

## **DMG Chapter 07 - Part 02: AA, DLA, CA, Dependency Increases, and ESA (see Part 6 for Bereavement and Widow's) 071700 - 072769**

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# AA, DLA, and CA 071700 - 071706

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## Introduction

071700 This section contains guidance on the residence and presence conditions, and competency conditions, for AA, DLA and CA. The guidance covers

1. residence and presence conditions under UK law
2. periods of temporary absence from GB under UK law
3. export of benefit to other countries, under EU law
4. new and repeat claims from abroad under EU law
5. claims made by “incomers” (i.e. EEA nationals who have recently moved to the UK)
6. reciprocal agreements on residence and presence.

**Note:** See appendices 3 and 4 for further guidance on competency.

071701 If a claimant does not satisfy the residence and presence conditions in UK law, the DM should consider whether the claimant is helped by EU law and, if not, by any reciprocal agreements.

071702 How EU law interacts with domestic legislation regarding residence and presence conditions for AA, DLA, and CA has changed over the years. The main relevant developments are set out below in historical order

1. Prior to 1.6.92, AA, DLA (both Care and Mobility), and CA were treated as invalidity benefits in light of a decision by the ECJ<sup>1</sup>. Under EU law<sup>2</sup> an invalidity benefit cannot be withdrawn solely because the recipient goes to live in another EEA country.
2. From 1.6.92, AA, DLA (Care and Mobility Components), and CA were listed in Reg (EC) 1408/71 as special non-contributory benefits (SNCBs)<sup>3</sup>. Such benefits are payable only in, and at the expense of, the country of habitual residence<sup>4</sup>. They could not be exported when someone moved permanently to live in another EEA Member State.
3. A number of judgments were made<sup>5</sup> which indicated that listing as an SNCB was conclusive as to a particular benefit's status.

**4.** On 18.10.07<sup>6</sup> the ECJ ruled that AA, DLA (Care Component), and CA are sickness benefits for the purposes of European legislation<sup>7</sup> but that DLA (Mobility Component) remains a special non-contributory benefit (SNCB)<sup>8</sup>. Although this ruling was made on 18.10.07, it relied heavily on an earlier judgement of the ECJ on 8.3.01<sup>9</sup> concerning an Austrian care benefit. In that judgement the ECJ first ruled that the fact that certain benefits were listed as SNCBs in European legislation was not conclusive, and that the Austrian benefit was a sickness benefit.

**5.** In a subsequent judgement on 5.5.11, the CJEU confirmed that DLA (Mobility Component) is an SNCB<sup>10</sup>.

**6.** On 21.7.11 the CJEU made a decision relating to a claim made for IB(Y) for a person who had been residing in Spain for 5 years. The CJEU held<sup>11</sup> that it is legitimate for the UK (as a member state) to make rules intended to ensure that there is a genuine and sufficient link between a claimant of a non-contributory benefit and the UK. However, the past presence test, applied without reference to other factors, was too narrow and was not necessarily representative of the real and effective degree of the connection between the claimant and the UK. The CJEU then listed the factors which applied in the case before it and held that, taken together, these demonstrated that there was a genuine and sufficient link.

1 R(M) 1/92, Newton v CAO, Case C-356/89; 2 Reg (EEC) 1408/71, Art 10, Reg (EEC) 883/04, Art 7;  
3 Reg (EEC) 1408/71, Art 4(2a) & Annex IIa entry Y(d), (e), & (f); 4 R (DLA) 5/99 & R(A) 1/99  
(Case C-20/96 & C-90/97); 5 ECJ Cases C-20/96 (Snare) & C-297/96 (Partridge), R(DLA) 5/99 & R(A)  
1/99;  
6 ECJ Judgement Case C 299/05; 7 Reg (EEC) 1408/71 & Reg (EC) 883/04;  
8 Reg (EEC) 1408/71 Annex IIa & Reg (EC) 883/04 Annex X; 9 ECJ Case C-215/99 (Jauch);  
10 CJEU Judgement case C-537/09; 11 Case C-503/09 LS v Secretary of State for Work and Pensions

071703 The CJEU decision referred to in DMG 071702.**6** means that, from 21.7.11, new considerations applied in relation to

- 1.** Decisions about whether an award of AA, CA or DLA (Care Component) which has been made to a person residing in the UK can be exported when the claimant moves to reside permanently in another EEA State **and**
- 2.** New and repeat claims for AA, CA or DLA (Care Component) made by persons residing in an EEA State other than the UK **and**
- 3.** Claims for AA, CA or DLA (Care Component) made by EEA nationals who have recently moved to the UK.

## Meaning of “EEA State”

071704 For the sake of simplicity, for the purposes of the guidance below, references to an “EEA State” means any Member State of the EU, plus Iceland, Liechtenstein, Norway **and Switzerland** and “EEA national” means a national of any of those countries.

## United Kingdom law - residence and presence conditions

[PLEASE NOTE [DMG MEMO 6/23](#) - DISABILITY LIVING ALLOWANCE FOR CHILDREN - CHANGES TO RESIDENCE AND PRESENCE TEST AND PEOPLE MOVING FROM ENGLAND AND WALES TO SCOTLAND]

071705 [[See DMG memo 12-25](#)] A claimant must satisfy prescribed conditions of residence and presence in GB on any day included in the claim<sup>1</sup>. Claimants must

- 1.** be habitually resident in the CTA **and**
- 2.** not be subject to immigration control (see DMG 070831 to 070834) **or** a person who is exempt from the exclusion of persons subject to immigration control for the purposes of AA, DLA and CA (see DMG 070836) **and**
- 3.** be present in GB **and**
- 4.** subject to special rules relating to children (see DMG 071719 to 071721), have been present in GB for a period of (or periods totalling) not less than 104 weeks in the previous 156 weeks<sup>2</sup>.

1 SS CB Act 92, s 64 (1) S 70(4), & s 71(6));

2 SS (AA) Regs, reg 2(1); SS (DLA) Regs, reg 2(1); SS (ICA) Regs, reg 9(1)

**Note:** The regs were amended in April 2013 replacing the requirement that the claimant be ordinarily resident with a requirement that they be habitually resident in the CTA. These amendments also changed the past presence test from a requirement of presence for 26 weeks out of the previous 52 to the requirement referred to in DMG 071705 **4**. See DMG 071712 for the dates these changes take effect.

## Person subject to immigration control & EU right to reside

071706 A person’s right to reside in the UK can depend on

- 1.** their status as determined by the Home Office **or**
- 2.** what right a person may acquire under EU law.

There are occasions where a person subject to immigration control can claim public funds (see DMG

070798). This can be, for example, where they are the family member of an EEA national, and that EEA national is exercising a freedom of movement right (see DMG 073250 et seq) (for example, as a worker or a self-employed person), or where they demonstrate a derivative right of residence (for example, Ibrahim/Teixeira)(see DMG 073387). The granting of leave to enter or remain (whether granted with or without recourse to public funds) is made under the Immigration Rules. Where the claimant has been granted leave to enter or remain without recourse to public funds, and that person also has a right to reside under the Imm (EEA) Regs 2016, the condition of having “no recourse to public funds” does not have effect for as long as the person has a right to reside under the Imm (EEA) Regs 2016<sup>1</sup>.

*1 Imm (EEA) Regs 2016, reg 43 & Sch 3, para 1*

# The Habitual Residence Test 071707 - 071714

[The Habitual Residence Test](#) 071707 - 071708

[Serving Members of the Forces](#) 071709 - 071711

[Serving Member of the Forces - Family Members](#) 071712

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## The Habitual Residence Test

071707 [[See Memo DMG 11-21](#)] [[See Memo DMG 8-22](#)] [[See Memo DMG 05-23](#)] [[See Memo DMG 11-23](#)] [[See Memo DMG 10/25](#)] With effect from the date determined in accordance with DMG 071713 below, it is a condition of entitlement for AA, DLA and CA that the claimant be habitually resident in the CTA (which comprises the UK, the Channel Islands, The Isle of Man and the Republic of Ireland).

**Note:** it is also a condition of entitlement that the claimant be “in GB”.

071708 The term “habitually resident” is not defined in UK law but there is detailed case law on what it means. It is for DMs to determine whether a claimant is habitually resident in the CTA based on all the facts of the case. DMs are referred to DMG 073707 et seq for full guidance.

## Serving Members of the Forces

071709 For AA, DLA and CA, a person who is absent from GB shall be treated as though they were habitually resident in GB (and therefore the CTA) where that person is resident outside GB in their capacity as a “serving member of the forces”<sup>1</sup>.

**Note:** Persons who are abroad in their capacity as serving members of the forces are also treated as present in GB (including for the purposes of the past presence test) (see DMG 071725 **1.**).

1 SS (AA) Regs, reg 2(1B)(a); SS (DLA) Regs, reg 2(1B)(a); SS (ICA) Regs, reg 9(1B)(a)

## Meaning of “serving member of the forces”

071710 Subject to the exceptions in DMG 071711, a “serving member of the forces” means<sup>1</sup> a person

who

**1.** is over 16 **and**

**2.** is a member of one of the following organisations and establishments who gives full pay service

**2.1** any of the regular naval, military or air forces of the crown

**2.2** the reserved forces, namely the Royal Fleet Reserve, The Royal Naval Reserve, the Royal Marines Reserve, the Army Reserve, the Territorial Army, the Royal Air Force Reserve and the Royal Auxiliary Air Force

**2.3** The Royal Irish Regiment (to the extent that its members are not members of the regular forces).

1 SS (AA) Regs, 2(3A)(a); SS (DLA) Regs, reg 2(3A) (a); SS (ICA) Regs, reg 9(3)(a)(i);  
SS (Conts) Regs 01, reg 1(2) & Part I of Sch 6

071711 The following persons do not come within the definition of “serving members of the forces”<sup>1</sup>

**1.** deserters

**2.** persons serving as a member of any naval force of Her Majesty’s forces who locally entered that naval force at an overseas base, provided that the person has

**2.1** not previously been an insured person under Part 1 of the National Insurance Act 1965 **and**

**2.2** is not and has not been a National Insurance contributor under the Social Security Act 1975

**3.** persons serving as a member of any military force of Her Majesty’s forces who entered that force or was recruited to that force outside the UK, where the depot of their unit is situated outside the UK

**4.** persons serving as a member of any air force of Her Majesty’s forces who entered that force or was recruited for that force outside the UK **and** is liable under the terms of engagement to serve only in a specified place outside the UK.

1 SS (Conts) Regs 01, reg 1(2) & Part 2 of Sch 6

## **Serving Member of the Forces - Family Members**

071712 For AA, DLA and CA a claimant who is living with a person who is resident outside GB in their capacity as a serving member of the forces (as defined in DMG 071710 & 071711 above) and who is that person’s

1. spouse or civil partner
2. son or daughter
3. step-son or step-daughter
4. father or mother
5. step-father or step-mother
6. father-in-law or mother-in-law

shall be treated as habitually resident in the CTA<sup>1</sup>.

**Note:** Persons satisfying these conditions will also be treated as present in GB (see DMG 071725.4).

1 SS (AA)Regs, reg 2(3A)(b); SS (DLA Regs, reg 2 (3A)(b); SS (ICA) Regs, reg 9(3)(a)(ii)

## Date the change to a Habitual Residence Test applies from

071713 The change from the test of ordinary residence to habitual residence and the consequent rules about serving members of the forces and their family members described in DMG 071709 to DMG 071711 take effect from<sup>1</sup>

1. in the case of a person who has an existing award of AA, DLA or CA on 7.4.13, whichever is the earlier of<sup>1</sup>
2. in any other case, 8.4.13<sup>2</sup>.

**2.1** the day immediately following the day on which the existing award terminates (i.e. when a fixed period award comes to an end) **or**

**2.2** on the day on which the first revision or supersession is made **on or after 8.4.13.**

**Note:** as the main change here is from a requirement to be “ordinarily resident” to a requirement to be “habitually resident”, it will be unusual for the change in legislation to affect entitlement.

1 SS (DLA, AA & CA) (Amendt) Regs 2013, reg 1(3) &(4); 2 reg 1(2)

071714





# The Past Presence test 071715 - 071724

[DLA \(Care\) - Application of the Past Presence Test to Certain Children](#) 071719 - 071721

[\[See Memo DMG 11-21\]](#)

071715 [\[See Memo DMG 10/25\]](#) [\[See Memo DMG 11-23\]](#) [\[See Memo DMG 05-23\]](#) [\[See Memo DMG 01-23\]](#) [\[See Memo DMG 8-22\]](#) It is a condition of entitlement to AA, DLA and CA that, in respect of any day of potential entitlement, the claimant must have been present in GB for a specified period in the past (“the past presence test”).

071716 From 17.3.16 PPT is no longer to be applied to claims submitted by refugees and their family members or to people with Humanitarian Protection status and their families<sup>1</sup>. All claimants must satisfy the other conditions of entitlement.

*1 [2016] UKUT 149 {AAC}*

071717 Subject to the rules relating to DLA for those aged under 16 described in DMG 071719 to 071722 below, the requirement is<sup>1</sup> that in respect of any day for which benefit is claimed, the claimant must have been present in GB for a period of (or periods totalling) 104 weeks in the 156 weeks immediately preceding that day.

**Note:** The past presence test was changed from a requirement that a claimant be present for 26 weeks out of the previous 52 by amending regulations made in April 2013. See DMG 07172 for details of when this change takes effect.

*1 SS (AA) Regs, reg 2(1) (a) (iii); SS (DLA) Regs, reg 2(1) (a) (iii); SS (ICA) Regs, reg 9(1)(c)*

## Example 1

On 15.4.13, Margaret claimed CA. She reported that she had lived and worked in the USA from 1999 until 21.5.11 when she returned to reside in the UK. The DM calculated that the 156 weeks immediately preceding 15.4.13 ran from 19.4.10 to 14.4.13. The DM calculated that, during that period, Margaret had been present in GB for 99 weeks and 2 days. The DM decided that, as at the first day of entitlement in relation to the claim, Margaret did not satisfy the past presence test. However he decided to treat the claim as being made in advance for a period starting on 18.5.13 (the first day immediately following the completion of 104 weeks residence in the UK). Accordingly, the DM made an award of CA starting from 21.5.13 (the beginning of the 7 days ending on Monday 27.5.12)

## Example 2

Howard made a claim for AA on and from 12.6.13. He reported that, during the previous three years, he

had resided in GB from May 2010 to 7.9.12 and since 31.1.13. The rest of the time he had lived in Australia. The DM calculated that the 156 weeks immediately preceding 12.6.13 ran from 16.6.10 to 11.6.13 and that during that period Howard had been in GB for a total of 136 weeks and 2 days (116 weeks and 3 days in the first period and then 19 weeks and 6 days from 31.3.13 to 11.6.13). He therefore decided that Howard satisfied the past presence test as at the date of claim.

### **Terminally Ill**

071718 In the case of a claim for AA or DLA from a person who is terminally ill, the past presence test does not apply<sup>1</sup>.

*1 SS (AA) Regs, reg 2(3); SS (DLA) Regs, reg 2(4)*

## **DLA (Care) - Application of the Past Presence Test to Certain Children**

### **Child aged less than 6 months**

071719 The past presence test in relation to any day of potential entitlement to DLA (Care Component) in the case of a claimant who is child under the age of 6 months is that they must have been present in GB for a period of (or periods totalling) 13 weeks<sup>1</sup>.

**Note:** This rule has applied since DLA began in 1992.

*1 SS (DLA) Regs, reg 2 (5)*

### **Continuation up to the age of 12 months**

071720 Where, immediately before they attain the age of 6 months, a child is entitled to DLA by virtue of having satisfied the past presence test described in DMG 071719, then the past presence test will be that, in respect of any day, that child must have been present in GB for a period of (or periods totalling) 13 weeks<sup>1</sup>. This test will continue to apply until that child attains the age of 12 months<sup>1</sup>.

**Note:** This rule has applied since DLA began in 1992.

*1 SS (DLA) Regs, reg 2 (6)*

### **Child aged over 6 months but less than 36 months**

071721 Except where, and to the extent that DMG 071720 applies, the PPT for a child who is aged 6 months or over, but under the age of 36 months, is that for any day of potential entitlement the child must have been present in GB for a period of (or periods totalling) 26 weeks in the 156 weeks immediately preceding that day<sup>1</sup>.

*1 SS (DLA) Regs, reg 2 (7)*

## **Child aged 36 months or over, but less than 16 years**

071722 The PPT for a child who is aged 36 months or over but under the age of 16 years is that for any day of potential entitlement the child must have been present in GB for a period of (or periods totalling) 26 weeks in the 52 weeks immediately preceding that day. In applying the PPT to children entering GB, decision makers should note the effect of an UT judgment<sup>1</sup>, which is applied from 12.10.20. Here it was held that two British national children returning to GB from a period of residence abroad (in Australia and New Zealand) were in an analogous position to those already resident and to treat them otherwise was a breach of Article 3.1 of the UN Convention on the Rights of the Child. Prior to 12.10.20 the past presence test required a non-resident child, over the age of 36 months, to have been in GB for 104 of the past 156 weeks in order to be eligible to claim DLA.

*1 [2020] UKUT 284 (AAC)*

## **Date the changes to the Past Presence Test Period apply from**

071723 The changes described in DMG 071717 & 071722 above take effect from<sup>1</sup>

**1.** in the case of a person who has an existing award of AA, DLA, or CA on 7.4.13, whichever is the earlier of<sup>1</sup>

**1.1** the day immediately following the day that the existing award terminates (i.e. when a fixed period award comes to an end) **or**

**1.2** 104 weeks after 8.4.13 (i.e. from 6.4.15) **or**

**2.** in any other case, 8.4.13<sup>2</sup>.

*1 SS (DLA, AA & CA) (Amendt) Regs 2013, reg 1(3) & (5); 2 reg 1(2)*

## **Example**

Alice claimed DLA on 13.9.12. In making her claim, Alice said that she had lived in Canada until 9.6.11 when she moved to reside in GB. The DM was satisfied that Alice satisfied the past presence test because she had been in GB for 26 weeks in the 52 weeks ending on 12.9.12. The DM made an award of DLA for a fixed term of 52 weeks. The first day of entitlement was 13.9.12. At the end of the fixed period the DM decided that the amended past presence test came into force in Alice's case on 12.9.13. He decided that the 156 week period ran from 16.9.10 to 11.9.13. During this period, Alice had been in GB for 104 weeks and 6 days and therefore she satisfied the amended past presence test.

