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Making an exception: Regs.29 Reg.35 in ESA cases

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Exceptional cases:

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- Reg 29 can help people who do not score 15 points under the LCW test (or otherwise count as having LCW) to still be treated as having LCW where there would be a risk to health if they were found fit for work.
- Reg 35 helps people who do not meet any of the descriptors for having LCWRA (or otherwise count as having LCWRA) to still be treated as having LCWRA in a similar way.
- This workshop takes a detailed look at these two rules and offers some tips for arguing they apply in appeal cases.

Why it is important to understand these rules:

- "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"
  - Judge Ward in *RB v SSWP (ESA)* [2012] UKUT 431 (AAC)

- a similar point can be made regarding regulation 35, given:
  - the time limiting of cESA for those not in the support group; and
  - the increased sanction amounts (from 03/12/2013) for failing to participate in work related activity

Reg. 29(1) and (2)(b):

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29.-(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) […]

(b) the claimant suffers from some specific bodily or mental disablement and by reason 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.

Reg. 29 and reasonable adjustments

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- From 28th January 2013, reg. 29 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
  - *Note this does not apply if claimant not sent an ESA50 that incorporates this change.*
  - *However, from 28th June 2013 all decisions, regardless of which ESA50 issued will include the "reasonable adaptations".*
- *This is problematic as we know in reality employers often don't make adjustments…*

Reg. 35(2) :

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35.-(1) […]

(2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 34(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.

Structure of the rules

- Both reg.29 and reg.35 require the risk to arise in consequence of:
  - a “specific disease or […] disablement”;
  - that may manifest itself if the claimant found not to have LCW (reg.29) or LCWRA (reg.35)
- Similarly, both regs. require the risk to be “substantial”.

“specific disease or […] disablement”

- The risk must arise because of a specific disease or disablement.
- Advisors should therefore ensure they concentrate on how it is the claimant’s health problems that cause the risk.
- Note however, that in *JG v SSWP (ESA)* [2013] UKUT 37 (AAC) a three-judge panel of the Upper Tribunal concluded (in respect of point scoring) that in most cases the limitations will clearly be the cause.

“substantial risk”

- Regard should be had to:
  - Likelihood of an occurrence; and
  - Nature of the harm that might result in the event of an occurrence.
    - *CIB/3519/2002* and *CIB/1064/2006*
- Eg:
  - It is possible for something that is relatively unlikely to happen to still count as substantial risk if, should it happen, there would be very significant harm; or
  - A risk can still be substantial if the harm when it materialised is likely to be less than in above example provided the chances of If something is quite likely to happen often but would cause

Reg.29: risk must arise from being found capable of work

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- Risk must arise as a possible consequence of claimant being found not to have LCW.
- Question: What does that mean?
- Answer: Usually it means risk arises from claimant having to do the sort of work they could be expected to get.
  - *Charlton v SSWP* [2009] EWCA Civ 42 (about the similar test for incapacity for work but held to apply equally to reg.29 ESA Regs in *JW v SSWP (ESA)* [2011] UKUT 416 (AAC))

Reg.29: risk must arise from being found capable of work

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- There are actually four different ways identified in the caselaw through which a risk might exist if the claimant found not to have LCW:
  - Risk possible due to mere communication of the decision
  - Risk possible due to consequences of having to sign on for JSA
  - Risk possible due to having to perform the sort of work the claimant could be expected to get
  - Risk possible due to travelling to work

Reg.29: risk from communication of decision

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- 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).

Reg.29: risk from having to claim JSA

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"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."

- *IJ v SSWP (IB)* [2010] UKUT 408 (AAC) (confirmed in *CF v SSWP (ESA)* [2012] UKUT 29)

Reg.29: risk from having to claim JSA/mere communication of decision

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- The requirement, post 28th January 2013, to consider whether risk would be reduced by significant adaptations to the workplace will not make a difference in a case where risk arises from:
  - Mere communication of decision; or
  - Effects of having to claim JSA.
- This is because the substantial risk is regarded as arising before one moves to consider the effect on health of the claimant actually being in a workplace.

Reg.29: risk from having to perform sort of work claimant might get

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- This will be the most common situation.
- *Charlton* held that the test:
  - "requires the decision-maker to assess risk in the context of the work or workplaces in which the claimant might find himself"
- Note though risk must arise directly as a consequence of work- not sufficient, for example, that claimant would drink more if had more income from work-
  - *MB v SSWP (ESA)* [2012] UKUT 228 (AAC)

Reg.29: risk from having to perform sort of work claimant might get

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- To what extent will this require detailed findings about the work claimant can do?
- *Charlton* endorsed this bit of 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 […]."

