

# Consultation Response

## Independent review of the Work Capability Assessment – Year 4

27<sup>th</sup> August 2013

This document is a response to the call for evidence by Dr Paul Litchfield who has been asked by the Secretary of State for Work and Pensions to carry out an Independent Review of the Work Capability Assessment (WCA). This response is a collation of responses from the membership of NAWRA and includes references to existing bodies of evidence gathered from members and other organisations over recent years. We used the broad terms of reference calling for evidence as a basis for a survey sent out to all members and we encouraged individual responses on each question to provide more specific evidence.

The National Association of Welfare Rights Advisers (NAWRA) was established in 1992 and represents advisers from local authorities, the voluntary sector, trade unions, solicitors and other organisations who provide legal advice on social security and tax credits. NAWRA currently has more than 240 member organisations.

We strive to challenge, influence and improve welfare rights policy and legislation, as well as identifying and sharing good practice amongst our members.

NAWRA holds a number of conferences throughout the year across the UK, attended by members from all sectors of the industry. An integral part of these events are workshops that help to develop and lead good practice.

Our members have much experience in providing both front line legal advice on benefits and in providing training and information as well as policy support and development. As such NAWRA is able to bring much knowledge and insight to this consultation exercise.

NAWRA is happy to be contacted to provide clarification on anything contained within this document. NAWRA is happy for details and contents of this response to be made public. Contact can be made via the Secretary at the address on the front cover.

This review is the fourth of five independent reviews and builds on the work of Professor Malcolm Harrington. This call for evidence has been designed to help Dr

Paul Litchfield (his successor) to gather specific information about those issues considered to be most pertinent by him at this time; broadly these areas are:

- the overall effectiveness of the WCA as a discriminator;
- the impact of earlier independent reviews;
- the way that mental health conditions are considered in the WCA; and
- the biopsychosocial factors that influence capability for work.

The specific questions arising from this consultation will be dealt with at each stage sequentially.

## THE NAWRA RESPONSE

Under the remit set within the Welfare Reform Act 2007, the Work Capability Assessment (WCA) was introduced in October 2008 as the new assessment of entitlement to for those incapable of work. The new benefit was called Employment and Support Allowance (ESA) and from 2010 the WCA was extended to those currently on incapacity-related benefits.

The WCA determines whether a person has a “limited capability for work” (i.e. they are unfit for work), and also whether they are capable of engaging in “work-related activity” i.e. whether or not they are able to prepare for work or not within a given medical assessment timeframe; those deemed unable to do so are placed into the support group and those deemed as able to prepare are placed into the work-related activity group. This latter group have specific conditions attached to their claim, e.g. to attend work focused interviews or to participate in Work Programme mandated activities. Failure to participate at any stage usually leads to loss of benefit (i.e. sanctions) for claimants.

The WCA has undergone a number of changes since 2008, notably in 2011 but most recently in January 2013 and there have been some changes to the WCA following the independent reviews and recommendations submitted by Professor Malcolm Harrington. However, year on year, NAWRA along with various disability organisations, have found that there are systemic issues with the way that the WCA is being implemented and administered, particularly with the way that the medicals

are carried out and the poor quality of Department for Work and Pensions (DWP) decision making on those being assessed or reassessed (as part of a migration from an incapacity benefit). There is clearly a distinct difference in methodology between DWP and the Tribunals Service in terms of how they are applying descriptors or interpreting and weighting evidence. Problems with ESA decision making have remained a continual issue for advice agencies creating incredible strain on services; something which has been widely reported on since the inception of ESA. For example,

In January 2012, Citizens Advice (CitA) published a report entitled 'Right First Time'; they found a "worryingly low" level of accuracy in WCA reports even "where ESA has been awarded"<sup>1</sup>.

In April 2012, Paul Farmer (Chief Executive from Mind) resigned from the Harrington review's Scrutiny Panel, stating:

*"I've moved from being puzzled about the reluctance to change, to being increasingly frustrated. I genuinely don't understand why the government doesn't just pause the process and reflect on why it's not working."*<sup>2</sup>

In a combined response to the 3<sup>rd</sup> Harrington review in September 2012, a host of mental health organisations (including Mind, Hafal, Rethink and the Royal College of Psychiatrists) stated:

*"Huge numbers of people continue to successfully overturn Fit for Work decisions at tribunals, and welfare rights advisers tell us that the system is still not making sufficient use of additional evidence about claimants, which could help avoid poor decisions."*<sup>3</sup>

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<sup>1</sup> [http://www.citizensadvice.org.uk/right\\_first\\_time.pdf](http://www.citizensadvice.org.uk/right_first_time.pdf).

<sup>2</sup> <http://www.theguardian.com/society/2012/apr/10/charity-chief-quits-over-fit-for-work-test>

<sup>3</sup> [http://www.mind.org.uk/assets/0002/0641/Mental\\_Health\\_Sector\\_response\\_to\\_3rd\\_WCA\\_Review.pdf](http://www.mind.org.uk/assets/0002/0641/Mental_Health_Sector_response_to_3rd_WCA_Review.pdf).

