

06-23: Disability Living Allowance for Children - Changes to Residence and Presence Test and People Moving from England and Wales to Scotland

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introduction

1. This Memo provides guidance on changes made by [The Scotland Act 2016 \(Social Security\) \(Disability Living Allowance\) \(Amendment\) Regulations 2023](#)¹. These regulations come into force on 7 July 2023. They amend [The Social Security \(Disability Living Allowance\) Regulations 1991](#)².

1: SA 2016 (SS)(DLA) (Amend) Regs 2023, 2: SS (DLA) Regs 1991

2. The Scottish Government introduced Child Disability Payment (CDP) in Scotland as an equivalent replacement benefit for Disability Living Allowance for children (DLAc). From November 2021 a new claimant resident in Scotland, who would previously have applied for DLAc, had instead to make a claim to CDP. Also, the existing caseload of DLAc recipients permanently resident in Scotland will have transferred to CDP by the end of June 2023.

3. These regulations alter the DLAc Residence and Presence Test and govern what occurs when

someone entitled to (or applying for) DLAc moves from somewhere in England and Wales to live permanently in Scotland.

4. These regulations also contain mirroring provisions for Northern Ireland¹. Northern Ireland will be treated the same way as England and Wales is treated in this guidance in relation to all the amendments. Guidance for Northern Ireland legislation is produced separately by the Department for Communities.

1: SA 2016 (SS)(DLA) (Amend) Regulations 2023 Part 3

CHANGES TO THE RESIDENCE AND PRESENCE TEST

5. It was a basic condition of entitlement for DLA that the claimant be **present** in Great Britain, as per regulation 2(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991. However, from 7 July 2023, the Residence and Presence test is now altered in certain circumstances, where instead the claimant must be present in England and Wales (i.e., it no longer includes being present in Scotland)¹. Those circumstances are where:

1. the person is under the age of 16, **or**
2. the person has **both**
 - a. an award of DLA which began before the claimant reached the age of 16 (this is defined as the “award condition”)², **and**
 - b. the person meets any one of the below conditions (these are defined as the “status condition”) – they are **either**:
 - (i) a person who was terminally ill on the date at which they reached the age of 16, and who **either**, remains terminally ill, **or** following a change in their prognosis is someone who will be invited to claim Personal Independence Payment (PIP), but has not yet been invited,
 - (ii) a person who became a hospital in-patient whilst under the age of 18 who **either** remains in hospital, **or** has left hospital and is someone who will be invited to claim PIP, but has not yet been invited,
 - (iii) a person entitled to DLA, but it is not payable as they are resident in a care home, or a hospital or similar institution,
 - (iv) a person invited to claim PIP but who has not yet made that application, **or**
 - (v) a person who has applied for PIP, but no decision has yet been made on that claim².

In other words, if the person is present in Scotland, and they satisfy 5.1 (they are under 16 years of age) they fail the Residence and Presence test for DLA.

If the person is present in Scotland and they are aged 16 or over and they meet both the award condition (5.2 (a)) and the status condition (5.2(b)) they fail the Residence and Presence test for DLA.

6. If such a person (someone who meets 5.1 or 5.2) is temporarily absent from England and Wales and present in Scotland, they shall be treated as being present in England and Wales.¹

1: SS (DLA) Regs 1991 Reg 2(2A)

7. If such a person (someone who meets 5.1 or 5.2) is absent from Great Britain for any of the following reasons, they are treated as present in England and Wales:

1. They are abroad in their capacity as-

(a) a serving member of the forces (or is living with a serving member of the forces, **and** is their spouse, civil partner, son, daughter, step-son, step-daughter, father, father-in-law, step-father, mother, mother-in-law or step-mother), **or**

(b) an airman or mariner, **or**

2. they are employed in connection with continental shelf operations, **or**

3. they are temporarily absent from Great Britain and that absence has not lasted for a continuous period of more than 13 weeks¹, **or**

4. for the first 26 weeks of an absence from Great Britain which is solely in connection with the medical treatment of a disease or bodily or mental disablement².

1: SS (DLA) Regs 1991 Reg 2(2), 2: Reg 2(3B)

8. It should be noted that paragraphs 5, 6 and 7 above are only concerned with establishing whether a person is **currently present** in England and Wales, the test set at paragraph 2(1)(a)(ii) of the SS (DLA) Regs 1991. These changes do not alter the Past Presence Test. For the purpose of the Past Presence Test, the distinctions made between England and Wales, and Scotland, do not apply. Time spent in either place counts towards the satisfaction of that test.

9. It should also be noted that these regulations, which come into force on 7 July 2023, should take effect once the entirety of the current DLAc Scottish permanent resident caseload have transferred to CDP, so it will not affect the current entitlement to DLA of any Scottish residents who could otherwise find

themselves failing these revised Residence and Presence conditions.

