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The Best Possible

Employment and Support Allowance Mandatory Reconsiderations and Appeals

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Contents

Appeals have changed

If you have previous experience of appeals then it's important for you to be aware that ESA appeals are different in two very important ways in relation to decisions made on or after 28th October 2013:

1 You can't go straight to appeal. Instead you must first ask the DWP to carry out a 'mandatory reconsideration' of their decision. The mandatory reconsideration is a process by which the decision you are unhappy with is looked at again, usually by a different decision maker. Once you receive the mandatory reconsideration notice, telling you whether the decision has been changed and, if so how, you can then appeal if you are still unhappy.

2 It's your job to lodge your appeal directly with the Tribunals Service (HMCTS), once you have received your mandatory reconsideration decision. It is no longer part of the DWP's role to forward your appeal to the Tribunals Service and you are responsible for ensuring you meet their deadlines.

Does mandatory reconsideration apply to me?

Mandatory reconsideration only applies to decisions made on or after 28th October 2013. The letter giving you a decision about your ESA must explain that if you wish to challenge the decision you will have to go through the mandatory reconsideration process before appealing. If that information is not included with the decision letter then you can go straight to appeal.

Deadlines

Please, please pay very careful attention to any deadlines set out in documents you receive – and always check to see if there are any.

For example, there is a one month from the date on the decision letter deadline for asking for a reconsideration. If you miss this deadline and the DWP don't accept your reason for lateness then there appears to be no way of challenging this at all, other than perhaps by a very complex judicial review. Instead, you are likely to have to attempt a fresh claim.

Who is this guide for?

This guide is for you if you are unhappy about a decision in relation to your claim for employment and support allowance.

Please note: this guide is designed for people who used the Benefits and Work guides to ESA when making their claim. If you did not do so, please download copies from our website at www.benefitsandwork.co.uk

There is information in the guides on how your capability for work and work-related activity is assessed that it is assumed readers of this guide are familiar with.

What this guide is about

This guide takes you through the process of challenging a decision in relation to your claim for ESA. It explains how to request a mandatory reconsideration. It guides you step-by-step through the process of taking your case to a tribunal, either with a representative or by yourself if you are unable to get help. We tell you what forms and paperwork to expect and how to deal with them. We also explain how to prepare your case and what will happen at the hearing. Finally, we tell you what steps you can take if you're unhappy with the tribunal's decision.

If the whole process seems too daunting for you, then go straight to the Help! pages and see if you can find someone to assist you with preparing your case and perhaps even representing you at your hearing.

Is it worth appealing?

Yes it is. The success rate for people appealing against a decision that they are capable of work is around 40%. That may not sound like a lot, but it still means that four out of ten people who appeal come away with an award.

Good luck!

Steve Donnison & Holiday Whitehead (barrister)

Is there any risk if you challenge a decision?

In relation to ESA, there are three main types of decision that you may be challenging.

1. You got no award of ESA at all.
2. You were awarded ESA but put in the work-related activity group when you consider you should be in the support group.
3. Your ESA has been sanctioned because, for example, you failed to attend a work-focused interview.

The first and third of these should not carry any risk, but the second definitely does.

If you were awarded no ESA at all, then you have nothing to lose by challenging the decision.

If you have had your ESA sanctioned, the worst the tribunal is likely to be able to do is confirm the decision to cut your benefit. It's highly unlikely that they would take the view that they could look again at whether you were entitled to ESA at all.

However, if you have been awarded ESA with the work-related activity component there is a potential risk involved in challenging the decision. This is because by asking to have the decision looked at again, you open up the possibility that a new decision will be made that you are not entitled to any rate of ESA at all.

In the vast majority of cases this will not happen. But if you are challenging a decision that you belong in the work-related activity group rather than the support group then you need to do a risk assessment based on two things:

Firstly, is the evidence to support the current award so strong that there is little likelihood of it being taken away?

Secondly, is the evidence to support your entitlement to the higher support component sufficiently strong that it is worth taking even a relatively small risk by asking for the decision to be looked at again?

In the end, only you can make this decision, but if you can get advice from an experienced welfare rights worker that would clearly help.

The emotional effects

You need to be aware that the appeal process can be time consuming and emotionally gruelling. The experience of going to a tribunal and being questioned in great detail about your everyday life can be distressing and, not only is there no certainty of success, you might even end up worse off if you are appealing to be moved from the work-related activity group to the support group.

However, most tribunals are run in a sensitive way by people who will try to put you at your ease and make it as little of an ordeal as possible.

What happens to your ESA claim whilst you are challenging a decision?

What happens to your claim will depend on which decision you are challenging.

Awarded ESA

If you have been awarded ESA, but only put in the work-related activity group, whereas you believe you should be in the support group, you will continue to receive your ESA with a work-related activity component as normal whilst you appeal.

ESA sanctioned

If you are challenging a decision to sanction your ESA then you will continue to receive your ESA minus the sanctioned amount whilst you appeal.

Found capable of work

If you have been found capable of work, it is not possible to claim ESA at the assessment phase rate during the mandatory reconsideration period. You will not be paid any ESA until either the decision is changed in your favour or the mandatory reconsideration is completed and you have lodged an appeal.

There is no statutory time-limit on how long the mandatory reconsideration should take. It will take longer in cases where you inform the DWP that you are intending to provide further evidence – usually the reconsideration process will be put on hold for a month – or where the DWP decide to seek further evidence from say your GP or consultant.

You can ask to be paid ESA at the assessment phase rate once you have received your mandatory reconsideration notice and, if you are still unhappy with the decision, lodged your appeal. However, it will not be paid until the Tribunals Service confirm to the DWP that an appeal has been lodged. At the moment it is not clear whether your ESA payments will be backdated to when your ESA was stopped at this stage, or whether this will only happen if you actually win your appeal. Please check back for updates.

You may be able to claim jobseeker's allowance (JSA) whilst you are awaiting the mandatory reconsideration decision. You should be able to restrict the work you are available for based on your health conditions. In addition, the fact that you have been claiming JSA should not be used against you in the appeal process. However, some claimants have had difficulties with getting the additional component backdated after they have won their ESA appeal.

You will still be able to claim other benefits, such as housing benefit whilst the mandatory reconsideration takes place. However, the ending of your ESA may interrupt the payment of other benefits and you may need to contact the agencies that pay them about the change in your circumstances.

Mandatory reconsideration

Once you have decided that you want to challenge an ESA decision, you must ask the DWP to carry out the mandatory reconsideration. You can ask for a mandatory reconsideration by writing to the address on the top of your decision letter or by telephoning the DWP on the number given in the letter.

If you do make your request by telephone we would advise that you follow this up with a letter confirming that you have asked by telephone for the decision to be reconsidered

Deadline for a Mandatory Reconsideration Request

The DWP must receive your request for a reconsideration within one calendar month of the date on the decision letter you received.

If you have asked the DWP for a written statement of the reasons for their decision within the one month time limit, then the DWP may extend this time limit, but you should check this with the office issuing the decision.

The time limit should be extended by two weeks if the reasons are sent out within the original one month limit.

If the reasons are sent out after the one month time limit, the deadline should be extended for two weeks after the date the reasons are sent.

Beware! If the reasons were included in the original decision letter, but you did not realise this perhaps because they were so brief and general, then the time limit may not be extended. We would very strongly advise that you keep within the one month time limit unless you have an extension in writing from the DWP. You can always send in further evidence to support your case after your reconsideration request has been made.

If you apply for a reconsideration more than a month after the date on the decision letter you must give reasons for being late and the DWP may then still agree to carry out the reconsideration.

Decision makers are told that the kinds of things they should take into account are:

- The applicant's partner or dependent has died or suffered serious illness
- The applicant is not resident in the UK
- Normal postal services were adversely affected
- The claimant has learning or language difficulties
- The claimant has difficulty obtaining evidence or information to support their application
- Ignorance or misunderstanding of the law or time limits when reasonable

The list is not exhaustive and each case should be considered on its own merits.

If you do not give reasons for being late, or the DWP do not accept your reasons for being late as being valid, then they can refuse to carry out a reconsideration and there does not appear to be any way of appealing against this refusal other than possibly by a judicial review, something which is outside the scope of this guide. You could try making a formal complaint to the DWP and also involve your MP, but you may also need to make a fresh claim for ESA to begin the process again.

Providing Evidence

When applying for a reconsideration it is important to consider what reasons the DWP have given for refusing to award ESA and, if possible, to provide further evidence about how your condition affects your ability to carry out the activities in the work capability assessment.

If you used our guides when completing your claim you should already have detailed evidence to support your claim and you may feel there is little further that you can add.

An explanation of the decision may highlight areas where further evidence might help to change the decision. Consider getting advice at this stage as submitting good extra evidence may get the decision changed in your favour and this may avoid the emotional distress of having to appeal the decision.

