

**EMPLOYMENT AND SUPPORT ALLOWANCE -  
RESIDENCE AND PRESENCE CONDITIONS**

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**INTRODUCTION**

- 1 ESA is introduced for new claimants on 27.10.08. ESA(Cont) replaces IB, and ESA(IR) replaces IS on grounds of disability. This Memo gives guidance on the residence and presence conditions for entitlement to ESA.
- 2 It is a condition of entitlement to ESA that the claimant is in GB<sup>1</sup>. However
  1. in relation to ESA(Cont), this condition must be read subject to EC law
  2. there are further residence and presence conditions for entitlement to ESA (Cont) relating to youth<sup>2</sup>
  3. a claimant must also be habitually resident in GB for ESA(IR)<sup>3</sup>

4. there are also provisions to allow continued entitlement to ESA (both Cont and IR) for certain temporary absences from GB.

*1 WR Act 07, s 1(3)(d); 2 Sch 1 Part 1 para 4(1)(c); 3 ESA Regs, reg 70*

## **ESA(CONT) - EC PROVISIONS**

- 3 It is a condition of entitlement to ESA that a claimant is in GB<sup>1</sup>. The claimant must be physically present in GB on the day or period in question. A claimant is disqualified for receiving ESA(Cont) and ESA(IR) for any period absent from GB<sup>2</sup> unless entitlement continues during a period of temporary absence<sup>3</sup>. When considering entitlement to ESA(Cont), however, this condition must be read in conjunction with European law<sup>4</sup> if the claimant is in another EEA member state or Switzerland. The EEA includes all EC countries and the three EFTA countries (see DMG 070040).

*1 WR Act 07, s1(3)(d); 2 s18(4)(a); 3 ESA Regs, reg 151(2); 4 Reg EEC 1408/71*

- 4 In order to benefit from EC Regulations, the claimant must normally be an EEA National; but see DMG 070080 et seq. Detailed guidance on how a claimant, first claiming from another EEA state or on moving to another EEA state, might benefit from EC Regulations is in Part 4 of Chapter 7 of the DMG. The guidance therein relates to IB, but this will equally apply to claims to ESA(Cont).
- 5 DMs should note that EC Regulations differentiate between sickness benefits<sup>1</sup> and invalidity benefits<sup>2</sup>. For ESA(Cont) the assessment phase is treated as a sickness benefit, and thereafter it is treated as an invalidity benefit.

*1 Reg (EEC) 1408/71 Title III Chapter 1; 2 Chapter 2*

- 6 In particular, EC provisions may assist the claimant
  1. satisfy the contribution conditions - see DMG 071391
  2. first claiming ESA in another EEA state - see DMG 071400 and 071467
  3. avoid disqualification if in another EEA state in the assessment phase – see DMG 071460
  4. avoid disqualification if in another EEA state after the assessment phase - see DMG 071500.

## ESA - RECIPROCAL AGREEMENTS

- 7 The UK has some 30 reciprocal social security agreements that include provisions on IB. These agreements are not to be extended or amended to include ESA. Thus ESA(Cont) is not covered by any reciprocal agreement (but see Part 4 of Chapter 7 of the DMG for those moving within the EC).
- 8 However, those claimants who continue to be entitled to IB after 26.10.08 will still be covered by the reciprocal agreements with other countries (see DMG 070330 and 070333).

## ESA(CONT) - RELATING TO YOUTH

- 9 For ESA (Youth provisions) a claimant must satisfy prescribed conditions of residence and presence in GB on any day included in the claim<sup>1</sup>. Claimants must
1. be ordinarily resident in GB<sup>2</sup> (see DMG 070769) **and**
  2. not be subject to immigration control<sup>3</sup> (see 070831 - 070836) **and**
  3. be present in GB<sup>4</sup> **and**
  4. have been present in GB for a period of (or periods totalling) not less than 26 weeks in the previous 52 weeks<sup>5</sup>.

*1 WR Act 07 Sch 1 para 4(1)(c); 2 ESA Regs, reg 11(1)(a); 3 reg 11(1)(b) and reg 11(3); 4 reg 11(1)(c); 5 reg 11(1)(d)*

- 10 Claimants to ESA(Cont) relating to youth, who are absent from GB on any day should, for the purposes of the residence and presence tests, be treated as resident or present in GB if on that day they are
1. in prescribed employment on the continental shelf<sup>1</sup> (see DMG 073260 - 073385)  
**or**
  2. aircraft workers or mariners<sup>2</sup> (see DMG 073260 - 073385) **or**
  3. living with a serving member of the armed forces<sup>3</sup> (see DMG 073287 and 073382) and are that person's spouse or civil partner, son, daughter, father, father-in-law, mother or mother in law<sup>4</sup>.

