

# Chapter 71 - Reduced earnings allowance

## Contents

<b>Introduction</b> .....	71001
Conditions of entitlement.....	71010
Gap in entitlement on or after 1.10.90 .....	71012
Questions arising on a claim for REA .....	71022
<b>Regular occupation</b> .....	71041
Meaning of regular .....	71044
Meaning of occupation .....	71045
Determining the regular occupation .....	71052
Two or more employments or occupations at the same time .....	71061
Subsidiary occupations .....	71063
New occupations.....	71071
Training for new occupation.....	71074
Temporary absence from regular occupation.....	71081
Abandonment of regular occupation for health reasons.....	71091
Retirement from regular occupation .....	71096
Extension of regular occupation.....	71100
Return to regular occupation.....	71101
Claimant in full-time education .....	71102
<b>Effects of prospects of advancement</b> .....	71105
Prospects of advancement in regular occupation.....	71107
Evidence of prospects of advancement .....	71115
Incapacity for regular occupation or suitable work of equivalent standard.....	71121
Medical evidence .....	71135
Comparison of standards for purposes of awards .....	71141
DM's decision and related matters.....	71146
Prospects of advancement in pay .....	71155

<b>Return to regular occupation</b> .....	71171
Resumption of duties in full .....	71172
Resumption of duties under easier conditions .....	71176
Output and pay reduced .....	71181
Limitation on ability to use equipment or perform processes .....	71183
<b>Employment of an equivalent standard</b> .....	71201
Meaning of equivalent standard .....	71203
Excluded employments .....	71211
Not capable of following an occupation though engaged in one .....	71216
Effect of easier conditions in the regular occupation .....	71219
<b>Suitability of employment</b> .....	71231
Claimant engaged in or seeking an employment.....	71239
Claimant not registering for employment .....	71241
Suitability of employment outside home area .....	71251
Irrelevant conditions, including the effects of advancing years .....	71255
Onus of proof.....	71261
<b>Incapacity</b> .....	71281
Effects of overtime working.....	71288
<b>Medical advice</b>	
General.....	71291
Meaning of HCP.....	71294
Conflict of medical opinion .....	71304
Differences of opinion between medical adviser and occupational physician .....	71305
Differences of opinion between the medical adviser and the claimant's doctor .....	71307
Medical adviser states that claimant is incapable of regular occupation but not as a result of the relevant loss of faculty .....	71308
Circumstances requiring further medical advice .....	71331
<b>Non-medical evidence</b> .....	71346
Seeking employment.....	71347
Neither employed nor seeking employment.....	71356

Engaged in employment of less than equivalent standard .....	71357
Changes in the requirements of regular occupation .....	71360
Incapable before accident of full duties of regular occupation.....	71361
Unwilling to return to regular occupation because of risk of further injury .....	71362
Loss of confidence .....	71364
Impairment of vision .....	71366
Susceptibility to recurrence of relevant condition .....	71369
Is the claimant capable of alternative employment.....	71370
Occupational deafness.....	71375
PD A11 .....	71379
<b>Is incapacity the result of the relevant loss of faculty .....</b>	<b>71381</b>
Claimant suffering from more than one condition .....	71389
Other effective causes of disablement.....	71391
Conditions not included in, but claimed to result from the relevant loss of faculty.....	71398
Unconnected or supervening conditions.....	71401
<b>Permanent condition and continuous condition .....</b>	<b>71421</b>
Permanent condition .....	71422
Regular occupation .....	71423
Employment of equivalent standard.....	71437
Continuous condition.....	71441
Work for rehabilitation, training or trial .....	71451
Work while awaiting surgical treatment .....	71461
Gap in assessment .....	71471
Effect on award of gap in assessment.....	71475
<b>Comparison of standards of remuneration.....</b>	<b>71481</b>
Comparisons - equivalent standard .....	71485
Regular occupation full-time .....	71487
Regular occupation part-time.....	71491
Pieceworkers.....	71494

Comparisons - rate of REA payable .....	71495
Regular occupation full-time .....	71496
Regular occupation part-time.....	71500
Pieceworkers .....	71508
Table of examples.....	71510
<b>Exceptional employment</b> .....	71511
Subsidiary occupations .....	71518
Earnings not to be included .....	71519
Earnings to be included .....	71520
Sheltered employment.....	71521
<b>Factors affecting the standard of remuneration</b> .....	71532
<b>Additions to, and deductions from earnings</b> .....	71535
Payment in kind.....	71536
Concessionary coal.....	71537
Tips.....	71543
Payment to or from colleagues .....	71544
Uniform, travelling expenses, subsistence allowance, etc.....	71548
NCB pneumoconiosis scheme.....	71550
Deductions from pay .....	71551
<b>Remuneration in regular occupation</b>	
Standard of remuneration in regular occupation.....	71552
Regular occupation said to have ceased to exist .....	71554
Mechanisation and new technology.....	71558
<b>Removal to another locality</b> .....	71564
<b>Exceptional earnings</b>	
Short-time working .....	71571
Loss of overtime.....	71576
Seasonal variations.....	71581
Special responsibility allowances for councillors .....	71592
Overtime earnings.....	71601
Averaging of earnings .....	71607

Evidence of earnings from in the coalmining industry .....71621

**Indexation of earnings**

General.....71701

Earnings subject to indexation .....71706

Previous awards at maximum rate.....71711

Regular occupation has ceased to exist .....71714

Suitable alternative employment .....71721

Method of indexation .....71731

Tables of grouped occupations and index factors .....71736

Deciding the relevant occupational group.....71746

**Claimants over pensionable age**

Meaning of pensionable age .....71747

Claimants who retired on or before 5.4.87 .....71748

Claimants who retired on or before 10.4.88.....71755

Claimants who retired between 11.4.88 and 9.4.89 .....71759

Claimants who retired between 10.4.89 and 30.9.89 .....71760

Claimants who reach pensionable age on or after 1.10.89 .....71763

First claim made after claimant reached pensionable age .....71766

Giving up regular employment 1.10.89 - 23.3.96.....71767

Giving up regular employment 24.3.96 onwards .....71771

Retirement Allowance .....71777

Gender Recognition .....71781

**Provisions affecting payment**

Statutory limitations .....71782

Unemployability supplement .....71785

Successive accidents.....71787

    Successive accidents in same occupation .....71788

    Successive accidents in different occupations .....71789

    Accident followed by PD .....71793

REA or RA with a pension in lieu of gratuity .....71794

Rounding up.....71797

Regular occupation earnings less than maximum REA.....	71798
<b>Period of award</b> .....	71801
<b>Commencing date of award and related matters</b>	
Period covered by claim .....	71816
Entitlement established on first claim.....	71821
Entitlement established on a claim other than the first .....	71823
Entitlement not established .....	71826
Disallowance decision - type and effect.....	71831
Fresh claim following disallowance .....	71836
Appeal action.....	71852
<b>Special considerations arising on REA appeals and supersession</b>	
Appeals .....	71856
Additional points to be covered in the submission to First-tier Tribunal .....	71861
Pneumoconiosis - existence of recommended dust conditions.....	71866
New evidence introduced at the First-tier Tribunal hearing .....	71876
Action following the First-tier Tribunal decision .....	71881
Further claim received while appeal to Upper Tribunal is outstanding .....	71886
Supersession.....	71888
Capacity for work .....	71889
Earnings .....	71894
Uprating.....	71899
Supersession following disallowance.....	71906

# Chapter 71 - Reduced earnings allowance

## Introduction

71001 REA was introduced on 1.10.86 to replace SHA<sup>1</sup>. REA is a benefit in its own right unlike SHA, which was an increase of IIDB<sup>2</sup>. The case law on SHA can be applied to REA.

*1 SS CB Act 92, Sch 7, para 11(1); 2 SS Act 75, s 60*

71002 REA compensates for the loss of earnings capacity where, as a result of an IA or PD, employed earners are unable to

1. return to their regular occupation **or**
2. carry out other work producing as high a level of earnings.

71003 The term “reduced earnings” relates to the claimant’s inability to achieve as high a level of income as in the regular occupation. The fact that a claimant’s total income from reduced earnings from an alternative occupation, plus IIDB and REA is greater than earnings had the regular occupation continued is not relevant (but see DMG 71782 et seq for the limitation on the rate of REA payable).

71004 - 71009

## Conditions of entitlement

71010 To be entitled to REA claimants must<sup>1</sup>

1. be entitled to
  - 1.1 IIDB except for PD A10 (or would be entitled if it were payable where disablement is assessed at not less than 1%) **or**
  - 1.2 IIDB for PD A10 where a reassessment is not less than 20%<sup>2</sup> **and**
2. as a result of the relevant loss of faculty
  - 2.1 be incapable
    - 2.1.a and likely to remain permanently incapable of following their regular occupation **and**
    - 2.1.b of following an employment of equivalent standard which is suitable in their case **or**
  - 2.2 be, and have at all times since the end of a period of 90 days after the date of the relevant accident or disease have been, incapable of following that occupation or any such employment<sup>2</sup> (see DMG Chapter 69 for the 90 day period).

*1 SS CB Act 92, Sch 7, para 11(1); 2 SS (II) (PD) Regs, reg 34(6); 3 SS CB Act 92, Sch 7, para 11(1)*

- 71011 There is no entitlement to REA for
1. an accident which occurred on or after 1.10.90<sup>1</sup> **or**
  2. a disease prescribed
    - 2.1 or extended between 1.10.90 and 9.10.94 - **unless** the date of onset was before 1.10.90<sup>2</sup> **or**
    - 2.2 before 10.10.94 but extended after that date and the claim relates to the extension<sup>3</sup> **or**
    - 2.3 on or after 10.10.94<sup>4</sup>.

For the effect on individual PDs, see DMG Chapter 67.

*1 SS CB Act 92, Sch 7, para 11(1); 2 Sch 7, para 11(1); 3 II (PD) Regs, reg 14A;  
4 SS CB Act 92, Sch 7, para 11(1)*

## **Gap in entitlement on or after 1.10.90**

- 71012 A person who
1. is entitled to REA on 30.9.90 **and**
  2. ceases to be entitled to REA for one or more days from 1.10.90
- cannot again become entitled to REA for that accident<sup>1</sup> or PD (but see DMG 71015).

*1 SS CB Act 92, Sch 7, para 11(2)*

- 71013 REA can still be awarded where
1. a continuation claim is made for a period beginning on the day following the last day of entitlement **and**
  2. the DM accepts that the entitlement conditions have been continuously satisfied since 1.10.90<sup>1</sup>.

There may still be underlying entitlement to REA even though REA is not payable.

*1 SS CB Act 92, Sch 7, para 11(2)*

- 71014 REA entitlement is established on 30.9.90 if
1. there is an award of REA covering 30.9.90 **or**
  2. a claim made before 1.10.90 is disallowed on payability for a period which includes 30.9.90 **or**
  3. a claim made before 1.10.90 is disallowed on payability from and including a date before 1.10.90 where the date of the DM's decision is on or after 30.9.90 **or**
  4. a first ever claim is made after 1.10.90 for an accident or PD occurring before 1.10.90 and the normal conditions of entitlement are satisfied for a period which includes 30.9.90.

71015 A person who was **not** entitled to REA on 30.9.90, for example, initial entitlement starts after that date, is not affected by DMG 71012 and gaps in entitlement from 1.10.90 have no effect on future REA entitlement<sup>1</sup>.

*1 SS CB Act 92, Sch 7, para 11(2)*

71016 - 71021

## Questions arising on a claim for REA

71022 Except where otherwise stated, all questions arising on a claim for REA are decided by a DM and can be reconsidered, superseded or revised.

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

71023 The DM should consider, in the order listed, whether

1. the claim is for an accident occurring before 1.10.90 or for a PD for which entitlement could arise (see DMG 71011)
2. there is a current assessment of disablement
3. the claimant had a regular occupation at the relevant date and, if so, what was it (see DMG 71041 - 71102)
4. the claimant is currently in employment and if
  - 4.1 that employment appears to be in the regular occupation, whether the circumstances are such that the claimant can still be regarded as incapable of following that occupation (see DMG 71171 - 71188) **or**
  - 4.2 it is not in the regular occupation, whether it suitable employment of equivalent standard and, if it is, whether there is any doubt that the claimant is capable of following it (see DMG 71201- 71221 and DMG 71231 - 71262)
5. there are any prospects of advancement (see DMG 71107 - 71158)
6. if the claimant
  - 6.1 is not currently employed **or**
  - 6.2 is employed in an occupation which is not the regular occupation nor suitable employment of equivalent standardthis is as a result of the relevant loss of faculty (see DMG 71231 - 71405)

7. if, as the result of the relevant loss of faculty, the claimant is currently incapable of following the regular occupation and suitable employment of equivalent standard the
  - 7.1 claimant has been continuously incapable since the end of the period of 90 days (excluding Sundays) from the date of accident or onset of the PD **or**
  - 7.2 relevant loss of faculty is likely to make the claimant permanently incapable of following the regular occupation (see DMG 71421 - 71474)
8. if the conditions are satisfied, at what rate and for what period REA is to be awarded (see DMG 71801 - 71811).

Special considerations for REA reviews and appeals are in DMG 71856 - 71909.

71024 - 71040

## Regular occupation

71041 One of the conditions for the award of REA is that the claimant is incapable of following their regular occupation. It is therefore necessary to establish whether the claimant had a regular occupation and, if so, what it was. This must usually be considered in relation to the date of the accident or date of onset of the disease<sup>1</sup>. This date is important and is referred to as “the relevant date”.

*1 R(I) 18/60*

71042 If at the relevant date the claimant

1. had no regular occupation **and**
  2. cannot be considered as having a regular occupation
- there can be no entitlement to REA<sup>1</sup>.

*1 CWI 29/49(KL); R(I) 18/60*

71043

## Meaning of regular

71044 “Regular” refers to what is normal, usual and of a permanent character. It does not mean “recognized” but relates to the doing of the same activity frequently, which the claimant had been following as an occupation<sup>1</sup>.

*1 R(I) 11/65*

## Meaning of occupation

71045 The word “occupation” refers to a

1. trade **or**
2. profession **or**
3. type of work (usually quite narrowly defined)

rather than a particular employment with a particular employer. The occupation must relate to what the claimant had actually been regularly doing.

71046 - 71051

## Determining the regular occupation

71052 REA is related to loss of earning power, so that a claimant's regular occupation need not be

1. employed earner's employment **or**
2. confined to the work actually being done at the time of an accident<sup>1</sup>.

The regular occupation must however be a gainful occupation. Unpaid work should be ignored<sup>2</sup>.

*1 R(I) 15/56; 2 CI 441/50(KL)*

71053 Where at the relevant date the claimant

1. is engaged in one specific occupation, usually in a particular employment **and**
2. has followed that occupation for some time **and**
3. intends to continue to follow that occupation

this should be considered the regular occupation.

71054 Sometimes the claimant may have

1. more than one occupation at the relevant date **or**
2. recently changed occupations **or**
3. left the occupation before the relevant date.

In these situations see DMG 71061 - 71102.

71055 Where a claimant's employment before the relevant date was in a grade which was one of a number of grades, through which an employee was expected to progress or else have to leave the employment, the claimant's regular occupation is

1. the full range of grades **and**
2. not just the grade in which the claimant was employed at the relevant date<sup>1</sup>.

The regular occupation can also be extended to include any other occupation to which the claimant had prospects of advancement. Further guidance is at DMG 71105 - 71117.

*1 R(I) 52/53*

71056 - 71060

## Two or more employments or occupations at the same time

71061 If, at the relevant date, the claimant was

1. regularly employed by two or more employers at the same time
2. doing exactly the same type of work in each employment

the regular occupation will consist of that type of work. The DM should add the remuneration from those employments together when assessing the level of remuneration in that occupation.

71062 A claimant may regularly follow two or more occupations at the same time, with the same or different employers. The regular occupation

1. should include all the occupations followed apart from subsidiary occupations (see DMG 71063 et seq) and the earnings should be added together in assessing the standard of remuneration in the regular occupation<sup>1</sup>
2. can include a number of different occupations regularly followed according to the season of the year.

**Note 1:** The principle in 1. applies where the claimant has two P/T employments and one is no more important than the other<sup>2</sup>.

**Note 2:** Where 2. applies earnings should be averaged after adding them together so that a weekly standard of remuneration can be calculated.

*1 R(I) 43/52; R(I) 24/55; R(I) 11/65; 2 R(I) 33/58*

### Subsidiary occupations

71063 A person's regular occupation cannot include any subsidiary occupation<sup>1</sup>.

*1 SS CB Act 92, Sch 7, para 11(5)(a)(b)*

71064 Where a person is following two or more separate and distinguishable occupations, one or more of which forms the principal occupation, the others are subsidiary. If a person is following only one occupation

1. there can be no question of it being a subsidiary occupation, even though the wages and the hours worked might be very small<sup>1</sup> **and**
2. one of two or more employments in the same occupation cannot be regarded as subsidiary<sup>2</sup>.

*1 CI 441/50(KL); 2 R(I) 10/65*

### Example 1

Colin is employed as a Banksman in a coal mine working normal weekly shift and a special voluntary staff shift entailing work in the mine moving girders. Colin was unable to do the special shift because of the relevant loss of faculty. The regular occupation consists of both types of work.

### Example 2

Brian worked as a surface worker at a coal mine. Outside normal working hours he worked on contract unloading timber. As a result of the relevant loss of faculty Brian followed a lighter job at the mine and was unable to do the work unloading timber. The work unloading timber was a subsidiary occupation<sup>1</sup>.

*1 CWI 30/50(KL)*

71065 - 71070

### New occupations

71071 The length of time a person has been following an occupation is not necessarily important. The DM should accept it as the regular occupation if the intention was to do the work regularly.

71072 If, before the relevant date, a person has changed from one occupation to another, the more recent occupation can become the regular occupation<sup>1</sup>. However, that does not apply where the claimant was not physically capable of carrying out the more recent occupation even if there was a genuine wish to follow it<sup>2</sup>.

*1 CWI 55/50; 2 R(I) 18/60*

### Example

Claire sustains an injury within an hour of taking up a new job which she was physically capable of doing when she started it. Both Claire and her employer had intended that the new job would be the regular job. The new job should be regarded as the regular occupation regardless of the earlier employment history. See DMG 71081 for temporary changes.

71073 In the absence of clear evidence to the contrary the regular occupation should be the occupation which caused

1. the accident **and**
2. the loss of earning power.

The DM should decide that the claimant had no regular occupation where the claimant has a long history of little or no regular employment<sup>1</sup>.

*1 R(I) 18/60*

## Training for new occupation

71074 Employees may suffer an IA during a course of training for a new occupation, even before they work in any of the duties of that occupation. Where there is clear evidence, the new occupation can be regarded as the regular occupation if the employee

1. was accepted by the employer as a trainee for that occupation **and**
2. had good prospects of being employed in that occupation on completion of the training<sup>1</sup>.

*1 CI 442/50(KL); R(I) 31/58*

71075 This will also apply where the period of training has been completed but at the relevant date the claimant had not yet started the occupation for which the training was given<sup>1</sup>.