However, if you tell the DWP that you are intending to submit further evidence they are likely to automatically put your mandatory reconsideration on hold for a month. If you need to get back onto the assessment phase of ESA as soon as possible, then this is something you will need to bear in mind.

The reconsideration should be carried out by a different decision maker than the one who made the original decision.

Decision Maker's Phone Call

If the decision maker cannot change the decision in your favour, they will telephone you to discuss anything which is unclear and may also ask you for further evidence which might make your circumstances clearer. The decision maker will try 2 or 3 times to contact you by phone. If they are not able to make contact they will carry out the reconsideration without any further evidence, unless you have already told them that you will be sending some.

You may welcome the opportunity to explain to a decision maker why the decision is wrong, in which case it may be worth making a note of the points you want to make and keeping them handy in case of a call. If you are in the process of getting additional evidence you may also want to tell the decision maker when you hope to be able to pass it on.

During the telephone call the decision maker may ask you for further evidence of specific aspects of your disability and may ask you which descriptors you think have not been applied correctly. They will tell you what evidence they would like to receive and where you can send the evidence. You will have a month to send in the extra information and the reconsideration will not take place until you have sent it. If you haven't sent in the extra evidence after a month the reconsideration will happen anyway.

You can find further information about getting medical evidence in our guides to claiming ESA.

You should be aware that what you say in this phone call may be used as evidence in the mandatory reconsideration and may form part of the evidence used by the DWP if you appeal the decision following the reconsideration.

The telephone call will probably not be recorded by the DWP, but the decision maker will keep their own written record of what they consider was said in the course of the call. If you are concerned that the decision maker's evidence may not be sufficiently accurate or detailed, you may want to keep records of your own,

This may involve taking notes yourself or putting your phone on speakerphone and getting someone else to take notes. Or you may wish to tape record the call for your own records. You are not under any obligation to inform the decision maker that you are doing this, provided you only intend to use the recording to help your memory of the call and, if necessary, to provide as evidence to an appeal tribunal.

DWP Deadline

You may not be surprised to learn that whilst there are very tight deadlines for claimants, the DWP does not have a time limit within which they must complete a Mandatory Reconsideration. The DWP say that it will vary depending on the circumstances of the case.

If you consider that the decision is taking an unreasonably long time, you may wish to consider complaining to your MP.

Reconsideration Decision

Once the reconsideration is complete you will receive 2 copies of the 'Mandatory Reconsideration Notice'. This notice contains the reconsidered decision. One copy is for you to keep. The second copy is for you to send to the Tribunals Service if you wish to appeal against the decision.

Decision makers are told that the notice should:

- be personalised and specific so that the claimant can recognise any evidence they have provided and recognise any evidence discussed within the reconsideration phone call
- clearly recognise the claimant's circumstances
- fully address any inconsistencies in the evidence
- where there are contradictions in evidence, explain why some evidence is preferred to other evidence
- be based on facts of the case and evidence in context of the Law
- avoid the use of jargon, if possible
- be fully supported by the evidence supplied; and
- include reference to the legislation used

Appeal or Not?

If you have been through the process of mandatory reconsideration and the decision has not been changed, or you disagree with the new decision, you will then have to decide whether to appeal against the decision to the Tribunals Service.

If you are you have been awarded ESA but only placed in the work-related activity group and you think you should be in the support group, it is important to remember that your award can be taken away altogether at appeal, so you need to consider carefully before appealing the decision.

If you have not been awarded ESA at all and this decision has not been changed after the mandatory reconsideration then you may feel strongly that you want to appeal.

In either situation you should try to get independent advice on appealing if possible and also try to find a specialist advisor who can help you prepare your case.

The experience of going to a tribunal and being questioned in great detail about your everyday life can be distressing and there is still no certainty of success. However, most tribunals are run in a sensitive way by people who will try to put you at your ease and make it as little of an ordeal as possible.

Bear in mind that you can withdraw an appeal at any stage before the hearing is held, so at this stage you are not doing anything that you cannot undo if you choose.

How to lodge an appeal

If you do decide to lodge an appeal the most important thing is to do so **within one month** of the date on the Mandatory Reconsideration Notice.

You can get a copy of the Tribunals Service booklet SSCS1A 'How to Appeal against a decision made by the Department of Work and Pensions' from the Tribunals Service website www.justice.gov.uk. This explains the appeals process.

You can get a copy of the SSCS1 appeal form at:

www.justice.gov.uk/downloads/forms/tribunals/sscs/sscs1.pdf

Please note that this is not the same as the GL24 appeal form currently used for other benefits.

If you do not have access to the internet then you may be able to get a copy of the appeal form from your local advice agency. You can also telephone the Tribunals Service for a copy of the appeal form. The telephone number will be on the Mandatory Reconsideration Notice.

The appeal form

The form asks you for:

- Confirmation that you have received a Mandatory Reconsideration Notice. You must send this with your appeal. Your appeal will not be accepted until this has been received by the Tribunals Service.
- Your name, address and phone number.
- Your date of birth and national insurance number.
- Your representative's details, if you have one. You can provide these details to the Tribunals Service at any time, if you are fortunate enough to get a representative at a later date.
- The grounds for your appeal.
- Explanation for your appeal being, late if you have missed the within one month deadline.
- Whether you want to attend a hearing or have your appeal decided on the basis of the paperwork only.
- Your available dates for an appeal hearing.
- Any special needs you have to enable you to attend a hearing.
- Your signature and the date.

If you can't get a copy of the form then you can write a letter to the Tribunals Service with all this information included. The Tribunals Service will accept appeals in letter form, but if you do not include all the above information they may write to you separately for the missing information and this could delay your appeal.

Grounds for your Appeal

Section 5 of the appeal form asks for the grounds for your appeal.

You need to explain simply why you think the decision you are appealing against is wrong. You can send further evidence with your appeal, though it is likely you will already have sent your evidence to the DWP as part of the mandatory reconsideration process. You do not need to send the same evidence again but if you have any new evidence this should be sent. If you need more space to write your reasons you can attach additional sheets of paper. Make sure any additional sheets have your name and National Insurance number on in case they get separated.

If you have been through the mandatory reconsideration process and got a full explanation of the decision you should have a good idea which areas you are disputing and can explain this on the appeal form.

If you have chosen not to discuss your application with the DWP, or they have not been able to contact you, you should still have some idea which descriptors you think have not been correctly applied as the DWP says that when they send out the initial decision they will include reasons for the decision.

The reasons given for appealing do not have to be lengthy, but it is helpful to be specific about points of dispute so that the tribunal can understand why you disagree and look at the evidence presented by you and the DWP before the hearing.

Where no award of ESA has been made

Where no award has been made, the explanation below should be sufficient to lodge your appeal.

*I wish to appeal against the decision that I do not have limited capability for work. I consider that I provided enough evidence for a finding to be made that I do have limited capability for work [*if you think you should be in the support group add the words *'and limited capability for work-related activity].*

I do not consider that the decision maker took full account of the severity of my condition or of the way that it affects my everyday activities and bodily functions.

[If you are able to, give more information about why you think the decision maker got it wrong, such as:

For example, in my questionnaire I stated that because of my depression I usually cannot motivate myself to do everyday things like getting out of bed, washing, dressing or eating breakfast unless my partner repeatedly encourages me. Yet I was awarded no points for this. This is only one example of why I think the decision is wrong.]

I wish to have an oral hearing so that I can explain the full effects of my condition to a tribunal and answer any questions they may wish to ask.

Whilst my appeal is being considered I wish to remain in the assessment phase of ESA.

Don't add the last sentence if you wish to claim, or continue claiming, JSA instead. If you do wish to claim ESA at the assessment phase rate it would also be worth writing a separate letter to the office dealing with your claim explaining that you have now made a formal appeal and wish to return to claiming ESA.

You will also need to continue providing sick notes and may be asked to provide a fresh sick note even if the DWP already hold a current one.

Where you have been placed in the work-related activity group

Where you have been placed in the work-related activity group but you believe you should be in the support group, use something along the following lines:

I wish to appeal against the decision that I do not have limited capability for work-related activity. I consider that I provided enough evidence for a finding to be made that I do have limited capability for work-related activity.

I do not consider that the decision maker took full account of the severity of my condition or of the way that it affects my everyday activities and bodily functions.

[Because there are such a limited number of ways that you can pass the limited capability for work-related activity assessment it is probably worth saying why you think you do. Such as:

For example, I am unable to mobilise more than fifty metres without experiencing severe discomfort but the decision maker has said that I can walk 200 metres and so has not put me in the support group. There may be additional grounds on which I wish to appeal once I have seen the papers.

I wish to have an oral hearing so that I can explain the full effects of my condition to a tribunal and answer any questions they may wish to ask.

