

# ***Making an exception***

- *Martin Williams takes a look at preparing appeals in cases involving the work capability assessment where the argument concerns the risk of substantial harm to the claimant or another person in the event they are not found to have limited capability for work (or work-related activity).*

Under regulation 29 of the Employment and Support Allowance Regulations those who fail to achieve 15 points from Schedule 2, must still be treated as having limited capability for work (“LCW”) if they suffer from some specific bodily or mental disablement which means there would be a substantial risk to their health, or the health of another person, if they were found not to have LCW.<sup>1</sup>

As Judge Ward recently observed in *RB v SSWP (ESA)* [2012] UKUT 431 (AAC) the “more onerous the points based regime becomes, the more cases are likely to require attention to be given to the terms of regulation 29”: in other words, with so many people failing to obtain 15 points, due to the bar for scoring descriptors being set so high, and continually being raised higher as the points regime is toughened up, more and more of them have nothing to argue except that a finding of no LCW would create a substantial risk to health. It is therefore important that advisers are equipped with a sound knowledge of the legal meaning of the test and the practical issues in preparing cases.

## **Reg 29: the test**

As ever in social security law, advisers will need to pay close attention to the actual wording of the legal test in preparing and setting out a claimant’s case that they are within the Reg 29 exemption. Regulation 29(1) provides that a person to whom either of the conditions in paragraph (2) applies and who does not achieve 15 points under the usual assessment falls to be treated as having LCW. A claimant will fall within the exemption discussed in this article (regulation 29(2)(b)) when s/he:

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<sup>1</sup> Reg 29 also protects those suffering from life threatening diseases in certain circumstances – such cases are outside the scope of this article.

(b) [...] 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.

Amendments in force from 28<sup>th</sup> January 2013 provide that, unless the claimant was sent an ESA50 form that did not incorporate the changes to the work capability assessment from that date<sup>2</sup>, the rule will not apply where the risk could be significantly reduced by reasonable adjustments being made in the claimant's workplace, or the claimant taking prescribed medication with the aim of managing their condition (see *bulletin 232 p6* <http://www.cpag.org.uk/content/wca-changes-again> for more details on the WCA changes from 28<sup>th</sup> January).

### ***“Specific disease or [...] disablement”***

The claimant must have some specific disease or bodily or mental disablement which would cause the substantial risk were they to be found not to have LCW. To score points under the assessment it is also a requirement that the reason the claimant scores the points is due to such a specific disease or disablement. A recent three judge panel of the Upper Tribunal considered this requirement in the context of scoring points and helpfully concluded that it will be rare for this to be an issue on which an appeal turns (*JG v SSWP (ESA)* [2013] UKUT 037 (AAC)). However, advisers should still be careful to explain how the problems a claimant would experience if found not to have LCW are due to their diagnosed health problems.

### ***“substantial risk”***

For reg 29 (or reg 35- see below) to apply then the risk to health must be “substantial”. In assessing whether a risk is substantial, regard should be had both to the likelihood of an occurrence and the nature of the harm that might result in the event of an occurrence.<sup>3</sup> In one Upper Tribunal case, an increase in the frequencies of exacerbations of pain was sufficient to count as substantial harm.<sup>4</sup>

### ***Risk must arise from being found capable of work***

The substantial risk to health has to exist as a possible consequence of the claimant being found not to have LCW. But what does it mean to consider what would happen if the claimant were found not to have LCW? The decision of the Court of Appeal in *Charlton v SSWP* [2009] EWCA Civ 42 considered the predecessor provision to reg 29(2)(b) that applied in incapacity for work cases and provides the answer to this question<sup>5</sup>. *Charlton* and the subsequent caselaw set out four situations in which a finding a claimant does not have LCW may pose a substantial risk to health due to:

- the mere communication of the decision;
- the consequences of having to sign on for jobseeker's allowance;
- having to perform the sort of work the claimant could be expected to get;

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<sup>2</sup> Although any decision made from 28<sup>th</sup> June 2013 will include the “reasonable adaptations” requirement regardless of what form was issued.

<sup>3</sup> CIB/3519/2002, CIB/1064/2006

<sup>4</sup> *JW v SSWP (ESA)* [2011] UKUT 416 (AAC)

<sup>5</sup> The Court in *Charlton* commented its ruling would be relevant to decisions on reg 29 – this is confirmed in *JW v SSWP (ESA)* and other cases..

- travelling to work.

### **Risk from communication of decision**

The Court in *Charlton* highlighted that in some cases (but probably not many) the mere giving of a negative decision may in itself create a substantial risk that would mean reg 29(2)(b) was satisfied:

“where the very finding of capability might create a substantial risk to a claimant’s health or that of others, for example when a claimant suffering from anxiety or depression might suffer a significant deterioration on being told that the benefit claimed was being refused” (para 34).

