EXPLANATORY MEMORANDUM TO

THE EMPLOYMENT AND SUPPORT ALLOWANCE (REPEAT ASSESSMENTS AND PENDING APPEAL AWARDS) (AMENDMENT) REGULATIONS 2015

2015 No. 437

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 Where an Employment and Support Allowance (ESA) claimant is found fit for work or not to have Limited Capability for Work (LCW) entitlement to benefit ends. Currently claimants are able to make a repeat claim to ESA after six months and there is no barrier to a repeat award of ESA even where the claimant provides no evidence to suggest that their condition has substantially deteriorated, or that they have a new health condition.

2.2 This instrument removes the six month rule and provides that claimants previously found fit for work who make a repeat claim for ESA will not be treated as having LCW and thus entitled to benefit at the assessment rate pending determination of the claim unless they can demonstrate that there has been a significant deterioration in their health condition or a new health condition has developed.

2.3 The instrument also provides that ESA payments pending appeal will not be made to claimants previously found fit for work who are found not to have LCW on their repeat claim.

2.4 Making these changes will end an unintended consequence where claimants can make repeated claims to ESA despite no significant deterioration in their health condition to ensure these claimants get the appropriate help and support to return to work through claiming Jobseeker's Allowance (JSA).

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 ESA is a benefit for claimants who have LCW because of a health condition or disability. The legislation governing entitlement to ESA is primarily the Employment and Support Allowance Regulations 2008 (SI 2008/794)[1] and the Employment and

[1] http://www.legislation.gov.uk/uksi/2008/794/contents/made

Support Allowance Regulations 2013 (SI 2013/379)[2] The 2013 Regulations govern contributory ESA because it will continue alongside Universal Credit.

4.2 These amendment regulations give effect to the policy intent of preventing payments of ESA where a claimant's condition has not significantly changed since the previous claim and also prevent payments pending appeal where claimants are found fit for work on a repeat claim.

5. Territorial Extent and Application

5.1 This instrument applies to England, Wales and Scotland. The Department for Social Development in Northern Ireland will make similar provisions.

6. European Convention on Human Rights

6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 Both the 2008 and 2013 Regulations provide that a determination that a claimant does not have LCW (and is thus not entitled to ESA) normally has validity for six months. This means that where a new claim is made within this period supported by medical evidence in the form of a fit note from the GP, claimants cannot be treated as having LCW until a fresh determination has been made as to whether or not they have LCW, unless their condition has significantly worsened or a new condition has developed. In the circumstances where the Department does not make an immediate decision on LCW because further evidence is needed, the claimant is referred for a new Work Capability Assessment (WCA), and is not paid ESA in the interim. The WCA is a functional assessment of how a claimant's health condition or disability affects their capability for work.

7.2 Where a new claim is made more than six months after the last fit for work decision then, subject to the other qualifying conditions, the claimant is treated as having LCW and ESA is awarded pending a fresh WCA, even where no evidence is provided to suggest that the claimant's condition has significantly worsened. One unwanted effect of this policy is that even where a First-tier Tribunal (FtT) has upheld a fit for work decision, if the appeal process has taken longer than six months, a claimant can immediately make a new (repeat) claim for ESA on the basis of exactly the same condition, and will be entitled to receive ESA at the assessment phase rate (the same rate as JSA) pending a new WCA. The cycle between ESA claim, WCA and disallowance starts again.

7.3 DWP analysis estimates around 26,000 of the repeat claims made to ESA in 2013 were made with broadly the same health condition as the previous claim. The Department

[2] http://www.legislation.gov.uk/uksi/2013/379/contents/made

is concerned that these claimants are moving further from the labour market.

7.4 It is therefore intended that claimants making repeat claims for ESA will no longer be treated as having LCW if they were found 'fit for work' following their most recent WCA regardless of the period of time which has since elapsed unless they can demonstrate that there has been a significant worsening in their health condition or that a new health condition has developed. Since entitlement to ESA depends on the claimant having, or being treated as having, LCW, this change will mean that claimants in these circumstances will (unless they can demonstrate that there has been a significant worsening in their health condition or that a new health condition has developed) not be awarded ESA pending a fresh WCA. This should prevent people claiming ESA instead of JSA through which they will receive the help and support they need to return to work. It would also bring the conditionality arrangements for such claimants broadly into line with those for Universal Credit.

