

# Technical factsheet T10 – Special cases

This factsheet considers special groups of claimants of Employment and Support Allowance (ESA) – terminally ill customers, customers who go outside Great Britain (GB), customers from abroad, customers who are pregnant or have a pregnant partner and imprisoned customers.

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## Terminally ill customers

### ■ What are Special Rules?

Special rules apply to people who are not expected to live longer than six months because of an illness i.e. terminally ill and whose claim to ESA specifically refers to terminal illness.

### ■ What is the effect of special rules on ESA claims?

Special rules will apply to customers at the outset of their claim if the customer has a progressive disease where death as a consequence of that disease can reasonably be expected within 6 months. ESA customers will automatically be placed in the Support Group where the Benefits Delivery Expert (Decision Making and Appeals) (BDE (DMA)) is satisfied the customer is terminally ill. While terminally ill customers are part of the Support Group they are a special category within that Group.

Special rules also apply to Disability Living Allowance (DLA). Terminally ill customers should also apply for DLA as soon as possible.

### ■ What evidence will be required to apply for ESA under special rules?

The BDE (DMA) will need sufficient medical evidence to confirm that a customer is terminally ill. Although a DS1500 form is not mandatory it exists for that purpose. The DS1500 form can currently only be completed by a registered doctor and the customer's claim (with or without the DS1500 form) will then be sent to the DWP Medical Services provider for advice. The decision is made by the Jobcentre Plus (JCP) decision maker.

### ■ From when does the Support Component become payable?

When the Work Capability Assessment (WCA) process confirms a customer is terminally ill the Support Component is payable from day one of the ESA claim. This is different from other customers in the Support Group who will only receive the Support Component from day 92 of their claim. If the diagnosis is made during the Assessment Phase, the Support Component will be paid from the date of that diagnosis.

## Customers outside GB

### ■ Can a customer go abroad while receiving ESA?

#### ● Temporary absence

The ESA Regulations allow a customer who is temporarily absent from GB to continue to be entitled to ESA for the first four weeks of the absence.

If a person is abroad for a temporary absence either Contributory based ESA or Income Related ESA (ESA(IR)) can be paid for a maximum of 4 Weeks Only – then ESA is normally disallowed.

Therefore the District Benefit Centres (DBC's) will deal with these cases and disallow ESA if a customer remains abroad for over 4 weeks. They will disallow ESA at the 4 week stage.

However, where a person has received the Contribution Based ESA (ESA(C)) for four weeks and the country involved is an European Economic Area (EEA) country or Switzerland then the case will be sent at that stage to International Pension Centre (IPC) for a decision on any further entitlement under the European Community (EC) Regulations.

There are special circumstances where the customer may be going abroad for the purpose of receiving medical treatment or accompanying their dependent child for this purpose. In these cases more information will be required from the customer. If the absence is allowed for medical purposes the customer will remain entitled to ESA for up to 26 weeks of their absence.

#### ● Permanent absence

If a person is going abroad permanently, ESA is not payable under the ESA Regulations and the DBC will disallow. However, if the customer is receiving Contribution Based ESA and they are going to an EEA country or Switzerland then the case will be sent to IPC for a decision on entitlement under the EC Regulations.

ESA(C) is not covered by the reciprocal agreements with non-EEA countries and Switzerland that currently cover Incapacity Benefit (IB) (Barbados; the Channel Islands; Israel; Jamaica; the Philippines; Turkey; the USA and the republics of the former Yugoslavia (applies to - Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Kosovo). ESA is not payable to persons going to live in any of the above countries.

Existing customers on IB living in those countries will continue to receive their existing benefit, so long as they continue to satisfy the entitlement conditions.

## ■ What does an absence abroad mean in ESA?

For the purpose of the ESA Regulations an absence abroad means being away from Great Britain for any period of time.

The definition of GB is:

- England
- Scotland, and
- Wales.

