

What to do if you disagree with a 'work capability assessment' for Employment and Support Allowance or Universal Credit.

This factsheet gives you advice about how to challenge a work capability assessment (WCA) decision, the stages involved, how to provide information to support your challenge and the appeal hearing.

The 'work capability assessment' (WCA) tests how sick you are for ESA and UC. The WCA consists of two tests. For ESA they determine if you are sick enough to get ESA and which ESA group you go into. For UC they determine which 'element' (amount of money) you get in UC. And for both benefits, what level of work-related activity you are expected to do. The two tests are called: 'Limited capability for work' (LCW) and 'Limited capability for work related activity' (LCWRA).

It is important that you understand these two tests and how you satisfy them. It will help you understand the DWP's decision, what your arguments will be and what supporting information or medical evidence you will need to obtain to prove your arguments.

These tests are explained in our other factsheet 'The Employment and Support Allowance and Universal Credit work capability test' on www.newcastle.gov.uk/benefitinformation

More information on these and other benefits is on www.newcastle.gov.uk/welfarerights

Whilst this factsheet relates to challenging WCA decisions, the section on the process of challenging decisions may be of use if you want to challenge other decisions.

Warning!

As you see above, this factsheet relates to the WCA under ESA and also UC - which has been introduced in Newcastle and other areas. It means that in such areas, there are people who satisfy the WCA and are on either ESA or UC. UC can be higher or lower than the benefits it's replacing and there are many other differences. This is a complicated area and is dealt with briefly in relevant sections below but ESA claimants in a UC area who fail the WCA should seek advice immediately before they decide what to do - to avoid wrongly going onto UC and losing money.

The two stages in challenging a WCA decision

Stage 1. 'Mandatory reconsideration' (revision)

If you are unhappy with a decision following your WCA, you **must** first ask the Department for Work and Pensions (DWP) to reconsider their decision called a 'mandatory reconsideration'. This compulsory stage applies to most benefits apart from Housing Benefit.

You can ask for a mandatory reconsideration by phone but it is better to make the request in writing to confirm it was made. You can write your own request but you can also download a form from the gov.uk website, which you can type into and print off to send: www.gov.uk/mandatory-reconsideration.

Your mandatory reconsideration request has to arrive at the DWP within one month of the date of the decision – which is found on the decision letter. An extension of this time can be requested in limited circumstances. Your request need only say you disagree with the decision for example:

"I believe you have underestimated the degree of my disability and consequently underestimated the extent of my problems and/or the difficulties I have regarding the criteria. I do not believe that the decision maker has fully considered my medical condition and any medical evidence in relation to the assessment criteria." This can be sent in and you will get a decision.

In a UC area, e.g. Newcastle:

If you are on ESA and the decision was that you do not satisfy the 'Limited capability for work' (LCW) test and you are in a UC area, you may want to submit this basic wording as soon as possible in order to get a quick decision. The reason being that you cannot claim ESA during a mandatory reconsideration and your only option may be to claim UC. But you may not wish to claim UC because once you are on UC, you cannot return to ESA. In addition, if you try to claim ESA or JSA in a UC area, the UC rules stop you being entitled to those benefits any more - along with all the other benefits that UC is replacing like Housing Benefit. Your only option then is to claim UC. If you have not claimed UC, once you get the mandatory reconsideration decision and you appeal (below) you can then ask to go back onto ESA 'pending an appeal'. Though even this is complicated. For example, you still may not get ESA 'pending an appeal' if it's not the first decision you're appealing about. This is a complicated area and you may wish to seek advice - as below. Also see the webpage www.newcastle.gov.uk/universalcredit.

However, **if this is not an issue, for example, you are already on UC or you are happy to claim UC after submitting a mandatory reconsideration**, you may wish to make a more detailed challenge at this stage and maybe get more supporting evidence. Although remember the one-month time limit. You can provide supporting information at this and each stage (see 'supporting information' below). After that you will get a decision.

In a non-UC area:

The above complications do not apply. The same rule applies, that you cannot get ESA during a mandatory reconsideration, but you can claim Jobseekers Allowance (JSA) or Income Support so long as you satisfy their rules. For JSA, you may need to negotiate some restrictions on your availability for work in light of your conditions. If you did however claim JSA, you must ask for ESA once you appeal and remember to send in 'fit notes' whilst appealing. **However, it is planned that UC will apply to all areas by December 2018.**

Reclaim ESA?

