

ESA AND PIP

A GUIDE TO RECONSIDERATIONS & APPEALS

JULY 2021



ESA AND PIP A GUIDE TO RECONSIDERATIONS & APPEALS

The ME Association welcomes feedback about this guide.

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The 2020 edition of **ME/CFS/PVFS - An Exploration of the Key Clinical Issues** is an authoritative publication representing the most comprehensive, evidence-based summary of PVFS/ME/CFS currently available. It contains everything that health professionals and patients need to know about this devastating neurological disease and comes highly recommended.

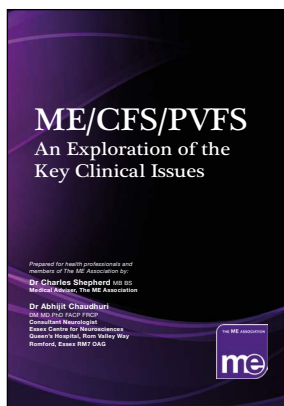
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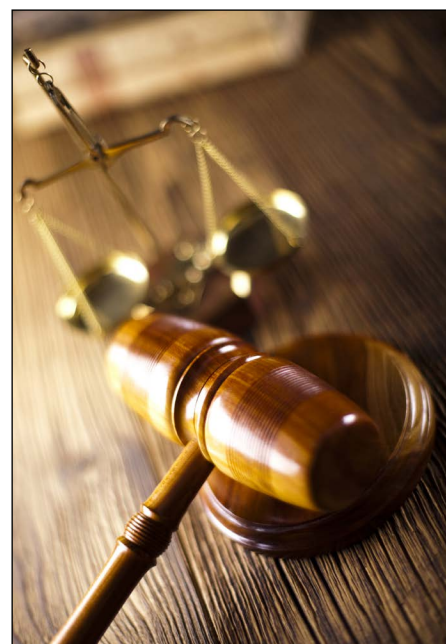
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ESA AND PIP A GUIDE TO RECONSIDERATIONS & APPEALS

CONTENTS

	page
Introduction	<u>4</u>
Mandatory Reconsideration	<u>4</u>
If it comes to an appeal	<u>6</u>
What happens next	<u>6</u>
If an appeal is struck out	<u>7</u>
Preparing your case	<u>7</u>
The Tribunal	<u>8</u>
The decision	<u>9</u>
Adjournments	<u>9</u>
After the tribunal has made its decision	<u>10</u>
Implementing the decision	<u>10</u>
Corrections	<u>10</u>
Setting aside	<u>11</u>
Further appeal	<u>11</u>
Two points to remember	<u>12</u>
Further information	<u>13</u>
Other sources of support	<u>13</u>



Note: This leaflet applies to all parts of the UK.

The same rules apply for both ESA and PIP reconsiderations and appeals.

ESA AND PIP A GUIDE TO RECONSIDERATIONS & APPEALS

INTRODUCTION

If you have not been awarded either Employment Support Allowance (ESA) or Personal Independence Payment (PIP), you have the right to challenge the decision.

You also have a right to challenge an award of benefit at a lower rate than you think you should get.

But make sure you are absolutely clear in your mind that you meet the criteria for the higher payment as the Department for Work and Pensions (DWP) or the Tribunal with whom you lodge an appeal can reduce or stop the benefit. This happens occasionally.

The first step when you appeal against decisions is to ask the DWP for a Mandatory Reconsideration, and you must do this within one month of the date of your decision letter. You cannot launch an appeal to the tribunal without taking this first step.



MANDATORY RECONSIDERATION

You can normally ask for a Mandatory Reconsideration over the phone but it would be wise to also confirm your request in writing to the office address on the decision letter. Phone the office a few days later to check that your request has been received.

When you ask for a Mandatory Reconsideration, you should explain why you think the decision is wrong. If you can, get evidence to back up your argument. If you cannot get this straight away, let them know how long it is likely to take to obtain.

Ask for them to send you a copy of the assessor's report.

In our experience, most assessment disagreements hinge on them not noticing something that's important to you – so you NEED to know what they missed out of their decision.

