

# **Disability Law Service**

advice and legal representation for disabled people

## **Appealing Employment Support Allowance Decisions**

# Employment Support Allowance

## How to make an ESA appeal

### Introduction

There are three levels of appeal when appealing a decision by the Department of Work and Pensions (DWP). They are:

1. Reconsideration
2. Appealing to the First Tier tribunal
3. Appealing to the Upper tribunal.

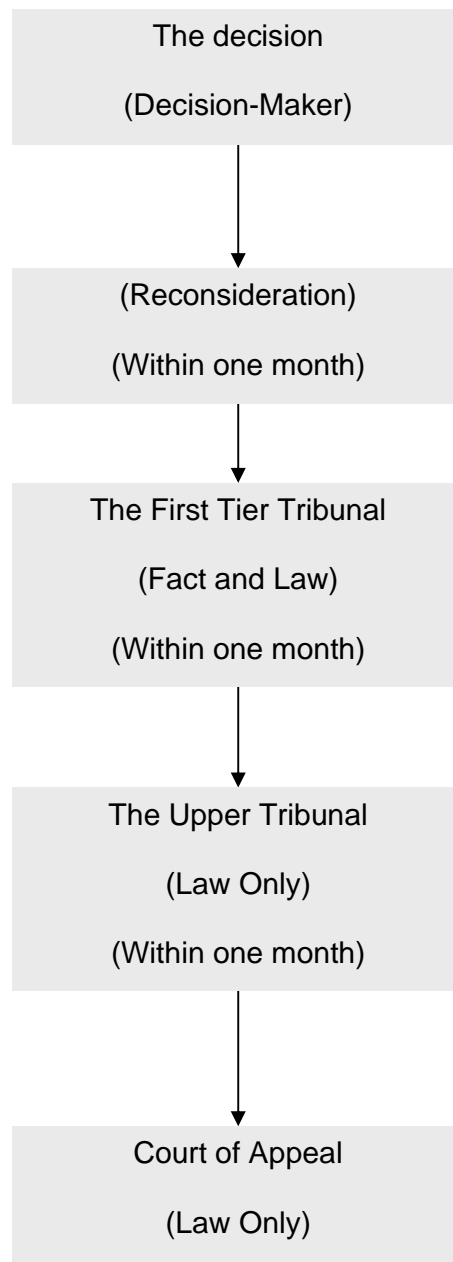
Generally it is best to first appeal by asking the Department of Work and Pensions to reconsider its decision. If this fails then you can appeal to the First Tier tribunal which is independent and run by the Social Security tribunal service. If your appeal to the first tier tribunal fails then you can appeal to the Upper tribunal.

On the next page you will find a list of some of the types of documents that you could use as evidence in any appeal or application for Employment Support Allowance.

**Evidence for appealing Employment Support Allowance decisions at any level of appeal**

- A letter of support from your doctor;
- A care plan;
- A doctor's report;
- A Statement by the claimant showing the history of the problems they have and how they affect them;
- Any medical information such as letter for appointments or anything which assists in proving your claimant attended their Doctor/hospital or other therapy for their problem;
- A diary of how the problems effect the claimant on a day to day basis;
- A statement from anyone that might provide care or help the claimant with their problems such as friends, family, care workers or Work colleagues etc.

# Appeals



## Reconsiderations

Reconsiderations are performed by the Department of Work and Pensions and are paper based. You can ask the Department of Work and Pensions to reconsider a decision by letter. It is advisable that you keep a record of your contact with the DWP and send your request for appeal by recorded delivery. It is best to send additional evidence when you are appealing a decision. Due to the time that it can take for an

appeal to progress once a matter goes to tribunal, it is better to try and win via the reconsideration stage first. Please remember you only have one month from the date of the decision to appeal or request reconsideration. Usually, regardless of whether you request an appeal or a reconsideration, you will be sent a letter by the DWP stating that they are reconsidering the decision regarding your Employment Support Allowance and that it will take four to 11 weeks.

## Appealing a ESA decision to the First Tier tribunal

### **Tribunal Procedural Rules**

As of 3 November 2008 there are newly formatted first and higher tier tribunals. They have a set of written rules governing how the First Tier tribunal is governed and what powers it has. There is also a separate set of rules for the Upper Tribunal service.