## **Effect of EU Law**

071724 The past presence test remains in force in UK domestic law but its application is modified where EU law applies: that is to say where the person concerned is within the personal scope of the EU

regulations concerning the co-ordination of social security systems<sup>1</sup> **and** the UK is the competent state for the payment of the benefits concerned. Details are given (starting at DMG 071750 below) in respect of the three situations where this will be a consideration

- 1.** Exportability of an award of AA, CA or DLA (Care Component)
- 2.** New and repeat claims for AA, CA and DLA (Care Component) made by persons residing in an EEA state other than the UK.
- 3.** Claims for AA, CA and DLA (Care and Mobility Components) made by EEA nationals who have recently come to reside permanently in the UK

*1 Reg (EEC) 1408/71 & Reg (EC) 883*

## Periods of absence from GB 071725 - 071739

[Members of the Forces, Aircrew, Mariners, etc.](#) 071725

[Temporary absences from GB - AA and DLA](#) 071726 - 071728

[Absence to receive medical treatment](#) 071729 - 071734

[Temporary Absences from GB - CA](#) 071735 - 071739

### Members of the Forces, Aircrew, Mariners, etc.

071725 Claimants who are habitually resident in the CTA but who are absent from GB on any day should, for the purposes of the presence tests (including the past presence test), be treated as being present<sup>1</sup> if on that day they are abroad **only** because they are

- 1.** serving members of the forces (see DMG 078060 - 078185) **or**
- 2.** aircrew or mariners (see DMG 078060 - 078185) **or**
- 3.** in prescribed employment on the continental shelf (see DMG 078060 - 078185) **or**
- 4.** living with a serving member of the forces and are that person's spouse, civil partner, son, daughter, step-son, step-daughter, father, father-in-law, step-father, mother, mother-in-law or step-mother.

**Note:** References to 'step' relationships and 'in-laws' are to be read as including relationships arising through civil partnerships<sup>2</sup>.

1 SS (AA) Regs, reg 2(2); SS (DLA) Regs, reg 2(2); SS (ICA) Regs, reg 9(3); 2 CP Act 04, s 246

### Temporary absences from GB - AA and DLA

[PLEASE NOTE [DMG MEMO 6/23](#) - DISABILITY LIVING ALLOWANCE FOR CHILDREN - CHANGES TO RESIDENCE AND PRESENCE TEST AND PEOPLE MOVING FROM ENGLAND AND WALES TO SCOTLAND]

## Meaning of “temporary absence”

071726 [\[See DMG memo 12-25\]](#) A person is “temporarily absent” from GB if<sup>1</sup>, at the beginning of the period of absence, that absence is unlikely to exceed 52 weeks.

1 SS (AA) Regs, reg 2(3C); SS (DLA) Regs, reg 2(3C)

### Example

## Temporary Absence - Up to 13 weeks

071727 An AA or DLA claimant who is temporarily absent from GB shall be treated as present (including for the purposes of deciding whether the past presence test is satisfied) for a period of up to 13 weeks<sup>1</sup>.

**Note:** The period allowed was reduced from 26 to 13 weeks by an amendment to regs made in April 2013. See DMG 071728 for the dates this change takes effect from.

1 SS (AA) Regs, reg 2(2)(d); SS (DLA) Regs, reg 2(2)(d)

## Date 13 week absence rule change takes effect from

071728 The change to the temporary absence rule described in DMG 071727 above takes effect from

**1.** in the case of a claimant who has an existing award of AA or DLA on 7.4.13, whichever is the earlier of<sup>1</sup>

**1.1** the day immediately following the day that the current award terminates (i.e. when a fixed period award comes to an end) **and**

**1.2** 26 weeks after 8.4.13 (i.e. 7.10.13) **or**

**2.** in any other case, 8.4.13<sup>2</sup>.

1 SS (DLA, AA & CA) (Amendt) Regs 13, reg 1(3) & (6); 2 reg 1(2)

### Example 1

A two year fixed term award of DLA was made to Vincent, with a first day of entitlement of 6.3.12. Vincent left the UK on 3.3.13 for a temporary visit to relatives abroad. The DM decided that as there was an existing award of DLA on 7.4.13, the new rules would take effect from 7.10.13. However the 26 weeks absence allowed under the old rules would expire on 4.9.13. He therefore set a BF date to check the position closer to that time.

### Example 2

Margaret has an indefinite award of AA which started in 2005. She left the UK on 25.4.13 for a temporary

visit to the USA. The DM decided that, as Margaret had an existing award of AA on 7.4.13, the new rules would apply in her case from 7.10.13. If Margaret's absence continued unbroken until 7.10.13, by that date she would have been absent for 23 weeks and 4 days. Under the new rules only 13 weeks absence starting with the first day of absence is allowable. Accordingly the DM set a BF date to check the position at a time close to 7.10.13.

### Example 3

Bill claimed DLA on 15.4.13 and an award was made from 18.4.13. On 5.5.13, Bill left for an extended holiday in Spain. The DM decided that, as there was no award of DLA on 7.4.13, the new rules applied from 8.4.13. The DM therefore decided that Bill could be treated as present in GB for up to and including 4.8.13 (i.e. 13 weeks starting on 6.5.13) and set a BF date accordingly.

## Absence to receive medical treatment

### Introduction

071729 The rules relating to absences from GB for medical treatment were changed by amending regs that were made in April 2013. However there are savings provisions under which the old rules may continue to apply for some time. The following guidance therefore sets out the old rules, the new rules and gives details of the savings provisions.

### The Old Rules

071730 Claimants who are absent from GB on any day should, for the purposes of the presence tests (including the past presence test) be treated as being present<sup>1</sup> if on that day they are abroad **only**

- 1.** because they are temporarily absent from GB (see DMG 070853 - 070878) **and**
- 2.** the absence is for the specific purpose of being treated for an incapacity or a disabling condition **and**
- 3.** the incapacity or condition began before leaving GB **and** the Secretary of State has certified that it is consistent with the proper administration of the Act<sup>2</sup> that they should be treated as being present in GB (see DMG 070822).

1 SS (AA) Regs, reg 2(2); SS (DLA) Regs, reg 2(2)

### The New Rules

071731 Subject to the savings provisions described in DMG 071733-4 with effect from 8.4.13 where<sup>1</sup>

- 1.** an AA or DLA claimant's absence from GB is temporary (within the meaning given in DMG 071726) **and**
- 2.** the absence is solely in connection with arrangements made for the medical treatment of the claimant for a disease or bodily or mental disablement (which started before the claimant left GB) **and**



**3.** the arrangements referred to in sub-paragraph **2** relate to medical treatment (see 071732)

**3.1** outside GB **and**

**3.2** during the period when the claimant is temporarily absent from GB **and**

**3.3** by, or under the supervision of, a person appropriately qualified to carry out that treatment

that claimant shall be treated as present in GB for the first 26 weeks of the absence.

1 SS (AA) Regs, reg 2(3B); SS (DLA) Regs, reg 2(3B)

### **Example**

The claimant, a British citizen, left Britain for the Czech Republic. Her absence was solely in connection with arrangements for medical treatment. The treatment was supervised by appropriately qualified doctors in the Czech Republic. Her intention at the outset was to return to GB within 52 weeks. She remained habitually resident in the UK. Although the claimant claimed whilst she was in the Czech Republic as she was still habitually resident in GB this wasn't a first claim from abroad.

As the claimant was habitually resident in the UK and hadn't switched her habitual residence then she was therefore subject to domestic legislation. The claimant's temporary absence was for 26 weeks, and they had intended to return within 52 weeks. The claimant was entitled to both components for the remainder of the temporary absence but not beyond that period.

### **Meaning of “medical treatment”**

071732 In DMG 071731 **2**. “medical treatment” means<sup>1</sup> medical, surgical or rehabilitative treatment (including any course or diet or other regimen).

1 SS (AA) Regs, reg 2(3B); SS (DLA) Regs, reg 2(3B)

### **The Savings Provisions**

071733 The rule described in paragraph 071731 above takes effect from 8.4.13, but there are savings provisions. The old rules described in DMG 071730 will continue to apply to a person<sup>1</sup>

**1.** who, on 8.4.13 is absent from GB **and**

**2.** whose absence is temporary and for the purpose of being treated for incapacity or a disabling condition, which started before they left GB **and**

**3.** in respect of whom, before 8.4.13, the Secretary of State had certified that it was consistent with the proper administration of the Act that, subject to that person satisfying the condition in sub-paragraph **2**, they should be treated as present in GB

until the date established in accordance with DMG 071734.

1 SS (DLA, AA and CA) (Amend) Regs 2013, reg 5(1) and (3)

071734 The old rules will continue to apply to a person described in DMG 071733 until the earlier of the following events takes place<sup>1</sup>

**1.** the person returns to GB

**2.** the first revision or supersession of the award is made **after 8.4.13.**

**Note:** The reference here is to the date the DM **makes** the revision or supersession decision **not** the date that decision takes effect from.

1 SS (DLA, AA and CA) (Amend) Regs 2013, reg 5(3)

### **Example 1**

Victoria has an indefinite award of AA. On 30.1.13, Victoria notified her local BDC that, with the approval of her GP, she intended to go to Germany for a period of medical treatment for her condition. She planned to leave the UK on 10.2.13. On 4.2.13, a Secretary of State's certificate (confirming that it was consistent with the proper administration of the Act that Victoria should be treated as present in GB) was made. In April 2013 the DM reviewed Victoria's position. She was still receiving the medical treatment in Germany and it was expected this would last for a month or two more. The DM noted that, as all the conditions in DMG 071733 above were satisfied, (subject to their being no grounds to revise or supersede the award in the meantime), the new rules would not be triggered until Victoria returned to the UK. The DM set a BF to check the position in two months' time.

### **Example 2**

Zainab has an indefinite award of DLA. With her GP's approval she left the UK on 15.4.13 to receive medical treatment in the USA. The DM decided that the condition in DMG 071733.1 was not satisfied and so the savings provisions did not apply.

Under the new rules Zainab could only be treated as present in GB for the first 26 weeks of absence. In this case the last day of that period would be 14.10.13.

## **Temporary Absences from GB - CA**

### **Temporary Absences - Four Weeks**

071735 A CA claimant who is absent from GB shall be treated as being present for an day where<sup>1</sup>

**1.** the absence is for a temporary purpose (and was for a temporary purpose when it began) **and**

**2.** it has not lasted for a continuous period of more than 4 weeks.

1 SS (ICA) Regs, reg 9(2)(a)

## **Accompanying the Severely Disabled Person**

071736 A CA claimant shall be treated as present on any day of absence from GB if <sup>1</sup>the absence

**1.** is temporary **and**

**2.** for the specific purpose of caring for the severely disabled person

**2.1** who is also absent from GB **and**

**2.2** for whom AA, the Care Component of DLA (at the highest or middle rates), the daily living component of PIP (at the standard or enhanced rate) or an AFIP<sup>2</sup> is payable.

**Note:** The term “specific purpose” does not mean the sole or only purpose for being absent from GB (see DMG 070649 - 070650).

1 SS (ICA) Regs, reg 9(2)(b); 2 Armed Forces and Reserve Forces (Compensation Scheme) Order 2011

071737 UK law does not allow claimants who go to live permanently in another country to export their benefit. But see DMG 071740 et seq. if a claimant goes to live permanently in another EEA Member State.

071738 - 071739

# Export of benefit to other EEA Member States under EU law 071740 - 071749

[General](#) 071740 - 071741

[Family member](#) 071742

[Transitional protection - Entitlement continuous from before 1.6.92](#) 071743 - 071749

## General

071740 **[See Memo DMG 16/20 and Memo DMG 11-22 and Memo DMG 07-24]** UK law does not allow claimants who go to live permanently in another country to export their benefit. If the claimant does not satisfy the residence and presence conditions in UK law, the DM should consider whether EU law helps the claim.

071741 To be helped by EU law a claimant must

- 1.** be an EEA national or a family member of an EEA national or a third country national in some circumstances (see DMG 071756 et seq) **and**
- 2.** come within the personal scope<sup>1</sup> (see DMG 071754 et seq) of EU law **and**
- 3.** have moved within the EEA.

1 Reg (EEC) 1408/71, Art 2 & Reg (EEC) 883/04, Art 2

## Family member

071742 Family member includes the spouse or civil partner of an EEA national, and the children of such a person who are either minors or dependant on such a person<sup>1</sup> (see DMG 071759 - 071760 for more detail).

1 Reg (EEC) 1408/71, Art 1(f)(ii) & Reg (EEC) 883/04 Art 1(i)(2)

## Transitional protection - Entitlement continuous from before 1.6.92

071743 A claimant who was continuously entitled to AA, CA, or DLA (Care Component) or DLA (Mobility Component) from before 1.6.92, and who moved to another EEA Member State before 18.10.07, is transitionally protected to export his benefit when moving to take up residence in that other EU Member

State<sup>1</sup> if he

**1.** was a national of an EEA Member State (or family member of an EEA citizen) as at 1.6.92 (but see DMG 071745 and note DMG 071747 - 071748 concerning countries that were not in the EU as at 1.6.92) **and**

**2.** moved to live in another EU Member State before 18.10.07 **and**

**3.** satisfies all other conditions of entitlement to the benefit other than residence and presence conditions **and**

**3.1** was within the scope of relevant EU law i.e. has worked in the UK (or any other Member State) at any time as an employed or self employed person **or**

**3.2** is a member of the family of another person who satisfies condition **3.1** above.

**Note:** The transitionally protected, pre -1.6.92 described above is an “invalidity benefit” for the purposes of the EU regulations concerning the co-ordination of social security benefits<sup>2</sup>.

1 Reg (EC) 1408/71 Art 95(b)(8); 2 Reg (EC) 1408/71 & Reg (EEC) 883/04

071744 Claimants who satisfy all the conditions in DMG 071743 above are transitionally protected to export awards of AA or CA, DLA (Care Component) or DLA (Mobility Component) where they left GB before 18.10.07 (but see DMG 071746 below).

**Note:** With DLA, the transitional protection only applies to the component for which there was continuous entitlement since before 1.6.92. So, if a claimant was entitled to the DLA (Care Component) from before 1.6.92 and then entitlement to DLA (Mobility Component) starts from a day falling after 1.6.92, only the Care Component is transitionally protected.

071745 However, only awards of DLA Mobility Component can still attract transitional protection if a claimant moves to another EEA Member State on or after that date. From 18.10.07, awards of AA, CA and DLA (Care Component) can only be exported as sickness benefits (see DMG 071750 et seq. below), even where the original award pre-dates 1.6.92.

071746 Transitional protection for AA, DLA, and CA does not apply to nationals of the EFTA countries (Iceland, Norway and Liechtenstein) or Switzerland. This is because the EEA and Swiss Agreements include exemptions from the transitional provision<sup>1&2</sup>. This also means that EEA nationals who move to Iceland, Norway, Liechtenstein or Switzerland cannot benefit from transitional protection.

1 EU/Swiss Agreement, Annex II, OJ 2002 L 114, p. 6 2 EEA Agreement, Annex VI, OJ 1994 L 1, p. 3

071747 A full list of EEA Member States is at DMG 070040, with details of when they first joined the EU. Additionally, the following countries were not EEA Member States as at 1.6.92:-

Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, Hungary, Latvia, Lithuania, Malta, Poland,

Romania, Slovakia, Slovenia, and Sweden.

071748 Persons who were entitled to AA, CA, DLA (Care Component) or DLA (Mobility Component) since before 1.6.92 who moves (before 18.10.07) to one of the countries listed in DMG 071747 can benefit from transitional protection and so will be able to export these benefits but only from the date that country joined the EU.

### **Example**

Grace is a UK national who became entitled to DLA (Mobility Component) from 1.4.92. In April 2002 she moved to live in Hungary. The DM decided that, as, at that time, Hungary was not a member of the EU, the DLA (Mobility Component) could not be exported as a transitionally protected “invalidity benefit”. However, having checked that the conditions of entitlement had been satisfied continuously since 1.4.92, the

DM decided that Grace could benefit from transitional protection from the date Hungary joined the EU (i.e. from 1.5.04).

### **Entitlement began on or after 1.6.92**

071749 From 1.6.92, AA, DLA, and CA were listed as SNCBs for the purposes of EU law<sup>1</sup>. Such benefits are payable only in, and at the expense of, the country of habitual residence. A person who became entitled to AA, DLA, or CA on or after 1.6.92 could not export their benefit when moving permanently to live in another EEA Member State<sup>2</sup>, nor could someone claim an SNCB when living in another EEA Member State. However, from 18.10.07, AA, DLA (Care Component) and CA are sickness benefits in EU law. But see Appendices 1 and 2 to this Part of Chapter 07 for more detailed guidance on the position between 8.3.01 and 20.7.11.

1 Reg (EEC) 1408/71, Art 4(2a) & 10(a) & Annex IIa; 2 ECJ cases C-20/96 & C-297/96, R(DLA) 5/99 & R(A)

# **Export of benefit to another EEA Member State from 21.7.11 071750 - 071784**

[EU Law - Background](#) 071751

[What types of benefit are AA, DLA & CA?](#) 071752

[Exportability - General Rules for AA, DLA \(Care\) or CA](#) 071753

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[UK competency ceases](#) 071779 - 071780

[Genuine and Sufficient Link](#) 071781 - 071784

071750 On 21.7.11, the CJEU made a decision<sup>1</sup> which affects the way EU law applies in relation to the export of AA, CA and DLA (Care Component). The guidance below therefore sets out the EU law position as it applies from 21.7.11. The guidance about how the law was applied from 8.3.01/18.10.07 up to 20.07.11 in the light of the CJEU’s decision<sup>2</sup> dated 18.10.07 that AA, CA and DLA (Care Component) are sickness benefits can be found in Appendix 1 to this Part of Chapter 07. There was also a law change to regularise the position with regard to new claims/requests for reconsideration made in the light of the

CJEU's decision<sup>2</sup> that AA, CA and DLA (Care Component) are sickness benefits. Details can be found at Appendix 2.