Another option maybe that instead of challenging the decision, if your condition gets worse or you have a new condition, you could submit 'fit note(s)' and claim ESA. Again, this may be problematic because for example, you cannot claim ESA in a UC area and you may lose the work-related activity component unless linking rules apply. Seek advice.

If the decision was only that you do not satisfy the 'Limited capability for work related activity' (LCWRA) test (i.e. the support group in ESA or the LCWRA element in UC):

- For ESA, the support component stops but your basic ESA continues.
- For UC, the LCWRA element stops but the rest of your UC continues.

During this time then, you would be considered as unfit for work but you may be asked to undertake some work related activity, which you should clarify.

Your challenge would be about this LCWRA test, which you should clarify. **Warning:** Even then, the DWP may look at the LCW too. This is true at the appeal stage too where the Tribunal consider your appeal.

If the DWP ring you to explain their decision, make sure they still send you the decision.

Stage 2. 'Direct Lodgement' (appeal)

Warning. When you appeal a decision, the whole award may be reconsidered. For example, you may only be challenging the 'Limited capability for work related activity test' but the tribunal may also consider the 'Limited capability for work' test.

If you are unhappy with the mandatory reconsideration decision, you can then appeal directly to the HM Courts and Tribunals Service (the Tribunals Service) on the form SSCS1. Your appeal has to arrive at the Tribunals Service within one month of the date of the decision. Send it by first class post and allow at least two days for it to get there. A late appeal can be made outside this time limit and up to 12 months but you must show good reasons for lateness. The last page of the form tells you where to send it. You should ask for a "proof of posting" from the Post Office. You can get the form SSCS1 from the DWP, an advice agency or www.gov.uk/government/publications/appeal-a-social-security-benefits-decision-form-sscs1 where you can either print it off to complete by hand or complete it online then print it off to send.

Some points on completing the SSCS1:

- You must enclose with it the DWP mandatory reconsideration decision letter.
- In section 4 'About your representative (if you have one)', do not assume that an organisation will represent you just because it has helped you in the past. You must check with them. If they do agree to represent you, you must keep them informed of any changes or letters you receive.
- In section 5, the 'Grounds for appeal' box, we suggest you write something like:

"I wish to appeal against the decision on my ESA/UC or WCA test. I do not believe that the decision maker has fully considered my medical condition and any medical evidence in relation to the assessment criteria. I request a copy of the medical assessment or any other medical information be sent to me."

You will also need to know which of the two WCA tests you failed in order to make your argument, as explained on page one.

- Section 6. Tribunals prefer claimants to attend and statistically you have a better chance of success if you do.
- Section 7. If a representative has agreed to come with you to the tribunal, check what dates they cannot make. Also see next pages.
- Again, you may want to include supporting evidence from, for example, a professional who knows you. See 'supporting information ...' below. If your appeal contains further or new evidence, the DWP should look again at its decision. If the DWP does not change its decision, the appeal process will continue. See "What happens after you appeal?" below.

What happens after you appeal?

For people living in a UC area, please see the above advice regarding the limitations on receiving ESA 'pending an appeal'.

The Tribunal Service will confirm it has received your appeal. The Department for Work and Pensions (DWP) office should write a response.

If the DWP partly or fully decides in your favour, your appeal ends and if unhappy with that new decision, you will have to make a new appeal. Otherwise, the appeal continues and you will be sent a bulky set of appeal papers which includes the DWP's reasons for its decision and a response to your appeal. You may wait several months before you receive these appeal papers.

The Tribunals Service will send you an 'enquiry form'. You must complete and return it within 14 days – in the provided pre-paid envelope. It is important that you understand the following before you complete it:

- You have a better chance of winning your appeal if you attend the tribunal hearing.
- The guidance on completing the SSCS1 'about your representative' above also applies here. You should not assume that they can attend a hearing at less than 14 days' notice even if you can. You should also ask your representative for any dates within the next six months when they are unavailable to represent you and you should include those dates with any that you cannot attend a tribunal, giving the reasons. For example, hospital appointments, holidays.
- You can ask for a domiciliary hearing. See below

Supporting information

You are entitled to see your medical record and medications free. The NHS encourage this to be done online: www.nhs.uk/using-the-nhs/about-the-nhs/how-to-access-your-health-records/. In addition, you can ask your GP to provide a letter confirming your medical conditions and medication and whether he/she can confirm any of the difficulties you say you have in relation to the WCA. You could also ask for a letter from anyone else helping you, such as a support worker, social worker, CPN, hospital doctor, physiotherapist, health visitor, consultant.