*1 R(I) 4/60; R(I) 3/60*

71076 But where at the relevant date the claimant was engaged in employment before the start of training, no account should be taken of the intended training. The regular occupation, if any, will be that being followed at the relevant date<sup>1</sup>.

*1 R(I) 3/60*

71077 If the evidence available does not establish good prospects of employment in the new occupation the regular occupation should be that of trainee in the occupation. This is likely to be the case where the trainee is not making satisfactory progress<sup>1</sup>.

*1 R(I) 1/63*

71078 - 71080

## Temporary absence from regular occupation

71081 An occupation may be accepted as the regular occupation, even though the claimant was employed in some other occupation at the relevant date. This will be the case if the claimant can establish that

1. the change of occupation was temporary **and**
2. there was an intention to return to the former occupation in due course **and**
3. there were reasonable prospects of returning to it.

71082 In such a case, the DM should consider

1. the claimant's employment history **and**
2. the reasons for the claimant's change of occupation **and**
3. any evidence, medical or otherwise, of the likely prospects of the claimant resuming the former occupation **and**

4. the length of time since that occupation was last followed by the claimant **and**
5. if any attempt had been made by the claimant to obtain or undertake employment in the former occupation.

Even if the claimant had made persistent efforts to return to the former occupation, the DM can decide that after a long period of time, the occupation had ceased to be the regular occupation.

71083 The DM should accept an occupation as temporary if for example

1. the claimant left the earlier occupation for health reasons **and**
2. it can be shown that the
  - 2.1 later occupation was taken on as a short-term measure or stop gap until the former occupation could be resumed **or**
  - 2.2 claimant hoped that it would aid recovery<sup>1</sup>.

*1 CI 80/49(KL); R(I) 34/51*

71084 In a PD case the occupation that caused the disease and loss of earning power should normally be the claimant's regular occupation. The exception is where there is clear evidence that the occupation was left before the date of onset<sup>1</sup>.

*1 R(I) 5/52*

71085 The same considerations apply where a claimant

1. left the occupation which is
  - 1.1 claimed to be the regular occupation, because of unemployment or redundancy **and**
  - 1.2 took other work as a temporary measure<sup>1</sup> **or**
2. started a new occupation experimentally to see if it was better than the former occupation<sup>2</sup>.

*1 R(I) 22/52; R(I) 9/55; 2 R(I) 44/52; R(I) 65/54*

71086 But where an employer

1. starts a job that is experimental, such as a trial **and**
2. discontinues this trial job soon after it has started

it should not be regarded as the regular occupation of a claimant who had taken part in the trial.

71087 - 71090

## Abandonment of regular occupation for health reasons

71091 The usual effect of abandoning an occupation before the relevant date is that the occupation cannot be accepted as the regular occupation for REA purposes. For example, when a person who has changed occupations cannot establish that

1. the change was temporary under the principles set out in DMG 71081 - 71086 **and**
2. there were reasonable prospects of resuming the former occupation

the occupation cannot be accepted as the regular occupation.

71092 A person who abandoned an occupation may have that occupation treated as the regular occupation for REA purposes<sup>1</sup> if the occupation was abandoned

1. before the first day for which there is an assessment of disablement of at least 1% **and**
2. as a result of the relevant disease **and**
3. at any time after the person had been employed in employed earner's employment in any occupation prescribed for that disease.

*1 SS (II) (PD) Regs, reg 17*

71093 DMs should note that

1. the expression "relevant disease" includes any attack of the same disease<sup>1</sup>
2. the occupation must have been abandoned before the first day for which there is an assessed loss of faculty
3. they can accept that the regular occupation was abandoned as the result of a disease even though a DM may have decided on an earlier claim, before or after the date of abandonment, that the claimant was not suffering from that disease
4. it does not follow that because it is accepted that a claimant abandoned an occupation because of the relevant disease it must also be accepted that the disease prevented them following that occupation as that is a question which they must decide on the available evidence.

*1 R(I) 4/69*

71094 - 71095

## Retirement from regular occupation

71096 A person who retires from an occupation **after** the relevant date may still have that occupation accepted as the regular occupation<sup>1</sup>.

*1 CI 258/49(KL)*

71097 If a person retires from an occupation **before** the relevant date the DM should consider whether

1. the pre-retirement occupation may still be treated as the regular occupation<sup>1</sup> (see DMG 71084 - 71086)
2. the claimant may by retirement have abandoned the occupation without later on taking up the same or any other employment; the effect is that that occupation cannot be accepted as the regular occupation for REA purposes<sup>2</sup>
3. claimants may be able to establish that, despite retirement, they did in fact have a regular occupation, having returned to employment in the same or another occupation and this will depend largely on the
  - 3.1 reasons for resuming work **and**
  - 3.2 intentions and prospects of continuing in the employment.

*1 SS (II) (PD) Regs, reg 17; 2 CWI 29/49 (KL)*

### Example 1

Malcolm is recalled to his former employment for a limited period to assist his successor. Malcolm is unable to show an intention to follow that employment regularly.

### Example 2

Stan takes up employment after retirement, with the intention of following it regularly - that employment is accepted as the regular occupation.

71098 An occupation cannot be accepted as regular if

1. it is merely temporary **or** casual **and**
2. the claimant has no intention or prospects of following it regularly.

71099 RP can be paid together with IIDB and REA, but see DMG 71782 et seq for restrictions on the rate of REA payable.

## **Extension of regular occupation**

71100 In considering what is a person's regular occupation, it may be appropriate to take account of the prospects of advancement

1. when assessing standards of remuneration<sup>1</sup> **and**
2. by including occupations to which the claimant would in the normal course have been advanced<sup>2</sup>.

*1 SS CB Act 92, Sch 7, para 11(5); 2 para 11(6)*

## **Return to regular occupation**

71101 The DM should consider the circumstances carefully where the claimant appears to have resumed the regular occupation, but the re-employment terms differ from the usual terms for that occupation. For example it may be that the tasks and duties have been changed. Where the change is due to the relevant disability, it may be appropriate to consider the occupation being followed as quite different from the regular occupation.

## **Claimant in full-time education**

71102 A claimant who has no regular occupation may suffer an accident while in employed earner's employment. That employment should be treated as the regular occupation if, at the time of the accident, a course of FTE was being followed<sup>1</sup>

1. by attendance at a recognized educational establishment **or**
2. elsewhere if the education is recognized by the Secretary of State under certain legislation<sup>2</sup>.

Any temporary interruption of FTE should be ignored if it is less than six months, or any longer period that the DM decides.

*1 SS (II & D) Misc Prov Regs, reg 2(1); 2 SS CB Act 92, sec 142(2)*

71103 - 71104



## Effects of prospects of advancement

71105 When considering the effects of a claimant's prospects of advancement can affect the claim for REA DMs should note that

1. in assessing the standard of remuneration in any employment, including a person's regular occupation, they should look at any reasonable prospects of advancement<sup>1</sup> (see DMG 71155 - 71158)
2. a person's regular occupation should include employment<sup>2</sup> to which
  - 2.1 people employed in that occupation would normally be advanced **and**
  - 2.2 the claimant would have had normal prospects of advancement if the occupation had been followed **without** the effects of the relevant loss of faculty.

The claimant should be treated as incapable of following the occupation when is deprived in whole or in part of those prospects as a result of the relevant loss of faculty.

*1 SS CB Act 92, Sch 7, para 11(5); 2 Sch 7, para 11(6)*

71106 DMG 71105 **1.** refers to the standard of remuneration in **any** employment which can be considered for REA purposes<sup>1</sup>. DMG 71105 **2.** refers to the regular occupation **only**<sup>2</sup> and is more likely to be favourable to the claimant. Where loss of prospects of advancement is questioned, the regular occupation should be considered first.

*1 SS CB Act 92, Sch 7, para 11(5); 2 Sch 7, para 11(6)*

## Prospects of advancement in regular occupation

71107 Claimants who<sup>1</sup>

1. have a current assessment for a loss of faculty **and**
2. would have had well-defined prospects of advancement to better paid work if they had continued in their regular occupation without suffering the relevant loss of faculty **and**
3. have since the accident or PD been incapable of doing that better paid work or work of an equivalent standard, as a result of the relevant loss of faculty.

may receive REA, or a higher rate of REA, from the date when they would have been advanced to the better paid work had they been able to do so.

*1 SS CB Act 92, Sch 7, para 11(6)*

71108 Claimants must show that

1. at the date of the accident they belonged to a group of employed people who are normally advanced to better paid work **and**
2. their own prospects of advancement were as good as those of others in their group.

The claimant's regular occupation can then be extended to include the better paid work to which they would have been advanced.

**Example**

If the occupation regularly followed at the time of the accident was student nurse, and nurse is the occupation to which the claimant would have been advanced, the "extended" regular occupation becomes nurse.

71109 Claimants who have good prospects of advancement cannot be assisted by this provision **unless** they establish that they belong to a group or class of employed people who are normally advanced to better paid work.

71110 Such a group will often include members of the claimant's regular occupation as a whole. But it may include only a small number taken from a clearly definable group, class or description of employees, for example those with certain experience or seniority. A group cannot consist of the claimant alone. But see DMG 71155 - 71158.

71111 When considering if a group or description of people is normally advanced, the DM should take into account the prospects of the group as a whole. If it is the accepted practice of the employment that the members of the claimant's regular occupation

1. as a whole **or**
2. within a general class or description of workers to which they belonged

would probably be advanced the condition at DMG 71108 will be met. Where a certain grade is regarded as the "career grade" in any career structure, it can be accepted that any person in that structure is normally advanced to that grade.

71112 Advancement must be virtually automatic: that is, where only some specific personal circumstance such as age, inefficiency, absenteeism or ill health would prevent the advancement<sup>1</sup>. Where advancement is by a selection process the claimant will not usually be able to satisfy the conditions<sup>2</sup>.

*1 R(I) 8/67; 2 R(I) 8/73; R(I) 8/80*

71113 - 71114

## **Evidence of prospects of advancement**

71115 Where the claimant states that prospects of advancement have been lost, the case should be referred to the DM before an enquiry is sent to the employer. The DM will decide

1. what questions to ask the employer to decide if the conditions in DMG 71108 are satisfied **and**
2. if an award of REA can be made while enquiries are proceeding, that is if it is possible to award without extending the regular occupation as in DMG 71107.

71116 The DM should

1. make it clear to the employer that any information given can be seen by the claimant
2. remember that the employer's opinion may have been based on records which the claimant has not necessarily seen
3. not make enquiries to employers who have indicated that they are unwilling to give further information.

71117 If the replies do not confirm the claimant's statements, the claimant should be given an opportunity of

1. commenting on the employer's statement **and**
2. submitting further evidence before a decision is given.

71118 - 71120

## **Incapacity for regular occupation or suitable work of equivalent standard**

71121 DMG 71281 et seq gives guidance on incapacity for REA purposes. That guidance, subject to the modifications in DMG 71122 - 71127, is also applicable to cases in which it has been accepted that there are prospects of advancement in the regular occupation.

71122 If claimants are incapable of their regular occupation they are also incapable of the extended regular occupation. Although claimants may return to the work which they were doing at the time of the accident they are incapable of their regular occupation if, because of the relevant loss of faculty, they are incapable of doing the better paid part of the work.

71123 In the same way claimants incapable of the pre-accident work, who obtain employment in the better paid part of the occupation, are incapable of their regular occupation. But in these circumstances they would be capable of work of an equivalent standard to what they were doing before the accident.

71124 If a claimant is capable of following a suitable alternative employment, this can only be considered as of an equivalent standard when the remuneration

1. in the extended regular occupation **and**
2. in the suitable alternative employment

is the same.

71125 Once it is established that advancement would have occurred, the REA entitlement provisions must then be applied in relation to the regular occupation as redefined, to include the better paid work. Claimants can then show that as the result of the relevant loss of faculty

1. they have been continuously incapable of their regular occupation (as redefined) **or**
2. that they are likely to remain permanently incapable

although they have returned to work in the regular occupation as previously defined.

71126 If

1. a claimant's regular occupation is extended **and**
2. the claimant is advanced to the better paid work **and**
3. the claimant later becomes unfit for it because of the relevant loss of faculty

the claimant is incapable of the regular occupation although still fit for the pre-accident job<sup>1</sup>. The claimant cannot satisfy the "continuous" condition unless the limits in DMG 71441 are satisfied.

*1 SS CB Act 92, Sch 7, para 11(6)*

71127 Where entitlement to REA depends entirely on the prospects of advancement to better paid work, claimants cannot become entitled until the date on which they would have been advanced.

71128 - 71134

## **Medical evidence**

71135 If a medical adviser has already advised that the claimant is incapable of the pre-accident work

1. it **will not** be necessary to obtain medical advice on the claimant's capacity for the "extended" occupation whilst the incapacity lasts **but**
2. it **will be** necessary to obtain medical advice on the claimant's capacity for the "extended" occupation if work is being sought in that occupation.

71136 If a medical adviser has advised that the claimant is capable of the pre-accident work or the claimant has returned to the pre-accident work medical evidence should be obtained on the claimant's capacity for the extended occupation, if necessary when the date of maturity approaches.

71137 A full description of the occupation on which advice is required should be given to the medical adviser.

71138 - 71140

## **Comparison of standards for purposes of awards**

71141 A comparison should be made between the standard of the

1. suitable employment of which the claimant is capable **and**
2. regular occupation

during the period for which benefit is being considered<sup>1</sup>. If the claimant would not by then have been advanced to the better paid work, it should not be taken into account when deciding the standard of remuneration in the regular occupation<sup>2</sup>.

*1 SS CB Act 92, Sch 7, para 11(10); 2 R(I) 10/63*

71142 - 71145

## **DM's decision and related matters**

71146 The DM's acceptance or rejection of prospects of advancement is not a formal decision which is notified to the claimant. It is a preliminary finding of fact which may be necessary to the decision on the actual claim for REA. However, a clear note in the claimant's papers of the

1. DM's findings **and**
2. date on which it is considered likely that the claimant's prospects of advancement have, or will have, matured

will show that the matter has been considered, as in the following examples.

### **Example 1 - No prospects of advancement<sup>1</sup>.**

This would be appropriate where the claimant's contention was rejected after enquiry.

### **Example 2 - Prospects of advancement. Expected date of maturity<sup>2</sup>.**

This would be appropriate where the contention has been accepted but the probable maturity date would not permit an award (or increased award) at the time of consideration.

### **Example 3 - Loss of prospects of advancement, maturity accepted from<sup>3</sup>.**

This would be appropriate in other cases.

*1 SS CB Act 92, Sch 7, para 11(6); 2 para 11(6); 3 para 11(6)*

71147 When it has been decided that the claimant had prospects of advancement, which have or will have been lost, DMs should note that

1. if the
  - 1.1 prospects of advancement would have matured by the beginning of the period under consideration **and**
  - 1.2 claimant is incapable, because of the relevant loss of faculty, of following the regular occupationthey should make an award in the normal way, taking account of the standard of remuneration in the extended regular occupation **or**
2. if it is accepted that the prospects of advancement would have matured in the period under consideration then, provided that the claimant is incapable as in **1.2**, they should give a decision in two parts (see DMG 71148) **or**
3. if the prospects of advancement would not have matured within the period under consideration, they should not be taken into account and
  - 3.1 the claim should be disallowed **or**
  - 3.2 an award made at the rate appropriate to the original regular occupation.

The DM should advise claimants to notify the DWP office when they consider that they would have been advanced to the better paid work.

71148 The two parts in DMG 71147 **2.** are

1. up to the date the prospects of advancement would have matured, either a disallowance or an award at the rate for the original regular occupation **and**
2. after the date the prospects would have matured, an award made for an appropriate period at the rate that takes account of the advanced standard of the extended regular occupation<sup>1</sup>.

*1 R(I) 10/63*

71149 The DM can reconsider the decision and supersede it where

1. an award has already been made **and**
2. enquiries are being made, as in DMG 71115 **and**
3. the enquiries show that the rate should be increased or the period altered.

The guidance in DMG 71147 - 71148 should be applied to the new decision.

**Note:** See DMG Chapter 04 for full guidance on supersession.

71150 If enquiries about prospects of advancement were made before the date when the claimant eventually claims advancement would have taken place, the DM deciding a later claim

1. should consider the findings recorded by the DM at the time the enquiries were made
2. is not bound by those findings **but** should
  - 2.1 be satisfied that the position on prospects of advancement has not changed **and**
  - 2.2 if necessary, seek confirmation that the claimant's prospects would now have matured.

If the DM accepts that prospects would have matured by then, the maturity date should be noted as in DMG 71146 2. or amendments made to any date already recorded.

71151 Where a claim involving prospects of advancement has been disallowed on any other ground and an application for reconsideration has not changed the decision the case can go to a FtT **and**

1. all the evidence of these prospects should be put to the FtT **and**
2. the DM should deal with the subject in the submission, so that the FtT can consider the claimant's statement in addition to any other issues arising.

71152 - 71154

## **Prospects of advancement in pay**

71155 Reasonable prospects of advancement are taken into account in assessing the standard of remuneration in any employment, including the regular occupation<sup>1</sup>. This applies only to reasonable prospects of advancement in pay (for example an incremental scale) within the particular occupation or employment under consideration<sup>2</sup>.

*1 SS CB Act 92, Sch 7, para 11(5); 2 Sch 7, para 11(6)*

71156 Reasonable prospects does not include promotion to a different occupation<sup>1</sup>. The DM should note that

1. the provision cannot assist a person who is capable of following the extended regular occupation<sup>2</sup> because it relates to standards of remuneration which it is not necessary to consider if the claimant is capable of the regular occupation **and**
2. it is the claimant's personal prospects only which are important.

*1 R(I) 44/51; R(I) 8/67*

- 71157 Any decision that other employment is of an equivalent standard to the regular occupation will hold good until such time as advancement re-establishes a difference in standards.
- 71158 Evidence obtained from an employer will usually be good enough to decide the claimant's prospects of advancement. Where the continuous condition is satisfied the DM should
1. calculate the rate and period of award **and**
  2. include the effects of advancement on the regular occupation earnings only after the date of advancement (see DMG 71141).

71159 - 71170

## Return to regular occupation

71171 Where the claimant returns to work after a period of incapacity the DM must decide if that employment is in the claimant's regular occupation. There can be no entitlement to REA if it is the regular occupation and the claimant is capable of it.

## Resumption of duties in full

71172 Where a claimant

1. resumes employment in the regular occupation **and**
2. carries out all the tasks and duties in the same way as before the relevant injury

the claimant cannot be regarded as incapable of following the regular occupation during the period of this employment.

71173 However

1. a claimant can suffer an injury **and**
2. the true extent and severity of the injury is not discovered until a long time after the accident **and**
3. the claimant resumes the regular occupation during this time
  - 3.1 in full **or**
  - 3.2 under easier conditions

perhaps earning as much as before the accident.

If, when the full severity of the injury is discovered, the evidence establishes that in fact the claimant was not capable of the work and should not have returned to it, the claimant can be considered incapable of following the regular occupation<sup>1</sup>. This principle may enable the claimant to satisfy the continuous condition.