1 Case C-503/09 LS v Secretary of State for Work and Pensions; 2 ECJ Judgement Case C-299/05

## EU Law - Background

071751 There are two current sets of EU regulations relating to the co-ordination of Social Security benefits across the Member States. These are

**1.** Regulation (EC) No. 883/2004 which sets out the main rules, **and**

**2.** Regulation (EC) No. 987/2009 which deals with the administrative procedures to be followed in implementing the main rules.

**Note:** For the EU Member States, these regulations replaced earlier regulations<sup>1</sup> with effect from 1.5.10. They applied to Switzerland from 1.4.12 and to Norway, Iceland and Liechtenstein from 1.6.12. The old regulations<sup>1</sup> continue to apply in certain transitional cases. DMs are advised to seek guidance from DMA (Leeds) where issues relating to the old regulations apply. See also DMG 071756 to 071758 below concerning third country nationals.

1 Reg (EEC) 1408/71 & Reg (EEC) 574/72

## What types of benefit are AA, DLA & CA?

071752 The EU Social Security Co-ordination Regs set out different rules depending upon the branch of social security involved (e.g. "sickness benefits", "old-age benefits", "family benefits"). On 18.10.07 the Court of Justice of the European Union (the CJEU) held<sup>1</sup> that the care component of DLA was a sickness benefit. However, on 5.5.11 the CJEU confirmed that the mobility component of DLA was a Special Non-Contributory Benefit (SNCB). DLA (Mobility Component) cannot, therefore, be paid to a person residing abroad. For the purposes of the EU regulations concerning the co-ordination of social security benefits AA, DLA (Care only) and CA are sickness benefits in cash for long term care.

1 ECJ Judgement Case C 299/05;

2 Bartlett, Gonzales Ramos and Taylor v Secretary of State for Work and Pensions Case C-537/09,

## Exportability - General Rules for AA, DLA (Care) or CA

071753 [[See Memo DMG 16/20](#); [Memo DMG 11-22](#)] and [[Memo DMG 06/24](#) and [Memo DMG 07-24](#)] A claimant with an award of AA, DLA (**Care only**) or CA, who leaves GB and resides in an EEA State will continue to be entitled to that award where<sup>1</sup>

**1.** the person is within the personal scope of relevant EU legislation **and**



- 2.** the UK continues to be the competent state for payment of a sickness benefit **and**
- 3.** the person can demonstrate that they have a genuine and sufficient link to the UK **and**
- 4.** the normal domestic conditions of entitlement are met except that the claimant no longer has to
  - 4.1.** be habitually resident in the CTA **or**
  - 4.2** be present in GB **or**
  - 4.3** meet the past presence test.

1 SS (AA) Regs, reg 2B; SS (DLA) Regs, reg 2B; SS (ICA) Regs, reg 9B

## Personal scope of EU legislation

071754 [[See Memo DMG 11-22](#) and [Memo DMG 07-24](#)] With effect from 1.5.10, a person is within the scope of the EU regulations relating to the co-ordination of social security systems if that person<sup>1</sup>

**1.** is

**1.1** a national of a Member State, **or**

**1.2** a stateless person or refugee residing in a Member State

who is or has been subject to the legislation of one or more Member States **or**

**2.** is a member of the family or a survivor of a person falling within 071754 **1.**

1 Reg (EC) 883/04, Art 2(1)

071755 Also within the personal scope of EU provisions<sup>1</sup> are survivors of persons who have been subject to the legislation of one or more Member States (regardless of the nationality of such persons), provided the survivor is

**1.** a national of a Member State, **or**

**2.** a stateless person or refugee residing in one of the Member States.

1 Reg (EC) 883/04, Art 2(2)

## Third country nationals

071756 The UK is not covered by the extension of rights to TCNs under Reg (EC) 883/04, which came in to force on 1.5.10. However TCNs will continue to be subject to the terms and limitations of Reg (EEC)

1408/71 as summarised below.

071757 An amendment to EU Regulations<sup>1</sup> extended the provisions of Reg (EEC) 1408/71 to third country nationals (TCNs) from 1.6.03 provided those nationals were legally resident in the territory of a Member State, were insured workers, and were in a situation that involved more than one state. However the following states did not extend the terms of Reg (EEC) 1408/71 to TCNs:

Denmark

Iceland

Norway

Liechtenstein

Switzerland.

1 Reg (EC) 859/2003

071758 Therefore a TCN who has worked will be able to export an award of AA or DLA (Care) or CA if he satisfies the same conditions that apply to an EEA national (and the UK is the competent state for payment of a sickness benefit) **except** where he leaves GB to live in Denmark, Iceland, Norway, Liechtenstein, or Switzerland. Of course, the TCN must be legally residing in both the UK and then the new state of residence that they move to.

## Meaning of “member of the family”

071759 Members of a person’s family are<sup>1</sup>

1. the spouse,
2. children under 18, **and**
3. children over 18 who are dependent.

1 Reg (EC) 883/04, Art 1(i)(2)

## Meaning of “dependent”

071760 A UT Judge has analysed the EU case law on the meaning of “dependent” in the context of the EU Citizenship Directive<sup>1</sup>. He summarised that case law<sup>2</sup> as finding that<sup>3</sup>

1. a person is only dependent who actually receives support from another
2. there need be no right to that support and it is irrelevant that there are alternative sources of support

available

**3.** that support must be material, although not necessarily financial, and must provide for, or contribute towards the basic necessities of life.

1 Directive 2004/38/EC; 2 Case C-316/85, Centre Public D'Aide Sociale de Courcelles v Lebon; Case C-2000/02, Chen v Secretary of State for the Home Department; Case C-I/05, Jia v Migrationsverket; 3 CIS/2100/07

## Deciding which EEA State's legislation applies

071761 [\[See Memo DMG 16/20; Memo DMG 11-22\]](#) and [\[Memo DMG 06/24 and Memo DMG 07-24\]](#) The EU co-ordination regs contain rules intended to avoid a conflict between the domestic laws of the Member States. The basic rules are<sup>1</sup>

- 1.** a person pursuing activity as an employed or self-employed person in a Member State is subject to the legislation of that Member State. (See DMG 071764 for the legislation that applies to posted workers).
- 2.** A civil servant is subject to the legislation of the Member State to which the administration employing him is subject.
- 3.** A person receiving unemployment benefits in accordance with a specific provision in the EU co-ordination regs<sup>2</sup> from the Member State of residence is subject to the legislation of that Member State.
- 4.** A person called up or recalled for military or civilian service by a Member State, is subject to the legislation of that Member State.
- 5.** Any other person to whom sub-paragraphs 1 to 4 do not apply is subject to the legislation of the Member State of residence. However this is subject to other rules in the EU co-ordination regs which guarantee benefits under the legislations of one or more Member States.

1 Reg (EC) 883/04, Art 11(3); 2 Art 65

071762 Except in relation to the benefits listed at DMG 071763, for the purposes of DMG 071759 **1.** a person receiving cash benefits because of, or as a consequence of, their activity as an employed or self-employed person shall be considered to be pursuing that activity<sup>1</sup>.

1 Reg (EC) 883/04, Art 11(2)

071763 DMG 071762 does not apply to<sup>1</sup>

- 1.** invalidity benefits

2. old age or survivors' pensions
3. pensions in respect of accidents at work or occupational diseases
4. sickness benefits in cash which are for treatment for an unlimited period.

1 Reg (EC) 883/04, Art 11(2)

## Workers posted abroad

071764 Where persons whose employer normally carries out its activities in the UK are posted by that employer to another EEA state, the legislation of the UK will continue to apply provided<sup>1</sup>

1. they are not sent to replace another person **and**
2. the posting is not expected to last more than 24 months<sup>1</sup>.

1 Reg (EC) 883/04, art 12(1)

## Competent state for the payment of cash sickness benefits

071765 The circumstances in which a state is required to export or award a sickness benefit to a claimant living in another EEA Member State are prescribed in EU law<sup>1</sup>. However, for third country nationals, these rules only apply when the claimant moves to certain of the EEA Member States (see DMG 071757-8 above).

**Note 1:** With effect from 31.10.11 the Act<sup>2</sup> was amended so as to confirm that, under GB law, EEA citizens who have moved within the EEA are only entitled to AA, CA, or DLA (Care Component) where the UK is the competent state for the payment of sickness benefits in cash under EU law<sup>3</sup>.

**Note 2:** See appendices 3 and 4 for further guidance on competency.

1 Reg (EEC) 1408/71 Art 1(q) & Chapter 1 Title III & Reg (EC) 883/04 Title III Chapter 1;

2 SSCB Act s 65(7), s 70(4A) & s 72(7B);

3 Reg (EEC) 1408/71, Chapter 1 of Title III & Reg (EC) 883/04, Chapter 1 of Title III

071766 [[See Memo DMG 05/21](#)] There are two main rules for deciding competency for sickness benefits in cash depending upon whether the claimant is an “insured person” or a person receiving a pension.

## Insured persons

[[See Memo DMG 05/21](#)]

071767 [[See Memo DMG 16/20](#)] In relation to sickness benefits, “insured person” means<sup>1</sup> any person

who satisfies the conditions of entitlement for a sickness benefit.

1 Reg (EC) 883/04, Art 1(c)

071768 An “insured person” (and members of that person’s family - see DMG 071759) who is residing or staying in a Member State (A) other than the Member State (B) in which they are insured, is entitled to sickness benefits in cash from Member State B<sup>1</sup>.

1 Reg (EC) 883/04, Art 21

071769 The following persons should be regarded as persons insured in the UK for cash sickness benefits -

**1.** those covered by GB contributions in the relevant income tax years that would enable them to claim ESA(Cont) (RITY cover) **provided** they have not been

insured for sickness benefits in an EEA State other than the UK since they worked and paid NI contributions in respect of that work in the UK

**2.** posted workers (see DMG 071777) and frontier workers (see DMG 071778) who work in GB **and**

**3.** claimants who are in receipt of JSA(CB), IBST, ESA(Cont) in the assessment phase, and MA,

**4.** workers who are currently living and working in the UK and their family members.

**Note:** DMs are reminded of the need to consider which EEA State’s legislation applies (see DMG 071761 to 071763). In general, where a person is living and working in an EEA State other than the UK, it is the legislation of that EEA State which will apply.

## Pensioners

071770 A person (and any member of that pensioner’s family) receiving a pension under the legislation of one or more Member States is to be paid cash sickness benefits by the Member State responsible for the cost of sickness benefits in kind<sup>1</sup>.

1 Reg (EC) 883/04, Art 29

071771 In receipt of a **pension** (under GB legislation) means entitled to and actually in receipt of

**1.** state RP of any category **or**

**2.** main phase ESA(Cont), long-term IB, SDA, **or**

**3.** a bereavement benefit, including widows’ benefit and Industrial Injuries Death Benefit (but not a bereavement payment which is not a pension but a Death Grant) **or**

4. a pension for Industrial Injuries Disablement Benefit (including REA and RA).

5. Transitionally protected DLA (Mobility Component)

**Note:** This definition of “pension” derives from the EU co-ordination regulations.

### **Meaning of sickness “benefits in kind”**

071772 For the purposes of the EU rules about sickness and maternity benefits “benefits in kind” means<sup>1</sup> benefits in kind provided for under the legislation of a Member State which are intended to

1. supply

2. make available

3. pay directly to a provider for

4. reimburse the cost of

medical care and products and services ancillary to that care, including long term care benefits in kind. This means healthcare. Long term care benefits in kind does not include AA, DLA (Care only) and CA, which are long term care benefits in cash.

1 Reg (EC) 883/04, Art 1(va)(i)

### **Deciding which state is responsible for sickness benefits for a pensioner**

071773 Where a person who receives a pension or pensions under the legislation of one or more Member States, one of which is the Member State of residence and the person is entitled to sickness benefits in kind under the legislation of the Member State of residence, then the Member State of residence will pay sickness benefits (in cash and in kind)<sup>1</sup>.

1 Reg (EC) 883/04, art 23

### **Example**

Martin resides in Germany. He receives pensions under both German and UK legislation and he is entitled to sickness benefits in kind under German legislation. Germany is the Member State responsible for paying cash sickness benefits to Martin.

071774 Where a person receives a pension or pensions under the legislation of one or more Member States but there is no entitlement to benefits in kind under the legislation of the Member State of residence, sickness benefits in cash and in kind will be provided by one of the Member States responsible for the pension(s) determined as follows<sup>1</sup>

1. where the person is entitled to benefits in kind under the legislation of only one Member State then that Member State will bear the cost of benefits in kind and pay the cash sickness benefits,
2. where the person is entitled to benefits in kind under the legislation of two or more Member States then the Member State where the person was insured for the longest period of time will bear the cost of benefits in kind and pay cash sickness benefits.

1 Reg (EC) 883/04, Art 24

### **Example 1**

Chris resides in Spain. He is entitled to and receives a full UK Retirement Pension. He does not receive a pension from any other Member State and he is not entitled to benefits in kind under Spanish legislation. Chris claimed the DLA (Care Component)

and the DM decided that, under EU rules the UK was the state responsible for paying sickness benefits in cash and in kind and that therefore DLA (Care Component) could be paid to him in Spain

### **Example 2**

Renate resides in Greece. She is entitled to a UK Retirement Pension at a reduced rate but she is also entitled to a German retirement pension. Renate is not entitled to benefits in kind under Greek law. The DM found out that Renate had worked and paid social security insurance in Germany for 25 years but only for 10 years in the UK. The DM decided that the UK was not the competent state for the payment of sickness benefits.

071775 Where a person who receives a pension under the legislation of one or more Member States (other than the Member State of residence) resides in a Member State where entitlement to sickness benefits in kind is not subject to conditions of insurance or activity as an employed or self-employed person then the rule in DMG 071774 above will apply<sup>1</sup>.

1 Reg (EC) 883/04, Art 25

### **Example**

Julie resides in the UK. She receives a full Cypriot pension. She is entitled to UK healthcare under UK domestic law but not to any UK pensions or benefits. The UK will provide her with healthcare but it will be paid for by the Cypriot authorities. (As Cyprus as her competent authority for sickness benefits, she must apply to Cyprus for any long term care benefits in cash).

### **Certain workers and their family members**

071776 The UK will be the competent state for a sickness benefit for

1. posted workers and their family members

2. frontier workers who work in GB, and their family members
3. family members of workers living and working in GB
4. claimants in receipt of JSA(CB), new style JSA, IBST, ESA(Cont), new style ESA in the assessment phase, and MA, and their family members.

### Meaning of “posted worker”

071777 A posted worker<sup>1</sup> is an employed or self employed person normally working in GB but posted temporarily to work in the territory of another EEA member state, usually for less than 12 months, or less than 24 months from 1.5.2010 (see DMG 070236).

1 Reg (EC) 883/04 Art 12 & 13

### Meaning of “frontier worker”

071778 Frontier worker<sup>1</sup> means an employed or self-employed person who works in GB but lives in another EEA member state where he returns daily, or at least once a week.

1 Reg (EC) 883/04 Art 1(f)

### UK competency ceases

071779 [[See Memo DMG 16/20](#); [Memo DMG 11-22](#)] and [[Memo DMG 06/24](#) and [Memo DMG 07-24](#)] The UK will automatically cease to be the competent state to pay a sickness benefit where either the claimant or the family member on whom the claimant relies to satisfy EU law

1. starts work in another EEA Member State as an employed or self-employed person<sup>1</sup> (other than as a UK posted worker of course) **or**
2. is or becomes eligible for a sickness benefit from the state of residence<sup>2</sup> **or**
3. receives an old age or invalidity benefit or other pension from the state of residence<sup>3</sup>.

**Note:** The UK may be the competent state for the payment of sickness benefits to a claimant because that claimant derives rights from a family member. However, if one of the events described in DMG 071779.1 to 3 happens to one family member, the DM must consider whether competency continues on account of rights derived from another family member.

### Example

Lucy is a disabled person, aged 25. She lives with and is dependent upon her parents, Patricia and Dan. The family resides permanently in Spain and DLA (Care Component) has been awarded to Lucy on the basis that Patricia was receiving a UK RP. The DM discovered that Dan had started work in Spain, and



decided that from the date his work commenced, Spain became the competent state for payment of sickness benefits to Lucy.

1 Reg (EC) 883/04 Art 11(3)(a) & 31; 2 Reg (EC) Art 21 & 29; 3 Reg (EC) Art 23, 24. & 29

071780 The UK will also cease to be the competent state to pay a sickness benefit where the claimant or the family member on whom the claimant relies to satisfy EU law

**1.** no longer has NI cover (the first day on which the claimant would no longer meet contribution conditions for title to IB(ST) or ESA(Cont) on a new claim) **or**

**2.** is no longer entitled to and receiving a pension from GB **or**

**3.** finishes the work from which rights were acquired<sup>1</sup>

**4.** is no longer entitled to and receiving JSA(CB), IBST, ESA(Cont) in the assessment phase, or MA

provided that the claimant, or the family member on whom the claimant relies to satisfy EU law, do not then fall within another category of person for whom the UK is the

competent state (for instance the claimant becomes entitled to a pension from GB before NI cover for IB(ST) or ESA(Cont) ends).

1 Reg (EC) 883/04 Art 11(3)(e)

## **Genuine and Sufficient Link**

071781 Once the DM is satisfied that the claimant is within the personal scope of the EU co-ordination regs and that the UK is the competent state for the payment of cash sickness benefits, in deciding whether AA, CA or DLA (Care) can be exported, DMs must determine whether the claimant has a genuine and sufficient link to the UK. Guidance on how to make this determination and the factors to be taken into account is given at DMG 071786 et seq below.

**NB** The past presence test does not apply.

071782 If the claimant does not have a genuine and sufficient link, then entitlement to DLA (Care), AA or CA ceases when the claimant leaves the UK.

