

# Disability Rights UK



## Mandatory consideration of revision before appeal DWP consultation

### Disability Rights UK response: May 2012

#### Disability Rights UK

Disability Rights UK was formed through a merger of Disability Alliance, Radar and the National Centre for Independent Living on 1 January 2012. We aim to be the largest national pan-disability organisation led by disabled people. Our vision is of a society where everyone with lived experience of disability or health conditions can participate equally as full citizens.

Disability Rights UK's objectives are:

- To mobilise disabled people's leadership and control;
- To achieve independent living in practice;
- To break the link between disability and poverty; and
- To put disability equality and human rights into practice across society.

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#### The principle of mandatory reconsiderations

Disability Rights UK is very disappointed that this consultation did not cover whether mandatory reconsiderations should be introduced. We are very concerned about this shift in policy which will disproportionately affect disabled people who are over-represented in the benefits system.

We are opposed to the change as we believe it will undermine disabled people's access to appeals and justice. We do not believe the policy change will improve the claimant's experience of the reconsideration and appeals process, or initial processes. We believe the pressure should be on assessors to get decisions right first time, but this policy change undermines the incentive to improve benefits assessments procedures, instead acting as a barrier to appeals for some disabled people.

In our experience it is almost unknown for the DWP not to carry out a reconsideration when an appeal is received, even though there has been no legislative requirement to do so. In practice, virtually all decisions are reconsidered before the appeal proceeds and the consultation document notes that a significant proportion of appeals are currently lapsed at this stage. We cannot therefore view making reconsiderations mandatory having a significant impact on improving the system.

It is claimed that the introduction of mandatory reconsiderations will enable claimants to make an “informed choice” as to whether they wish to appeal. We would suggest that it would be equally effective to improve the standard of information provided with decisions so that claimants are better able to understand why a decision has been made before they decide whether or not to seek to dispute that decision. We believe DWP and Jobcentre Plus communications could be significantly improved to ensure better understanding of new systems and especially assessments processes. This would ensure less people appeal unnecessarily.

Disability Rights UK is keen to ensure the new PIP assessment process and change in benefits from DLA to PIP is communicated well with disabled recipients. We believe organisations like ours have a key role to play in such communications and welcome the chance to work with DWP to ensure people understand benefit changes and the need to comply with new processes, meet new criteria and provide independent information for example.

We also note that when DLA was first introduced it was mandatory to apply for review before an appeal could be lodged. We cannot recollect any indication at the time that this led to fewer appeals, and this system was abandoned when the current system of revisions and supersessions was introduced. We see no reason to suppose that mandatory reconsiderations will be any more beneficial now than they were in the initial years of DLA.

However, we accept that the Government is determined to implement the change and that this reconsideration is primarily concerned with the process that will be adopted.

## **1. Please give us your views on how the decision making and appeals standards can be further improved.**

The main areas in which we would see a need for improvements in decision-making standards are in relation to the Work Capability Assessment (WCA) and to DLA claims.

With regards to the WCA, a large part of the problem lies in the standard of evidence provided by the assessing healthcare professionals. Improving the standards of examinations and ensuring that medical reports accurately reflect the claimant's impairments/health conditions and their impact would improve the quality of evidence upon which a DWP decision is based, and consequently improve the quality of decisions.

Many disabled claimants report feeling that WCA examinations were rushed, feel that the healthcare professional had little understanding of their specific health condition, and worryingly often state that the report does not accurately reflect what was said or done during the examination.

There still seems to be a tendency for decision-makers to follow the healthcare professionals report in preference to any other evidence, and to disregard any inconsistencies in the report, and adopting a more critical approach to the reports would be the main improvement that DWP could make in this area. This process would be helped if more evidence were gathered from other sources, such as GPs or consultants treating the claimant.

We believe the Government was wrong to reduce the timeframe in which disabled people could provide independent medical evidence using the ESA50 form. This form should be better emphasised in advance communications with claimants and sufficient time made available to ensure decisions are based on as wide an evidence base as possible.

