Benefits and Work
Guides you can trust

The Best Possible

Employment and Support Allowance and Universal Credit Mandatory Reconsiderations and Appeals

November 2020

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Contents

Some important points about appeals

1 Normally, you can't go straight to the appeal stage after receiving a decision. Instead you must first ask the Department for Work and Pensions (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.

Until recently, this meant that if you were found fit for work you could not be paid ESA again until the mandatory reconsideration decision had been made and, if you were still unhappy, you had lodged an appeal.

However, as a result of the Connor decision in the High Court dated July 24th 2020 you no longer have to go through the mandatory reconsideration process if you have been found fit for work under the work capability assessment (WCA). Instead, you can be paid ESA again once you have appealed, without needing to ask for a mandatory reconsideration first.

But if you have failed the WCA for reasons other than being found fit for work, such as failing to return your ESA50 or failing to attend a WCA assessment, you still have to go through the mandatory reconsideration process and you will not be eligible for ESA again until you have lodged an appeal.

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.

3 The normal time limit to submit an appeal, which must be in writing, is one month from the date on the mandatory reconsideration decision notice. It is possible to make a late appeal within twelve months of the normal one-month time limit, but specific conditions must be met.

4. From March 24th 2020 for a period of at least 6 months, until September 24th 2020 it is extremely unlikely that there will be any face-to-face Tribunal hearings. This is as a result of the Coronavirus pandemic. It is very important that in addition to reading the rest of this document, that you read the section headed 'Paper or Oral Hearing' and the sections which follow it.

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 deadline of one month from the date on the initial decision letter to ask for a mandatory reconsideration. If you miss this deadline you can still request a mandatory reconsideration, provided it is not more than 13 months since the date of the decision. In this case you should supply as much detail as possible to persuade the DWP to accept your request. You may also be able to attempt a fresh claim. There are now strict rules on the circumstances in which you can make a new claim for Employment and Support Allowance (ESA) or the limited capability for work (LCW) element of Universal Credit (UC) if this follows a decision that you do not have limited capability for work.

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 (ESA) or the limited capability for work (LCW) element of Universal Credit (UC).

Please note: this guide is designed for people who used the Benefits and Work guides to ESA and UC 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 or the LCW element of UC. 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 most recent government statistics (March 2019) show that the success rate for people appealing against a decision that they are capable of work is as high as 72%.

As it is now even harder to reclaim ESA or the LCW element of UC if a claim is refused, or if an award is withdrawn following a review, it is even more important that claimants use the reconsideration and appeal process where necessary.

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.

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

1. You got no award for the limited capability for work element of UC at all.
2. You were assessed as having limited capability for work (LCW) instead of having limited capability for work-related activity (LCWRA).
3. Your UC has been sanctioned because, for example, you failed to attend a work-focused interview.

The first and third scenarios should not carry any risk for either ESA or UC claimants.

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

If you have had your ESA or UC 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 or UC at all.

However, the second scenario definitely does carry a risk for both ESA and UC claimants.

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.

If you have been awarded UC with the limited capability for work component there is 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 fit for work. As a result, you will not be entitled to the limited capability for work element and your claimant commitment will become more demanding as you will be moved from the 'work preparation requirement' group to the 'all work-related requirements' group.

In the vast majority of cases this will not happen. But if you are challenging a decision that you have been placed in the work-related activity group rather than the support group (ESA) or limited capability for work group rather than the limited capability for work-related requirement group (UC) 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 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, for example, you are appealing to be moved from the work-related activity group to the support group of ESA.

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 whilst you appeal, but, for new claimants, this payment will only comprise the personal allowance. The work-related activity component (WRAC) was abolished for new claimants from 3 April 2017. .

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, you can appeal without the need to go through the mandatory reconsideration process, and will be paid ESA again. This does not apply if it is decided that you are not entitled to ESA either because you failed to return your ESA50 or you failed to attend a WCA assessment without 'good cause'.

However, an Upper Tribunal decision, CE/2126/2018 decided that the letter that came with your ESA50, and the letter that required you to attend a WCA may both be illegal, as they did not expressly explain the legal obligation to return the form or attend the WCA. If the decision disallowed you ESA for either of these grounds and it was dated 21/2/20 or later you should remain entitled to ESA. The DWP say that they have amended all the letters and forms so that they are now legal. If you are thinking of challenging your decision on the above grounds, check the wording of your letter very carefully and get advice if you can.

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.

Reclaiming ESA after being found capable of work

If you have been turned down for ESA in the past, and you reapply, you will no longer be entitled to ESA whilst you are waiting for a decision on the new claim. Instead you will have to try to claim another benefit, such as UC.

In addition, if you are refused again and your mandatory reconsideration is also refused you will not be able to claim the assessment phase rate of ESA whilst waiting for your appeal to be heard.

There are exceptions to this rule, however.

You will be able to make a new claim and be awarded ESA at the assessment phase rate either if there is a deterioration in your health condition **or** you have developed a new health condition at any time after you have been refused ESA.

You will need to go back to your GP and get a new fitness for work certificate. It is important that you ensure that the GP notes on it either that your condition has deteriorated

or that you have a new condition. You will need to make a new claim for ESA or UC.. This should then trigger a fresh work capability assessment and you should receive ESA or UC at the assessment phase rate if you meet all the other criteria for an award.