The next thing – while you wait for that report to arrive – is to ask sympathetic friends, family, teachers, employers and neighbours to write letters describing the difficulties they see you struggling with (the more relevant to the ESA/PIP questions, the better).

Then rest up, save your energy, and stay as calm and peaceful as possible.



ESA AND PIP

A GUIDE TO RECONSIDERATIONS & APPEALS

You can't do anything until you get that report and know WHY, and you're going to need all your energy at the next stage of the process because the next stage is going to need you to be a nitpicker extraordinaire!

When the report comes, read it through with a notepad and jot down any immediate discrepancies that you notice don't match up with either your own experience, or the evidence you gave them at the assessment.

Then lay it out next to your copy of the form you filled in (assuming you made a photocopy/scan for yourself) and go through searching for any more areas where what they say disagrees with what you've told them.

Also look for any areas where your evidence might, in retrospect, have been either ambiguous to someone who's not familiar with ME, or where you were trying to be positive and it could have been misinterpreted.

Check if they've had a report from your GP/specialist. If they have, check what it said; if they haven't, go to your GP and ask for a letter confirming your symptoms and level of impairment.

Look online (or on the MEA advice leaflets) to see where the various points come from and tot up how YOU think you ought to score. Then focus on finding a good argument – logical and pragmatic, not emotional – for why you feel they got their assessment wrong at those particular points.

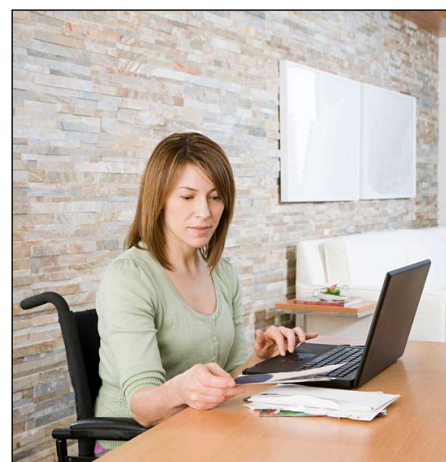
Finally, write your letter with all of that disagreeing information taken in order – bullet points are fine (nice and easy to read for both you and them!), just make sure that you've got a clear contrast between “here's what the assessor's report says” and “here's why I disagree and where I've said it before”.

(Don't forget to document, along with everything else, how long it's taken you to read/analyse the report and write the reconsideration letter, what help you needed to do it, and what it's cost you (in terms of physical and neurological flare-up of symptoms) to do that - that's a vital part of your evidence too!)

Then get a copy of everything to keep for your records, and send your collection of letters/evidence off in one big envelope (preferably with recorded delivery).

Hopefully it'll be enough and you won't have to go through the full-blown appeal.

But...



Focus on finding a good argument, then write your letter with all of your disagreeing information in order.

ESA AND PIP A GUIDE TO RECONSIDERATIONS & APPEALS

IF IT COMES TO AN APPEAL

If the Mandatory Reconsideration is not successful, you can then go on to the Appeal stage. You will need to appeal directly to the Tribunal service and you have another month in which to do so from the date of the new decision letter.

Your Appeal needs to be made on a form called Notice of appeal against a decision of the Department for Work and Pensions SSCS1. You can phone the office concerned and ask for a copy to be posted to you, or go online and download it at <https://tinyurl.com/h9z9hmv3>

The SSCS1 form will ask whether you want to attend a hearing of your appeal. It is better to attend a hearing, especially if your case involves medical or disability questions.

If you miss the deadline, the tribunal will decide whether to accept it. You should explain on the form why it has been delayed.

The tribunal can accept a late appeal so long as it is made within 12 months of the end of the normal one-month time limit.

Note: Since the principle of Mandatory Reconsideration was established in 2013, the DWP has required claimants to request it within a month of their letter of decision. In 2016, an Upper Tribunal found that this deadline is not supported by the original legislation and has ruled that claimants should have 13 months from the DWP letter of decision to request MR.

WHAT HAPPENS NEXT?

HM Courts and Tribunal Service (HMCTS) will send a copy of your appeal to the DWP. The DWP will write a response and return it to HMCTS together with the relevant documents.