Another major problem with DLA decisions is that claimants often do not understand why they have not qualified for benefit, or why they have qualified for a particular rate of a component. Better explanations of decisions would improve the claimant's experience, and it should be noted that the clearer qualifying conditions for the personal independence payment should partly address this issue. We have previously requested that a full copy of the decision and rationale be provided to disabled people undergoing WCAs but DWP have expressed the view that this is too costly. Unfortunately, this option has generated a more than £26 million bill for appeals. We believe the emphasis needs shifting on 'effective' decision making rather than making decisions using the cheapest options available.

A common complaint from claimants is that examining healthcare professionals rarely seem to know anything about them, even where there have been several examinations in the past. This is reported for both ESA and DLA. The standard of evidence produced from examinations might be improved if the healthcare professionals were to be provided with copies of previous assessments so that they had some background information before the examination. We note that this seems to be the practice for industrial

injuries benefits, where it is quite common to see an examining doctor referring back to previous reports and noting how things have changed. This enables a more reasoned decision to be reached and reduces the “snapshot” nature of the often very short examinations lacking professional understanding of impairments/health conditions.

Another area for improvement concerns re-assessments under the WCA and renewal claims for DLA. In both these cases it is common to find that the latest decision is different to a previous decision. Claimants often have difficulty understanding why the decision is different, especially if their perception is that their condition has not improved. Improving the explanations provided in such cases, making it clear why the new decision is different to the previous one would greatly improve claimants’ experience, and possibly lead to reduction in applications for revision or appeal.

## **2. Do the proposed changes go far enough in order to deliver a fair and efficient process?**

Our view is that the changes will sadly not improve the fairness or efficiency of the process.

The requirement for applications for revision before appeals can be lodged will in many cases inevitably lengthen the process. It seems unlikely that claimants will provide much more evidence when applying for a reconsideration than they currently do when lodging appeals, unless explicitly asked to do so by a decision-maker. If further evidence is sought at this stage, the process will inevitably be delayed. This will have a significantly disadvantageous effect on disabled people who could, for example, lose access to adapted vehicles provided under the Motability scheme through an initially poor decision which is later overturned on appeal.

The suggestion that revision decisions will be explained by phone may be helpful in some cases, but is only acceptable if decisions are also fully communicated in writing. Many claimants will seek advice before appealing, and there is clear scope for misunderstanding and wasted appeals if claimants are largely relying on their recollection of a phone call when explaining the position to an adviser.

It is also important that explanations given by phone are neutral in tone. When tax credits were introduced, HMRC had a policy that whenever a claimant appealed they would be phoned to ensure that the decision had been properly explained. Whilst laudable and understandable in principle, many people were given the inaccurate impression in the phone calls that there was no point continuing with an appeal and consequently withdrew from

processes which could have ensured people accessed appropriate support. Phone calls to explain decisions must not be used as a way of persuading claimants not to appeal, must be limited to explaining decisions already made, and must make it clear to the claimant that they have the right to go to appeal.

The proposed changes could improve the position where the revision decision is favourable to the claimant. At present when a claimant appeals, the DWP usually carry out a revision. If there is any change in the claimant's favour, the appeal will lapse and a fresh appeal must be submitted. For example if the decision is that the claimant has been overpaid by £1000 and on revision the decision-maker identifies an arithmetic error meaning that the overpayment is only £990 the appeal lapses, even though the real issue in the appeal was whether any overpayment was recoverable. Carrying out the revision before the appeal is submitted could avoid such instances, although there will remain a power to revise if an error in the decision becomes apparent after the appeal has been lodged.

The proposal to impose a time limit on the Department in which to prepare the appeal submission is to be welcomed. However there is no indication what sanctions there will be should the Department fail to comply. We would welcome clarification of what will happen if time limits are missed. The equivalent step in the civil Courts would in most cases be the serving of a defence to a claim, and the sanction for failing to serve within the time limit is ultimately that the defendant may be precluded from defending the claim, or for the claimant to be able to seek summary judgement. It is difficult to see that such sanctions would be appropriate in social security cases, and it is not clear that there are any effective sanctions that could be devised. The introduction of a time limit will only be beneficial if the Department is also provided with the resources needed to meet that time limit – and demand is high. We understand DWP expect more than 500,000 appeals to benefits decisions in this financial year alone.

