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Employment & Support Allowance claims on Physical Health Grounds

A guide to the Work Capability Assessment

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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 physical health condition, such as:

- epilepsy
- arthritis
- heart disease
- back problems

It covers the new 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: 2. Standing and sitting.

What this activity is about

This activity looks at your ability to:

- move from one seated position to another, such as when moving from a wheelchair to a toilet;
- stand;
- sit.

The descriptors: what the law says you score points for

2. Standing and sitting.

(a) Cannot move between one seated position and another seated position located next to one another without receiving physical assistance from another person. **15 points**

(b) Cannot, for the majority of the time, remain at a work station, either:

(i) standing unassisted by another person (even if free to move around) or;

(ii) sitting (even in an adjustable chair)

for more than 30 minutes, before needing to move away in order to avoid significant discomfort or exhaustion. **9 points**

(c) Cannot, for the majority of the time, remain at a work station, either:

(i) standing unassisted by another person (even if free to move around) or;

(ii) sitting (even in an adjustable chair)

for more than an hour before needing to move away in order to avoid significant discomfort or exhaustion. **6 points**

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

Support group alert

You will qualify for the support group if it is accepted that 2(a) applies:

(a) Cannot move between one seated position and another seated position located next to one another without receiving physical assistance from another person.

Completing the questionnaire – standing and sitting

Please tick this box if you can stand and sit without any difficulty.

Only tick this box if you're sure none of the descriptors apply to you.

Remember! If this activity causes you severe discomfort, pain, breathlessness or extreme fatigue or if you could do it once but not repeatedly or if your ability varies then you may count as not being able to do it. See the section on: 'How to show you score points even if you can actually do an activity' above.

Can you move from one seat to another right next to it without help from someone else?

No.

Yes.

It varies

If you tick 'No', you are assessing yourself as scoring 15 points and also as being eligible for the support group.

If you tick 'Yes' you may still be eligible for a lower scoring descriptor.

If you tick 'It varies', you will need to give full details in the 'Use this space' box. Your ability should be based on what you can manage for the majority of the time.

This descriptor relates to such things as being able to transfer from a wheelchair to an ordinary chair or to a toilet or a bed, for example. Health professionals are told that 'this descriptor reflects a severe restriction of lower and upper limb function.'

Health professionals are also told that 'the use of simple aids such as sticks/ transfer boards can be taken into consideration' but hoists should not be.

Use this space

It's a good idea to give information about any problems you have with the following activities, as these are ones you are likely to be asked about if you have a medical, according to the WCA Handbook:

- Getting on and off the toilet unaided, without the assistance of another person.
- The use of public transport in the absence of a companion
- The use of an adapted car by a wheelchair dependant person
- Getting in and out of a car; and
- Getting out of chairs or off the bed
- Aids used such as a board or hoist

Sample answer

My multiple sclerosis has caused loss of strength in my legs to the degree that I am now mainly restricted to my wheelchair. I also suffer with tremors in my arms that prevent me from supporting my weight. Therefore, I require physical help to move from my wheelchair to bed, into the car or getting on and off the toilet. When I am not in my wheelchair I still need help to rise from sitting.

Can you stay in one place, either standing or sitting, for at least an hour without help from another person?

This does not mean standing completely still. It includes being able to change position.

- No.
- Yes.
- It varies

If you tick 'No', you are assessing yourself as scoring 6 points.

If you tick 'Yes' you are assessing yourself as scoring zero points for standing and sitting, though you can still be awarded points for moving between seated positions.

If you tick 'It varies', you will need to give full details in the 'Use this space' box. Your ability should be assessed based on what you can manage for the majority of the time.

Warning – 30 minutes!

The form only asks about standing or sitting for one hour, but you score 9 points if you can't stand or sit for more than 30 minutes. If this is the case, make sure you give the correct length of time in the 'Use this space' box.

Warning – both standing and sitting!

The law asks about your ability either to stand *or* to sit at a work station for 30/60 minutes and the ESA50 form asks about your ability to 'stay in one place, either standing or sitting'. The WCA Handbook, however, tells health professionals:

'... the person does not have to stand or sit for the whole 30 or 60 minutes. They can alternate between the two. For example, a person may only be able to sit for 30 minutes, but

then stand for 10 or 15 and then sit for another 30 minutes. In this case they would not attract a scoring descriptor as they are able to remain at the workplace for in excess of 60 minutes.'

We consider that this is an incorrect interpretation of the law. If the test is of your ability to remain at a workstation for 30/60 minutes either standing or sitting or alternating between standing and sitting then that is what the law should say.

In addition, the health professional would also need to collect evidence about your ability to rise from sitting to standing without help if they are going to assess a combination of both activities, something which they are not instructed to do. However, if you are unable to rise from sitting to standing you may want to consider giving details in the 'Use this space' box.

Use this space - standing

The legal test is your ability to stand without help from another person even if free to move around.

The WCA Handbook states that:

'When standing, a person would not be expected to need to stand absolutely still, but would have freedom to move around at the workstation or shift position whilst standing.'