In July 2012 the High Court granted permission for a Judicial Review of the WCA, forwarded by the Public Law Project (PLP). The case argued that people with mental health conditions are placed at a substantial disadvantage in navigating the WCA system and that this amounted to discrimination according to the Equality Act 2010. This case succeeded and in May 2013 PLP published their statement on the ruling:

*“Today at the Royal Courts of Justice, a three judge panel of the Upper Tribunal has ruled that the Work Capability Assessment substantially disadvantages claimants with mental health problems, because the system is designed to deal with a high volume of claimants who can accurately report the way in which their disability affects their fitness to work.”<sup>4</sup>*

In the same month of July in 2012, both Channel 4 (Dispatches) and the BBC (Panorama) aired programmes related to issues with the way that Atos conducts medicals under the WCA. Importantly, being interviewed for Panorama, Professor Harrington said that while he believed his recommendations had improved the WCA, changes were not happening quickly enough. He fell short of proposing a new assessment system completely, but he concurred with the interviewer that the WCA (prior to full implementation of his recommendations) is not “fit for purpose”<sup>5</sup>.

Meanwhile in August 2012, the National Audit office (NAO) stated that they had identified outstanding issues regarding governance of the contract between Atos and the DWP. They concluded that the DWP had “*not sought adequate financial redress for contractor underperformance*” and that current contractual targets for Atos were not “*sufficiently challenging*” saying just 10% of the penalties triggered by poor performance had been applied<sup>6</sup>.

In September 2012, in a Westminster debate, the Chair of the Work and Pensions Committee, Dame Anne Begg, said that there was “something fundamentally wrong” with the ESA assessment system and the contract that Atos was delivering on behalf

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<sup>4</sup> [http://www.publiclawproject.org.uk/documents/press\\_release\\_WCA\\_assessment\\_discriminatory.pdf](http://www.publiclawproject.org.uk/documents/press_release_WCA_assessment_discriminatory.pdf).

<sup>5</sup> <http://www.bbc.co.uk/programmes/b01lldrc>

<sup>6</sup> <http://www.bbc.co.uk/news/uk-19244639>

of the DWP. She also stated that the Government had failed to grasp how “disastrous” the system was, and that it was “not something that can be fixed by a few tweaks here and there.”<sup>7</sup>

Mark Hoban, however, has until recently consistently rejected calls for a fundamental review of the WCA, preferring to emphasise instead that the Government’s approach is to make “continuous improvements to the process to get the right outcomes for claimants.”<sup>8</sup>

More recently in July 2013, Mark Hoban announced that between the periods of October 2012 and March 2013, many Atos assessments falls to the bottom end of quality standards set<sup>9</sup>; this will likely lead to a breaking up of the monopoly that Atos currently enjoys for carrying out WCA medicals.

The official figures speak for themselves; those who are found to be “fit for work” (and thereby not eligible for ESA), have consistently been around 59-60% year on year; of those, around 40% tend to have appealed; of those who appealed around 38% tend to have been successful. The figures are very consistent from the outset with marginal changes since 2008<sup>10</sup>. The ‘un-official’ figures are even higher; some agencies have success rates of 80 - 90%.

It is clear that there are significant and widespread problems with the way that the Work Capability Assessment (WCA) has been administered. However, NAWRA is confident that change will occur for the better and submits that there has never been a better time than now for a thorough review of the WCA.

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<sup>7</sup> <http://www.parliament.uk/briefing-papers/SN05850>

<sup>8</sup> <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120905/halltext/120905h0002.htm>

<sup>9</sup> <https://www.gov.uk/government/news/hoban-taking-action-to-improve-the-work-capability-assessment>

<sup>10</sup> DWP general statistic tool <https://www.gov.uk/government/organisations/department-for-work-pensions/about/statistics>

**Q.1 WHAT EVIDENCE AND EXAMPLES CAN YOU PROVIDE AS TO THE EFFECTIVENESS OF THE WCA IN DOING THIS? IN YOUR OPINION, WHAT ARE THE STRENGTHS AND WEAKNESSES OF THE WCA IDENTIFICATION PROCESS?**

**EXPLORATION: ISSUES OVER EVIDENCE**

The process of evidence gathering is clearly a crucial element in supporting quality decisions so that the WCA is applied fairly where claimants receive the appropriate level of support as set out in legislation. Indeed, according to the official guidance for Atos disability analysts (health care professionals who conduct the medical as part of the WCA process), evidence should carry more weight than opinion:

*“Consistency is a vital element in any good report. It is essential that the comments really do bear out the choice of descriptor, especially when the opinion differs from the customer’s own assessment, and the Decision Maker must decide which (if either) assessment is correct. The Decision Maker has a legal duty to ensure that their decisions are based on facts which are **clearly established by evidence**: A definite distinction is made between fact and opinion and while an opinion on its own may have persuasive value it can never take precedence over an opinion which is based on clear and concise evidence.”<sup>11</sup>*

This places additional pressure on the healthcare professional (HCP) to ensure that any statements on the esa85 are corroborated with evidence where possible. Indeed, Atos use a system called LiMA (Logic Integrated Medical Assessment) which is supposed to assist the assessing HCP in gathering evidence during medical. For example, guidance states:

*“LiMA (Logic Integrated Medical Assessment) is an evidence based computer programme which allows the practitioner to document evidence gathering and supports the evaluation of data and provision of advice on levels of disability using logic based on evidence based medicine protocols.”<sup>12</sup>*