071783 - 071784

# New and Repeat Claims from abroad for AA, DLA (Care) or CA under EU law 071785 - 071789

[Introduction](#) 071785

[Genuine and sufficient link](#) 071786 - 071789

## Introduction

071785 [\[See Memo DMG 07/24\]](#) [\[See Memo DMG 06/24\]](#) and [\[See Memo DMG 16/20\]](#) Provided the claimant is within the personal scope of the EU co-ordination regulations and provided the UK is the competent state for the payment of sickness benefits, where a new claim for AA, CA or DLA (Care Component) is made by a person who is habitually resident in another EEA state in respect of any period on or after 21.7.11, DMs cannot apply the past presence test and the claimant will not have to satisfy the conditions that they be present “in GB” nor the condition that they be “habitually resident” in GB<sup>1</sup>. However, the claimant will have to show a genuine and sufficient link to the UK<sup>1</sup>.

1 SS (AA) Regs, reg 2B; SS (DLA) Regs, reg 2B; SS (ICA) Regs, reg 9B

## Genuine and sufficient link

071786 Except where DMG 071796 applies, DMs must determine whether the claimant has a “genuine and sufficient link” with the UK.

071787 DMs will need to make a balanced judgement based on all the facts of the case. Among the relevant elements that may be considered are -

**1. Personal factors**, for example whether the claimant is receiving a UK benefit for example, a pension

**Note:** where the claimant has a spouse’s or survivors pension, that will be a relevant factor but is not sufficient in itself where the claimant has never lived in the UK or been a UK worker **and**

**2. Periods of residence or work in the UK**, for example

**2.1** whether the claimant has spent a significant part of their life in the UK

**2.2** whether the claimant has worked and paid UK NI contributions as result of that work

**and, if the claimant is a family member** (within the meaning given in DMG 071775 i.e. including adult children who are dependant on their parents)

**3. Family factors**, for example where the claimant is a dependent child of someone who is receiving a pension from the UK. Where the claimant is the spouse or civil partner of a person with a genuine and sufficient link with the UK that will be a relevant but not exclusive factor in deciding whether the claimant has a genuine and sufficient link.

**4.** Decision makers and, on appeal, the courts are entitled to be cautious about self-serving statements by applicants, especially if the benefits are claimed immediately on or only shortly after arrival in the UK. Such caution is justified not only because self-serving statements as to motives, intentions and expectations may not be genuine but also because, even if they are genuine, actual realisation of the intentions and expectations of the applicant will not have been tested by the passage of time and the realities of the situation.

**Note:** This is not a checklist and it will be for the DM to give the appropriate weight to each relevant fact in coming to an overall determination of whether there is a genuine and sufficient link to the UK.

### **Example 1**

Harry moved to Spain in 2005 after having lived and worked all his life in the UK. He receives a full UK state Retirement Pension in Spain. On 12.9.11 he claimed AA. The DM decided that the UK was the competent state for sickness benefits and that Harry had a genuine and sufficient link to the UK.

### **Example 2**

Susan, a UK worker retires early and moves to France. She marries her French neighbour, Henri. At 60 she claims her UK pension. Henri does not work due to disability and has no income. He is not yet old enough to receive his French pension and does not meet the conditions for any French benefits. Henri claims DLA (Care Component). The DM decided that the UK was the competent state for the payment of sickness benefits. However he decided that Henri did not have a genuine and sufficient link to the UK: the only link was that he was married to a UK pensioner. He had never lived nor worked in the UK and had no UK benefits payable to him.

071788 Subject to the other conditions of entitlement, if all the EU law conditions above are satisfied, AA, CA or DLA (Care Component) can be paid to the claimant in their country of residence.

071789



## Claims for AA, CA & DLA (Care) by “Incomers” 071790 - 071794

071790 [\[See Memo DMG 06/24\]](#) and [\[See Memo DMG 16/20\]](#) and [\[see Memo DMG 07-24\]](#) DMs will encounter claims for AA, CA and DLA (Care) made by persons who have recently moved from an EEA state to reside permanently in the UK.

071791 [\[See Memo DMG 05/21\]](#) On any day where a claimant

- 1.** is habitually resident in GB **and**
- 2.** a relevant EU regulation applies to them **and**
- 3.** can demonstrate a genuine and sufficient link to the UK

for the purposes of establishing entitlement to AA, DLA and CA for that day, that claimant **does not** have to satisfy the past presence test<sup>1</sup>.

1 SS (AA) Regs, reg 2B; SS (DLA) Regs, reg 2B; SS (ICA) Regs, reg 9B

071792 A relevant EU regulation applies when the claimant is within the personal scope of the EU regulations relating to the co-ordination of social security systems **provided** that the UK is the competent state for the payment of AA, DLA (Care Component) or CA (which for the purposes of in the co-ordinating regs are cash “sickness benefits” for long term care).

071793 Where a claim for AA, DLA (Care Component) or CA is made by a claimant who satisfies the conditions in DMG 071791 **1.** & **2.** but cannot demonstrate a genuine and sufficient link to the UK, the past presence test applies just as it would for a UK national. However the past presence test may be deemed to be met if the claimant satisfies DMG 071796 or the EU rules about aggregation (see DMG 071797-8) may assist.

071794

# The Past Presence Test and EU law 071795 - 071799

[Introduction](#) 071795

[Certain employed and self-employed persons](#) 071796

[Aggregation and the past presence test - AA, CA & DLA \(Care\)](#) 071797 - 071799

## Introduction

071795 [See [Memo DMG 07-24](#)] The past presence test continues to have application in respect of some claims for AA, CA, and DLA (Care Component) by “incomers” (see DMG 071791) and in the case of DLA (Mobility Component) see DMG 071803).

## Certain employed and self-employed persons

071796 The following persons who are EEA or Swiss nationals are treated as satisfying the past presence test and DMs do not have to consider whether they have a genuine and sufficient link to the UK.

1. Current workers (and their family members), whether employed or self-employed, who pay UK national insurance contributions. This includes posted workers (see DMG 071797) and frontier workers (see DMG 071778) **or**
2. People who (and their family members), although not currently employed, are receiving ESA(Cont) or new style ESA in the assessment phase or JSA(CB), new style JSA or MA, or those who continue to be insured for ESA(Cont)/new style ESA after they cease work.

## Aggregation and the past presence test - AA, CA & DLA (Care)

071797 Some periods of insurance in another Member State may qualify to be aggregated with residence in the UK when considering whether the past presence test is met. The past presence test does not apply to claims to AA or DLA from the terminally ill (see DMG 071717).

071798 Certain workers and their family members are deemed to satisfy the past presence test for claims to AA, DLA or CA (see DMG 071798). Where deeming is not appropriate, any periods recognised as insurance whether from residence, employment or self employment in another Member State, can be aggregated with presence in the UK in order to satisfy the past presence test<sup>1</sup> provided the claimant is

within the scope of EU law (see DMG 071754).

1 Reg (EC) 883/04 Art 6 & Annex XI entry 2.

**Note:** See DMG 071805 for the effect of aggregation on the past presence test in the case of DLA (Mob).

071799

# DLA (Mobility Component) - Effect of EU law 071800 - 071819

[Claims from abroad and exportability](#) 071800

[Claims by incomers](#) 071800 - 071804

[Aggregation and the Past Presence Test - DLA \(Mob\)](#) 071805 - 071809

[Residence and presence and reciprocal agreements](#) 071810 - 071819

## Claims from abroad and exportability

071800 The Mobility Component of DLA, is a SNCB<sup>1</sup>, It cannot be claimed from abroad and where an award has been made to a person residing in the UK under UK domestic law provisions DLA (Mob) that award cannot be exported when the claimant moves to reside permanently abroad but see DMG 071743 et seq regarding certain claimants with transitional protection.

1 Reg (EEC) 1408/71 Art 4(2a), Art 10a, & Annex IIA & Reg (EC) 883/04 Art 3(3) & Art 70 & Annex X & CJEU Judgement case C-537/09.

## Claims by incomers

071801 [see [Memo DMG 07-24](#)] On any day when a claimant

- 1.** is habitually resident in GB **and**
- 2.** a relevant EU regulation applies (see DMG 071792) to them **and**
- 3.** can demonstrate a genuine and sufficient link to the UK

for the purposes of establishing entitlement to DLA (Mobility Component) for that day, that claimant **does not** have to satisfy the past presence test<sup>1</sup>.

1 SS (DLA) Regs, reg 2A

071802 In these cases the question of whether the UK is the competent state is not at issue, but DMs will need to establish whether the claimant is within the personal scope of the EU co-ordination regs<sup>1</sup>.

1 Reg (EC) 883/04, Art 2



071803 Where a person satisfies the conditions in DMG 071801.**1. & 2.** but cannot demonstrate a genuine and sufficient link to the UK, the past presence test will apply. However the claimant may be able to gain assistance from EU law.

071804 Firstly the past presence test may be deemed to be satisfied because the claimant is a worker or self-employed person who satisfies the conditions in DMG 071796. Secondly they may be able to satisfy the past presence test by virtue of aggregation (see DMG 071805).

## **Aggregation and the Past Presence Test - DLA (Mob)**

071805 [See [Memo DMG 07-24](#)] As the Mobility Component is to be treated as an SNCB, it is only payable in the UK. However, for the purpose of satisfying the past presence test, periods of insurance for social security benefits arising from periods of employment, self-employment or

residence in another EEA State qualify to be aggregated with residence in the UK when considering whether the past presence test is met.

071806 - 071809

## **Residence and presence and reciprocal agreements**

### **General**

071810 Where general UK law is not helped by EU law, the DM should consider whether the claim is helped by any reciprocal agreements with other countries. See DMG 070320 which gives guidance on when reciprocal agreements can be used.

071811 AA and DLA (both Care and Mob) are covered in the reciprocal agreements with

**1. Jersey and Guernsey<sup>1</sup> (including Alderney, Herm, and Jethou) and**

**2. Isle of Man<sup>2</sup> and**

**3. Northern Ireland<sup>3</sup>.**

1 SS (Jersey and Guernsey) Order 94; 2 SS (I of M) Order 77;

3 SS (N. Ireland Reciprocal Arrangements) Regs 76

### **Habitually resident test**

071812 The agreements do not help a claimant to satisfy the habitually resident test. A claimant must be habitually resident in GB before benefit can be awarded, but residence and presence in Northern Ireland can be treated as residence and presence in GB<sup>1</sup>.

1 SS (N. Ireland Reciprocal Arrangements) Regs Sch Art 2

## **Subject to immigration control**

071813 Nationals of the countries in DMG 071811 will always satisfy the test in DMG 071705 **2**.. Other claimants who come to live in GB from one of these countries are treated as if they do not have a limitation on their right to reside in GB<sup>1</sup> and will also satisfy the test.

1 SS (DLA) Regs, reg 2(1A)(e)

## **Presence tests**

071814 The agreements allow periods of presence in the other country to be taken into account for the presence tests in DMG 071705<sup>1</sup>.

1 SS (Jersey and Guernsey) Order 94, Sch, Art 29; SS (I of M) Order 77, Sch 1, Art 2;  
SS (N. Ireland Reciprocal Arrangements) Regs 76, Sch 1, Art 2

## **Example**

An Australian national who has lived in the Isle of Man for 15 years comes to live in GB on 2.9.96 and claims DLA immediately on arrival. The past presence condition is satisfied by using the periods of presence in the Isle of Man. However, the decision maker will also have to consider whether the claimant is habitually resident here before an award of benefit can be considered.

071815 - 071819

## Dependency Increases 071820 - 071829

071820 This section contains guidance on dependency increases. The guidance covers entitlement to increases of benefits for

1. spouses or civil partners (see DMG 071830)
2. persons caring for children (see DMG 071850) **and**
3. children (see DMG 071870)

where either the dependant, claimant or both is absent from GB.

071821 For each type of dependant the guidance includes

1. UK law **and**
2. EC law **and**
3. reciprocal agreements.

071822 If the claimant does not satisfy the conditions for payment of an increase in UK law the decision maker should consider whether the claimant is helped by EC law and, if not, by any reciprocal agreements.

071823 When considering entitlement to a dependency increase the decision maker will need to refer to the guidance in DMG Volume 3, Subjects Common to all Benefits on the general entitlement conditions for dependants to ensure that these are satisfied before considering this section.

071824 If the claimant's personal benefit is disqualified because of absence from GB, then any increase is also disqualified.

071825 - 071829

## Dependency increases - spouse or civil partner 071830 - 071849

[United Kingdom law](#) 07183 - 071832

[Claimant and spouse or civil partner both absent from Great Britain](#) 071833

[European Community law](#) 071834 - 071840

[Reciprocal agreements](#) 071841 - 071842

[Claimant in Great Britain but spouse or civil partner absent](#) 071843 - 071849

### United Kingdom law

#### General

071830 UK law disqualifies a claimant from receiving benefit because of absence from GB<sup>1</sup>. However, providing all the general conditions of entitlement are satisfied (DMG Volume 3, Subjects Common to all Benefits) an increase for a spouse or civil partner can be paid if the conditions in DMG 071831 - 071833 are satisfied.

1 SS CB Act 92, s 113(1)

#### Claimant in Great Britain but spouse or civil partner absent

071831 An adult dependency increase is payable if

- 1.** the claimant is in GB **and**
- 2.** the claimant's spouse or civil partner is absent from GB **and**
- 3.** the claimant and spouse or civil partner are still accepted as residing together (DMG Volume 3, Subjects Common to all Benefits)<sup>1</sup>.

1 SS Ben (PA) Regs, reg 13; SS (PRT) Regs, reg 2(1) & (4)

#### Spouse or civil partner in Great Britain but claimant absent

071832 An adult dependency increase is payable if

1. the claimant is absent from GB **and**
2. the claimant is **not** disqualified from receiving personal benefit because of the absence **and**
3. the spouse or civil partner remains in GB<sup>1</sup>.

1 SS CB Act 92, s 113(1)

## Claimant and spouse or civil partner both absent from Great Britain

071833 An adult dependency increase is payable if

1. the claimant and spouse or civil partner are both absent from GB **and**
2. the claimant is **not** disqualified from receiving personal benefit because of the absence **and**
3. the claimant and spouse or civil partner are still accepted as residing together (DMG Volume 3, Subjects Common to all Benefits)<sup>1</sup>.

1 SS CB Act 92 s 113; SS Ben (PA) Regs, reg 13; SS (PRT) Regs reg 2(1) & (4)

## European Community law

### General

071834 If the conditions for payment of an increase are not satisfied in UK law, the DM should consider whether EC law helps. For this purpose the claimant and/or spouse or civil partner must be absent in another EEA country (see DMG 070040).

071835 In order to rely on EC law the dependant (who does not have to be an EEA national) must be a member of the family of a worker (see DMG 070063) or survivor (see DMG 070053) who is

1. an EEA national (see DMG 070040) **and**
2. within the personal scope of EC law (see DMG 070052 et seq).

071836 A spouse is a member of the family of a worker for EC law. A civil partner may be a member of the family for EC law depending on the domestic legislation of the member state<sup>1</sup> (see DMG Chapter 10).

1 Directive 2004/38/EC Art 2 (2)

071837 EC law allows for payment of an increase of benefit when the dependant is **residing** in another EEA country. Unlike personal benefit there are no provisions to assist payment of the increase when the dependant is only **staying** in another EEA country.

## **Claimant in Great Britain but spouse or civil partner absent**

071838 Whether or not the claimant is also absent from GB, an adult dependency increase is payable if the **claimant**

- 1.** is an EEA national (see DMG 070040) **and**
- 2.** comes within the personal scope of EC law (see DMG 070052 et seq) **and**
- 3.** the dependant is a member of the claimant's family (see DMG 070020) **and**
- 4.** the dependant is residing (see DMG 070000 - 070883) in another EEA country **and**
- 5.** the claimant would satisfy the GB conditions for an increase if the dependant were residing in UK (see DMG Chapter 16)<sup>1</sup>.

**Note:** The dependant does not have to be an EEA national.

1 Reg EEC 1408/71, Art 23(3), 39(4), 47(3), 58(3) & 68(2)

## **Spouse in Great Britain but claimant absent**

071839 An ADI is payable if

- 1.** the claimant is absent from GB **and**
- 2.** the claimant remains entitled to personal benefit **and**
- 3.** the general conditions for entitlement to an ADI remain satisfied (see DMG Chapter 16).

## **Claimant and spouse both absent from Great Britain**

071840 An ADI is payable if the conditions in DMG 071838 are satisfied.

## **Reciprocal agreements**

### **General**

071841 Guidance on the countries covered by reciprocal agreements and the benefits covered is in DMG 070333. The cover for increases for dependants varies according to each agreement. Some agreements make specific provision for increases for dependants while others define "benefits, pensions and allowances" as including any increase for a dependant. An ADI will therefore remain payable in the circumstances in DMG 071843 - 071845.

071842 Reciprocal agreements with EEA countries have little effect because of the wide provisions in EC law and so guidance on those agreements is not included. This section contains guidance on the provisions in the agreements with non EEA countries.

## Claimant in Great Britain but spouse or civil partner absent

071843 An ADI is payable if the country and benefit involved are shown as covered by an agreement in the following table<sup>1</sup>

	IBLT	IBST	CA	II Bens	MB	RP	SDA
<b>Barbados</b>	X	X	-	X	X	X	-
<b>Bermuda</b>	-	-	-	X	-	X	-
<b>Cyprus</b>	X	X	-	X	X	X	-
<b>Guernsey</b>	X	X	-	X	X	X	-
<b>Isle of Man</b>	X	X	X	X	X	X	X
<b>Israel</b>	-	-	-	X	-	X	-
<b>Jamaica</b>	X	-	-	X	-	X	-
<b>Jersey</b>	X	X	-	X	X	X	-
<b>Malta</b>	X	X	-	X	-	X	-
<b>Mauritius</b>	-	-	-	X	-	X	-
<b>New Zealand</b>	-	X	-	-	-	X	-
<b>Northern Ireland</b>	X	X	X	X	X	X	X
<b>Philippines</b>	-	-	-	X	-	X	-
<b>Switzerland</b>	X	X	-	X	-	X	-
<b>Turkey</b>	X	X	-	X	X	X	-
<b>USA</b>	X	X	-	-	-	X	-
<b>Yugoslavia</b>	X	X	-	X	X	X	-

(see note)

**Note:** The reciprocal agreement between the UK and former Yugoslavia should be treated as separate agreements between the UK and

1. the State Union of Serbia and Montenegro
2. Bosnia-Herzegovina
3. Croatia
4. the former Yugoslav republic of Macedonia
5. Slovenia.