7.5 It is also intended that, where the repeat claim is allowed and results in a fit for work decision and, after mandatory reconsideration, the claimant lodges an appeal, they should not become entitled to receive ESA pending the outcome of the appeal. For these claimants, this serves to align ESA with what happens for all other social security benefits where if a claimant is found not to be entitled, no benefit is paid whilst awaiting the outcome of the appeal. We believe this is reasonable because in their previous claim, the claimant will have had the opportunity to appeal to a tribunal if they disagreed with the decision. Claimants will instead be signposted to JSA as it is the appropriate benefit for someone who has been found fit for work. JSA provides claimants with personalised support to return to work taking into account their health condition or disability. It is acknowledged that not all ESA claimants will be eligible for JSA because they may not meet the conditions of entitlement.

Consolidation

7.6 Informal consolidated text of statutory instruments is available to the public free of charge via 'The Law Relating to Social Security' (Blue Volumes) on the Department for Work and Pensions website at http://www.dwp.gov.uk/publications/specialist-guides/law-volumes/the-law-relating-to-social-security/ or the National Archive website legislation.gov.uk. An explanation as to which instruments are maintained on each site is available here."

8. Consultation Outcome

8.1 DWP did not undertake a formal consultation exercise as part of the legislative process as the changes will affect a small number of claimants.

8.2 However DWP has had informal discussions with both external stakeholder organisations and DWP staff in relation to communicating the removal of the six month period. They have both stressed the importance of ensuring that advisers, GPs, claimants and others receive clear information about what evidence will be required in circumstances where a repeat claim has been made. DWP guidance will be amended to reflect the legislative change and also the input from stakeholders.

8.3 The Social Security Advisory Committee referred the regulations for a limited consultation from 8-19 December 2014 and ran two workshops; one in London and one

in Glasgow, attended by 20 representatives of relevant organisations and also received 21 written responses. There were a number of concerns raised, particularly in relation to people with mental health problems, fluctuating conditions and people who have failed to attend a WCA, or do not return their ESA50 form and have not had a WCA. The Government's response is in the Act Paper laid alongside these regulations. The Act Paper is available here.

8.4 In response to concerns raised by the Social Security Advisory Committee and stakeholders who responded to its consultation, the Government has decided to exclude from the regulations the existing six month provision for those claimants who failed to return the ESA50 form, or failed to attend a WCA.

8.5 As a result of consultation, the Department is also introducing an evidence gathering letter to be sent to claimants asking for more detail on how their health condition affects them differently from when they were last assessed. This should help to ensure that Decision Makers will have the evidence they need to determine whether the claimant meets the requirements to re-qualify for ESA.

9. Guidance

9.1 Existing guidance for DWP staff will be amended to reflect the legislative change and this will be available by the date the changes come into force.

9.2 The Government has considered the effect of the changes on vulnerable claimants and although it is satisfied that there are extensive safeguards already in place to protect vulnerable claimants it will ensure the guidance issued to DWP operational staff and decision makers is expanded substantially, so that it is clear what evidence should be sought from claimants who make a repeat claim with the same, worsening or new condition.

10. Impact

10.1 We do not expect that there will be any impact on business. However there may be small indirect impacts on civil society organisations which provide advice to our customers. We are working closely with key stakeholders to ensure that they are aware of the changes in eligibility and that their products such as technical guides and leaflets reflect the planned changes.

10.2 The impact on the public sector is negligible.

10.3 An impact assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 We will monitor the impact of the change through established customer feedback processes. We will also seek feedback from external stakeholders through regular informal meetings to help ensure that the policy design meets its objective and that those with health conditions are being supported into work where appropriate.

12.2 The Department will also be assessing the effectiveness of the policy by gathering management information through DWP systems to capture information about the number of claimants who make claims under the new provisions.

13. Contact

Trevor Pendergast at the Department for Work and Pensions (Tel: 0207 449 5639) or email: [trevor.pendergast@dwp.gsi.gov.uk] can answer any queries regarding the instrument.