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<sup>11</sup> [www.dwp.gov.uk/docs/wca-handbook.pdf](http://www.dwp.gov.uk/docs/wca-handbook.pdf)

<sup>12</sup> [ibid](#)

However, NAWRA members have consistently found problems with the quality of Atos medical reports, often in relation to the generalised style of 'tick-box' answers. Respondents report that there is widespread misinterpretation or inaccuracies on esa85s. For example, one respondent noted that a claimant at a medical asked for assistance to get onto the couch - but this was reported as "had some difficulty but didn't need assistance". Another submission outlined that an HCP reported that the claimant "likes to read horror books"; however, it came to light that the claimant does not read books at all and does not possess any horror books. In another example, it was reported that the claimant "walked slowly and with a walking stick/ limped the 5 metres to the interview room and I found this consistent"; yet, the HCP later reported that the claimant can walk more than 200 metres so no points. Other typical cases include examples where HCPs note that claimant "appeared to have difficulty coping at interview" but no points awarded on social engagement, coping with change etc. The result is often an esa85 report awarding nil points and typically, the decision is overturned at Tribunal.

#### **EXPLORATION: FAILED WCA AND NOW ON JSA**

There are reports that find that there are risks to claimant's health where they have been found "fit for work" and are being invited to claim Job Seekers Allowance (JSA) instead. Some members are finding that these claimants are actually not fit for work and unable to keep up with what is required to meet JSA requirements; as a result they are being sanctioned and their health is deteriorating.

A consultation report by Citizens Advice published last December 2012 (with regard to the Work Programme) also reported numerous examples and cases where claimants are unable to keep up with JSA conditions due to being on the wrong benefit<sup>13</sup>. Sanctions have consequences for housing benefit (HB) as well where awards are passported from a means-tested benefit (i.e. income-based JSA) and the local authority will in many cases automatically suspend a housing benefit claim once a passporting benefit has been sanctioned; claimants with mental health or

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<sup>13</sup> <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmwelaf/writev/work/contents.htm>



learning disabilities are particularly vulnerable to these sanctions and as a result, those claimants will often end up in a spiral of debt, poverty and despair. These cases are very typical and represent widespread experiences across the advice sector.

#### **EXPLORATION: NIL POINTS TO WORK-RELATED ACTIVITY GROUP (WRAG)**

Respondents have reported that the majority of appeal successes relate to claimants who have scored 0 points and have successfully managed to qualify for the WRAG on appeal. One very busy member organisation (CAB) reported that out of all the appeals for the year there were only five examples where the appellant was not successful in an ESA appeal. These appellants include claimants who have severe physical health problems, severe mental health conditions, those in alcohol and substance misuse rehabilitation, victims of domestic violence, very young adults and claimants close to pension age.

#### **EXPLORATION: NIL POINTS – THEN INTO THE SUPPORT GROUP (SG)**

One respondent reported that there have been numerous recorded decisions in 2012 about clients who have scored 0 points and then placed into the SG by a Tribunal on appeal. This has most consistently arisen in relation to claimants who have chronic physical conditions in particular; conditions such as osteoarthritis, Fibromyalgia, Chronic Fatigue Syndrome, problems with ankle joints and broken limbs, and should be considered under descriptor one (mobilising).

#### **CASE STUDY 1 – NIL POINTS TO THE SG**

Mr X has problems walking caused by severe back pain and a condition which affects the lower part of his body which also causes severe pain. He walks with the use of an aid (crutch). This claimant was assessed by Atos; the subsequent decision by the DWP was that he was able to mobilise more than 200 metres due to having no difficulties with his upper limb function (i.e. he was treated as reasonably being able to use a wheelchair). A score of 0 points was awarded and the claimant was deemed fit for work. An appeal was later made and this claimant was

placed in the support component under the appropriate descriptor one (mobilising) as it was not reasonable to expect him to use a wheelchair due to the associated pain in his lower back and risk of worsening his health.

#### CASE STUDY 2 – NIL POINTS TO THE SG

Another case was submitted under similar circumstances to above. The claimant (Mr Y) was a builder but over recent years he has suffered from degenerative spinal disease, osteo-arthritis and gout; he suffers from severe pain all over his joints but particularly to his lower back and hips. He is often left with no feeling or sensation in his legs at all. He also suffers from some serious mental health disorders as well and is under the local mental health team; his main diagnoses are severe anxiety disorder, insomnia and social phobias but he also reported that he was at risk of suicide (having made attempts in the past) as he finds dealing with his condition almost unbearable. Plenty of evidence was submitted as part of his claim (around 30 pages of reports). Despite this, he was awarded nil points at his Atos medical. The case went to appeal and the Tribunal judge awarded the claimant 15 points under descriptor one (mobilising) and placed him into the support group – this occurred prior to the hearing and was based on the paper evidence alone.

#### EXPLORATION: WRONG GROUPING

Related issues occur even where claimants are awarded sufficient points and thereby qualify for ESA, but who are placed into the inappropriate grouping for their condition and symptoms. This has been a particular problem for claimants whose mental health condition is so severe that the prospect of attending work focused interviews may lead to an extreme decline in health.