The rules restricting a claimant’s right to reclaim ESA also do not apply if the reason you were refused ESA initially was that you failed to return your ESA50 or UC50 form (the limited capability for work questionnaire) or you failed to attend a face-to-face assessment. In these circumstances, you can reapply and be paid at the assessment phase rate even if your condition has not deteriorated and you do not have a new condition. Depending on the circumstances you should also consider challenging the decision to refuse you ESA.

Also, if the decision is the first time you have been refused ESA, and you have been through the mandatory reconsideration process, and have lodged an appeal, you can ask for ESA or UC (at the assessment phase rate) to be reinstated provided you can send in a fitness for work certificate to correspond with the period in question. These can be paid from the date you were first refused, if the fitness for work certificate is also backdated.

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

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

Found capable of work

The rules differ slightly between ESA and UC, mainly because ESA can **only** be paid on the basis of limited capability for work, whereas UC can be paid to those with **and** without limited capability for work. Therefore, if you are found capable of work or assessed as having limited capability for work, you will still be entitled to claim UC and receive an amount comprising the standard allowance and child, carer, childcare and housing elements, where applicable, while you are challenging a decision.

Awarded LCW element

If you are challenging a decision where you were assessed as having limited capability for work (LCW) and you believe that you have limited capability for work-related activity (LCWRA), you will **not** receive a LCW amount within your UC payment while you are challenging a decision. This is because the additional amount payable under the LCW element for those assessed as having limited capability for work was abolished for new claimants from 3 April 2017;

UC sanctioned

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

Asking for a mandatory reconsideration

From March 17th 2020 for a period of at least 3 months until June 17th 2020 assessments have been suspended as a result of concerns regarding the spread of coronavirus. This does not mean the time limits have been suspended. For example, you receive a decision dated March 26th saying you are not entitled to ESA or UC, YOU MUST stick to the basic one-month time limit for challenging the decision. This is also important so that in the long term if the decision is changed in your favour you receive the maximum amount of arrears.

If the DWP decide that your MR requires an assessment this will not be a face-to-face one during this 3-month period. They may carry out an MR by phone or on the papers.

Once you have decided that you want to challenge an ESA or UC 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 using form CRMR1 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 mandatory reconsideration within one calendar month of the date on the decision letter you received. If your request is more than one month after the date of the decision you should still apply for a mandatory reconsideration, and quote this case law.

It is normal practice for the DWP to issue a written statement of the reasons for their decision with the initial decision notice. However, if the statement of reasons has **not** been provided to you, and you request it within one month of the decision, then the DWP should extend the one month reconsideration time limit by two weeks.

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 reconsideration more than a month after the date on the decision letter you should explain why it is late.

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 DWP do not accept your reasons for being late as valid, then they can refuse to carry out a reconsideration and there is not 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 or UC to begin the process again. But note the restrictions explained at in the preceding section on making new claims to ESA and UC following a failed claim.

Providing Evidence for a mandatory reconsideration

When applying for a reconsideration it is important to consider what reasons the DWP have given for refusing to award ESA or the LCW element of UC 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, for example, 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.

Beware of DWP Unfair Practices

We've heard from a number of Benefits and Work members about unfair practices used by some DWP staff to try to keep the number of challenges to decisions as low as possible.

These include:

- Refusing to allow a mandatory reconsideration request to be lodged until you have had a telephone call explaining the original decision. This is unlawful and leaves you with much less time to actually request a mandatory reconsideration.

- Failing to make the explanatory phone call. People who have been told that they must wait for this phone call then find that it just never comes, or it comes when you are in a public place and when you ask for a call back at a time when your privacy can be ensured the call back never happens.

- Failing to clearly explain at the end of the explanatory phone call that you can request a mandatory reconsideration or even implying that now that an explanation has been given that is the end of the process.

- Denying that a mandatory reconsideration request was ever made. Because most requests are made by telephone it is very easy for the DWP to deny the existence of the call. But there are many accounts of even written requests mysteriously never being received by the DWP. No appeal to a tribunal can be made unless a mandatory reconsideration has taken place.

- Not including an appeal form with the mandatory reconsideration notice. By not including an appeal form the DWP make it even harder for a claimant without access to the internet and a printer to appeal.

Dealing with unfair practices

As soon as you receive a decision that you wish to challenge, write asking for a mandatory reconsideration. Keep a copy of the letter and either register the letter or obtain proof of postage. You can follow this up with a telephone call requesting a mandatory reconsideration if you wish.

If you receive – and answer - a telephone call explaining the decision, make it clear you wish to continue with your mandatory reconsideration request.

Once the phone call is over, write confirming that, as explained during your discussion, you wish to continue with the mandatory reconsideration request you lodged on whatever date. Again, keep a copy and get proof of postage.

You may also receive a call from a different DWP decision maker once your mandatory reconsideration request has been received. Again, you may wish to confirm in writing that you want to continue.

The DWP claim that most mandatory reconsiderations are dealt with within 30 days, so make sure you chase yours up if you don’t receive the written mandatory reconsideration notice within this time.