**Note:** References to 'in-laws' are to be read as including relationships arising through civil partnerships.

*1 reg 11(2)(b); 2 reg 11(2)(c); 3 reg 2 and Sch 1; 4 reg 11(2)(a)*

## ESA(IR) - HABITUAL RESIDENCE

- 11 The habitual residence test applies to ESA(IR) in the same way as to IS and JSA(IB). A claimant who is not habitually resident in the CTA is a person from abroad<sup>1</sup> and has an ESA(IR) applicable amount of nil<sup>2</sup>.

*1 ESA Regs, reg 70(1); 2 Sch 5, Part 1 para 11*

- 12 Regulations provide that a claimant cannot be habitually resident unless he has the right to reside in the CTA<sup>1</sup>. The CTA is the UK, the Channel Islands, the Isle of Man, and the Republic of Ireland.

*1 reg 70(2)*

- 13 Detailed guidance on habitual residence and the right to reside is in Part 3 of Chapter 7 of the DMG.

- 14 Apart from certain temporary absences from GB (see paragraphs 15 to 21 below), a claimant is not entitled to ESA(IR) unless he is present in GB<sup>1</sup>. In European law, ESA(IR) is to be treated as a special non-contributory benefit<sup>2</sup>, and thus only payable in GB. It is treated as IS until ESA(IR) can be officially listed in the new EC regulations<sup>3</sup> which are to replace Reg EEC 1408/71, probably in 2010.

*1 WR Act 07, s 1(3)(d); 2 Reg EEC 1408/71 Arts 4(2)(a) & 10a & Annex IIA entry Y(c) 3 Reg (EC) No 883/04*

## ESA(CONT) AND ESA(IR) - TEMPORARY ABSENCE ABROAD

### Short absence

- 15 A claimant will continue to be entitled to ESA(Cont) and ESA(IR) for the first four weeks of any absence from GB if
1. the absence is temporary **and**
  2. the absence is unlikely to exceed 52 weeks **and**
  3. he continues to satisfy the other conditions of entitlement to ESA<sup>1</sup>.

*1 ESA Regs, reg 152*

### Absence to receive medical treatment

- 16 A claimant will continue to be entitled to ESA(Cont) and ESA(IR) for the first 26 weeks of absence from GB<sup>1</sup> if

1. before leaving GB the claimant sought and received the permission of the Secretary of State **and**
2. the absence is temporary **and**
3. the absence is unlikely to exceed 52 weeks **and**
4. he continues to satisfy the other conditions of entitlement to ESA **and either**
  - 4.1 the absence is solely to receive treatment for a condition which started before the claimant left GB and which is directly related to the claimants limited capability for work **or**
  - 4.2 the claimant is accompanying a dependant child receiving treatment abroad.

*1 ESA Regs, reg 153(1)(a)(b)(c) & (e)*

- 17 Treatment abroad, whether for the claimant or a dependant child, must be by or under the supervision of a person qualified to provide medical treatment, physiotherapy, or similar forms of treatment<sup>1</sup>.

*1 reg 153(1)(d) and (2)*

### **Absence for NHS treatment**

- 18 A claimant will continue to be entitled to ESA(Cont) and ESA(IR) during any period of absence from GB<sup>1</sup> if
1. before leaving GB the claimant sought and received the permission of the Secretary of State **and**
  2. the absence is temporary **and**
  3. he continues to satisfy the other conditions of entitlement **and**
  4. the absence is for the claimant to receive treatment at a hospital or similar institution outside GB but provided
    - 4.1 under section 6(2) and pursuant to section 12(1) and paragraph 18 of Schedule 4 of the NHS Act 2006 **or**
    - 4.2 under section 6(2) and pursuant to section 10(1) and paragraph 18 of Schedule 3 of the NHS (Wales) Act **or**

4.3 any equivalent provision in Scotland.

*1 ESA Regs, reg 154*

### **Family member of a member of HM Forces**

- 19 A claimant will continue to be entitled to ESA(Cont) and ESA(IR) for any period of absence from GB<sup>1</sup> if
1. before leaving the claimant sought and received permission from the Secretary of State **and**
  2. the absence is temporary **and**
  3. the claimant is a member of the family of a member of HMF **and**
  4. the absence is because the claimant is living with that member of the forces.

*1 reg 155*

- 20 Member of the family<sup>1</sup> means the spouse, civil partner, son, daughter, step-son, step-daughter, father, father-in-law, step-father mother, mother-in-law and step-father. References to “step-parent and step-children and in-laws” are to be read as including such relationships arising through civil partnerships.

*1 reg 155(2)*

- 21 Member of HMF<sup>1</sup> includes the various reserve forces but only if they give full pay service - see DMG 073287 and 073382.

*1 reg 2 and Schedule 1*

### **ANNOTATIONS**

The number of this Memo (DMG Memo 38/08) should be noted against the following DMG paragraphs

070152, 070155, 070168, 070280 (heading), 070310 (heading), 070401, 070643, 070661 (heading), 070756 (heading), 071180, 071380 (heading), 071940 (heading), and 41012.

## **CONTACTS**

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, GS36, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in Memo DMG 26/08 - Obtaining legal advice and guidance from DMA Leeds.

**DMA Leeds: October 2008**