#### CASE STUDY 3 – WRONG GROUPING

One client, Mr Z, has been diagnosed with Paranoid Schizophrenia. He has a long history of self-harm, suicide attempts and formal sectioning. He was so anxious about the conditions attached to his ESA claim (as

part of the work-related activity group conditions) that he removed his two front teeth with a pair of Pliers as a form of self-harm. This claimant eventually managed to get their decision revised without the need for a tribunal but that was only after considerable evidence had been supplied by those within his care and treatment.

There are numerous other examples where claimants have been wrongly placed in the WRAG when the SG would seem far more appropriate. Again, similarly to the above, many appellants have managed to successfully appeal. These decisions clearly place a huge strain on the claimants who must endure a complex journey through the system and so this often leads to a decline in health and/or relapse. For some, the consequences are even more serious; for example, one website called 'Callum's list' has recorded substantiated and referenced catalogue of deaths related to benefits cuts in general.<sup>14</sup>

In other cases claimants have been put in the WRAG and then told by their personal adviser that they are not well enough and therefore their next work-focussed interview will not be for six months. These claimants should clearly be in the support group if the assessment made is that they cannot cope with work-related activity.

#### EXPLORATION: PROBLEMS WITH SELF-REPORTING - MH

A recent court ruling has found that:

*"... the Work Capability Assessment substantially disadvantages claimants with mental health problems, because the system is designed to deal with a high volume of claimants who can accurately report the way in which their disability affects their fitness to work."<sup>15</sup>*

NAWRA concurs and has found that claimants who suffer from mental health or learning disabilities are at particular disadvantage when it comes to self-reporting symptoms and limitations. Claimants will often do their best on the esa50 and will

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<sup>14</sup> <http://calumlist.org/>

<sup>15</sup> [http://www.publiclawproject.org.uk/documents/plp\\_press\\_release\\_WCA\\_discriminatory\\_22\\_5\\_13.docx](http://www.publiclawproject.org.uk/documents/plp_press_release_WCA_discriminatory_22_5_13.docx)

give basic details on the form, with some areas missed (because they misunderstand the question) and other areas completed with details which do not relate to the question of relate to a different question. They will often find it very difficult to understand and in many cases will only seek support from an advice agency after a negative decision i.e. turning down their benefit, has been made.

In some areas claimants have to wait weeks to see an adviser or caseworker; this is a serious concern for NAWRA members because there is only one month to complete and return the esa50 and in most cases only one month in which to appeal a negative decision. This is another aspect that further impinges on claimants who already suffer from problems related to concentration or memory issues, depression, learning disabilities etc.

#### **PROBLEMS WITH ESTABLISHING SUBSTANTIAL RISK**

A claimant does not always need to score points in order to qualify for ESA as there are a number of exemptions e.g. if a claimant is terminally ill or pregnant and there would be a risk to the claimant or babies health if they were deemed fit for work. One of the exemptions relate to “substantial risk”, which is dealt with by regulation 29 (2)(b) of the ESA regulations 2008. This regulation is designed to provide appropriate support for claimants who might suffer substantial risk to a person (not necessarily the claimant only) if they were found fit for work i.e. if they did not score sufficient points under the descriptor route. Most often, a typical example is where a claimant might have a mental health condition which is exacerbated by social interaction, or fear of social interaction, and as a result of being found fit for work, might self-harm or harm someone else. The leading authority is the Court of Appeal decision in Charlton vs. Secretary of State which makes clear that to apply a claimant must:

- Suffer from a mental or physical disablement;
- By reasons of such disablement there must be a substantial risk to anyone’s health

- That the substantial risk needs to be caused by a decision that the claimant has limited capability for work<sup>16</sup>.

A substantial risk is determined on the facts of an individual case and can include a decline in health, risk of relapse for someone with substance misuse/alcohol condition, increased levels of anxiety/panic attacks or risk of self-harm or suicide.

The first problem with regard to capturing claimants who might rightly be eligible under those rules is that the esa50 itself does not have an explicit section which deals effectively with eligibility via this route. There is no explicit section which asks the claimant if they consider themselves to be at risk if they might be expected to job seek etc. Therefore, claimants do not have an opportunity to report this unless they have had advice to include a relevant statement prior to completing the form (in the 'Other details' section for example). As indicated already, in most cases, a claimant will have made an attempt to complete the esa50 themselves without support in the first instance as they assume that the relevant agency will contact their healthcare professionals for further details.

However, in practice, NAWRA have found that the DWP rarely contact the claimant's HCPs for further evidence (i.e. via the esa113 form); on those occasions when they do, it tends to be if they need further evidence to establish whether or not the claimant requires a face-to-face assessment or is eligible for the support group. Our findings are also reported by Citizens Advice (CiTA). For example, in one report CiTA that found between October 2008 and January 2010, only about eight per cent of ESA claims involved the use of an esa113 form<sup>17</sup> Official guidance may be the issue here. For example, in the DWP Medical Services Handbook, it states:

*“At Filework, an Atos Healthcare HCP reviews the Med 3 details as well as any information made available by the claimant, and may decide that **further medical evidence is required** (FME). The FME may be requested from any HCP involved in the claimant's care. All information is then reviewed, looking for any*

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<sup>16</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2009/42.html>

<sup>17</sup> [http://www.citizensadvice.org.uk/right\\_first\\_time.pdf](http://www.citizensadvice.org.uk/right_first_time.pdf).

*evidence that suggests the claimant **does not require a face to face examination** to determine their level of disability.”<sup>18</sup>*

Therefore, the emphasis on additional evidence gathering is on establishing whether or not a claimant will need a face-to-face medical; rather than it being on serving the claim as a whole and helping accurate decisions to be made.

#### DISPARITY BETWEEN THE DWP AND TRIBUNALS SERVICE

Mark Hoban has himself recently admitted that “In most cases”, the ESA appeal success rates are a “consequence either of oral evidence presented at the tribunal or newer evidence being presented.”<sup>19</sup> Tribunals routinely favour a “broad view” approach to evaluating claimants’ claims about their own limitations. This is supported by case law (*Moyna v Secretary of State for Work and Pensions*<sup>20</sup>) and aims to underpin judicial best practice in terms of providing fairness and access to justice for appellants. In practice, what this means is that a Tribunal will consider *all* evidence before them, including oral or paper evidence. In the view of NAWRA, this is a reasonable and fair approach to evidence weighting.

There is a problem, however, because the DWP appear to have a different approach which favours the Atos medical assessment over all other evidence. NAWRA has heard about numerous examples where claimants have provided 20 plus pages of good evidence from across a range of healthcare professionals closest to the claimant, but where the recommendations from the Atos medical report have taken precedence, only later to be rightly overturned by a Tribunal. This issue is not new and has been duly noted by Professor Harrington in his first year report:

*The Jobcentre Plus Decision Makers do not in practice make decisions, but instead they typically ‘**rubber stamp**’ the advice provided through the Atos assessment. They often do not have or do not appropriately consider additional evidence submitted to support a claim for Employment and Support Allowance*

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<sup>18</sup> <http://www.dwp.gov.uk/docs/wca-handbook.pdf>

<sup>19</sup> <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130520/debtext/130520-0001.htm>

<sup>20</sup> <http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030731/moyna-1.htm>

*(ESA). This results in the Atos assessment driving the whole process, rather than being seen in its proper context as part of the process<sup>21</sup>*

## OTHER RELATED ISSUES

NAWRA has had reports that claimants who have successfully appealed a decision often face another reassessment medical only to be found capable of work again, triggering another appeal phase. This creates incredible strain on claimants, particularly those that suffer from mental ill health.

## CASE STUDY 4 – REPEATED APPEALS

Mr P was aged 35 and had severe mental health problems and drug dependency dating back to about age 11 due to an extremely abusive and traumatic childhood. Although he had worked continually he had used drugs at an extreme level throughout. Due to having a son he was determined to deal with his problems and went into treatment. Having been clean of drugs for 4 weeks and in intensive treatment he was found fit for work. This was overturned at appeal only for him to be reassessed less than a year later and found fit for work again. Although still clean from drugs Mr P was having to deal with the trauma that had surfaced as a result of no longer using and was in no way fit to work as was confirmed by a second tribunal. Less than a year on the same thing happened again and Mr P was found fit for work. On this occasion the advice agency were able to get the decision turned round on revision avoiding another extremely stressful and prolonged appeal process.

NAWRA welcomes the process now being followed by tribunal judges to make a recommendation of a time period before reassessment should happen. However, it would be helpful if this was binding on the DWP unless there was a substantial change of circumstances.

NAWRA has also had reports that ESA medical assessments are regularly being used to fail Disability Living Allowance applications and renewals. The on-going impact on a claimants' income and health can be devastating. For example:

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<sup>21</sup> <https://www.gov.uk/government/publications/work-capability-assessment-independent-review-year-1>

## CASE STUDY 5 – ESA DECISION AFFECTS DLA AWARD

One client, Mr A, aged 43 had worked as a window cleaner for some time. In December 2010, he fell off of his ladder and shattered his heel bone. 12 months previously he had fallen off the ladder and broken his wrist shattering a number of bones. He had a bone graft and until he can stop using the crutches the wrist is not able to heal.

Mr A had to use crutches and a mobility scooter because he could not put the injured foot to the floor. He made an application for ESA and attended a work capability assessment; he scored nil points on the medical assessment. Mr A had submitted 35 pages worth of medical reports, but the DWP had preferred the ESA medical assessment over all other evidence. Mr A had also made an application for Disability Living Allowance and was refused that benefit as well on the basis of the former ESA medical report.

With the assistance from an advice agency, the client appealed both of these decisions to the First Tier tribunal and he was subsequently awarded ESA and placed in the support group; the tribunal decision took approximately 10 minutes to conclude. The client's latter appeal (for DLA) was decided in a similar time frame and the client was awarded the highest rate of the mobility component and the middle rate of the care component.

