

Scrutiny Committee – 4 September 2012

9. Employment Support Assessment - Report to Scrutiny Committee

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Purpose of report and action required

Earlier this year, the Scrutiny Committee were made aware of the fact the Welfare Benefits Team were encountering significant issues relating to the recently introduced Employment and Support Allowance (ESA) and this in turn was having an impact on capacity within the team and their ability to fulfil all their functions. It was agreed that the issue would be investigated and reported to the Scrutiny Committee.

This report sets out the findings of that investigation and a number of points (detailed from paragraph 8) that, if endorsed by members, can be submitted to the independent review process described in the report.

1.0 Background

- 1.1 At SSDC we are fortunate to have a dedicated Welfare Advisory Service which over time has had significant success in ensuring South Somerset residents access the benefits to which they are entitled. Taking such a proactive approach has enabled us to support residents before crisis points are reached – thus minimising both the financial and operational impact to this authority. The team work to ensure advice available on a broad range of benefits, however, since the introduction of the ESA, they have found that a disproportionate amount of their time is being spent on the administration of this particular benefit – to such an extent that until recently – the team was unable to accept new clients.
- 1.2 This report briefly explains the ESA process and sets out a number of points that, if endorsed by members, can be submitted to the independent review process described in the report.

2.0 What is ESA?

- 2.1 Employment and Support Allowance (ESA) was introduced in October 2008. It replaced three incapacity benefits – Incapacity Benefit, Income Support by virtue of a disability and Severe Disablement Allowance – for claimants making a new claim for financial support on the grounds of illness or incapacity. ESA is intended for people who have limited capacity for work (who are placed in the Work Related Activity Group), and people who have limited capability for work related activity (who are placed in the Support Group).
- 2.2 The Work Capability Assessment (WCA) determines whether a claimant falls into one of these groups, or is fit for work. People who are found fit for work may be eligible for Job Seeker's Allowance, which is the benefit paid to people who are available and actively seeking work.
- 2.3 The WCA replaced the Personal Capability Assessment that was used to assess people claiming incapacity benefits. It is intended as a functional health assessment rather than

as a diagnostic medical assessment, which will already have taken place through the claimant's GP or healthcare specialist. The focus of the WCA is on what people can do rather than what they cannot.

- 2.4 In April 2011, the Government began reassessing people entitled to Incapacity Benefits (IB), Severe Disability Allowance and Income Support on incapacity grounds to determine their eligibility for ESA. This reassessment is a key part of the government's welfare reform agenda by ensuring that those people who can work are encouraged to do so.

3.0 ESA Process

- 3.1 Generally all claimants will complete an initial application form and then enter a 13 week assessment phase and start on the same benefit rate as Job Seekers Allowance. When they apply for ESA they are required to send a 'fit note' to the Department for Work and Pensions (DWP) to decide whether they are entitled to ESA and which category they should be in. There are three potential outcomes to the assessment:

- allocated to the ESA Support Group,
- allocated to the ESA work related activity group,
- found fit for work and not entitled to any ESA.

- 3.2 The WCA is then carried out by a healthcare professional (usually a doctor or a nurse – but there is some evidence that assessments have been carried out by Physiotherapists). The health care professionals are employed by a private contractor appointed by the DWP – Atos Health Care. Once the medical assessment has been carried out, the health care professional sends their report to a 'decision maker' at the DWP. Based on the information available, the Decision Maker decides if and at what level, ESA should be awarded.

- 3.3 The WCA conducted by the Atos employee follows a scripted interview process – the healthcare professional asks a number of questions from a computer programme. Each question relates to a different type of physical functioning (called a *Descriptor*). Each descriptor scores a different level of points depending to on the individuals' level of impairment. The report of the Atos professional is then sent to the DWP decision maker.

4.0 Concerns/Issues

- 4.1 The quality of the WCA provided by Atos has been a major concern for many involved – especially the accuracy of their reports. It is estimated that over the lifetime of their contract with the DWP, Atos will have been paid over £1 billion and it is not clear if there are any financial penalties for inaccurate reports which lead to appeals by applicants being supported at tribunal stage.

