

Department for Work and Pensions

DECISION MAKING AND APPEALS (PART OF LEGAL GROUP)

Decision Makers Guide

Volume 3 Amendment 50 – February 2016

1. This letter provides details on Amendment 50; the changes have already been incorporated in to the Intranet and Internet versions of the DMG.
2. PDF amendment packages are also available. These can be printed with the amended pages being reproduced in full. Each page will contain the amendment number in the footer

PDF amendment packages can be found on the **Intranet** at:

<http://intranet/1/lg/acileeds/guidance/decision%20makers%20guide/index.asp>

or on the **Internet** at the 'Amdt Packages' tab on the following link:

<http://www.dwp.gov.uk/publications/specialist-guides/decision-makers-guide/>

Note: When printing PDF packages set the print properties to Duplex/Long Edge in order to produce double sided prints.

3. Amendment 50 affects the list of Abbs, SI's & Statutes, Chapters. The changes make amendments to
 - Chapter 13 Amendments (Annexes 6 and 7 refer) relate to increased earnings limits for permitted work as a result of the increase in the National Minimum Wage from 1.10.15
 - Chapter 15 added useful case-law ref to 15455.
 - Chapter 18 - minor amendments to the legal references at 18022 and 18060.
4. The last two amendment packages amending Volume 3 were
 - Amendment 49 [October 2015]
 - Amendment 48 [June 2015]
5. If using a PDF amendment package remove the sheets as stated in the left hand column of the Remove and Insert table below and insert the new sheets as stated in the right hand column (note the record of amendments at the back of the Volume).

The content of the examples in this document (including use of imagery) is for illustrative purposes only

Remove

RA-YT (2 pages)

Statutes

NHS Act77 – WC Act 25 (1 page)

Statutory Instruments

SS Ben (PA) Regs - SS (IB) (Trans) Regs
(1 page)

Chapter 13

Annex 6 – Annex 7 (2 pages)

Chapter 15

15452 – 15469 (2 pages)

Chapter 18

18020 – 18026 (1 page)

18060 – 18119 (1 page)

Insert

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Chapter 13

Annex 6 – Annex 7 (2 pages)

Chapter 15

15452 – 15469 (2 pages)

Chapter 18

18020 – 18026 (1 pages)

18060 – 18119 (1 page)

RA	Retirement Allowance
RBD	Reduced Benefit Direction
RCH	Residential Care Home
REA	Reduced Earnings Allowance
Reg(s)	Regulation(s)
Res A	Residential Allowance
RISWR	Redundant Iron and Steel Employees re-adaptation scheme
RMPS	Redundant Mineworkers Payment scheme
RP	Retirement Pension
RQC	Relevant Qualifying Condition
RVU	Relationship Validation Unit
S	Section (of an Act)
S2P	State Second Pension
SAP	Shared Additional Pension
SAYE	Save As You Earn
SB	Sickness Benefit
SC	Savings Credit
Sch	Schedule (as in an Act)
SCT	Savings Credit Threshold
SDA	Severe Disablement Allowance
SDM	Sector Decision Maker
SDP	Severe Disability Premium
S/E	Self-Employed
Sec	Section (of an Act)
SED	Scottish Education Department
SERPS	State Earnings Related Pension Scheme
Sev DP	Severely Disabled Person
SF	Social Fund
SFFP	Social Fund Funeral Payment(s)
SFO	Social Fund Officer
SHA	Special Hardship Allowance
SI	Statutory Instrument
SIR	Standard Interest Rate
SJP	Supervised Jobsearch Pilot Scheme
SMG	Standard Minimum Guarantee
SMP	Statutory Maternity Pay
SP	State Pensions
SPC	State Pension Credit
SpTA	Special Transitional Addition
SPW	Supported Permitted Work
SRPS	Shipbuilding Redundancy Payment Scheme

