

# Department for Work and Pensions

DECISION MAKING AND APPEALS (PART OF LEGAL GROUP)

## Decision Makers Guide

### Volume 11

### Amendment 41 – June 2018

1. This letter provides details on Amendment 41; 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 41 affects chapter 71. The changes:
  - incorporate DMG memo 7/18 and make consequential changes.
4. 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).

#### **Remove**

##### **Chapter 71**

71421 – 71445 (2 pages)

#### **Insert**

##### **Chapter 71**

71421 – 71445 (2 pages)

## Permanent condition and continuous condition

71421 If, as the result of the relevant loss of faculty, a claimant is incapable of following the regular occupation or suitable employment of an equivalent standard, the DM should then consider if either of the conditions, known as the “permanent condition” and the “continuous condition”, are satisfied<sup>1</sup>.

*1 SS CB Act 92, Sch 7, para 11(1)*

### Permanent condition

71422 To satisfy the permanent condition, claimants must show that as a result of the relevant loss of faculty they are

1. incapable and likely to remain permanently incapable of their regular occupation (see DMG 71423 - 71432) **and**
2. incapable, though not necessarily permanently, of following employment of an equivalent standard which is suitable in their case (see DMG 71437).

DMs should consider whether the permanent condition is satisfied where claimants have been following their normal occupation but that occupation has ended (for example due to retirement). This will depend on the facts of the case. Cases of doubt should be referred to DMA Leeds for advice.

### Regular occupation

71423 The DM should note the guidance at DMG 71424 - 71429 when considering if incapacity for the regular occupation is likely to be permanent.

71424 “Permanently” has not been defined either by statute or in case law. It should therefore be given its ordinary and natural meaning of “lasting for the remainder of the claimant’s life”.

71425 The permanent condition can be considered at any time. It is capacity for the regular occupation in the future which is relevant, not in the past.

71426 The statutory test is that of being “likely” to remain permanently incapable<sup>1</sup>. It is **not** necessary to be certain that the claimant will remain permanently incapable; it is enough if on the balance of probabilities, permanent incapacity is likely.

*1 SS CB Act 92, para 11(1)(b)*

71427 Where a final assessment has been made, but not for life, it would be difficult to justify a finding that incapacity was likely to be permanent. If evidence supporting permanent incapacity is submitted, and it is weighing and current, it may provide grounds for the claimant to make an application to have the decision on his claim to IIDB revised or superseded as appropriate.

**Note:** See DMG Chapter 03 for guidance on revision and DMG Chapter 04 for guidance on supersession.

71428 The award of a life assessment need not mean that the claimant is permanently incapable of following the regular occupation. The loss of faculty may have no bearing on the ability to work in that occupation and each case should be considered in the light of the evidence<sup>1</sup>.

*1 R(I) 86/52*

71429 The permanent condition is difficult to satisfy<sup>1</sup> if the loss of faculty results from a disease or condition which can be cured or greatly improved as far as capability is concerned. Where an operation is required for the cure or improvement, a reasonable refusal by the claimant to undergo that operation would not prevent the permanent condition being satisfied<sup>2</sup>. Before a claimant can be considered to be acting unreasonably there must be evidence that the operation

1. is not a danger to life or health or
2. will not cause exceptional suffering and
3. will probably, and not just possibly, remove the cause of incapacity.

In practice, such evidence is difficult to find.

*1 R(I) 7/53; 2 R(I) 23/59*

71430 If

1. a claim for REA has been allowed on the basis of the permanent condition being satisfied and
2. at a later date there is reason to suppose that the claimant's condition has improved

the permanent condition should be reconsidered at the next renewal. Examples of the type of situation in which this can occur are where treatment or training has proved very effective or the claimant has learned to counter the handicap.

71431 Where REA has been disallowed because incapacity for the regular occupation was not likely to be permanent and later on there is a further claim supported by medical evidence to suggest that

1. the effects of the injury have worsened or
2. an expected recovery has not happened, so that the claimant is likely to have become permanently incapable

entitlement to REA should be considered.

71432 If it is accepted that permanent incapacity for the regular occupation is satisfied, the date from which it is satisfied will depend on the type of case. If

1. the medical evidence results from a change in the claimant's condition, it may be reasonable to accept that permanency is satisfied from the date of the change

2. a long period of incapacity for the regular occupation leads to a medical opinion that the claimant will be permanently incapable of the regular occupation, permanency should not be accepted before the date of the medical opinion.

**Note:** The DM may seek medical advice on this issue (see DMG 71291 - 71293) before giving a decision.

71433 - 71436

### **Employment of equivalent standard**

71437 To satisfy the “permanent condition”, claimants have to show that they are incapable of alternative employment, but they do not have to be permanently incapable. The fact that a claimant has

1. followed such employment **and**
2. had a claim disallowed on these grounds

does not mean that the claimant cannot later satisfy the conditions<sup>1</sup>.

*1 R(I) 5/69*

71438 A person not incapable of following employment of an equivalent standard may become incapable later if

1. evidence is produced which establishes that the claimant was not in fact capable of employment of an equivalent standard or that it was not suitable
2. the disablement from the relevant loss of faculty has become worse since the last disallowance of REA
3. alternative employment is no longer of an equivalent standard due to changes in wage rates
4. work of an equivalent standard has ceased to exist (see DMG 71439).

71439 Where DMG 71438 4. applies it should be accepted that the claimant is incapable of following employment of an equivalent standard **unless** other suitable equivalent work can be found.

71440

### **Continuous condition**

71441 A claimant satisfies the continuous condition if, as a result of the relevant loss of faculty, they have been continuously incapable of

1. their regular occupation **and**
2. suitable employment of an equivalent standard

since the end of the period of 90 days (excluding Sundays) during which IIDB is not normally available to the claimant. There is no requirement about future prospects of returning to the regular occupation or to suitable employment of an equivalent standard after the period of award.

71442 In PD A10 cases where

1. the 90 day waiting period does not apply **and**
2. IIDB is available from the date of onset

it will not be necessary to determine whether the claimant satisfies the continuous condition, since they will probably be able to satisfy the permanent condition<sup>1</sup>.

*1 R(I) 2/81*

71443 Once continuity has been broken by the claimant becoming capable of following the regular occupation or employment of an equivalent standard the continuous condition cannot be satisfied later, unless clear evidence is produced that the claimant was not, in fact, capable. However, this does not apply where there

1. is a break in the continuity of disablement reflected by a gap between
  - 1.1 assessments or
  - 1.2 the end of the 90 day period and the first assessment (see DMG 71471 - 71474) or
2. are periods during which a claimant has worked in the regular occupation or employment of equivalent standard may be disregarded<sup>1</sup> if the work was done
  - 2.1 for rehabilitation training, or finding out if the claimant had recovered from the effects of the relevant injury (see DMG 71451)
  - 2.2 while awaiting surgical treatment for the effects of the relevant injury (see DMG 71461).

*1 SS (Gen Ben) Regs, reg 17*

71444 The DM should consider the permanent condition where

1. REA cannot be awarded under the continuous condition because continuity is broken **and**
2. none of the exceptions in DMG 71443 apply.

71445 Where a claimant has resumed work but is incapable of

1. the regular occupation **and**
2. of employment of an equivalent standard

the continuous condition will be satisfied. REA may need to be awarded on the basis of a comparison of earnings according to the extent of the claimants capabilities.