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Employment & Support Allowance claims for Mental Health & Learning Difficulties

A guide to the Work Capability Assessment

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Authors: Steve Donnison & Holiday Whitehead

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INDEX

Introduction - why this guide is so big	3
Who is this guide for?	4
How to start your claim for ESA.....	5
Three ways to get into the work-related activity group	8
1 Should you be in the work-related activity group on exemption grounds?.....	9
2 Should you score enough points to get into the work-related activity group?	11
3 Should you be in the work-related activity group because of exceptional circumstances?	12
Three ways to get into the support group	14
1 Should you be in the support group on exemption grounds?	15
2 Should you be in the support group because a descriptor applies to you?.....	16
3 Should you be in the support group because of exceptional circumstances?	18
Completing the ESA50 questionnaire	19
How to show you score points even if you can actually do an activity.....	21
How to complete pages 1-6.....	23
Completing Part 2 – Mental, cognitive and intellectual functions.....	26
How to explain problems with: 11. Learning how to do tasks.....	28
How to explain problems with: 12. Awareness of hazard or danger.....	34
How to explain problems with: 13. Initiating actions.....	40
How to explain problems with: 14. Coping with change.....	45
How to explain problems with: 15. Going out.....	49
How to explain problems with: 16. Coping with social situations.....	53
17. Behaving appropriately with other people	57
Providing 'Other information'	61
Signing the 'Declaration'.....	61
Completing page 20	61
Supporting evidence means more chance of success	63
Medical examination – will you have to have one?	66
Preparing for a medical examination	67
What happens at your LiMA computer controlled medical	69
Questions you are likely to be asked at your medical	72
How the decision is made and what to do when you get it.....	74
Where to look for help with claims and appeals.....	77

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Introduction - why this guide is so big

Dear Reader,

The first thing you're likely to notice about this guide is its sheer size.

We realise that when you're already having to cope with a serious health condition or disability, discovering you need a publication of this size just to make a claim for a single benefit isn't good news

Unfortunately, Employment and Support Allowance (ESA) includes the worst and most complex assessment procedure for a benefit that we have ever encountered. Which means our guide has to help you make sense of things that take a great deal of explaining.

At the heart of the assessment procedure is something called the **work capability assessment**, which includes two medical tests.

These tests were designed by dubiously constituted committees, tried out on a statistically insignificant number of claimants, reworked to make them harder to pass and then hastily written up into almost incomprehensible legislation.

In 2011 the test was revised to make it shorter and even harder to pass, if no simpler to understand.

The questionnaire you have to fill in is misleading and, at times, different from the actual legal tests. The guidance given to doctors carrying out the medicals is, in our view, at some points equally questionable.

So this guide is designed to allow you to make an effective claim in spite of the system set up by the DWP.

Our method is a slow, repetitive and painstaking one with quite a few uncertainties along the way. And we do not in any way guarantee that using this guide will mean that you will be awarded ESA. That will depend on your health issues and how they affect you.

But we can say with certainty that if you follow the information in this guide you will provide the most accurate possible evidence about your entitlement to ESA. And you will avoid all of the deliberate, or merely incompetent, pitfalls we have identified which will undoubtedly lead to many thousands of less well informed claimants missing out on a benefit they are entitled to.

Good luck!

Steve Donnison and Holiday Whitehead (barrister)

Who is this guide for?

This guide is for you if you are applying for employment and support allowance (ESA) because you have a condition such as:

- a mental health condition
- learning difficulties
- a brain injury
- substance misuse or dependency problems

We publish a separate guide for people who have a physical health condition.

It covers the most recent work capability assessment which came into force on 28 March 2011.

What this guide is for

This guide will help you to:

- complete the ESA50 questionnaire
- provide supporting evidence
- prepare for and attend a medical

How to use this guide

Use it slowly, bit-by-bit.

This is a step-by-step guide to a highly complex process. It will help you to make a very detailed and well supported claim and considerably improve your chances of success. But it's also very long and we often have to say the same thing in several different places, so please don't try to read it all at once. Use it like you would any other instruction manual – a car maintenance manual, say - just read the bit you need at the time and don't worry about the rest.

How to explain problems with: 12. Awareness of hazard or danger

The descriptors: what the law says you score points for

12. Awareness of everyday hazards (such as boiling water or sharp objects).

12 (a) Reduced awareness of everyday hazards leads to a significant risk of:

(i) injury to self or others; or

(ii) damage to property or possessions,

such that they require supervision for the majority of the time to maintain safety. **15 points**

12 (b) Reduced awareness of everyday hazards leads to a significant risk of

(i) injury to self or others; or

(ii) damage to property or possessions,

such that they frequently require supervision to maintain safety. **9 points**

12 (c) Reduced awareness of everyday hazards leads to a significant risk of:

(i) injury to self or others; or

(ii) damage to property or possessions,

such that they occasionally require supervision to maintain safety. **6 points.**

12 (d) None of the above apply. **0 points**

What this activity is about

This activity is about not being fully aware of the danger that everyday things such as boiling water and sharp knives pose. To score points, you need to show that:

- you are at risk hurting yourself or other people or damaging things;
- the risk is caused by not realising dangers rather than realising them but not being able to avoid them;
- you need supervision at least occasionally – but please note, we think that **even if you don't get supervision** you may be eligible for points – see below.

You score points depending on how much of the time you require supervision.

Support group

If 12(a) is accepted by the decision maker as applying to you, then you will be placed in the support group.

DLA alert

If you are getting DLA on supervision grounds and you think that this activity applies to you then take great care to make sure you give accurate evidence because a medical report for this assessment can be used to look again at your DLA award.

Also consider – exceptional circumstances and activity 15

Exceptional circumstances

Astonishingly, causing danger to yourself or others frequently does not score enough points to be found to have limited capability for work, even though it would clearly make you a danger in the workplace.

If you are arguing that descriptors 12(b) or 12(c) apply then you should also very definitely consider arguing that the exceptional circumstances rules apply to you, on the grounds that there would be a substantial risk to yourself or to others if you were found not to have limited

capability for work and possibly also limited capability for work-related activity (support group). Indeed, the WCA Handbook says that the substantial risk issue should be considered where 12(b) applies, but in our opinion this does not go far enough as even an occasional risk – if the danger is severe enough – should be sufficient.

See '*Should you be in the work-related activity group because of exceptional circumstances?*' above for more details on giving evidence on this.

Activity 15

If you lack awareness of danger from traffic then it may be that you cannot get to specified or unspecified places without being accompanied by another person.

Ticking the boxes

Please tick this box if you can keep yourself safe when doing everyday tasks such as cooking.

Only tick the box if you have read the descriptors and are sure that none of them apply to you. Remember, this activity is not just about danger to yourself and other people but also about damaging property.

Do you need supervision (someone to stay with you) to keep yourself safe?

- Usually*
- Sometimes*
- It varies.*

Warning – need supervision!

Before you choose a box, bear in mind that the regulations talk about whether you 'require' supervision, not whether you receive it. If you don't get supervision, but have accidents, hurt yourself or others, damage property or have near misses, then it may be that you do reasonably 'require' supervision even though you don't actually receive it.

Warning – damage to property!

The question above fails to ask about whether you'd be a danger to other people or whether you are liable to damage property, so it's really important that you give details in the '*Use this space*' box.

Tick '*Usually*' if supervision is required for the majority of the time.

'Sometime' and *'It varies'* are both extremely imprecise. To score 9 points, supervision needs to be frequent and 'occasionally' for 6 points. If you need supervision, but for less than the majority of the time we would suggest you choose 'sometimes' and give details in the '*Use this space*' box.

A system for completing the 'Use this space' box

If you're struggling to know how to give detailed evidence for this activity, try writing the answers to these 6 questions:

- 1 What condition or medication causes you problems with this task?
- 2 How does it reduce your awareness of hazards? For example, does it affect your ability to concentrate on things, to understand danger, or do you get confused?
- 3 Can you give examples of accidents or near misses you have had?
- 4 Do you get supervision from someone else?
- 6 How much of the time are you affected in this way?

Sample answers

Please note: these are just examples of the kinds of information you may wish to give – they aren't 'correct' answers of any sort. But it is vital that you give detailed evidence rather than just ticking boxes. You don't need to put the numbers in – that's just to show how the system works.

Depression

1 I have problems with this activity because of severe depression and because I self-medicate with alcohol.

2 As a result of the effects of prescription drugs and alcohol I am frequently confused, have poor concentration and do not realise when I am putting myself in danger.

3 I have fallen down stairs and cracked a rib, nearly been hit by cars, taken accidental overdoses of prescription medication leading to hospitalisation and burnt myself with hot drinks and hot pans. I frequently leave the iron, cooker or electric fire on and fall asleep with cigarettes burning. It's really only by luck that the house hasn't burnt down.

5 My flatmate keeps an eye on me most of the time.

6 I have accidents or near misses on most days.

Dementia

1 Because of my dementia

2 I lack awareness that some situations could be dangerous and have very poor concentration.

3 It's not safe for me to cross roads alone as I often don't think to look for traffic. I don't remember whether I have taken my medication and so would sometimes fail to take it and sometimes take it several times if I wasn't supervised. It is not safe for me to cook, use knives or make hot drinks unsupervised anymore because I forget that I have a sharp knife or hot kettle in my hand. My partner always runs the bath for me because I have forgotten to turn it off and also made it much too hot and then attempted to get in. I cannot choose appropriate clothes to wear for the weather and would go out without a coat even on freezing, wet days.