SS	Social Security
SS benefits	Benefits payable under SS(CB) Act 92
SSMG	Sure Start Maternity Grant
SSP	Statutory Sick Pay
STCP	Skills Training Conditionality Pilot
Supp B	Supplementary Benefit
SVQ	Scottish Vocational Qualification
TA	Transitional Addition
TAW	Temporary Allowance for Widow(ers)
TBI	Total Benefit Income
TD	Trade Dispute
TE	Transitional Element
TEC	Training and Enterprise Council
TFEU	Treaty on the Functioning of the European Union
TS	Tribunals Service
TU	Trade Union
UB	Unemployment Benefit
UC	Universal Credit
UCP	Urgent Case Payment
UEL	Upper Earnings Limit
UK	United Kingdom
US	Unemployability Supplement
UT	Upper Tribunal
VAT	Value Added Tax
VSO	Voluntary Sector Option of New Deal for young people
WA	Widow's Allowance
WB	Widow's Benefit
WBLA	Work Based Learning for Adults
WBLfYP	Work Based Learning for Young People
WBTfA	Work Based Training for Adults
WBTfYP	Work Based Training for Young People
WC	Workmen's Compensation
WC(S)	The Workmen's Compensation (Supplementation) Scheme
WC (Supp)	Workmen's Compensation (supplementation) scheme
WCA	Work capability assessment
WDisP	War Disablement Pension
WFHRA	Work focused health related assessment
Wfi	Work-focused Interview

WFP	Winter Fuel Payment
WFTC	Working Families Tax Credit
WMA	Widowed Mother's Allowance
WMA(C)	WMA payable where late husband entitled to Cat C retirement pension
WP	Widow's Pension
Wp	Work programme
WPA	Widowed Parent's Allowance
WP(C)	Widow's Pension payable where late husband entitled to Cat C retirement Pension
WPT	Widow's Payment
WRAC	Work-related activity component
WRAG	Work-related activity group
WTB	Work and training beneficiary(ies)
WTC	Working Tax Credit
WtWB	Welfare to Work Beneficiary
WWP	War Widow's Pension/War Widower's Pension
YT	Youth Training

National Health Service Act 1977	NHS Act 77
National Health Service Act 1990	NHS Act 90
National Health Service and Community Care Act 1990	NHS & CC Act 90
National Insurance Act 1965	NI Act 65
National Insurance (Industrial Injuries) Act 1965	NI (II) Act 65
National Insurance contributions Act 2008	NIC Act 08
National Minimum Wage Act 1998	NMW Act 98
Pensions Act 2007	Pensions Act 07
Pensions Act 2008	Pensions Act 08
Pensions Act 2014	Pensions Act14
Pension Schemes Act 1993	PS Act 93
Registered Homes (Amendment) Act 1991	RH (Amdt) Act 91
Registered Homes Act 1984	RH Act 84
Rehabilitation of Offenders Act 1974	ROO Act 74
Social Security Act 1975	SS Act 75
Social Security Act 1985	SS Act 85
Social Security Act 1986	SS Act 86
Social Security Act 1988	SS Act 88
Social Security Act 1989	SS Act 89
Social Security Act 1990	SS Act 90
Social Security Administration Act 1992	SS A Act 92

Social Security Contributions and Benefits Act 1992	SS CB Act 92
Social Security Contributions (Transfer of Functions, etc) Act 1999	SSC (ToF) Act 99
Social Security Fraud Act 2001	SS Fraud Act 01
Social Security (Incapacity for Work) Act 1994	SS (IfW) Act 94
Social Work (Scotland) Act 1968	SW (Scot) Act 68
State Pension Credit Act 2002	SPC Act 02
Supervised Jobsearch Pilot Scheme (Designation of Employment Officers) Order 2014	SJP Scheme (Designation of Emp. O) Order 2014
Tax Credit Act 2002	TC Act 02
Tribunals, Courts and Enforcement Act 2007	TCE Act 07
Teaching and Higher Education Act 1998	T & HE Act 98
Trade Union and Labour Relations (Consolidation) Act 1992	TULR (C) Act 92
Trade Union Reform and Employment Rights Act 1993	TURER Act 93
Welfare Reform Act 2007	WR Act 07
Welfare Reform Act 2009	WR Act 09
Welfare Reform and Pensions Act 1999	WRP Act 99
Workmen's Compensation Act 1925	WC Act 25

Statutory Instruments

The Social Security Benefit (Persons Abroad) Regulations 1975 No. 563	SS Ben (PA) Regs
The Social Security (Civil Penalties) Regulations 2012	SS (CPen) Regs
The Social Security (Computation of Earnings) Regulations 1978 No. 1698	SS (C of E) Regs
The Social Security (Claims and Information) Regulations 2007 No. 2911	SS (C&I) Regs
The Social Security Class 3A Contributions (Units of Additional Pension) Regulations 2014 SI 2014 No. 3240	SS Class 3A Conts (UAP) Regs
The Social Security (Child Maintenance Bonus) Regulations 1996 No. 3195	SS (CMB) Regs
The Social Security (Claims and Payments) Regulations 1979 No. 628	SS (C&P) Regs 79
The Social Security (Claims and Payments) Regulations 1987 No. 1968	SS (C&P) Regs
The Social Security Commissioners (Procedure) Regulations 1999 No. 1495	SS Commissioners Procedure Regs
The Social Security (Contributions) Regulations 1979 No. 591	SS (Conts) Regs
The Social Security (Contributions) Regulations 2001 No. 1004	SS (Conts) Regs 01
Social Security (Contribution Credits for Parents and Carers) Regulations 2010 No. 19	SS (CC P & C) Regs
The Social Security (Credits) Regulations 1975 No. 556	SS (Credits) Regs
The Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001 No. 769	SS (Crediting etc) Regs
The Social Security and Child Support (Decisions and Appeals) Regulations 1999 No. 991	SS CS (D&A) Regs
The Social Security and Child Support (Jobseeker's Allowance) (Miscellaneous Amendment) Regulations 1996 No. 2538	SS & CS (JSA) (Misc Amdt) Regs

Statutory Instruments

The Social Security (Deferral of Retirement Pensions) Regulations 2005 No. 453	SS (Def RP) Regs
The Social Security (Deferral of Retirement Pensions, Shared Additional Pension and Graduated Retirement Benefit) (Miscellaneous Provisions) Regulations 2005 No. 2677	SS (Def RP, SAP & GRB) (Misc Provs) Regs
The Social Security (Disability Living Allowance) Regulations 1991 No. 2890	SS (DLA) Regs
The Social Security (Introduction of Disability Living Allowance) Regulations 1991 No. 2891	SS (Introduction of DLA) Regs
The Social Security and Family Allowances (Polygamous Marriages) Regulations 1975 No. 561	SS & FA (Poly Marr) Regs
The Social Security (General Benefit) Regulations 1982 No. 1408	SS (Gen Ben) Regs
The Social Security (Graduated Retirement Benefit) (No. 2) Regulations 1978 No. 393	SS (GRB) (No. 2) Regs
The Social Security (Graduated Retirement Benefit) Regulations 2005 No. 454	SS (GRB) Regs
The Social Security (Habitual Residence) Amendment Regulations 2004 No. 1232	SS Hab Res Regs
The Social Security (Hospital In-Patients) Regulations 1975 No. 555	SS (HIP) Regs
The Social Security (Hospital In-Patients) Regulations 2005 No. 3360	SS (HIP) Regs 05
The Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 No. 636	SS (I&A) Cql Amdts Regs
The Social Security (Incapacity Benefit) Regulations 1994 No. 2946	SS (IB) Regs
The Social Security (Incapacity Benefit - Increases for Dependents) Regulations 1994 No. 2945	SS (IB for D) Regs
The Social Security (Incapacity Benefit) (Transitional) Regulations 1995 No. 310	SS (IB) (Trans) Regs

Annex 6

NMW rates since 1.10.10

(See DMG 13896)

From	Hourly rate
1.10.10	£5.93
1.10.11	£6.08
1.10.12	£6.19
1.10.13	£6.31
1.10.14	£6.50
1.10.15	£6.70

Annex 7

Exempt work – weekly earnings limits since 13.4.95

(See DMG 13893)

From	Weekly earnings limit
13.4.95	£44.00
8.4.96	£45.50
7.4.97	£46.50
6.4.98	£48.00
12.4.99	£49.50
10.4.00	£58.50
2.10.00	£59.50
9.4.01	£60.50
1.10.01	£66.00
1.10.02	£67.50
1.10.03	£72.00
1.10.04	£78.00
1.10.05	£81.00
1.10.06	£86.00
1.10.07	£88.50
1.10.08	£92.00
1.10.09	£93.00
1.10.10	£95.00
1.10.11	£97.50
1.10.12	£99.04
1.10.13	£101.00
1.10.14	£104.00
1.10.15	£107.50

The content of the examples in this document (including use of imagery) is for illustrative purposes

Averaging of amounts

15452 The weekly amount of a person's income from earnings may be averaged¹ if the income varies or the regular pattern of work means that the claimant does not work every week. The DM should average over

1. a complete cycle if there is a recognisable cycle of work **or**
2. five weeks **or**
3. another period if this means a more accurate weekly amount can be calculated.