*1 R(I) 72/53*

71174 Claimants cannot be considered to have resumed the regular occupation, where they

1. resume the pre-accident employment **and**
2. are unable to accept grade to grade advancement, which is an essential part of that employment

because the pre-accident grade is only part of the regular occupation<sup>1</sup>.

*1 R(I) 52/53*

71175

## Resumption of duties under easier conditions

71176 Even though a claimant has apparently resumed the regular occupation, enquiries may reveal

1. that the tasks and duties **or**
2. the terms under which the claimant has been re-employed

have been changed to such an extent that a different occupation is being followed.

71177 The fact a claimant may

1. work
  - 1.1 more slowly **or**
  - 1.2 for fewer hours **or**
  - 1.3 less productively **or**
2. be receiving a different level of pay

is not conclusive. The test is whether the claimant is able to fulfil all the ordinary duties that employers expect of a person in the relevant occupation<sup>1</sup> with the relevant loss of faculty.

*1 R(I) 29/52; CI 443/50(KL)*

71178 In applying this test in cases where it is claimed that the relevant loss of faculty prevents a claimant from working overtime **or** returning to the regular occupation it is necessary to establish the employer's requirements.

71179 If the employer would not normally engage anyone unable to work overtime

1. the claimant cannot be regarded as fulfilling the ordinary requirements of the employer in the particular employment **and**
2. provided the claim is supported by medical evidence, the claimant will not be capable of the regular occupation.

However if the working of overtime in the regular occupation is entirely voluntary, it should be disregarded in considering the requirements of the employer even if the medical evidence shows that the claimant is unable to work overtime.

71180 Examples of the type of situation in which it might be necessary to decide if the claimant had resumed the regular occupation are given in DMG 71181 et seq.

### Output and pay reduced

71181 The test will normally show that claimants are not capable of the regular occupation **only** if their reduction in output is such as to end the occupation as a regular occupation<sup>1</sup>. But where claimants can return only P/T to a job formerly carried on F/T they may succeed<sup>2</sup>.

*1 CI 447/50(KL); CI 448/50(KL)(T); R(I) 3/55; 2 CI 444/50(KL)*

71182 If claimants are simply unable to work overtime, they will not have established incapacity for their regular occupation **unless** that limitation would prevent them getting a job with another employer<sup>1</sup>.

*1 CI 443/50(KL); CI 446/50(KL); R(I) 58/53;*

### **Limitation on ability to use equipment or perform processes**

71183 Claimants may also be able to show incapacity for their regular occupation if they

1. are unable to use certain equipment<sup>1</sup> **or**
2. need the assistance of fellow workers to carry on the previous work<sup>2</sup> **or**
3. are given the old job out of the kindness of the employer<sup>3</sup>.

*1 CWI 30/50(KL); CWI 69/50(KL); 2 R(I) 29/52; R(I) 39/52; R(I) 5/58;*

*3 CI 445/50(KL); R(I) 39/55*

#### **Example 1**

Claimants may be prevented from carrying out a heavy but essential part of their work, in which case the incapacity condition would be satisfied<sup>1</sup>.

#### **Example 2**

Claimants may have returned to the same basic grade but be employed on entirely different operations<sup>2</sup>.

*1 CI 205/50(KL); R(I) 43/52; 2 R(I) 66/51; R(I) 1/52; R(I) 7/58*

71184 Where claimants are prevented from carrying out a particular process but can still fulfil all the requirements of an employer in that occupation, they cannot be regarded as not having returned to the regular occupation<sup>1</sup>.

*1 R(I) 10/59*

71185 Cases where earnings come only from piecework should be distinguished from those where piecework forms only part of the earnings<sup>1</sup>.

*1 CI 446/50*

71186 In a case in which earnings come from piecework only, the test is whether, as a result of the relevant loss of faculty, claimants are incapable of attaining the level of earnings of

1. their regular occupation **or**
2. any employment of equivalent standard that is suitable in their case<sup>1</sup>.

*1 R(I) 4/77; Appendix to R(I) 7/69*

71187 Where earnings in the regular occupation are wholly or mainly based on commission which is reduced because of the relevant loss of faculty, the DM should consider if the number of hours now worked is substantially reduced. If they are, the claimant should be regarded as incapable of the regular occupation<sup>1</sup>.

*1 R(I) 6/66*

71188 Guidance on the question of whether the employment being followed is employment of an equivalent standard is given at DMG 71201 - 71221.

71189 - 71200

## Employment of an equivalent standard

71201 If the claimant has not resumed the regular occupation, or cannot be regarded as having resumed the regular occupation (see DMG 71176 - 71188), the DM should consider if

1. there is any work which
  - 1.1 is suitable for the claimant **and**
  - 1.2 the claimant is not prevented from doing by the relevant loss of faculty **and**
2. this employment is of an equivalent standard to the regular occupation.

The claimant cannot be entitled to REA whilst capable<sup>1</sup> of suitable employment of an equivalent standard.

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

71202

## Meaning of equivalent standard

71203 For REA purposes the word “standard” refers to a standard of remuneration. Remuneration is the amount of money (or its equivalent) people receive in return for their services<sup>1</sup>.

*1 CW 17/49(KL)*

71204 In deciding if an employment is of an equivalent standard the DM should make a comparison between the standard of remuneration in the

1. regular occupation **and**
2. suitable alternative employment.

In assessing the standard of remuneration the nature and conditions of the work are irrelevant to the question<sup>1</sup>.

*1 R(I) 7/69, Appendix*

71205 The standards to be considered are those which represent the normal level of earnings in the employment for the normal number of hours worked by people in that employment. Where it is evident that a claimant

1. has earned significantly **more** than normal for the occupation **and**
2. would still be earning more but for the injury

a more detailed description of the claimant’s regular occupation maybe necessary.

71206 Where a claimant has earned significantly **less** than normal for the occupation

1. the standard regular occupation should be used **and**
2. any personal shortfall taken into account when assessing likely earnings for comparison purposes.

Similar individual considerations apply where the regular occupation was carried out P/T or solely on a piecework basis.

71207 The DM should take a broad view when deciding if an employment is of equivalent standard to the regular occupation. If the difference between the two standards is only minor (for example, less than one per cent of the standard for the regular occupation), the standards should be regarded as equivalent **unless**

1. this would cause payment on the earlier REA claim to stop **and**
2. the pattern of earnings had not changed a lot.

71208 - 71210

### **Excluded employments**

71211 Only employed earner's employment can be considered as "employment of equivalent standard"<sup>1</sup>

*1 SS CB Act 92, Sch 7, para 11(5)*

71212 Excluded employment is usually self-employment. When the question of an excluded employment arises DMs should note

1. HMRC decide if the claimant's employment is employed earner's employment
2. they should decide whether physical and mental capabilities mean that claimants can be considered as capable of the same or a similar occupation in employed earner's employment where they are employed in excluded employment
3. if the excluded employment requires some aptitude not normally needed in any employed earner's employment, the claimant might remain incapable of suitable employed earner's employment of equivalent standard
4. a claimant following an excluded employment with a lower standard of remuneration than that of the regular occupation can still be considered capable of a suitable employed earner's employment which is of a standard equivalent to that of the regular occupation<sup>1</sup>.

*1 CI 351/50(KL)*

71213 - 71215

## Not capable of following an occupation though engaged in one

71216 Claimants may appear to be engaged in an occupation although they are not in fact capable of following it, where for example they

1. have to be helped by their workmates **or**
2. through the goodwill of the employer, are paid the rate for an occupation whilst actually performing work of a lower standard.

In these circumstances they cannot be considered capable of the occupation in question<sup>1</sup>. But sometimes, although a person's disabilities mean that they cannot do certain tasks, the facts may show that their contribution to the work in a particular occupation is so valuable that they cannot be regarded as incapable of it<sup>2</sup>.

*1 R(I) 26/53; 2 R(I) 29/52*

71217 An occupation must be a recognized occupation, to be taken into account for comparison as an equivalent occupation. DMs should note that a

1. recognized occupation is an occupation in which employees are normally employed
2. restricted range of duties cannot be treated as an equivalent occupation even though the earnings for that restricted range of duties are the same as those earned before the accident for a full range of duties<sup>1</sup>.

*1 R(I) 7/58*

71218 Once the occupation has been identified, the DM should decide whether the claimant can fulfil all the ordinary requirements of employers in that occupation<sup>1</sup> despite the relevant loss of faculty. Where a person starts a job in ignorance of the true nature of the injury suffered, the evidence may show that the person is not actually capable of work<sup>2</sup>.

*1 R(I) 29/52; 2 R(I) 72/53*

## Effect of easier conditions in the regular occupation

71219 If a claimant

1. is incapable of the regular occupation **and**
2. returns to the former employment under easier conditions and still receives the same standard of remuneration

the question of entitlement will depend on the circumstances<sup>1</sup>. Incapacity for the regular occupation is normally decided on an impersonal basis and can only apply if the work done by the claimant is in a recognized occupation. Where claimants are employed in a recognized occupation then they must be considered capable of work to an equivalent standard.

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

71220 A claimant who

1. retains the standard of remuneration appropriate to the regular occupation through the goodwill of the employer **and**
  2. is engaged in lesser work which does not constitute a recognized occupation
- will be entitled to REA, but it would not be payable<sup>1</sup>.

*1 SS CB Act 92, Sch 7, para 11(10) & (11)*

71221 Where claimants are capable of and engaged in employment of equivalent standard it does not help them to argue that, because of the lessened duties, they are not really earning the money they receive<sup>1</sup>.

*1 R(I) 29/52*

71222 - 71230

## Suitability of employment

71231 Where the evidence shows that the claimant is capable of some alternative employment, the DM should consider what work is suitable for the claimant.

71232 The question of suitability arises when considering

1. employment of an equivalent standard<sup>1</sup> **and**
2. standards of remuneration<sup>2</sup>.

In both situations the alternative employment must be **suitable** for the claimant.

*1 SS CB Act 92, Sch 7, para 11(1); 2 para 11(10) & (11)*

71233 Suitable in this situation means suitable having regard to the claimant's personal qualifications, including mental and physical capacity<sup>1</sup>. The suitability of an employment is decided by looking at the claimant's

1. personal qualifications (background, training and experience) **and**
2. intellectual ability **and**
3. constitutional physique.

Any disabling condition which, at the time of the accident or onset of the disease, would have made the claimant incapable of undertaking a particular employment<sup>2</sup> should also be taken into account.

*1 R(I) 2/66 Appendix; 2 R(I) 4/76 Appendix*

71234 Suitability must be decided as at the date of the accident or onset of the disease. An employment which was closed to the claimant at the time of the accident or onset of the disease, because of any of the factors in DMG 71233, is unsuitable and will remain so unless there is a relevant change.

### Example

The claimant may recover from a pre-existing disability, or obtain a new qualification, which opens up a new field of employment. The DM then considers whether there is suitable alternative employment.

71235 Employment suitable at the time of the accident will

1. normally continue to be regarded as suitable **and**
2. not normally be made unsuitable by some factor occurring since the date of the accident or onset of the disease such as age and physical conditions.

71236 Only those factors which affect ability as an employee can be considered<sup>1</sup>. Family and domestic responsibilities and other personal factors which may restrict a claimant's availability for suitable work, cannot be taken into account.

*1 R(I) 10/66*

71237 The fact that suitable employment is difficult to obtain is not relevant, provided that it exists<sup>1</sup>. But the employment should be

1. within reasonable travelling distance of home (see DMG 71251 for employment available at a distance from home)
  2. in a recognized occupation and not just
    - 2.1 selected duties of the regular occupation **or**
    - 2.2 employment in a limited class of jobs selected in view of the claimant's disability
- which do not normally constitute an occupation<sup>2</sup>.

*1 R(I) 2/66 Appendix; 2 R(I) 7/58*

71238 Employment by Remploy

1. represents sheltered employment of a special type **and**
2. is unlikely to indicate what the claimant could probably earn in the open market **and**
3. should not be used **unless** the claimant is employed by the company and this represents the limit of capacity<sup>1</sup>.

*1 R(I) 6/77*

## **Claimant engaged in or seeking an employment**

71239 In most cases the fact that a claimant is actually following an employment is first hand evidence that it will be suitable in the claimant's case. However, such employment should not be accepted as suitable if it is

1. clearly a stop-gap measure **and**
2. of a nature which the claimant would not normally be expected to undertake **and**
3. clearly beyond the claimant's capabilities.

71240 Where a claimant is registering for and seeking a particular employment, it should be accepted as suitable in the claimant's case **unless** that employment

1. is totally unreasonable **and**
2. represents a misjudgement by the claimant of their abilities.

## **Claimant not registering for employment**

71241 If a claimant is not registering for employment, the DM will need evidence at an early stage to make a realistic assessment of the type of work which is suitable in each case.

- 71242 The DM should first decide the
1. fields of employment open to the claimant before the relevant accident or onset of disease **and**
  2. factors that limit the claimant's suitability for such work including
    - 2.1 physical and intellectual powers **and**
    - 2.2 education and training **and**
    - 2.3 employment history **and**
    - 2.4 age and
    - 2.5 any physical or mental disabilities existing at that time.

Full details of all relevant limitations should be obtained.

71243 In deciding suitable alternative employment the DM may be helped by information from employers in the area or the Jobcentre. Where suitable work can be identified from information already held, no further enquiry on suitability is needed.

71244 Where suitable employment cannot be identified, the Jobcentre should be

1. sent an enquiry **and**
2. supplied with the fullest information about the claimant **and**
3. given the age of the claimant at the date of the accident or onset of the disease **and**
4. informed of limitations imposed by a pre-existing condition, including any congenital disability.

**Note:** The claimant's name and address should not be given.

71245 In making such enquiries of the Jobcentre, it should be noted that

1. it is essential that the information supplied to the Jobcentre is accurate and detailed in order to produce a realistic reply **and**
2. it is for the DM and **not** the Jobcentre to decide if a particular occupation is a suitable alternative employment but the decision may be based on information obtained from the Jobcentre.

71246 Married woman must be treated at the same basis as for other employees, that is, any family, and domestic responsibilities cannot be taken into account<sup>1</sup>.

*1 R(I) 24/57; R(I) 10/66*

71247 - 71250

## Suitability of employment outside home area

71251 If employment which the claimant is capable of following

1. does not exist in the immediate locality **and**
2. is available elsewhere

it cannot be regarded as not suitable simply because the claimant's family or domestic circumstances may be disturbed if they moved. The claimant should be allowed a reasonable time to find out if there is suitable employment in the home area, and if not, to make arrangements to move to an area where suitable employment exists.

71252 A "reasonable interval" will vary according to the claimant's circumstances, for example, whether the claimant is

1. single or married **and**
2. used to moving from place to place<sup>1</sup>.

Disallowance of REA, or an award at a reduced rate, for these reasons should not be imposed without careful consideration of all the issues and only in exceptional circumstances.

*1 R(I) 24/57*

71253 -71254

## Irrelevant conditions, including the effects of advancing years

71255 The DM must consider the restrictions currently imposed by the relevant loss of faculty assuming that

1. the claimant's state of health in other respects is no worse than it was at the time of the accident or onset of disease **and**
2. any factors, relating solely to advancing years<sup>1</sup>, such as retirement, are disregarded.

*1 R(I) 14/62*

71256 If a claimant leaves employment which has been regarded as suitable and the cause of leaving is

1. the normal ageing process **or**
2. a worsening of the condition not due to the relevant loss of faculty

that employment should continue to be regarded as suitable<sup>1</sup>. Full account must be taken of any mental defect or disability which existed before the accident or onset of the disease<sup>2</sup>.

*1 R(I) 33/55; 2 R(I) 1/74*

71257 The relevant loss of faculty may make claimants unable to carry out occupations which would otherwise be suitable for such a long period after the accident, that by the time recovery takes place they have

1. lost former skills **or**
2. reached an age after which they would be considered too old for the occupation in question.

In such cases the occupation would not be considered suitable.

71258 If the claimant

1. is engaged in a suitable occupation **or**
2. has taken the initiative in looking for a particular type of work and as a result employment has been accepted as suitable

that will be first hand evidence that the claimant is capable of that employment.

Where doubt arises see DMG 71357 - 71359.

71259 - 71260

### **Onus of proof**

71261 The onus of proving that an employment is not suitable rests with the claimant. It is unrealistic to expect a claimant to list all possible jobs and then show that none are suitable. Because of this, the DM

1. will need to suggest certain specific employments within the claimant's abilities **and**
2. in making employment suggestions should
  - 2.1 not rely on vague generalisations such as "light work"
  - 2.2 suggest some specific employment or employments which are considered suitable for the claimant **and**
3. be able to give reasons for the choice if necessary.

71262 Because the onus is on claimants to show that the employments suggested are not suitable, they should be encouraged to approach the Jobcentre to see what employment they can suggest. This will produce a more accurate assessment than the process described at DMG 71241 - 71245.

71263 - 71280



# Incapacity

71281 If the claimant

1. has not returned to the regular occupation **or**
2. is not following employment of an equivalent standard

the question of incapacity should be considered.

71282 The DM should consider whether

1. the claimant is incapable of following
  - 1.1 the regular occupation **or**
  - 1.2 employment of an equivalent standard which is suitable **and**
2. incapacity is the result of the relevant loss of faculty.

71283 These are questions of fact, to be decided in the light of all the relevant evidence.

This will include

1. evidence of
  - 1.1 the nature of the occupation **or**
  - 1.2 employment under consideration **and**
2. medical evidence about the claimant's capacity for work.

71284 A claimant does not have to be totally incapacitated for work to be regarded as incapable of following

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

Nor does the relevant loss of faculty have to be the only, or even the major, cause of incapacity. It is enough if, on the balance of probability, the relevant loss of faculty contributes to a material degree to the incapacity<sup>1</sup>.

*1 R(I) 29/51; R(I) 26/52*

71285 The relevant loss of faculty is that found by the DM following consideration of medical advice or the FtT following appeal<sup>1</sup>.

*1 R(I) 7/64*

71286 - 71287

## Effects of overtime working

- 71288 The DM must find out whether overtime is an essential characteristic of the job when defining the regular occupation or alternative employment. If overtime is
1. compulsory, claimants whose relevant loss of faculty stops them from working overtime can be considered as incapable of the occupation or employment
  2. voluntary, that is if the employer would be happy to employ someone not willing to work overtime, a claimant will not establish incapacity for an occupation by inability to work overtime.

Except where circumstances change, occupations should be defined only once at the outset.

71289 - 71290

# Medical advice

## General

71291 It will be necessary to get medical advice on the claimant's capacity to follow the regular occupations or alternative employment. The DM can refer any question which has to be answered in deciding a claim to a HCP for medical advice. An opinion is obtained automatically on certain occasions, but the DM can ask for a further opinion to be obtained at any time before the decision is given<sup>1</sup>.

*1 SS Act 98, s 19*

71292 The medical adviser has the advantage of considering the claimant's medical condition specifically for the purposes of a claim to REA. This advice should therefore normally be followed unless there is some evidence (doctor's statement) to the contrary. Any conflict in medical opinion should be resolved by the DM who will assess which opinion appears to carry the greater weight taking into account all the evidence available (see DMG 71304).

71293 The DM should return advice for rework if the medical adviser has given advice which

1. is not clear **or**
2. is incomplete **or**
3. appears self-contradictory.

**Note:** The DM should take such action only at the time the report is first received and before any decision is given.

### Example 1

The claimant does not satisfy the "continuous" condition but medical advice does not make it clear whether incapacity as a result of the relevant loss of faculty is only temporary or is likely to be permanent.

### Example 2

The medical adviser states that the claimant is capable, or incapable, but not as a result of the relevant loss of faculty, and the wording of the report would not adequately explain the reasons for the opinion in the event of an appeal to the FtT.

## Meaning of HCP

71294 A HCP<sup>1</sup> is a

1. registered medical practitioner **or**
2. registered nurse **or**
3. registered occupational therapist or physiotherapist<sup>2</sup> **or**
4. member of such other regulated profession<sup>3</sup> as prescribed.

**Note:** Only for the purposes of the higher rate of DLA mobility component for the severely visually impaired have regulated professions of optometrist and orthoptist been prescribed as HCPs (see DMG Chapter 61)

*1 SS Act 98, s 39(1); SS (C&P) Regs 79, reg 2(1); 2 Health Act 1999, s 60;  
3 NHS Reform & Health Care Professions Act 2002, s 25(3); SS Act 98, s 39(1)*

71295 - 71303

## **Conflict of medical opinion**

71304 Occasionally there may be conflicting evidence as to a claimant's ability to follow their regular occupation or suitable alternative employment. This is why all the evidence available in the claimant's papers should be examined before reaching a decision.

### **Differences of opinion between the medical adviser and occupational physician**

71305 Cases may arise in which the medical advice is that the claimant is capable of the regular occupation but, because the occupational physician takes the opposite view, the employer refuses to re-employ the claimant in the regular occupation. Where

1. the opinion of the occupational physician indicates that the unfitness is due to the relevant loss of faculty **and**
2. the medical adviser's advice does not reveal a likely cause of incapacity other than the relevant loss of faculty

the DM should consider accepting the opinion of the occupational physician and not the medical adviser's.

71306 The occupational physician may advise that a claimant is incapable of the regular occupation because of the relevant loss of faculty. This opinion may be unacceptable because of a very low disablement assessment in relation to the relevant loss of faculty and the regular occupation. The DM should consider if the occupational physician has taken other disabilities into account.

### **Differences of opinion between the medical adviser and the claimant's doctor**

71307 Where

1. the medical adviser states that the claimant is incapable of work, but not as the result of the relevant loss of faculty **and**
2. the claimant's doctor is issuing medical statements advising the claimant to refrain from all work solely for a condition which appears to stem from the relevant loss of faculty

the DM should be satisfied that the opinion of the medical adviser was given on the basis of an adequate description of the regular occupation before proceeding as in DMG 71308.

### **Medical adviser states that claimant is incapable of regular occupation but not as a result of the relevant loss of faculty**

71308 In these cases the DM should consider the medical adviser's advice against

1. the available medical evidence **and**
2. the claimant's doctor's statements if available.

In many cases the medical adviser's advice will be preferable to that of the doctor.

71309 If the claimant indicates that the incapacity has changed, the award of REA should be considered on the evidence available. A reference to the medical adviser may be made to resolve any doubt.

71310 If there was a conflict of opinion and the award of REA was based on incapacity, the award of REA should continue on the same basis if

1. REA has been in payment for several years **and**
2. the incapacity has not changed.

A note to the effect that the medical adviser's opinion has been disregarded should be included in the BI2.

71311 - 71330

### **Circumstances requiring further medical advice**

71331 If new evidence about the regular occupation is obtained which throws doubt on the medical advice on the claimant's capability, the DM should

1. record the evidence **and**
2. obtain a further opinion from the medical adviser.

71332 If the medical adviser has advised that a claimant is incapable of the regular occupation, but later on a FtT

1. reduces the assessment of disablement **or**
2. finds a loss of faculty which differs materially from that previously found

then further advice on the incapacity should be obtained as soon as possible from a medical adviser.

71333 On receipt of the advice obtained the DM should consider superseding any current REA award. But if an award has ended and the claimant makes a fresh claim for REA before the further advice is available

1. the question of supersession should not be pursued **and**
2. consideration should be given to making further short award(s) until the advice is received.

71334 Where evidence

1. does not establish total IfW **or**
2. suggests that the claimant is capable of more remunerative work than is being undertaken or sought (see DMG 71356)

and the available evidence does not indicate that the claimant is fit for the alternative employments considered suitable, the DM should obtain full details of the requirements of the employments before seeking further advice from the medical adviser on the claimant's fitness.

71335 A claimant's regular occupation may have disappeared because of mechanisation, such as in the coal-mining industry. Where the manual occupation has ceased to exist

1. it does not mean that the occupation is no longer the claimant's regular occupation **and**
2. it is the duties of that occupation which should be taken into account when obtaining medical advice as to capacity for the regular occupation.

71336 - 71345

## Non-medical evidence

71346 DMG 71347 - 71379 gives guidance on a number of situations in which it is unnecessary to seek medical advice because of the non-medical evidence available.

### Seeking employment

71347 Where claimants are seeking employment in their regular occupation it is

1. evidence that they regard themselves as capable of following that occupation **but**
2. not conclusive evidence of their ability to follow it.

Other evidence may show that claimants are incapable of the employment, or not capable of resuming the tasks and duties of the occupation in full, but only of performing some modified or lighter version of the job. In such cases the principles in DMG 71176 - 71183 may be applied<sup>1</sup>.

*1 R(I) 80/51*

71348 The onus is on the claimant to show that they are not capable of following the regular occupation. In practice therefore they should be regarded as fully capable of that occupation if they are seeking employment in it, provided this view is supported by all the other evidence in the case.

71349 If the claimant is seeking employment in an occupation other than the regular occupation, this is primary evidence that

1. they are capable of such employment **and**
2. it is suitable in their case **and**
3. the normal standard of remuneration in that employment is for comparison with that of the regular occupation.

71350 This must be considered along with any other evidence for example

1. the medical evidence **or**
2. the nature and degree of the disablement **or**
3. the nature of the work in question which might suggest that the claimant is not capable of such employment **or**
4. that the employment is not suitable in the claimant's case **or**
5. that the claimant is not capable of performing the full tasks and duties of the employment and the earnings would be less than normal.

71351 - 71354

71355 The fact that the employment being looked for, either in the regular occupation or in other employment, is **not**

1. available **or**
2. easily obtainable

has no bearing on the question of whether the claimant is capable of it<sup>1</sup>.

*1 CI 99/49 KL (relating to US); R(I) 29/53; R(I) 24/57*

## **Neither employed nor seeking employment**

71356 If the evidence does not establish that the claimant is totally incapable of work and the claimant is neither in, nor seeking, employment the DM should consider whether

1. the claimant is capable of resuming the regular occupation **and**
2. there is a suitable alternative type of employment which the claimant could do if 1. does not apply<sup>1</sup>.

*1 R(I) 23/54*

## **Engaged in employment of less than equivalent standard**

71357 If, as the result of the relevant loss of faculty the claimant is incapable of following the regular occupation and obtains employment in some other type of work at a lower standard of remuneration the DM should consider if

1. such employment marks the limit of the claimant's capability **or**
2. the claimant could undertake better paid employment.

Unless the claimant has demonstrated fitness for better paid employment, it should be assumed that the employment which the claimant is following is the best paid, suitable employment that they can do.

71358 DMs should consider disallowance of the claim or a reduction in the rate payable where

1. there is firm evidence that the claimant is capable of better paid employment which can be specified **and**
2. they are satisfied that the claimant is capable of it and that it is suitable employment.

The fact that such employment may not be readily obtainable does not matter. This is most likely to occur where an employment has been chosen which is below the standard of which the claimant is capable because the claimant likes it better and the loss of earnings is compensated for by REA.

71359 Where the difference in standards of remuneration between the employments under consideration and the regular occupation would give entitlement to the maximum rate of REA it will not normally be necessary to seek additional medical advice in cases arising under DMG 71356 or 71357.

### **Changes in the requirements of regular occupation**

71360 Where someone is employed in an occupation requiring a particular skill and the skill of the occupation changes so that they are required to adapt themselves to the new requirement to retain their job, then if, because of the relevant loss of faculty

1. they are unable to master the new skill **and**
2. employment of the type to which they are accustomed has been completely superseded by that involving the new skill

it can be decided that they are unable to follow the regular occupation as the result of the relevant loss of faculty<sup>1</sup>.

*1 R(I) 10/59*

### **Incapable before accident of full duties of regular occupation**

71361 Where a claim is received in which there is reason to suppose that the claimant was incapable of undertaking the full range of duties of the occupation **before** sustaining the relevant loss of faculty, because of pre-existing constitutional ailments or age, enquiries should be made to find out

1. the duties actually performed before the accident **and**
2. if the ability for those tasks has in fact been reduced by the relevant loss of faculty.

### **Unwilling to return to regular occupation because of risk of further injury**

71362 A claimant cannot normally be treated as incapable of the regular occupation<sup>1</sup> where

1. recovery from the injury is sufficient for the claimant to be physically and mentally fit to return to the regular occupation **but**
2. the claimant chooses not to do so because of unwillingness to run the risk of further injury in that occupation.

*1 R(I) 5/84*

71363 However, claimants can be treated as incapable of the regular occupation where their physical condition following the accident is such that a return to work would be a danger to them or to others<sup>1</sup>. The most common circumstances in which these concerns arise are

1. impairment of vision (see DMG 71366)
2. occupational deafness (see DMG 71375)
3. PD A11 (see DMG 71379).

*1 R(I) 15/74*

## **Loss of confidence**

71364 A claimant's reluctance to resume the regular occupation may be due to a lack of confidence which creates actual fear of further injury. If there is nothing physical stopping the claimant carrying out the regular occupation, whatever it is that is preventing the return to the regular occupation must be mental. Where the claimant's fears seem real, the DM should consider if the

1. question of incapacity is because of the relevant loss of faculty **and**
2. medical authorities have described the relevant loss of faculty as including an appropriate mental condition<sup>1</sup>.

*1 R(I) 12/80*

71365 Claimants badly affected by loss of confidence could have the condition included in the relevant loss of faculty by

1. appeal to the FtT **or**
2. application for supersession.

**Note:** See DMG Chapter 04 for guidance on supersession and DMG Chapter 06 for guidance on appeals.

## **Impairment of vision**

71366 Where a claimant decides not to return to the regular occupation because

1. the relevant loss of faculty is loss of vision of one eye **and**
2. there is an increased risk of total blindness

the claimant may be regarded as incapable of that occupation as a result of the relevant loss of faculty, **provided** the occupation involves a substantial risk of further eye injury<sup>1</sup>.

*1 R(I) 66/52*

71367 The wide interpretation of the word “incapable” has been applied only in relation to a claimant who has been blinded in one eye. It does not apply where the loss of sight in the injured eye was partial, because any later injury to the other eye would not result in total blindness<sup>1</sup>.

*1 R(I) 8/56; R(I) 6/59*

71368 If it can be established that binocular vision is an essential qualification for a particular occupation, claimants can be accepted as incapable of the regular occupation if

1. they lose the sight of an eye **or**
2. it can conclusively be shown that as a result of the impairment of vision it is no longer safe for them to
  - 2.1 use a particular machine **or**
  - 2.2 work in the proximity of machinery<sup>1</sup>.

*1 R(I) 15/85*

## **Susceptibility to recurrence of relevant condition**

71369 People can be accepted as being incapable of work in the regular occupation as the result of the relevant loss of faculty where

1. they recover from the effects of the relevant injury or PD so as to be physically capable of the regular occupation **but**
2. their residual disablement is such that a return to that occupation would cause a recurrence of the relevant condition making them unable to fulfil the ordinary requirements of the job.

### **Example**

A small life assessment is made in a PD D5 case because of the risk of a further breakdown in the skin condition of the claimant, a hairdresser, even though he is no longer suffering from the PD itself. Because of the likelihood of a recurrence which would make him incapable of performing the full range of duties, the claimant is accepted as incapable of his regular occupation<sup>1</sup>.

*1 R(I) 29/53; R(I) 28/60*

## Is the claimant capable of alternative employment

- 71370 All the factors of the case should be considered especially the
1. time that has elapsed since the date of the accident or date of onset **and**
  2. nature of and terms of employment in the regular occupation.

- 71371 The DM may decide that it is not yet reasonable for the claimant to take up alternative work if
1. they worked for the same employer for many years before the accident **and**
  2. their job is being kept open for them.

The DM might decide that it is reasonable for the claimant to take up alternative work if the previous employment was a series of temporary jobs; for example, a labourer who worked for a variety of employers.

- 71372 The DM will usually have more grounds for deciding that it is **not** reasonable for the claimant to take up alternative work when considering initial claims for REA, rather than renewal claims. In many cases a claimant could not be expected to abandon an occupation which may have been followed for many years at an early stage **unless** there was considerable doubt of the ability to resume it. This is especially true if the claimant is skilled.

- 71373 The DM should accept that it is not reasonable for the claimant to take up alternative work if the evidence indicates that the claimant will be fit to return to the regular occupation within a few months. But the DM should consider what alternative employments are suitable if the evidence indicates that the claimant will
1. **never** return to the regular occupation **or**
  2. **not** return to the regular occupation for a long time.

- 71374 The medical adviser will normally indicate the restrictions that are imposed on the claimant's capacity for work by the relevant loss of faculty. It will be for the DM to
1. identify actual occupations which are within those limits **and**
  2. decide which are suitable in the claimant's case **and**
  3. consider standard of remuneration

before giving a decision on the claim. Any conflict of medical opinion must be resolved before the DM can proceed as in DMG 71304 - 71310.

## Occupational deafness

71375 Claimants should be accepted as incapable of the regular occupation as a result of the disease where they

1. are suffering from occupational deafness **and**
2. might be physically capable of performing all the duties of the regular occupation **but**
3. claim REA on the basis that further employment will cause their hearing to get worse.

This would apply even if their reasons for having left are unconnected with the relevant loss of faculty, if they can show that such a risk would be a factor which would cause them to decline further employment in the occupation if offered<sup>1</sup>. The question whether such incapacity was likely to be permanent should be considered in the normal way.

*1 R(I) 2/81*

71376 This also applies where ear protection is used. Medical advice is that hearing protectors will reduce the damage due to noise, but may only be effective in that they make further hearing loss less than it would be without them. Such hearing loss cannot properly be described as "only insubstantial".

71377 Similarly when considering a suitable alternative employment the DM should take care not to select noisy occupations which would expose the claimant to the same sort of risk as if they returned to their regular occupation.

71378 But if claimants

1. take up a noisy alternative employment after abandoning their regular occupation **and**
2. re-expose themselves to the risk which was the basis for acceptance of incapacity for that occupation

the DM should consider the whole question of their IfW.

### PD A11

71379 PD A11 is generally considered to be a degenerative disease that once contracted will not improve. Whether or not a claimant should be treated as incapable of their regular occupation will depend on the date of onset. If the date of onset is

1. **before** the date the claimant left the regular occupation they should be regarded as incapable even if their reasons for leaving are unconnected with the relevant loss of faculty

2. **after** the date the claimant left the regular occupation they must prove as a matter of fact that the occupation was abandoned as a result of the disease<sup>1</sup> (see DMG 71092).

*1 SS (II) (PD) Regs, reg 17*

**Example**

Eric was employed as a miner from 1966 to 1984. He claimed PD A11 in 1992 and was assessed at 5% for life with a date of onset of 21.7.88.

Eric claimed REA on 19.2.02. On the date of onset he was employed as a bus driver. The medical adviser's opinion was that Eric was not incapable of the regular occupation. Eric stated that his regular occupation should be that of a miner as this was the occupation that caused the disease.

Investigations revealed that the occupation was abandoned because of redundancy and that Eric would have continued to work as a miner had the mine not closed.

REA was disallowed because the occupation was not abandoned as a result of the disease.

71380

## Is incapacity the result of the relevant loss of faculty

71381 If it is decided that the claimant is incapable of following either the regular or a suitable alternative occupation, the DM should consider whether incapacity is the result of the relevant loss of faculty. If the only reason a claimant is incapable of work is because of a condition **not included** in the relevant loss of faculty, the claim for REA will normally be for disallowance.

71382 The relevant loss of faculty is that found by the DM based on medical evidence, or by a FtT in the course of deciding the disablement question<sup>1</sup>, linked to the claim for basic IIDB. The findings of the medical adviser on the

1. loss of faculty **or**
2. degree or duration of disablement

are not binding in relation to the REA questions, but can be used as evidence.

*1 SS CS (D&A) Regs, reg 12(1)(c)*

71383 It does not follow that, because there is a permanent loss of faculty, there is also a permanent incapacity for following a regular occupation.

71384 It is for the DM to consider, in the light of all the evidence available

1. what the actual effects upon the claimant of the relevant loss of faculty at the time for which REA is claimed are **and**
2. whether these effects play a material part in preventing the claimant from following a particular occupation.

71385 In making the decision the DM is

1. not bound by the forecast of the medical adviser
2. at liberty to admit and accept evidence from other sources
3. free to admit evidence that the disablement forecast by the medical adviser has ceased to exist.

71386 For REA purposes incapacity does not have to be due **only** to the relevant loss of faculty. It is enough if that loss of faculty contributes to incapacity to such an extent that it cannot be ignored<sup>1</sup>. This is usually described as “materially contributing”.

*1 R(I) 20/51; R(I) 26/52; R(I) 26/56*

71387 Once it has been accepted that the relevant loss of faculty materially contributes to the claimant’s inability to perform the regular occupation or work of an equivalent standard, it will usually continue to be acceptable **unless** there is some improvement in the effect of the relevant loss of faculty.

- 71388 An improvement in the effect of the relevant loss of faculty may not be shown by a reduction in the assessment of disablement (for example, where there is a life assessment) but may become apparent
1. as and when advice is sought from the medical adviser at renewal stages **or**
  2. from other circumstances such as a cessation of incapacity for all work.

## **Claimant suffering from more than one condition**

71389 A claimant may suffer from two or more conditions, of which at least one may not be related to the relevant loss of faculty. In deciding if the relevant loss of faculty materially contributes to the incapacity for any particular occupation, the DM should note that

1. the claimant cannot be regarded as incapable of the regular occupation as the result of the relevant loss of faculty if, at the time the effects of that relevant condition develop, the claimant is already totally incapable because of an irrelevant condition<sup>1</sup>
2. where the relevant condition would on its own make the claimant unable to carry out the regular occupation, then it should be accepted as contributing materially to the incapacity for that occupation even if an irrelevant condition develops at the same, or at a later stage which by itself also incapacitates<sup>2</sup>
3. it should be accepted that the relevant condition materially contributes to the claimant's incapacity for the regular occupation<sup>3</sup> where
  - 3.1 neither the relevant condition **nor**
  - 3.2 the irrelevant conditionis sufficient on its own to incapacitate the claimant for the regular occupation, but the two acting together do incapacitate
4. where a claimant is incapacitated for the regular occupation by the irrelevant condition but not by the relevant condition, then the relevant condition does not materially contribute to the claimant's incapacity for the regular occupation<sup>4</sup>.