When the DWP is preparing its response, a decision-maker may decide to revise their decision at this stage. If they do, your appeal comes to an end if the new decision is 'more advantageous' to you – even if it does not give you everything you want.

If you wish to continue, you must launch your appeal once again.

An appeal is decided without a hearing only if all parties consent and the tribunal agrees that a hearing is unnecessary.



It is better to attend a hearing, especially if your case involves medical or disability questions.

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A GUIDE TO RECONSIDERATIONS & APPEALS

If there is no hearing, the tribunal will study all the appeal papers and come to a decision based on these alone. You can send comments or extra evidence to the tribunal to consider at any time before they make their decision – but you won't be told when the decision will be made, so do so quickly.

If you need time to prepare your information, contact the clerk to the appeal tribunal. Say when you expect to send the information and ask for the decision to be delayed until they have received your paperwork.

You can withdraw your appeal at any time before the hearing and you don't have to give a reason.



This is not a
criminal court so
you do not have
to prove your case
“beyond reasonable
doubt”

IF AN APPEAL IS STRUCK OUT

The tribunal can strike out an appeal. It can do so in the following circumstances:

- If it feels it does not have the power and authority to deal with it,
- You have failed to comply with a direction given (eg. to provide additional evidence),
- You have failed to co-operate in such a way that the tribunal no longer considers it can deal with your appeal fairly or justly,
- If the tribunal feels that your appeal, or any part of it, has no reasonable prospects of success.

If you then want the appeal to be reinstated, HMCTS must receive your request within one month of the date of the letter notifying you that it has been struck out..

PREPARING YOUR CASE

This is not a criminal court so you do not have to prove your case “beyond reasonable doubt”. You just have to show that the facts you bring forward are true “on a balance of probabilities”, which means showing they are more likely than not to be true.

Your word is just as much “evidence” as any document. However, do try to get as much evidence as you can to back up what you are saying, as this helps tip the balance of probabilities your way.

ESA AND PIP

A GUIDE TO RECONSIDERATIONS & APPEALS

You may need to call witnesses and, if so, you should get their agreement beforehand. Make sure their account backs up your case. If a witness cannot attend the hearing, ask them to provide a written statement for the tribunal.

If you can, send further evidence or comments on the appeal to HMCTS well before the hearing. Make a copy of your evidence and take it with you to the hearing.



You may need to call witnesses... Make sure their account backs up your case. If a witness cannot attend the hearing, ask them to provide a written statement for the tribunal.

THE TRIBUNAL

It will consist of three members – a tribunal judge (someone legally qualified), a medical practitioner and a disability expert. They will probably be conducting a number of other appeals on the same day as your hearing.

DWP is entitled to send their own representative (called a 'Presenting Officer') but they mostly don't. You and your representative will probably meet with the tribunal alone.

The hearing is likely to be conducted in informal surroundings – with you sitting on one side of a large table and the tribunal members the other. The tribunal judge will introduce everyone and take a formal note of the proceedings.

The judge will summarise the issues according to the papers he has seen after which any representatives will usually be invited to make opening statements. Members of the tribunal may then ask questions about matters in dispute – don't worry if they don't cover matters that are NOT in dispute.

In their own notes, HMCTS say "giving evidence is a serious and important part of the proceedings. Neither you nor the tribunal should be distracted by interruptions from representatives or others. Everyone will get their chance to speak at the appropriate time."

If, after the tribunal has finished asking its questions, you think it has missed out anything, do tell the judge.

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THE DECISION

The tribunal will consider the evidence and statements in private. At this point you will be escorted by the tribunal clerk back to the waiting room. In most cases you will be invited by the Judge to wait while the tribunal reaches its decision.

However, if the Judge thinks it unlikely that a decision can be reached fairly quickly, you will be advised that the decision will be posted to you. If the tribunal is able to give its decision on the day, you will be invited back into the tribunal room for the judge to announce the decision. A typed decision notice will also be given. Announcing the decision closes the appeal and there is no further discussion.

ADJOURNMENTS

The tribunal may come to the conclusion that it cannot reach a decision on the day and there will have to be an adjournment. When adjourning, the tribunal will aim to set a date for the next hearing and give directions to minimise the risk of any further delay to the completion of the case.

The above description is a general outline. Sometimes the tribunal may have formed the view from reading the appeal papers that the appeal turns on a single issue and it may decide to concentrate on that point from the start of the hearing.

MY NOTES:



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AFTER THE TRIBUNAL HAS MADE ITS DECISION

IMPLEMENTING THE DECISION

If you have had an oral hearing, a notice setting out the decision of the tribunal is given or posted to you and to DWP on the day of the hearing. If your case has been decided on the papers, you will receive a notice of the decision through the post a day or two after the hearing and a copy of the decision will also be sent to DWP.

Unlike the courts, the tribunal has no legal powers to enforce its decisions.

If the decision requires DWP to pay you benefit, the tribunal will not be able to assist you to compel payment. If the decision is that DWP is entitled to recover overpaid benefit from you, again the tribunal will play no part in enforcing that decision.

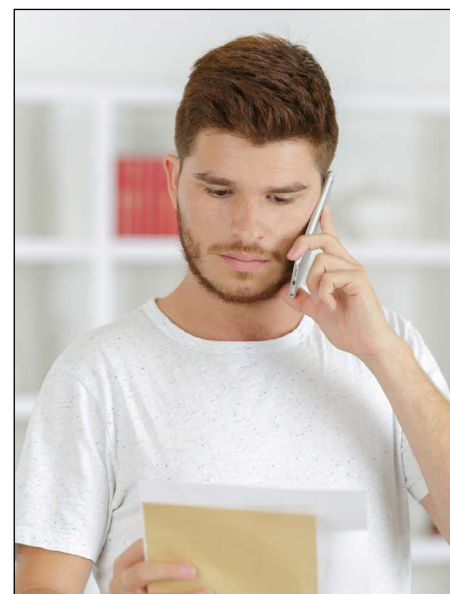
In practice, DWP implements the tribunal's decision in the overwhelming majority of cases and decline to do this only when they plan to appeal against the tribunal's decision.

DWP is entitled to suspend payment of any benefit awarded you by the tribunal, if they are appealing against the tribunal's decision.

Once the tribunal has made its decision, you should direct any queries about how the decision is implemented to DWP as they now have the responsibility for implementing the tribunal's decision. You should expect a short delay following DWP's receipt of the decision whilst they consider the outcome and next steps.

CORRECTIONS

If you think the decision notice contains an accidental error (for example, the Judge may have written 2018 instead of 2017 for the starting date of an award), you may write to HMCTS, asking for a correction to be made. This rule only applies to what might be called 'slips of the pen'.



Once the tribunal has made its decision, you should direct any queries about how the decision is implemented to DWP.

ESA AND PIP

A GUIDE TO RECONSIDERATIONS & APPEALS

SETTING ASIDE

You may apply to have the decision of the tribunal set aside (that is, cancelled) and a new hearing arranged in limited circumstances. These are:

- A document relating to the proceedings (for example, notice of the hearing) was not sent or not received in time, or
- A hearing had been arranged but you (or your representative or DWP) did not attend and the tribunal accepts the explanation for the non-attendance, or
- There has been some other procedural irregularity.

The tribunal will set the decision aside if one of the above conditions applies and the tribunal considers it just to do so.

An application to set aside must be made in writing within one month of the date of issue of the decision notice or statement of reasons, whichever is the later. This time limit may be extended by the tribunal if there are good reasons for this.

FURTHER APPEAL

You may apply for permission to appeal against the decision of the tribunal to the Upper Tribunal. You may appeal only on the ground of 'error of law'. The following are examples of what is meant by 'error of law':

- The tribunal applied the law incorrectly
- The tribunal conducted the proceedings in breach of the proper procedures
- The tribunal failed to make adequate findings of fact or to give adequate reasons for its decision.

The first step in applying for permission to appeal is to request a statement of reasons for the tribunal's decision. The request for a statement must be made in writing within one month of the date of issue of the decision notice. This time-limit may be extended by the tribunal. The statement will be written by the Judge of the tribunal that heard your appeal.

If, having considered the statement of reasons, you believe that the decision of the tribunal was erroneous in law, you may apply for permission to appeal to the Upper Tribunal.

