

## **RESTRICTED**

### **Peer Review**

**Customer: [REDACTED]**

**Review conducted by:**

*Name:* **[REDACTED]**

*Role:* **[REDACTED]**

*Address:* FES DMU, Merthyr Tydfil BC

*Signed off by:* **[REDACTED]**

## Guidance and Notes for Peer Review authors

1. The Peer Review process complies with the Ombudsman's Principles of complaint handling:
  - Getting it right
  - Being customer focused
  - Being open and accountable
  - Acting fairly and proportionally
  - Putting things right
  - Seeking continuous improvement
2. Consider all available evidence and if required ask for additional documents. The commissioning body will supply a detailed chronology.
3. For suicide/alleged suicide cases take into account actions that happened up until the customer's death, actions after that date can be considered but are usually outside of the scope of the investigation. Legal Services advice can be sought if required.
4. Any local recommendations identified by this review will be taken forward by the commissioning body.
5. Recommendations that impact on national Customer Journeys will be handed by Operational Intelligence Division.
6. This Peer Review must be signed off at SCS level, please ensure that this approval has been gained before returning the report to the Peer Review Focal Point.

### **Peer Review - purpose and methodology**

This Peer Review has been commissioned by [REDACTED].

This review focuses on the whole customer journey rather than the handling of any complaint – looking at both any variances from Customer Journey national standards at the local level and any improvements required to the Customer Journeys. Its purpose is as a continuous improvement tool and not to be used to seek out or apportion blame.

The review has been conducted by examining all available customer records, relevant evidence and current/appropriate guidance.

### **Focus of Peer Review**

This Review focuses on the procedures and timescales involved during the customer journey through the Mandatory Reconsideration (MR) and subsequent Appeals process. As part of that review it considers whether any special measures were in place to deal with vulnerable customers [REDACTED] and if so if those special measures were followed and if not whether there is a need for special measures for certain vulnerable customers.

### **Background** [REDACTED]

### **Summary of Findings/Lessons Learnt** [REDACTED]

### **Recommendations for Local consideration**

1. The review date needs to be reset in all cases when assessments are revised under the mandatory reconsideration or appeals process. This will prevent the review date relating to the original decision maturing too early.
2. The DM should list all evidence used when making a decision.
3. ESA regulations 29 and 35 should be considered by the DM in all cases where it is decided that the functional descriptors (points) are not met. This will ensure that claimants whose mental or physical health would be at substantial risk should ESA not be awarded can be protected.
4. A review should take place in all cases in the Benefit Centre prior to the case being passed to DRT.

5. All claimants should be advised, preferably by telephone, when medical certificates are needed in pursuance of an appeal against a disallowance of ESA, on the day benefit is due to be suspended.

### Recommendations for National Customer Journeys

1. Additional training and guidance is given to DMs when dealing with cases where there is a considerable change in the functional descriptors (points) to ensure that cases are given extra consideration e.g. claimants who are considered to have no entitlement to ESA and were previously in the Support Group, have severe mental health issues or both.

In such cases DMs are encouraged to retrieve all historical case files before making a decision so that the medical history and all supporting evidence can be perused to minimise the risk of withdrawing benefit inappropriately and placing a vulnerable claimant at risk.

2. Policy and guidance should be explicit about the need to maintain good communication links with customers and in particular, explaining clearly why things are required or done in a particular way, e.g., the need for a review or provision of medical evidence.

### Timetable of Events

Note add or delete rows as appropriate

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**Annexes:**

Additional papers listed below. [embed as required]

Annex 1	Annex 2	Annex 3	Annex 4
 07.13.319 Use of Exceptional Circumsta			

## **Gatekeeper Memo / Information Alert**

To: BD Group Managers      From: [REDACTED]  
BD Group Business      Benefit Business Partner Team  
Managers  
[REDACTED]  
[REDACTED]  
Cc: [REDACTED]      Tel: [REDACTED]  
[REDACTED]      Mob: [REDACTED]  
Email: [REDACTED]  
Date: [REDACTED]

Admin Use: Gatekeeper Number	[REDACTED].319
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## **Use of exceptional circumstances in ESA Decision Making**

### **Issue**

To ensure that the exceptional circumstance regulations, Regs 29 & 35, are applied consistently and in line with policy intent.

### **Action**

The attached key messages to be distributed to all staff involved in ESA WCA Decision Making and Appeals activity.



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### **Timing**

Immediate

### **Background**

There is a growing concern that the exceptional service regulations are being applied inconsistently and in too many cases by decision makers.

Policy intent is that these regulations should be used in only approximately 1% of all decisions and they are currently being applied in up to 29% of cases.

The aim of these key messages is to reinforce that exceptional circumstance should only be applied in very limited circumstances. This is the first in a series of communications, and more detail on how to apply Regs 29 & 35 with examples will be issued shortly.