### **Risk from having to claim JSA**

Following *Charlton*, the Upper Tribunal has also highlighted that one must look at the potential effect on a claimant of them having to claim jobseeker’s allowance in the event they are found not to have LCW. In *IJ v SSWP (IB)* [2010] UKUT 408 (AAC) (confirmed in *CF v SSWP (ESA)* [2012] UKUT 29) the Judge commented about this issue in the case before him as follows:

“In the present economic climate, a claimant who is 62 years old with mental health problems, and who has not worked since the early 1990’s, is unlikely to find work quickly and would very possibly never find it. His GP’s assessment that it is inconceivable that he would ever be able to earn his living may be right. The tribunal would then have to determine how this change from his being in receipt of incapacity benefit would affect the claimant’s mental health, looking not at some work he may do, but at the effect on his mental health of fruitless and repeated interviews and the possibly hopeless pursuit of jobs until he reached retirement age.”

In both this type of case and in cases where there is risk arising from mere communication of the decision, the requirement, post 28<sup>th</sup> January 2013, to consider whether risk would be reduced by significant adaptations to the workplace will not be relevant as the substantial risk is regarded as arising before one moves to consider the effect on health of the claimant actually being in a workplace.

### **Risk for performing the sort of work the claimant could get**

In most cases, the issue of substantial risk is to be approached by considering the risks that would exist if the claimant were to be employed doing the actual work that particular claimant would be likely to have to do if they were found not to have LCW. As the Court holds, the test:

“requires the decision-maker to assess risk in the context of the work or workplaces in which the claimant might find himself”

The level of specificity required in identifying the content of the work and the features of the workplace in which the claimant might find him or herself all depends on the circumstances of the case. The Court of Appeal in *Charlton* endorsed the following words of Deputy Commissioner Paines in CIB/360/2007:

"17. The degree of detail in which [the consequences of a finding that the claimant is capable of work] will need to be thought through will depend on the circumstances of the case... A tribunal will have enough general knowledge about work, and can elicit enough information about a claimant's background, to form a view on the range or types of work for which he is both suited as a matter of training or aptitude and which his disabilities do not

render him incapable of performing. They will then need to decide whether, within that range, there is work that he could do without the degree of risk to health envisaged [...].”

In *RB v SSWP* the First-tier Tribunal had simply found that “there was no evidence to suggest that any of the exceptional circumstances applied such as to justify an award on circumstances where the points based requirement was not met”. Judge Ward found that in the context of the case, as it was not immediately obvious what work the claimant could do, the failure to consider the range of work he could do was an error. There are some cases where any work would pose a substantial risk<sup>6</sup> but it is suggested that the majority of cases will require identification of the range of work a claimant could do as preliminary to considering the risk that would arise.

Advisers should note however, that the risk must arise directly as a consequence of performing the work itself. In *MB v SSWP (ESA)* [2012] UKUT 228 (AAC), Judge Jacobs rejected an argument that a claimant with addiction problems would incur substantial risk to health due to increased drug use that could be achieved if he had more income available from having employment as too indirect a connection.

### **Risk from travelling to work**

It is clear from cases such as *CSIB/33/2004* and *CSIB/719/2006* that the substantial risk may arise not just from the duties a claimant would have to perform at work but also from the consequences of having to be in work. The example given in those cases are a risk due to having get up quickly in the mornings to go to work rather than being able to pace oneself.

### ***Preparing cases***

In *Charlton* the Court of Appeal state that the information needed to enable the decision maker or Tribunal to identify the range of work a claimant might be expected to perform and go on to determine whether doing such work would create a substantial risk:

“may be elicited by reference to the claimant's completion of the initial questionnaire, questioning during his medical examination, or by any evidence he may choose to give on an appeal to the Tribunal”.

However, the initial questionnaire completed by the claimant (ESA50) does not specifically explain to a claimant that such information is relevant. Indeed, the report of the medical examination (recorded on form ESA85) also seldom if ever contains any evidence that would allow a decision maker to make findings of fact about the range of work a claimant may be able to do. In effect this means that in the great majority of cases, it will not be until an appeal that the issue receives its first meaningful consideration. In these circumstances, advisers acting for claimants in disputes about LCW should:

- Consider whether the case is one where the mere fact of the negative decision or the possibility of having to claim JSA is such as to present a substantial risk.
- Seek evidence from the claimant (their statement about their work history, previous training, fears about the effect of work on their health etc) to assist the tribunal to make the findings demanded by *Charlton*.

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<sup>6</sup> See *Cattrell v SSWP* [2011] EWCA Civ 572 and the suggestion that this may apply to claimants undergoing intensive drug/alcohol rehabilitation programmes which they would be unable to complete if found not to have LCW in *JW v SSWP*

- Seek corroborative evidence from GPs and other health care professionals on the risks to health if the claimant were to do the type of work identified above.
- Be prepared to argue that the opinion of the Health Care Professional on whether Reg 29 applies, as expressed in the ESA85, should be given little weight given it is not based on asking the questions which the Court held to be relevant in *Charlton*.