1 SS (Barbados) Order 92, Sch, Art 5(7); SS (Bermuda) Order 69, Sch, Art 9(4) & 10(3); SS (Cyprus) Order 83, Sch, Art 4(2); SS (I of M) Order 77, Sch 1, Art 2(1); NI and II (Israel) Order 57, Sch, Art 9; SS (Jamaica) Order 97, Sch 1, Art 5; SS (Jersey and Guernsey) Order 94, Sch, Art 5(5); SS (Malta) Order 96, Sch, Art 4(4); SS (Mauritius) Order 81, Sch 1, Art 4(3); SS (New Zealand) Order 83, Sch, Art 3; SS (N Ireland Reciprocal Arrangement)s Regs , Sch Art 2 SS (Philippines) Order 89, Sch, Art 4(3); FA, NI and II (Switzerland) Order 69, Sch 1, Art 16(3); NI and II (Turkey) Order 61, Sch, Art 28(1); SS (USA) Order 84, Sch 1, Art 7(4); FA, NI and II (Yugoslavia) Order 58, Sch, Art 26(1)

### **Spouse or civil partner in Great Britain but claimant absent**

071844 An ADI is payable if the claimant is absent from GB **and**

1. resides in a country covered by a reciprocal agreement (see DMG 070333)
2. remains entitled to personal benefit because of that agreement **and**
3. other general conditions for entitlement to the ADI are satisfied (see DMG Volume 3, Subjects Common to all Benefits).

### **Claimant and spouse or civil partner both absent from Great Britain**

071845 An ADI is payable if the claimant and spouse, civil partner or person caring for a child

1. reside in a country covered by a reciprocal agreement (see DMG 070333) **and**
2. the claimant remains entitled to personal benefit because of that agreement **and**
3. all other general conditions for entitlement to the ADI are satisfied (see DMG Volume 3, Subjects Common to all Benefits).

071846 - 071849



# Dependency increases - person caring for a child 071850 - 071869

[United Kingdom law](#) 071850 - 071853

[European Community law](#) 071854 - 071857

[Reciprocal agreements](#) 071858 - 071869

## United Kingdom law

### General

071850 United Kingdom law disentitles a claimant from receiving an increase of benefit because of the dependants absence from GB<sup>1</sup>. However, providing all the other conditions of entitlement are satisfied (Volume 3, Subjects Common to all Benefits), title to ADI will exist if the conditions in 071852 or 071853 are satisfied.

1 SS (IB for D) Regs, reg 14; Ben SS (Dep) Regs, reg 10(3); reg 12(2); Sch 2, para 7(b)(iv)

### Claimant in Great Britain but person caring for child absent

071851 There is no entitlement to an ADI<sup>1</sup>.

1 SS (IB for D) Regs reg 14; SS Ben (Dep) Regs, reg 12(1); SS Ben (Dep) Regs, reg 10(3); SS JSA (Transitional Provisions) Regs, reg 9(4); SS Ben (Dep) Regs reg 12(2); Sch 2, para 7(b)(iv)

### Person caring for a child in Great Britain but claimant absent

071852 An ADI is payable if

- 1.** the claimant is absent from GB **and**
- 2.** the claimant is not disqualified from receiving personal benefit because of the absence **and**
- 3.** the person caring for a child is in GB **and**
- 4.** all other conditions of entitlement for an increase are satisfied<sup>1</sup> (Volume 3, Subjects Common to all Benefits).

1 IB and SDA - SS (IB for D) Regs reg 14, SS (Dep) Regs reg 12(1);  
MA, Retirement Pension, Dis Pen with US - SS (Dep) Regs, reg 10(3),  
SS JSA (Transitional Provisions) Regs, reg 9(4); ICA - SS (Dep) Regs, reg 12(2); Sch 2, para 7(b)(iv)

## **Claimant and person caring for a child both absent from Great Britain**

071853 An ADI is payable if<sup>1</sup>

- 1.** the claimant and the person caring for the child are absent from GB **and**
- 2.** the claimant is not disqualified from receiving personal benefit because of the absence **and**
- 3.** is still accepted as residing with<sup>2</sup> (Volume 3, Subjects Common to all Benefits) the person caring for a child **and**
- 4.** all other conditions of entitlement for an increase are satisfied (Volume 3, Subjects Common to all Benefits).

1 SS (IB for D) Regs, reg 14; SS Ben (Dep) Regs, reg 12(1); SS Ben (Dep) Regs, reg 10(3);  
SS JSA (Transitional Provisions) Regs, reg 9(4); SS (Dep) Regs, reg 12(2); Sch 2 para 7(b)(iv);  
2 SS (PRT) Regs, reg 2(1) & (4)

## **European Community law**

### **General**

071854 The guidance in DMG 071834 - 071837 for spouses also applies to persons caring for a child.

### **Claimant in Great Britain but person caring for a child absent**

071855 Whether or not the claimant is also absent from GB, an ADI is payable if the conditions in DMG 071838 are satisfied.

### **Person caring for child in Great Britain but claimant absent**

071856 An ADI will be payable if the conditions in DMG 071839 are satisfied.

## **Claimant and person caring for child both absent from Great Britain**

071857 An ADI is payable if the conditions in DMG 071838 are satisfied.

## **Reciprocal agreements**

### **General**

071858 The guidance in DMG 071841 - 071842 for spouses or civil partners also applies to an increase for persons caring for a child. An ADI will therefore remain payable in the circumstances in DMG 071859 - 071860.

### **Claimant in Great Britain but person caring for child absent**

071859 An ADI is payable if the country and benefit are covered as indicated in DMG 071843.

**Person caring for a child in Great Britain but claimant absent**

071860 An ADI will be payable if the conditions in DMG 071844 are satisfied.

**Claimant and person caring for a child both absent from Great Britain**

071861 An ADI will be payable if the conditions in DMG 071845 are satisfied.

071862 - 071869

# Child dependency increases 071870 - 071909

[Conditions in United Kingdom law](#) 071870

[United Kingdom law - entitlement to Child Benefit](#) 071871 - 071878

[Conditions in European Community law](#) 071879 - 071882

[Reciprocal agreements](#) 071883 - 071909

## Conditions in United Kingdom law

### General

071870 CDI were abolished for most benefits from 6.4.03 but certain awards are transitionally protected. Detailed guidance on CDIs can be found in DMG Chapter 16 in Volume 3. There are no residence and presence conditions in UK law for child dependency increases. To be entitled to CDI a claimant must be entitled, or be treated as entitled, to CHB<sup>1</sup>. Questions regarding entitlement to CHB should be referred to HMRC.

1 SS CB Act 92, s 80(1)

## United Kingdom law - entitlement to Child Benefit

071871 To be entitled to CHB a claimant must satisfy presence conditions in GB<sup>1</sup>. If these conditions are not satisfied, a claimant may be treated as being entitled to CHB<sup>2</sup> if

- 1.** the claimant/child are absent in a country where there could have been entitlement to CDI under EC law or a reciprocal agreement (see DMG 071872) **or**
- 2.** the claimant/child are temporarily absent in a country where there could not have been entitlement to CDI under EC law or a reciprocal agreement (see DMG 071875) **or**
- 3.** immediately before returning to GB the claimant was entitled to CDI (see DMG 071877)
- 4.** the claimant is entitled to another country's family benefits under a reciprocal agreement (see DMG 071878).

1 s 146(3); 2 SS Ben (PA) Regs, reg 13A

## **Absence from Great Britain - possible entitlement under European Community law or reciprocal agreement**

071872 A claimant and/or child who is absent from GB may be treated as being entitled to CHB if

- 1.** they are in a country in which there would have been entitlement to CDI under EC law or a reciprocal agreement but for the reason that there is no entitlement to CHB **and**
- 2.** the claimant would have been entitled to CHB for the child if the presence tests had been satisfied **and**
- 3.** if the child cannot be treated as living with the claimant the claimant is contributing to the cost of maintaining the child by at least the total of the weekly rates of CHB and CDI **and**
- 4.** no other person is entitled to CHB for the child<sup>1</sup>.

1 SS Ben (PA) Regs, reg 13A(1)

071873 If a claimant would satisfy the conditions in DMG 071872 except for the fact that the child is in GB, the child is treated as being present in the same country as the claimant<sup>1</sup>.

1 reg 13A(2)

071874 For the purposes of DMG 071872, the claimant or child may be treated as absent from GB even though they have never previously been in GB<sup>1</sup>.

1 reg 13A(4)

## **Temporary absence from Great Britain - no possible entitlement under European Community law or reciprocal agreement**

071875 A claimant and/or child who is absent from GB with no possible entitlement to CDI under EC law or under a reciprocal agreement as in DMG 071872 may be treated as being entitled to CHB if

- 1.** the claimant would have been entitled to CHB for the child if the presence tests had been satisfied **and**
- 2.** if the child cannot be treated as living with the claimant the claimant is contributing to the cost of maintaining the child by at least the total of the weekly rates of CHB and CDI **and**
- 3.** the claimant's and/or child's absence has always been, and continues to be, intended to be temporary (see DMG 070853 - 070878) **and**
- 4.** no other person is entitled to CHB for the child<sup>1</sup>.

1 reg 13A(3)

071876 **[See memo DMG 16/17]** For the purposes of DMG 071875, if a woman has a child whilst absent from GB, that child will be treated as having been present in GB on the date on which its mother was last

present in GB, providing she was pregnant with the child at that time<sup>1</sup>.

1 SS Ben (PA) Regs, reg 13A(4)

### **Entitled to Child Dependency Increase immediately before return to Great Britain**

071877 A claimant may be treated as being entitled to CHB if

- 1.** immediately before returning to GB that claimant was entitled to CDI, for example under DMG 071872 **and**
- 2.** on return to GB that entitlement would have continued except for the fact that there was no entitlement to CHB **and**
- 3.** the claimant would have been entitled to CHB for the child if the presence tests had been satisfied **and**
- 4.** where the child cannot be treated as living with the claimant, the claimant is contributing to the cost of maintaining the child by at least the total of the weekly rates of CHB and GA **and**
- 5.** no other person is entitled to CHB for the child<sup>1</sup>.

1 reg 13A(5)

### **Claimant in Great Britain entitled to another country's family benefits**

071878 A claimant in GB may be treated as being entitled to CHB if

- 1.** the claimant, or spouse or civil partner residing with the claimant, is entitled to family benefits from another country under a reciprocal agreement **and**
- 2.** consequently is **not** entitled to CHB **and**
- 3.** would otherwise have been entitled to CDI<sup>1</sup>.

1 reg 4A(4)

## **Conditions in European Community law**

### **General**

071879 If the claimant does not satisfy the residence and presence conditions in UK law, the DM should consider whether EC law helps the claim.

071880 In order to be helped by EC law a claimant must

- 1.** be an EEA national (see DMG 070080) **and**

2. come within the personal scope<sup>1</sup> (see DMG 070050) of EC law.

1 Reg (EEC) 1408/71, Art 2

071881 In EC law CDI's for all benefits other than IS and IDB come within the category of **family benefits**<sup>1</sup> and CDI of WMA comes within **family allowances**. Family benefits are all benefits, in kind or in cash, intended to meet family expenses<sup>2</sup>. Family allowances are periodical cash payments based on the number and age of the members of the family<sup>3</sup>.

1 Art 4(1)(h); 2 Art 1(u)(i); 3 Art 1(u)(ii)

071882 If a claimant satisfies the conditions in DMG 071880 see

1. the guidance on family benefits under EC law at DMG 071800 as this applies equally to CDI **and**
2. the guidance on supplements at DMG 071830.

## Reciprocal agreements

### General

071883 If a claimant does not satisfy UK law and is not helped by EC law, the DM should consider whether the claim is helped by any reciprocal agreements with other countries. See DMG 070320 which gives guidance on when reciprocal agreements can be used.

071884 CDI's are included in many reciprocal agreements with EEA and other countries (see DMG 070330 - 070333). The agreements with EEA countries have little effect because of the wide provisions in EC law and so guidance on those agreements is not included. This section contains guidance on the provisions in the agreements with non EEA countries.

071885

### Barbados

071886 If a child is in Barbados, the claimant will be entitled to CDI if

1. the claimant is entitled to a UK personal benefit covered by the agreement **and**
2. there would be entitlement to a CDI if the child had been in the UK<sup>1</sup>.

1 SS (Barbados) Order 92, Sch, Art 5(7) & 22(2)

### Bermuda

071887 If a child is in Bermuda, the claimant will be entitled to CDI if

**1.** the claimant is entitled to a UK personal benefit covered by the agreement **and**

**2.** there would be entitlement to CDI if the child had been in the UK<sup>1</sup>.

1 SS (Bermuda) Order 92, Sch, Arts 9(4) & 10(3)

## **Cyprus**

071888 If a child is in Cyprus (including the Sovereign Base Areas), the claimant will be entitled to CDI if

**1.** the claimant is entitled to a UK personal benefit covered by the agreement **and**

**2.** there would be entitlement to CDI if the child had been in the UK<sup>1</sup>.

1 SS (Cyprus) Order 83, Sch, Art 4(2)

## **Guernsey**

071889 If a child is in Guernsey, the claimant will be entitled to CDI if

**1.** the claimant is entitled to a UK personal benefit covered by the agreement **and**

**2.** there would be entitlement to CDI if the child had been in the UK<sup>1</sup>.

1 SS (Jersey and Guernsey) Order 94, Sch, Art 5(5)

## **Isle of Man**

071890 The agreement allows periods of presence in the Isle of Man to be treated as periods of presence in the UK. This means that a claimant who is entitled to a UK personal benefit will continue to be entitled to CDI during any absences, or the child's absences, in the Isle of Man<sup>1</sup>.

1 SS (I of M) Order 77, Sch 1, Art 2(1)

## **Israel**

071891 If a child is in Israel, the claimant will be entitled to CDI if

**1.** the claimant is entitled to UK RP, WB and Industrial Injuries benefits **and**

**2.** there would be entitlement to CDI if the child had been in the UK<sup>1</sup>.

1 NI and II (Israel) Order 57, Sch, Art 9

## **Jamaica**

071892 If a child is in Jamaica, the claimant will be entitled to CDI if



**1.** the claimant is entitled to a UK personal benefit covered by the agreement **and**

**2.** there would be entitlement to CDI if the child had been in the UK<sup>1</sup>.

1 SS (Jamaica) Order 97, Sch 1, Art 5

## **Jersey**

071893 If a child is in Jersey, the claimant will be entitled to CDI if

**1.** the claimant is entitled to a UK personal benefit covered by the agreement **and**

**2.** there would be entitlement to CDI if the child had been in the UK<sup>1</sup>.

1 SS (Jersey and Guernsey) Order 94, Sch, Art 5(5)

## **Malta**

071894 If a child is in Malta, the claimant will be entitled to CDI if

**1.** the claimant is entitled to a UK personal benefit covered by the agreement **and**

**2.** there would be entitlement to CDI if the child had been in the UK<sup>1</sup>.

1 SS (Malta) Order 96, Sch, Art 4(4)

## **Mauritius**

071895 The agreement allows

**1.** where a claimant is entitled to RP only under the UK scheme, CDI to be paid by the UK **or**

**2.** where a claimant is entitled to RP only under the Mauritius scheme, an increase for a child to be paid by Mauritius **or**

**3.** where a claimant is entitled to RP under both the UK and Mauritius schemes, an increase for a child to be paid by the country in which the claimant is habitually resident **and**

**4.** if a child is in Mauritius, entitlement to CDI to continue if the claimant is entitled to a UK personal benefit covered by the agreement **and** there would be entitlement to CDI if the child had been in the UK **and** the claimant is residing with, or would be residing with if not temporarily absent from, the child and is responsible for the child<sup>1</sup>.

1 SS (Mauritius) Order 81, Sch 1, Art 4(3) & 15

## New Zealand

071896 If a child is in New Zealand, the claimant will be entitled to CDI if

1. the claimant is entitled to a UK personal benefit covered by the agreement **and**
2. there would be entitlement to CDI if the child had been in the UK **and**
3. the child is **not** usually resident in New Zealand **or** the eldest, elder or only child in a WMA claim<sup>1</sup>.

1 SS (New Zealand) Order 83, Sch, Art 3

## Northern Ireland

071897 The agreement allows periods of presence in Northern Ireland to be treated as periods of presence in the UK. This means that a claimant who is entitled to a UK personal benefit will continue to be entitled to CDI during any absences, or the child's absences, in Northern Ireland<sup>1</sup>.

1 SS (N. Ireland Reciprocal Arrangements) Regs, Sch, Art 2

## Philippines

071898 The agreement allows

1. where a claimant is entitled to RP only under the UK scheme, CDI to be paid by the UK **or**
2. where a claimant is entitled to RP only under the Philippines scheme, an increase for a child to be paid by the Philippines **or**
3. where a claimant is entitled to RP under both the UK and Philippines schemes, an increase for a child to be paid by the country in which the claimant is habitually resident **and**
4. if a child is in the Philippines, entitlement to CDI to continue if the claimant is entitled to a UK personal benefit covered by the agreement **and** there would be entitlement to CDI if the child had been in the UK<sup>1</sup>.

1 SS (Philippines) Order 89, Sch, Art 4(3) & 14

## Switzerland

071899 A claimant who is entitled to a UK personal benefit will continue to be entitled to CDI if the child is absent in Switzerland<sup>1</sup>.

1 FA, NI and II (Switzerland) Order 69, Sch 1, Art 16(3)

## Turkey

071900 If a child is in Turkey, the claimant will be entitled to CDI if

**1.** the claimant is entitled to a UK personal benefit covered by the agreement **and**

**2.** there would be entitlement to CDI if the child had been in the UK<sup>1</sup>.

1 NI and II (Turkey) Order, 61, Sch, Art 28(1)

## **United States of America**

071901 If a child is in the United States of America, the claimant will be entitled to CDI if

**1.** the claimant is entitled to a UK personal benefit covered by the agreement **and**

**2.** there would be entitlement to CDI if the child had been in the UK<sup>1</sup>.

1 SS (USA) Order 84, Sch 1, Art 7(4)

## **Yugoslavia**

071902 The reciprocal agreement between the UK and former Yugoslavia should be treated as separate agreements between the UK and

**1.** the State Union of Serbia and Montenegro

**2.** Bosnia-Herzegovina

**3.** Croatia

**4.** the former Yugoslav republic of Macedonia

**5.** Slovenia.

071903 If a child is in one of the countries in DMG 071902, the claimant will be entitled to CDI if

**1.** the claimant is entitled to a UK personal benefit covered by the agreement **and**

**2.** there would be entitlement to CDI if the child had been in the UK<sup>1</sup>.

1 FA, NI and II (Yugoslavia) Order 58, Art 26(1)

071904 - 071909

# Employment and Support Allowance - Residence and Presence Conditions 071910 - 072769

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## Introduction

071910 ESA was introduced for new claimants on 27.10.08. ESA(Cont) replaced IB, and ESA(IR) replaced IS on grounds of disability.