Obtain an appeal form as soon as you have lodged your mandatory reconsideration request, so that you are ready to lodge an appeal immediately if you are not happy with the result of the reconsideration. These can now be downloaded or completed online (see ‘How to lodge the appeal’ below).

Above all, make sure you have detailed up-to-date information about every stage of your claim and challenge – including the all-important deadlines.

Decision Maker's Phone Call If The Mandatory Reconsideration Goes Against You

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 and UC.

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 mandatory 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 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.

Beware! We have heard accounts of decision makers trying to persuade people to let the matter drop at this stage and not continue on to an appeal.

Bizarrely, there have even been accounts by welfare rights workers of decision makers sobbing on the telephone when claimants insisted that they intended to take the matter to a tribunal. This suggests that decision makers are coming under a great deal of pressure to cut the number of appeals.

If you do receive a telephone call explaining why the mandatory reconsideration decision has not gone in your favour, you do not need to tell the decision maker that you intend to appeal.

Instead, you can just thank them for their call and say that you look forward to receiving the mandatory reconsideration notice. Once you have this you can go ahead and lodge your appeal with the Tribunals Service.

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.

Mandatory Reconsideration Notice

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 (HMCTS) 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;
- include reference to the legislation used.

Should you 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, for example, you have been awarded ESA but only placed in the work-related activity group and you think you should be in the support group, or you have been awarded UC but only placed in the limited capability for work group and you think that you should be in the limited capability for work-related activity group, it is important to remember that your ESA award or UC LCW element can be taken away altogether at appeal, so you need to consider carefully before appealing the decision.

If you have not been awarded ESA or the UC LCW element 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. Although we advise that you should attend an appeal hearing where the issue is about your fitness for work – and statistically you are more likely to be successful if you do attend and give evidence to the tribunal – you can always opt for a paper hearing. This is where the tribunal make a decision based on all the written evidence available.

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 your 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 Government website at www.gov.uk/government/publications/how-to-appeal-a-decision-by-dwp-sscs1a. This explains the appeals process. You can also get a copy of the SSCS1 from this webpage.

From sometime in early 2020 the appeal form is being replaced by SSCS1PE in order to match the questions in the paper form to the online appeal form. The exact date is not currently known, but at the time of writing, May 2020, this has not happened. Don't worry if you use the old form, your appeal will be processed, but it may take slightly longer for this to happen.

Alternatively, if you live in England, Wales or Scotland you can now use a new online appeal form for ESA and UC appeals via https://www.gov.uk/appeal-benefit-decision/submit-appeal Scroll down and click on the box 'Start now'.

If you do not have access to the internet you may be able to get an appeal form from a local advice agency or by phoning the Tribunals Service. Its phone numbers are currently 0300 123 1142 (England and Wales) and 0300 790 6234 (Scotland).

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 (see section on 'paper or oral hearing' below).
- Any dates when you are not available for an appeal hearing. (NB if you have a representative you may wish to also include any dates when they are not available to attend a hearing, e.g. due to annual leave).
- Any special needs you have to enable you to attend a hearing, or whether you will need an interpreter or signer (Don't rely on a family member or friend to interpret for you at the hearing: the tribunal is unlikely to accept them).
- Whether you are willing to accept less than 14 days notice of the hearing (think carefully before agreeing to this: you might be get your case heard sooner, as the tribunal service will be able to fit you into a slot vacated by another appeal, but most representatives will not be able to represent you in person with such short notice).
- Your signature and the date.

The online form asks the same questions, apart from the following important differences:

- The sections and questions are not numbered
- You are not asked to provide a copy of your mandatory reconsideration notice, but you do need to confirm that you have received one and give the date on the top of it.
- You also need to find the address on the top right of the notice and give the name of the office which is shown in the first line of the DWP’s address.
- It asks if you want to be given updates on the progress of your appeal by text: if you agree to this it then asks for a mobile phone number to receive these texts.
- The section ’your reasons for appealing’ is confusing. To give a reason, you should click on ‘Add another reason’ even if you haven’t given any other reasons yet.
- You are given the opportunity to upload evidence. This is not your last chance to submit evidence: don’t delay appealing if you’re not sure, or you haven’t got the documentation ready.

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 are appealing online just keep selecting 'Add another reason' until you are content.

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 or the LCW element of UC 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 ESA support group or UC LCWRA 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 [not applicable if appealing UC decision]

If you do wish to have your ESA reinstated 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 fitness for work certificates and may be asked to provide a fresh fitness for work certificate even if the DWP already hold a current one.

Where you have been placed in the work-related activity group (ESA) or limited capability for work group (UC)

Where you have been placed in these groups but you believe you should be in the ESA support group or the UC limited capability for work-related activity 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.

There are a small number of other routes to pass the limited capability for work-related activity but these can be complex, so you may wish to get expert advice about this.

Where you have had your ESA or UC sanctioned

Where you have had your ESA or UC 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/UC. 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 the Tribunal Service may write and ask you why your appeal is late, but they don't always do this, so if your appeal explain why on the appeal form.

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. Generally, the later your appeal is the more likely it is that DWP will object to your appeal. But bear in mind that any reasons for lateness should be considered on an individual basis, and it is ultimately up to the Tribunal Service to decide where DWP has laid objections, whether or not a late appeal should be accepted. The absolute time limit for appealing is 13 months (see above).