- 4.2 Most Claimants are sent an ESA 50 form which asks for details of how their condition or impairment affects their functioning. Further medical evidence may be sought at any time from the claimant's own doctor although evidence from the Citizens Advice Bureau (CAB) and the experience of SSDC Officers suggests that this additional information is rarely sought. In many cases NHS Doctors will charge an average of £30 for medical evidence and few people on low incomes can afford this.

- 4.3 The large majority of new claimants are asked to attend a face to face assessment (which is a cause of concern to some advocacy groups supporting claimants with mental health issues as the assessments can be a stressful experience with little flexibility to allow for the needs of the individual to be taken into account).

- 4.4 CAB reports a significant level of inaccuracy on many of the Atos medical reports – the response of Atos and DWP has been that they carry out a significant number of assessments and there are bound to be a ‘few mistakes’. However, when looking at only those cases dealt with by SSDC officers, there appears to be a significant level of inaccuracy, resulting in a notable number cases being appealed and upheld at tribunal. To substantiate previously anecdotal concerns over the accuracy of Atos assessment reports, the CAB carried out a national investigation. Full details of the investigation can be found at www.citizensadvice.org.uk. Out of the 37 cases chosen nationally, 16 were identified as having a serious level of inaccuracy, 10 indicated a medium level of reported inaccuracy and 11 cases indicated a low (or no) level of inaccuracy.
- 4.5 There were 5 main types of inaccuracy identified:
- 4.5.1 - **Omissions or incorrect observations recorded**
E.g. a pronounced and clearly observable impairment simply not recorded.
 - 4.5.2 - **Incorrect factual recording of the history given by the claimant**
E.g. a claimant saying he couldn’t dress unaided was recorded as saying that although they experienced some difficulty was able to dress unaided.
 - 4.5.3 - **Medical evidence inappropriately determined**
E.g. Atos making medical assessments they are not qualified to do.
 - 4.5.4 - **Closed questions, lack of empathy to encourage the person to talk and incorrect assumptions made when the information was not gathered, and**
 - 4.5.5 - **Inconsistency within the report.**
E.g. the narrative information in the report indicated a certain number of points should be awarded, yet a different number are actually awarded.

The experience of SSDC officers would support these findings and would strongly indicate that these issues remain current and to date, show little, if any signs of improving.

5.0 Tribunals

- 5.1 Claimants who feel that they have been placed in the wrong category following their WCA can appeal the decision and may take their case as far as tribunal. Government figures from April 2012 show that 60% of those who have undergone the WCA have been declared fit for work, 41% of such decisions have been appealed against and 38% of appeals have been successful. In some cases, claimants scoring 0 points after the initial assessment have been awarded in excess of 15 points at appeal.
- 5.2 There is a considerable amount of work (and stress) involved in taking a case to tribunal. From the perspective of the Tribunals System, the Ministry of Justice estimates the total cost to the Courts Service of the 112,30 ESA appeals disposed of in the six months from April to October 2011 to be £26.844 million and likely to rise to £50 million a year. The service currently has to list additional tribunal hearing dates and recruit additional staff accordingly.

- 5.3 From an SSDC perspective, preparing cases for tribunal is a lengthy and involved process which takes up a considerable amount of the Welfare Benefit Advisory Team's time. Essentially the team has to operate on a reactive basis, mitigating the impact of a change in Government Policy rather than being able to proactively support clients in the take up of appropriate benefits.
- 5.4 Based on figures collected during July, in staffing costs alone, SSDC is spending approximately £2714.47 per month supporting clients through the ESA and WCA process- this roughly equates to £33k per year administering a single benefit's process.