Where you have had your ESA sanctioned

Where you have had your ESA sanctioned you will either need to show that you had good cause for doing, or failing to do, whatever you are accused of or you will need to argue that the accusation is untrue. It will probably, therefore, be necessary to explain in your appeal form what your defence is in some detail. For example:

I wish to appeal against the decision to sanction my ESA. The decision maker states that I failed, without good cause, to participate in a work-focused interview.

However, I consider that I did have good cause because the interview was held in an open-plan office to which the public had access. I asked to have a private room in which I could answer questions about my health condition without others overhearing. I was told that the only private room was on the first floor with no lift and that I could not have the interview at home at a later date, even though I cannot climb stairs. I therefore refused to answer any questions about my health condition that I considered embarrassing or unreasonable in view of the public nature of the interview.

I believe that I have a right to have my personal details kept confidential and that the DWP and their agents have a duty under the Data Protection Act to collect data securely and confidentially and that I therefore had good cause to decline to answer questions about my health.

There may be additional grounds on which I wish to appeal once I have seen the papers.
I wish to have an oral hearing so that I can explain the full effects of my condition to a tribunal and answer any questions they may wish to ask.

Please note, this is just an example, we can't guarantee that a tribunal would accept this as good cause – although we certainly think they ought to.

Appeal Time Limit

Section 5 also asks you if your appeal is in time.

To be in time, your appeal must be received by the Tribunals Service within one month of the date on the Mandatory Reconsideration Notice. Your appeal will be considered late if it is received more than a calendar month after the date on the notice. If it is late you must give reasons why it is late. If you do not give reasons for lateness your appeal will not be considered.

If your appeal is late and you have given reasons for lateness the Tribunals Service will treat it as having been received in time, unless the DWP object. If the DWP objects you will be given a

chance to comment on their objections and then the appeal will be referred to a Tribunal Judge to decide whether it should be accepted or not.

This means that if your appeal is going to be late, but you have a good reason for lateness, e.g. being in hospital, out of the UK etc., then you can still appeal a decision. However, as there is a risk that the DWP will object and the appeal will be rejected, it is important to get your appeal in on time if possible.

Paper or Oral Hearing?

Section 6 asks if you want to attend your appeal hearing or have it decided on the papers.

At an oral hearing you, and your representative if you have one, will be able to meet the tribunal panel and put forward you case in person. The tribunal will also be able to ask questions. The DWP may send a representative to the hearing as well, although this happens only rarely.

The alternative to an oral hearing is to have the case decided by the tribunal on the papers alone. Neither you nor the DWP will be able to attend and the tribunal will make a decision based solely on the evidence you have submitted, the letter of appeal, the outcome of your face to face assessment and any other paperwork submitted by you or the DWP. This is called a 'paper hearing'. A paper hearing will take place if no-one has asked for an oral hearing.

An oral hearing will only be arranged if you or the DWP ask for an oral hearing or if the tribunal decides an oral hearing would be more appropriate. If you change your mind after your appeal has been submitted and want to change from an oral to paper hearing or paper to oral hearing then you can ask the tribunal to do this, but you should do it as soon as possible.

We would strongly advise you to ask for an oral hearing where you put your case in person. The chances of success at a paper hearing, where you are not present to tell the tribunal about your everyday life, are generally much lower. It is likely to be another two to three months or more before your hearing, so there is still time to try to find a representative or someone to accompany you if you don't already have one.

Access and Availability

In section 7 of the appeal form you have an opportunity to explain any special requirements which would need to be met to enable you to attend a hearing and you can also give any unavailable dates.

As well as giving any days of the week or times of the day you are unavailable, it is worth giving any specific dates in the next six months when you will not be able to attend, for example because you have a hospital or other appointment or because you will be away. Remember to check dates with anyone you hope is going to accompany you, either for support or as a witness. If any other dates become unavailable before you have a date for the hearing, let the Tribunals Service know about these too

Tribunals are held locally, not at the regional office that you return the form to, unless that happens to be your home town. But you may still have to travel some distance, perhaps to the nearest large town or city, for your hearing. You can phone or write to The Tribunals Service to find out where your hearing will be held. If your condition means you cannot use public transport and you can't drive or get a lift you may need to travel to the hearing by taxi. The Tribunals Service may agree to pay the fare, so explain in this box why a taxi is needed.

If you have any special requirements, you also need to give details in this section. For example, if you need a signer or an interpreter this will be arranged by the Tribunals Service and an extended hearing should be allocated.

Not all tribunal venues have wheelchair access, so you should also make it clear if this is a requirement.

If you cannot attend a hearing at any time because of your health it is possible to have a domiciliary hearing held in your home. However, The Tribunals Service are very, very reluctant to grant domiciliary hearings – you may have a long fight on your hands. You may also have to wait up to a year before a date is set. But if you do need a domiciliary hearing, say so here.

What Happens After You Lodge Your Appeal?

After you send in your appeal, the Tribunals Service will check it to see that you have sent in the Mandatory Reconsideration Notice and that you are within the time limit. If there are any problems with your appeal they will return it to you with a letter explaining what the problem is. You will need to reply to this letter or there is a risk that your appeal will be struck out.

If you appeal is accepted as valid you will get an acknowledgment letter. You may also be sent an enquiry form to find out if you have any special requirements to enable you to attend a hearing, if you have not already put these on the appeal form.

Your appeal will be transferred by the Tribunals Service to the regional centre which deals with your geographical area. If your appeal has been accepted the acknowledgment letter will include details of the regional centre which will handle your appeal, including the telephone number.

A copy of your appeal will also be sent to the DWP and they will be asked to prepare a report explaining how they came to their decision. The DWP have a time limit of 28 days to send in this report to the Tribunals Service. They can ask for an extension of this time limit and a tribunal judge will decide whether to allow this. The Tribunals Service will let you know if an extension has been granted.

When the DWP receives your appeal they will look at their decision again and consider any new information you may have provided. The DWP can still change their decision before the appeal hearing if they think there is a reason to do so.

If the DWP change the decision to your advantage before the hearing your appeal will automatically come to an end. However, the new decision by the DWP will also carry the right of appeal, so the DWP will contact you before changing the decision and will only put the new decision in place if you agree with it. If you do not agree to the new decision your appeal will continue.

The DWP can object to your appeal if they think the Tribunals Service should not have accepted it, for example if it is late and they do not think you have given good reason for being late, or if they think it has no reasonable prospect of success. You will be sent information about their objection and be invited to reply. A Tribunal Judge will then decide whether the DWP have good reasons for their objection.

If the DWP does not object to your appeal you will be sent a copy of their response to your appeal. This will be sent to you as part of the 'bundle' of papers showing a history of your claim and how the decision was made. Remember that the DWP normally has to do this within 28 days of receiving your appeal from the Tribunals Service.

The response to your appeal should include:

- The decision being appealed
- A summary of the relevant facts
- The reasons for the decision
- Extracts from the relevant law
- A copy of your appeal form or letter
- Copies of documents relevant to the appeal (claim form, medical reports, letters from your GP and other medical evidence)

Once the DWP's response has been received the Tribunals Service will proceed to arrange your appeal.

Getting copies of the DWP evidence

It may take many weeks before you receive a copy of the bundle of papers that make up the evidence for your appeal. But right at the outset you may wish to get copies of the evidence used by the DWP to make their decision so that you can begin preparing your appeal in detail.

You have a right to see this evidence and the quickest and simplest way to get it is to write to the office dealing with your claim and ask for it.

There should be a list of evidence used by the decision maker in the letter you received informing you of the decision. But, whether you have that letter or not, a request along these lines should get you the most important evidence:

Dear Sir/Ms,

Subject Access request under the Data Protection Act 1998
Your name and address
Your national insurance number

I wish to be provided with copies of all the evidence used by the decision maker in reaching the decision dated [insert date] *in relation to my application for employment and support allowance. This evidence should include:*

The ESA85 medical report form and any evidence as to whether the report was audited and whether any amendments were made as a result [if you had a medical].
The ESA85A form [if you did not have a medical].
The ESA113 if one was acquired in my case
Any medical evidence from health professionals such as my GP or consultant.
Any queries, requests for clarification, correspondence, memos, emails or other communications between Atos health professionals and the decision maker in relation to my claim or any notes or records of conversations between Atos and the DWP.
Any other evidence considered by the decision maker in reaching their decision.

In addition, I wish to be provided with a copy of any worksheet, score sheet or any similar document which sets out which descriptors, exemptions or exceptional circumstances the decision maker considered applied and did not apply to me and any other documents which set out the justification for the decision reached in my case.

Yours faithfully,

You may wish to phone the office concerned to make this request, but do make sure that you put it in writing as well.

The time limit for responding to such a request is a maximum of 40 calendar days from the date it is received by the DWP and there is no charge for providing documents.

Withdrawing an appeal

You can withdraw an appeal at any time before the hearing. This must be done in writing to the Tribunals Service, but it is not necessary to give reasons, a simple statement saying *'I wish to withdraw my appeal'* is all that is required.