Paper or Oral Hearing?

From March 24th 2020 until at least March 2021, it is extremely unlikely there will be many, if any, face-to-face oral hearings.

Judges will be able to decide appeals on their own. They will make a provisional decision based on the papers if your appeal is likely to be successful. This decision will be sent to you and the DWP and if both parties accept it, then it will become the final decision.

If either party does not accept the decision then a Tribunal hearing will be arranged. This will almost certainly be either carried out over the phone or by video link.

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 as your representative, 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. You should contact the office dealing with your hearing in advance to agree that they will pay for a taxi.

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 is 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, you should explain why this is necessary here. You may find that the Tribunals Service will ask you for medical evidence as to why you can’t travel to a tribunal venue.

Requesting an urgent hearing

On 15 April 2020 HMCTS issued instructions to judges explaining which hearings should be treated as urgent.

The most urgent are those where claimants have no benefit in payment at all, for example where your universal credit has been sanctioned, or you have been refused Employment and Support Allowance or Universal Credit.

Tribunal judges are told that:

"Particular urgency arises when appellants, who may already have severe illness, including severe mental illness, realise that their appeal may not go ahead as planned because of the restrictions in face to face hearings that are not remote. Appellants can request an urgent hearing giving reasons and this will be considered by an authorised judge sitting alone on the papers."

So, you can request an urgent appeal. It would be best to do this when you fill in your SSCS1 form (above), but you can do it later if necessary.

You will need to give reasons why you consider your appeal to be urgent and the matter will be considered by a judge sitting alone.

The guidance does not give any further details about what would constitute 'urgent'. But we would suggest that your explanation sets out the information below as briefly as possible. If you are completing your SSC1 form you may have given much of this information already:

- Why you have no income.
- Your family circumstances.
- If you have any other form of income, what it is e.g. Child Benefit.
- You need your benefit to pay your housing costs.
- The impact on you, and your family if appropriate, of having no income.

If the urgent appeal does go ahead, it may be possible for the same judge to make an immediate decision if this is completely in your favour.

Otherwise, the urgent appeal will be heard by a judge sitting alone, or by an appeal panel, depending on what the judge considers is necessary.

If the judge decides that the appeal is not urgent, it will be listed for hearing in the normal way.

Section 6 asks if you want to attend your appeal hearing or have it decided on the papers. Even given the changes imposed by Coronavirus, you are strongly advised to request an oral hearing.

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 called a 'presenting officer' to the hearing as well. Try not to be concerned at the possibility of a DWP representative being at your hearing; the tribunal members should still deal with your case in an even-handed way. And it is not uncommon for a DWP presenting officer to agree that the appellant has a valid case, and that their colleague got the original decision wrong.

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 application has been submitted, and you 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 some months 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 someone to go with you.

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 you submitted your appeal online you do not need to send in a copy of the Mandatory Reconsideration Notice. 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 within the time limit you are given or there is a risk that your appeal will be struck out.

If your appeal is accepted as valid you will get an acknowledgment letter.

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

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. This is called the decision maker's response. The DWP have a time limit of 28 days to send in this report to the Tribunals Service. If they cannot produce a response within 28 days they are meant to ask the Tribunals Service for an extension, do not be surprised if they do not do this and it can be many months before you receive their response. Once the 28 days has expired ask the Tribunal Service to list your appeal without a submission. This tends to concentrate their mind on chasing up the DWP.

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, or 'lapses'.

Your appeal lapses for example if you are awarded benefit at a higher rate or for a longer period, or if you gain financially in any way from the revised decision. If your appeal lapses but the decision does not satisfy all the grounds for your appeal (e.g. if you are found to have limited capability for work but not to have limited capability for work-related activity) you will have to submit a new appeal application against the revised decision.

If the decision is revised, but in a way that is not advantageous to you, your appeal should continue, but against the revised decision.

The DWP can object to your appeal if they think the Tribunals Service should not have accepted it, e.g. 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. No reasonable prospect of success could be, e.g. that you are appealing because you think the rate at which ESA is paid is not enough for you to live on [benefit rates are decided by the government and cannot be appealed.] The DWP has 28 days from the date the Tribunals Service lodge your appeal to object. 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.

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. Note however that it is likely to be a number of months – depending on how busy the region that you live in is for arranging tribunal hearings – before you are given a date to attend your appeal hearing.

If you have a representative the Tribunals Service should send them a copy of everything they send to you. Sometimes this does not happen, it is best to check with your representative that they have received everything. This seems to be a particular problem if you arrange for someone to represent you after you have submitted 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 (choosing ESA/UC references as appropriate) 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/Universal Credit.*
This evidence should include:

- *The ESA85/UC85 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/UC85A form* [if you did not have a medical];
- *The ESA113/UC113 [*[report requested from a health professional e.g. your GP] *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 Maximus health professionals and the decision maker in relation to my claim or any notes or records of conversations between Maximus 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.

If you withdraw your appeal but you then change your mind, you can apply in writing for it to be reinstated. The Tribunal writes to confirm whether you can do this once it receives your withdrawal request, and gives you the date you must do this by (1 month from when they received your withdrawal request).

Note: The DWP also has the right to apply for your appeal to be reinstated.

Working with the appeal papers

The appeal papers are prepared by the DWP and they generally contain around 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/UC claim. It is important that the date stated for the original decision is correct as if your appeal is successful any arrears of benefit that you are entitled to will be payable from this date.
- **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.
- **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/UC50 questionnaire, ESA85/UC85 medical report, ESA113/UC113, 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 four 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.

Are the pages legible?
Check the pages can actually be read. Sometimes during photocopying, pages are blurred, skewed or are unreadable. If you can't read the contents, neither can the tribunal, so again it's worth contacting the Tribunals Service and asking for a new copy of the page(s).

Are details of previous decisions included?

The DWP very rarely include details of previous decisions when you have passed the work capability assessment. This is especially the case if you won at a Tribunal. These papers can be very important as the DWP will have to identify how you have improved since then. If these papers are not included, you should ask the Tribunal Service to request the DWP to supply them.

The Maximus medical report

Centre for Health and Disability Assessments, generally referred to as Maximus, is the private organisation that currently has the contract to carry out face-to-face assessments of claimants as part of the work capability assessment. Not everyone will have a Maximus medical report. Some people will be awarded ESA just on the basis of 'scrutiny' by a Maximus health professional of any evidence available. This might include your ESA50/UC50 questionnaire, an ESA113/UC113 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/UC85 medical report.

Make a note of anything you consider to be wrong with this report. Did the Maximus health professional fail to note down things you told them or things that happened at the medical? Has the Maximus health professional said they consider that you can do things that in fact you can't? Has the Maximus health professional taken things you said or did out of context? Has the Maximus 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 Maximus 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 Maximus 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 has 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 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 detail and offer suggestions as to how they should be understood. Your appeal tribunal may prefer your interpretation of a descriptor where it is different to the interpretation that seems to have been used by the Maximus 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 the rules require 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 as a general rule they seem to be quite happy to do so. The tribunal may accept evidence as late as the day of the hearing as long as there is not too much new evidence, but try to avoid submitting it this late if possible.

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.

For example, 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 Tribunals 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 (amend to refer to ESA/UC as appropriate):

Dear Clerk to the Tribunal,

Re: Ms Sylvia Jones

NINO: WE 67 48 54 D
Appeal ref: SC946/19/01234

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/Universal Credit.*

2. *I requested both in my ESA50/UC50 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 GP 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 a 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/UC85 report from the Maximus health professional and an ESA113/UC113 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/UC113 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/UC85 and a non-specific ESA113/UC113 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 Maximus 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 above, if you wish to provide further evidence once you have read the submission you are normally expected 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. Be aware though that if you turn up at your Tribunal with many pages of evidence they may decide to adjourn your hearing on the grounds they don't have time to consider all the evidence. If possible you should try to send in any extra evidence in advance.

Medical evidence

Is there medical evidence from the Maximus 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 do so only 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, a Maximus 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: SC946/19/01234

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.

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/UC, 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. There is caselaw from Upper Tribunals available that helps to guide First-tier Tribunals on how various terms should be interpreted. You can use any cases that help to try to persuade a tribunal that your understanding of the law should be preferred to that of the DWP (see below). You'll find lots of suggestions in our guides to ESA/UC as to what the possible interpretation of terms and concepts in the work capability assessment should be.

Dear Sir / Ms,

Re: Ms Sylvia Jones
NINO: WE 67 48 54 D
Appeal ref: SC946/19/01234

My appeal hearing takes place on 03.08.19 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. An Upper Tribunal decision supports my view. In AR v SSWP (ESA) [2013] UKUT 0446 (AAC) Judge Gray holds that in the context of social engagement, 'social' contact here is not the same as contact for 'business or professional purposes' (paragraph 18). Thus, engagement for purposes such as attending medical examinations was not the correct context. For engagement to be 'social' there has to be an element of what was referred to in the Oxford English Dictionary definition i.e., 'marked or characterized by friendliness, geniality, or companionship with others; enjoyed, taken, carried out, etc., in the company of others'.*

4. *I have provided detailed evidence in my ESA50/UC50 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.*

Yours faithfully,

You can read more sample written submissions in our *Guide To Employment and Support Allowance Appeal Submissions* in the members area of the Benefits and Work website.

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.

See our separate *Guide To Employment and Support Allowance Appeal Submissions* in the members area of the Benefits and Work website.

Time limits

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

Using Upper Tribunal Judges' decisions

The normal tribunal that you will be attending is known as a First-tier Tribunal. In some limited cases, and only where there has been an 'error of law', First-tier Tribunal decisions can be reviewed by a judge in an Upper Tribunal. These decisions (and decisions from certain Courts) create the caselaw mentioned above. Decisions now made by the Upper Tribunal were made in the past by Social Security Commissioners. Commissioner's decisions are still relevant as caselaw, 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.

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 a First-tier 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 Judges' 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 you may 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

Disability Rights UK
The free downloadable resources on the Disability Rights UK website are excellent as a starting point for anyone trying to find out if there has been a decision relating to a particular aspect of their claim. Case law summaries are available on all sickness and disability benefits, from 2003 onwards. The resources are updated as new decisions are published. www.disabilityrightsuk.org/how-we-can-help/benefits-information/law-pages/case-law-summaries

Upper Tribunal (Administrative Appeals Chamber)
The Upper Tribunal’s site has a keyword based upper tribunal decision search facility.
www.gov.uk/administrative-appeals-tribunal-decisions

Department for Communities, Northern Ireland
The administration for benefits and pensions in Northern Ireland is located within the Department for Communities.

