Response to the inquiry into Employment and Support Allowance and Work Capability Assessments

Written evidence submitted by National Association of Welfare Rights Advisers

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Executive summary

1. NAWRA has major concerns about the assessment and decision-making within employment and support allowance (ESA) and the reconsideration and appeal process. These include:
    - Restrictive descriptors which limit assessment of the overall effect of an illness or condition
    - Failure to properly consider regulations 29 and 35 until appeal stage
    - Insensitive and inappropriate treatment of terminally ill claimants
    - Poorly trained and inappropriately qualified health care professionals (HCPs)
    - Decision makers failing to make fully considered decisions based on all the evidence leading to poor decisions
    - Claimants left in extreme financial hardship due to both the mandatory reconsideration process and in situations where good cause is not properly considered
    - Unnecessary and extreme stress placed on claimants both through the number of poor initial decisions and the continual reassessments

The National Association of Welfare Rights Advisers

2. 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.

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

4. 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.

5. 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.

6. This response is a collation of responses from the membership of NAWRA collected via email and through a workshop at our most recent conference in February 2014.

7. 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.

8. Due to the limitation on length for the submission NAWRA has chosen to focus on three main areas of the inquiry in which our members have the greatest experience: the effectiveness of the work capability assessment (WCA), the ESA entitlement decision-making process, and the reconsideration and appeals process.

The effectiveness of the work capability assessment

9. NAWRA members feel that the Schedule 2 and 3 descriptors in the WCA are very restrictive and do not adequately assess many conditions. For example those that assess use of the upper limbs (activities 3 to 5) generally assume that a person is fit to work if they can perform basic functions with one arm. They do not adequately assess someone whose upper limb function is affected for example by arthritis, ME, or fibromyalgia whose symptoms may be variable, or who may be able to perform the very specific functions but struggle in a more generalised way.

10. Similarly long term support has often enabled those with learning disabilities or mental health problems to manage to perform some of the descriptors in a limited way along a strict or unvaried routine or location. This often leads to them being assessed as having no problem. For example, if a person is able to attend their day centre and get there themselves, this would likely lead to 0 points being awarded on activities 15 and 16 (getting about and social engagement) whereas in reality they may not get to any other familiar place or cope with other social engagement.

11. The assessment process does not allow for variable conditions. Many people with mental health problems may have days when they cope reasonably well. However, they will also have days when they would meet many of the descriptors. The WCA has no process to deal with such variable problems or any mechanism for establishing what the triggers may be for relapse. NAWRA members report over and over again claimants relapsing and even admitted to hospital because they receive a decision that they are fit for work. If just receiving the decision is enough to do this it is unlikely that they would be able to cope with holding down a job.

12. As set out above the descriptors do not always capture claimant's limitations and it is important that regulations 29 and 35 are considered (where there would be a risk to the claimant or someone else's health were they found not to have limited capability for work or limited capability for work-related activity). As the Upper Tribunal have noted[1] these regulations allow the claimant to be looked at as a whole person or system of interrelated functions and abilities in contrast to the descriptors which are very specific. However, in our experience, these regulations are not properly considered as part of the WCA. There are no

[1] [2013] UKUT 359 (AAC) para 15

questions relating to these on the ESA50 questionnaire. The report by the HCP (ESA85) typically has a standard statement recording that the conditions for these regulations are not met. The claimant's individual circumstances are not addressed.

13. The assessments carried out by HCPs are fraught with problems. They are extremely short, typically less than half an hour, and generally carried out by physiotherapists and registered general nurses who have no training in mental health or other conditions which require a specialised training. It has already been acknowledged by Judge Mark at the Upper Tribunal that '*it is plainly important that questions of mental health should be assessed by a disability analyst with appropriate mental health qualifications if their opinion is to be of any evidential value…the opinion of somebody with no mental health qualifications in such circumstances should have carried no weight at all'*.[2] Despite this ruling, assessments continue to be carried out by HCPs without the appropriate training or qualifications.

14. There are also huge inconsistencies in the outcome of assessments. A claimant may be put in the support group as a result of one assessment and then at the next assessment be found fit for work despite their condition remaining much the same. Or they may be awarded 0 points at the assessment and then put in the support group on appeal. A process which gives such varied outcomes cannot be operating effectively.

15. Reassessments are also happening too quickly for claimants that have chronic or relatively unchanging conditions. Even where a tribunal has recommended that reassessment should not take place for a specified period (typically 18 months or two years) this is often ignored.

