

ESA REASSESSMENTS FOLLOWING APPEAL

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Law Centre (NI)

At a glance

This briefing explains what advisers can do to help clients who return multiple times to seek help with reassessments after successful appeals.

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Introduction

Advisers and representatives will be aware of clients assisted to successfully appeal Employment and Support Allowance (ESA) decisions who then return multiple times to seek help with subsequent reassessments and appeals.

For example, clients with chronic conditions may have to appeal negative decisions on a yearly basis. This sometimes leaves them feeling that they are being singled out.

It may be worthwhile therefore to consider the correct policy on this matter and discuss the options available to representatives and Tribunals.

1. The current policy

1.1 Recommendations of the Year 4 Review of WCA

In the Year 4 Independent Review of the Work Capability Assessment¹, Dr Paul Litchfield made a number of recommendations. Recommendations 14 and 15 refer to reassessment post appeal:

“14. Apply any Tribunal recommendations on review periods as the default and should only be altered where there is strong justification.

15. Consider a minimum period (e.g. 6 months) between a successful appeal decision and a recall notice unless there are good grounds for believing that an earlier review is indicated.”

Dr Litchfield’s Year 5 review² informs us that these recommendations have been accepted and implemented.

1.2 Department’s decision making guidelines

This is outlined in the Department’s Decision Making Memo Vol 8/63³ which reflects Recommendation 14 when it states:

¹www.gov.uk/government/uploads/system/uploads/attachment_data/file/265351/work-capability-assessment-year-4-paul-litchfield.pdf

²www.gov.uk/government/uploads/system/uploads/attachment_data/file/380027/wca-fifth-independent-review.pdf

³www.dsdni.gov.uk/sites/default/files/.../dsd/dmser-vol8-63.doc

“In cases where the claimant has been successful at appeal, the Appeal Tribunal may recommend when the claimant should next be referred for a Work Capability Assessment.”

... Where the Appeal Tribunal recommends a review period which is in excess of the minimum review period then the decision maker should abide by that recommendation.”

In relation to Recommendation 15, the same Memo indicates that:

“The Department believes that an 8 month minimal period is suitable as a minimum review period between a successful appeal hearing and a subsequent Work Capability Assessment unless the Appeal Tribunal has recommended a longer review period.”

2. What this means for clients, representatives and tribunals

1. Following a successful appeal, there should not be a subsequent decision on the client’s capability for work within eight months of the tribunal decision unless there are good grounds for believing that an earlier review is required.
2. Clients and their representatives can request that Tribunals consider including a recommendation on the decision notice of when the client should next be referred for a Work Capability Assessment.

For example, this might be appropriate in a case when the client has a chronic condition with little or no short term likelihood of improvement. The Tribunal may feel it is appropriate to take an informed view on the basis of all the evidence available that it would benefit all parties if there was no further work capability assessment for a period of two to three years.

3. Representatives should be aware that tribunal decisions are often made at a substantially later date than the decision under appeal.

For example, a Tribunal might decide on 20/01/16 that the appellant has limited capability for work from 20/01/15 and that there should be no further work capability assessment for a period of two years. As one year has already passed since the decision under appeal, the Department could make a further decision on limited capability for work on 20/01/17.

If appropriate, the representative may therefore request that the Tribunal recommends no further work capability assessment for a period of three years, or alternatively two years from the date of the tribunal decision.

4. Representatives should be aware that this is a discretionary power available to Tribunals, and that Tribunals are not required to make a recommendation regarding subsequent work capability assessments.
5. Even if the tribunal declines to recommend a period before reassessment, representatives may wish to write separately to the ESA office following the tribunal decision. The letter should outline why, on the basis of the evidence available, it might be inappropriate to reassess in the shorter term.

This option is also available to advisers at the application stage and at the reconsideration stage.

Advisers encountering difficulties with similar cases and other social security issues are encouraged to contact the Law Centre's specialist social security advice line, Monday to Friday, 9.30 to 1pm, 028 9024 4401.

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