Working with the appeal papers

The appeal papers are prepared by the DWP and they generally contain around 50-100 pages. They will contain some or all of the following elements, though not necessarily in this order:

- **Schedule of evidence**: this is the front page and it's just an index of what's inside.
- **Claimant details**: your name, address and national insurance number.
- **Decision appealed against**: this is just a restatement of the decision about your ESA claim.
- **List of descriptors**: this will be both the limited capability for work and limited capability for work-related activity descriptors.
- **Acts and Regulations relied upon**: this is a list of the relevant laws, you can research these if you wish, but you really don't need to.
- **Upper tribunal decisions relied upon**: Upper tribunals (formerly commissioners) are the next level up from an ordinary tribunal. If you lose at the hearing you may be able to appeal to the upper tribunal. We deal with upper tribunal decisions in a separate section.
- **Claimant's grounds of appeal**: this is taken from the appeal form you completed.
- **Summary of facts and decision maker's submission/response**: this is where the DWP explains why it thinks its decision was right. They may quote bits of law, large chunks from upper tribunal decisions, bits of your claim form and bits of medical evidence.
- **Documents relating to the case**: this may include medical certificates, your appeal form, ESA50 questionnaire, ESA85 medical report, ESA113, any supporting letters plus any other evidence used in coming to the decision.

The bundle of papers can look extremely intimidating and many appeals falter at this point, even though it's perfectly possible for a claimant to put forward their case at an oral hearing without ever reading the papers and many people do so. However, you can give your appeal a better chance of success by focusing on the most important parts of the appeal papers.

Simple checks

Before you even do this, however, there are three simple checks you can make which may save your hearing being needlessly adjourned and a further wait of several months before it is finally heard.

Are the papers about you?
Surprisingly often people are sent papers that are not about them, particularly if you have a popular last name. If you've got the wrong person's papers, contact the DWP and tell them.

Is everything in the schedule present?
There is a list or schedule of documents at the front of the bundle. Make sure that everything listed in the schedule is actually in the papers and that nothing has accidentally been left out.

Are there pages missing?
Check the page numbers in the bundle. The page numbers are usually hand written at the top of each page. It's easy for a page to be missed out in the photocopying process. If there is anything missing, contact the Tribunals Service and tell them.

The Atos medical report.

Not everyone will have an Atos medical report. Some people will be awarded ESA just on the basis of 'scrutiny' by an Atos health professional of any evidence available. This might include your ESA50 questionnaire, an ESA113 from your GP and any other evidence the DWP have received.

However, the vast majority of people who have lodged an appeal will have had a medical assessment at which the examining health professional produced an ESA85 medical report.

Make a note of anything you consider to be wrong with this report. Did the Atos health professional fail to note down things you told them or things that happened at the medical? Has the Atos health professional said they consider that you can do things that in fact you can't? Has the Atos health professional taken things you said or did out of context? Has the Atos health professional recorded things that didn't happen or that you didn't say?

It may be necessary to try to get medical evidence with which to challenge some aspects of the Atos report, other parts may be dealt with by non-medical evidence. However, many aspects of the report may be shown to be unreliable simply by you giving evidence and examples at your hearing.

The summary of facts and the decision maker's submission.

Go through these just as carefully because what the DWP calls facts may not be facts at all.

- Has the decision maker made assumptions about you that aren't based on any evidence and then presented them as facts?
- Has the decision maker relied on evidence from the Atos medical report which you consider to be incorrect?
- Has the decision maker ignored or unfairly dismissed other evidence that you, your GP or someone else provided that undermines the decision maker's case?
- Has the decision maker just not bothered to justify their decision in any detail at all, simply setting out the criteria for an award of ESA and then stating that you don't satisfy them?

Once again, you need to decide how best to challenge the DWP's evidence. This may be by submitting additional medical or other evidence or by giving oral evidence at the hearing or, more probably, a combination of the two.

Other evidence in the bundle

Has the decision maker relied on any other evidence in reaching their decision. For example, did the DWP send your GP or consultant a form to complete? Once again, you need to decide how best to challenge evidence that you consider incorrect.

Using our guides

Make sure you use our highly detailed guides to the work capability assessment to help you prepare your appeal. They look at each descriptor in details and offer suggestions as to how they should be understood. A tribunal may prefer your interpretation of a descriptor where it is different to the interpretation that seems to have been used by the Atos health professional and the decision maker. Even if the tribunal doesn't agree with your interpretation, this may give you grounds for appealing to the upper tribunal if you are unhappy with the decision.

Getting help

You may be able to get help from an experienced welfare rights worker with going through the papers and seeking additional evidence and they may also be able to prepare a written submission for you, see Getting Help.

Time limits

If you wish to provide further evidence once you have read the submission, new rules introduced in November 2008 oblige you to do so within one month of the date on which the

bundle was sent out. In practice it will often be virtually impossible to get medical evidence, for example, within the time limit. You should send in any evidence you can within the time limit and send in any other evidence as soon as it becomes available, along with a letter explaining why it could not be sent earlier. The tribunal has the power to accept late evidence if it chooses and at the time of writing they seem to be quite happy to do so.

Requesting that the tribunal issue directions

The tribunal has the power to issue directions to either party, telling them to do or refrain from doing something. There may be occasions when you wish to ask the tribunal to exercise this power. This is something that is relatively untried and we have no idea if it will work, but we can see no reason why claimants shouldn't make requests in this way.

For example, you may have had a home visit for your medical and the health professional may have written their report by hand rather than using a computer. As a result important passages in the report may be illegible. In this case you should first write to the DWP asking them to provide you with a typed transcript of the illegible parts. If they fail to do so you could then write to the tribunals service and ask that, in the interests of justice, directions be issued to the DWP instructing them to provide a typed transcript prior to the hearing.

Alternatively, you may discover when you receive the bundle that the DWP have not contacted your consultant for a medical report even though you asked them to do so and you consider the consultant's evidence to be vital if the tribunal is to have all the information it needs to make an informed decision. You may have been unable to get a report yourself because the consultant would have charged you for it.

Once again, it would be wise to write to the DWP first asking them to contact your consultant for a report and pointing out that if they do not you will ask the tribunal to issue directions that they do so. If they don't respond, or refuse to obtain the evidence, then you could write to the tribunal service asking them to issue a direction. We don't know if a tribunal judge would be willing to do this. They might, for example, prefer to wait until the hearing and then reach a conclusion about whether more evidence is needed. But even if the tribunal refuse your request, it may give you grounds for an appeal to the upper tribunal if your appeal is unsuccessful.

You do need to bear in mind though that you have no control over what questions the DWP ask your consultant or what responses they might give, so there is no certainty that their evidence will support your case.

A letter requesting that directions be issued might look something like this:

Dear Clerk to the Tribunal,

Re: Ms Sylvia Jones
NINO: WE 67 48 54 D
Appeal ref: U/04/802/2003/00184

I would be most grateful if you would place this request for directions to be issued before a tribunal chair at your earliest convenience.

1. *I have received the bundle of papers in connection with my appeal against the decision not to award me employment and support allowance.*

2. *I requested both in my ESA50 and in a letter to the DWP decision maker dated 12.08.11, following receipt of the appeal papers, that my consultant, Mr James*

Charlesworth of Bath Royal Mineral Hospital, be contacted for a report on the way that my condition affects my ability to mobilise.

3. *I see my consultant regularly, and have done so for three years, but I am unable to obtain a written report from him because of the cost involved. I understand that the consultant's report would be provided free of cost to the DWP because of the contractual relationship between the DWP and the NHS.*

4. *However, it appears from the papers that the DWP have failed to contact my consultant and have instead relied on the ESA85 report from the Atos health professional and an ESA113 form from my local GP practice.*

5. *Unfortunately, as I made clear to the DWP, I seldom visit my GP's practice because there is nothing that they can do in relation to my treatment and they do not therefore have any detailed knowledge of its effects upon my mobility. As a result the ESA113 form contains no detailed evidence about how my condition affects my mobility.*

6. *I consider that a report from my consultant would greatly aid the tribunal in reaching a fair decision based upon a range of evidence rather than simply having the ESA85 and an non-specific ESA113 at its disposal.*

7. *I therefore respectfully request that a direction is issued to the DWP instructing them to seek a report from Mr James Charlesworth of Bath Royal Mineral Hospital prior to my hearing, which has not yet been listed,*

Yours faithfully,

You could ask for directions in relation to other issues too. For example, you may want a previous Atos medical report or other document that you do not have a copy of including in the bundle, but the DWP are refusing. But do make sure that your request is a reasonable one and that you have exhausted other methods of getting satisfaction before asking the tribunal to intervene.

Your letter should be addressed to the clerk to the tribunal at whichever tribunals service office is dealing with your request. As always, keep a copy and record of posting.