Relevant condition means the relevant loss of faculty or those conditions which may be treated as resulting from it. "Irrelevant condition" means all other conditions.

*1 R(I) 2/56; 2 R(I) 29/51; 3 R(I) 56/51; R(I) 26/52; 4 R(I) 26/52*

71390

## Other effective causes of disablement

71391 In assessing the extent of a person's disablement, conditions which contribute to the disability arising from the relevant loss of faculty but which do not result from the relevant accident or disease, will be considered by the medical adviser when recording his advice<sup>1</sup>.

*1 SS (Gen Ben) Regs, reg 11*

71392 These conditions are known as "other effective causes" and are identified by the medical adviser as

1. "O (pre)" where the condition was present before the accident or disease **and**
2. "O (post)" where the condition arose afterwards.

71393 It is not necessary for the claimant's total disablement to result in incapacity for the regular or alternative occupation. Provided the relevant loss of faculty contributes materially to the incapacity, the claimant is entitled to succeed<sup>1</sup>.

*1 R(I) 17/59*

71394 Where the claimant was already suffering from a disabling condition a further loss of faculty may make the claimant turn from a person capable of following the regular occupation to one incapable of it<sup>1</sup>. Although this further loss of faculty may not on its own be a cause of incapacity, it can be thought of as the "last straw".

*1 R(I) 49/54*

71395 In cases involving injuries to an organ which is one of a pair, the assessment of the disablement arising from the relevant loss of faculty may have been increased because of a disability in the other organ. Where a final assessment was made before 17.7.58 the cases were identified by the medical authorities as paired organ. Some transitional cases after 17.7.58 were also identified as paired organ, where a provisional assessment was made. In all of these cases, the paired organ should be treated as if it was a "connected condition".

71396 When giving advice for REA purposes, the medical adviser will usually consider if the relevant loss of faculty, as made more disabling by the paired organ condition, causes incapacity.

71397 In some cases it may seem that in giving advice the medical adviser has taken no account of the greater disability resulting from other conditions. This would not prevent allowance of the claim. The DM must remember that, in REA cases, the advice of the medical adviser is

1. not binding **and**
2. to be weighed and interpreted in the same way as any other evidence.

## Conditions not included in, but claimed to result from the relevant loss of faculty

71398 A claimant's incapacity may result from a condition which has not been included by the DM in the relevant loss of faculty. A statement that such a condition results from the relevant loss of faculty

1. will not enable a claim to succeed
2. cannot be considered by the DM, who can only consider the effects of the relevant loss of faculty itself<sup>1</sup>.

*1 R(I) 5/84*

71399 The claimant may seek to have a condition included in the relevant loss of faculty by

1. making an application for revision/supersession **or**
2. following an appeal to a FtT.

**Note:** See DMG Chapter 03 for guidance on revision, DMG Chapter 04 for guidance on supersession and DMG Chapter 06 for guidance on appeals.

71400

## Unconnected or supervening conditions

71401 A claimant who suffers from a condition not forming part of the relevant loss of faculty either

1. at the date of accident or onset of disease **or**
2. which arises after these dates

may still be regarded as incapable of the regular or alternative occupation **provided** the relevant loss of faculty contributes materially to such incapacity (subject to DMG 71405). This applies even if the other condition deteriorates afterwards to such an extent that it, on its own, makes the claimant incapable<sup>1</sup>.

*1 R(I) 29/51; R(I) 17/59; R(I) 14/62*

71402 Where the medical advice is that the relevant loss of faculty no longer contributes materially to incapacity, DMs should

1. consider the advice carefully **and**
2. if completely satisfied that there has been no improvement in the relevant loss of faculty
  - 2.1 ignore the advice **and**
  - 2.2 accept continuing incapacity due to the relevant loss of faculty.

71403 The claimant can no longer be regarded as incapable as the result of the relevant loss of faculty where it's effects

1. diminish **and**
2. no longer contributes materially to the claimant's inability to follow the regular occupation or employment of equivalent standard.

This applies even though a pre-existing or supervening condition still remains, which on its own renders the claimant incapable.

71404 The effects of advancing years should be treated in the same way as any other condition not due to the relevant loss of faculty.

71405 In some PD cases, mainly those involving diseases which have a long latent period, it is possible for a date of onset to occur during a period of total incapacity due to some other condition. This may have a non-industrial or other industrial cause. In such a case the DM should follow the guidance in DMG 71389 **1.** and disallow the claim for REA.

71406 - 71420



## 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.

71446 If after the end of the 90 day period the claimant appears to have returned to the regular occupation or taken up employment of equivalent standard, the continuous condition cannot be satisfied unless

1. there is evidence that the claimant is not capable of the regular occupation or of employment of an equivalent standard **or**
2. work in the regular occupation can be ignored<sup>1</sup> (see DMG 71451 - 71468).

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

71447 - 71450

### **Work for rehabilitation, training or trial**

71451 Periods of work for rehabilitation or trial done since the end of the 90 day period can be ignored<sup>1</sup>. But such work must have been undertaken in

1. the claimant's regular occupation **or**
2. suitable employment of an equivalent standard.

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

71452 The type of work which can be ignored is work done for the purposes of

1. rehabilitation **or**
2. trial **or**
3. finding out if the claimant had recovered from the effects of the relevant injury.

In deciding if a period can be ignored under **3.** the deciding factor is whether the claimant had recovered from the effects of the relevant injury sufficiently to be able to work in the regular occupation or in work of an equivalent standard<sup>1</sup>.

*1 R(I) 1/69*

71453 The periods of work which may be ignored are limited<sup>1</sup> to any

1. period during which the claimant worked for any of the stated purposes with the approval of the DM on the advice of a medical practitioner **and**
2. other period or periods during which the claimant worked for any of the stated purposes which did not exceed six months in aggregate.

**Note:** There is no limit to the number or lengths of periods which can be ignored under **1.** Periods may be ignored under **2.** in addition to those disregarded under **1.**<sup>2</sup>.

*1 SS (Gen Ben) Regs, reg 17(2)(a); 2 R(I) 97/53*

71454 The continuous condition cannot be satisfied if there is a period which cannot be ignored in between the end of the 90 day period and the date from which REA has been claimed.

71455 Because there cannot be entitlement to REA whilst a claimant is engaged in the regular occupation or in suitable work of an equivalent standard, the question of ignoring particular periods can only be considered for an earlier period, when the claimant has had to give up such employment and claims REA<sup>1</sup>.

*1 R(I) 1/51*

71456 In practice the approval of the DM is not sought

1. until nearly six months of the period of rehabilitation, training or trial is exhausted **and**
2. only when the work is not being undertaken on medical advice.

Such approval cannot be given for an earlier period, but if it is given the DM should accept the earlier period.

71457 When fixing the period of six months referred to in DMG 71453 2., the DM should note that where the

1. claimant has worked every week for the number of days normal for the occupation, the period should be regarded as six calendar months from the first day of work
2. work done is intermittent (that is the claimant has worked on less than the number of days normal for the occupation) the days worked should be totalled.

The period of six months ends when the number of days worked equals 26 times the normal working week in the particular employment.

71458 For the claimant to have worked for the purpose of rehabilitation or training or of finding out if recovery from the effects of the relevant injury had taken place, it must be obvious that the efforts were designed to

1. improve fitness for work **or**
2. find out if the claimant could fulfil the requirements of the regular occupation despite with the loss of faculty.

71459 The purpose of this provision is to

1. encourage those who have suffered injury to get back to work as soon as possible **and**
2. protect employees who are prepared to find out by trial if they have recovered enough from the effects of the injury to return to work<sup>1</sup>.

A claimant relying on the provision for a return to work on the advice of a medical practitioner, should be able to produce evidence in support of this. In cases where the claimant returns to the regular occupation for the purpose of finding out if there

has been some recovery from the effects of the accident, the absence of direct evidence should not be seen as a barrier to the success of the claim.

*1 R(I) 13/61; R(I) 1/69*

71460

### **Work while awaiting surgical treatment**

71461 For the purpose only of deciding if the continuous condition is satisfied certain periods of work in

1. the regular occupation **or**
  2. suitable employment of equivalent standard undertaken
    - 2.1 after the end of the 90 day period **and**
    - 2.2 before obtaining surgical treatment for the effects of the relevant injury
- may be ignored<sup>1</sup>.

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

71462 The periods which may be ignored<sup>1</sup> are any

1. period throughout which the claimant was waiting to undergo surgical treatment on the advice of a medical practitioner **and**
2. other period throughout which the claimant was in the process of getting such advice.

*1 SS (Gen Ben) Regs, reg 17(2)(b)*

71463 There is no limit to the length of periods of work ignored under these provisions. It is possible for a period of disregard to be covered partly by

1. one condition
2. the other **and**
3. the conditions relating to work for rehabilitation, training or trial.

71464 "Surgical treatment" does not necessarily suggest the use of the knife<sup>1</sup>. "Surgery" is the art or practice of treating injuries, deformities, and other disorders by manual operation or instrumental appliances. This includes the fitting of a false limb.

*1 R(I) 13/56*

71465 To satisfy DMG 71462 1. the

1. doctor should have given a definite opinion that surgical treatment should be carried out as soon as it could be arranged **and**
2. claimant should have accepted the doctor's advice **and**
3. claimant should have a genuine intention to undergo the treatment as soon as the arrangements have been made.

A remark by a doctor that the claimant may have to have an operation eventually is not enough.

71466 The condition in DMG 71462 **2.** covers those periods during which the claimant is

1. seeing a doctor **or**
2. attending hospital for examination

pending a decision on the need for surgical treatment. This decision may not be made for several months. But this period should be considered reasonable if the claimant appears to have been cooperative, especially if shortly after receiving the advice the claimant decides to have the surgical treatment<sup>1</sup>. Thereafter DMG 71462

1. will apply.

*1 R(I) 13/56*

71467 The continuous condition cannot be satisfied where

1. the question of surgical treatment did not arise until after the claimant's return to work in
  - 1.1 the regular occupation **or**
  - 1.2 suitable alternative employment of an equivalent standard, as there will be a break in continuity **or**
2. the claimant declines to pursue surgical treatment<sup>1</sup>, having received advice (although the claimant may succeed under DMG 71451).

*1 R(I) 35/57*

71468 Where

1. it is known that the surgical treatment will consist of a series of operations **and**
  2. a claimant works in the regular occupation between the operations
- the work can be ignored for purposes of the continuous condition.

71469 - 71470

### **Gap in assessment**

71471 There does not need to be a continuous assessment of disablement for the continuous condition to be satisfied. It can still be satisfied if there is a gap between two assessments or between the end of the 90 day period and the first assessment although doubt may arise. The DM should consider

1. the circumstances in which the gap occurred **and**
2. any other evidence **and**
3. any medical advice available

before deciding on the balance of probabilities whether there has been continuous incapacity as the result of the relevant loss of faculty.

- 71472 Incapacity has to have been unbroken throughout the whole period of a gap to be effective for claim purposes but see below.
- 71473 A gap was often created because a medical adviser (or a FtT) found unforeseen aggravation since the last medical board, but was prevented from making an assessment for any period more than three months before the date of application for review. From 7.4.97 the period was reduced to one month before the date of application and from 5.7.99 an assessment can only begin from the effective date (see DMG Chapter 01).
- 71474 If it is reasonably clear that an assessment would probably have been made, but for a backdating restriction
1. the date of expiry of the last assessment **or**
  2. to the end of the 90 day period as appropriate
- it can be accepted that the continuous condition is satisfied<sup>1</sup>.

*1 R(I) 9/66*

### **Effect on award of gap in assessment**

- 71475 Awards of REA
1. can be made where continuous incapacity is accepted throughout gaps in assessments provided there is no entitlement on 30.9.90 (see DMG 71012)  
**but**
  2. cannot be made during such a gap.

71476 - 71480



## Comparison of standards of remuneration

- 71481 The DM will need to compare standards of remuneration when deciding
1. whether a suitable alternative employment is of an equivalent standard to the regular occupation<sup>1</sup>
  2. the rate of REA payable in cases where the claimant is not incapable of all work<sup>2</sup> as the result of the relevant loss of faculty.

*1 SS CB Act 92, Sch 7, para 11(1); 2 Sch 7, para 11(10) & (11)*

- 71482 Both situations require a comparison to be made in the level of earnings, but for different reasons. DMG 71481 **1.** requires one occupation to be compared with another and the comparison is normally made on an impersonal basis<sup>1</sup>. DMG 71481 **2.** is concerned with the amount of REA payable to the claimant and the comparison is based on the personal loss of capacity to earn<sup>2</sup>.

*1 SS CB Act 92, Sch 7, para 11(1); 2 Sch 7, para 11(10) & (11); R(I) 7/69 Appendix; R(I) 6/68; R(I) 1/72*

- 71483 For the purposes of both DMG 71481 **1.** and **2.**, it is the gross and not net earnings that should be compared.

71484

## Comparisons - equivalent standard

- 71485 When considering an equivalent standard, a broad view should be taken and two occupations can be regarded as equivalent despite minor differences between them (see DMG 71207).

- 71486 Where an occupation is available
1. with more than one employer in the area **or**
  2. at varying rates depending on such factors as experience or length of service
- it is for the DM to decide if an average figure would be reasonable or, if a higher or lower level is appropriate, having regard to the claimant's ability and employment history, (or lack of either)<sup>1</sup>.

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

## Regular occupation full-time

- 71487 Where the regular occupation was carried out F/T, the standard of remuneration means the normal level of earnings in the employment, for the normal number of hours worked by people employed in that employment.
- 71488 Where the claimant's earnings are much more than the average for the regular occupation, the DM should consider if the claimant's occupation has been described too broadly (see DMG 71205).
- 71489 Where the claimant's average earnings in the regular occupation were less than the average for that employment, because the claimant worked fewer
1. hours **or**
  2. shifts
- than were normally worked in that employment, the normal average gross weekly earnings for the employment should be used as the basis for the comparison.
- 71490 But if the claimant regularly worked substantially fewer hours or shifts than normal for a F/T worker, it would be justifiable to treat the record as that of a P/T worker (see DMG 71491 - 71493 and DMG 71500 - 71504).

## Regular occupation part-time

- 71491 The term P/T employment should be taken to include employment where it is usual for all people doing that work to do so for comparatively few hours each week, such as a school meals helper or school crossing attendant<sup>1</sup>. The hourly rate of pay should not be regarded as irrelevant<sup>2</sup>, so comparison should normally be between the earnings for the
1. number of hours worked in the regular occupation **and**
  2. same number of hours, if available, in the alternative employment.

*1 R(I) 6/68; 2 R(I) 7/68*

- 71492 The comparison does not apply where the
1. only hours available are set at less than those worked in the regular occupation **or**
  2. claimant is prevented from working the same number of hours because of the relevant loss of faculty.

In such cases the comparison is based on earnings for the hours worked in the regular occupation and those for the lesser hours in the alternative employment.

71493 Alternative employment which is only available

1. F/T **or**
2. P/T for a greater number of hours than those worked in the regular occupation

should not be used for the purposes of comparison **unless** it is actually being worked by the claimant<sup>1</sup>.

*1 R(I) 9/80; R(I) 3/83*

### **Pieceworkers**

71494 Pieceworkers may be regarded as being incapable of attaining the normal standard of an ordinary worker in an occupation, as the result of the relevant loss of faculty<sup>1</sup> if they

1. return to the regular occupation **or**
2. take up alternative employment

**but** because of the relevant loss of faculty they are only able to work at a reduced speed, so reducing their output.

*1 R(I) 4/77*

### **Comparisons - rate of REA payable**

71495 A comparison should<sup>1</sup> be made between the earnings that claimants

1. would probably have been receiving had they remained in their regular occupation and not suffered the relevant loss of faculty **and**
2. are capable of receiving in suitable alternative employment taking the effects of the relevant loss of faculty into account.

The DM should ignore other conditions not connected with the relevant loss of faculty, which could affect the claimant's capacity for alternative work.

*1 SS CB Act 92, Sch 7, para 11(10)*

### **Regular occupation full-time**

71496 When considering notional earnings for the regular occupation, the DM should assume that the claimant's working habits would have continued to follow an established pattern **unless** there is evidence to suggest that circumstances would have changed. For example if

1. the claimant had been in the habit of working more overtime than others **and**
2. overtime would still have been available

the notional earnings should include the additional overtime payment.

- 71497 Notional earnings may also need be adjusted if the claimant tended to earn less than the norm, particularly if it was by the claimant's own choice, such as not wanting to work available overtime.
- 71498 If the claimant is actually engaged in an alternative employment, the assessment of earnings should take account of the earning capacity (as limited by the relevant loss of faculty) and the working pattern.
- 71499 Anything regularly earned
1. above the norm, should usually be used as the basis for comparison **or**
  2. below the norm, should be used as the basis from comparison only if it is due to the effects of the relevant loss of faculty.

The fact that a claimant may choose to work P/T is irrelevant if the loss of faculty would not prevent them from F/T work.

### **Regular occupation part-time**

- 71500 If the claimant was working P/T in the regular occupation, the standard of remuneration for alternative employment must be worked out in the same way<sup>1</sup>. Remuneration in the alternative employment is assessed for the same number of hours as those worked in the regular occupation. This principle may not apply where
1. a claimant is actually working in alternative employment (see DMG 71502) **or**
  2. it is known that the available hours of P/T work are not flexible (see DMG 71503).

The DM should not assume that a claimant whose regular occupation was P/T could earn more in the alternative employment by working longer hours<sup>2</sup>.

*1 R(I) 6/68; 2 R(I) 7/68*

- 71501 If the claimant is working in alternative employment, the working pattern may provide a guide to the earning capacity and the amount of work which is available. These factors would affect the basis of the comparison. For example, if the claimant is working
1. more hours than in the regular occupation **or**
  2. fewer hours than in the regular occupation and this is due to the effects of the relevant loss of faculty **or**
  3. fewer hours than in the regular occupation because it can only be worked for that number of hours<sup>1</sup>

the actual earnings should be used for the comparison, subject to considering whether the claimant is capable of other suitable employment.

*1 R(I) 3/83*

71502 Where

1. the claimant is not working in alternative employment which is considered suitable **and**
2. there is evidence that such employment could not be worked for as many hours as had been worked in the regular occupation

the comparison should be between earnings for the hours performed in the regular occupation and earnings for the hours available in the alternative employment.

71503 A claimant who worked P/T in the regular occupation should not be considered capable of alternative employment which would only be available

1. F/T **or**
2. for a set number of hours greater than previously performed<sup>1</sup>.

*1 R(I) 3/83*

71504 Sometimes it will not be clear from the evidence available if P/T employment can be worked for the same number of hours as were worked in the regular occupation.

The DM

1. must be satisfied that the alternative employment can actually be worked P/T
2. does not need to find out the exact hours that are available **unless** argued for by the claimant, or suggested by employer's evidence or local knowledge.

Where no enquiry is needed the claim may be decided as in DMG 71500.

71505 - 71507

### **Pieceworkers**

71508 Where pieceworkers return to the regular occupation at reduced output, the comparison should be made between the

1. probable personal standard of remuneration which they would have received if they had not been injured **and**
2. personal standard they are capable of receiving taking into account the relevant loss of faculty<sup>1</sup>.

*1 SS CB Act 92, Sch 7, para 11(10) & (11); R(I) 4/77*

71509

## Table of examples

71510 The principles discussed in DMG 71471 - 71508 are shown in the following tables. When considering Table A it should be remembered that if a claimant is in alternative employment on a P/T basis, that does not stop the DM from using the F/T earnings **unless** the relevant loss of faculty would stop the claimant working F/T.

### Table A - regular occupation full-time

#### Type of case

#### Effect of comparison

1. Claimant is working in suitable alternative employment and the normal earnings in the regular occupation have been accepted as the claimant's earnings.

**A.** If earnings at least as much as in the regular occupation, disallow on the grounds that the claimant is not incapable of employment of an equivalent standard<sup>1</sup>.

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

**B.** If earnings less but the difference is small, consider if disallowance is appropriate (see DMG 71471).

**C.** If earnings less than in the regular occupation and B. does not apply, award the difference, up to the maximum.

2. Claimant is working in suitable alternative employment, but the earnings in that employment or in the regular occupation are not typical of those jobs in the area.

**A.** If earnings at least as much as in the regular occupation, use the norm to consider if the occupation is an equivalent standard<sup>1</sup>. If not, disallow payability.

*1 SS CB Act 92, Sch 7, para 11(10) & (11)*

**B.** If earnings less in the alternative employment than in the regular occupation, and this is because of the relevant loss of faculty, award the difference, subject to the maximum.

**C.** If earning the norm for the alternative employment and this is less than the normal earnings in the regular occupation, award the difference, up to the maximum.

**D.** If earning less than the norm in alternative employment for reasons other than the relevant loss of faculty, treat the normal F/T earnings in that employment as the claimant's earnings. Proceed as in **A** or **C**.

## Type of case

3. Claimant has worked in suitable alternative employment, but is not now working in it due to factors unconnected with the relevant loss of faculty.

4. Claimant has not worked in the suitable alternative employment.

5. Absenteeism in occupation.

## Effect of comparison

Calculate the probable earnings in that employment as if the claimant was still working in it. Proceed as **1.** or **2.**

Obtain details of normal earnings in that employment from Jobcentre Plus or appropriate employers. If minimum and maximum figures are supplied, take the average, unless a higher or lower point is obviously more suitable in the claimant's case. Treat these earnings as the claimant's probable earnings, and carry on the lines indicated in **1.** or **2.**

If the claimant's earnings in the regular occupation were less than the normal earnings in the job (which may include overtime), but the claimant is not to be treated in the same way as a P/T worker use the normal earnings in the regular occupation (see DMG 71489).

## Table B - regular occupation P/T

### Type of case

1. Claimant is working in suitable alternative employment and earning at least as much as in the regular occupation.

2. Claimant is working in suitable alternative employment, but earning less than in the regular occupation.

### Effect of comparison

**A.** Where the hourly rate in alternative employment is the same as or more than that in the regular occupation, disallow on the grounds that the employment is of equivalent standard<sup>1</sup>.

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

**B.** Where the hourly rate is less than that in the regular occupation or the hourly rate is not known, disallow under payability whatever the hours worked<sup>1</sup>.

*1 SS CB Act 92, Sch 7, para 11(10) & (11)*

**A.** Where the claimant is working at least the same number of hours as worked in the regular occupation (or less and this was due to the relevant loss of faculty) award the difference between the actual earnings and regular occupation earnings, up to the maximum.

## Type of case

## Effect of comparison

**B.** Where the claimant is working fewer hours than worked in the regular occupation for reasons unconnected with the relevant loss of faculty, but the work for the additional hours exists in the alternative employment (not necessarily with the same employer), calculate earnings in the alternative employment for the same number of hours as worked in the regular occupation. If these earnings are at least the same as in the regular occupation disallow normally under equivalent standard<sup>1</sup>. If less award the difference between the calculated alternative employment earnings and the regular occupation earnings, up to the maximum. If work for the additional hours does not exist, see **C**.

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

**C.** Where in **B** work for the additional that are available and the regular hours does not exist in the alternative employment, award the difference between calculated earnings for the number of hours occupation earnings<sup>1</sup>, subject to consideration of the claimant's capacity for other suitable alternative employment (see DMG 71124).

*1 SS CB Act 92, Sch 7, para 11(10) & (11)*

**3.** Claimant has worked in suitable alternative employment, but is not now working in it due to factors unconnected with the relevant loss of faculty.

Proceed as in **1.** or **2.** as if the claimant were still working in the alternative employment.

## **Type of case**

**4.** Claimant has not worked in the suitable alternative employment.

## **Effect of comparison**

If the employment is available on a P/T basis, find out the hourly rate payable, then:

**A.** if the rate is the same as or greater than that in the regular occupation and there is no evidence that the hours which could be worked are less than in the regular occupation, disallow on the ground of equivalent standard<sup>1</sup>.

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

**B.** the rate is less than in the regular occupation and there is no evidence that the hours worked are less than the regular occupation, award the difference based on the hours worked in the regular occupation;

**C.** if the employment can only be worked, or because of the relevant loss of faculty the claimant would only be capable of working, for less hours than in the regular occupation, award the difference between payment for the total hours which could be worked in the alternative employment and for the total hours that were worked in the regular occupation;

**D.** do not use any employment as the basis for comparison if the suitable alternative employment can only be worked F/T or for a greater number of hours than in the regular occupation.



## Exceptional employment

71511 Claimants may obtain employment in which

1. they earn as much as they would in the regular occupation **or**
2. the hourly rate is as high.

71512 However, DMG 71511 may not represent a claimant's true earning capacity because

1. the earnings or hourly rate may be exceptionally high for the type of work **or**
2. the employment may be
  - 2.1 only temporary **or**
  - 2.2 exceptional and not a true indication of the claimant's capability.

Where this applies people should not be regarded as capable of following employment of an equivalent standard<sup>1</sup>. The claim should be disallowed on payability<sup>2</sup>.

*1 SS CB Act 92, Sch 7, para 11(1); 2 Sch 7, para 11(10) & (11)*

71513 An employment should not be treated as exceptional just because it does not last long. An employment

1. which does not last long **and**
2. which is a recognized type of employment of which the claimant is capable **and**
3. which is not a job specially selected or made for the claimant **and**
4. in which earnings are not unusually high

cannot be disregarded as exceptional, and disallowance should be imposed. In cases of doubt the DM should look at the position over a longer period<sup>1</sup>.

*1 SS CB Act 92, Sch 7, para 11(1); R(I) 48/53; R(I) 27/57; R(I) 42/61*

71514 The standard of the regular occupation should usually be compared with the standard of the suitable employment in the area in which the claimant lives. It will be unreasonable to expect the claimant to move for the purpose of obtaining suitable employment elsewhere at a higher standard.

71515 If, exceptionally

1. there is no suitable employment in the claimant's area **or**
  2. the suitable employment is P/T only, and the claimant is capable of F/T work
- it may be necessary to consider the suitability of employment outside the home area (see DMG 71251). If the claimant has left the home area, see DMG 71564.

71516 A claimant will usually try to get the best paid employment possible<sup>1</sup>. The standard of the employment which the claimant is in may as a general rule be used as the basis of comparison with that in the regular occupation, **unless** the claimant has

1. shown fitness for more suitable paid work **or**
2. deliberately chosen to follow employment below the standard of which they are capable.

*1 R(I) 45/61*

71517 Claimants may agree that the probable standards of remuneration in the regular occupation is not representative of the period under consideration. If, but for the relevant loss of faculty, a claimant would

1. in all probability have moved on in the regular occupation to another employer **and**
2. have been paid higher wages by that employer.

The higher figure should be accepted in (subject to satisfactory evidence).

## **Subsidiary occupations**

71518 Earnings from a subsidiary occupation followed after the accident

1. can be ignored or included according to the circumstances of the case **and**
2. cannot be included in the assessment of the probable standard of remuneration in the regular occupation, as the regular occupation cannot include a subsidiary occupation (see DMG 71063 - 71064).

## **Earnings not to be included**

71519 The earnings from a post-accident subsidiary occupation **should not** be included in the earnings where the

1. subsidiary occupation was followed both before and after the accident in addition to F/T employment<sup>1</sup> **or**
2. same subsidiary occupation was followed to the same extent both before and after the accident in addition to P/T employment.

*1 R(I) 2/70*

## **Earnings to be included**

- 71520 The earnings from a post-accident subsidiary occupation **should** be included in the earnings where the subsidiary occupation has been taken up since the accident
1. in addition to P/T employment **or**
  2. as well as the F/T employment and the total hours are similar to the hours worked in the regular occupation (for example where overtime was worked in the regular occupation but not in the post-accident employment and the claimant has taken up a subsidiary occupation).

## **Sheltered employment**

- 71521 Employment with Reemploy should not be used for the purposes of comparison unless
1. the claimant is actually employed by Reemploy **and**
  2. this employment represents the limit of the claimant's capacity.

Employment with Reemploy is sheltered employment of an exceptional character and the probable earnings of a person in this employment should not be taken as a sign of the claimant's probable earning capacity in outside industry<sup>1</sup>.

*1 R(I) 6/77*

71522 - 71531



## Factors affecting the standard of remuneration

71532 Age should only be a consideration in that earnings in a notional occupation should be those of an adult. Where the claimant's age would attract a lower rate of pay during the period of the claim, the earnings should be those appropriate to the claimant's age.

71533 Where the claimant was a trainee (see DMG 71074 - 71077), the regular occupation earnings should be taken as those proper to the maximum of the scale, **unless** the claimant would not have reached that point by the period under consideration.

71534 When considering an alternative employment which has

1. an incremental **or**
2. a progressive scale

the earnings used should be those which the claimant is receiving or, if not actually engaged in the employment, expected to receive.



## Additions to, and deductions from earnings

71535 The DM is concerned with the level of income which the claimant is able to obtain. This means that there will be elements of remuneration which have to be

1. **excluded**, such as travelling expenses **or**
2. **included**, for example, tips.

### Payment in kind

71536 If a person receives payment in kind in return for services, the value should be included in working out the wages from the employment<sup>1</sup>. The reasonable value of a meal provided as part of the terms of employment should be included.

*1 R(I) 47/54; R(I) 3/58*

### Concessionary coal

71537 Workers in the coal mining industry may receive an allowance in the form of

1. coal at a specially reduced price **or**
2. an annual allowance of smokeless fuel **or**
3. cash in place of fuel.

71538 The amount of the allowance depends on whether the worker is a

1. householder **or**
2. subtenant **or**
3. lodger.

71539 Where the allowance takes the form of coal, the allowance may differ from district to district depending on local agreements. Where, the allowance is by one of the other methods the

1. value of the smokeless fuel allowed **or**
2. cash alternative

is a fixed figure, calculated according to the employee's category and applied nationally. This fixed figure is determined every year, and is known as the "equivalent sum".

71540 The "equivalent sum" should be regarded as part of the standard of remuneration when making earnings comparisons but will only be important where the regular occupation or alternative employment are in the coal mining industry. If both jobs are within the industry the same figure will feature on both sides of the comparison and cancel itself out.

71541 When a claimant has left the mining industry, the concession will form part of the standard of remuneration for the regular occupation. Any continuing payment of the concession as

1. compensation **or**
2. retirement pay

should not be considered as part of the claimant's remuneration. This applies even if alternative employment is being followed elsewhere.

71542 Coal mining employers will need to know the appropriate domestic category if notional earnings, including the concession, are required for an occupation within the mining industry which is not being followed by the claimant.

## Tips

71543 Tips which are

1. a customary part of the earnings in any occupation, should be included when assessing the standard of remuneration<sup>1</sup>
2. casual or occasional or very small can be ignored.

Estimates of the amounts normally received should be obtained from the employer for comparison with any figure suggested by the claimant, or a figure may have already been agreed with HMRC for tax purposes.

*1 R(I) 47/54*

## Payment to or from colleagues

71544 A person may receive in addition to wages from the employer, regular payments from colleagues for assisting them in their work, with the employer's knowledge and agreement. These payments should be included as part of the claimant's remuneration for the purposes of a comparison of earnings **unless** such assistance constitutes a subsidiary occupation<sup>1</sup>.

*1 R(I) 60/52*

71545 Such payments should only be included after the claimant has established the existence and amount of the extra payment with evidence from those who make it.

71546 Payments **cannot** be taken into account if they

1. are illegal **or**
2. involve or encourage a neglect of duty on the part of the recipient to the employer **or**
3. are casual or sporadic in amount.

71547 If, because of the relevant loss of faculty, a claimant

1. cannot carry out all the duties of an occupation **and**
2. pays workmates for assistance

the amount paid may be deducted in assessing the standard of remuneration<sup>1</sup>.

*1 R(I) 5/58*

## **Uniform, travelling expenses, subsistence allowance, etc**

71548 An employer may provide an employee with articles or cash payments, for example

1. uniform **or**
2. overalls **or**
3. travelling expenses **or**
4. subsistence allowance.

71549 Where an employer provides an employee with articles or cash payments and these are

1. for the purposes of the work **and**
2. not given to the employee in return for services

they do not form part of the earnings or remuneration<sup>1</sup>. Where however, the articles or cash payments are given as a bonus they are included in the remuneration<sup>2</sup>.

*1 R(I) 33/52; R(I) 1/54; 2 R(I) 24/59*

## **NCB pneumoconiosis scheme**

71550 In an agreement effective from 1.10.74, made between the former British Coal (then the NCB) and the unions of the coal mining industry, a scheduled scheme of compensation for employees (past and present) suffering from pneumoconiosis was created. This compensation provided for

1. lump sum payments (by reference to the percentage disablement assessment or extent of incapacity) **and**
2. death benefit to dependants **and**
3. loss of earnings allowance.

All payments made under the Scheme are considered to be an out of court settlement of damages at common law and are not remuneration.

## Deductions from pay

71551 The standard of remuneration should be based on gross pay before deductions which are not connected with the actual performance of the work, such as income tax, NI contributions and superannuation. Deductions or amounts expended which are directly related to the work, for example

1. service or materials
2. postage
3. cleaning materials
4. travelling during work (but not to or from work)

are **not** part of the standard of remuneration<sup>1</sup>.

*1 R(I) 79/52*

# Remuneration in regular occupation

## Standard of remuneration in regular occupation

71552 The standard of remuneration in the regular occupation is

1. that which the claimant would have obtained during the period under consideration, if the claimant had been able to continue in the regular occupation
2. **not** just the standard obtainable at the date of the accident because any increases or decreases in the standard of remuneration in the regular occupation since the date of the accident must be taken into account.

71553 If

1. the claimant
  - 1.1 was on piecework **or**
  - 1.2 was paid according to output **or**
  - 1.3 worked regular overtime **and**
2. conditions have changed since the date of the accident

the claimant's probable standard of remuneration in the regular occupation should be calculated according to the average increase (or decrease) in the standard of remuneration of colleagues in the same occupation, working under the same conditions.

### Example

If the earnings of colleagues have risen by an average of 5%, the claimant's standard of remuneration should also be adjusted by 5%<sup>1</sup>.

*1 R(I) 78/51; R(I) 88/52*

## Regular occupation said to have ceased to exist

71554 Where, at some time after the relevant date, a claimant's regular occupation is said to no longer exist, the DM may find that

1. although the particular post has been abolished the occupation still exists elsewhere
  - 1.1 with the same **or**
  - 1.2 some other employer<sup>1</sup> **or**
2. the regular occupation
  - 2.1 has been too narrowly defined **and**

**2.2** may be found to be done elsewhere<sup>2</sup> if a broader definition is taken.

*1 R(I) 88/52; R(I) 16/54; 2 R(I) 10/54*

71555 If the regular occupation has disappeared this is not a bar to entitlement to REA<sup>1</sup>. The probable standard of remuneration can be calculated by taking the claimant's actual earnings in the regular occupation and bringing them up to date by making a suitable adjustment, based on the percentage increase of other similar employed people<sup>2</sup>.

*1 R(I) 14/62; 2 R(I) 11/65*

71556 An occupation, although continuing, may include new techniques which the claimant is unable to use, because of the disability. This does not mean that the occupation has ceased to exist<sup>1</sup>.

*1 R(I) 10/59*

71557 For claims made on or after 6.4.87 the DM is required in certain circumstances<sup>1</sup> to decide the standard of remuneration in a regular occupation that is said to have ceased to exist<sup>2</sup> by reference to the percentage increase in earnings in the relevant occupation group<sup>3</sup>. For further guidance see DMG 71714 - 71716.

*1 SS (II) (REA & Trans) Regs, reg 2(4); 2 reg 2(8); 3 reg 2(6)*

## **Mechanisation and new technology**

71558 Special consideration may be needed when mechanisation and new technology has altered the nature of the claimant's regular occupation, from one which was manual at the time it was being done especially when the place of employment has closed.

71559 The current notional earnings in the regular occupation should be obtained as in DMG 71560 - 75563.

71560 Where the manual occupation is still carried out

1. at the place of employment in the claimant's home area **and**
2. where the claimant has worked or is working

the DM should obtain details of earnings in that occupation from that employer.

71561 Where

1. that place of employment is closed **or**
2. the manual occupation is no longer carried out there, but is carried out elsewhere, within reasonable daily travelling distance of the claimant's home

the DM should obtain details of earnings in that occupation from the other source.

71562 If the manual occupation is not carried out within reasonable daily travelling distance, the DM should find out from the employer for whom the claimant last worked details of

1. the regular occupation **and**

2. whether the claimant would probably have been kept in the occupation despite the changes in its nature.

71563 If the information in DMG 71562 cannot be supplied, the DM should check if the majority of colleagues were kept in the occupation. If the evidence indicates that the claimant would probably

1. have been kept on, the earnings in that occupation should be treated as the notional earnings in the regular occupation, as it has become in the claimant's home area **or**
2. **not** have been retained, the current notional earnings in the manual occupation may be assessed by following the principle outlined at DMG 71555.



# Removal to another locality

71564 Where

- 1 a comparison is being made between the standards of remuneration in the regular occupation and the post-accident occupation **and**
2. the person has moved from one locality to another

the comparison must be between occupations in the present locality. The actual or likely standard of remuneration in the previous, or any other, locality<sup>1</sup> must be ignored.

*1 R(I) 2/66 Appendix*

71565 This principle is illustrated in the Table of Comparisons (Table C). The DM should note particularly the situation where neither the regular nor the post-accident occupations is carried on in the locality to which the claimant has moved (paragraph 5 of Table C). The DM should also note the guidance at DMG 71566 - 71569.

## Table C

### Type of case

1. Regular occupation and post accident employment followed in the old locality are both available in the new locality.

### Form of comparison

**A.** If the claimant is following the same post-accident employment

**compare** the average gross weekly earnings in the regular occupation in the new locality

**with** the current earnings in the present occupation

**B.** If the claimant is following a different post-accident employment in the new locality

**compare** the average gross weekly earnings in the regular occupation in the new locality

**with either** the current earnings in present occupation

**or** the average gross weekly earnings in the new locality for the post-accident employment which the claimant followed in the old locality.