EFFECT OF MOVE TO SCOTLAND

PERSONS ENTITLED TO DLA

10. This concerns the situation where a 'relevant DLA entitled person' (see paragraph 12 for the definition of this person) moves from England and Wales to become permanently resident in Scotland on or after 7 July 2023. The date that the person becomes permanently resident in Scotland is called the "residence change date"¹.

1: SS (DLA) Regs 1991 Reg 1(2)

11. When the relevant DLA entitled person makes that move to Scotland, they will retain entitlement to DLA for a period of approximately 13 weeks. This "run-on period"¹ begins with the residence change date and ends at the end of the day preceding the DLA pay day which falls immediately after the end of 13 weeks.

1: SS (DLA) Regs 1991 Reg 1(6)

12. A relevant DLA entitled person is someone who on the day before their residence change date was:

1. entitled to DLA, **and**

2. present (or treated as present) in England and Wales, **and**

3. (a) under the age of 16, **or**

(b) someone who met both the "award condition" and "status condition" set out at paragraph 5.2 above¹.

1: SS (DLA) Regs 1991 Reg 2ZA (2)

13. During the run-on period the relevant DLA entitled person will be deemed to be present in England and Wales¹ (despite the fact they are now permanently resident in Scotland), in order that DLA entitlement can continue for this 13-week period only.

1: SS (DLA) Regs 1991 Reg 2ZA (3)

14. If there is a fixed term award of DLA (i.e., a 'renewal') which is due to expire during the run-on period, that fixed term period is extended so it expires at the end of the run-on period¹.

1: SS (DLA) Regs 1991 Reg 2ZA (4)

PERSONS WITH AN ONGOING CLAIM FOR DLA

15. This concerns the situation where a person has an ongoing DLA claim (i.e., a claim upon which no decision has yet been made) on the residence change date. This applies where:

1. there is no award of DLA, **and**
2. there is a claim for DLA made by a person who is under the age of 16 on the date of claim, **and**
3. the person is (or is treated as) present in England and Wales on both the claim date, and the end of the day preceding the residence change date, **and**
4. the person becomes permanently resident in Scotland after the claim date **and** on or after 7 July 2023¹, **and**
5. that claim has not been decided, or withdrawn, or otherwise ceased to be under consideration by the Secretary of State, by the time of the residence change date².

1: SS (DLA) Regs 1991 Reg 2ZB (2)(a), 2: Reg 2(b)

16. In these circumstances the Secretary of State must make a decision upon the DLA claim, unless that claim is voluntarily withdrawn by the claimant¹.

1: SS (DLA) Regs 1991 Reg 2ZB(3)

17. In order to satisfy the Residence and Presence test for individuals with an ongoing DLA claim, the decision made by the Secretary of State must disregard the amendments made to the Residence and Presence Test conditions introduced by these regulations. This means that the person only needs to be considered present in Great Britain, rather than the more specific territory of England and Wales, to meet the test requirements. This allows for the possibility of an initial award of DLA. To determine the appropriate duration of the award, paragraph 18 introduces the concept of a 'transfer day'.

1: SS (DLA) Regs 1991 Reg 2ZB(4)

18. The term "transfer day" means either the final day of the run-on period, or if earlier, the day before the day on which the person became entitled to CDP¹. If there is a decision to award DLA the claimant is treated as satisfying the Residence and Presence conditions up to and including the transfer day². This ensures that the person can continue receiving their award of DLA until the correct end point of that DLA award, limited either by the run-on period, or by the coming into effect of a CDP award.

1: SS (DLA) Regs 1991 Reg 2ZB(6), 2: Reg 2ZB (5)(a)

EXAMPLE 1

The claimant was a child living in England who made a claim to DLA. Before a decision on that claim was made, they moved permanently to Scotland. The DLA decision maker was able to award DLA to the claimant, despite the claimant being present in Scotland, as they were treated as present in England and Wales during the run-on period. The award length was set to last for the duration of the run-on period.

EXAMPLE 2

The claimant was a child living in Wales who made a claim to DLA, which resulted in a decision to disallow the benefit. The claimant challenged that decision. In the meantime, they became permanently resident in Scotland, immediately made a claim to CDP, and were awarded CDP. As there was no DLA award in place the CDP decision maker made their award from the date of the CDP claim, 5 September 2023. A DLA decision maker decided to revise the DLA decision, awarding the benefit. The end date of that DLA award was limited to the day prior to the date the CDP award became effective, so ended 4 September 2023.

19. If the DLA award is for a fixed period (i.e., a ‘renewal’) and it expires before the transfer day, that fixed term award is extended to expire upon the transfer day.

1: SS (DLA) Regs 1991 Reg 2ZB (5)(b)

ANNOTATIONS

The number of this Memo (06/23) should be noted at DMG paragraphs [071705](#), [071726](#).

CONTACTS

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, Existing arrangements for such referrals should be followed, as set out in DMG Memo [4/19](#) - Requesting case guidance from DMA Leeds for all benefits.

DMA LEEDS JULY 2023