The Northern Ireland Digest of Case Law 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.
https://www.communities-ni.gov.uk/services/northern-ireland-digest-case-law

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

What sort of hearing will you have?

At one time, this was a straightforward question to answer.

If you had followed our guidance you would have asked for an oral hearing and, in due course you would have received a letter telling you that you hearing had been listed to be heard at a named venue, at a given date and time in front of a panel of two tribunal members.

Not any longer. Now, the possibilities include:

- Your appeal may be considered by a panel of two members or just a judge sitting alone, who may or may not have taken advice from a panel member before the hearing.

- Even though you asked for an oral hearing, your appeal may be decided just on the papers and the first you will know about it will be when you get the decision notice. If you are unhappy with the decision, you can ask to have it set aside and you will then have a hearing by telephone or video link.

- Your appeal hearing may take place, but either by telephone or video link. This will usually be from your own home, but could be at a centre equipped for video appeals.

The one thing that is extremely unlikely to happen at the moment, due to coronavirus, is that you ask for an oral hearing and you are invited to a tribunal venue to appear in person before a panel.

We'll go through all these options in the coming pages. But please do bear in mind that much of this is new and may change, or we may learn more about it, so please check back for updates.

Who will decide your appeal?

Ordinarily, oral LCW tribunals consist of a panel of two people: a judge who is legally qualified (often a practising or retired solicitor), and a doctor.

There will sometimes be a representative of the DWP, the Presenting Officer, but this is rare. A clerk may also be present, but they will probably come and go throughout the hearing and they take no part in the proceedings.

However, primarily because of coronavirus, your appeal may not be heard by this type of panel.

Now a full-time judge will sift appeals and decide how to proceed.

The judge may decide the case themselves on the papers.

Or they may do so, but only after getting advice from an expert panel member about a particular aspect of the case. If they do this, they must tell you what the advice was.

Or the judge may rule that your appeal should be listed to be decided on the papers by a panel of either two members, depending on what expertise is required.

If you requested a paper hearing in the first place, then the resulting decision will be one to which the ordinary rules apply. So, if you are unhappy with it you will generally have to appeal to the upper tribunal.

If, however, you requested an oral hearing and it has been decided on the papers alone, then the decision should only be a provisional one. Only appeals where a successful, or partly successful, outcome is likely will be decided on the papers if you asked for an oral hearing. So, you will almost certainly have got an award of ESA or UC. You should try to get expert advice before accepting the provisional decision. You may be entitled to a more beneficial decision than the provisional one.

But if you (or the DWP) are unhappy with the award, you can ask for the matter to be listed for an oral hearing. A full-time judge will then issue new directions, the provisional decision will not apply and a remote hearing will take place via telephone or video link.

There's more on this below.

Paper appeal, where you requested one

If you opted for a paper hearing (see above) the Tribunals Service will write to say that it is going ahead and to ask if you have any further evidence.

If you now want an oral hearing instead (as we strongly recommend), phone the Tribunals Service to ask for one. You can also withdraw your appeal at this stage by phoning or writing to them.

You will not be notified of the date for a paper hearing. You will receive a notice of the decision of the tribunal 2 to 3 days after the hearing. This will also be sent to the DWP.

Even if you requested a paper hearing, in certain cases the tribunal may adjourn to request that you attend an oral hearing. This is normally a positive sign as it suggests that you may have underestimated, or not fully explained, your difficulties. If this happens to you, make sure you read about oral or remote hearings below, depending on what sort of hearing you now have listed.

Paper appeal, where you didn't request one

On 19 March 2020, new rules were introduced by the Tribunals Service to allow appeals to be decided on the papers, known as 'triage', even where you have requested a paper hearing.

The purpose of this change is to allow appeals to be dealt with more quickly, where a judge thinks that they can make a decision in the claimant's favour. You (and the DWP) have the right to have the decision set aside and the case heard at a hearing in the normal way if you are not happy with the decision.

Getting the decision notice

The first you may know of the fact that a decision has been made in your case without a hearing is when you receive a letter from the clerk to the tribunal enclosing the decision notice.

If this does happen you are very likely to have got an award of ESA or UC, because the judge would not have made a decision on your appeal unless they were sure that they would be able to make an award. Judges are specifically warned that, if they refuse an appeal without a hearing, the appellant will almost certainly ask for a set aside and the judge will '*simply be generating lots of post-hearing work which is not desirable'.*

The decision notice should begin by explaining that, in order to prevent an unjust delay, the judge decided to consider your appeal on the papers. It should also state whether the judge was sitting alone.

The notice should then explain that this is a provisional decision, that the appeal is allowed and the reasons why.

The notice should end with an explanation of what happens next. Suggested wording by the Tribunals Service is:

"If within 28 days of issue of this Notice both parties' consent to this decision being made then a final decision in the same terms may be issued by the tribunal as a Consent Order.