## **BENEFITS STIGMA**

For reasons outlined, claimants who have been subject to work capability assessments and ESA decisions have reported to feel stigmatised as a benefit claimant and as an individual with a disability. There was also a perception amongst respondents that the decisions made were target driven and made to cut public spending on welfare. The perception about stigma is of course backed up by numerous other reports. For example, in one report on behalf of Scope in 2011, key findings were:



- Almost half (46%) said people’s attitudes towards them have got worse over the past year
- 73% experienced the assumption that they don’t work;
- 83% say negative coverage about benefits recipients is a chief cause of worsening public attitudes;
- 87% blame benefit scroungers themselves

Another major report published last year entitled, *Benefits Stigma in Britain*, outlined that stigma can operate on three levels, “personal, social, and institutional” and that although these interact, “personal stigma was restricted to a minority, social stigma is quite common, and that institutional stigma is widespread”<sup>22</sup>. The report also argues that stigma in the press, specifically from the media and government, is the major cause of the problem<sup>23</sup>.

## SUMMARY

- There are issues with the entire evidence gathering process, specifically The esa50 form is flawed and fails to capture statutory criteria for ESA;
- The DWP often fail to seek further evidence prior to medical;
- The WCA too often fails to capture claimants eligible for ESA, either under the WRAG or SG;
- The WCA too often fails to capture claimants eligible under the substantial risk rules;
- Poor quality decisions unfairly affect other benefit entitlement (such as DLA);
- Claimants health is often put at risk as a result and they often feel stigmatised;

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<sup>22</sup> <http://www.turn2us.org.uk/PDF/Benefits%20Stigma%20in%20Britain.pdf>

<sup>23</sup> ibid

Q.2: A NUMBER OF CHANGES HAVE BEEN MADE TO THE WCA SINCE ITS INTRODUCTION IN 2008. DO YOU THINK THESE CHANGES HAVE MADE A DIFFERENCE TO THE EFFECTIVENESS OF THE IDENTIFICATION PROCESS AND, IF SO, HOW?

The main changes to the WCA have been in 2011 and 2013. NAWRA welcomes the changes relating to treating oral chemotherapy and radiotherapy on a par with intravenous chemotherapy which means that cancer patients undergoing treatment will be treated the same. The clarification that Activity 7 (understanding communication) can relate to hearing impairment alone **or** visual impairment alone is also welcomed and NAWRA believes this has made identification of limited capability for work in these situations more effective.

However, many of the other changes have rendered the process less effective. The change from walking to mobilising in Activity 1 has caused significant problems in appropriate assessment. Case study 1 in this document demonstrates how there can be an assumption that most people with walking difficulties can self-propel themselves in a wheelchair (this is a commonly reported scenario among members). Claimants completing the esa50 are not aware that they need to specify any difficulties they would have using a wheelchair, nor is it a question asked at Atos assessments. Therefore problems are generally not identified effectively. Caselaw<sup>24</sup> has also highlighted how any assessment should consider realistic access to a wheelchair (availability/financial issues) and appropriateness with regard to living arrangements. Again questions about these issues are not asked and therefore routinely not considered leading to poor identification of the appropriate descriptor.

The amalgamation of the standing and sitting descriptors and the further clarification that a claimant scores no points if they can remain using a combination of standing and sitting has caused further confusion. Claimants who would not be able to work effectively at a work station because of having to change position so frequently are being awarded 0 points. Judge Wilkeley has highlighted though that any assessment should consider whether the claimant can remain at the work station in a

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<sup>24</sup> [2012] UKUT 376 (AAC)

'meaningful' way.<sup>25</sup> This point is again not being asked and therefore not considered leading to poor decisions.

The additions to Regs 29 and 35 requiring that consideration should be given as to whether 'reasonable adjustments' or 'taking prescribed medication' would reduce 'substantial risk' also may be misapplied. Although it is too early to have had many appeal hearings concerning this point it is of concern that an employer would not be willing to make 'reasonable adjustments'. Or that there may be very good reasons for not taking prescribed medication eg severe side-effects.

**Q.3: THERE HAVE BEEN THREE INDEPENDENT REVIEWS OF THE WCA SINCE 2010. DO YOU HAVE EVIDENCE THAT THE WCA AS A WHOLE HAS CHANGED AS A RESULT OF THE REVIEWS? IF SO, PLEASE DETAIL.**

NAWRA members report anecdotal evidence that suggests there may be a reduction in 0 point decisions (though still below the required 15) and also that there is an increase in the number of decisions being turned round at the revision stage. But these are haphazard rather than a consistent trend. There continue to be numerous occasions of tribunals changing 0 point decisions to support group (see previous section) and the number of tribunals remains consistently high.

Changes to the esa50 have also been positive in that the questions now more accurately reflect the descriptors. However, it is too early to have seen the effect that this has had.

The standard of Atos assessments remains a huge cause for concern. Members report medicals still frequently lasting less than 20 minutes with some as short as nine minutes! Esa85s continue to have inaccuracies and inconsistencies (see previous section on issues over evidence). The poor standard of Atos assessments remains a major factor in poor decisions. Until this is effectively addressed NAWRA believes there is limited scope for improvement.

