

Derbyshire Welfare Rights Service

Employment and Support Allowance

Challenging a Decision you are Fit for Work

This information should be read alongside 'Challenging a Benefit Decision' which tells you about the process of Mandatory Reconsideration and appealing to an independent tribunal.

If you are challenging any other sort of ESA decision (including that you have failed to complete an ESA 50 form or to attend a medical assessment or other benefit decision) seek advice – the information below does not apply.

The Work Capability Assessment

As part of your claim for Employment and Support Allowance (ESA) you are assessed via a questionnaire (form ESA 50 which asks about your illness or disability) and a face-to-face medical examination. The process is known as the Work Capability Assessment (WCA).

The decision on your claim is made by a Decision Maker at Jobcentre Plus.

If you are found fit for work, you cannot be paid ESA. Under the WCA test it is perfectly possible for you to be found fit for work for ESA purposes even when your GP or specialist says that you are not fit.

If you disagree with the decision you can challenge it – you must first of all request 'Mandatory Reconsideration' of the decision, and if this does not change the decision you can appeal to an independent tribunal.

For details (and time limits for taking action) see 'Challenging a Benefit Decision'.

ESA – some claims may go straight to appeal

Until recently, if the Decision Maker found you fit for work, you could not be paid ESA while the Mandatory Reconsideration (MR) was in progress - but in some circumstances when you lodged an appeal, ESA could go back in to payment (see below).

After a court case in 2020, it was decided that in some cases the Mandatory Reconsideration process does not apply, and the claimant may go straight to appeal.

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You may go straight to appeal if:

- you have been found 'fit for work' after attending a medical examination
- this is the first decision on your 'capability for work – or -
- the decision *prior to the one you are appealing against* was that you have 'Limited Capability for Work' or 'Limited Capability for Work-Related Activity'
- AND you provide medical evidence that you are not fit for work

In this situation, you can be paid ESA while you wait for your appeal, subject to the usual ESA rules.

All other claims will still need to apply for MR: this includes ESA decisions if you have not returned a form or not attended the medical examination.

Seek advice if you are not sure which rules apply to you.

Claiming Universal Credit if your ESA stops

If your ESA stops, you may instead have to claim Universal Credit (UC). If you claim UC you will not be able to go back on to Income-Related ESA even if your MR or a subsequent appeal is successful, but a successful challenge will mean that you will have 'limited capability for work or limited capability for work-related activity on UC, and your monthly UC entitlement may increase.

Disabled people who received a 'severe disability premium' as part of their Income-Related ESA cannot claim Universal Credit and will have to claim another benefit – usually Income-Related Jobseeker's Allowance. Seek advice if this applies to you. More details are also available in our leaflet 'UC – what is happening now and in the future'.

Claiming UC or JSA will not invalidate your challenge to the ESA decision.

You do not have to make any new benefit claims, but in many circumstances, claiming UC or JSA will be your only way of getting some income while the ESA decision is looked at again.

Claiming Universal Credit during the Mandatory Reconsideration period

The 'full service' of UC has now been introduced throughout Derbyshire. Under the UC full service, you cannot usually make a claim for Income-Based Jobseeker's Allowance while you challenge the ESA decision – but see below.

If you are claiming benefits on the basis of your National Insurance record, you can still get JSA on this basis even in a UC area. Seek advice if this applies to you.

If you are entitled to ESA based upon your National Insurance contributions, UC does not replace this benefit and your ESA will be restored if you win your challenge. You may receive some UC in addition to this.

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If you claim UC and you are challenging an ESA decision, please make sure that your Work Coach knows that you are unwell, hand in sick notes if your GP issues them, ask for the 'work-related' requirements of UC to be reduced in accordance with your health problems, and ask for a new 'work capability assessment' under UC.

Always seek advice, as UC is very new and its rules are complicated.

Claiming JSA during the Mandatory Reconsideration period

If you received a 'severe disability premium' (SDP) as part of your Income-Related ESA (or you received or still receive it in Housing Benefit) you cannot claim Universal Credit. This also applies if an award of benefit with an SDP stopped less than a month ago and you still satisfy the rules for getting an SDP.

You may be able to claim Income-Based Jobseeker's Allowance.

How can I tell if I get an SDP in my benefit?

Any letters from the DWP which show how your benefit is made up will include a sum of £66.95 a week (one SDP) or £133.90 a week (two SDPs) as part of your benefit assessment. Next to the figures it will usually say 'because you/your partner are severely disabled'. If you are not sure, seek advice.

To claim Jobseeker's Allowance you need to:

Make a claim through Jobcentre Plus as a part of which you must agree to sign on for, to be available for and to seek full-time work, and also that you are 'capable of work'.

For the purposes of JSA, the fact that you have not passed the Work Capability Assessment should be sufficient.

You must also sign up to a 'Claimant Commitment' (previously known as a Jobseeker's Agreement').

However, if you have an illness or disability that limits your ability to seek work, to do certain types of work, to travel for 90 minutes each way for a job or to seek work of 40 hours a week or more you may ask for your condition to be taken in to account in your Claimant Commitment.

To claim JSA, phone 0800 055 6688 or see your local office if you have problems contacting them by phone.

It will prevent potential administrative problems if you claim JSA within one month of your ESA/WCA decision. We recommend you claim right away.