4 My partner never leaves me on my own for more than a few minutes at most because it would not be safe to do so.

5 I have better and worse days, but no days on which I could be left unsupervised.

What Atos health professionals are told

Remember: this is just how the DWP think the law should be interpreted – you don't have to agree with it.

The WCA Handbook says that this activity may apply to people with reduced awareness of danger due to:

- learning difficulties
- conditions affecting concentration
- effects of medication
- brain injury or other neurological conditions
- severe depressive illness and psychotic disorders which result in a significant reduction in attention and concentration

They are told that it applies where there is 'a lack of understanding that something is dangerous.' It also applies where claimants do not realise that it may be dangerous for them to attempt an activity, such as a person with dementia attempting to cook.

In relation to 12(a), however, the WCA Handbook confusingly says that:

'Those with simple concentration problems would not be considered in this area as they should normally have the insight to realise they have poor memory/concentration and therefore should avoid hazardous situations.'

However, if you are found capable of work then you will not be able to avoid potentially hazardous situations, without risking losing your benefits.

Health professionals are told that daily living activities that they should ask the claimant about in relation to this activity include:

- Ability to cope with road safety awareness
- Driving
- Ability in the kitchen
- Awareness of electrical safety
- Responsibility for children/pets

They are also told to consider whether the claimant 'could be safely left alone to manage basic daily life'.

Understanding this activity in detail

You don't have to read this section to complete your questionnaire. But if there are terms that you find confusing, or if you're preparing an appeal, it may be helpful.

Caution: this is just our idea of what these terms may mean, the decision maker or tribunal may well take a different view.

Reduced awareness

You need to show that you don't fully realise the hazards you are facing, rather than that you *deliberately* or knowingly take risks or harm yourself or damage things.

Reduced awareness could be caused by, for example:

- confusion caused by dementia
- distraction caused by hearing voices
- learning difficulties
- extreme fatigue
- overwhelming anger or frustration
- substance misuse
- confusion or poor concentration caused by medication

Everyday hazards

Everyday hazards would be things you are likely to come into contact with at home or outdoors. These could be things like, for example:

- boiling water
- cooker rings
- dressing inappropriately for the weather
- electric appliances
- fire

- taking medication
- hazardous substances such as bleach
- food past its sell by date
- heights
- medication
- running water
- sharp objects
- traffic

It may be worth arguing that reduced awareness of the risk posed by a just one or two everyday hazards should count. So, if you are only unaware of the risks of fire and electricity, for example, but safe around other things you should give details.

Inappropriate behaviour with strangers, such as allowing strangers into your home or behaviour that appears to be sexually provocative or aggressive may also be relevant. Ultimately, if the DWP disagree, it would be up to a tribunal to decide whether strangers constitute an 'everyday hazard'.

Failure to maintain personal hygiene, such as not washing your hands after using the lavatory, because of a lack of awareness of the danger of germs might also be relevant. Again, it would be up to tribunals to decide if health hazards such as germs and bacteria are an 'everyday hazard'.

Supervision

The level and type of supervision is not specified. Does it mean someone being present in the room with you or would just listening out from another room and checking on you from time to time be sufficient?

We would argue that supervision may include such things as checking rooms to see if there are any hazards present and then regularly checking back to see if you are safe.

As we said above, if you don't get supervision, but have accidents, hurt yourself or others, damage property or have near misses, then it may be that you do reasonably 'require' supervision even though you don't actually receive it.

Majority of the time

This may mean four or more days a week or for more than half of the day. Where there are periods of remission in the condition it may be possible to look at an average over a period of weeks or months.

Warning – majority!

The WCA Handbook advises that:

'The "majority of the time" would represent a need for daily supervision. Frequently would represent several times a week.'

We think that this is clearly wrong – daily supervision would be all the time, not the majority of the time. If you need supervision on four or more days a week or for more than half of the day and do not get put in the support group you may wish to consider appealing.

Frequently

Frequently, in this context, should mean less than a majority of the time - so may mean less than four days a week or less than half of the day. As stated above, the WCA Handbook advises that 'Frequently would represent several times a week.'

In the absence of a clear definition of frequently, try to give the clearest possible idea of how often you are at risk or have accidents.

Injury to self or others

Injury isn't defined and we would argue that it would include minor:

- bruises
- burns
- cuts
- scalds
- sprains

as well as more serious harm such as being hit by a vehicle or serious burns.

Damage to property or possessions

Damage to property or possessions could include things like:

- breaking crockery
- breaking windows,
- burning holes in carpets
- flooding bathrooms or kitchens
- starting fires
- damaging electrical appliances