GB does not include:

- Northern Ireland
- The Isle of Man
- The Channel Islands.

However there are specific arrangements for customers moving to Northern Ireland which operate differently from the arrangements for other countries.

A customer's absence abroad begins on the day after the date of departure and ends on the day before the date of return.

### **Example 1**

Mr Colin Turner leaves GB on 06 November 2008 and he returns to GB on 16 November 2008.

His period of absence from GB for the purpose of ESA will be the period of 07 November 2008 to 15 November 2008.

### **Example 2**

Mrs Barbara Blunt leaves GB on 05 November 2008 and returns to GB on 30 November 2008.

Mrs Blunt's period of absence from GB for the purpose of ESA will be the period of 06 November 2008 to 29 November 2008.

## ■ Rules – What is the short absence rule?

The short absence rule applies for four weeks. It enables ESA customers to continue to be entitled to and paid ESA for that period. It requires the customer to continue to meet all the other conditions of entitlement to ESA during the absence. Under the ESA Regulations there is no need for the customer to be sick for six months prior to date of departure from GB.

## ■ **Rules – What is the absence to receive medical treatment rule?**

This rule applies for up to 26 weeks:

- Where the customer is abroad for any medical treatment of the physical or mental health condition(s) that underlies their Limited Capability for Work (LCW), or treatment appropriate to a personal injury arising out of an industrial injury.
- Where the customer has taken a dependant child abroad for the treatment of a disease or physical or mental disability by an appropriately qualified person.

The customer must seek specific permission to use this rule. The rule enables the continued entitlement and payment of ESA. The rule requires the customer to continue to meet all the other conditions of entitlement to ESA during the absence.

## ■ **Rules – What is the NHS Treatment temporary absence rule?**

This rule:

- enables the continued entitlement and payment of ESA during an unlimited period of NHS treatment abroad
- requires the customer to seek specific permission to use this rule
- requires the customer to continue to meet all the other conditions of entitlement to ESA during the absence.

## ■ **Rules – Can a customer claim ESA for a Period of Limited Capability for Work that commenced abroad?**

Although a customer may claim ESA for a Period of Limited Capability for Work (PLCW) that commenced whilst they were abroad there is nothing in the ESA Regulations to assist a claim in these circumstances.

However, if a customer claims ESA(C) for a period of LCW that commenced in an EEA country or Switzerland then the case must be referred to the International Pension Centre (IPC) at Tyneview Park, Newcastle to consider if the EC Regulations apply. These regulations apply to countries that are members of the European Economic Area and Switzerland.

■ **People living abroad –  
Will people abroad be able to claim ESA?**

ESA(C), in the same way as contributory incapacity benefit, will be paid to people within the European Economic Area and Switzerland provided they satisfy the National Insurance contributions in Great Britain and meet the other conditions for entitlement to benefit.

ESA(C) is not covered by the reciprocal agreements with non-EEA countries and Switzerland that currently cover IB (Barbados; the Channel Islands; Israel; Jamaica; the Philippines; Turkey; the USA and the republics of the former Yugoslavia (applies to - Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Kosovo). No claims for ESA can be made from those countries under the agreements.

## Customers from abroad

### ■ Can people coming from abroad claim ESA?

A customer who has worked abroad may claim ESA(C) if they have:

- paid enough UK National Insurance Contributions (NICs) in the past (or the equivalent in other EEA countries or Switzerland) or
- worked abroad for an employer based in the UK and paid National Insurance Contributions as an employee during the first 52 weeks of that employment

Anyone who has paid a UK contribution since their return to GB can rely on the EC Regulations and insurance periods in other Member States in order to help satisfy the contribution conditions for ESA(C) in a similar way as they currently do for IB. These cases should be referred to International Pension Centre for advice.

ESA(C) is not covered by reciprocal agreements with other countries and insurance periods in those countries cannot therefore help in claims for ESA(C).

