

ESA appeals

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Current Trends

The first 2 sets of official statistics on ESA were published in October 2009 and January 2010- they appear to confirm and even exceed advisers' worst nightmares!

In the first 10 months following the introduction of ESA (Oct 08 -Aug 09) - 190,000 assessments were completed of which 69% failed the test i.e. were not found to have limited capability for work! Of the remaining 31% - 10% were put in the support group and 21% in the work related activity group. Figures from the second report -Sept-Nov 09 showed almost identical results.

There is also an indication in the reports that over a third of claims were closed before completion of a WCA!

Of the ESA appeals held up to November 2009 - 8,800 - approx 38% were successful.

The appeals done by the Welfare Rights Unit so far have had a much higher success rate. but the numbers failing the test indicate that we are missing quite a few! By the end of

March, we will have represented at 65 ESA appeals -27 listed in the month of March alone So far we have lost approx 6., with 4 of these being appealed to the Upper Tier. See the case studies below for examples of how we have managed to overturn findings that people do not have limited capability for work.

If you are helping someone with an ESA appeal, the following tips may be helpful:

- The schedule of activities and descriptors will not usually be included in the papers - make sure you have one in front of you when preparing the appeal.
- Identify which activities/descriptors you think apply to the case and highlight these in a written submission backed with supporting evidence if possible.
- Point out any inconsistencies or unsupported statements in the health professional's report (ESA85).
- There is *no* case law on ESA at present - the Tribunal are as much in the dark as you are!

- In the current absence of case law, statements concerning the activities/descriptors should be given their ordinary English language meaning.
- If the appeal is unsuccessful, always request the statement of reasons, there is nothing to lose and you may create some case law!

Case studies

Case A - physical health problems

Mr A was a former long distance coach driver who had had to give up work due to bilateral frozen shoulders for which he received little relief from strong analgesic medication and for which he was awaiting surgery.

He attended a medical examination and was awarded no points!

He subsequently obtained very good supporting evidence from his G.P. which underlined the severity of his condition.

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ESA appeals continued

The Tribunal found that he satisfied:-

Descriptor 4b - Cannot put either arm behind back as if to put on a coat or jacket (15 points). Mr A had told the doctor at the examination that his right shoulder was more badly affected than the left, whilst this was true; problems with the left were also an issue. The G.P had made it clear that the problem was bi-lateral. Points for reaching in the ESA test can only be awarded if **both** arms/shoulders are affected.

Mr B - mental health problems

Mr B. was a man in his late 50s who had suffered traumatic life events and had had significant input from the mental health services including daily visits from the Crisis Team, daily attendance at a day hospital and regular appointments with a consultant psychiatrist.

He completed the ESA 50 himself with very little detail on it -afterwards he had no recollection of having done so, attended a medical examination and was awarded no points! The ESA85 (record of the medical examination was extremely brief with no detailed explanation as to

why none of the descriptors applied to Mr B.A report was obtained from the psychiatrist treating Mr B which confirmed that his depression was severe and he had marked suicidal tendencies.

The Tribunal found that he satisfied:-

Descriptors 13b - Awareness of hazard (9 points)
14c - Memory and concentration (6 points).

Mr C - Mental health problems

Mr C. was suffering from depression and had had to give up self employment in the service sector as he was unable to deal with social interactions with clients. He had not been referred to the mental health services and was struggling to manage his condition without medication. He avoided all social situations as he would make inappropriate remarks and upset family members. He attended a medical examination and was awarded no points.

Mr C. attended the Tribunal along with his wife - they were both quite distressed but gave an extremely good account of how their life

had become restricted due to Mr C's condition - on this basis, Mr C was found to satisfy the following:

Descriptors 17c - coping with change (6 points), 19c - coping with social situations (6 points) and 21c - Dealing with other people (9 points) - a total of 21 points.

This appeal took place in May 2009 - Mr C received a further ESA50 to be returned in October 2009 - less than 6 months after the successful appeal! He then attended a further medical examination in November and was found to have limited capacity for work.

This renewal claim involved help from the Welfare Rights Unit - the result being very different the second time around!

The introduction of ESA has had implications for the work of the Welfare Rights Unit as people who cannot cope with the process need a lot more help.