### **How do I appeal?**

The Department of Work and Pensions will send you a letter with the decision. The letter will give you details of how to appeal the decision. When you reply to this, you will be sent an appeal form from the Tribunal service which is called the GL24. Once you send this off you will be sent further details and the submission from the Department of Work and Pensions and this will be the start of your appeal. Again, please remember that you only have one month from the date of the decision to appeal. If you are late then you can request that they accept it out of time but you will have to give good cause as to why you could not submit an appeal in time.

### **Do I appeal?**

The decision to appeal will be based directly on your or the person you are representing (the claimant's) condition relative to the basic tests for Employment Support Allowance. There are generally only two types of appeal that you will consider for an ESA appeal namely a decision not to award Employment Support Allowance at all or a decision not to place you in the Support group.

If the question is whether you should be awarded Employment Support Allowance at all then the first thing a person must do is compare them self to the Schedule 2 descriptors. They should see which of these they fall within and if, in total, these make up to at least 15 points. There is a copy of the descriptors in our basic guide to Employment Support Allowance. If you think you have enough points then the next step is to find the evidence to show that this is the case. Please look at the above page which gives ideas as to possible evidence you could consider.

If you are unable to find 15 points on the ESA list of descriptors, as a plan B you can argue that you fall within section 29 of the ESA regulations 2009. This is an exception where you can show that due to your disability there would be a substantial risk to your health or to the health of someone else if you are found not to be eligible for ESA. The part of the regulation which is relevant is put below.

‘The claimant suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work.’

In order to use the above argument you should ask your GP if they agree with the above statement and if so have them write that in a letter stating why. Again if you can find any other evidence to support this argument such as diaries and statements from others that know you then it will boost your credibility.

If you wish to appeal not being put in the support group then you must read through the Schedule 3 descriptors which are not points based and see if you fall within any of those. Then it is a case of finding evidence to show this as stated above.

### **Please read the DWP’s submission**

Generally the issue, once the decision is taken to appeal, will be to find evidence to dispute the medical evidence of the Department of Work and Pensions. It is for this reason that it is important that the papers that you receive in your appeal, called a submission, from the Department of Work and Pensions are thoroughly read. This way you will know what evidence you to have to be going up against the submission. This

will usually be in the form of a supporting letter from your or the claimant's doctor although witness statements from you, or the claimant, and others, will assist.

### **The date of the decision**

If you, or the claimant, decide to appeal then you must bear in mind that the tribunal will only look at how you or the claimant was at the time of the decision. If you, or the claimant, have become worse after that date it will not affect the decision of the tribunal. The only use of evidence dated after the date of the decision will be to show that you, or the claimant, have a continuing illness and deserve a longer award.

### **Oral or written**

On the appeal form, when requesting an appeal, it is asked whether you, or the claimant, would prefer an oral or written appeal. On the basis of previous statistics always aim for an oral appeal as it greatly increases the possibility of winning.

### **Sequence of events – The tribunal**

- Notify the Department of Work and Pensions that you want to appeal.
- Receive the Department of Work and Pensions' bundle/submission.
- Receive the tribunal enquiry form with the option of an oral or written appeal (choose oral).
- Gather evidence and medical support and then write your submission.
- Receive the date for the tribunal hearing.
- Send in your submission, with evidence (if possible a few weeks before the tribunal) but you can, if you have no other choice, bring evidence in on the day.
- The tribunal day itself. The decision will be given on the day or sent that day by post.

## **The submission**

If you are representing a claimant you will want to send a written letter stating the reasons you should be awarded Employment Support Allowance. If possible keep this to two pages and try and keep to the time period in question. The tribunal do not want the claimant's life story in the submission as your evidence should be the letters from yourself and your doctors and friends, ex work colleagues etc.

## **Submitting to tribunal**

When you submit your evidence to the tribunal make sure that you send it early enough. The evidence will still have to be sent to the tribunal from the main tribunal office and so will take time. The tribunal itself will then have time to read it days in advance. On rare occasions this may lead to you turning up to the tribunal and being told that they are willing to offer your claimant an award directly on the submission (apparently this is rare but can ease your day and the claimant's stress levels)

## **The day of the tribunal**

On the day of the tribunal, if the Department of Work and Pensions Presenting Officer does not appear, you and your claimant will be told to go to a room when the tribunal is ready for you. The tribunal may ask the representative some questions but the majority of the questions being asked by the tribunal will be to the claimant. The basis of this will form the tribunal's decision. After the tribunal have asked their questions, they will ask if you have any questions. That will end the hearing.