Submitting additional evidence

If you filled in the claim pack using one of the Benefits and Work guides then there's a good chance that you included additional evidence from other people anyway. However, once you've seen all the evidence in the bundle you may decide that that further evidence is needed to challenge some of the assertions made by the decision maker.

Time limits

As explained overleaf, if you wish to provide further evidence once you have read the submission, new rules introduced in November 2008 oblige you to do so within one month of the date on which the bundle was sent out. In practice it will often be virtually impossible to get medical evidence, for example, within the time limit. You should send in any evidence you can within the time limit and send in any other evidence as soon as it becomes available, along with a letter explaining why it could not be sent earlier. The tribunal has the power to accept late evidence if it chooses and at the time of writing they seem to be quite happy to do so.

Medical evidence

Is there medical evidence from the Atos health professional that can be challenged by an opinion from another doctor?

Your GP or other health professionals may be willing to address specific issues, such as how far you consider you can walk without severe discomfort, in a letter. But you should bear in mind that health professionals are under no obligation to provide you with a letter of support for your claim. Some may refuse to supply a letter, others may only do so if they are paid.

GP's evidence

Has your GP provided inaccurate or incomplete evidence to the DWP by filling in a form without first discussing matters with you? If so, can you contact the GP and ask them to consider submitting further evidence to correct the wrong impression? It's not that uncommon for tribunals to receive a letter from a GP saying that they filled in a form without speaking to their patient and now wish to correct any wrong impression they may have given. Unfortunately, the tribunal may take the view that the first evidence from the doctor was accurate and the follow-up letter has been written only as a result of pressure from you.

Non-medical evidence

Is there evidence that can be provided by friends, relatives, carers or support staff? For example, people who have had to help you when you have had falls or who have witnessed you becoming very distressed over relatively minor events?

Photographs

Photographs can occasionally be useful. For example, an Atos health professional might write that although you say you can now only walk short distances, there is no muscle wasting in your legs. This may not be true. However, tribunals are strictly prohibited from carrying out a physical examination of claimants, so how do you prove it? Clearly the best way is to get medical evidence saying there is muscle wasting. But if this is not possible, or in addition, there is nothing to prevent you submitting photographs of your legs.

How to submit additional evidence

Where possible, send the additional evidence to the Tribunals Service along with a letter giving your name, national insurance number and appeal reference. Don't send originals of letters and documents, in case they get lost. Instead, send copies. But you must take

the originals with you to the hearing as the tribunal are entitled to ask to see them. A very brief covering letter like the one below is all that is required.

If you have yet to hear from the Tribunals Service and so don't know where to send your additional evidence, visit the Tribunals Service website, where you can select social security and child support tribunals from the drop down list on the venues page and type in your postcode. You will then be given contact details for your nearest Tribunals Service venues. Contact the nearest office before sending your additional evidence to ensure that they are holding your papers. If you don't yet have an appeal reference, your name, address and national insurance number will be sufficient for your papers to be identified.

Dear Sir / Ms,

Re: Ms Sylvia Jones
NINO: WE 67 48 54 D
Appeal ref: U/04/802/2003/00184

Please find enclosed 4 pages, single-sided, of additional evidence to be included in the appeal papers.

Yours sincerely,

You should get a reply from the Tribunals Service acknowledging receipt of the additional evidence and enclosing numbered copies of it for you to add to your bundle.

If this doesn't happen, contact the Tribunals Service to find out if they received your letter.

Letters requesting evidence

If you write to a health professional or someone else asking for evidence you don't have to submit this letter along with the reply, but you must take it to the tribunal. The panel are entitled to ask to see the letter soliciting evidence to decide whether the witness was coerced, emotionally blackmailed or otherwise improperly persuaded or led to give the evidence they did.

If you can't produce the letter at the hearing the tribunal could decide to adjourn until a later date in order for the evidence to be provided. Of course, if the evidence was requested in a telephone conversation or by you going to visit the witness then there will be no letter to produce. However, the tribunal are entitled to reach their own conclusion about how reliable any piece of evidence is.

Whether and how to write a submission

Written submissions, as opposed to written evidence, are used to set out your case or to challenge particular aspects of the DWP's case. Written submissions are becoming increasingly common because many advice agencies funded via Community Legal Services cannot get money for representing a client at a tribunal, but can get money for helping them to prepare their case.

However, the general rule is that evidence is best given by you in person at the hearing, where the tribunal can make a judgement about your honesty and reliability and ask further questions.

Most claimants do not provide a written submission, apart from their initial appeal form, and you should not feel under any pressure to do so. However, there are some circumstances when you might decide you want to provide a written submission.

Complex matters

You don't have to be involved in complex legal arguments in relation to ESA, particularly if you are not a welfare rights worker.

However, if you have used our guides you may want to challenge the DWP's opinion on the definition of various terms used in the work capability assessment. Because the assessment is relatively new and keeps changing it will be some time before higher courts reach binding decisions on how various terms should be interpreted. In the meantime, it is open to you, if you wish, to try to persuade a tribunal that your understanding of the law is to be preferred to that of the DWP. You'll find lots of suggestions in our guides to ESA as to what the possible interpretation of new terms and concepts in the work capability assessment should be.

The Tribunals Service
Oxford House
Hill Street, The Hayes
Cardiff CF10 2DR 14 October 2013

Dear Sir / Ms,

Re: Ms Sylvia Jones
NINO: WE 67 48 54 D
Appeal ref: U/04/802/2003/00184

My appeal hearing takes place on 23.11.13 and I respectfully request that the tribunal take into account the following submission.

1. In their submission, the decision maker stated that I scored no points for activity 16 of the limited capability for work assessment: Coping with social engagement due to cognitive impairment or mental disorder

2. The decision maker stated that because I was able to attend doctors' appointments that none of the descriptors in activity 16 apply.

3. I would submit that the wrong test was applied by the decision maker. An appointment to see someone in their professional capacity does not, in my view, constitute a social engagement and should not therefore be used as evidence in relation to this activity.

4. I have provide detailed evidence in my ESA50 about the ways in which my depression and panic attacks preclude virtually all forms of social engagement, particularly with people with whom I am not familiar.

5. I respectfully request that the tribunal consider whether the correct legal test has been applied by the decision maker in regard to activity 16 and, if not, that they make findings as to whether any of the relevant descriptors apply to me.

Your faithfully,

Summary of your case

Again, this is absolutely not something that you have to do. But, if you wish, you may find it helpful to provide a written submission setting out a brief summary of your case to save the tribunal time and point them in the right direction. This should be no more than 2 sides of A4 and should include information such as:

- What the decision was in your case.
- What your health conditions are.
- What award you consider you meet the criteria for.
- Brief information about how you meet those criteria, e.g. what points you think you score or which exceptional circumstances you think apply.

Producing a written submission

There is no standard format for written submissions, but it is worth numbering paragraphs so that you can direct the panel to them in the course of the hearing if you need to do so. Sub-headings also make a written submission more reader friendly. There is a brief sample written submission above in relation to complex matters.

Time limits

If you do wish to provide a written submission once you have read the decision maker's submission, new rules introduced in November 2008 require you to do so within one month of the date on the decision maker's letter. However, at the moment tribunals seem happy to exercise their discretion to accept late submissions.

Using upper tribunal judges' (Commissioners') decisions

From November 2008 Social Security Commissioners are part of the Upper Tribunal, with ordinary tribunals now know as First Tier Tribunals. New decisions are now upper tribunal decisions rather than commissioners decisions. Decisions made in the past are still likely to be called commissioners decisions, however, but to make life simpler we will just refer to all such decisions as upper tribunal decisions

It's entirely possible, and indeed usual, not to use upper tribunal decisions at all in the course of putting your case to the tribunal. So don't worry if you have neither the time nor the inclination to get involved with looking for relevant upper tribunal decisions. On the other hand, they can be useful and you don't need to be a lawyer to understand them, so it's worth knowing a little bit about how they work.

But do bear in mind that in relation to the work capability assessment (WCA), and particularly in relation to mental health, it will be some years before there is a large body of decisions to refer to. Some of the decisions made about the personal capability assessment for incapacity benefit may apply equally to the WCA where the wording of descriptors is the same or very similar. But in many cases, we will have to wait many months, or even years, before we know what views judges take about the WCA descriptors.

If you lose an appeal against a benefits decision, you may be able to appeal further to the upper tribunal. Upper tribunal judges can overturn an appeal tribunal's decision and their decisions are binding on all tribunals. So, for example, if an upper tribunal judge rules in a particular case that a tribunal should have taken into account the claimant's breathlessness when deciding how far he could walk without severe discomfort, then all future tribunals will have to take breathlessness into account.

Unfortunately, upper tribunal decisions are not binding on other upper tribunal judges. So it's entirely possible for another upper tribunal judge to find exactly the opposite and for yet more upper tribunal judges to then step in and take sides in a kind of judge's playground fight. Tribunals must then choose which decision they are going to follow.