1 SS Ben (C of E) Regs, reg 8(3)

15453 The averaging of the weekly amount does not change the other rules on the treatment of earnings such as the date that they are treated as paid. This means that earnings should only be averaged where the claimant is actually in receipt of a payment.

Example 1

John works two weeks on and one week off.

In the two weeks John actually works he works 12 hours a week and receives earnings of £80 a week.

In the third week, he receives a retainer of £20.

The DM decides that the earnings should be averaged over a period of three weeks because that is the period of the recognisable cycle of work.

The DM calculates that John's average weekly earnings is £60, that is

$$\frac{80 + 80 + 20}{3}$$

This average amount is taken into account from the fourth week. For the first three weeks, the DM used the actual amounts of earnings paid to John before an average figure could be calculated.

Example 2

Maggie works at a school term-time only as a classroom assistant. During the school holidays she doesn't work and receives no earnings.

The DM can only average Maggie's earnings during term-time when she is actually in receipt of an income. During the school holidays Maggie receives no earnings so there is no income to take into account.

Identifying a recognisable cycle

- 15454 The DM should see whether there is a pattern, or whether a pattern emerges from the fluctuating earnings over a period of time.

Example 1

Week 1 £40

Week 2 £45

Week 3 £40

Week 4 £40

Week 5 £45

Week 6 £40

There is a regular cycle of 3 weeks (weeks 1 to 3 repeated in weeks 4 to 6). The average weekly earnings are £41.67.

Example 2

Month 1 £180

Month 2 £200

Month 3 £180

Month 4 £200

There is a regular cycle of 2 months. The average monthly earnings are £190.

No recognisable cycle

- 15455 Where there is no pattern the DM should average earnings over 5 weeks or some other period where this would prove more accurate¹.

Example 1

Week 1 £40

Week 2 £40

Week 3 £45

Week 4 £47

Week 5 £43

There is no recognisable cycle. The average weekly earnings are £43.

- 15456 When one week contains unusually high earnings it may be inappropriate to include that week when averaging earnings.

Example

Week 1 £140

Week 2 £40

Week 3 £50

Week 4 £47

Week 5 £43

In this case the DM may choose to disregard week 1 and average earnings over weeks 2 to 5. By doing so, average earnings will be £45.

NS v SSWP (IS) [2015] UKUT 423 (AAC)

15457 - 15469

In-patients

Free in-patient treatment

Deciding free in-patient treatment

18020 There are five points to consider when deciding whether a person is receiving free in-patient treatment. The person must be all of the following

1. maintained free of charge
2. receiving medical or other treatment
3. in a hospital or similar institution
4. an in-patient
5. receiving free in-patient treatment under prescribed legislation¹ **or** in a hospital or similar institution maintained or administered by the Defence Council.

Note: A person who does not meet any one of these conditions is not receiving free in-patient treatment. The decision maker does not need to consider the other conditions.

1 NHS Act 06; NHS (Wales) Act 06 NHS (Scot) Act 78; NHS & CC Act 90

Maintained free of charge

18021 A person is treated as being maintained free of charge¹ in a hospital or similar institution unless

1. accommodation and services are being provided for that person as a private patient² **or**
2. the person is meeting the full cost of their maintenance as a private patient in a private hospital.

1 SS (HIP) Regs 05, reg 2(4); SS (AA) Regs, reg 6; SS (DLA) Regs, reg 8;

*2 NHS Act 06, Sch 2 para 15 & Sch 6 para 11; NHS (Wales) Act 06, Sch 2 para 15 & Sch 5 para 11
NHS (Scot) Act 78, s 57 & Sch 7A, para 14; NHS & CC Act 90, Sch 2, para 14*

18022 In any other circumstances the person is treated as maintained free of charge. For example when

1. a payment is made by the patient for an amenity bed but the treatment is provided under the National Health Service¹
2. a patient is in paid work outside the hospital during the day and pays an amount to the HA or Health Board based on earnings towards maintenance and incidental costs²
3. a person is a patient in a nursing home being funded under arrangements made by the HA or Health Board³.