The precise meaning of 'move around' is not clear. We would argue that it means not standing stock still but not being able to walk up and down to relieve discomfort either. If you do need to move around then give as much detail as possible and, if you are not happy with the result of your claim, appeal.

Atos health professionals are told that standing can be achieved with the use of aids but that:

'When standing, the person must be capable of some activity at the workstation, therefore someone who can only stand with the aid of 2 sticks would not be considered capable of "standing" in this context as they could not perform any useful function at the workstation.'

If you need to use sticks to stand for any length of time then give details. If you need to hold a stick with one hand and have limited or no use of the other hand then we would argue that, following the logic of the ESA Handbook, you are not able to stand at a workstation because you will not have the use of either hand to 'perform any useful function at the workstation'.

It's a good idea to give information about any problems you have with the following activities, as these are ones you are likely to be asked about if you have a medical, according to the WCA Handbook:

- Standing to do household chores such as washing up or cooking.
- Standing at queues in supermarkets or waiting for public transport.
- Standing and waiting when collecting a child from school.
- Standing to watch sporting activities.

If you have said that your standing ability varies, give details in this box.

Assumption alert!

If you say you go shopping or catch buses, the doctor may assume you can stand in queues for 30 minutes or more. So, if you sit on walls or there are seats at the bus stops you use, say so. Likewise, if you go shopping with someone else and they stand in the queue while you sit down or you lean heavily on your shopping trolley while queuing, you need to tell the doctor this. If you stand for a short time without apparent difficulty during the examination, the doctor may assume that you are able to do so for much longer. So, if it hurts, say so and try to make a note of how long you actually stand for uninterruptedly during the examination.

Use this space – sitting

For the purposes of this test, you will be assessed on the length of time you could sit in an 'adjustable' chair if this would allow you to sit for longer.

The WCA Handbook states that:

'Inability to remain seated in comfort is only very rarely due to disabilities other than those involving the lumbar spine, hip joints and related musculature. Reported limitations for reasons other than these require thorough exploration and strongly supported evidence. Often, a suitably adjusted chair will overcome many of these issues.'

If you have a different problem, such as painful fistulas, provide as much detail as you can and, if possible, supporting medical evidence.

The WCA Handbook also claims that:

'Sitting need not be entirely comfortable. The duration of sitting is limited by the need to move from the chair because the degree of discomfort makes it impossible to continue sitting and therefore any activity being undertaken in a seated position would have to cease.'

However, the 'degree of discomfort' provision actually comes from the legislation from the previous WCA. The legislators made the choice not to include this phrase in the current regulations. If you need to appeal a decision in relation to sitting you may wish to make the possible misdirection of the health professional one of your grounds of appeal.

It's a good idea to give information about any problems you have with the following activities, as these are ones you are likely to be asked about if you have a medical, according to the WCA Handbook:

- Watching television (for how long at a time and type of chair).
- Other leisure or social activities, e.g. listening to the radio, using a computer, sitting in a friend's house, pub or restaurant, cinema, reading, knitting.
- Sitting at meal times (which may involve sitting in an upright chair with no arms).
- Time spent travelling in cars or buses.

Sample answer

Following a fall and resultant injury to my coccyx I now find sitting down for long periods of time extremely uncomfortable. The symptoms of this injury have worsened over time so that I can no longer drive unless it is a very short journey. If I have to travel any distance as a passenger I request that we stop every 20 minutes at most so that I can get up and relieve the pressure. Unfortunately, even though I cannot stay sat down for very long, when I stand up the pain is excruciating. Sitting on soft surfaces aggravates the condition, so if I want to watch television I have to either lay down or sit on a dining chair rather than the sofa. This is still uncomfortable but means that I can stay sitting for about 20 minutes, rather than the 10 minutes or so that I could stay on the sofa. I eat meals quickly or get up half way through and move around.

If you have a medical

The health professional may ask you about the issues listed in the Use this space box above.

They may observe how you sit at the medical: if you sit still without obvious discomfort for say 10 minutes, the health professional may say that you could clearly have sat for much longer. They may also observe how long you stand for when asked to do so during the examination and make assumptions about how much longer you could stand.

Remember: if it hurts, say so. So, if sitting or standing causes you pain, fatigue or severe discomfort, don't just suffer in silence: tell the doctor or they may assume you have no problems.

Assumption alert!

The health professional is likely to ask you what TV programmes you watch. If you say you watch films, for example, the doctor may assume you can sit for at least 90 minutes. Or if you say you watch Coronation Street the doctor may assume you can sit for at least 30 minutes. So make sure, even if you're not asked, that you tell the doctor if you have to get up during programmes, what sort of chair you sit in, whether it has special cushions or whether you lie on the sofa.

If you say you have been on holiday, perhaps driving from London to Cornwall, the doctor may assume that you can sit for at least three hours. Make sure that, if you do mention any especially long trips, you also make it clear if you had breaks, stood up and walked up and down on the plane or train, etc.

The time you arrived for your medical will have been noted and the doctor may assume, without ever asking, that if you were kept waiting for say half an hour, then you sat for that period. Don't expect to be asked, instead make a point of telling the doctor if you were unable to sit for the whole time.