If the Department of Work and Pensions Presenting Officer does appear, they may be asked questions by the tribunal as they are going through the evidence.

## **The Employment Support Allowance tribunal**

The tribunal is made up of the following people and is independent:

- Doctor
- A Judge (solicitor or barrister).

## The decision

Depending upon the day, the tribunal may give you a decision straight away or ask you to leave for ten minutes and then tell you or it may say it is too busy and say it will write to you with its decision.

### Does having Representation at a tribunal make a difference?

The tribunal can, from a distance, be quite daunting from the perspective of a claimant. The Department of Work and Pensions Submission is usually padded out with copies of the application forms for Employment Support Allowance and medical documents. The claimant will also not know what the rules are and therefore will not know if they have a chance of success or if they are bringing with them the evidence they need.

Having a Representative assisting a claimant changes all of the above. The claimant should walk in to the tribunal fully informed, with an understanding of the process and what is the likelihood of them winning their case. More importantly, they will know why. You can see below that the difference between a claimant winning their appeal on their own and a claimant with a representative winning is around 15%.

<b>Overall success</b>	<b>Claimant attended only</b>	<b>Representative attended only</b>	<b>Claimant and representative attended</b>	<b>Oral hearing without claimant or rep</b>	<b>Paper hearing</b>
45.1%	51.7%	62.1	66.6	20.2	16.6

Please note that the Key to winning tribunals is preparation. This is knowing the main rules for ESA and having sent the evidence into the tribunal. The majority of claims/appeals fail just because they have not gathered evidence to support their case.

# The Upper Tribunal

If you have an Employment Support Allowance decision at the First Tier tribunal which you are not happy with then you can appeal to the Upper Tribunal. Please note the procedure below and, importantly, the timeframes. One of the main problems with this is that you generally cannot submit additional evidence. The question that the Upper Tribunal must face is whether the first tier tribunal made an error in law when considering the documents and testimony that they had on the day. This is another reason why it is important to make sure that enough evidence is sent in for the original first tier tribunal appeal.

## The process

- a. You must ask the tribunal which you have been dealing for a statement of reasons and a record of proceedings. You must ask for this for within one month of the tribunal decision. It can sometimes take a while for it to be sent to you, in some cases this can be a number of months.
- b. When you receive the statement of reasons then it must be compared to the documents that were available on the day to see if there are any arguable points which may be considered errors of law.
- c. You then must apply for permission to appeal to the upper tribunal by writing to the original tribunal. This must be done again within one month of the statement of reasons. You must include a copy of the original decision you are appealing against. You should also include the issues which you think are errors in law. When you apply for permission you can also request that the judge set aside the decision and start a new tribunal.
- d. If the Judge refuses these requests then you can apply directly to the Upper Tribunal. You must apply directly to the Upper Tribunal within one month of receiving the decision. You must apply using the UT1 form which is available on the Upper tribunal website: <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/aa/form/index.htm>.

### **What can the Upper Tribunal do?**

You can ask it to set aside your decision, allow you a fresh tribunal or to make a decision itself if there is no new fact-finding that is required.

### **Do I appeal?**

The question of whether you appeal or not is based on whether the tribunal have made an error of law. It does not matter if you did not have the best evidence with you. Nor does it matter if you have better evidence now. The Upper tribunal will only look at the decision the tribunal made on the day with the evidence they had in front of them at the time.

### **What is an error of law?**

- a. The tribunal were wrong in their application of the law, i.e. it misinterpreted a previous decision or a statute.
- b. There was no evidence to support the decision that the tribunal came to.
- c. The tribunal made decisions after getting the facts wrong in the case.
- d. A breach of procedure/breach of natural justice, for example: irrationally not allowing an adjournment; not allowing you to call witnesses; no interpreter or bad interpretation; you did not get notice of the hearing; you did not receive the Department of Work and Pensions' submission; you asked for an oral hearing but one did not take place.
- e. The tribunal did not give adequate reasons for its decision.
- f. The Tribunal accepted a government Medical Report such as one performed by ATOS Healthcare over your GP's medical report without giving good reason of choosing one over the other.

### **Not an error of law**

It is not an error of law if a different tribunal would have come to a different conclusion but the original tribunal did not make any of the above mistakes.

### **Legal Disclaimer**

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For further advice on these matters please contact:

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