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You will have a 'new jobseeker's interview' and you should usually be paid JSA three days after this. Seek advice if payment is delayed.

You will see a Work Coach at your local Jobcentre Plus. When you draw up your Claimant Commitment, make sure that you discuss with them how they can take account of your illness or disability when working out what you need to do in order to look for a job.

Ask if your Jobcentre has a specialist Disability Employment Adviser (DEA); ask to discuss your situation with the DEA.

You should not refuse to look for work – this could mean that you are not eligible for JSA.

If you are refused JSA for any reason, seek advice.

Options other than JSA

If you do not wish to claim JSA or you cannot claim it, your options for further benefit claims are limited. Contact our Helpline to see if there are any other options – for instance if the SDP rules (see above) apply to you and you are a carer for another disabled person you may be able to claim Income Support.

Can't I just make a new claim for ESA?

It will not usually be possible to do this unless you had an SDP in your benefit, and you are suffering from a new health condition, different from the one on which your previous claim was based, or an existing health condition has become significantly worse.

If you claim, you may have your claim refused unless there is sufficient medical evidence to support it, or you may receive no benefit until you have had a new Work Capability Assessment, and this can take a long time.

Contact the Helpline if you wish to make a new claim for ESA as the rules are very complex.

What if I make no new claims at all?

This is a financially risky strategy as you may go without money for a very long time – only undertake it if you have received advice. You would have to have other income or savings to live off while your ESA claim is decided.

If you do not make a new claim for means-tested benefit (including Housing Benefit) while your Mandatory Reconsideration is underway, you will be without your ESA for as long as the MR takes. If the MR is successful, you will get your benefit back, with arrears, and you will remain on Income-Related ESA.

See below for what happens if your MR is not successful and you have to appeal.

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What happens if my Mandatory Reconsideration is successful?

If you have claimed UC:

You cannot return to Income-Related ESA but you would get back on to ESA payable on the basis of your National Insurance record.

You may qualify for a higher rate of UC, and your UC 'Claimant Commitment' should be reduced to reflect the fact that you have won your ESA challenge.

If you have claimed JSA:

If the decision is changed in your favour, your ESA claim should go back in to normal payment. You do not have to make a new claim for ESA, although you may be asked to close your JSA claim. This can be done over the phone.

The Mandatory Reconsideration Notice and lodging an appeal

When the Mandatory Reconsideration is complete, you will be sent a 'Mandatory Reconsideration Notice' to show whether or not the decision has been changed.

If the decision has not been changed or you still disagree with any part of it, you may now appeal to an independent tribunal. For details of how to do this, see 'Challenging a Benefit Decision'

What happens to my claim when I appeal?

Once your ESA appeal has been lodged with Her Majesty's Courts and Tribunals Service (HMCTS), they should contact Jobcentre Plus to tell them this.

If you have claimed UC

You cannot go back on to 'Income-Related ESA' at any point. If your ESA is payable on the basis of your National Insurance record, you may ask for this to go back in to payment, but it will only be paid at its lowest rate.

NB this form of ESA will count as income for UC and you will need to make sure that UC is aware of this income.

If UC does not apply and you have not previously been found fit for work:

If you have claimed JSA during the Mandatory Reconsideration period, contact Jobcentre Plus and ask for your JSA claim to be closed and your ESA claim to be reopened.

You should not be required to make a new claim for ESA.

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When you receive a letter from HMCTS to say that your appeal has been lodged, it may be useful to show this to your Jobcentre.

ESA will only be paid to you at its lowest possible rate ('assessment rate') while you await an appeal hearing.

If you receive Disability Living Allowance (DLA) or Personal Independence Payment (PIP) you may be better off remaining on JSA rather than going back to ESA. This is because you will get an additional payment called a 'disability premium' on JSA which does not exist in ESA. However, if you remain on JSA you will still need to look for work. Call the Helpline if this applies to you.

If you have previously been found fit for work - if this is not the first time that you have been found fit for work, you may not be able to go back on to ESA pending your appeal unless you can show that your condition has become a lot worse, or you are suffering from a new condition. Seek advice right away if this applies to you.

If you go back to ESA you will need to provide up-to-date 'fit notes' from your GP.

If you have not claimed JSA during the Mandatory Reconsideration period, 'assessment rate' ESA will be paid once your appeal is lodged, and will be backdated providing you have medical evidence to show that you were not fit for work throughout that period.

Housing Benefit and Council Tax Support when your benefits change

Your HB and CT Support may be suspended if the office is aware that there has been a change in your income but they do not have sufficient details – you can avoid this by keeping them up to date on changes to your benefits.

Keep the HB/CTS office informed even if your income has dropped, e.g. you go on to 'assessment rate' ESA while you wait for an appeal date.

If you claim Universal Credit you will usually no longer receive Housing Benefit (rent payments are part of UC unless you are homeless and in temporary accommodation or certain types of accommodation where counselling and support are provided) but you should still claim Council Tax Support as a separate benefit, and keep the CT office updated on any changes to your situation.

Additional information can be found on our website, visit www.derbyshire.gov.uk/welfarebenefits

To keep up-to-date with benefit changes in Derbyshire go to
www.derbyshire.gov.uk/benefitnews

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Benefits Helpline – 01629 531535 or email
welfarebenefits@derbyshire.gov.uk

Monday, Tuesday, Thursday, Friday
11.00am – 4.00pm