ESA(C) is not covered by the reciprocal agreements with non-EEA countries and Switzerland that currently cover IB (Barbados; the Channel Islands; Israel; Jamaica; the Philippines; Turkey; the USA and the republics of the former Yugoslavia (applies to - Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Kosovo). A customer who has worked for abroad in one of those countries for a UK based employer may nevertheless be covered by the rules described above and be able to claim ESA(C).

Anyone coming to the UK from abroad, either as a returning UK national, a European Economic Area (EEA) national, or Swiss national, may remain in the UK and claim ESA subject to them meeting certain conditions. For ESA(IR) these conditions are called the Habitual Residence Test (HRT).

### ■ What is the Habitual Residence Test?

Customers must show they have the right to reside as well as being habitually resident in the UK, Channel Islands, Isle of Man or the Republic of Ireland.

Applicants who do not satisfy this test are known as Persons From Abroad and are not entitled to Employment and Support Allowance (Income Related) (ESA(IR)).

The test is in two parts:

**Step One:** A test of the right to reside in the UK or Common Travel Area (CTA) is applied to everyone who claims ESA(IR).

A customer who does not have a right to reside in the UK is not habitually resident in the CTA and is known as a Person from Abroad. **[NB: Please note that the 2 year rule has been removed from the right to reside aspect of the habitual residence test]**

**Step Two:** A test of habitual residence in the UK. This is only applied to people who have a right to reside and who have arrived or returned to live in the UK within two years of claiming benefits. People who demonstrate a right to reside but who have been in the UK for more than two years are not subject to the second step of the test.

## ■ What is The Right to Reside test?

Anyone who has arrived in the UK from abroad and claims ESA will need to provide the correct documents to show they have the right to reside in the UK. Anyone who fails to provide any documentary proof or whose evidence shows that they do not have the right to reside is not eligible for ESA. If the customer has shown that they do not have the right to reside, the application is closed at this stage without considering the second part of the test, the Habitual Residence Test.

## ■ Habitual Residence Test – What is the second stage of the Habitual Residence Test?

All applicants who satisfy the Right to Reside test will also have to show that they are habitually resident in the Common Travel Area. Anyone who fails to satisfy the second part of the Habitual Residence Test will not be eligible for ESA(IR). The applicant must be treated as habitually resident in the UK or actually resident in the CTA to receive ESA.

For a person to actually be habitually resident, it is not sufficient that the person came to this country voluntarily and for settled purposes. The person must show residence for a period which demonstrates that the residence has become and is likely to remain, habitual.

## Imprisoned customers

### ■ Can a customer in prison receive ESA?

The general rule is that a customer does not get ESA as a prisoner. A customer would normally be –

- disqualified for receiving ESA(C) (but see Exception to the disqualification rule for ESA(C)); and
- disentitled to ESA(IR) (but see Remand Prisoners).

Imprisonment includes detention in a young offender institution, a secure training centre and secure accommodation in a children's home.

A period of detention in custody begins on the day on which a person is detained. The day of release from detention is not classed as a day of detention.

The rules on imprisonment apply whether the person is imprisoned in Great Britain or anywhere else in the world.

### ■ Are there any exceptions to the disqualification rule for ESA(C)?

A person is not disqualified for receiving ESA(C) if their imprisonment or detention in legal custody is –

- in connection with civil rather than criminal proceedings; or
- if on appeal the sentence is quashed or replaced by some other form of punishment (for example, community service).

A person disqualified for receiving ESA(C) cannot be credited with NI contributions either.

### ■ What happens to remand prisoners?

A person held on remand pending trial or sentence following a criminal charge is not disqualified for receiving ESA(C). Instead payment of benefit is suspended until court proceedings are concluded. If a sentence is imposed, the period during which the individual was held on remand will count towards the period of disqualification. If no sentence is imposed, payment will be reinstated and arrears paid.

