

aiac

**Association of Independent Advice
Centres (NI)**

Social Policy Briefing

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SUPPLEMENTAL

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Incapacity Benefit

Changes to forms and leaflets which have been shown to directly impact upon a claimant's ability to qualify for benefit

In the Spring 2003 Social Policy Briefing Paper we have made the points that the qualifying conditions for contributory benefits are tightening and that overall government spending on contributory benefits has been seen to become relatively less important over the 1978/79 to 2001/02 period.

This can be seen particularly in relation to what was called Sickness & Invalidity Benefit. The less generous Incapacity Benefit was introduced in 1995, with a tighter focus on the qualifying conditions for benefit.

Apart from these legislative changes, there have also been significant changes to the layout of forms and literature regarding Incapacity Benefit which have served to further impact upon a claimant's ability to qualify for benefit.

Background

In order to qualify for Incapacity Benefit, a claimant must be incapable of work or treated as incapable of work. The question of whether a claimant is incapable of work is determined by one of two tests:

- The 'own occupation test' which applies for the first 28 weeks of the claim if you have a regular occupation when you fall ill;
- The 'personal capability assessment' which applies after 28 weeks, or from the start of your claim if you do not have a regular occupation when you fall ill;

The own occupation test refers to your ability carry out tasks which you would reasonably be expected to do in the course of your usual occupation.

The personal capability assessment is an assessment of your ability to perform prescribed activities and this is scored on a points basis. There are two lists of activities: one physical and the other mental and these are set out in Schedule to the Social Security (Incapacity for Work) (General) Regulations 1995.

http://www.hmso.gov.uk/sr/sr1995/Nisr_19950041_en_9.htm

The Schedule sets out the activities which you will be assessed against and the scoring system in relation to each of the activities.

Changes to the layout of forms and literature

Let us now examine the inconsistency between the wording as laid down in legislation in comparison to the wording within Social Security Agency forms and leaflets.

The personal capability assessment activities as set out in the Schedule are:

- (1) Walking on level ground with a walking stick or other aid if such aid is normally used
- (2) Walking up and down stairs
- (3) Sitting in an upright chair with a back, but no arms
- (4) Standing without the support of another person or the use of an aid except a walking stick
- (5) Rising from sitting in an upright chair with a back but no arms without the help of another person
- (6) Bending and kneeling
- (7) Manual dexterity
- (8) Lifting and carrying by the use of the upper body
- (9) Reaching
- (10) Speech
- (11) Hearing with a hearing aid or other aid if normally worn
- (12) Vision in normal daylight or bright electric light with glasses or other aid to vision if such aid is normally worn
- (13) Continence (other than enuresis (bedwetting))
- (14) Remaining conscious without having epileptic or similar seizures during waking moments
- (15) Completion of tasks
- (16) Daily living
- (17) Coping with pressure
- (18) Interaction with other people

The activities as laid out within Social Security Agency forms and leaflets are:

- (1) Sitting in a chair
- (2) Getting up from a chair
- (3) Bending or kneeling
- (4) Standing
- (5) Walking
- (6) Walking up and down stairs
- (7) Using your hands
- (8) Reaching with your arms
- (9) Lifting and carrying
- (10) Seeing
- (11) Speaking
- (12) Hearing
- (13) Fits or something like this
- (14) Coping with toilet needs
- (15) Information about anxiety, depression and other mental health problems

Whilst there may be an argument for altering the wording in order to make the forms and literature more user friendly, we have reservations about:

The sequencing of the activities as they appear in the forms and literature; &
The fact that the mental health activities are not listed.

In itself, this sequencing of the activities would not appear to impact on a claimant's ability to qualify for benefit. However, when a case is appealed to the Independent Tribunal Service (TAS), the paperwork generated by TAS uses the sequencing as laid out in the Schedule and this variation can be confusing to the claimant in preparing the case and also during the hearing itself.

The issue of the mental health activities being listed in the forms and literature is very important. If the physical descriptors can be listed individually then it must follow that the mental health activities should also be listed. To not list the mental health descriptors that the claimant will be scored against is to provide less favourable treatment to claimants with a mental health problem and which must surely impact upon their ability to qualify for benefit.

In addition to the sequencing of the activities, perhaps a more fundamental change has occurred in the points layout within each activity.

The points layout within each activity as set out in the Schedule is as follows:

- (1) Walking on level ground with a walking stick or other aid if such aid is normally used

	(Points)
Cannot walk at all	15
Cannot walk more than a few steps without stopping or severe discomfort	15
Cannot walk more than 50 metres without stopping or severe discomfort	15
Cannot walk more than 200 metres without stopping or severe discomfort	7
Cannot walk more than 400 metres without stopping or severe discomfort	3
Cannot walk more than 800 metres without stopping or severe discomfort	0
No walking problem	0

Within the Schedule, the points layout within all the activities follow this pattern, with the points being listed in descending order from the maximum 15 points down to 0 points.