16. NAWRA members believe there should be scope within the WCA to exempt claimants with specific conditions from the test. Under incapacity benefit claimants were treated as incapable of work if they had conditions such as severe mental health problems, severe learning disabilities, severe and progressive neurological or muscle wasting disease and a range of others. This is recognition that where there is a serious condition it is unnecessary to put the claimant through the assessment process.

17. The assessment should also place a greater value on evidence from other sources and give it full consideration. Even when evidence is provided this is often ignored in preference to the ESA85 from the HCP. At tribunal it is often the alternative evidence which allows the appeal to succeed.

The employment and support allowance entitlement decision-making process

[2] [2013] UKUT 269 (AAC) para 23

18. NAWRA members report that in the majority of decisions, the decision maker still 'rubber stamps' the report from the HCP without considering alternative evidence that is submitted. Although there is some improvement of this on reconsideration it still feels that the decision maker is not acting independently of ATOS.

19. When assessing the evidence decision makers tend to 'cherry-pick' statements which do not support points on the activity and ignore statements which do. This is often a direct copy from the reasoning of the HCP. One example given was a decision maker assessing activity 16 (social engagement). In order to evidence the award of 0 points they had brought forward the statement '*able to use public transport and shop at local shop for groceries'* but ignored the statement *'find it very hard to go out and talk to people. I get very anxious, very nervous, hot flushes and shake very much'.*

20. The decision-making process takes an excessively long time. The assessment phase is meant to last 13 weeks. In practice it takes six to 14 months. This means that a claimant may be up to a year on the reduced assessment rate of benefit. This is particularly detrimental to claimants under the age of 25 who receive less money in the assessment phase. The loss of weekly benefit during the delay can range from £28.45 to £64.85 per week (approximately £1,500 to £3,400 per year). Although a backdated payment is made once the process is finished extreme hardship can be caused during the delay. If the claimant becomes fit for work before assessment has taken place the process is not finished and the lost benefit is never paid. This means people who have a shorter term incapacity of six months to a year may never receive their correct entitlement. It is a concern that there is little incentive for the DWP to hurry the process if they make savings as outlined above.

21. The law is not always being applied correctly. Action for Blind People highlight Activity 7 in Schedule 3. DWP guidance[3] makes it clear that this activity is met if the person cannot **either** understand non-verbal communication (reading 16 point or Braille) **or** verbal communication. However, claimants unable to use non-verbal communication are being refused the support group because they are able to communicate verbally.

22. In addition regulations 29 and 35 are not given proper consideration in the decision-making process (as set out in 12 above). Regulation 35 is impossible to assess as work-related activity for the individual is not specified. Therefore the risk to that individual's health cannot be assessed. Although Upper Tribunal decisions have highlighted this difficulty,[4] decision makers continue to put claimants in the work-related activity group without specifying what the work-related activity would be or considering the effect of it.

23. NAWRA members report inappropriate treatment of terminally ill claimants. Even when a DS1500 form has been submitted claimants are being sent ESA50s to complete and asked to attend assessments. One member reported a claimant with motor neurone disease who had submitted a DS1500 being called for

[3] DMG 3/12

[4] [2013] UKUT 545 (AAC), [2013] UKUT 553 (AAC), [2013] UKUT 591 (AAC)

assessment. The HCP suggested *'work could be considered within 3 months'* and *'the available evidence suggest significant functional impairment is unlikely'*. Fortunately the adviser was able to intervene and resolve the situation but other claimants may not be in a position to access advice.

24. A claimant may be 'treated as' not having limited capability for work where they fail to attend or submit to an assessment without good cause. In these cases no ESA is payable pending appeal. This means that a claimant can be left without money for several months. Decisions about good cause, or lack of, seem to be taken without proper consideration of the claimant's circumstances. One member reported a claimant who had attended two assessments but was turned down for ESA on the grounds that he failed to submit to them. On both occasions the claimant had got agitated and aggressive due to his mental health condition and the HCP had felt unable to continue. However, there was no consideration by the decision maker as to whether activity 17 (aggressive or disinhibited behaviour) may have applied. The claimant's benefit was stopped.

25. It remains the case that far too many ESA decisions are not only incorrect but hugely wrong. NAWRA members continue to report numerous examples of claimants initially awarded 0 points and then put into the support group on appeal. The most recent statistics[5] show 45% of appeals are found in the favour of the claimant. NAWRA members report a success rate considerably above that and, in some cases, over 90% showing the difference that support and representation can make. Unfortunately availability of this support and advice is being continually eroded meaning more and more claimants may find themselves unable to challenge inaccurate decisions.