071911 It is a condition of entitlement to ESA that the claimant is in GB<sup>1</sup>. However

- in relation to ESA(Cont), this condition must be read subject to EC law
- there are further residence and presence conditions for entitlement to ESA (Cont) relating to youth<sup>2</sup>
- a claimant must also be habitually resident in GB for ESA(IR)<sup>3</sup>
- there are also provisions to allow continued entitlement to ESA (both Cont and IR) for certain temporary absences from GB.

1 WR Act 07, s 1(3)(d); 2 Sch 1 Part 1 para 4(1)(c); 3 ESA Regs, reg 70

## ESA(Cont) - EC Provisions

071912 [\[See Memo DMG 32/10\]](#) and [\[Memo DMG 07-24\]](#) It is a condition of entitlement to ESA that a claimant is in GB<sup>1</sup>. The claimant must be physically present in GB on the day or period in question. A claimant is disqualified for receiving ESA(Cont) and ESA(IR) for any period absent from GB<sup>2</sup> unless entitlement continues during a period of temporary absence<sup>3</sup>. When considering entitlement to ESA(Cont), however, this condition must be read in conjunction with European law<sup>4</sup> if the claimant is in another EEA member state or Switzerland. The EEA includes all EC countries and the 3 EFTA countries

(see DMG 070040).

1 WR Act 07, s 1(3)(d); 2 s 18(4)(a); 3 ESA Regs, reg 151(2); 4 Reg (EC) 883/04

071913 In order to benefit from EC Regulations, the claimant must normally be an EEA National; but see DMG 070080 et seq. Detailed guidance on how a claimant, first claiming from another EEA state or on moving to another EEA state, might benefit from EC Regulations is in Part 4 of Chapter 7 of the DMG. The guidance therein relates to IB, but this will equally apply to claims to ESA(Cont).

071914 EC Regulations differentiate between sickness benefits<sup>1</sup> and invalidity benefits<sup>2</sup>. For ESA(Cont) the assessment phase is treated as a sickness benefit, and thereafter it is treated as an invalidity benefit.

1 Title III Chapter 1; 2 Chapter 2

071915 In particular, EC provisions may assist the claimant

- satisfy the contribution conditions - see DMG 073791
- first claiming ESA in another EEA state - see DMG 073800 and 073867
- avoid disqualification if in another EEA state in the assessment phase - see DMG 073860
- avoid disqualification if in another EEA state after the assessment phase - see DMG 073900.

## **ESA - Reciprocal Agreements**

071916 The UK has some 30 reciprocal SS agreements that include provisions on IB. These agreements were not extended or amended to include ESA. Thus ESA(Cont) is not covered by any reciprocal agreement (but see Part 4 of Chapter 7 of the DMG for those moving within the EC).

071917 However, those claimants who continue to be entitled to IB after 26.10.08 are still covered by the reciprocal agreements with other countries (see DMG 070330 and 070333).

## **ESA(Cont) - relating to youth**

071918 For ESA (Youth provisions) a claimant must satisfy prescribed conditions of residence and presence in GB on any day included in the claim<sup>1</sup> (but see DMG 071919). Claimants must

- 1.** be habitually resident in GB<sup>2</sup> (see DMG 070769) **and**
- 2.** not be subject to immigration control<sup>3</sup> (see DMG 070831 - 070836) **and**
- 3.** be present in GB<sup>4</sup> **and**
- 4.** have been present in GB for a period of (or periods totalling) not less than 26 weeks in the previous 52

weeks<sup>5</sup>.

1 WR Act 07 Sch 1 para 4(1)(c); 2 ESA Regs, reg 11(1)(a); 3 reg 11(1)(b) & reg 11(3); 4 reg 11(1)(c);  
5 reg 11(1)(d)

071919 A person is to be treated as having satisfied the conditions in DMG 071918.1, 3, and 4. throughout a PLCW (see DMG 41024.7 for the definition of PLCW) where those conditions are satisfied on the first day of that period.

071920 Claimants to ESA(Cont) relating to youth, who are absent from GB on any day should, for the purposes of the residence and presence tests, be treated as resident or present in GB if on that day they are

1. in prescribed employment on the continental shelf<sup>1</sup> (see DMG 078060 - 078185) **or**
2. aircraft workers or mariners<sup>2</sup> (see DMG 078060 - 078185) **or**
3. living with a serving member of the armed forces<sup>3</sup> (see DMG 078087 and 078182) and are that person's spouse or civil partner, son, daughter, father, father-in-law, mother or mother in law<sup>4</sup>.

**Note:** References to 'in-laws' are to be read as including relationships arising through civil partnerships.

1 ESA Regs, reg 11(2)(b); 2 reg 11(2)(c); 3 reg 2 & Sch 1; 4 reg 11(2)(a)

071921 - 071929

## ESA(IR) - habitual residence

071930 [\[See Memo DMG 11-21\]](#) [\[See Memo DMG 8-22\]](#) [\[See Memo DMG 05-23\]](#) [\[See Memo DMG 11-23\]](#) [\[See Memo DMG 10/25\]](#) The habitual residence test applies to ESA(IR) in the same way as to IS and JSA(IB). A claimant who is not habitually resident in the CTA is a person from abroad<sup>1</sup> and has an ESA(IR) applicable amount of nil<sup>2</sup>.

1 ESA Regs, reg 70(1); 2 Sch 5 Part 1 para 11

071931 Regulations provide that a claimant cannot be habitually resident unless he has the right to reside in the CTA<sup>1</sup>. The CTA is the UK, the Channel Islands, the Isle of Man, and the Republic of Ireland

1 ESA Regs, reg 70(2)

071932 Detailed guidance on habitual residence and the right to reside is in Part 3 of Chapter 7 of the DMG.

071933 Apart from certain temporary absences from GB (see DMG 071940 below), a claimant is not

entitled to ESA(IR) unless he is present in GB<sup>1</sup>. In European law, ESA(IR) is a special non-contributory benefit<sup>2</sup>, and thus only payable in GB<sup>3</sup>.

1 WR Act 07, s 1(3)(d); 2 Reg EEC 1408/71 Arts 4(2)(a) & 10a & Annex IIA entry Y(c), Reg (EC) 883/04, art 70 & para (e) of the UK entry in Annex X, 3 Reg (EC) No 883/04

071934 - 071939

## **Temporary absence abroad - ESA(Cont) and ESA(IR)**

### **Short absence**

071940 A claimant will continue to be entitled to ESA(Cont) and (IR) for the first four weeks of any absence from GB if

- 1.** the absence is temporary **and**
- 2.** the absence is unlikely to exceed 52 weeks **and**
- 3.** he continues to satisfy the other conditions of entitlement to ESA<sup>1</sup>.

1 ESA Regs, reg 152

### **Absence to receive medical treatment**

071941 A claimant will continue to be entitled to ESA(Cont) and (IR) for the first 26 weeks of absence from GB<sup>1</sup> if

- 1.** the absence is temporary **and**
- 2.** the absence is unlikely to exceed 52 weeks **and**
- 3.** he continues to satisfy the other conditions of entitlement to ESA **and either**

**3.1** the absence is solely to receive treatment for a condition which started before the claimant left GB and which is directly related to the claimants limited capability for work **or**

**3.2** the claimant is accompanying a dependant child receiving treatment abroad

1 ESA Regs, reg 153(1)(a)(b)(c) & (e)

071942 Treatment abroad, whether for the claimant or a dependant child, must be by or under the supervision of a person qualified to provide medical treatment, physiotherapy, or similar forms of treatment<sup>1</sup>.

### **Absence for NHS treatment**

071943 A claimant will continue to be entitled to ESA(Cont) and ESA(IR) during any period of absence from GB<sup>1</sup> if

- 1.** the absence is temporary **and**
- 2.** he continues to satisfy the other conditions of entitlement **and**
- 3.** the absence is for the claimant to receive treatment at a hospital or similar institution outside GB but provided
  - 3.1** under section 6(2) and pursuant to section 12(1) and paragraph 18 of Schedule 4 of the NHS Act 2006 **or**
  - 3.2** under section 6(2) and pursuant to section 10(1) and paragraph 18 of Schedule 3 of the NHS (Wales) Act **or**
  - 3.3** any equivalent provision in Scotland.

1 ESA Regs, reg 154

### **Family member of a member of HM Forces**

071944 A claimant will continue to be entitled to ESA(Cont) and (IR) for any period of absence from GB<sup>1</sup> if

- 1.** the absence is temporary **and**
- 2.** the claimant is a member of the family of a member of HMF **and**
- 3.** the absence is because the claimant is living with that member of the forces

1 ESA Regs, reg 155

071945 Member of the family<sup>1</sup> means the spouse, civil partner, son, daughter, step-son, step-daughter, father, father-in-law, step-father, mother, mother-in-law and step-mother. References to “step-parent and step-children and in-laws” are to be read as including such relationships arising through civil partnerships.

1 ESA Regs, reg 155(2)

071946 Member of HMF<sup>1</sup> includes the various reserve forces but only if they give full pay service - see DMG 078087 and 078182.



071947 - 072769

## **Appendix 1 - AA, CA & DLA (Care component) - pre 21.7.11 guidance (see also Appendix 2)**

### **AA, CA & DLA (Care component) - pre 21.7.11 guidance (see also Appendix 2)**

#### **Export of benefit to other EEA Member States under EU law**

##### **General**

1. UK law does not allow claimants who go to live permanently in another country to export their benefit. If the claimant does not satisfy the residence and presence conditions in UK law, the DM should consider whether EU law helps the claim.

2. To be helped by EU law a claimant must

**1.** be an EEA national or a family member of an EEA national or a third country national in some circumstances **and**

**2.** come within the personal scope<sup>1</sup> of EU law **and**

**3.** have moved within the EEA.

1 Reg (EEC) 1408/71, Art 2 & Reg (EEC) 883/04, Art 2

##### **Family member**

3. Family member includes the spouse or civil partner of an EEA national, and the children of such a person who are either minors or dependant on such a person<sup>1</sup>.

1 Reg (EEC) 1408/71, Art 1(f)(ii) & Reg (EEC) 883/04 Art 1(i)(2)

##### **Background**

4. Prior to 1.6.92, AA, DLA (both Care and Mobility), and CA were treated as invalidity benefits in light of a decision by the ECJ<sup>1</sup>. Under EU law<sup>2</sup> an invalidity benefit cannot be withdrawn solely because the recipient goes to live in another EEA country.

1 R(M) 1/92, Newton v CAO, Case C-356/89; 2 Reg (EEC) 1408/71, Art 10

5. From 1.6.92, AA, DLA (Care and Mobility Components), and CA were listed in Reg (EC) 1408/71 as

special non-contributory benefits (SNCBs)<sup>1</sup>. Such benefits are payable only in, and at the expense of, the country of habitual residence<sup>2</sup>. They could not be exported when someone moved permanently to live in another EEA Member State.

1 Reg (EEC) 1408/71, Art 4(2a) & Annex IIa entry Y(d), (e), & (f);  
2 R(DLA) 5/99 & R(A) 1/99 (Case C-20/96 & C-90/97)

6. However, the ECJ subsequently ruled<sup>1</sup> on 18.10.07 that, for the purposes of EU law, AA and DLA (Care Component only) and CA are sickness benefits. Once the relevant

domestic conditions of entitlement are satisfied, a sickness benefit may be exported to, or claimed from, another EEA Member State, if certain conditions in EU law are met<sup>2</sup>.

1 ECJ Judgement Case C-299/05; 2 Reg (EEC) 1408/71, Art 4(1)(a) & Chapter 1 of Title III & Reg (EC) 883/04  
Art 3(1)(a) & Chapter 1 of Title III

7. Although this ruling was made on 18.10.07, it relied heavily on an earlier judgement of the ECJ on 8.3.01<sup>1</sup> concerning an Austrian care benefit. In that judgement the ECJ first ruled that the fact that certain benefits were listed as SNCBs in European legislation was not conclusive, and that the Austrian benefit was a sickness benefit. In view of these two judgements, AA, DLA (Care Component) and CA should be treated as sickness benefits from 8.3.01. However, DMs could not have known this until the Judgement C-299/05 was given on 18.10.07, particularly in view of earlier ECJ judgements<sup>2</sup>. See paragraph 16 below for the position from 8.3.01 onwards.

1 ECJ Case C-215/99 (Jauch); 2 ECJ Cases C-20/96 (Snare) & C-297/96 (Partridge), R(DLA) 5/99 & R(A) 1/99

8. The ruling does not affect the Mobility Component of DLA which remains an SNCB and is not exportable<sup>1</sup> (but see paragraph 9 et seq. below for certain claimants who may have transitional protection).

1 CJEU Judgement case C-537/09

### **Transitional protection - entitlement continuous from before 1.6.92**

9. A claimant who was continuously entitled to AA, CA, or DLA (Care and/or Mobility Component) from before 1.6.92, and who moved to another EEA Member State before 18.10.07, is transitionally protected to export his benefit when moving to take up residence in that other EEA Member State<sup>1</sup> if he

**1.** was a national of an EEA Member State (or family member of an EEA citizen) as at 1.6.92 **and**

**2.** moved to live in another EEA Member State before 18.10.07 **and**

**3.** the state he moved to was a Member State as at 1.6.92 **and**

**4.** satisfies all other conditions of entitlement to the benefit other than residence and presence conditions **and**

**4.1** was within the scope of relevant EU law i.e. has worked in the UK (or any other Member State) at any time as an employed or self employed person **or**

**4.2** is a member of the family of another person who satisfies condition **4.1** above.

**Note:** The transitionally protected, pre -1.6.92 described above is an “invalidity benefit” for the purposes of the EU regulations concerning the co-ordination of social security benefits<sup>2</sup>.

1 Reg (EEC) 1408/71 Art 95(b)(8) 2 Reg (EEC) 1408/71 & Reg (EC) 83/04

10. Claimants who satisfy all the conditions in DMG 071741 are transitionally protected to export awards of AA or CA or DLA (both components) where they left GB before 18.10.07 (but see paragraph 13 below).

11. However, only awards of DLA Mobility Component can still attract transitional protection if a claimant moves to another EEA Member State on or after that date. From 18.10.07, awards of AA, CA and DLA (Care Component) can only be exported as sickness benefits, even where the original award pre-dates 1.6.92.

12. A full list of EEA Member States is at DMG 070040, with details of when they first joined the EU. Transitional protection for AA, DLA, and CA has never applied to nationals of the EFTA countries (Iceland, Norway and Liechtenstein) or Switzerland. Additionally, the following countries were not EEA Member States as at 1.6.92:-

Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia, and Sweden.

13. Persons who were entitled to AA, CA, DLA (Care Component) or DLA (Mobility Component) since before 1.6.92 who moves (before 18.10.07) to one of the countries listed in paragraph 12 can benefit from transitional protection and so will be able to export these benefits but only from the date that country joined the EU.

### **Example**

Grace is a UK national who became entitled to DLA (Mobility Component) from 1.4.92. In April 2002 she moved to live in Hungary. The DM decided that, as, at that time, Hungary was not a member of the EU, the DLA (Mobility Component) could not be exported as a transitionally protected “invalidity benefit”. However, having checked that the conditions of entitlement had been satisfied continuously since 1.4.92, the DM decided that Grace could benefit from transitional protection from the date Hungary joined the EU (i.e. from 1.5.04).

14.

### **Entitlement began on or after 1.6.92**

15. From 1.6.92, AA, DLA, and CA were listed as SNCBs for the purposes of EU law<sup>1</sup>. Such benefits are payable only in, and at the expense of, the country of habitual residence. A person who became entitled to AA, DLA, or CA on or after 1.6.92 could not export their benefit when moving permanently to live in another EEA Member State<sup>2</sup>, nor could someone claim an SNCB when living in another EEA Member State. However, from 8.3.01, AA, DLA (Care) and CA are sickness benefits in EU law.

1 Reg (EEC) 1408/71, Art 4(2a) & 10(a) & Annex IIa; 2 ECJ cases C-20/96 & C-297/96, R(DLA) 5/99 & R(A) 1/99

### **Export of benefit to another EEA Member State from 8.3.01**

16. A claimant with an award of AA, DLA (**Care only**) or CA, who leaves GB to live in another EEA Member State on or after 8.3.01 will continue to be entitled to that award where

- 1.** the person is within the personal scope of relevant EU legislation **and**
- 2.** the UK continues to be the competent state for payment of a sickness benefit **and**
- 3.** the normal domestic conditions of entitlement are met except that the claimant no longer has to
  - 3.1** be habitually resident in GB **or**
  - 3.2** be present in GB **or**
  - 3.3** meet the past presence test on an ongoing basis.

17. Where a decision on export of AA, DLA (Care) or CA was made on or after 8.3.01 and before 18.10.07, and that decision is subsequently shown to be in error of law in light of ECJ judgement C299/05, that decision can be superseded<sup>1</sup> with effect from the date of request for supersession<sup>2</sup>. Where, in similar circumstances, the DM is unable to supersede the incorrect disallowance (for instance where the original disallowance was confirmed by a FtT) a claim to AA, DLA (Care) or CA can be treated as made on the date of request for supersession or reinstatement. Provided the conditions in paragraph 16 above are met, the claimant will have satisfied the past presence test when they left GB and the claimant is not then required to further satisfy this condition at the date of request for re-instatement. The Mobility Component of DLA remains an SNCB which cannot be exported unless the claimant has transitional protection (see paragraphs 9 to 13 above).

