

Explanatory notes for General Practitioners

ESA Regulations 29 and 35 ~ Substantial Risk Exceptional Circumstances

Regulation 29 (if found 'fit for work')

(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) This paragraph applies if -

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

(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 it 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.

(4) In this regulation "medical evidence" means—

(a) evidence from a health care professional approved by the Secretary of State; and

(b) evidence (if any) from any health care professional or a hospital or similar institution, or such part of such evidence as constitutes the most reliable evidence available in the circumstances.

Regulation 35 *Claimants to be treated as having limited capability for work-related activity (WRAG)*

(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 by way of intravenous, intraperitoneal or intrathecal chemotherapy; or

(ii) recovering from that 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.

Or - (2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 30 (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***

(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.***

Legal advice on interpretation of the regulations

The Black Triangle Campaign has consulted with Senior Counsel regarding the statutory interpretation of these regulations.

“Substantial” or “Serious” Risk

Regulation 29 (2) (b) and Regulation 35 (2) (a) & (b)

These terms both apply to the word ‘risk’ and not to a patient’s ‘disease’ or ‘disablement’ (illness/es or impairment/s).

Therefore, the question before the General Practitioner is:

“If, as a result of the DWP/Atos Work Capability Assessment, your patient was found either ‘fit for work’ or to possess ‘limited capability for work’ (and placed in the Work-Related Activity Group) is it more likely than not that harm would result?”

Counsel has advised the exemptions must be applied to all cases where harm is likely.

Counsel further explained that, as the first duty of any doctor is to “do no harm”, in relation to any question regarding whether or not the ‘harm’ caused would be sufficiently ‘serious’ - all that is required of the doctor is to make a simple clinical judgment as to whether or not harm would occur.

To recap: ***Any harm is itself*** sufficiently ‘serious’ or ‘substantial’ to warrant applying Regulations 29 or 35 in the correct statutory interpretation of this law because both words apply only to the word ‘risk’ and not to ‘harm’. With regard to the degree of harm, it need only be “more likely than not” that harm to the patient would result from being found either ‘fit for work’ or having ‘limited capability for work’ (WRAG).