It may be helpful for you to show them the assessment criteria and explain which parts of it you satisfy - remembering that there are the two tests under the WCA. For example, the WCA 'limited capability for work' test involves scoring points for being unable to carry out certain listed activities. The section 'Further information and advice' below shows you where to find these criteria. Such evidence is very helpful. Your own evidence (for example what you wrote in your claim form or what you tell the tribunal in your own words) is best backed up with evidence but it can be sufficient for the tribunal to allow your appeal, provided it is believable and not exaggerated.

Some GPs and others may charge you for a letter. If this is not an option for you, you can ask the Tribunal Service to contact the GP. If the Tribunal agrees, it would pay the fee not you. Your request to the Tribunal should contain the following instruction: "I consent to the Tribunal obtaining my medical records for a period which it thinks is necessary to decide my appeal, but no earlier". However, GP practices must provide you with your medical records and a list of medications free of charge.

Keep a diary of your problems that relate to the two sets of WCA criteria. It can be very helpful for you to and the tribunal to understand your needs and their frequency. Explain any help that you need whether you get it or not.

Worsening condition. The tribunal can only consider your needs at the date of the decision which you are appealing and not after, so it won't help to say it's got worse. You will find that date on the front page of the appeal papers where it states "date of decision." Therefore, you should ask for any supporting evidence to relate to your situation at that time, not later. If, since the decision was made, your condition(s) has worsened or the decision was made in ignorance or error, it may be possible to make a new claim. However, for ESA claimants in a UC area this may be problematic because this would trigger a claim for UC and it would then become

virtually impossible to return to ESA. This is briefly described on page 2. Seek advice. See also the webpages: www.newcastle.gov.uk/universalcredit

Where does the tribunal take place?

For people who live in Newcastle, the tribunal hearing is normally held at:

Manor View House, Kings Manor, Newcastle, NE1 6PA.

Phone: 0300 123 1142. Email: sscsa-newcastle@hmcts.gsi.gov.uk

More details can be found by typing in your postcode at:

www.gov.uk/courts-tribunals/first-tier-tribunal-social-security-and-child-support

If you are too ill to travel to the tribunal venue, the Tribunals Service can arrange for your appeal to be held at your home. This is known as a **domiciliary hearing**. You should obtain a letter from your doctor confirming that you are too ill to travel. However, domiciliary hearings are granted only in exceptional circumstances so your request may be refused even if you have a doctor's letter.

At the tribunal hearing

You may have a representative with you but you can also have a companion. When you arrive at the tribunal, you will be shown where to go and register your arrival.

For WCA appeals the tribunal panel consists of two members comprising a judge (usually a solicitor) and a doctor. The judge will chair the proceedings, introduce everyone and write notes. Make sure you do not speak too fast! WCA related tribunals cannot carry out a medical examination. But note that tribunals can however, observe how you entered the room, how long you comfortably sit - which may contradict what you say about your difficulties.

Try not to be intimidated by the tribunal. They are supposed to be friendly, informal and should enable you to explain yourself properly. However, they also need to make a proper and careful decision, weighing up all the evidence and information. You should be prepared to be assertive and make sure you get your points across. Short and simple answers are the best. If you are asked a question, but you do not think it covers the situation, be prepared to add some information to give a fuller picture of your needs.

Sometimes, the DWP may send a Presenting Officer whose job it is to explain to the tribunal why the decision was made rather than to defend the decision. The tribunal is not a contest between you and the DWP but a discussion about your difficulties and how you satisfy the WCA test(s).

You are expected to co-operate with the tribunal and answer their questions honestly. Even if you have a strong case, if the tribunal feels you are exaggerating, you may risk not being believed. On the other hand, you should not minimise your needs and explain if you have good and bad days. Again, the evidence you may have from your doctor or your diary mentioned above – can help. Be careful not to verbally contradict what you have already said in writing, for example in the claim form. If you are aware of inconsistencies or you feel the information you previously supplied does not do justice to your needs, then explain why.

The tribunal members will not confine their questions to what is in the papers. They may ask you other questions about your hobbies, how you look after your children, how you get to the shops, how you got to the tribunal and so on. They are not trying to catch you out. They just want to get an idea of how you manage and your needs and whether they satisfy the criteria. But again, just be prepared to answer honestly and consistently.

As stated above, the tribunal can only consider your needs at the date of the decision which you are appealing and not after. Nevertheless, they may ask whether you are better, worse or about the same compared to the date of the decision you are appealing. If for example, your condition is about the same now as it was then, you can simply answer the tribunal's questions based upon how you are now, because there has been no change in your difficulties. That is often helpful to the tribunal.

If you say you are a lot worse now than the at the date of the decision, that may - in the minds of the tribunal - minimise your needs at that time.

At the end of the tribunal hearing

After the tribunal has considered the appeal, you will usually be given a short decision. Otherwise it will be sent to you by post.

If the tribunal allows your appeal and you are happy with its decision then theoretically, you need do nothing. The Tribunal will send a copy of its decision to the DWP who should, after a few weeks, put into place the tribunal's decision, including payment of any arrears. This depends on what you were appealing about. If it was about the 'Limited capability for work test' you may be entitled to your ESA again and backdated or for UC the relevant element. If it was about the other 'Limited capability for work related activity' test you may return to the ESA support group and get the related component - or the equivalent under UC. If you are challenging an ESA decision but have since claimed UC, then the ESA section of the DWP Jobcentre will be responsible for paying any backdating that is due and the UC section will add any increase in to your claim going forward. You will most likely need to provide a copy of the Tribunal decision notice to Universal Credit so that they can see that an increase is due.

What if you are unhappy with the tribunal's decision?

If you disagree with the tribunal decision, you should read the information sheet that came with the tribunal's decision. That tells you how to challenge the decision. The first step is to write to the Tribunal Service (same address as above) requesting the tribunal for a **'statement of reasons'** for its decision within a month of the tribunal decision.

Once you receive the tribunal's reasons, you have a month to ask the tribunal for **'permission to appeal to the Upper Tribunal'**. A tribunal decision can only usually be challenged 'on a point of law'. This can include many reasons, such as not understanding or correctly applying the law, breaching the rules of natural justice or not giving adequate reasons for its decision. Remember to quote your national insurance number in your letter.

The Tribunals Service will normally write to you within a few weeks and may refuse your request for permission to appeal. A refusal at this stage is not unusual. You then need to appeal directly to the Upper Tribunal using form UT1 available from the Tribunal Service or www.gov.uk/government/collections/administrative-appeals-chamber-upper-tribunal-forms

Your reasons for appealing will be the same as before, i.e. error in law. Your completed UT1 form should be received by the Upper Tribunal within one month of the date of the letter that refused you permission to appeal. If the Upper Tribunal decides the tribunal made an error in law it can make the correct decision or send it back to another tribunal to reconsider the appeal from fresh usually with some guidance.

Further information and advice

More guidance on challenging benefit decisions from:

Citizens Advice

www.adviceguide.org.uk/england/benefits_e/benefits_benefits_introduction_ew/benefits_problems_with_benefits_and_tax_credits_e.htm

Disability Rights UK

www.disabilityrightsuk.org/challenging-work-capability-assessment-decisions

The Government and the Tribunal Service

www.gov.uk/government/publications/social-entitlement-chamber-tribunal-procedure-rules
www.gov.uk/appeal-benefit-decision

Guides to the WCA and ESA from:

Disability Rights UK: www.disabilityrightsuk.org/work-capability-assessment

Citizens Advice: www.citizensadvice.org.uk/benefits/sick-or-disabled-people-and-carers/employment-and-support-allowance/

Organisations that support particular groups and conditions:

Organisations that represent groups and conditions may provide guidance on how the WCA criteria relates to them. There are too many to list here. The easiest way to find this information is to do a search within that organisation's website or search via an internet search engine, using for example, the terms 'work capability assessment'

Newcastle City Council website information on:

- Other benefits
 - Your nearest advice service and phone advice lines
 - Information for professionals such as consultancy lines, training, regular bulletins
- www.newcastle.gov.uk/welfarerights

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