1 SS & CB (D&A) Regs, reg 6(2)(b)(i); 2 SS Act 98, s 10(5))

### **Personal scope of EU legislation**

18. The main group within the personal scope of Reg (EEC) 1408/71 is those who are or have been employed or self-employed persons, who have been subject to the legislation of one or more EEA Member States and who are nationals of an EEA Member State, or stateless persons or refugees; and members of their family and survivors<sup>1</sup>. From the introduction of Reg (EC) 883/04 on 1.5.10, all nationals of a Member State, stateless persons and refugees residing in a Member State who have been subject to the legislation of one or more Member States, and members of their family and their survivors, are within the personal scope<sup>2</sup>.

1 Reg (EEC) 1408/71, Art 1 & 2; 2 Reg (EC) 883/04 Art 1 & 2

### **Residence and presence conditions**

19. Those relying on EU law rights to export an award of AA or DLA (Care) or CA are not required to be habitually resident or present in GB. However they are required to satisfy the past presence test<sup>1</sup> on a one-off basis on the first date from which entitlement to benefit whilst abroad can be established for a particular claim to that benefit.

1 SS (AA) Regs, reg 2(1)(a)(iii); SS (DLA) Regs, reg 2(1)(a)(iii); and SS (ICA) Regs reg 9(1)(c)

### **Competent state**

20. The circumstances in which a competent state is required to export or award a sickness benefit to a claimant living in another EEA Member State are prescribed in EU law<sup>1</sup>. However, for third country nationals, these rules only apply when the claimant moves to certain of the EEA Member States - see paragraph 34 below.

1 Reg (EEC) 1408/71 Art 1(q) & Chapter 1 Title 111 & Reg (EC) 883/04 Title II & Title III Chapter 1

21. The UK will be the competent state (subject to certain exceptions set out below) to pay a sickness benefit for the following groups:

- claimants in receipt of a pension from GB (usually receiving a contributory benefit) and family members of such a person<sup>1</sup> if no other Member State is paying a pension and is
- competent for sickness
- those covered by GB contributions in the relevant income tax years that would enable them to claim ESA(Cont) (RITY cover ) and family members of someone with RITY cover<sup>2</sup>
- certain workers and their family members
- claimants who retain worker status whilst in receipt of JSA(CB), IBST, ESA(Cont) in the assessment phase, and MA, and their family members.

1 Reg (EEC) 1408/71 Art 28 & Reg (EC) 883/04 Arts 24 & 29;  
2 Reg (EEC) 1408/71 Art 1(o), (q), (r), & (s), & Reg (EC) 883/04 Art 1(c)(q), (s), (t) & (u)

### **Claimant in receipt of a pension from GB (and family members)**

22. In receipt of a pension under GB legislation<sup>1</sup> means entitled to and actually in receipt of

**1.** state RP of any category (except Category D only awards with no contributory element) **or**

**2.** main phase ESA(Cont), long-term IB, SDA, **or**

**3.** a bereavement benefit, including widows' benefit and Industrial Injuries Death Benefit (but not a bereavement payment which is not a pension but a Death Grant) **or**

**4.** a pension for Industrial Injuries Disablement Benefit (including REA and RA) **or**

**5.** transitionally protected DLA (Mobility Component).

23. However, for SDA and transitionally protected DLA (Mob) to be treated as a pension, the claimant must firstly fall within the personal scope of EU legislation (see paragraph 16 above).

1 Reg (EEC) 1408/71 Art 28; & Reg (EC) 883/04 Arts 24 & 29

24. The claimant will be treated as in receipt of a pension where he has continuing entitlement to a pension but it is not payable because of domestic overlapping benefit rules, such as where long term IB is not payable to a claimant in receipt of unemployment supplement paid with a war pension.

25. Where the claimant receives an old-age or invalidity benefit or other pension from the EEA Member State of residence and from another EEA Member State, the state of residence will be the competent state for sickness benefits. If the claimant receives a pension from 2 EEA Member States, but neither is the state of residence, the competent state will be the one whose legislation the claimant was subject to for the longest period of time. If exceptionally, these are equal periods, the state whose legislation the claimant was last subject to will be the competent state for payment of sickness benefits<sup>1</sup>.

1 Reg (EEC) 1408/71 Art 28(2)(b) & Reg (EC) 883/04 Art 25

26. Where a claimant does not personally satisfy the conditions specified in EU law, the UK may still be the competent state to pay a sickness benefit if the claimant is a family member (DMG 071732) of someone receiving a GB pension, but only from 1.5.2010 when new EC Regulations<sup>1</sup> were introduced.

1 Reg (EC) 883/04 Art 29(1) & (2)

### **Person with RITY Cover and family members**

27. The UK will be the competent state<sup>1</sup> for a sickness benefit where the claimant is insured in GB for

sickness benefits i.e. where he satisfies the normal relevant income tax year (RITY) contribution conditions that would give title to short-term IB<sup>2</sup> or ESA (Cont)<sup>3</sup>. Guidance on RITY conditions is at parts 41 and 56 of the DMG.

1 Reg(EEC) 1408/71 Art 1(o), (q), (r) & (s) & Reg(EC) 883/04 Art 1(c), (q), (s), (t), & (u);

2 C&B Act 92, s 30A(2) & Sch 3, part 1, para 2; 3 WR Act 07, s 1(2)(a) & Sch 1, Part 1, paras 1 & 2

28. Where the claimant does not personally satisfy the conditions specified in EU law, the UK may still be the competent state to pay a sickness benefit if the claimant is a family member of someone who has insurance cover against sickness (has RITY cover).

### **Certain workers and their family members**

29. The UK will be the competent state for a sickness benefit for

1. posted workers and their family members
2. frontier workers who work in GB, and their family members
3. family members of workers living and working in GB
4. claimants in receipt of JSA(CB), IBST, ESA(Cont) in the assessment phase, and MA, and their family members.

30. A posted worker<sup>1</sup> is an employed or self employed person normally working in GB but posted temporarily to work in the territory of another EEA member state, usually for less than 12 months, or less than 24 months from 1.5.2010 (see DMG 070236).

1 Reg EEC 1408/71, Art 14(1) and 14a & Reg (EC) 883/04 Art 12 & 13

31. Frontier worker<sup>1</sup> means an employed or self-employed person who works in GB but lives in another EEA member state where he returns daily, or at least once a week.

1 Reg EEC 1408/71, Art 1(b) & Reg (EC) 883/04 Art 1(f)

### **UK competency ceases**

32. The UK will automatically cease to be the competent state to pay a sickness benefit where either the claimant or the principal person (family member) on whom the claimant relies to satisfy EU law:-

1. starts work in another EEA Member State as an employed or self-employed person<sup>1</sup> (other than as a UK posted worker of course) **or**
2. is or becomes eligible for a sickness benefit from the state of residence<sup>2</sup> **or**



**3.** receives an old age or invalidity benefit or other pension from the state of residence<sup>3</sup>.

1 Reg (EEC) 1408/71 Art 34(2) & Reg (EC) 883/04 Art 13(3)(a) & 31;

2 Reg (EEC) 1408/71 Art 19 & 28(1) & Reg (EC) Art 21 & 29;

3 Reg (EEC) 1408/71 Art 27 & 28, & Reg (EC) Art 23, 24. & 29

33. The UK will also cease to be the competent state to pay a sickness benefit where the claimant or the principal person (family member) on whom the claimant relies to satisfy EU law:-

**1.** no longer has NI cover (the first day on which the claimant would no longer meet RITY conditions for title to IB (ST) or ESA(Cont) on a new claim) **or**

**2.** is no longer entitled to and receiving a pension from GB **or**

**3.** finishes the work from which rights were acquired<sup>1</sup> (see paragraph 29 above)

**4.** is no longer entitled to and receiving JSA(CB), IBST, ESA(Cont) in the assessment phase, or MA

provided that the claimant, or the family member on whom the claimant relies to satisfy EU law, does not then fall within another category of person for whom the UK is the competent state as summarised at paragraph 21 (for instance the claimant becomes entitled to a pension from GB before RITY cover ends).

1 Reg (EC) 883/04 Art 11(3)(e)

### **Third country nationals**

34. An amendment to EU Regulations<sup>1</sup> extended the provisions of Reg (EEC) 1408/71 to third country nationals (TCNs) from 1.6.2003 provided those nationals were legally resident in the territory of a Member State, were insured workers, and were in a situation that involved more than one state. However the following states did not extend the terms of Reg (EEC) 1408/71 to TCNs:

Denmark

Iceland

Norway

Liechtenstein

Switzerland.

1 Reg (EC) 859/2003

35. Therefore a TCN who has worked will be able to export an award of AA or DLA (Care) or CA if he satisfies the same conditions that apply to an EEA national (and the UK is the competent state for payment of a sickness benefit) **except** where he leaves GB to live in Denmark, Iceland, Norway,

Liechtenstein, or Switzerland. Of course, the TCN must be legally residing in both the UK and then the New state of residence that they move to.

36. The UK is not covered by the extension of rights to TCNs under Reg (EC) 883/04, which came in to force on 1.5.2010. However TCNs will continue to be subject to the terms and limitations of Reg (EEC) 1408/71 as summarised above.

## **Claims from abroad under EU law**

37. For claims to AA, DLA (Care), or CA from claimants living in another EEA Member State and who are within the personal scope of EU law (see paragraph 18 above), the DM should first decide whether the UK is the competent state to pay a sickness benefit as at the first date that entitlement to benefit could potentially be established in accordance with domestic legislation. This will usually be:

- 1.** the day after expiry of a current award in “renewal” claims **or**
- 2.** the date of claim in new claims (or at the end of the qualifying period if later) **or**
- 3.** the date the claim can be considered from for a CA claim.

38. Where the UK is the competent state at that date, the claimant will have to satisfy the normal domestic conditions of entitlement at that same date, except that the claimant no longer has to be habitually resident or present in GB.

39. The claimant will not have to satisfy the past presence test on an ongoing basis as required for claimants in GB. This domestic test is modified for those relying on EU law rights. A claimant living in another EEA Member State will have to satisfy the past presence test on a one-off basis at the first date from which entitlement to benefit can be established. The claimant is required to have been present in GB for a period of, or periods amounting to, at least 26 weeks in the 52 weeks immediately preceding

- 1.** the date of claim (or the end of the qualifying period if later) **or**
- 2.** the day after expiry of a current award in renewal claims (but see paragraph 40 below) **or**
- 3.** the date the claim can be considered from for a CA claim.

40. However, in renewal claims the DM may treat the claim as a request for reconsideration of the previous award and consider if the period of the previous award should be extended (whether at the same or a different rate). Where the supersession<sup>1</sup> extends the period of the previous award, the past presence test will already have been met during the currency of the award (as amended on supersession).

1 SS Act 98, s 10, & SS CS (D&A) Regs, reg 7

41. Those claiming under the special rules for the terminally ill do not have to satisfy the past presence

test in domestic legislation. The following groups are treated as satisfying the past presence test, on this limited one-off basis, through the UK insurance of a worker:

- 1.** frontier workers and members of their family
- 2.** posted workers and members of their family
- 3.** a family member of someone living and working in GB
- 4.** a person treated as a worker (and their family members) who, although not currently working, is receiving JSA(CB), ESA(Cont) in the assessment phase, or MA, or those who continue to be insured for ESA(Cont) after they cease work.

42. The Mobility Component of DLA, as a SNCB<sup>1</sup>, cannot be claimed from abroad; but see paragraph 9 above regarding certain claimants with transitional protection.

1 Reg (EEC) 1408/71 Art 4(2a), Art 10a, & Annex IIA, & Reg (EC) 883/04 Art 3(3) & Art 70 & Annex X & CJEU Judgement case C-537/09.

## **Appendix 2 - Export of AA, DLA (Care Component) and CA - Claims etc for periods before 18.10.07**

### **Export of AA, DLA (Care Component) and CA - Claims etc for periods before 18.10.07**

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Supersession	10
Competent state	

### **Introduction**

1 The ECJ (now called the Court of Justice of the European Union (CJEU)) decided on 18.10.07<sup>1</sup> that AA, DLA care component and CA were not Special Non-Contributory Benefits under EU legislation<sup>2</sup>.

1 ECJ decision case C-299/05, Commission v Parliament;

2 Reg (EEC) 1408/71, Art 4(2)(a), Annex 11A, entry Y(d), (e) & (j).

2 Guidance on the effect of the ECJ’s decision can now be found in [DMG 071750](#) et seq. Regulations<sup>1</sup> (“the amending regs”) have now been made to regularise the position with regard to certain new claims/ requests for reconsideration where the ECJ’s decision is at issue. These amending regs take effect from 31.10.11.

1 The Social Security (Disability Living Allowance, Attendance Allowance and Carer’s Allowance)

## Date of Claim for AA or DLA Care Component

3 With effect from 31.10.11, a claim for AA or DLA care component which is made on or after 18.10.07 and is in respect of a period before 18.10.07 shall be treated as made on 18.10.07 where<sup>1</sup>

- 1.** on or after 8.3.01, the claimant had an award of AA or DLA care component **and**
- 2.** a DM made a supersession decision ending that award on the ground that there had been a relevant change of circumstances<sup>2</sup> as a result of the claimant moving from GB to a EEA state or Switzerland **and**
- 3.** that supersession was confirmed on appeal by an FtT **and**
- 4.** the claimant has not received an extra-statutory payment (see paragraph 7 below) in respect of the AA or DLA care component being claimed **and**

1 SS (C&P) Regs, reg 6(35); 2 SS CS (D&A) Regs, reg 6(2)(a)(i)

**Note:** DMs will then need to establish whether the other conditions of entitlement are satisfied from 18.10.07 onwards.

## DLA Care Component - Age Limits

4 The Act<sup>1</sup> says that no person shall be entitled to DLA for any period after they reach age 65, unless an award has been made before that age. However this rule is modified by regulations<sup>2</sup> ([see DMG 61551 et seq.](#)).

1 SS CB Act 92, s 75(1); 2 SS (DLA) Regs, reg 3

5 With effect from 31.10.11, where<sup>1</sup> a person makes a claim for DLA care component and that claim is treated as made on 18.10.07 in accordance with paragraph 3 above then that person is not excluded from entitlement to DLA care component solely on the grounds that they have reached age 65.

1 SS (DLA) Regs, reg 3(3) & (3A)

## Date of Claim for CA

6 A claim for CA which is made on or after 18.10.07 and is in respect of a period before 18.10.07 shall be treated as made on 18.10.07 where<sup>1</sup>

- 1.** on or after 8.3.01 the claimant had an award of CA **and**
- 2.** a DM superseded that award to end it on the ground that there had been a change of circumstances as

a result of

**2.1** the CA claimant moving from GB to an EEA state or Switzerland **or**

**2.2** the CA claimant no longer caring for a severely disabled person as defined in specific legislation<sup>2</sup> because that person's award of AA or DLA care component had ended because they had moved to an EEA state or Switzerland **and**

**3.** the CA claimant has not received an extra - statutory payment (see paragraph 7 below) in respect of CA.

1 SS (C&P) Res, reg 6(36); 2 SS CB Act 92, s 70(2)

**Note:** DMs will then need to establish whether the other conditions of entitlement are satisfied from 18.10.07 onwards.

## Meaning of “extra-statutory payment”

7 The term “extra-statutory payment” used in paragraphs 3 and 4 above means<sup>1</sup> a payment made to (or in respect of) the claimant equivalent to the amount of

**1.** AA **or**

**2.** DLA **or**

**3.** CA

which would have been payable to the claimant had their awards not been superseded and terminated as in paragraphs 3.2 or 6.2 above from 18.10.07.

1 SS (C&P) Regs, reg 6(37)

## Supersession

8 As explained in [DMG 071751](#), where a claimant applied for reconsideration of an earlier disallowance made on the grounds that AA, DLA care component or CA was not exportable to another EEA state or Switzerland, the only option previously available was supersession on the grounds of error of law<sup>1</sup> and the effective date of such a supersession was the date the claimant's application was received<sup>2</sup>. The amending regs change this effective date to 18.10.07 in the circumstances set out in para 9 below.

1 SS CS (D&A) Regs, reg 6(2)(b)(i); 2 SS CB Act s 17(4)

## Transitional protection - entitlement continuous from before 1.6.92

9 With effect from 31.10.11 where<sup>1</sup>

- 1.** on or after 8.3.01 the claimant had an award of AA, DLA care component or CA **and**
- 2.** a DM superseded that award to terminate it on the ground that there had been a relevant change of circumstances as a result of the claimant (or in the case of CA the severely disabled person) moving from the UK to a EEA state or Switzerland **and**
- 3.** the claimant continues to satisfy the other conditions of entitlement for AA the DLA care component or CA **and**
- 4.** after 31.10.11, a DM then supersedes the termination referred to in paragraph 7.2 above on the grounds that it was erroneous in law<sup>2</sup>

the effective date of that supersession will be 18.10.07<sup>3</sup>.

1 SS CS (D&A) Regs, reg 7(9A); 2 reg 6(2)(b)(i); 3 reg 7(9A)

**Note** Where, before 31.10.11, the termination has already been superseded on the grounds of error of law in accordance with the guidance in [DMG 071751](#), it cannot be superseded again under the provisions described above.

## Competent State

10 With effect from 31.10.11, the Act<sup>1</sup> is amended so as to confirm that, under GB law, EEA citizens who have moved within the EEA are only entitled to AA, DLA care component or CA in GB where the UK is the competent state for the payment of sickness benefits in cash to those persons under EU law<sup>2</sup>.

1 SS CB Act s 65(7) s 70(4A) &, s 72 (7B);

2 Reg (EEC) 1408/71 Chapter 1 of Title III & Reg (EC) 883/04 Chapter 1 of Title III

## Example

Pierre is a French national aged 55. He was born in France and had worked there for some 35 years. He receives a French invalidity pension. He moved to the UK for the first time in June 2011 and, in December 2011 he claimed DLA care component. The DM decided that the UK was not the competent state for the payment of sickness benefits in Pierre's case and decided that he was not entitled to DLA care component.

## **Appendix 3 - Deciding the competent state to pay cash sickness benefits**

[\[See Memo DMG 06/24\]](#) [\[See Memo DMG 16/20\]](#)

### **Deciding the competent state to pay cash sickness benefits**

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## Introduction

1 This appendix expands the guidance in DMG chapter 7 for deciding the competent State to pay cash sickness benefits. It also incorporates Regulation (EC) 883/2004.