Sometimes a gang of three upper tribunal judges will get together to decide a particularly contentious issue. Their decisions are binding on all upper tribunal judges, which prevents any further gang warfare.

Decisions of Northern Irish upper tribunal judges are not binding on mainland tribunals, although they are persuasive.

Submitting upper tribunal decisions

If you wish to draw the tribunal's attention to an upper tribunal decision, the simplest way is to turn up on the day with four full copies of the decision, with the passages you consider relevant highlighted with a highlighter pen. If the decision is a reported one the tribunal will have copies available to them, so you can just refer to the relevant paragraphs in the course of the hearing. (Though I still prefer to take highlighted copies along).

If you refer to a decision in a written submission, you should enclose a copy with the submission, unless it is a reported decision, in which case you need only quote the relevant section(s).

But do make sure you read the whole decision before submitting it. You may find that although one part is supportive of your case, another part could be very damaging. Also, avoid submitting great piles of decisions: if you do it on the day, the hearing may be

postponed because the panel don't have time to look at them all and even if you do it weeks beforehand you're likely to irritate and confuse the panel. Stick to one or two of the most relevant decisions if you use any at all.

Where to find upper tribunal decisions

Benefits and Work www.benefitsandwork.co.uk
The free access section of the site includes the fully searchable text of hundreds of upper tribunal/commissioners' decisions.

Disability Alliance www.disabilityalliance.org
The free, downloadable Digests of Commissioner's decisions on Disability Alliance's site are excellent, though by no means exhaustive, resources, which appear to be kept updated. One digest covers DLA and AA decisions and the other relates to incapacity for work. Both are available in word or .pdf format. They are a very useful starting point for anyone trying to find out if there has been a decision relating to a particular aspect of their claim.

Office of the social security Commissioners www.osscsc.gov.uk
What used to be the social security commissioners' site has a keyword based upper tribunal/commissioners decision search facility.

Department for Social Development of Northern Ireland www.dsdni.gov.uk
DSDNI is Northern Ireland's equivalent of the Department for Work and Pensions. The benefits law index page contains links to a range of legal resources, including:
the Northern Ireland Digest of Case Law which contains full copies in Word format of all NI Commissioners' decisions since the year 2000 and many of the most important Commissioners decisions from preceding years.

Department for Work and Pensions www.dwp.gov.uk/
The Information for professionals and advisers section of the Resource centre contains links to a wide variety of guides, manuals and legal texts, including:
full texts of all reported Commissioners decisions from 1991 to March 2002, available in a set of downloadable .pdf files;
Neligan's Digest, a downloadable volume which contains digests of Commissioners' decisions (but not full texts) that the DWP considers important.

Rightsnet www.rightsnet.org uk/
The most comprehensive collection of commissioners/upper tribunal decisions on the web, but you do have to pay a subscription to access them.

Preparing yourself for the hearing

Attend a hearing

If you have never been to a tribunal before, one of the most effective ways to prepare yourself is to attend one. They are scheduled to last just 40 minutes, so if you spend a morning at the tribunal offices, you should be able to watch several. This will mean that when you attend your own hearing you will know the layout of the building and have a much clearer idea of how the tribunal is likely to be conducted. If you are able to watch an experienced representative you may also pick up some useful pointers.

Contact your regional Tribunals Service office to get details of where your nearest tribunal venue is and when ESA hearings are held. They may also be able to tell you whether there are any claimants attending with representatives on the day you wish to attend, and at what time. Alternatively, you may be able to phone the clerk at the local venue itself, if it's used regularly.

When you get to the hearing venue introduce yourself to the clerk, explain why you are there and ask them to speak to whoever is going in next about your attending their hearing. Strictly speaking, appeals are public hearings, although the judge can decide to exclude the public in some circumstances. However, if particularly personal details are being discussed the appellant may say they'd rather you didn't attend.

Practice saying 'Sir' and 'Ma'am'.

From November 2008 tribunal chairs have been given the title of judge. They should therefore be addressed as 'Sir' or 'Ma'am' (unless the judge tells you differently). For some people this is not a problem at all, for others it may feel a little strange, if not entirely objectionable. So, if you think you may find this awkward, practice calling people Sir and Ma'am until it trips off your tongue as if you'd been doing it all your life.

Mark up your papers

If there are things in the papers you want to draw the tribunal's attention to, make sure you can find them quickly and easily. Use post-its, highlighter pen and marginal notes liberally. Doing this means that the tribunal won't get increasingly impatient as you scrabble through the bundle muttering "*Sorry, I'll find it in a minute . . . I'm sure it's here somewhere"*. In addition, you can direct the tribunal to the pages you want them to look at and give them less opportunity to go hunting around for things you might be less keen on them spending time on: *"At page sixteen of the bundle, the doctor states . . . however at page 7, the decision maker says . . . and if you'll turn to page 93 . . ."*

Draw up a checklist of evidence you think it is vital for the tribunal to hear

One of the worst feelings is to walk out of a hearing and then start thinking of all the things you intended to tell the tribunal but forgot about. If the hearing is not successful you're going to be left wondering if those extra bits of evidence would have made all the difference.

So make brief notes of each point and example you think the tribunal needs to hear, then at the hearing tick them off as they are dealt with. During the hearing add any further points that come up. Then when you're asked for any final comments, you can check through the list and briefly give the tribunal the extra information they need.

Draw up a checklist of things to take to the hearing

On the day of the hearing you may well be feeling a little nervous and you may not have slept terribly well – or at all. So in the days beforehand it's very well worth making a list of all the things you need to take to the hearing. For example:

- Appeal papers
- 3 x copies of additional evidence.
- Originals of GP's letter.
- Copies of letter to GP asking for evidence.
- Tribunal office number.
- Notebook and pens.
- List of points that need to be made.

What to wear

Dressing smartly demonstrates respect and 'respectability'. However, if in your claim you have said that you have to wear slip on shoes, elasticated waists or other clothing dictated by your condition then you should either:

- wear that clothing, because the tribunal will definitely notice if you don't and are entitled to draw conclusions from it; or
- wear smart clothes but actually point out to the panel that this is not what you normally wear and explain any extra help required or discomfort involved.

Medication

Tribunals are entirely accustomed to claimants turning up with rings under their eyes, looking extremely anxious and uncomfortable and stuttering and stammering their way through the hearing. And if it takes you two minutes and much discomfort to walk to your seat at the hearing then the tribunal will just have to wait patiently. These are not problems.

But if you take additional pain killers, tranquilisers or other drugs to help you cope with the ordeal, this can be a disaster, because the tribunal are entitled to take into account their observations of you at the hearing. So it's worth trying to stick to your normal medication regime. Otherwise, if for example, you have said that you suffer pain when walking more than a few yards but walk into the tribunal without any apparent discomfort, because you've taken a double dose of pain killers, it could do your case a great deal of harm. Similarly, if you suffer from anxiety attacks, but attend the hearing in a state of benign detachment due to taking extra tranquilisers, you may well make a very unconvincing witness.

Getting to the hearing

You are likely to be asked by the panel how you got to the hearing. For this reason it is not a good idea for you to use public transport on the day, unless you regularly use public transport and have no difficulties doing so. There is often an assumption that people who use public transport have less serious health problems because they are able to get to a bus stop and stand for long periods, as well as coping with the crowding, jolting and frequent stops and starts. If you do have to use public transport you will need to explain to the tribunal in great detail any problems that the journey caused you and any problems it may cause you for the rest of the day or following days.

On the other hand, if you come by car, you may be asked where you parked and how long it took you to walk from the car park.

A taxi is often a good option for attending a hearing, if you are able to afford it.

In the tribunal building

As well as being observed when you are in the hearing, you may be seen by panel members as you move around the tribunal building. Or you may be asked about how you managed walking along the corridor, whether you used stairs or a lift and so on. If you

have visited the tribunal venue, you will know the layout and know whether there will be any difficulties for you. For example, is it a long walk from the waiting room to the room in which the hearing is held? If so will you be able to walk it or is there a wheelchair available for your use?

Postponement, adjournment or no decision

If your hearing is listed for late in the afternoon, prepare yourself for the possibility of being sent home unheard if the hearings are running late. In addition, sometimes hearings begin, but are then adjourned because, for example, the tribunal decides it needs extra medical or other evidence or because the tribunal have been given the wrong papers or incomplete sets of papers. Finally, there is a slim possibility that although the hearing will be heard in full, the tribunal will be unable to reach a decision on the day and you will be sent home not knowing the outcome. The decision will be sent in the post to you some days later.

Inviting witnesses

You need to give the matter careful thought before inviting people to be witnesses. Could the potential witness actually give their evidence in a letter instead? Clearly it is better and more persuasive evidence if the witness is there in person to be asked questions by the tribunal, but the hearing is a short one, less than an hour, and there is not time for a stream of witnesses.

If you do intend to have witnesses, remember to check their unavailable dates and pass them on to the Tribunals Service.