## Regulation 35- support group exception

Regulation 35 sets out a similar test which governs access to the support group for those to whom none of the descriptors in Schedule 3 of the Regulations apply: such claimants are to be treated as having “limited capability for work related activity” if a failure to treat them in this way would mean there was a substantial risk to the claimants mental or physical health of any person.

However, although the question of when there will be a substantial risk to the health of a person if the claimant is found not to have limited capability for work related activity (“LCWRA”: eg if found not to be in the support group), is worded in a similar way the considerations involved in arguing this applies at appeal are different and it does not, thus far, seem to have produced much caselaw. However, getting into the support group is increasingly important to claimants. It enables them to avoid the time-limiting of contributory ESA, to escape the requirement to participate in work related activity with the attendant risk of sanction and provides an exemption to the benefit cap. Judge Jacobs has recently considered the proper application of reg 35 in *AH v SSWP (ESA)* [2013] UKUT 118 (AAC).

Judge Jacobs holds that, on analogy with *Charlton* the question to be asked is what would be the effects on the health of the claimant (or another) if the claimant were required to perform the sort of work related activity which the claimant would be likely to have to do if they were not in the support group. He set aside the decision in the case before him because the tribunal had no evidence about work related activity the claimant might be asked to do on which to answer that question.

In another recent decision, *ML v SSWP (ESA)* [2013] UKUT 174 (AAC), Judge Jacobs makes clear that because the emphasis in reg 35 is on risks arising from work related activity, rather than risks arising from work, then one cannot simply read off whether reg 35 applies from the view taken on reg 29: he states that a passage to the contrary from the *Medical Services Handbook for ESA* is incorrect. It is also worth noting that in this case, the Judge held that the claimant was not within reg 35 despite having only the “general, formulaic statements” about the content of work related activity: clearly there are cases where the claimant’s health is such that there would be no risk from any conceivable work related activity.

Judge Jacobs also comments further in *ML v SSWP* on the failure of the Secretary of State to include further detail on work related activity in his response to appeals:

“I accept that it is not possible to say in advance what precisely would be expected of any particular claimant. However, it must be possible to give a sufficient indication of what is involved in order to allow a claimant to provide evidence and argument, and to allow a tribunal to make a decision. The decision whether or not a claimant satisfies the conditions for the support group carries the right of appeal to the First-tier Tribunal under section 12 of the Social Security Act 1998. It is not one of those decisions that are excluded from the right of appeal. The existence of a statutory right of appeal requires that it must be effective. It cannot be effective without the necessary information for claimants to participate in the appeal and for the tribunal to make a decision.”

It is likely that following that criticism, advisers might start to see more detailed descriptions of work related activity in responses to appeals: if they are not present it might be worth asking for them to be provided.

However, even if that happens, the absence of specific description of the work related activity a particular claimant would have to do, when the test following *Charlton*, holds that such might be needed, does pose problems. As Judge Jacobs makes clear, whilst in applying the reg 29 test tribunals will have enough general knowledge about work to be able to address the issue that arises there, it is unlikely that tribunals will have much general knowledge about the content of the work related activity a claimant would be asked to do if not in the support group. In *AH v SSWP* the Judge comments that only the Secretary of State can provide that evidence. However, it is suggested that this may be difficult for the DWP, given the “black box” approach to the content of the Work Programme provided they have taken. Work related activity is provided by a multi-tiered system of private and third sector contractors which means that the content of work related activity provided will vary depending on the provider and the perceived needs of a particular claimant.

Advisers however, may be in a better position to provide evidence. Advice agencies are likely to see a lot of claimants participating in the Work Programme in their particular area. It may be possible for such agencies to draw up a witness statement for use in appeals that raise the reg 35 issue which sets out, based on the experience of advising these claimants and their instructions, what the content of the work programme is locally, the degree to which local providers are flexible and respond to the particular needs of claimants and so on. For example, if advice agencies have seen situations where claimants who suffer from anxiety in social situations are asked to participate in group workshops under threat of sanction and providers are unwilling to relax that requirement or to offer alternative provision that may well be relevant to assessing the risks for a particular claimant.

## Conclusion

Given the high threshold for a claimant to obtain 15 points from the LCW assessment or be placed in the support group advisers are likely to see claimants for whom the only argument that can be made is that they fall within the reg 29 and/or reg 35 exception. The failure of the DWP to illicit evidence relevant to whether these exceptions apply, must mean many cases are wrongly decided. However, this also means that advisers must be prepared to gather evidence relevant to the legal tests at issue and explain the relevant points to the tribunal.

-Martin Williams