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<sup>25</sup> [2012] UKUT 324 (AAC) para 38

**Q.4: A SIGNIFICANT PROPORTION OF PEOPLE APPLYING FOR ESA HAVE MENTAL HEALTH CONDITIONS. WHAT EVIDENCE DO YOU HAVE THAT MENTAL HEALTH CONDITIONS ARE OR ARE NOT GIVEN APPROPRIATE CONSIDERATION DURING THE WCA PROCESS?**

NAWRA members report that even for people with mental health problems the majority of assessments are carried out by registered nurses and, in some cases, physiotherapists. The assessments typically last less than half an hour and the reports are often inaccurate or inconsistent. People with mental health problems may have difficulty articulating their problems, particularly in a strange place to a person they have not met before. NAWRA believes the assessments would have a better chance of eliciting the correct information if the assessors were trained in mental health issues eg a psychiatric nurse. One NAWRA member highlighted the issue of claimants with mental health problems still being assessed by registered nurses. He reported two claimants who were bipolar being found fit for work by registered nurses. One took the decision at face value and got a job – the stress tipped them over the edge and caused a big relapse – they were found living in a shed having burnt their house out. Both of them ended up in hospital for a significant length of time.

As Mark Hoban has reported<sup>26</sup> the main reasons tribunals are overturned are because of new evidence or oral evidence at the tribunal. NAWRA members report that the questioning at the Atos assessment is very different to that at a tribunal. The HCP works from a script and asks specific, often closed, questions. The tribunal are much more inquisitorial and when particular information comes to light will ask supplementary questions to find out more. Therefore the quality of oral evidence is much better at a tribunal. The new evidence provided for a tribunal is also information that could be acquire during the WCA process. NAWRA believes that particularly for mental health cases it should be standard to obtain further evidence from the professionals who know the claimant. Mental health problems can be very variable and it is impossible to gain a full picture in a 20-30 minute assessment.

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<sup>26</sup> <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130520/debtext/130520-0001.htm>

A further problem in the Atos assessment is that the report is based on a typical day. Often for people with mental health problems there is no such thing as a typical day and therefore it is difficult to answer the questions accurately.

**Q.5: THERE IS A PERCEPTION THAT THE WCA IS TOO HEAVILY WEIGHTED TOWARDS A MEDICAL MODEL. DO YOU BELIEVE THIS IS THE CASE? DO YOU THINK THAT THE WCA TAKES SUITABLE AND SUFFICIENT ACCOUNT OF THE PSYCHO-SOCIAL FACTORS THAT INFLUENCE CAPABILITY FOR WORK (THIS IS NOT ABOUT THE LIKELIHOOD OF FINDING WORK) - IF NOT HOW DO YOU THINK THIS SHOULD CHANGE?**

There is a strong medical emphasis on the WCA and this has been exacerbated by the recent change<sup>27</sup> whereby the physical descriptors can only apply where there is a physical condition and the mental, cognitive and intellectual descriptors can only apply where there it a mental health or cognitive condition. It is well recognised that physical factors can affect mental health and vice versa and these can in turn impact on capability for work. To separate the tests in such a rigid way fails to acknowledge the many ways in which a condition can impact on a person.

NAWRA members report many clients who are able to manage in the restricted environment they have set up for themselves but would not manage in the wider world of the work environment. While Regulations 29 and 35 make some allowance for this, the descriptors are often rigidly applied without taking this into consideration. On esa85s it is rare to see proper consideration given to these regulations. All too often they have the same standard sentence which states that the evidence does not suggest that the client has a condition which means there would be a substantial risk. .

#### CASE STUDY 6 – FAILURE TO APPLY REGS 29 AND 35

Ms A has severe social phobia and experiences panic attacks. However, she is well able to care for herself within her home and can manage visiting family

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<sup>27</sup> Employment and Support Allowance (Amendment) Regulations 2012 (SI No. 3096/2012)

members in their home. She is also help to do her shopping and visit her GP with the help of a friend. Initially she was awarded 6 points for the help she needed getting about and 6 points for her difficulties with social interaction. Because she was managing her situation by restricting her life she was considered fit to work. The assessment failed to look at the reality of how she would manage if she had to step outside this comfort zone. A tribunal put her into the support group under Reg 35.

**Q.6: CHANGES HAVE ALREADY BEEN MADE TO THE WCA FACE-TO-FACE ASSESSMENT SINCE ITS INTRODUCTION. DO YOU BELIEVE THAT FURTHER CHANGES WOULD IMPROVE THE FACE-TO-FACE PART OF THE WCA? IF SO, PLEASE DETAIL WHAT CHANGES YOU WOULD SUGGEST AND PROVIDE SUPPORTING EVIDENCE THAT THEY WOULD BE EFFECTIVE.**

NAWRA members report that the questioning at the face-to-face assessment is formulaic and the esa85 reports, as previously stated, can be inaccurate or inconsistent. Assessors need to have time to ask more open questions to elicit fuller and more accurate answers. They also need to record answers fully. One esa85 reported 'walked here – took an hour'. This was factually accurate but misleading – no mention was made of the fact that the claimant only lived 400 yards away! Another stated 'claimant came alone' whereas in fact they were accompanied and their friend was in the waiting room but no question was asked to ascertain this. NAWRA members report numerous similar examples.

#### CASE STUDY 7 – INCOMPLETE QUESTIONING AT ASSESSMENT

Mr B is 19 and has learning difficulties. He attended his Atos assessment with his advice worker. The HCP asked him if he could use a microwave and Mr B answered yes. The HCP then went to move on to the next question but the advice worker interrupted and asked Mr B how he knew how long to put the microwave on for. He then replied he didn't – he just put everything on for ten minutes. Without the supplementary question no difficulties were identified. There were repeated examples of this throughout the assessment. Mr B was put straight in the support group but without the presence of the advice worker

may well have been found fit for work as he has limited insight into his capabilities.