If someone can give wide ranging evidence because they are a carer, partner, live with you or something similar then it may well be worth them attending as a witness. However, make sure that the witness is prepared to take your advice about dress and how to give evidence. If they turn up in deeply distressed denim and harangue the tribunal about the dreadful way you have been treated they may do more harm than good.

Witnesses are not generally called, as such. Usually they simply sit alongside you and are invited to speak on relevant issues by the tribunal judge. However, some judges may insist that witnesses wait outside until they are required.

You need to be careful if your witness is a parent or partner who has got into the habit of speaking on your behalf. Tell them that at the tribunal the panel will want to hear from you first every single time and that if they jump in first the tribunal may well feel that the evidence being given is unreliable. Lay out clear ground rules: the witness should never interrupt anybody, should wait to be invited to give evidence either by the tribunal judge or by you and, as far as possible, should only give the evidence agreed between you beforehand.

You don't have to inform the tribunal beforehand that you're bringing witnesses, but tell the clerk when you arrive at the hearing that they are there as witnesses rather than just to observe.

Notice of a hearing

Once you have returned the enquiry form you will probably hear nothing until you get a letter giving you the date, time and venue of the hearing. This may take five months or more and you will not usually get much more than two weeks notice of the actual hearing. Indeed, as the Tribunals Service are only obliged to send out the notice 14 days before the hearing date you may actually get less than two weeks notice. The letter should also tell you the name of the doctor who is to sit on the panel. If you know the doctor you should contact the Tribunals Service straight away. The Tribunals Service will then either to arrange for the doctor to be replaced, if that is possible at short notice, or have the hearing postponed.

When you get the date, check it is one you, and your witnesses if you have any, can attend on. If it's not, and it was a date you put down as being unable to attend, then contact the Tribunals Service immediately. They should offer you a new date instead. If they refuse to change the date write to them immediately asking for the hearing to be postponed and explaining why. Your letter should then be passed on to a tribunal judge. If they still carry on with the hearing in your absence you will have to get help in applying for a set aside, assuming you are unhappy with the tribunal's decision. As always, keep copies of everything and make notes of names and dates when you speak to people on the phone.

If the date is one that you told the Tribunals Service you could attend then you will need a very compelling reason for wanting it changed and there is no certainty that the Tribunals Service will agree to do so. If you are too ill to attend, inform the Tribunals Service by telephone and follow it up with a letter. If they do not postpone the hearing, make sure you get a doctors letter saying that you were too ill to attend and seek advice on trying to get the tribunal's decision set aside if you are unhappy with it.

What to do at the hearing

Because tribunals have very few rules of procedure, almost anything can happen on the day. However, in this section we try to give you some idea of what may happen and what you might do about it.

Arriving at the hearing

The clerk will be popping in and out of the waiting room and should approach you not long after you arrive. They will explain to you how the appeal system works and check if you have any expenses.

Go through the following things with the clerk:

- if you've brought any witnesses, introduce them and explain that they are attending as witnesses;
- ask how late are the hearings are running, this will give you some idea of how long you might have to wait;
- ask if they received any additional submissions you sent: compare bundles with the clerk;
- give the clerk copies of any further evidence that you didn't post to the Tribunals Service; for example, last minute medical evidence;
- ask if a presenting officer (see below) will be attending; the answer will almost certainly be no – but it's worth checking.

If there are problems: if things are running late, if you get sent home because they won't have time to hear your case, don't take it out on the clerk. Tribunal clerks do a very difficult job for not very good money and sometimes have to take the brunt of people's fury at having to attend a hearing or, worse still, losing their appeal. They manage nonetheless, to be courteous and helpful.

Being shown into the room

The two tribunal members sit together on one side of a table. The clerk will show you and any witnesses to seats opposite them. Tribunals are public hearings, so in theory the public can attend. In practice they don't. Sometimes someone from the DWP or a Citizens Advice Bureau who is learning about tribunals may wish to observe, however. The clerk will normally have told you if anyone else is attending and you can ask for the hearing to be held in private, though the final decision is the judge's.

Who must be present

The tribunal itself consists of two people.

A **judge,** who is legally qualified. This may be a retired solicitor or a younger solicitor hoping to work their way up to becoming an upper tribunal judge. Some are very pleasant and courteous; some businesslike and efficient and some, sadly, can seem very stressed, irascible and anxious to shut you up and get you in and out as quickly as possible.

A **doctor** who may also carry out medical examinations for the DWP. Again, some can be pleasant, whilst others seem most interested in trying to catch you out. Some doctors seem to have pet conditions that they are very sympathetic about and other conditions, say ME/CFS or back pain, that they are very sceptical and undermining about.

Who may also be present

In addition, there will very rarely be a representative of the DWP, the Presenting Officer, who will put their case. A clerk may also be present, but they will probably come and go throughout the hearing and they take no part in the proceedings.

The judge's introduction

The judge will introduce themselves and the medical member. Note the doctor's name, if possible, in case you wish to address them directly. The judge will explain that they are not part of the DWP and that they are here to consider the matter afresh.

Rules of evidence and procedure.

Tribunal Chairs run hearings pretty much as they choose. There are no rules of evidence at a tribunal and very little in the way of procedure. So, for example:

- No oath to tell the truth is sworn – although you can be asked to at the judge's discretion
- Evidence is given sitting down.
- You can be asked leading questions.
- 'Hearsay' evidence is permitted.
- Documents can be submitted without the other side having seen them in advance.
- Witnesses are not generally asked to wait outside and then called to give evidence – though they can be, at the judge's discretion.

Starting out: chronology of the case and the current award.

The tribunal will often begin proceedings by recapping what has happened: whether you are currently getting ESA; when the decision that is being appealed was made and what that decision was. It's useful if you have these basic facts to hand, which you can usually find at the beginning of the bundle, after the schedule (index).

Giving evidence at the hearing

The tribunal can question you in any way it wishes. Generally the judge will take the lead, asking questions about a particular issue and then asking the medical member if they have any further questions they wish to put.

Sometimes the judge will begin by asking you about a typical day, or they may ask in detail about what you did yesterday: what time you got up, when you dressed, whether you had problems washing and bathing etc. They may then ask about the day before and so on until they feel they have built up an accurate picture of how your condition affects you.

One potential problem with this line of questioning is that the tribunal are supposed to be looking at how your condition was at the date of the decision, not how it is now. If your condition varies, it may be that you are in a better patch at the moment and so your answers will not be an accurate reflection of your condition. If this is the case you will need to explain it to the tribunal. This is particularly the case with ESA where there can be a delay of many months between a decision being made and an appeal being heard.

Dealing with silences

When asked questions you should try to answer them accurately, but as briefly and concisely as possible. Not only will this help the tribunal get through their business, but it can also help prevent them going off at a tangent because you have given more information than was needed.

If there is a long silence after your answer, you should try to avoid filling it just out of politeness or nervousness: it's quite likely that the judge is simply noting down what you've

said before moving on. Watch the judge's pen, if it's still moving then there's no need to speak – the judge will look up when they have finished and ask another question.

Difficult situations.

Most panels are polite and will give you time and help to put your case. Occasionally, however, this may not be the case. For example, they may display clear prejudice against your condition or show obvious inattention. They may hector or hurry you in a way that causes you distress. They may talk amongst themselves or with a presenting officer about legal issues that you don't understand.

When things happen that you are unhappy about, you may be very reluctant to make any sort of protest in case it prejudices the tribunal against you. The problem with not objecting at the time is that if you later seek to rely on what you view as unfair behaviour as grounds for an appeal, it may count against you that you didn't say anything at the time. Though the fact that you are an unrepresented claimant will count in your favour in this regard.

There are no right answers in these circumstances, but below are a few things you may wish to try.

Ask for the matter to be noted

When you ask for something to be noted in the record of proceedings you are telling the panel that you want an official record made. The tribunal will be aware that you may then use this record as the basis of a complaint against individual panel members or as grounds for an appeal if it prejudiced your case in some way. For example:

'Ma'am, I respectfully request that it be noted in the record of proceedings that on the last five occasions on which I have attempted to speak I have been interrupted by the panel.'

'Sir, I would ask it to be noted that the medical wing member is tipping his chair back onto two legs, twanging an elastic band between his teeth and appears not to be paying any attention at all to the proceedings'. (This did actually happen).

'Sir, I would ask that it be noted in the record that you have just asked me if I am stupid as well as deaf'. (This also actually happened . . . at the same hearing).

Keep careful notes yourself

If something happens that you're unhappy with, try to make brief notes at the time and more detailed ones immediately you get back into the waiting room. Any witnesses should also make notes immediately afterwards. If you do subsequently appeal or make a complaint, the fact that you have a contemporaneous record of what happened will increase the chances of success.