The reconsideration and appeals process

26. NAWRA welcomes a process which enables decisions to be reconsidered more quickly without the need to go to appeal. However, it has serious concerns about some of the problems arising with the new system currently.

27. The new mandatory reconsideration (MR) rules have only been in place for just over 4 months so experience remains limited. However, members report the reconsideration process typically taking 6-8 weeks despite Employment Minister Esther McVey indicating it would be around 14 days.[6] During this time a claimant may be left with no money as their health may prevent them claiming jobseeker's allowance (JSA). During this time they are reliant on foodbanks or their local welfare system. Availability of the latter varies according to region typically only one crisis payment can be made.

[5] https://www.gov.uk/government/publications/tribunal-statistics-quarterly-october-to-december-2013

[6] Hansard, 25 Nov 2013 : Column 121W

28. When ESA ceases any direct deductions made from the benefit also stop eg fine payments or rent arrears. This can lead to possession action or other legal action against the client resulting in further hardship and stress.

29. NAWRA feels strongly that assessment rate ESA should be paid during the MR period to avoid the above circumstances and to simplify administration. If JSA is claimed in the reconsideration period it can be complicated stopping the JSA claim and reinstating an ESA claim once the appeal process is started.

30. NAWRA understands that the MR period is an opportunity for the claimant to submit further evidence or raise any issues they disagree with. However, the claimant is not sent sufficient information to do this. Typically a decision letter states that the claimant has been found fit for work. It does not always tell them how many points they have scored, or if they have, where they scored the points. A copy of the ESA85 (which is often the main source of evidence – see 18 above) is not included. A copy can be requested but can take weeks to arrive. This means a longer reconsideration period without money. The decision letter should include all evidence and give reasons so the claimant has full opportunity to respond.

31. The MR process is also not being applied correctly in all cases. One member reported a claimant who, following a reconsideration request, received a letter giving a negative outcome but did not receive the official Mandatory Reconsideration Notice (MRN). An appeal was made using the outcome letter and explaining that the MRN was not issued but the appeal was rejected for not having the appropriate notice. The Tribunal Rules[7] allow HMCTS to waive the requirement to provide the notice. However, NAWRA members report that there appears to be no judicial oversee of the actions of clerks and administrative staff at the new centres established by HMCTS to ensure that rule 7 may be employed.

32. Another member reported cases where the decision was partially changed under MR ie the claimant was initially refused ESA and put in the work-related activity group on reconsideration but wished to continue the appeal to be considered for the support group. Again a MRN was not issued and a subsequent appeal was refused for not including it. It appears the DWP was not issuing a MRN because the decision had been changed. Regulations[8] stipulate that a claimant has a right of appeal once an application to revise has been considered. In these cases the application had been considered and the MRN should have been issued.

33. NAWRA also has concerns about how requests for a late reconsideration will be dealt with. It is too soon to have significant experience of this but, unlike late appeals, requests will be decided by the DWP and they have indicated that there will no right of appeal against a refusal. NAWRA believes there should be a right of appeal if a late reconsideration request is refused so that the request can be considered by a judge.

[7] Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, rule 7

[8] Social Security and Child Support (Decisions and Appeals) Regulations 1999

34. Within the appeal process NAWRA members report that appeal papers are poorly put together. Whole sections are cut and pasted and do not relate to the individual. On a number of occasions there are references to a claimant of a different gender or with a different condition! The decision maker's submission is typically copied directly from the HCP's report with no consideration of other evidence. Regulations 29 and 35 are not considered (see 22 above).

35. At the tribunal hearing itself it is extremely rare for there to be a presenting officer. Issues relating to poor or incomplete papers cannot be addressed and tribunals are left to either adjourn or make a decision on inadequate information.

Key recommendations

36. NAWRA recommends the following:
    - A review of the descriptors which are too restrictive and do not allow for variable conditions
    - Claimants with certain conditions to be exempt from the WCA
    - Consideration of evidence from a number of sources and the decision maker to actively request this evidence where necessary
    - Where assessments are deemed necessary they should be carried out by appropriately qualified HCPs
    - Decision makers to properly consider Regulations 29 and 35
    - Where a claimant is seeking a reconsideration or appeal due to a failure to attend an assessment this should be carried out as a matter of urgency to minimise time with no benefits
    - Assessment phase rate ESA to be paid during the mandatory reconsideration period
    - A right of appeal to be granted where a late request for mandatory reconsideration is refused
    - Less frequent reassessments particularly for chronic conditions