6.0 Independent Review Process

- 6.1 The Welfare Reform Act of 2007 which introduced these elements also legislated for *an independent report on the operation of the assessment annually for the first five years aftercoming into force.*
- 6.2 The first independent review of the ESA / WCA was carried out by Professor Malcolm Harrington and was published in November 2010. This review found that, whilst the system was not broken,*"beyond repair, it was not working as well as it should..."*
- 6.3 The review made a number of recommendations to improve the fairness and effectiveness of the system, including:
- 6.3.1 - improving the capability and confidence of the Decision Makers at DWP operations who decide benefit entitlements;
 - 6.3.2 - making the WCA a more compassionate process;
 - 6.3.3 - improving the face-to-face assessment conducted by contractors Atos Healthcare by putting in place 'champions' with additional expertise in mental, cognitive and intellectual conditions and by ensuring every Atos assessment contains a personalised summary in plain English.
- 6.4 Professor Harrington's second review was published in November 2011. This review stated that he believed the WCA remained the right process and asked that all those who believed that improvements had not been made to be patient – things were getting better. He did go on to make a series of further recommendations including:
- 6.4.1 - **better communications and sharing of information between all parts of the system** - this will mean that everyone involved knows their roles and responsibilities, the purpose of the WCA and the reasons for any decisions taken.
 - 6.4.2 - **Increasing and improving the transparency of the assessment**
 - 6.4.3 - **Monitoring the impact if recommendations from the Independent Reviews** – Ensuring that the issues identified are being addressed and they are having the desired impact.
- 6.5 Relating to all his recommendations, Professor Harrington acknowledged that there were likely to be cost implications but stated that seen in the wider context the proposed changes would be likely to be cost saving or cost neutral in the medium to long term by ensuring that decisions are right first time.
- 6.6 As part of the call for evidence for the third annual review, SSDC have the opportunity to state how the system is currently operating from our perspective. To date, no other local authority has contributed to the independent review process, although several national

organisations have provided considerable evidence as to how the ESA is impacting on some of the most vulnerable people in our society

7.0 Recommendations for improvement

- 7.1 Accuracy seems to be the key in securing improvement. In his second independent report, Professor Harrington expresses concern about the WCA process as a whole and inaccuracy specifically and the Government itself in a report to the Work and Pensions Select Committee in 2012 recognises the need to do more to learn lessons from the management of the Atos contract, including the need for robust performance indicators.
- 7.2 SSDC officers and members support the call for independent monitoring of the accuracy of WCA reports and the introduction of more formal quality assurance procedures.
- 7.3 Our experience would support the call for DWP decision makers to take a more proactive approach when making their decisions about whether or not to award ESA. The Decision Makers should more routinely challenge and question findings of the Atos completed WCA. The Decision Taker should have received adequate training and be made aware that the Atos report should form **part** of their decision making process, along side evidence from GP's. We support the calls for medical evidence to be provided from the professional nominated by the claimant as knowing them best. We concur that it should not be the responsibility of the claimant to provide medical evidence as this would lead to an inequitable situation where only those who can afford it, get a better quality of decision.
- 7.4 Completed WCA's should be routinely sent to claimants for them to verify prior to a final ESA decision being taken – claimants should be given a specified amount of time within which to confirm the content before it is sent to DWP – no response will be taken as confirmation.
- 7.5 Bearing in mind the significant value of the contract between DWP and Atos and the costs involved in inaccurate decisions being overturned at Tribunal, the DWP should consider imposing financial penalties on Atos for every inaccurate report they produce.

8.0 Conclusion

- 8.1 SSDC Experience supports the wealth of evidence gathered by national organisations such as CAB and would seem to contradict Professor Harrington's assertion that practitioners should be patient as the issues identified in years one and two are now being resolved.
- 8.2 It is recommended that the very practical experiences of our officers should be reported to the third annual Harrington Review so that those conducting the review are clear that the situation is still causing grave concerns at an operational level with very little sign of improvement.
- 8.3 The Call for Evidence for Professor Harrington's Third Annual Review asks three very specific questions. The questions and the suggested SSDC response are as follows (as detailed in 8.4, 8.5 and 8.6 below):

8.4 Communications

- 8.4.1 The questions contained in the current ESA 50 form do not correspond directly to the descriptors so it is difficult to see how the Atos professional can use the

information gathered via the ESA 50 form to award points against the agreed set of descriptors.

- 8.4.2 It is very difficult to make telephone contact with the DWP – you can never call and speak directly to the officer dealing with a particular case – you have to leave details which are e-mailed to the relevant officer who will make one attempt to get back to you. This can be very difficult for vulnerable people trying to resolve their cases.