Reg.29: risk from having to perform sort of work claimant might get

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- 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".
- UT held: 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 (*SSWP v Cattrell* [2011] EWCA Civ 572- latex allergy, or *JW v SSWP*- intensive drug/alcohol rehab). Majority of cases need to consider range of work a claimant could do as preliminary to considering the risk.

Reg.29: risk from travelling to work

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- 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-
  - *CSIB/33/2004* and *CSIB/719/2006*
- 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.

Reg.29: Preparing cases

- What is their in ESA50 or ESA85 that helps answer *Charlton* questions?
- Advisers should:
    1. Consider if mere fact of the negative decision or the possibility of having to claim JSA presents risk.
    2. 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*.
    3. 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.
    4. Argue that the opinion of the Health Care Professional on whether Reg 29 applies in the ESA85 should be given little weight: it is not based on asking the questions which the Court held to be relevant in *Charlton*.

Reg.35: a reminder

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THIS TEST IS NOT THE SAME AS THE REG 29 TEST!

35.-(1) […]

(2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 34(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.

Reg.35: what is this test about?

- One cannot simply read off the result from reg.29:
  - The former is concerned with the risk of work; the latter is concerned with the risk of work-related activity. There is no reason why the former should automatically be determinative of the latter. This will depend on: (i) the nature of the claimant's condition; (ii) its effects; and (iii) the nature of the work-related activity. It may be that the condition will give rise to the same risk whether the claimant undertakes work or work-related activity. Or it may give rise to different risks. Or it may give rise to risk in respect of one but not the other.
    - *ML v SSWP (ESA)* [2013] UKUT 0174(AAC)
- The *Charlton* test must be modified as follows:
  - The decision-maker must assess the range or type of work-related activity which a claimant is capable of performing and might be expected to undertake sufficiently to assess the risk to health either to himself or to others.
    - *AH v SSWP (ESA)* [2013] UKUT 118 (AAC)

Reg.35: to apply the test you need evidence!

- Para 27, *AH v SSWP*:
  - The evidence is the key […]. It consists of two elements and there must be appropriate evidence relevant to each element. The elements are the nature of the work-related activity and the claimant's health.
- Para 31, *AH v SSWP:*
  - The nature of the claimant's disabilities will determine the nature of the evidence that the tribunal needs in order to decide whether regulation 35(2) applies. Broadly, there are two possibilities. In some cases, the tribunal will need only general information in order to decide that a particular claimant does or does not satisfy section 35(2). For example: a claimant whose only disability is restricted mobility should have no difficult in attending an interview or an appropriate course. In other cases, the tribunal will need evidence on the specific nature of the activity that the claimant would have to undertake.

Reg.35: how much evidence about work-related activity?

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- Para 31, *AH v SSWP:*
  - The nature of the claimant's disabilities will determine the nature of the evidence that the tribunal needs in order to decide whether regulation 35(2) applies. Broadly, there are two possibilities. In some cases, the tribunal will need only general information in order to decide that a particular claimant does or does not satisfy section 35(2). For example: a claimant whose only disability is restricted mobility should have no difficult in attending an interview or an appropriate course. In other cases, the tribunal will need evidence on the specific nature of the activity that the claimant would have to undertake.

Reg.35: where to get evidence on work related activity?

- Para 28, *AH v SSWP:*
  - The evidence on the work-related activity can only come from the Secretary of State.
- In this case the evidence from the SSWP was very general in nature.
- Their was a detailed argument for the claimant about how being on the work-programme would affect fatigue levels etc:
  - The tribunal could not have dealt with that argument without having some specific evidence of the type of activity that Mr H might be expected to undertake. Just to take a couple of examples: What type of adjustments might be reasonable in Mr H's case? What sort of support would the Advisor be able to provide for him? In the absence of that evidence, it was unable to decide how regulation 35(2) applied. Its decision that it did not was not soundly based in evidence.

Reg.35: the SSWP must try to provide evidence

- Para 15 *ML v SSWP*:
  - "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."

Reg.35: can advisors provide evidence?

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- Clearly it is difficult for the SSWP to provide evidence given his “black box” approach.
- If advisors see many people who are on the work-programme, perhaps they could prepare a statement as to what it consists of locally?
  - Are local providers flexible?
  - Do they make adjustments for claimants?
  - How many hours a week do claimants attend?
  - Are their group meetings which particular claimants might find difficult?
  - Have claimants been unreasonably sanctioned?
  - Are claimants told (wrongly) that they have to apply for work?

Good luck making exceptions!

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