"If either party does not agree with the appeal being decided in this way then you must notify the tribunal within 28 days of issue of this Notice. If either party objects to the provisional decision then the tribunal will arrange a hearing of the appeal which may be by telephone [or video]. Any further evidence that you want the tribunal to take into account should be sent within 21 days.

"If neither party objects to the tribunal making a paper determination within 28 days of issue of this Notice then the tribunal will issue a final decision."

What this means is that if both parties write and agree to the decision within 28 days then it will go ahead.

If neither party responds within 28 days then it will also go ahead.

However, if either party objects within 28 days then the case will be listed for a hearing by telephone or video link.

If you are happy with the decision, then you should write and agree to the decision.

If you are not happy with the decision, please try to get advice if you can, because asking for another hearing could mean you end up with a lower award or no award at all.

But, if you think the decision is wrong and that you can explain in what way it is wrong, then you can ask for the judge's decision to be set aside and for a new hearing to take place.

Please note that not all judges seem to be following these directions. We have already seen a decision notice in which the judge made no mention of the fact that this was a provisional decision and simply gave the appellant 28 days to ask for a set aside, if they wished.

Asking for a set aside

If you look at the bottom of your decision notice , you will see the judge's signature and the date the decision was made.

Below this there is a further date, for example:

'Issued to the parties on: 04/05/2020'.

You have 28 days from this issue date to ask for the decision to be set aside, if you are not happy with it.

If you do want to have the decision set aside, write as soon as possible, preferably using recorded delivery or getting proof of postage. If lockdown means you can't do either of these, then at the very least try to keep a copy of your letter and a note of how and when it was posted.

Send your letter to the address on the correspondence you received with the decision notice, quoting your appeal reference number, which will also be on the correspondence.

Your request for a set aside does not have to be detailed. Something along the following lines will be sufficient:

Appeal ref:
National Insurance number

Dear Clerk to the Tribunal,

My appeal was decided by a judge sitting alone on 04/05/2020. However, I had requested an oral hearing when I lodged my appeal.

I wish to request that the decision be set aside and that the matter is decided at an oral hearing, where I will have the opportunity to give evidence and answer any questions that the panel may wish to ask.

Yours sincerely,
What will happen next
You should receive confirmation from the Tribunals Service that the decision has been set aside and that it will be relisted for hearing.

Your oral hearing will almost certainly not be face-to-face, it may be a telephone or video hearing. But you will have the opportunity to speak and explain why you think you meet the criteria for a higher award.

Oral, remote hearing by telephone or video link

If you are having a paper hearing, the notice you receive in the post should tell you where and when your hearing will take place and whether it will by telephone or video link.

If you have a representative, it is really important that you let them have these details as soon as possible, because the Tribunals Service seem to be struggling to keep other parties informed during the coronavirus emergency.

If it is a video hearing it could be in your own home or at a centre where there are facilities for video hearings.

For the vast majority of claimants, however, the most likely option is a telephone hearing in your own home.

Arranging your telephone hearing

There will be contact details in the notice of hearing. Use these to make sure that the Tribunals Service have all the information they need.

For example, have they got the best telephone number to contact you on? Do you want to give them a second number, in case there are problems with the first?

Are you intending to have someone in the room with you? If so, will they be there just for support, to help you give evidence or as a witness? You will need to inform the tribunal in advance of their presence, if possible.

If you are thinking of having someone with you, it's worth looking at the section on Inviting witnesses further on in this guide.

Do you need someone else to take part, but they can't be there because of the lockdown?

In this case, you need to ask the Tribunals Service to arrange to have them included in the call.

Be aware, we are hearing of people being told they can't take part because of a limit on the number of callers that can be included in the conference call. There isn't really any excuse for the Tribunals Service to not be able to include everyone if they use up-to-date conference call systems.

If the person you need cannot be included, we would not advise you to refuse to take part in the hearing, as it may well go ahead in your absence. But make your objections in writing prior to the hearing. At the start of the hearing, ask for it to be noted that you could not have someone you needed to take part in the hearing and that you consider that this will make it harder for you to give detailed evidence. If you are unhappy with the decision you can use this as one of your grounds of appeal to the Upper Tribunal.

Preparing for your telephone hearing

Preparing for a telephone hearing is similar to preparing for a telephone assessment with a PIP health professional, an experience which an increasing number of claimants will have had. The better prepared you are for your telephone hearing, the more you will be able to concentrate on giving accurate, detailed evidence. The list below covers what we think are the main things you need to consider.

Private space. It can be hard in a lockdown to find somewhere quiet and undisturbed in your home for a call that could well last over an hour. But this is something the Tribunals Service say is a requirement for a hearing.

Letter with details of your tribunal. This will have contact details of the Tribunals Service; you'll need these if the call doesn't come through or you get cut off and they don't call back.
Copy of your appeal papers. You will need these with you at the hearing. It can be useful to have marked any sections you want to refer the panel to, possibly using sticky notes and a highlighter pen.
Bullet point list of the most important points you want the tribunal to be aware of.
Notebook and pen, it will be worth making notes if there is anything you are concerned about during the hearing. And remember, it is a contempt of court to make an audio recording of your hearing and could result in a criminal conviction, so please don't do it.
Phone with speakerphone. The tribunal may be very brief or it could last an hour or more, so it is definitely worth having speakerphone on if at all possible. If you are using a mobile phone make sure the battery is charged and, if possible, have it plugged in. Also try to be in the area of your house with the strongest signal, so you can clearly hear and be heard.
A separate phone on a different number, if possible. This will be useful if you need to call the Tribunals Service because the call has not come through
Water. It's could be a long call and you may have to do a lot of talking. Guidance from the Tribunals Service says that you may only drink water during a hearing and that there must be no eating, smoking or e-cigarettes.