8.5 Face to face assessment

- 8.5.1 From an operational perspective, we remain very concerned about the accuracy of the reports resulting from the face to face assessments.

In one example, the assessment that our client underwent did not effectively measure fitness for work. Our client has Multiple Sclerosis and suffers from the full range of associated symptoms –due to her illness she has not worked since 2002. Following her WCA she was found not to meet the threshold for Limited Capability for Work. This decision was subsequently appealed and overturned but not before a vulnerable client had been subjected to a lengthy and stressful process.

The written report of the assessment states that the client would have difficulty standing for periods of longer than 2 minutes and needed help to fulfil a range of daily tasks – the points awarded however did not seem to match the written observations.

- 9.5.2 Another of our cases highlights the fact that the face to face assessment does not adequately take account of mental health issues. In the case in question, the client suffers from long standing bi-polar disorder and also on-going mobility issues. In her initial form, the client stated her full range of physical impairments as well her difficulty in coping with social engagement and appropriateness of behaviour with other people.

Our client's assessment was conducted by a physiotherapist with no experience of mental health issues and concluded that none of the physical activity outcomes or any of the mental health descriptors applied to our client.

A complaint was made to the DWP Decision Maker on behalf of the client and the DWP admitted that the assessment report was '*short of relevant information and is superficial and does not cover all aspects of your client's walking ability*'. Despite this and the fact that additional medical information was provided, the original decision was not overturned and the appeal again progressed to Tribunal Stage.

Our client was extremely anxious during the tribunal process but was finally awarded 42 points on mental health factors alone and it was concluded that our client satisfied the criteria for Schedule 2. para.14 and was consequently placed into the Support Group. It is worth noting that the Tribunal Judge and medical professional noted that our client 'needs help and we hope that she gets it'.

8.6 Decision Making

- 8.6.1 We consistently find that the DWP Decision Maker is not taking account of additional medical information when taking decisions. Guidance clearly states

that the WCA is not a diagnostic assessment – yet information relating to clinical diagnosis is either not routinely sought, or when it is provided, it is not taken into account.

- 8.6.2 It appears that the Decision Makers may not feel able to challenge the report of the Atos professional when it appears there is contradictory additional information. We are not in a position to say if this is down to inadequate resources or inadequate training. However, it is resulting in a significant number of incorrect decisions being taken which are subsequently over turned at tribunal.
- 8.6.3 Locally, the quality of decisions would be greatly improved in the DWP decision takers allowed for our officers to comment on ESA applications. Our officers have more detailed knowledge of our clients' needs as well as a good understanding of the ESA assessment process. As an organisation we are currently spending a considerable amount of time, effort and money on supporting clients through the ESA application and appeals process – resources that are already in short supply. It would represent a much better use of limited resources – both ours and those of the DWP and Tribunal Service, if we could find a way of making sure the Decision Maker is actually taking a decision based on the whole picture, rather than just on the WCA assessment report – which is after all only supposed to form **part** of the final decision making process.
- 8.6.4 If clients and/or their advisors if applicable, were sent a copy of the WCA report prior to it being sent to the Decision Maker and given a specified amount within which to respond, any inaccuracies / omissions could be identified and corrected **prior** to a decision being taken.
- 8.6.5 Concern may be expressed that such an approach may lead to delays in the decision making process – however, the current system with such a high proportion of cases resulting in Tribunal hearings, is already causing a delay in reaching a final outcome and is in addition, causing significant levels of stress and anxiety for vulnerable people.
- 8.6.6 We would be willing to work with DWP and other agencies involved to pilot practical solutions to the current operational difficulties.

9.0 What one thing (if any) would you change about the WCA to make the system better for people claiming ESA?

We would like to see all of the practical suggestions mentioned in this response taken forward in order to improve the claimant's experience of the ESA / WCA process. However, if asked to identify one thing in particular that we would wish to change, it would be a more stringent requirement for Decision Makers to seek the views of a claimant's own GP or clinical professional. Being routinely in possession of such information would allow the Decision Maker to take a decision based on all the available information rather than solely on the WCA report. The requirement to provide additional clinical information should not financially disadvantage any claimant.