A claimant or partner held on remand cannot be treated as being a member of the household. For the purposes of ESA(IR), a person held on remand pending trial or sentence is classed as a prisoner. However they may be eligible for housing costs only.

### ■ **Release from prison – is a new claim needed?**

If a customer was entitled to ESA(C) upon being imprisoned and is released after serving six weeks or less, a new claim is not required, provided the conditions of entitlement were satisfied throughout the period of imprisonment. In these circumstances the admission into, and release from, prison is a relevant change of circumstances. Upon release payment of ESA(C) should be reinstated.

A customer held on remand and entitled to housing costs would not need to make a new claim if released without a sentence being imposed. In all other circumstances a new claim for ESA(IR) would be needed as entitlement would have ceased upon admission. A new claim to ESA can be made either at the local Jobcentre or through the Contact Centre.

### ■ **What happens to psychiatric patients held in legal custody?**

Patients held in legal custody in a psychiatric hospital or unit are eligible for ESA in the normal way unless they have been–

- transferred from prison under section 47 of the Mental Health Act 1983 or section 136 of the Mental Health (Care and Treatment)(Scotland) Act 2003; or
- given a prison sentence by a court but directed to hospital for treatment for mental disorder under section 45A of the Mental Health Act 1983 or section 59A of the Criminal Procedure (Scotland) Act 1995.

A patient held under sections 45A or 47 of the Mental Health Act is eligible for ESA when they reach the date recorded on a certificate sent by the Ministry of Justice. This certificate should indicate the date on which then person would have been expected to be released from prison if it were not for their mental disorder. A date is given in cases where the person was given a determinate sentence; this procedure does not apply to those with a life sentence.

If there is entitlement to ESA a letter should be sent to the Secretary of the Area Health Authority (AHA), asking if the patient is able to manage their own affairs.

If the reply from the Secretary of the AHA states that the customer is able to manage their own affairs, action should continue as normal. If the customer is unable to manage their own affairs DWP would normally appoint a person to act for that individual for benefit purposes (an “appointee”). An appointee could be an individual such as a spouse, family member or friend. It could also be a corporate body such as the AHA.

## Customers and pregnancy

### ■ What is the impact of pregnancy on ESA?

When customers claim ESA the Customer Service Agent will ask the customer a series of questions regarding pregnancy to determine if they are expecting a baby or they have recently had one. The week in which a baby is due is known as the Expected Week of Confinement (EWC).

The Benefits Delivery Officer (BDO) needs to find out if a customer was employed on any day in the 15th week before the week the baby is due. This is because they may be entitled to Statutory Maternity Pay (SMP).

### ■ What is Statutory Maternity Pay? How does it affect ESA?

Statutory Maternity Pay (SMP) is a payment made by employers to qualifying women employees or former employees. SMP is payable for 39 weeks. This 39 weeks period is called the Maternity Pay Period (MPP).

If a customer is in receipt of ESA(IR) and becomes entitled to SMP from their employer the amount of SMP paid during the MPP will be taken into account as other income.

A customer is not entitled to ESA(C) at the same time as being entitled to SMP unless the day immediately before the customer's MPP, they were in a Period of Limited Capability for Work (PLCW) and satisfied the contribution conditions for ESA(C). They must also continue to submit medical evidence of their incapacity if required for ESA purposes.

If a customer is in receipt of ESA(C) and becomes entitled to SMP from their employer, the action the Benefit Delivery Officer takes depends on whether the SMP exceeds their ESA(C) rate or not.

If SMP exceeds the customer's rate of ESA(C) payable, ESA(C) will be paid up to and including the day before the start of the MPP.

If SMP is less than the customer's rate of ESA(C) payable, the rate of ESA(C) will be the rate after deduction of SMP.

As the customer cannot receive full payment of both ESA(C) and SMP, the case will have to be referred to the BDE (DMA) for a decision. SMP is not an overlapping benefit and therefore should not be treated as one. The decision maker will also need to consider the amount payable when the rate of ESA changes at the 14<sup>th</sup> week and uprating.