## Type of case

2. Regular occupation is available in the new locality but not the post-accident employment followed in the old locality.

3. Regular occupation is **not** available in the new locality but the post-accident employment followed in the old locality is.

4. Regular occupation is not available in the **new** locality and the post-accident employment followed is not available in the **old** locality.

5. Neither the regular occupation nor the post-accident employment followed in the old locality is available in the new locality.

## Form of comparison

**Compare** the average gross weekly earnings in the regular occupation in the new locality, **with** the current earnings in the present occupation and decide entitlement and rate.

**A.** If the claimant is following the same post-accident employment in the new locality

**compare** the notional earnings for the regular occupation in the old locality

**with the higher of** the current earnings in the present occupation and

the earnings in that occupation in the old locality.

**B.** If the claimant is following a different post-accident employment in the new locality

**Compare** the notional earnings for the regular occupation in the old locality

**with the highest of** the current earnings in the present occupation and

the average gross weekly earnings in the new locality for the post-accident employment followed in the old locality **and**

the earnings in that occupation in the old locality.

**Compare** the notional earnings in the old locality for the regular occupation **with** the current earnings in the present occupation.

**Compare** the notional earnings in the old locality for the regular occupation **with the higher of** earnings in the previous post-accident employment in which the claimant was engaged **and**

the current earnings in the present occupation.

71566 Where the claimant

1. was not working at the old locality but it was considered that there was alternative work there which was suitable in the claimant's case **and/or**
2. is not working at the new locality and there is also work there for which it is considered the claimant is suited, whether it is the same work or not

the table at DMG 71565 should be applied, reading "suitable employment" for "employment followed" or "is following" as necessary.

71567 Where the claimant was

1. not working at the old locality **and**
2. is working at the new

no comparison should be made involving the notional earnings at the old locality.

71568 Where the claimant was not working, references to "earnings" (other than those for the regular occupation in the old locality) should be taken as references to the average gross weekly earnings.

71569 Once the "higher" or "highest" post-accident earnings have been established for comparison purposes in deciding entitlement and rate to REA, the work which produced those earnings should continue to be used as a basis for comparison unless there has been a further change of occupation.

71570



# Exceptional earnings

## Short-time working

71571 Where the DM is considering if the

1. regular occupation **and**
2. alternative employment

are of **equivalent standard**<sup>1</sup>, a long-term view should be taken.

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

71572 A temporary reduction in the normal level of earnings in either employment, due to short-time working should be

1. ignored if caused by a passing recession in the industry concerned **or**
2. taken into account only if the situation is likely to be long-lasting<sup>1</sup>.

*1 R(I) 8/53; R(I) 31/59*

71573 When considering the **rate of REA**<sup>1</sup> a temporary reduction of earnings should be taken into account **unless** it is likely to last only for a few weeks. Therefore a decrease in the regular occupation earnings might reduce the rate of REA to a nil award for a period<sup>2</sup>, even though the claimant

1. retains entitlement to REA **and**
2. continues to be regarded as incapable of employment of an equivalent standard<sup>3</sup>.

*1 SS CB Act 92, Sch 7, para 11(10) & (11); 2 Sch 7, para 11(10) & (11);  
3 Sch 7, para 11(1)*

71574 If DMG 71573 applies, the DM will tell the claimant that if the regular occupation earnings increase a fresh claim for REA should be made unless the claimant is making an application for a claim to be reconsidered. In making a decision

1. the DM can do so only on the facts as they exist at the date of decision **and**
2. it is not enough for a claimant to show at some later date a total loss of earnings over a longer period<sup>1</sup>.

A period for which no payment is made under this principle would not stop the continuous condition being satisfied at some later date.

*1 R(I) 5/62*

- 71575 On the other hand, a claimant might
1. initially qualify for REA at a reduced rate **and**
  2. at a later date qualify for a higher rate, because of short-time working in the post-accident employment<sup>1</sup>.

*1 R(I) 8/53; R(I) 31/59*

## **Loss of overtime**

71576 A decrease in earnings caused by failure to work overtime (for example on the instructions of a Trade Union) in the

1. regular occupation **or**
2. post-accident employment

must not be taken into account if overtime work is available, **unless** the claimant can prove that inability to work overtime is due to the relevant loss of faculty.

71577 - 71580

## **Seasonal variations**

71581 The case may arise where although a claimant is employed throughout the year the level of wages changes seasonally

1. in the regular occupation **or**
2. in the post-accident employment **or**
3. as the claimant changes employment with the seasons, perhaps with breaks of no more than a few weeks between each job.

71582 The aim is to calculate the earnings of such employment in a way as will give a fair average weekly rate in each, over the fairest possible period<sup>1</sup>. A long view should be taken of REA and its payment should not be looked at period by period in isolation. The DM should make a comparison, looked at over a period of time, between the

1. employment which the claimant is capable of following **and**
2. regular occupation

and consider whether the claimant is worse off financially because of the relevant loss of faculty. If figures are available for a year both in the regular occupation **and** in the new employment, these figures, reduced to a weekly average, will usually give a proper basis of comparison.

*1 R(I) 76/52; R(I) 5/53*

71583 Where the level of wages are

1. averaged **and**
2. compared over the whole year (as in DMG 71582)

if REA is awarded, the rate should be the same throughout the year, including the periods when the claimant earns more in the post-accident employment than they would in the regular occupation.

71584 If the claimant was a seasonal worker

1. in the regular occupation **or**
2. in the post-accident employment **or**
3. both (that is there was, or is, no employment for parts of the year)

REA can only be considered for the periods during which there is an effective loss of earning capacity.

#### **Example**

Claimants cannot be compensated for those periods during which they would not have been working in the regular occupation. In considering seasonal post-accident employment cases, DM's should investigate whether suitable employment exists that claimants are capable of undertaking during the off-season. Whether such employment is available to them is immaterial.

71585 Entitlement should be assessed in the normal way, by deciding whether any suitable alternative employment within the claimant's capability is of an equivalent standard to that of the regular occupation<sup>1</sup>. If it is established that the conditions are satisfied, the rate and period of award of REA should be determined<sup>2</sup> in accordance with DMG 71586 - 71589.

*1 SS CB Act 92, Sch 7, para 11(1); 2 Sch 7, para 11(10)*

71586 Where the

1. regular occupation continued throughout the year but the post-accident employment is seasonal only **and**
2. claimant is capable of suitable employment during the off-season

a comparison should be made over a complete year if possible, as in DMG 71581 - 71582.

71587 Where the

1. regular occupation continued throughout the year but the post-accident employment is seasonal only **and**
2. claimant is not capable of suitable employment during the off-season

the rate should be calculated and awards made season by season.

71588 Where the regular occupation was seasonal

1. entitlement can only arise during the period of the working season (see DMG 71012) **and**

2. the rate should be calculated season by season separately<sup>1</sup>

the claimant's post-accident earnings should be calculated over the regular occupation working season only.

*1 R(I) 56/53*

71589 Where the regular occupation was seasonal and the

1. post-accident employment is also seasonal **and**

2. claimant is not employed in it throughout the regular occupation working season

the rules in DMG 71586 and DMG 71587 should be applied, taking the regular occupation working season as the basic period instead of a year.

71590 In a case involving seasonal employments, the DM may be asked to give a decision at an early stage, when the claimant has been employed for only a very short time since the accident and it is difficult to estimate what the future earnings are likely to be. The DM should try to obtain information from

1. the employer **and**

2. Jobcentre Plus

where it seems likely that the claimant will follow various employments according to season.

71591 If it is impossible to make any reasonable estimate of the claimant's likely future earnings, the DM should

1. give a decision covering only a short period, based on the claimant's current earnings **and**

2. reconsider the position on the next claim when more figures have been obtained.

## **Special responsibility allowances for councillors**

71592 A special responsibility allowance can be paid, in addition to attendance payments, to some members of principal councils who are councillors. This payment is made at the discretion of the council and LA. The weekly earnings should be taken into account when comparing earnings<sup>1</sup>.

*1 SS CB Act 92, Sch 7, para 11(10) & (11)*

71593 - 71600

## Overtime earnings

71601 In cases involving overtime the DM should first

1. define the regular and alternative occupations **and**
2. decide if overtime is an essential feature of the jobs (see DMG 71288).

71602 The only issue then to decide is whether overtime working is a regular feature of<sup>1</sup>

1. the regular occupation **or**
2. the alternative occupation **or**
3. both occupations<sup>1</sup>.

*1 R(I) 7/51*

71603 Occasional overtime and occasional breaks in regular overtime should be ignored. But where there is a temporary cessation of overtime which has been constant in the regular occupation the

1. rate of REA awarded should be reduced if it is established that the cessation is more than an exceptional break **and**
2. period of award should be short so that the matter can be reconsidered if the overtime position changes<sup>1</sup>.

**Note:** It is not necessary for overtime to be continuous throughout the year for it to be taken into account; it can be seasonal only<sup>2</sup>.

*1 CI81/49(KL); 2 R(I) 76/52*

71604 If voluntary overtime work or voluntary Saturday work was available but the claimant did not work it or did not work all of it the DM should note that for the

1. regular occupation, the normal earnings (not the claimant's personal earnings) should be taken into account in assessing the standard of remuneration<sup>1</sup>
2. post-accident employment, the actual overtime earnings should be accepted in assessing the standard of remuneration except that if the
  - 2.1 claimant has not acted reasonably in relation to overtime **and**
  - 2.2 actual earnings are not a fair measure of earning power

the average of the overtime earnings of the claimant's colleagues should be used instead of the claimant's.

*1 R(I) 7/69 Appendix*

71605 - 71606

## Averaging of earnings

71607 Where earnings fluctuate it will usually be necessary to calculate an average. A statement of a year's earnings for income tax purposes may prove a reliable average if available, otherwise, the DM should note that

1. occasional weeks during which earnings are lower than usual because of absence from work are normally excluded (see DMG 71608) for guidance on when this does not apply but if the claimant has
  - 1.1 regularly suffered such losses (for example because of a generally poor state of health) **and**
  - 1.2 reduced earnings can be regarded as normal and representativethen the relevant weeks should be included (for example, the claimant in the post-accident employment might be frequently off work because of illness and a fair average of the earnings might properly take account of this)
2. weeks in which earnings were exceptionally high because of some special non-recurring payment should be excluded (for example a bonus for unusually high output, only rarely earned, or an occasional week of overtime, could force earnings up)
3. holiday weeks, where holiday pay differs from the normal pattern of earnings, should be excluded.

71608 DMG 71607 1. does not apply if the claimant has

1. regularly suffered such losses (for example because of a generally poor state of health) **and**
2. reduced earnings can be regarded as normal and representative.

When this applies the relevant weeks should be included. For example, the claimant in the post-accident employment might be frequently off work because of illness and a fair average of the earnings might properly take account of this.

71609 - 71620

## Evidence of earnings from in the coalmining industry

71621 Replies to earnings enquiries may be in the form of a computer print-out showing earnings for the claimant's pay-group. These printouts show three lines giving

1. a detailed break-down of
  - 1.1 the shift pattern **and**
  - 1.2 the average earningsover each of the two most recent tax quarters for which figures are available at the time of enquiry **and**

2. for the two quarters combined.

In most cases the details in the third line, giving the average over six months, should be accepted as the weekly norm, both for shift working and gross earnings.

71622 The DM should use the figures for a quarter which give a more accurate representation of the normal average where the average

1. pay for the six months is depressed by factors such as a trade dispute leading to an overtime ban or stoppage **or**
2. is inflated (for example by pay arrears).

71623 Where there are circumstances which make a particular claimant's earnings significantly more or less than those of others in the same occupation, evidence may be obtainable of the claimant's earnings for the most recent quarter

1. before the accident/date of onset where the enquiries relate to the regular occupation **or**
2. covered by the group statement, where post-accident/date of onset employment is involved.

71624 - 71700



# Indexation of earnings

## General

71701 For claims made before 6.4.87, the rates of payment for an employment were usually obtained by asking

1. the employers **or**
2. Jobcentre Plus.

These enquiries were made on initial and on all renewal claims.

71702 For initial or renewal claims made on or after 6.4.87<sup>1</sup> a revised method of deciding the probably standard of remuneration was introduced<sup>2</sup>. This involves applying percentage increases to the level of earnings for the relevant occupational group (indexation). Indexation

1. is not used in all cases **and**
2. when it is used is applied only in respect of the third or subsequent award of REA for a particular accident or PD.

Earnings for first or second awards of REA **in all cases** are decided in the usual way<sup>3</sup> (that is, by earnings comparison).

*1 SS (II) (REA & Trans) Regs, reg 5; 2 SS CB Act 92, Sch 7, para 11(13);*

*3 SS (II) (REA & Trans) Regs, reg 2(1) & 2(2)*

71703 A "first award" in the context of indexation is the first award of REA for a particular accident or PD following the initial claim. All previous awards for the accident or disease should be taken into account when deciding the chronological number of a particular award. Awards of SHA made before 1.10.86 are treated as awards of REA for this purpose<sup>1</sup>.

*1 SS (II) (REA & Trans) Regs, reg 6*

71704 It does not matter if the earlier series of awards are not consecutive; a break in entitlement does not mean the numerical sequence has to start again. Where an award

1. has been changed on revision or supersession **or**
2. varied on appeal by a FtT

the substituted award does not count as a further award **but as a replacement** for the award originally made.

71705 However, if the award was changed on the grounds of a relevant change of circumstances<sup>1</sup>

1. any revised award is always treated as a first award<sup>2</sup> **and**
2. the probable standard of remuneration is decided by suitable enquiries.

*1 SS A Act 92, s 25(1)(B); 2 SS (II) (REA & Trans) Regs, reg 4*

## Earnings subject to indexation

- 71706 Indexation of earnings on third or subsequent awards applies where the second or
1. subsequent award of REA was payable at the **maximum** rate (see DMG 71707) **or**
  2. later award of REA was **not** payable at the maximum rate (see DMG 71708).
- 71707 For the purposes of DMG 71706 **1.** indexation applies to earnings in **both** the regular occupation and the post accident employment **unless**
1. REA would be payable at less than the maximum rate as a result of indexation<sup>1</sup> **or**
  2. there has been a relevant change of circumstances since the last award<sup>2</sup> (see DMG 71711 - 71713).

*1 SS (II) (REA & Trans) Regs, reg 3(2)(a); 2 reg 3(2)(b)*

- 71708 For the purposes of DMG 71706 **2.** indexation applies to earnings in
1. the regular occupation, where that occupation has ceased to exist<sup>1</sup> (see DMG 71714 - 71716) **or**
  2. a suitable alternative employment where the claimant is
    - 2.1 not employed<sup>2</sup> **or**
    - 2.2 employed but the employment is not suitable<sup>3</sup>and there has been no change of circumstances since the last previous award<sup>4</sup> (see DMG 71721 - 71724).

*1 SS (II) (REA & Trans) Regs, reg 2(4); 2 reg 2(5)(a); 3 reg 2(5)(b); 4 reg 2(5)(c)*

- 71709 The DM should note that where the second or a subsequent award of REA was at the maximum rate, indexation should be applied to **both** pre- and post-accident earnings automatically. There is no need to consider whether
1. the regular occupation has ceased to exist **or**
  2. in respect of the alternative employment the claimant is not employed etc.

- 71710 Only where the second or subsequent award was **not** at the maximum rate will the DM need to confirm whether the conditions in DMG 71708 **1.** or **2.** are satisfied before indexation can be applied on the third or subsequent award.

## Previous awards at maximum rate

- 71711 Where a second or subsequent award of REA
1. has been paid at the maximum rate **or**
  2. would have been paid but for the limitations imposed on certain retired beneficiaries

the DM should calculate the probable standard of remuneration in the regular occupation **and** the post accident occupation, by applying the appropriate index factor to the earnings determined on the last award.

71712 The rate of REA may fall below the maximum, because of the application of the relevant index factors to pre and post-accidents earnings. The DM should then decide the claim in the same manner as a first award, that is by obtaining actual earnings figures<sup>1</sup>. In every other way the claim remains a third, fourth etc. award. Any award made after the award which has been decided as a first award

1. does not become a second award, but takes its number from the continuing sequence - fourth, fifth etc. **and**
2. is decided by applying indexation to the earnings.

*1 SS (II) (REA & Trans) Regs, reg 2(3)(b)*

71713 If indexation is not appropriate because there has been a relevant change of circumstances

1. the award is treated as being a first award<sup>1</sup> **and**
2. any subsequent award becomes the second award **and**
3. only on the award following that (the third award) can indexation be considered.

A relevant change of circumstances in this situation means a relevant change in the claimant's personal circumstances. For example the claimant starts a new suitable alternative employment or is now regarded to be capable of work in cases where incapacity was previously accepted. It does not include an annual pay award or where a claimant commences a new job and the old job is still considered to be the suitable alternative employment (see DMG 71722).

*1 SS (II) (REA & Trans) Regs, reg 4*

## **Regular occupation has ceased to exist**

71714 The circumstances in which a regular occupation can be said to no longer exist are where the

1. former employer is no longer trading in the locality (but see DMG 71715) **or**
2. work the claimant did at the former place of employment no longer exists or has changed in character so that the work is now a different occupation

and there is no employer in the locality providing work similar to that in which the claimant was employed<sup>1</sup>.

*1 SS (II) (REA & Trans) Regs, reg 2(8)*

71715 The DM should continue to apply the guidance in DMG 71564 if the claimant's former employer is still in business but the claimant has moved to a new locality. The DM should continue to use the average gross weekly earnings of the regular occupation in the old locality where there is no similar work in the claimant's new locality.

71716 The DM should

1. obtain average gross weekly earnings in the claimant's new locality if similar work exists in it **or**
2. make enquiries of the original employer if work in the claimant's new locality should later become unavailable **or**
3. calculate the probable standards of remuneration by means of indexation, if the original employer has ceased to trade.

71717 - 71720

## **Suitable alternative employment**

71721 When deciding if indexation is appropriate on a third or subsequent award the phrase "not employed" includes

1. retired beneficiaries **and**
2. those who are unemployed<sup>1</sup>.

The phrase does not include those, who due to incapacity are unable to work but who still have a contract of service with their employer.

*1 SS (II) (REA & Trans) Regs, reg 2(5)(a)*

71722 Where the

1. DM is considering if an alternative employment is suitable **and**
2. claimant working in a suitable alternative employment leaves that occupation (occupation A) for reasons unconnected with the relevant loss of faculty **and**
3. claimant takes up work in a different occupation (occupation B) which is lower paid

the DM should continue to use the earnings from occupation A for REA purposes. This is because occupation A will remain suitable alternative employment in the claimant's case. The earnings figure for the last previous award, based on occupation A, will be indexed in the future, even though actual earnings in that occupation may continue to be available from the relevant employer.

## Example

Claimant permanently incapable of the regular occupation but working in a suitable alternative employment (A). REA has been awarded at maximum rate by indexation. The claimant leaves that employment for reasons unconnected with the relevant loss of faculty and starts a lower paid job (B).

The DM supersedes the decision on the grounds of relevant change of circumstances but does not change the award.