The proposal that all appeals should be submitted to HMCTS rather than to DWP would bring social security cases into line with the majority of other proceedings in Courts and tribunals. However, other than consistency with other parts of the legal system, there is no obvious advantage from this change. Although it is arguably desirable in principle that appeals go to the tribunal rather than the other party in the first instance, we are not aware of any significant problems arising as a result of appeals being lodged with DWP.

At present, when an appeal is lodged the Department sends the claimant an acknowledgement that explains the steps that will be taken. There is no indication that HMCTS will acknowledge appeals. Acknowledgements are not

issued in many other jurisdictions, but the current DWP practice has the great advantage that the claimant knows the appeal has been received. If no acknowledgement is issued by HMCTS, claimants will not know whether their appeal has been received, and are likely to contact HMCTS to check this, which will involve additional work and will detract from the resources available for processing appeals. It is important that the current DWP practice of acknowledging appeals is continued by HMCTS under the proposed changes.

It will also be very important that claimants are made aware of who they should contact with queries at each stage of the process.

The proposal to exclude local authority administered benefits from the proposed changes is sensible given the forthcoming changes to housing and council tax benefit. However, great care will need to be taken during the transition period to avoid difficulties as a result of familiarity with the former system, and having different systems and processes for benefits administered by local authorities and central government departments. It is also clearly sensible that HMRC benefits are brought within the same system as DWP benefits.

**3. Please give us your views on whether the draft regulations (Annex C) meet the intention as described in the summary section of this consultation document.**

The draft Regulations do appear to meet the intentions set out.

**4. Please let us have any specific comments about the draft regulations that you would like us to consider.**

There is very significant issue relating to appeals against WCA decisions that is not mentioned in the consultation document or the draft Regulations.

At present, a claimant appealing against a decision that they do not have a limited capability of work is able to continue to receive ESA at the assessment phase rate pending the outcome of their appeal. In the majority of cases, a claimant notified that their ESA is to be withdrawn because of a WCA assessment will appeal more or less immediately and will continue to receive benefit without any significant break, albeit at a lower level in many cases. However, the right to continued payment only arises once the claimant has lodged an appeal.

It is not clear how the new appeals process will deal with this situation. If the ESA regulations are not amended, the position would be that following a negative WCA decision ESA would be withdrawn, the claimant would then have to apply for a revision, but would not be able to continue to receive ESA whilst the revision was being carried out. Only once the revision decision was made, and an appeal was lodged against that decision would there once again be entitlement to ESA pending the appeal.

Unless revisions were carried out extremely quickly, which would seem to go against the intention to make the revision process more meaningful, claimants would be likely to have to claim JSA whilst the revision was carried out and then reclaim ESA once an appeal was lodged. This does not seem sensible for claimants, and the need to process additional claims would clearly be an unnecessary drain on the Department's resources.

There is a clear need to amend the ESA Regulations. This could either be to allow for payment at the assessment phase rate whilst the revision is carried out, or to remove the entitlement to payment pending an appeal altogether.

Removing entitlement altogether following a negative WCA decision and only reinstating entitlement if a revision or appeal is successful would bring ESA into line with other benefits. There is no other provision allowing for payment of benefit pending an appeal about whether there is entitlement to that benefit. However, it is clear that the rule exists because it is recognised that not all decisions under the WCA will be correct, and if there is no payment of ESA while the decision is disputed most claimants will be forced to claim JSA, and will have to comply with the labour market conditions and take part in work seeking activities that may be inappropriate.

In our view, it is inappropriate to withdraw ESA altogether whilst a decision is disputed, and it would not be an efficient use of resources to continue with the present system of paying ESA pending appeal but not whilst a revision is carried out. A third of disabled people already live in poverty and such withdrawal of limited support is likely to cause destitution, debt, despair and even deaths of disabled people unable to access any alternative help. The removal of all support also has implications for local authority spending for councils obliged to provide food banks to people losing DWP funding.

In our view, and given the very large number of disputed WCA decisions, it is essential that the ESA Regulations should be amended to allow for payment whilst a revision is carried out as well as while an appeal is pending.

### **Contact/further information**

If you have any questions about this response or Disability Rights UK please do not hesitate to contact: Ken Butler: [Ken.Butler@disabilityrightsuk.org](mailto:Ken.Butler@disabilityrightsuk.org)