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We are currently undertaking an exercise with Atos and policy colleagues with the aim to identify a consistent level for the use of these regulations across the whole process. Further communications will be issued once this work is complete.

If you have any queries regarding this please contact

**[REDACTED]**

**[REDACTED]**

Benefit Business Partner Team

Operational Intelligence Division



## **Regulations 29 and 35 – Exceptional Circumstances**

### **Background - What are Regulations 29 and 35?**

Regulations 29, for LCW, and 35, for LCWRA, provide an alternative method to the functional descriptors for finding a claimant has LCW or LCWRA.

**Regulation 29 or 35 should only be applied after a claimant has been found not to have LCW/LCWRA, when the legislative functional descriptors have been applied.**

### **Key Messages**

- The ability to treat a claimant as having LCW or LCWRA using regulations 29 and 35 should be used as a safety net only, and only when the claimant satisfies the appropriate test. These regulations should not be used because the claimant is anxious about going to work, or because we sympathise with them because of their condition.
- If, during the Decision Assurance Call, further medical evidence is presented, the DM should **always** discuss this evidence with an HCP before changing the decision and before considering Reg 29/35.
- When deciding if a claimant is at risk, if found fit for work or work related activity, it should be remembered that we are not looking at specific jobs but at the type of workplace the claimant is suitable for in general and whether there is anything that they could do which would not cause a substantial risk. A similar consideration should be applied to work related activity when considering Reg 35. Travel to and from a workplace or Work Related Activity should be considered too.
- It is rare for a mental or physical health condition that could result in a risk to the claimant's health, to be present in the absence of functional effects. In almost all cases where there would be risk, a severe functional impairment will be identified when applying the WCA descriptors. Regulations 29 and 35 apply to the exceptions where this does not hold true.
- In determining whether the claimant is at risk the DM needs to specify exactly what the risk is and why it is likely to be realised if the claimant is found fit for work or fit for work

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related activity. A full statement of reasoning needs to be produced and should detail exactly why Reg 29/35 has been deemed appropriate.

- When reconsidering or revising a decision following a request from the claimant or as a result of an Appeal, the same consideration needs to be made with regards to risk. The DM/Appeal Writer should always contact a HCP for advice before changing the decision.
- When cases are returned from HMCTS cases following a successful Appeal they should be sifted and prioritised and in all cases where Reg 29 or 35 has been used to award LCW/LCWRA should be reviewed straight away.
- When reviewing these cases ensure there is sufficient evidence to explain why they decided to apply Reg 29/35. If it is in any way unclear why Reg 29/35 has been applied by HMCTS then a Statement of Reasons (SoR) should be requested. SoR need to be requested within 1 month of the date of the Appeal decision.
- If after considering the SoR from HMCTS, you feel that the decision to award LCW/LCWRA is flawed, has not been based on additional evidence or there is a fundamental disagreement with the reasoning of the Tribunal the case should be referred to Professional Services, DMA Team in Leeds for consideration for referral to the Upper Tribunal.
- Referral to the Upper Tribunal needs to take place within 1 month of the SoR being issued. This should be taken into account when referring cases and although given priority by the DMA Team, time should be allowed for the team to take all the required actions and the case referred to them ASAP.

## **Annex 1**

### **Regulation 29**

(1) A claimant who does not have limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work if paragraph (2) applies to the claimant.

(2) Subject to paragraph (3), this paragraph applies if –

(a) the claimant is suffering from a life threatening disease in relation to which –

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(i) there is medical evidence that the disease is uncontrollable, or uncontrolled, by a recognised therapeutic procedure; and

(ii) in the case of a disease that is uncontrolled, there is a reasonable cause for if not to be controlled by a recognised therapeutic procedure; or

(b) the claimant suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work.

(3) Paragraph (2)(b) does not apply where the risk could be reduced by a significant amount by –

(a) reasonable adjustments being made in the claimant's workplace; or

(b) the claimant taking medication to manage the claimants' condition where such medication has been prescribed for the claimant by a registered medical practitioner treating the claimant.

### **Regulation 35**

#### **Certain claimants to be treated as having limited capability for work-related activity**

(1) A claimant is to be treated as having limited capability for work-related activity if:

(a) the claimant is terminally ill;

(b) the claimant is–

(i) receiving treatment for cancer by way of chemotherapy or radiotherapy;

(ii) likely to receive such treatment within six months after the date of the

determination of capability for work-related activity; or

(iii) recovering from such treatment,

and the Secretary of State is satisfied that the claimant should be treated as having limited capability for work-related activity; or\_

(c) in the case of a woman, she is pregnant and there is a serious risk of damage to her health or to the health of her unborn child if she does not refrain from work-related activity.

(2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 34(1) is to be treated as having limited capability for work-related activity if–

(a) the claimant suffers from some specific disease or bodily or mental disablement; and

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(b) by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity.