



**Zacchaeus 2000**

**Z2K Submission  
to the Fourth Independent  
Review of the Work Capability Assessment**

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## **Introduction**

1. The Zacchaeus 2000 Trust (Z2K) is a London-wide anti-poverty charity that promotes the improvement of living conditions on the basis of economic and social justice through the provision of evidence-based policy alternatives to government, and by direct engagement with the lives of the poorest and most vulnerable.
2. Z2K provides a generalist advice and casework service offering in-depth and long term support for people struggling on low incomes. This service primarily focuses on those facing debt as a result of: over and under-payments of benefits; benefit sanctions; unmanageable debt repayment arrangements; bailiffs; utility bills; Council Tax liabilities; rent arrears; and most other debt-related matters. Z2K also offers support in the form of non-legal representation at Tribunals, County Courts and Magistrates, and supports and trains other organisations to do the same.
3. In recent years a major part of Z2K's work has been supporting our clients through Work Capability Assessments (WCA) as they are transferred from Incapacity Benefit or Income Support to Employment and Support Allowance (ESA), as well as supporting new ESA claimants through the application process.
4. We help claimants to fill out their ESA50 forms, attend WCAs, gather medical evidence, write appeal submissions and provide representation at appeals. In the last 3 years we have supported over 200 clients through their WCA and/or subsequent appeals. As such we have extensive experience of the entire WCA process and this experience forms the basis of our submission to the review.

## **What are the strengths and weaknesses of the WCA identification process?**

5. The main problem we experience with the WCA process is that not only are our clients with serious debilitating conditions frequently found fit for work but they are often awarded 0 points following the assessment. In our opinion the regularity with which people who face severe barriers to employment receive 0 points in the WCA process demonstrates there is something fundamentally wrong with its ability to determine whether claimants are fit for work.
6. However we find that when we support clients through the appeals process there is a good chance of these decisions being overturned. We have had dozens of clients who are initially awarded 0 points as a result of their WCA but then go on to receive 15, 18 or even 24 points on appeal. In our opinion this indicates that the problems with the WCA are not necessarily as result of the policy design but due to its poor delivery. Although we believe there to be some problems with the descriptors the main issue is not with their wording or that of the regulations, but a failure to properly apply them during the WCA process. That a tribunal utilising the same descriptors and regulations as the WCA can come to such a radically different result indicates fundamental problems with the application of these descriptors in the initial decision.

7. In addition to this we often provide further supplementary evidence at appeal and find that greater consideration is applied to supplementary evidence by the tribunal than by the DWP Decision Maker (DM) and this can be the decisive factor in an appeals success. The DM could have had access to that evidence, and often does, but appears to favour the ATOS Health Care Professional's (HCP) report.
8. The regulations state that as well as considering whether the claimant is able to undertake an activity listed in a particular descriptor the assessor must also consider whether they can do it:
  - Safely
  - Repeatedly
  - Reliably
  - Painlessly
  - In a timely manner
9. If a claimant cannot fulfil these conditions then the assessor should view the claimant as being unable to carry out that task and the appropriate number of points should be awarded. However in our experience the assessors often fail to give due regard to these conditions and find that a claimant is able to carry out a task, even if they can only do so in an extreme amount of pain or it takes them an undue amount of time.
10. For example a client with chronic fibromyalgia and Irritable Bowel Syndrome was awarded 0 points and found fit to work. As part of her assessment the HCP found that she was capable of walking 200 metres because she was able to undertake a 15 minute walk to her local shop. However the shop was in fact 40 metres from her home and the walk takes 15 minutes because she has to stop every minute due to severe joint pain. In addition on her ESA50 form she recorded that she can only undertake this walk at most twice a week to buy milk and bread and that she was dependent upon a friend for the rest of her shopping.
11. In this instance the assessor made an inappropriate inference from the fact that the client was able to undertake a 15 minute walk, ignored the further information provided and did not consider the fact that the activity was carried out with extreme pain and not in a timely manner. Further to this the clients ability to walk 10 metres in the assessment was taken as indicative of her ability to do so frequently and to walk 50 metres without difficulty.
12. Such inappropriate inferences are a regular occurrence and match with the revelation by Dr Greg Wood<sup>1</sup>, formerly employed by ATOS as an assessor, that HCPs are given 'rule-of-thumb' tests in training that lack the detail stipulated in the regulations. It is our belief that the use of these 'rule-of-thumb' tests rather than a detailed consideration of the evidence lead to inappropriate inference which allow claimants to be incorrectly found fit for work.

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<sup>1</sup> <http://www.theguardian.com/society/2013/jul/31/atos-fitness-work-test-greg-wood?INTCMP=SRCH>

13. A further frequent concern of our clients is that the assessors report does not match their experience of the face to face assessment and in the instances where we are able to attend the assessment with our client we experience a similar mismatch. For example in one assessment a client was asked to extend her leg by an assessor and the client informed them she was unable to do so as it 'hurt too much'. When we received a copy of the report the assessor had recorded that the client had 'refused to undertake this test'.
14. In other instances assessors have informed our clients that they don't need to undertake a test as they are evidently too disabled to do so, giving the impression that they accept the client meets the descriptor in question but then in their report find the opposite. In another case a HCP found that a client was able to sit still for an extended period of time because they had sat in a chair with a back for 42 minutes, when the assessment had in fact lasted 25 minutes, approximately the maximum amount of time the client was able to sit still for. In all these cases the initial decision was overturned at appeal.
15. The WCA process is also ill equipped to understand fluctuating conditions. Too often DMs incorrectly apply the maximum level of functioning to our clients, rather than recognising that their condition fluctuated. In these cases DMs regularly fail to consider the effect of fluctuations in relation to each of the descriptors.
16. Mental Health conditions in particular are rarely stable and claimants who experience them will not only describe 'good days' and 'bad days', but will often have 'good periods' and 'bad periods'. To a HCP who lacks sufficient expertise in mental health a claimant experiencing a 'good period' can superficially appear fit for work. There is a tendency during the WCA to give undue focus to claimants abilities on 'good day's. In our experience our clients are asked in great detail about they are able to do on their 'good days' with little to no attention to what they are able to manage on a 'bad day'.
17. In these instances it would be beneficial to take a full account of a person's medical history including triggers and patterns, how this may change and what level of social care is provided. This, at the very least, would lead to a greater understanding of the issues a claimant experiences in relation to their ability to work.
18. Finally we also find that assessors fail to give sufficient consideration to the effect of conditions as a composite. For example we had a client who suffered cerebral palsy, arthritis and a number of other conditions. This meant that she had an unsteady gait, swollen knees and joint pain, the assessor found each of these individual symptoms should not prevent her from walking 200 metres but this failed to understand the cumulative impact of the combined symptoms on her ability to walk.
19. On a related note a problem we find with the descriptors is that they do not take into account general pain or limitation. This arises particularly where claimants have neck/shoulder or other injuries which limit their movement or cause them chronic pain. This pain generally limits their ability to carry out day to day activities or to carry them out repeatedly, but they are not physically unable to do complete the activities in the descriptors if the tests are strictly applied.

## Have the changes to the WCA improved it's effectiveness?

20. In our experience the main problem with the WCA's effectiveness is the large number of claimants being inappropriately found fit to work. Therefore any improvement in the system's effectiveness would involve a reduction in the number of applicants being found fit for work.
21. In this regard the figures do show some improvement as the number of claimants found fit for work has decreased since the WCA was introduced. The latest figures for new claims<sup>2</sup> show that from December 2008 until November 2010 there was gradual decline in the number of claimants found fit to work from 65% to 56%, this was followed by period of stability from December 2010 to May 2011 then a further decline in the number found fit for work from 57% to 48% in November 2012.
22. This reduction over the past four years could be attributed to the implementation of the recommendation from the previous Independent Review and the descriptor changes that came as a result of the Internal Review. However without better government statistics it is difficult to say if there is a definite correlation.
23. Despite the fact that the number of claimants found fit for work has reduced the experience of our clients has not changed. In almost every case we take on our clients still find the WCA process a distressing and unpleasant experience and receive an incorrect decision as a result of it. This anecdotal evidence is backed up by the figures for the rates of appeal and success rates for appeal.
24. Rates of appeal and their success are a major indicator of the ineffectiveness of the WCA process. If the WCA process improves then you would expect the rate of appeals to fall, as more claimants are happy with the process and if the outcomes were more accurate then the success rate of appeals should also fall.
25. Unfortunately the most recent statistics<sup>3</sup> show that both the number of appeals and the success rate of those appeals have increased. Between Q4 2011/12 and Q4 2012/13 appeals for ESA claims heard at tribunal more than doubled and the tribunal service found in favour of the 'customer' (the claimant) in 43 per cent of ESA cases (up from 38 per cent previously).
26. However we believe that even these figures do not show the whole story. Data obtained from the Tribunals Service in 2012 under the Freedom of Information Act<sup>4</sup> showed that 67 per cent of claimants who had representation at their oral appeals were successful while only 41 per cent claimants who represented themselves had their decision overturned. Overall only 21% of appeals had representation.
27. We believe therefore that that there are many more incorrect decisions that fail to be overturned at tribunal due to a lack of proper representation for claimants. Taking a

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<sup>2</sup> [Employment and Support Allowance: outcomes of Work Capability Assessments, Great Britain \(July 2013\)](#)

<sup>3</sup> [Tribunals Statistics Quaterly \(1<sup>st</sup> January to 31<sup>st</sup> March 2013\)](#)

<sup>4</sup> [http://www.mind.org.uk/assets/0002/0641/Mental\\_Health\\_Sector\\_response\\_to\\_3rd\\_WCA\\_Review.pdf](http://www.mind.org.uk/assets/0002/0641/Mental_Health_Sector_response_to_3rd_WCA_Review.pdf)

case to tribunal is a lengthy, complicated and stressful process that many ESA claimants, by the very nature of their condition, lack the ability to carry out. The preparation of a tribunal submission and gathering of necessary evidence requires writing and concentration skills and the ability to put together a coherent argument, precisely the same skills that the lack of proves to be a barrier to work for claimants. Equally being able to put your case across at tribunal requires communication skills and being able to hold up to the stress.

28. In this regard we submit that although there has been an increase in the number of people accessing ESA there remain significant problems with the WCA process as outlined above.
29. A further issue we experience in our casework is that although descriptors have been amended in the regulations this change is not always properly reflected in the WCA itself. For example in the revised schedule 2 to the employment and support allowance regulations 2008, which came into effect from 28<sup>th</sup> March 2011, the words 'with either hand' are removed from the equivalent descriptors for activity 5. This suggests that a claimant satisfies the manual descriptors if they cannot complete each test with both hands. However in our experience DMs frequently incorrectly hold that the descriptors are not met if a claimant can complete the tests with one hand.
30. This problem is illustrated by a case study of a client with Cerebral Palsy which predominantly affected her right hand. Because the client was shown to be able to 'pick up a £1 coin' and 'turn the pages of a book' with her left hand she was awarded zero points for manual dexterity. However the ability to carry out these tests with her left hand gave an inaccurate account of the nature of the dexterity, for example she was not able to button her shirt, tie her shoelaces or any other activity that requires the use of both hands.
31. We argued at tribunal that because the client was unable to complete any of the tests (including pressing a button) with her right hand she satisfied all the descriptors for manual dexterity and the tribunal found in our favour. This is not an isolated case, whenever we have a client whose manual dexterity is limited to one hand the Decision Maker and/or HCP invariably find that the descriptors have not been met. This demonstrates that although the descriptors have been changed for the better these changes are not always properly implemented in the WCA.

**Are claimants with mental health conditions given appropriate consideration during the WCA process?**

32. In our experience claimants with mental health conditions are more likely to be found fit for work and we believe this is because the WCA process does not give due consideration to the specific issues relating to mental health.
33. People with conditions that affect their mental health can have significant difficulties with communicating how their condition impacts on their lives. This is often due to issues with confidence or conditions that inhibit social interaction.

34. The complexity of mental health problems also means that claimants might lack cognitive insight into the extent of their impairments. These factors can impair their ability to collect evidence independently. For some claimants gathering and submitting evidence can be an impossible challenge, particular where they lack insight into their condition or where their condition means that they have an impaired understanding of how processes work and the importance of gathering evidence. A belief that their condition is better than it is can also prevent them from seeking support from advice services.
35. These problems are compounded by the fact that most Atos HCPS do not have a professional background in mental health, and this lack of expertise means they can fail to understand the full implications of mental health conditions. This gives claimants who have problems with their mental health a significant disadvantage in the WCA process. This view was independently confirmed by the Upper Tribunal in a recent Judicial Review, where they ruled that the WCA discriminates against people with mental health problems.
36. We believe that the use of assessors with specific expertise in mental health would substantially improve the quality of assessments and accuracy of outcomes for applicants with mental health problems. Without expertise in causal conditions HCPs are not sufficiently equipped to understand why and how function may be impaired or to elicit the relevant information from an applicant who may have the difficulties in reporting their condition.

#### **How can the overall WCA process be improved?**

37. Drawing on our experience of the WCA process outlined above we feel able to make a number of recommendations for improvements to the process.
38. Firstly DMs are still not making sufficient use of additional evidence about claimants, which could help avoid poor decisions. As outlined above vulnerable claimants and those with Mental Health conditions in particular struggle to gather their own evidence. DMs should therefore have a duty to collect evidence proactively from the medical professionals names by the claimant and give such evidence due consideration.
39. Claimants should be assessed by assessors with expertise in their condition group, where such expertise exists. This should particularly be the case where conditions are complex, fluctuating and difficult to explain and understand – such as mental health conditions and neurological conditions.
40. Assessors need to be retrained to root out ‘rules-of-thumb’ tests and prevent inappropriate inferences being made. Assessors should be reminded that the standard proof ‘beyond reasonable doubt’ does not apply in the WCA. All that is required is for the evidence to support the claim on the balance of probabilities.