This application must be made in writing. A form for this purpose will be supplied on request. You have one month from the date

If, having considered the statement of reasons, you believe that the decision of the tribunal was erroneous in law, you may apply for permission to appeal to the Upper Tribunal.



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A GUIDE TO RECONSIDERATIONS & APPEALS

of issue of the statement in which to apply for permission. This time-limit may be extended by the tribunal.

An application for permission to appeal will be considered by a senior Tribunal Judge. The Judge may:

- Grant permission, in which case you can forward your appeal to the Upper Tribunal
- Refuse permission. You then have the option of asking the Upper Tribunal directly for permission
- Decide to set aside the decision of the tribunal without the need to refer the case to the Upper Tribunal. The Judge may re-decide the case or have it heard by a fresh tribunal.

If the appeal proceeds to the Upper Tribunal, the Upper Tribunal has power to set aside the tribunal's decision and refer the case to a fresh tribunal, or to substitute their own decision.

Please bear in mind that the above rights to apply for a correction, setting aside, statement of reasons and further appeal are also available to DWP.

* The evidence indicates that it is unlikely that the claimant's condition has any impact on any of the daily living and mobility activities (i.e., the decision-maker thinks you obviously don't qualify for PIP)

* The evidence indicates that the claimant's condition has a significant impact on many of the daily living and mobility activities (i.e., the decision-maker thinks you obviously do qualify)

* There is strong evidence on which to decide the case and where a face-to-face consultation is likely to be stressful to the claimant.

Two points to remember

- There is a high rate of success on appeals involving refusals – with a significant number of decisions being overturned. So anyone who believes they have not been treated fairly should consider going to appeal.
- The chances of success at appeal are often increased by appearing in person and providing good supportive medical evidence from health professionals (and any other professional – including care workers) who are involved in your care – especially if this was not provided at the time of your application.



There is a high rate of success on appeals involving refusals.

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FURTHER INFORMATION

Useful information on benefit appeal procedures can be found in a presentation given by Dr Jane Rayner (Chief Medical Member of the Social Security Tribunals) to the Forward ME Group of ME charities at their meeting on 26 January 2011. The minutes of this meeting can be found here: <https://tinyurl.com/hfdx56v4>

Dr Jane Rayner has also produced a video on the appeal process. This can be found on the MEA website: <https://tinyurl.com/suv3bt5z>

The Tribunal Service has produced a useful booklet called How to Appeal – A Step by Step Guide. This can be downloaded from the HMCTS website: <https://tinyurl.com/p58qye5>



OTHER SOURCES OF SUPPORT

Citizens Advice: look up your local bureau in a phone book or go online to find your local bureau here: <https://www.citizensadvice.org.uk> Many bureaux have benefits rights advisers who may be able to provide you with help in filling in the form.

Welfare Rights Officers: Check with your local council to see if they employ a welfare rights officer who could help you prepare your appeal and might be in a position to provide some advocacy at the tribunal.

Friends and family: If you have a supportive network, do ask someone you trust to talk things through. They can help you spot holes in your logic and arguments, and things you might have forgotten. And do remember the old adage – “a problem shared is a problem halved”.

Good luck. We hope things go well with you!



ME CONNECT

The Support and Information Service for people affected by ME/CFS/PVFS and Long Covid

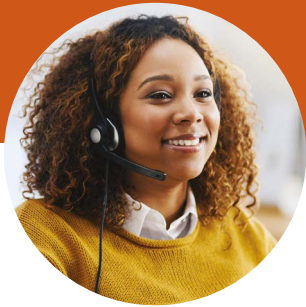


Freephone
0800 538 5200

Monday to Friday 10am - 6pm
(Late night until 9pm on Thursdays)

Saturday & Sunday
10am - 12 noon & 7pm - 9pm

Contact ME Connect
3 WAYS TO GET IN TOUCH:
by phone, email
or social media private message



HERE TO LISTEN

We are here to listen, validate and empathise with any issues you might be facing.



VITAL SUPPORT

We are here to help you reach an informed decision.



SAFE ENVIRONMENT

We provide a safe, confidential and understanding environment where you can be heard and understood.

We're here for you!



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