1 NHS Act 06, s 189; NHS (Wales) Act 06, s 137; NHS (Scot) Act 78, s 55;

2 NHS Act 06, s 190; NHS (Wales) Act 06, s 138; NHS (Scot) Act 78, s 56;

3 NHS Act 06; NHS (Wales) Act 06; NHS (Scot) Act 78

Burden of proof

18023 The burden of proving that a person is not being maintained free of charge rests with that person¹.

1 CS 591/49

Medical or other treatment

18024 To be treated as a hospital in-patient a person must be receiving

1. medical treatment (for example surgical treatment or administration of drugs and injections) **or**
2. other treatment which includes nursing services by professionally trained staff in the form of observation, therapy, support appropriate to the persons needs, advice and training in domestic and social skills.

It does not include straightforward care and attention by unqualified staff.

18025 Whether a person is receiving treatment is a question of fact. It cannot be assumed that because one person is receiving treatment in a hospital or similar establishment, that another person in the same establishment can automatically be regarded as receiving treatment. But the fact that a person is an in-patient in a hospital is strong evidence that the person is receiving medical or other treatment¹.

1 R(S) 26/54

18026 A person does not have to receive treatment throughout each day (midnight to midnight) for the day to be included in a period of in-patient treatment. The condition is satisfied if a person receives treatment at some time during the day¹.

1 R(S) 4/84

Continuing care - NHS responsibilities

Legal Background

18060 Under the NHS Act¹ the Secretary of State for Health is under a duty to provide facilities for the care of persons suffering from illness and the after-care of persons who have suffered from illness¹. Services under the Act must be provided free of charge² except in so far as the making or recovery of charges is expressly provided for by law.

Note: This paragraph and DMG 18061 to 18069 describe law and case law that applies in England and Wales and the guidance has no direct application to Scotland where the law is different.

1 NHS Act 06, s 3(1)(e); NHS (Wales) Act 06, s 3(1)(e); 2 NHS Act 06, s 1(3); NHS (Wales) Act, s 1(3)

18061 Accordingly Primary Care Trusts acting on behalf of the Secretary of State can arrange for long term care in a care home for a person whom they assess as needing that care¹. In such a case the service must be provided free of charge and the HA is responsible for the full cost.

1 NHS Act 06, s 12; NHS (Wales) Act 06, s 10

18062 LAs may make arrangements for providing residential accommodation for persons over 18 who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them¹. LAs can charge for this provision.

1 NA Act 48, s 21

18063 In July 1999 the Court of Appeal¹ considered where the borderline lay between the duties of LAs and the duties of the NHS as regards providing nursing care. The Court held that it is lawful for LAs to provide nursing services where they are

1. merely incidental to the provision of accommodation which a LA is under a duty to provide **and**
2. of a nature which it can be expected that an authority whose primary responsibility is ordinarily to provide social services can be expected to provide.

1 R v North and East Devon Health Authority ex parte Coughlan [2000] 3 All ER CA 850

The Health Ombudsman's report

18064 In February 2003 the Health Service Commissioner for England (known as the Health Ombudsman) issued a report called "NHS Funding for Long Term Care of Older and Disabled People".

- 18065 The Ombudsman found a number of defects in the way in which decisions had been made regarding whether a person should be provided with continuing care in a home free of charges under the NHS or by an LA with charges payable.
- 18066 Among the Ombudsman's recommendations were that Strategic Health Authorities and Primary Care Trusts should
1. review the criteria used and the way they had been applied since 1996 **and**
 2. make efforts to remedy any consequent financial injustice to patients where the criteria, or the way they were applied, were not clearly appropriate or fair. This would include attempting to identify patients who may wrongly have been made to pay for their care in a home and making appropriate recompense to them or their estates.
- 18067 Where, following a review of the criteria it is decided that a claimant should be fully funded by the NHS in a home providing care then, provided the DM is satisfied that the care home concerned is a similar institution to a hospital, the claimant will be a hospital in-patient from the date the Primary Care Trust makes a decision that continuing care should be provided.
- 18068 As, with effect from 10.4.06, hospital downrating at 52 weeks was abolished, such a decision by a Primary Care Trust will have no effect on the amount of the benefits listed in DMG 18010 after that date.
- 18069 If a period before 10.4.06 is involved, DMs are advised that payments made to compensate claimants for the period during which they were wrongly charged for care do not mean that those claimants were hospital in-patients for the period covered by the compensation. These claimants were not in fact being maintained free of charge while undergoing medical or other treatment as in-patients under NHS legislation during that period. Payment of compensation does not alter that fact.

18070 - 18119