The points layout within Social Security Agency forms is as follows:

Walking	(Points)
No walking problem	0
Cannot walk at all	15
Cannot walk more than a few steps without stopping or severe discomfort	15
Cannot walk more than 50 metres without stopping or severe discomfort	15
Cannot walk more than 200 metres without stopping or severe discomfort	7
Cannot walk more than 400 metres without stopping or severe discomfort	3
Cannot walk more than 800 metres without stopping or severe discomfort	0

Within the Agency forms, the points layout within the activities follow this pattern, with the 'no problem' statement appearing at the top of the list and then the other statements in descending order. However, in some literature (IB214 for example), the layout is different again:

No problem with walking
Cannot walk more than 800 metres without stopping or severe discomfort
Cannot walk more than 400 metres without stopping or severe discomfort
Cannot walk more than 200 metres without stopping or severe discomfort
Cannot walk more than 50 metres without stopping or severe discomfort
Cannot walk more than a few steps without stopping or severe discomfort
Cannot walk at all

We feel that this may very well impact upon a claimant's ability to qualify for benefit.

Firstly, if the claimant does not read the question properly and s/he ticks the first box they see, then this will be the 'no problem' statement and this will generate 0 points.

However, not only will this generate 0 points, but it will impact on how the claimant's application is dealt with from then onwards. For example, when the Examining Medical Officer within Medical Support Services is conducting their examination they will see that the claimant ticked the 'no problem' statement and so may not even question the client as to their capability in relation to the other statements within that activity.

In addition, if the case reaches the tribunal stage it is very difficult to argue that the claimant inadvertently ticked the wrong box.

The fact is that if the statements were listed in the order as set out in the Schedule then clients would not be disadvantaged in this way.

This view is supported by Commissioner's Decision CIB 5361/97 (Commissioner Howell).

<http://www.hywels.demon.co.uk/commrs/cib/ib536197.htm>

To quote from the decision:

"5. It is not however necessary for me to decide whether the appeal could have succeeded on that ground alone, as the papers show a much more serious flaw in the way this claimant's case has been dealt with. To understand this, it is necessary to bear in mind the way in which Part I of the descriptor table for the all work test is constructed, and the express requirements of the regulations as to how it is to be applied. (Part II, the mental descriptor table, operates in a different way and is not in point here).

6. Under Part I of the schedule each activity to be tested for physical disabilities has several different descriptors and a number of points assigned to each. In each case the top descriptor in the table represents the most severe level of disability and carries the highest points; the bottom ones represent "no problems" which carry no points, and the ones in between represent a *descending* (not an *ascending*) scale of severity and appropriate point scores. Only one point score for each activity is to be taken, though as is clear from the descriptors themselves and from reg 26 two or even more descriptors may well be equally applicable to a person for any given activity. Reg 26(3) deals with this by making it mandatory that:

"(3) In determining a person's score in respect of descriptors specified in Part 1 where more than one descriptor specified for any activity applies to him, only one descriptor shall be counted and that shall be the descriptor with the highest score in respect of each activity which applies to him."

7. Since the descriptors with the highest scores are the ones that appear the furthest up each section of the table, the only valid way to conduct an assessment of a person's physical disability score in accordance with this mandatory requirement of the regulations must therefore be to work down from the top of each section of the table and stop as soon as one comes to a descriptor that applies to him.

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10. The adjudication officer in a helpful further submission dated 12 May 1998 at pages 104-105 says

"I submit that in adopting a system of scoring descriptors from the "bottom up" the EMO is operating a system that is not compatible with regulation 26(3) of the Social Security (Incapacity for Work)(General) Regulations 1995. This approach constitutes an error in law."

He makes the point that in the instant case (and no doubt in others) adopting a "bottom up" approach can directly affect the total number of points a claimant could score in the all work test.

11. I agree with that submission.”

Finally, it is extremely interesting to note that in the original IB214 (NI) printed in April 1995 following the introduction of Incapacity Benefit, this followed the exact wording as laid out in the Schedule, both in terms of the sequencing of the activities and scoring layout within each activity.

We are therefore bound to ask the question “**why the variation from legislation?**” especially when the variation has been shown to “directly affect the total number of points a claimant could score”.

This matter has been raised with the Social Security Agency by AIAC and also via the Advice Services Alliance, and has been an ongoing issue since 2001. As yet the Agency appears reluctant to address this issue.

The Social Policy Briefing (Spring 2003) has already outlined that the rules and qualifying conditions for Incapacity Benefit are tightening. Claimants could do without being further disadvantaged by the layout of Agency forms and literature.

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