What to do if the call doesn't come through

Some people who have had telephone hearings were told that they would receive a call in advance to make sure everything was working OK. This was also the case where family members were taking part in a conference call. However, these advance calls don't always happen.

We would suggest that you leave it no longer than 10 minutes after the actual hearing time to contact the Tribunals Service if you have not received a call. If possible, do this on a separate line, so that the Tribunals Service can get through if they try whilst you are calling them.
It is entirely possible that the previous hearing has overrun and that is why you haven't been called yet. But there is also the possibility that they have called and for some reason not got through, so it is as well to check.
What happens at your telephone hearing?
The Tribunals Service say that everyone must treat remote hearings as seriously as if they were in a court or tribunal building.

They stress that you should be alone unless you have permission to have someone with you.

Because you cannot actually see the tribunal judge and any other members , it may be difficult at times to work out who is asking you questions.

There may also be quite long, unexplained pauses. This is likely to be due to the tribunal judge making notes about what you have said. Try not to fill these silences. Instead just wait quietly until you are asked another question.

For more about what happens at the hearing and what kind of questions you are likely to be asked, see What you may be asked at your hearing

For a video hearing
Most of the advice above relating to a telephone hearing will apply to a video hearing as well. In addition, the Tribunals Service say that if you are joining a hearing by video from your home, you should:

check you have the right software for your device, if needed, and that you know how to join the hearing
test the equipment, so you know it works

dress as if you were coming into a court or tribunal building
have something plain behind you like a blank wall
sit with light in front of you, so your face is not in shadow
make sure we can see your face and shoulders

Preparing yourself for an oral 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/UC 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'.

Judges should 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/medical letter/s;
- Copies of letter to GP, etc. asking for evidence;
- Tribunal office phone 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 in wearing those clothes.

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 painkillers, tranquilisers or other drugs to help you cope with the ordeal, this can be a disaster, because the tribunal is 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 upfront. If you need to use a taxi, you can contact the Tribunals Service in advance of your hearing to t get their agreement to reimburse you for the fares.

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, you might have to 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 and you should get it within a few days.

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 accompany you.

Notice of a hearing

You will get a letter giving you the date, time and venue of the hearing.. Unless you have indicated on your appeal form that you will accept less than 14 days’ notice of a hearing, the Tribunals Service should make sure that by the time the letter arrives, you will have at least 14 days’ notice of the hearing.

When you get the date, check it is one you, and your representative and witnesses if you have these, 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’ (meaning as if the hearing never happened), 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.

In practice, if the judge on the day is aware that you have asked for a postponement with good reasons and you fail to attend, they are more likely to postpone it at that time, as it is “in the interests of natural justice” to do so.

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 doctor’s 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 an oral 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 if the hearings are running to schedule so that 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; e.g. 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 Citizens' Advice, 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 for the judge.

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 when they are not sitting on tribunals. 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 may be a representative of the DWP, a presenting officer, who will put their case. A clerk will 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 judges 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 (although judges generally do not like this)
- 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.

Some judges prefer to let the medical member ask the questions and will only ask additional questions of their own afterwards.

Sometimes the judge or doctor 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 is 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 (or even up to a year) between a decision being made and an appeal being heard.

Some judges will keep reminding you to answer the questions thinking back to how you were at the time of the decision and *not* how you are now.

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, 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 that 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. 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 takes 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, and the clerk will come and fetch you. You are shown back into the tribunal room where the panel sits 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 Group component from April 27th 2017."

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

As a result of the Coronavirus pandemic there have been changes to the Upper Tribunal procedures. As Upper Tribunal appeals take such a long time, and rarely involve an oral hearing you are unlikely to notice any difference to your appeal.

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 statement of reasons. 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.

Asking for the full statement of reasons, which can take three months or longer 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 an experienced 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 just that you disagree with the decision, you have to show that the tribunal made an 'error of law'. This includes where 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 statement of reasons was sent out. You can apply outside the one month time limit but there is no guarantee that your appeal will be accepted. You can do this using form UT1 which can be downloaded from HMCTS.

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, within one month of the date of the refusal. Again you can apply outside the one month time limit, but there is no guarantee that your appeal will be accepted. First Tier judges are very inclined to refuse you permission. Do not be put off. Upper Tribunal judges are much more likely to grant you permission.

If permission is refused by an Upper Tribunal judge 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 are held in various venues around the UK., or – usually - 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

It is always worth trying to get help with your appeal. This could be anything from help writing a submission, to a welfare rights worker accompanying you and acting as a representative at your hearing.

Help of this sort is now harder to find because of cuts to legal aid and cuts to local authority funding. See our guide to *Getting Help With your Benefits*, which you can download for free from this page of the Benefits and Work website:

https://www.benefitsandwork.co.uk/help