

*Conclusions and recommendations*

16. In CPAG's considered view, both of the proposed changes to the ESA regulations represent a real threat to the rights and well-being of vulnerable claimants, and would exacerbate many of the already serious flaws in the ESA system. In light of this, CPAG recommends that the Social Security Advisory Committee strongly advises government not to proceed with either proposal at least until the many underlying problems with both ESA policy and administration are resolved.

17. However, should the government change the regulations as proposed, CPAG suggests three mitigating measures:

    - That the right for those who have been found fit for work as a result of an administrative oversight such as missing an appointment or failing to furnish relevant documents in time to reclaim ESA after a six month time period has elapsed be retained;

    - That the burden of proving a new or deteriorating condition is placed on DWP who should be required to seek out the required evidence directly from medical professionals;

    - That the adjudication made by DWP as to whether new medical evidence is sufficient to prove a worsening or new condition is challengeable and gives rise to a right to appeal.

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