#### CASE STUDY 8 – INCOMPLETE QUESTIONING AT ASSESSMENT

Mr D is profoundly deaf from birth and a BSL user. He also has Usher's syndrome so has very restricted tunnel vision. The esa85 report stated that although he has both hearing and visual impairments these should not affect his functional ability and he was awarded 0 points. This was based on the fact that he was able to get the bus to the deaf centre and play snooker there. The report also stated that Mr D had lost his previous job due to health and safety issues. These were directly related to his sensory impairments causing accidents but no account or further explanation of this was sought. A tribunal put him in the support group under Activity 7.

NAWRA has concerns that claimants, advisers, and even some HCP assessors have lost faith in the face-to-face assessment due to past bad experiences

#### Q.7: ASSESSMENT PROCESSES CAN BE CRITERION-BASED, POINTS-BASED OR (AS IN THE CASE OF THE WCA) A COMBINATION OF THESE. WHAT EVIDENCE DO YOU HAVE OF THE EFFECTIVENESS OF THESE DIFFERENT APPROACHES IN IDENTIFYING THE CAPABILITY OF CLAIMANTS CONSISTENTLY?

NAWRA believes that the wording of the Schedule 2 descriptors can be very restrictive and rigid meaning claimants may not score points despite having considerable functional limitation. For example the 15 point descriptor on social engagement reads 'engagement in social activity is **always** precluded..'. This means that if a claimant is able to meet with one member of their family very occasionally the descriptor does not apply. This is repeated in other descriptors eg 'cannot cope with **any** change...', 'cannot get to **any** space outside of the claimant's home...'. These are so restrictive as to be rendered meaningless – NAWRA members report that it is virtually impossible to score 15 points on these descriptors even with extremely limited function in the relevant area.

The Schedule 3 descriptors exacerbate this further as they generally align with the 15 point descriptors from Schedule 2. This means that to get into the support group a claimant needs to have an extreme disability in one functional area but cannot qualify through having severe disability in a number of areas. And as already explained it can be virtually impossible to meet the 15 point descriptor. It is consistently reported by NAWRA members that by far the majority of claimants placed in the support group get there by meeting Regulation 35. This is an indication of the ineffectiveness of the Schedule 3 descriptors in accurately assessing a claimant's capability for work-related activity.

NAWRA believes that in order to accurately assess claimants who present with widely varying disabilities and functional capability it is necessary to have a degree of flexibility which the Schedule 2 and 3 descriptors do not allow. Scope for flexibility is limited to Regulations 29 and 35 which are far more limited than the exemptions in previous tests for incapacity benefit and invalidity benefit.

NAWRA members report that it is not uncommon for claimants who are assessed through the WCA as fit for work to then be told by their personal adviser at the jobcentre that they are not fit for work.

**Q.8: THINKING ABOUT THE OVERALL WCA PROCESS, DO YOU THINK THE SYSTEM NEEDS FURTHER IMPROVEMENT, AND IF SO WHAT CHANGES DO YOU THINK ARE REQUIRED? PLEASE PROVIDE SUPPORTING EVIDENCE THAT THE CHANGES WOULD BE EFFECTIVE.**

The WCA process as it stands is not fit for purpose for a number of reasons as already laid out and evidence in this response:

- HCPs not sufficiently trained or inappropriately used
- Insufficient questioning at assessments
- Inaccurate or incomplete recording at assessments
- Failure to ask for evidence from professionals who work with the claimants
- Failure to give relevant weight to additional evidence that is sent in
- Rigidity and lack of flexibility in the Schedule 2 and 3 descriptors



- Lack of proper consideration given to Regulations 29 and 35 during the WCA process

All of these need to be addressed if there is to be significant improvement.

There have also been number of reports about the way Atos assessors are trained and carry out assessments. Both Panorama and Dispatches, as mentioned previously in this response, and also the Guardian<sup>28</sup> have provided evidence. And indeed a recent audit by the DWP itself has confirmed the inadequacy of Atos reports<sup>29</sup>. However NAWRA is concerned at the slow timetable for change and the damaging effect continued use of the WCA as it currently is will have on claimants.

**Q.9: PLEASE GIVE US ANY FURTHER INFORMATION AND EVIDENCE ABOUT THE EFFECTIVENESS OF THE WCA, PARTICULARLY THINKING ABOUT THE EFFECT ON CLAIMANTS, THAT YOU CONSIDER TO BE HELPFUL.**

The repeated reassessments of claimants is having a negative impact on their health. NAWRA members report claimants who were close to being able to return to work being set right back because of the stress of the repeated assessments and having to go through the appeal process.

NAWRA welcomes the practice of tribunals recommending a minimum period before reassessment but believes this should be binding on the DWP decision makers to ensure that it is carried out.

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<sup>28</sup> <http://www.theguardian.com/society/2013/may/16/atos-doctor-claimants-biased-medical-assessments>

<sup>29</sup> <https://www.gov.uk/government/news/hoban-taking-action-to-improve-the-work-capability-assessment>