### General rule

2 In general, a person is only subject to the legislation of one EU Member State<sup>1</sup>.

1 Reg (EC) 883/04, Art 11(1)

3 A person will not be entitled to AA<sup>1</sup>, CA<sup>2</sup>, or DLA care component<sup>3</sup> or unless the UK is the competent State for payment of cash sickness benefits to that person.

1 SS CB Act 92, s 65(7); 2 s 70(4A); 3 s 72(7B)

4 Special Non-Contributory Cash Benefits can only be paid to people by and in their Member State of residence. In the UK

**1. SPC and**

**2. JSA (IB) and**

**3. DLA mobility component and**

**4. ESA (IR)**

are Special Non-Contributory Cash Benefits<sup>1</sup>.

1 REG (EC) 883/2004, Annex X

## Additional voluntary insurance

5 Although a person is subject to compulsory insurance in one EU Member State, that person may voluntarily decide to join the optional insurance scheme in another EU Member State for the purposes of entitlement to

**1.** invalidity benefit **and**

**2.** retirement pension **and**

**3.** widow's benefits<sup>1</sup>.

1 Reg (EC) 883/04, Art 14(3)

## Deciding whose legislation applies

### General rules

6 The general rules are<sup>1</sup> that

**1.** a person pursuing an activity as an employed or self-employed person in an EEA Member State is subject to the legislation of that Member State

**2.** a civil servant is subject to the legislation of the Member State to which the administration employing him is subject

**3.** a person receiving unemployment benefits in accordance with a specific provision in the EU co-ordination Regulations<sup>2</sup> from the Member State of residence is subject to the legislation of that Member State

**4.** a person called up or recalled for military or civilian service by a Member State, is subject to the legislation of that Member State

**5.** any other person to whom sub-paragraphs **1.** – **4.** do not apply is subject to the legislation of the Member State of residence.

**Note:** The rule in sub-paragraph **5.** operates subject to any other rules in the EU co-ordination regs which may guarantee a person benefits under the legislation of one or more Member States.

1 Reg (EC) 883/04, Art 11(3); 2 Art 65

7 Except in relation to the benefits listed at paragraph 9, for the purposes of paragraph 6, a person receiving cash sickness benefits because of, or as a consequence of, their activity as an employed or self-employed person shall be considered to be pursuing that activity<sup>1</sup>.

8 The benefits to which the rule detailed in paragraph 7 do not apply are<sup>1</sup>

1. invalidity benefits **or**
2. old age or survivors' pensions **or**
3. pensions in respect of accidents at work or occupational diseases **or**
4. sickness benefits in cash which are for treatment for an unlimited period.

1 Reg (EC) 883/04, Art 11(2)

### **Meaning of “legislation”**

9 In paragraph 6 “legislation” means<sup>1</sup> the laws, regulations, statutory provisions and all other implementing measures relating to the branches of social security listed in the co-ordinating regs.

1 Reg (EC) 883/04, Art 1(l)

### **Meaning of “competent Member State”**

10 The “competent Member State” means<sup>1</sup> the Member State in which the competent institution is situated.

1 Reg (EC) 883/04, Art 1(s)

### **Meaning of “competent institution”**

11 The “competent institution” means<sup>1</sup> the institution

1. with which the person concerned is insured at the time of the application for benefit **or**
2. from which the person concerned is or would be entitled to benefits if he or a member of his family resided in the Member State in which the institution is situated **or**
3. designated by the competent authority of the Member State concerned.

1 Reg (EC) 883/04, Art 1(q)

### **Meaning of “competent authority”**

12 “Competent authority” means<sup>1</sup> the Minister or other equivalent authority responsible for social security schemes throughout (or in any part of) the member state in question.

## Posted to another EEA country

13 An employed person who is posted by their employer to another EEA State remains subject to the legislation of the Member State where the employer is based and where that person normally works, provided

1. the work is not expected to last more than twenty-four months, **and**
2. that person has not been sent to replace somebody who has completed a posting<sup>1</sup>.

1 Reg (EC) 883/04, Art 12

## Working in more than one Member State

14 Persons who normally pursue activity as an employed person in two or more Member States will be subject to the legislation of<sup>1</sup>

1. the Member State of residence if they
  - 1.1 pursue a substantial part of their activity in that Member State **or**
  - 1.2 are employed by two or more employers, at least two of which have registered offices or places of business in Member States different to that of the Member State of residence **or**
2. the Member State in which the employer's registered office or place of business is situated, if the person does not pursue a substantial part of his work in the Member State of residence, and either
  - 2.1 the person is employed by only one employer; **or**
  - 2.2 the person is employed by two or more employers, all of which have their registered office or place of business in only one Member State.

1 Reg (EC) 883/04, Art 13(1)

15 A person who normally pursues activity as a self-employed person in two or more Member States shall be subject to the legislation of<sup>1</sup>

1. the Member State of residence if they pursue a substantial part of their activity in that Member State **or**
2. if the person does not reside in one of the Member States in which they pursue a substantial part of their activity, the Member State in which the centre of interest of their activities is situated.

16 If a person spends less than a quarter of their time on their activities as an employed or self employed person in a Member State, that shall be taken as an indication that a person is not pursuing a substantial part of their activities in that Member State<sup>1</sup>.

## **Employed on a ship**

17 Subject to paragraph 18 below, activity as an employed or self-employed person normally pursued on board a vessel at sea, flying the flag of a Member State is deemed to be an activity pursued in that Member State<sup>1</sup>

18 However<sup>1</sup> a person employed on board a vessel flying the flag of a Member State who is paid by an undertaking or person whose registered office or place of business is in a Member State other than that in which the vessel is registered is subject to the legislation of the latter Member State if they reside in that Member State.

### **Example**

A claimant is employed on a cruise ship that flies the UK flag. The claimant lives in France and she is paid by a company registered in France. The claimant is subject to the legislation of France.

## **Civil Servants**

19 Civil Servants, and people treated as Civil Servants, are subject to the legislation to which the administration employing them is subject<sup>1</sup>.

### **Example**

A UK official is working in Brussels but remains employed by a UK department. That person remains subject to UK legislation.

## **Members of the armed forces**

20 A member of the armed forces is subject to the legislation of the country in whose forces that person is serving<sup>1</sup>.

## Claims from pensioners

21 As a general rule, if a claimant receives a pension and is entitled to benefits in kind from a single Member State, that Member State is competent for the payment of cash sickness benefits to that person<sup>1</sup>.

1 Reg (EC) 883/04, Art 24(2)(a)

### Example

A claimant resides in the UK, and only receives a pension from Greece. Greece is the competent state for cash sickness benefits.

22 Where a claimant

1. receives a pension from two or more Member States **and**
2. resides in one of those Member States **and**
3. is entitled to benefits in kind under the legislation of that Member State

the Member State of residence will be competent for payment of cash sickness benefits to that person<sup>1</sup>

1 Reg (EC) 883/2004, Art 23, Art 29(1)

### Example

A claimant resides in the UK and receives a pension from both Greece and from the UK. The UK is the competent State for benefits in kind and for the payment of cash sickness benefits.

**Note:** The general rule ceases to apply if the person receiving a pension from another Member State undertakes activity as an employed or self-employed person in the Member State of residence. In these circumstances, the Member State of residence may become competent for the payment of cash sickness benefits to that person for such time as that person is employed or self-employed.

23 If a claimant

1. receives a pension from two or more Member States **and**
2. is consequently entitled to benefits in kind from two or more Member States **but**
3. is not entitled to a pension from the State of residence

the competent Member State for payment of cash sickness benefits is the Member State to whose

legislation the claimant has been subject for the longest period of time<sup>1</sup>.

1 Reg (EC) 883/04, Art 24(2)(b)

### **Example**

A claimant resides in Spain and receives pensions from the UK, Germany and France. The claimant worked in the UK for 6 years, Germany for 12 years and France for 20 years. France is the competent state for cash sickness benefits.

## **Derived rights**

### **Family members**

24 Claimants can derive a right to payment of benefits<sup>1</sup> from their family members<sup>2</sup>. Family members are

- 1.** a spouse **or**
- 2.** civil partner
- 3.** a parent of a child under 18 **or**
- 4.** a parent of a child over 18 who is a dependant.

1 Reg (EC) 883/04 Art 2(1); 2 Reg (EC) 883/04 Art 1(i)(2)

### **Prioritising rights**

25 Claimants may have both an independent right to benefits and a derived right to benefits at the same time. An “independent right” to benefits is a right a person has acquired independently themselves as a consequence of, for instance, their activity as an employed or self-employed person in a Member State, their residence in a Member State, or their receipt of a pension from a Member State. A derived right is a right to benefits a person can derive from a family member. Subject to paragraphs 26 and 27 below, an independent right to cash sickness benefits should take priority over a derived right to cash sickness benefits as the family members of those covered by the Regulation<sup>1</sup>.

1 Reg (EC) 883/04 Art 32(1)

### **Example**

A claimant who is a Polish national is in receipt of a Polish pension and a disability benefit also from Poland. He arrives in the UK to be with his wife. His wife has been working in the UK and paying NI contributions for the last 5 years. As the claimant is in receipt of a pension from Poland he has an independent right to cash sickness benefits from Poland. However, he also has a derived right to benefits in the UK which he derives from his working wife. As the general rule is that a person’s

independent right to benefits takes priority over their derived right, the claimant's independent right to benefits in Poland takes priority and Poland is therefore the competent state for the payment of cash sickness benefits to the claimant.

26 However, where a claimant has an independent right to cash sickness benefits arising purely from their residence in a Member State, any rights they derive from a family member who is, for example, receiving a pension from or who is employed in another Member State will take priority over that claimant's independent right to benefits<sup>1</sup>.

1 Reg (EC) 883/04 Art 32(1)

### **Example 1**

A claimant has returned to reside in the UK, having been resident in another EU Member State. The claimant's husband lives and works in Germany but the couple are still together. The claimant is not working in the UK. The claimant has an independent right to cash sickness benefits in the UK arising solely out of their residence in the UK. The claimant also has a right to benefits in Germany derived from her husband, who is living and working in Germany. In these circumstances, Germany is the competent State for payment of cash sickness benefits to that claimant.

**Note:** Should the claimant in the above example start work in the UK then the UK would become the competent state, as the claimant's independent right to benefits would no longer arise solely out of her residence in the UK.

### **Example 2**

A claimant returns to live in the UK having been resident in another EU Member State. The claimant is self-employed in the UK. The claimant's husband lives and works in Spain. In this situation, the independent rights of the claimant do not arise solely out of her residence in the UK. The UK is therefore the competent state for payment of cash sickness benefits to the claimant.

27 Where a claimant is employed or self employed in a Member State their independent right takes priority over a derived right even if they have a family member employed in or receiving a pension from another Member State<sup>1</sup>.

1 Reg (EC) 883/04 Art 32(1)

### **Example**

A claimant lives and works P/T in the UK but is financially dependent on their parent. Their parent lives and works in Germany. The UK is the competent State for cash sickness benefits for the claimant.

**Note:** Should the claimant in the above example stop working in the UK then Germany would become the competent state, as the claimant's independent right to benefits would arise solely out of her residence



in the UK.

## **Step parents**

28 As a general rule, a child cannot derive rights from a step parent as the step parent does not come within the definition of “family member” set out in paragraph 24 above.

## **Example**

A child moves from Spain to the UK with his mother and step-father. The child’s biological father lives and works in Spain. Whilst the step-father is in F/T employment in the UK the mother is not working. As the mother is not in employment in the UK but the child’s father is in employment in Spain, the right to benefits the child derives from the parent working in Spain is prioritised, and Spain is therefore the competent State for cash sickness benefits for the child.

## **Exchange of claims between Member states**

29 If on considering the claim the DM decides that the UK is not the competent State the DM should forward the claim without delay to the competent institution in the Member State the DM considers competent<sup>1</sup>.

1 Reg (EC) 883/04 Art 81

30 Where the DM receives a claim from another Member State the date of claim will be the date the claim was made in the other Member State<sup>1</sup>.

1 Reg (EC) 883/04 Art 81

## **Competent State**

31 Where a claimant, coming into the UK from another MS, makes a claim to a UK cash sickness benefit the DM must determine whether the UK or the previous MS of residence is competent to pay that benefit. If the claimant was in receipt of a contributory benefit, or exporting a cash sickness benefit, it would be said that that MS remains competent, or, if the MS is not competent, remains responsible for continuing payment of an existing entitlement that is protected by Article 7. However, if the claimant commences “gainful” work in the UK, competency switches. Prior to JS, SSWP only counted the work carried out by a claimant as “gainful” if they were liable to pay National Insurance Contributions (NICs) on that work (whether employed or self-employed). This was known as the “NICs test”.

## **JS v SSWP**

32. A was in receipt of a Polish Pension, but was also working as a self-employed cleaner, earning £50/week. SSWP determined that, for competency purposes, the claimant was not ‘gainfully self-employed’ as the low level of her earnings did not make her liable to pay NICs. This meant that the

pension she was receiving from Poland made Poland competent for the payment of Carer's Allowance (CA).

33. At the UT, Judge Jacobs decided that although her earnings were below the threshold for national insurance contributions, she was actively pursuing an activity as a self-employed person because she was working regularly, and was typical of someone who carried out a small amount of work to supplement the family income. Therefore, he decided that the UK was the competent state for payment of CA to the claimant. He went on to say that this was "but one of numerous variations that may arise for decision in self-employed cases", "outcomes for other types of cases will depend on their individual circumstances", and "will have to be decided upon as and when they arise".

34. DMs should no longer be making enquiries to establish whether someone is liable for NIC when deciding if the UK is competent for their CSB; the NIC 'test' should not be used. Instead DMs should ask the claimant to provide 'evidence' which will then be used to determine if the claimant is pursuing an activity as an employed or self-employed person

35. Evidence to determine whether someone is self-employed / employed include;

- invoices,
- confirmation from the eNirs system,
- receipts,
- wage slips,
- contract of employment,
- evidence of advertising,
- they have a website,
- they can provide a business case
- registered as self-employed,
- contract to undertake work

N.B. this also applies to those claimants who may be self-employed, but may not have received a payment yet.

36. DMs may also need to consider if the claimant's employment has been temporarily interrupted by ill health, their work is seasonal or erratic, they are living off past earnings from an activity, like an author. If the claimant satisfies the above criteria they then still have to satisfy the usual benefit entitlement, in order to receive the benefit.

37. The points above are non-exhaustive and the outcome will depend on individual circumstances. It may be that in some cases the answer may be found by applying the requirement of EU law that the claimant must be pursuing the activity. Where the DM is unsure on whether the claimant is carrying out employed or self-employed activities, they should refer the case to DMA Leeds for guidance.

## **Example 1**

Jan is in receipt of a Polish Pension. He puts in a claim for CA as he is looking after his mother (who is in receipt of AA). Jan has stated that he works, self-employed as a website designer. So far he has only had two clients and been paid £60 by each of them. However, he tells the DM that he has contracts with those clients to update their websites annually, he has registered with HMRC and advertises on various social media platforms. He has recently provided quotes and mock-ups to three other potential clients. The DM decides that Jan is self-employed, and that therefore, the UK is competent for the payment of cash sickness benefits to him.

## **Example 2**

Matteus comes to the UK from Spain to become a carer for his father who is in receipt of DLA (C) and makes a claim to CA. He is in receipt of a Spanish Pension. He tells the DM that he has been working in a corner shop, but on questioning he states that he has only worked there once for 5 hours. His friend runs the shop and needed someone to cover for him. There is no contract of employment, and Matteus received payment as cash in hand. There are no fixed plans for Matteus to work there again any time soon. The DM decides that Matteus is not employed,

## **Appendix 4 - The DM decides that the UK is the competent state for the payment of cash sickness benefits (DMG 071752)**

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### **Introduction**

1 This appendix expands the guidance for DMs on the approach to take to cases where a decision on competency has been reached.

### **The DM decides that the UK is the competent state for the payment of cash sickness benefits (DMG 071752)**

2 Where the DM decides that the UK is the competent state to pay cash sickness benefits to a person, the DM should then go on to consider whether the relevant domestic conditions of entitlement are met.

### **The DM decides that the UK is not the competent state for the payment of cash sickness benefits**

**Scenario one: Where there is no acceptable evidence of a dispute regarding competence between member states**

3 Where the DM decides that the UK is not the competent state they should

**1. refuse the claim and**

2. immediately forward the claim to the member state the DM considers is competent<sup>1</sup>

1 Art 81 Reg (EC) 883/04; [2015] AACR 26

### **Scenario Two: Difference of opinion between member states as to competence**

4 Where there is a difference of opinion between the UK and one or more other Member States as to the identification of the State competent to provide cash benefits to a person, then either the

1. state where the claimant resides **or**

2. member state where the claim was first made (if the claimant does not reside in any of the member states concerned in the dispute)

will provide cash benefits to that person on a provisional basis, provided that person meets the relevant domestic eligibility criteria<sup>1</sup>.

1 Reg (EC) 987/09 Art 6(2)

**Note:** Competency is not contingent on the other member state having a similar benefit to the one applied for by the claimant. Therefore the position regarding competence will not be altered if the other member state does not have a similar benefit to the one applied for by the claimant. Further, payment on a provisional basis will not need to be made in these circumstances.

5 Should a dispute regarding competence arise between the UK and another member state the DM should not await

1. an appeal **or**

2. the outcome of an appeal

before making provisional payments<sup>1</sup>.

1 [2015] AACR 26

### **Resolving the dispute**

6 Where no agreement can be reached between the member states as to who is competent the DM should refer the matter to DMA Leeds. DMA Leeds will liaise with policy and legal services to decide whether to refer to the Administrative Commission<sup>1</sup>.

1 Reg (EC) 987/09 Art 6(3)

7 The Administrative Commission will try to reconcile the dispute within 6 months<sup>1</sup>.

8 Where the UK has paid benefit on a provisional basis and the Administrative Commission decides another member state is competent that member state will reimburse the UK benefits paid<sup>1</sup>.

**The content of the examples in this document (including use of imagery) is for illustrative purposes only**