

## **ESA APPEALS**

<b>Contents</b>	<b>Paragraphs</b>
Background	1
General appeal rights	2
Non appealable decisions	3
Appeal - claimant does not have limited capability for work	4
Recommendation to First-tier Tribunal	5
Case referred back to the decision maker for determination	6 - 7
Annotations	
Contacts	

### **BACKGROUND**

- 1 This memo is being issued to give DMs guidance on appeal matters specific to ESA<sup>1</sup> and includes what recommendations to the First-tier Tribunal (FtT) for disposal of the appeal should be included in the appeal response where the claimant has been found by the DM not to have LCW.

*1 WR Act 07, Sch 3, para 17*

### **GENERAL APPEAL RIGHTS**

- 2 ESA is a relevant benefit<sup>1</sup> and so decisions on claims, revision and supersession are appealable as for other relevant benefits. There is a right of appeal for disqualification from ESA<sup>2</sup>.

*1 SS Act 98, s 8(3)(ba); 2 Sch 3, para 3(g)*

### **NON APPEALABLE DECISIONS**

- 3 The following ESA decisions have been added to the list of decisions against which no appeal lies

1. which partner should make a claim for ESA<sup>1</sup>
2. treating a claim for MA as a claim for ESA<sup>2</sup>
3. manner and time of payment of ESA<sup>3</sup>
4. alteration of benefit rates<sup>4</sup>.

*1 SS (D&A) Regs, Sch 2, para 5(aa); 2 Sch 2, para 5(h); 3 Sch, 2, para 5(mn); 4 SS Act 98, Sch 2, para 6(b)(iv)*

## **APPEAL - CLAIMANT DOES NOT HAVE LIMITED CAPABILITY FOR WORK**

- 4 DMG 06333 et seq gives guidance on more detailed responses required where deciding the issue under appeal leads to further issues not yet considered by the DM. For ESA appeals where
  1. benefit or credits are disallowed following a LCW determination **and**
  2. the FtT decide on appeal that the claimant has LCW

the issue outstanding is whether the claimant has LCWRA. The appeal response needs to include a recommendation as to what the FtT should do in such cases.

## **RECOMMENDATION TO FIRST-TIER TRIBUNAL**

- 5 In all appeals as in paragraph 4 1. above, the appeal response should include a recommendation that, if the FtT decides that the claimant has LCW, they should also go on to decide whether or not they have LCWRA. The FtT will have the complete report (ESA 85) from the HCP including an opinion about whether the claimant has LCWRA to enable them to decide this matter. Where the FtT decide the LCWRA, on return of the case from the TS, the DM can then commence payment at the main phase rate<sup>1</sup> (see DMG 44026 et seq).

*1 ESA Regs, reg 2(1)*

## **CASE REFERRED BACK TO THE DECISION MAKER FOR DETERMINATION**

- 6 However, should the FtT not go on to decide LCWRA, the DM should do so on return of the case from the TS. If the DM does not have sufficient evidence to decide on

LCWRA then this will need to be obtained from medical services (see DMG 42361 et seq).

- 7 Where paragraph 6 above applies, the claimant will continue to receive the assessment phase rate until the determination on LCWRA has been made and the ESA award superseded to include the appropriate component.

## **ANNOTATIONS**

Annotate the number of this memo (Memo DMG 02/09) against the following paragraphs

06040, 06041, 06333, 06422, Volume 1 Annex A, D & E, 42361, 44026

## **CONTACTS**

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, GS36, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in Memo DMG 26/08 - Obtaining legal advice and guidance from DMA Leeds.

**DMA Leeds: January 2009**