Ask for a brief adjournment

If you have someone with you, such as your partner, a brief adjournment will give you the opportunity to confer and decide how best to deal with an unexpected situation. For example, the tribunal may have asked if it would be a good idea to adjourn the hearing in order to obtain some additional piece of evidence that might help your case. Or you may have become so distressed that you are having difficulty giving evidence.

Withdrawing your appeal

There may be circumstances under which you wish to withdraw your appeal once the hearing has begun. This could happen where, for example, the tribunal gave a clear indication that it was considering taking away an existing award. However, since November 2008 the tribunal has the power to refuse to allow an appeal to be withdrawn orally at the hearing. (Appeals can

still be withdrawn in writing prior to the hearing without anyone having the power to prevent the withdrawal).

Closing statement from you.

We've already suggested you have a checklist of all the most important points and examples which you can cross off as they're covered. If any didn't get covered, or you've added additional ones during the hearing, raise them at the end. This shouldn't be a problem as you should be asked by the judge if you have anything you want to add before they make their decision. But if the hearing has already overrun and the judge is in a rush to get shot of you, they may ask you to leave without inviting any final points. If this happens, you must be brave and insist:

"Sir, I do apologise, but there are some brief points that I think it's important the tribunal should be aware of when coming to your decision".

Paradoxically, it can be hardest to do this if the tribunal has been very pleasant and you feel sure they are going to find for you: the last thing you feel like doing is holding them up for longer and perhaps losing some of their goodwill. Don't be fooled, the tribunal may have enormous sympathy for you yet still find against you, or they may just be very good at hiding their opinions. So, no matter how hard, make those points. Make them as briefly as you possibly can, but make them. Because if the tribunal find against you you'll always wonder if it would have been different if you'd said all the things you thought important.

Waiting for the decision

Once the tribunal is satisfied that they have all the evidence they need, they will ask you and anyone else in the room to leave whilst they deliberate and reach their decision. Very rarely the judge may say that they are unable to reach a decision today because the matter is a complex one and tell you that a decision will be put in the post.

Waiting for the decision is probably the worst bit of the entire appeal process. One thing you can be certain of, however: there is no connection between the length of time the tribunal take to make a decision and whether it will be for or against you, so don't bother speculating.

Getting the decision and the decision notice.

Sooner or later, it might be five minutes, it might be twenty minutes, the clerk will come and fetch you. You are shown back into the tribunal room where the panel sit in silence until you are seated. The judge will say something like:

"Ms Jones, we have allowed your appeal. You will receive employment and support allowance with the support component from April 27th 2011."

You will be passed the decision notice and that's it. If the decision is a good one give them a big smile and a quiet thank you. If it's a bad one, look the judge in the eye, nod curtly and leave. You could ask the tribunal for a 'full written decision', but it may be better to wait. See the next section for more details.

Whatever you do, don't have a go at the judge. It won't do any good and, if you want to challenge the tribunal's decision the first person you have to seek permission from is . . . the tribunal judge.

Appealing to the upper tribunal – the first step

If you are unhappy with a tribunal decision, then as soon as you have been given it you can say to the judge that you would like to have a full statement of reasons for the tribunal decision. This is a complete record of the hearing which the judge writes and has sent to you. If you don't do it at the hearing you can still write to the Tribunals Service **within one month** of the hearing and ask for a full written decision. In fact it's a good idea to make the request in writing anyway, even if you did do it verbally, just in case it doesn't get noted down.

You can also ask in the same letter to be provided with a copy of the judge's contemporaneous notes. These are the notes that the judge took at the hearing and if there is a material disparity between what the notes say and what the statement says, this may provide grounds for appeal.

Some representatives prefer, in any case, to wait a few weeks to make the request rather than asking at the hearing. They consider that if you ask at the hearing the judge may be able to make a good job of writing up the proceedings from their notes. If, on the other hand, a few weeks have gone by the judge may find it harder to reconstruct the proceedings from handwritten notes and there may be a better chance of finding a point of law on which to appeal.

Asking for the full statement, which can take anything up to three months to arrive, does not commit you to anything. But if you do not have the full written decision you are not permitted to seek leave to appeal to the upper tribunal, so it's worth keeping your options open by asking for a copy whilst you consider what to do.

The process of actually appealing to the upper tribunal is beyond the scope of this current guide, but we have set out the first steps in brief below. It is a lengthy and more complex procedure than an appeal hearing and it is helpful to have some legal knowledge, although there are claimants who have succeeded at the upper tribunal with no support at all. It would be wise, therefore to try to get help for you from a welfare rights worker as soon as you receive a copy of the full decision.

Appeals to the upper tribunal have to be based on points of law. In other words, you have to say more than that you disagree with the decision, you have to show that the tribunal: got the law wrong; got the facts wrong; failed to take account of relevant facts; behaved unfairly or hasn't properly explained how it arrived at its decision.

Initially you have to ask the judge for permission to appeal to the upper tribunal and this must be done within one month of the date on which the full written decision was sent out. You can do this using form UT1 which can be downloaded from the former commissioner's website at www.osscsc.gov.uk.

It's worth using the form as it will tell you what needs to be included in your application. If the judge grants permission your appeal will then go forward. If the judge refuses permission, which they very often do without any explanation whatsoever, you can then apply directly to the upper tribunal for leave to appeal, using the same form UT1.

If permission is refused by a upper tribunal then, realistically, that's the end of the process unless you are in a position to seek a judicial review.

If permission is granted, then both you and the DWP will be invited to make further submissions. By this stage you really do need to have got help from a welfare rights worker, if at all possible. The client's representative, or the client themselves if they don't have one, may be invited to an oral hearing which can be held in London or Cardiff, or the case may be decided on the papers.

If the upper tribunal judge finds in your favour they may either substitute a new decision of their own or, more commonly, send the matter back to be heard by a new tribunal with additional instructions about what should be considered.

Getting help with an appeal

The agencies listed below may be able to help you with your appeal. Some advice agencies and law centres may be able to represent you at a hearing, others may help you prepare your case, and perhaps provide a written submission but not actually represent at the hearing.

Citizens' Advice Bureaux (CAB)
There are over 750 bureaux in mainland Britain. Look under Citizens Advice Bureau in your phone book or telephone the National Association of Citizens Advice Bureaux on **0207 833 2181** for details of your nearest one. You can also find details of your nearest bureau at: www.citizensadvice.org.uk

Disability Information Advice Line
There are over 140 local DIALs, all staffed by disabled people and all offering telephone advice. If you have a local line it should be listed in your telephone directory under DIAL UK. Alternatively, call the national office on **01302 310 123** or visit your website at www.dialuk.org.uk

Other advice agencies
Over 900 advice agencies are members of AdviceUK. Details of your nearest ones are available from AdviceUK's website at www.adviceuk.org.uk

Law Centres
Contact details of your nearest Law Centre, where you may be able to get free advice and representation at appeals, are available from the Law Centres Federation on **0207 387 8570** or from www.lawcentres.org.uk

Housing Associations
Some housing associations employ a welfare rights worker. If you live in a housing association property contact your local office.

Doctor's surgeries
An increasing number of surgeries and health centres have a welfare rights worker on the premises, part-time or full-time. Check with the receptionist.

Local Authority
Your local council may employ welfare rights workers who can help you with your claim. Start by asking your council's main switchboard if they can put you through to a welfare rights worker. If the operator doesn't know of one ask to be put through to the Social Services Department and if they can't help try the Housing Department, either department may employ welfare rights workers.

Appendix 1: Changes introduced in November 2008

The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 introduced a number of changes to social security tribunal procedure and practice. Below are some of the most important changes.

Tribunal chairpersons are now judges.

There is now an overriding objective for tribunals to deal with cases 'fairly and justly'. If a tribunal does not treat you in a fair and just manner you may have grounds to challenge the decision at the upper tribunal.

Where the tribunal has been notified that the appellant has a representative they need only provide documents (such as copies of submissions) to the representative and not to the appellant.

The tribunal now has case management powers, allowing it to do such things as: shorten or lengthen time limits; hold case management and preliminary hearings; oblige either party to provide documents, information or a submission.

The tribunal can issue a summons to require a person to appear before them.

In the draft legislation there was a requirement that the decision maker must respond to a request for an appeal within 42 days by providing the bundle of documents and their submission as to the merits of the appeal . This was removed from the final legislation and replaced by a requirement that a response should be given 'as soon as reasonably practicable'.

However, if the claimant or their representative wish to make a submission or provide further documents having seen the appeal papers, they must do so within one month of the date on which the decision maker sent out the bundle. This time limit can be extended at the judge's discretion.

The tribunal has the power to exclude any evidence which was not provided within a time limit, including a time limit set by the tribunal.

The tribunal has the power to admit any evidence it chooses, even if it would not be admissible in other courts. (In practice this has always been the case but has never been formally stated in legislation).

The appellant can withdraw an appeal in writing prior to the hearing. However, the tribunal can refuse consent for an appeal to be withdrawn where the request is made orally at the hearing.