## ■ **What is Maternity Allowance? How does it affect ESA?**

If the customer is not entitled to Statutory Maternity Pay from any employer or is self employed or has been recently employed they can on or after the 14th week before the expected week of confinement make a claim for Maternity Allowance (MA).

If the customer qualifies for MA, and is unemployed at the 11<sup>th</sup> week before her EWC her MA must start at the beginning of the 11<sup>th</sup> week

If the customer qualifies for MA and is employed or self-employed on or after the 11<sup>th</sup> week before her EWC, she can choose the date from which her MA starts. The latest date it can start is the day after the baby is born. But it must start in the 4 weeks before her EWC if her incapacity is wholly or partly related to pregnancy.

A customer cannot receive full payment of both ESA(C) and MA. If a customer claims MA whilst receiving ESA(C) the case will be referred to the BDE (DMA) for an overlapping benefit decision. This decision will be for the duration of the Maternity Allowance Period (MAP). The decision maker will also need to consider the amount payable when the rate of ESA changes at the 14<sup>th</sup> week and uprating.

### ● **Customer claims MA but has not made a claim to ESA**

Where a woman makes a claim for MA and qualifies and the rate payable is less than the rate of ESA ( C), the ESA processor will establish whether the woman would satisfy the ESA contribution condition for the start of the woman's Maternity Allowance Period (MAP). If she does, MA will be 'topped-up' to the ESA(C) rate by payment of ESA(C) for the duration of her MAP.

In this circumstance, the woman will not complete an ESA claim form and she does not need to provide medical evidence. The maternity certificate, form MATB1 which is required to confirm the date her baby is due for MA, is sufficient evidence for ESA in this circumstance

If at the end of her MAP she is incapable of work she would have to submit a claim form for ESA.

### ● **Customer is not entitled to MA**

Where a woman does not qualify for MA and has not made a claim to ESA, the ESA processors must consider whether she would be entitled to ESA(C).

The ESA processor needs to establish whether the woman would satisfy the ESA contribution condition at the beginning of the 6<sup>th</sup> week before the week the baby is due. If she does, ESA(C) will be payable from the 6<sup>th</sup> week before the week the baby is due and will end 14 days after the date of confinement.

In this circumstance, the woman will not complete an ESA claim form and she does not need to provide medical evidence. The maternity certificate, form MATB1 which is required to confirm the date her baby is due for MA, is sufficient evidence for ESA in this circumstance.

If she is incapable of work after this period she would have to submit a claim form for ESA.

## ■ **Entitlement – How does pregnancy affect the Work Capability Assessment?**

The normal conditions of entitlement still apply, such as the requirement to provide medical evidence and participate in the Work Capability Assessment (WCA).

In some circumstances a pregnant customer is treated as having Limited Capability for Work (LCW) where:

- there is serious risk of damage to the health of the customer or unborn child, or
- the customer is within the 39 week MAP and is not disqualified from receiving MA, or
- on any day beginning six weeks before the EWC or the Actual Date of Confinement (ADC) whichever is the earlier, and ending on the 14th day after the ADC, if they are not entitled to MA or SMP.

In these circumstances the customer will not be required to undertake the face-to-face LCW assessment.

## ■ **Does Statutory Maternity Pay or Maternity Allowance affect ESA(IR)?**

If a customer in receipt of ESA(IR) becomes entitled to SMP or MA the amount of SMP or MA paid will be taken into account as other income.

## **Disclaimer**

This leaflet is only a guide and does not cover every circumstance. We have done our best to make sure that the information in this leaflet is correct as of December 2008. It is possible that some of the information is over simplified, or may become inaccurate over time, for example because of changes to the law. Names in the examples have been used for illustrative purposes only. The rates mentioned in these factsheets are applicable to December 2008 and may change thereafter.