Although the decision was superseded on the grounds of relevant change of circumstances there was no change in the personal circumstances. Job (A) is still the suitable alternative employment for indexation purposes.

71723 Action will be needed to find a suitable alternative occupation if

1. a third or subsequent award is being considered **and**
2. the medical evidence suggests that a claimant previously incapable of alternative work is now capable of such employment.

Indexation will not apply even if the claimant actually takes up employment, because this will be looked upon as a relevant change of circumstances and is, therefore, excluded from indexation<sup>1</sup>.

*1 SS (II) (REA & Trans) Regs, reg 2(5)(c)*

71724 If the claimant is employed in a suitable alternative occupation and has not received REA at the maximum rate

1. indexation of earnings will not be appropriate **and**
2. the award should be decided in the same manner as on a first award<sup>1</sup>.

*1 SS (II) (REA & Trans) Regs, reg 2(3)(b)*

71725 - 71730

## Method of indexation

71731 To index an award, the probable standard of a person's remuneration is determined by

1. increasing the level of earnings used on the last award **by**
2. a percentage equal to any percentage increase in the level of earnings for the relevant occupational group<sup>1</sup>.

In practice this is done by applying the relevant index factor to the previous level of earnings (see DMG 71736).

*1 SS (II) (REA & Trans) Regs, reg 3(1)*

71732 - 71735

## Tables of grouped occupations and index factors

71736 Tables have been produced for the DM giving details of

1. grouped lists of occupations **and**
2. index factors and percentage increases.

71737 The index factors and percentage increases

1. have been prepared by a statistician **and**
2. are based on information published in the Annual Survey of Hours and Earnings.

The tables can be found in procedural instructions.

71738 The Annual Survey of Hours and Earnings is a sample survey of earnings of employees in employment in GB, conducted and published by The Office for National Statistics. Its purpose is to obtain information once a year about the

1. levels **and**
2. distribution **and**
3. make-up

of earnings of employees in the various occupations industries and major wage negotiating groups.

71739 The index factors in the Table are obtained by dividing the average weekly earnings for the particular occupational group in one year by the average weekly earnings for the same group in the previous year.

### Example

1995	1996
Average weekly earnings in the occupational group	Average weekly earnings in the occupational group
£306.45	£321.70

Index factor = 321.70 divided by 306.45 = 1.050.

71740 The Table of Index Factors is revised each year and should be applied to REA awards beginning on or after the first February following the year to which the increase relates<sup>1</sup>.

*1 SS (II) (Rea & Trans) Regs, reg 2(7)(c)*

- 71741 The design of the Table prevents the index factor for the twelve month period being applied more than once during the year, even though a number of REA awards can be given during that time.
- 71742 When the Table is referred to, the DM should identify the year of the previous earnings review. The Table will then show the correct earnings factor to apply in order to bring the likely level of wages of the previous award up to date.
- 71743 Where the last earnings review was earlier in the same year there will be no column of index factors shown and the likely level of wages for the previous award must be used again.
- 71744 Application of index factors gives a simpler means of calculating increases in earnings than applying percentage increases as required in the legislation. The results should be the same. The percentage increases for each occupational group should not be used to calculate earnings.
- 71745 DMs should contact Industrial Injuries Live Support and Adviceline for more information on
1. any aspect of the Annual Survey of Hours and Earnings **or**
  2. the calculation of a certain index factor.

## **Deciding the relevant occupational group**

- 71746 So that the appropriate index factor can be applied it is necessary to assign the employment under consideration to the right occupational group. The right occupational group is the group specified in the Survey which is nearest to the claimant's
1. regular occupation **or**
  2. suitable alternative occupation **or**
  3. both<sup>1</sup>.

*1 SS (II) (REA & Trans) Regs, reg 2(7)(a)*



# Claimants over pensionable age

## Meaning of pensionable age

71747 See DMG Chapter 75 for the meaning of pensionable age for RP purposes and DMG Chapter 74 for the meaning of pensionable age for SP purposes<sup>1</sup>.

*1 Pensions Act 1995, Sch 4, Part I, para 1*

## Claimants who retired on or before 5.4.87

71748 Where on 5.4.87 a person

1. was of pensionable age **and**
2. had retired or was deemed to have retired from regular employment **and**
3. was entitled to REA

the rate of REA could not be increased above the amount in payment on 5.4.87<sup>1</sup>, nor could indexation be applied to an award<sup>2</sup>.

*1 SS (II) (REA & Trans) Regs 87, reg 5; 2 Social Security Act 1986, Sch 3*

71749 Though the rate of REA could not increase above the rate payable immediately before 6.4.87 it could go down. If, for example, on renewal, a lower rate was found to be appropriate on comparison of earnings, the new award would reflect this. In these circumstances

1. there was nothing to prevent the rate subsequently increasing again on a renewal award **but**
2. the rate could **never** be greater than that payable on 5.4.87.

Therefore each claimant affected by this limitation had a personal ceiling on the REA rate imposed.

71750 In cases where REA was reduced because the total IIDB and REA would otherwise have been greater than the 100% IIDB rate<sup>1</sup>, the reduced rate payable immediately before 6.4.87 became the claimant's upper limit for the future.

*1 SS (II & D) Misc Prov Regs 86, reg 9*

71751 Similarly claimants with entitlement to IIDB totalling 100% could not establish entitlement to REA in the future because nothing was payable immediately before 6.4.87. Where claimants first made claims to REA on or after 6.4.87 they were prevented from gaining entitlement to REA. This is because the statutory limit of 140% of the IIDB rate<sup>1</sup> is modified by the replacement of 100% with 140% where the claimant was treated as retired for NI purposes before 6.4.87<sup>2</sup>.

*1 SS CB Act 92, Sch 7, para 11(10); 2 SS (II) (REA & Trans) Regs, reg 8*

71752 The combined effect of the legislation<sup>1</sup> was that in no circumstances could a claimant who retired before 6.4.87 obtain an aggregate of REA and IIDB greater than the equivalent of the 100% IIDB rate.

*1 SS (II) (REA & Trans) Regs, reg 7 & 8*

- 71753 It will not be possible to establish entitlement to REA in the future in cases where there was underlying entitlement to REA immediately before 6.4.87 **but** for some reason no benefit was in payment. This is because the rate of REA payable immediately before 6.4.87 was nil. For example if the claimant was abroad or serving a term of imprisonment.
- 71754 Should the rate of REA payable immediately before 6.4.87 later be revised, superseded or varied on appeal, with retrospective effect, the DM should reconsider any awards which followed and which reflected the original pre 6.4.87 rate. In these circumstances the payable rate can
1. increase **or**
  2. decrease.

In changing any award that follows, an increase should only be given where the earnings differential allows.

**Note:** See DMG Chapter 03 for guidance on revision, DMG Chapter 04 for guidance on supersession and DMG Chapter 06 for guidance on appeals.

## **Claimants who retired on or before 10.4.88**

- 71755 Claimants are entitled to REA for life<sup>1</sup> if on 10.4.88 they
1. were of pensionable age **and**
  2. had retired or were deemed to have retired from regular employment **and**
  3. were entitled to REA

But the rate of the allowance is frozen at the amount payable on 10.4.88<sup>2</sup>.

*1 SS (CB) Act 92, Sch 7, para 12(1); 2 Sch 7, para 12(2)*

- 71756 In the circumstances in DMG 71756
1. satisfaction of the usual entitlement conditions for REA is no longer relevant **and**
  2. the link between REA and IIDB is broken **and**
  3. REA will continue at the same rate for life regardless of any later changes in the claimant's circumstances which could otherwise affect entitlement, for example ending of the assessment of disablement.
- 71757 Because these REA awards are at a set rate for life
1. there is no question of renewal **but**
  2. revision or supersession may be necessary if a claimant is subject to disqualification due to
    - 2.1 absence abroad<sup>1</sup> **or**
    - 2.2 imprisonment<sup>2</sup>.

These provisions apply in “frozen” REA award cases and existing guidance should continue to be followed (see DMG Chapter 07 and DMG Chapter 12).

*1 SS CB Act 92, s 113(1)(a); 2 s 113(1)(b)*

71758 Where on 10.4.88 a person was entitled to REA but disqualified from payment for the reasons in DMG 71758, payment can be resumed

1. when the conditions for payment become satisfied
2. at the rate which would otherwise have been payable (but for the disqualification) on 10.4.88<sup>1</sup>.

*1 SS CB Act 92, Sch 7, para 12(2)*

### **Claimants who retired between 11.4.88 and 9.4.89**

71759 From 10.4.89 the “frozen rate” of REA was extended to REA beneficiaries who

1. retired **or**
2. were deemed to have retired

in the period from 11.4.88 to 9.4.89 inclusive<sup>1</sup>. The rate of REA payable for life was the rate payable on 9.4.89.

*1 SS CB Act 92, Sch 7, para 12(1) & (2)*

### **Claimants who retired between 10.4.89 and 30.9.89**

71760 A person who, between 10.4.89 and 30.9.89

1. had reached pensionable age **and**
2. had retired or was deemed to have retired from employment **and**
3. was entitled to REA on the day immediately before retirement or deemed retirement

ceased to be entitled to REA from the day of retirement<sup>1</sup>.

*1 SS CB Act 92, Sch 7, para 13(1)*

71761 A person who

1. satisfied all three conditions in DMG 71760 **and**
2. was entitled to REA at a weekly rate of not less than £2 on the day immediately before retirement or deemed retirement

became entitled to RA (see DMG 71777).

71762 A person who had ceased to be entitled to REA because of retirement could become entitled to REA again only if they elected to de-retire. In these circumstances

1. a fresh claim was necessary **and**
2. all the entitlement conditions for REA had to be met again.

## Claimants who reach pensionable age on or after 1.10.89

71763 From 1.10.89 the earnings rule for RP was abolished<sup>1</sup>. With the abolition of the earnings rule there is no longer a retirement condition for entitlement to RP. Entitlement to RA for REA beneficiaries reaching pensionable age on or after 1.10.89 cannot be tied to a date of retirement.

*1 SS Act 89, s 7*

71764 From 1.10.89 a person who

1. reaches pensionable age **and**
  2. gives up regular employment **on or after** 10.4.89 **and**
  3. was entitled to REA on the day before giving up regular employment
- ceases to be entitled to REA from the day regular employment is given up<sup>1</sup>.

*1 SS CB Act 92, Sch 7, para 13(1)*

71765 A person cannot be entitled to REA

1. after they have reached pensionable age **and**
2. if they are no longer in regular employment.

### Example

Philip reached pensionable age on 28.2.09. He gave up regular employment on 31.3.93. He had an IA in April 1970 and received REA from 30.9.70 to 28.2.09. He has another IA in January 1980 and received REA from 2.7.80 to 28.2.09. On 14.8.14 Philip made another claim for REA following a DM's decision on 7.8.14 that he had been suffering from PD A11 since 1.1.74. The DM decides that Philip is not entitled to REA from 14.8.14.

## First claim made after claimant reached pensionable age

71766 Subject to the prescribed time for claiming (3 months), a person who

1. makes a first claim for REA after reaching pensionable age **and**
2. is not in regular employment

can never be converted to RA because they do not reach pension age while they are in receipt of REA. However, a person who can never be converted to RA can continue to receive REA whilst conditions for REA are met.

**Note:** See DMG Chapter 02 for full guidance on the prescribed time for claiming.

## Giving up regular employment 1.10.89 - 23.3.96

71767 In the period 1.10.89 - 23.3.96 it was important that the conditions in DMG 71765 1. - 3. be satisfied in the strict order in which they appear. A person who gave up regular employment **before** reaching pensionable age (or before 10.4.89) could not lose entitlement to REA (but see DMG 71771).

71768 From 1.4.90 regular employment meant gainful employment which a person undertook for at least ten hours a week, in each of five or more consecutive weeks<sup>1</sup>. A person was also treated as engaged in regular employment in any week in a period of five consecutive weeks during which the total number of hours worked averaged at least ten hours a week<sup>2</sup>.

*1 SS (II) (RE) Regs, reg 2(1); 2 reg 2(2)*

71769 In deciding whether a person had given up regular employment the words must be given their normal everyday meaning and denote some conscious act on the part of the doer<sup>1</sup>. A person's intentions were therefore important when considering this question.

*1 R(I) 2/93*

71770 A person was not treated as having given up regular employment in any week in which there were one or more days in interruption of employment<sup>1</sup>. A day in interruption of employment is any day of unemployment or IfW<sup>2</sup>. This includes days of UB, SB, IVB and IB but **not** days for which

1. SSP, SMP or SDA were payable **or**
2. a person received autocredits or signed for credits only.

*1 SS (II) (RE) Regs, reg 2(3) (as then in force); 2 SS CB Act 92, s 57(1) (as then in force)*

## Giving up regular employment 24.3.96 onwards

71771 From 24.3.96<sup>1</sup> a person who reaches (or has already reached) pensionable age is regarded as having given up regular employment at the start of the first week following

1. week commencing 24.3.96 **or**
2. the week in which they reach pensionable age **or**
3. if still in regular employment, the week in which they are no longer in such employment

whichever is the later<sup>2</sup>. A week is defined as a period of seven days beginning with a Sunday<sup>3</sup>.

**Note:** Where employment is seasonal, a person is not in regular employment when a seasonal contract ends.

*1 SS (II & D) (Misc Amdt) Regs, reg 6; 2 SS (II) (RE) Regs, reg 3; 3 SS CB Act 92, s 122*

71772 A person who is regarded as having given up regular employment as in DMG 71771 ceases to be entitled to REA. But they may be entitled to RA instead (see DMG 71777).

71773 The changes from 24.3.96 mean that a person's intentions to continue working are of no relevance. Nor does it matter if regular employment is given up before pensionable age. A person who reaches pensionable age will continue to be entitled to REA only if they are in regular employment (see DMG 71774).

**Note:** These changes do not apply to people receiving "frozen" REA (see DMG 71756).

71774 From 24.3.96 regular employment is defined for

1. employed earners as gainful employment under a contract of service which requires a person to work for an average of ten hours or more a week in any period of five consecutive weeks but any week where absence is permitted under the contract for example, sickness or leave, is disregarded **and**
2. S/E people as gainful employment which a person undertakes for an average of ten hours or more per week in any period of five consecutive weeks<sup>1</sup>.

*1 SS (II) (RE) Regs, reg 2*

71775 For the purpose of DMG 71774 2. a S/E person can remain in gainful employment, and therefore in regular employment, for weeks where they are not actually working. The absences are disregarded if they would have been disregarded under DMG 71774 1. had the person been an employed earner. If the absence is due to sickness DMs should consider whether the person

1. would have worked had they not been ill
2. could return to work in the foreseeable future
3. decided they were no longer in gainful employment
4. changed their pattern of work so their weekly hours reduced.

This list is not exhaustive. However, claimants still have to meet the requirement in DMG 71774 1. that they must undertake employment for an average of 10 hours a week in any period of five consecutive weeks.

#### **Example**

Bill is a S/E earner working 12 hours a week on a regular basis. He has a period of sickness which begins on 10.1.11. He states that he would have worked had he not been ill and intends to go back to work when he is better. He returns to work on 31.1.11 and continues to work 12 hours a week. The DM decides that Bill remained in regular employment throughout the absence.

71776 For the purposes of DMG 71774 the five consecutive weeks can be taken

1. forwards in time **or**
2. backwards **or**

3. both.

The five consecutive weeks can also include periods in which no work is undertaken.

**Example 1**

w/c 3.6.07		w/c 7.10.07	w/c 14.10.07
gives up work - contract ends		age 65	

The claimant last works on Friday 8.6.07 (the day his contract terminates) and does not start another job. He reaches pensionable age on Tuesday 9.10.07. He is regarded as giving up regular employment on Sunday 14.10.07.

**Example 2**

w/c 9.9.07		w/c 18.11.07	w/c 25.11.07
age 65		stops work - contract ends	

The claimant reaches pensionable age on Thursday 13.9.07 but continues in regular employment until Friday 23.11.07 when the contract of service terminates and does not start another job. He is regarded as giving up regular employment on Sunday 25.11.07.

**Example 3**

			w/c 15.4.07	w/c 22.4.07	w/c 29.4.07	
				age 65 finishes work		
15 hours	15 hours	15 hours	15 hours	15 hours	(12 hours)	(9 hours)

The claimant is 65 on Wednesday 18.4.07 and has been working on a self-employed basis (that is other than under a contract of service). He finishes work on Friday 20.4.07 having been working for 15 hours each week and does not start another job. He cannot be regarded as having given up regular employment until his hours of work, averaged over a 5 week period, drop to less than 10 per week. His last week of regular employment is w/c 22.4.07 and he is regarded as giving up regular employment on Sunday 28.4.07.

#### Example 4

w/c	w/c
14.10.07	21.10.07
sick-incapacity benefit/age 65	

The claimant has been unable to work for several years and has been receiving benefit. He reaches age 65 on Wednesday 17.10.07. He is regarded as giving up regular employment on Sunday 21.10.07 as this will be the start of the first complete week following pensionable age in which he does no work.

#### Example 5

w/c	w/c	w/c
14.10.07	21.10.07	28.10.07
sick-incapacity benefit		

The situation is the same as for example 4 except that age 65 is reached on Sunday 21.10.07. The claimant is regarded as giving up regular employment on Sunday 28.10.07.

#### Example 6

w/c	w/c	w/c	w/c	w/c	w/c	w/c
20.5.07.	27.5.07	3.6.07	10.6.07	17.6.07	24.6.07	1.7.07
stops work	age 65	no work	no work	no work	starts another job	
					30 hours	30 hours

The claimant stops work on Friday 25.5.07. He is age 65 on Monday 28.5.07. He does no work for three weeks and then starts another job on Monday 25.6.07 working 30 hours a week. The hours of work, averaged over the five week period beginning with the week after the claimant is pensionable age, do not drop to less than ten per week. The claimant has **not** given up regular employment and remains entitled to REA.

## Retirement Allowance

71777 RA is awarded from the start of the first week in which a claimant is not in regular employment<sup>1</sup>. A week is defined as a period of 7 days beginning on a Sunday<sup>2</sup>. The **award** of REA will always finish on a Saturday but will be payable to the following Tuesday. The **award** of RA begins on a Sunday but is payable from the following Wednesday.

*1 SS (II) (RE) Regs, reg 3; 2 SS CB Act 92, s 122*

71778 A person who ceases to be entitled to REA is entitled to RA for life if on the day before it ceased there was entitlement to REA at a rate of £2.00 or more per week (from one or more awards)<sup>1</sup>. If the assessment of IIDB ceases from a date after the award of RA starts entitlement to RA continues.

*1 SS CB Act 92, Sch 7, para 13(2) & (3)*

71779 The weekly rate of RA is

1. 25% of the weekly rate of REA to which the claimant was last entitled **or**
  2. 10% of the maximum rate of IIDB (excluding increases of IIDB)<sup>1</sup>
- whichever is the less**<sup>2</sup> (½p or more being rounded up)<sup>3</sup>.

*1 SS CB Act 92, Sch 7, para 13(11); 2 Sch 7, para 13(4); 3 Sch 7, para 13(6)*

71780 Before 1.10.90, a person who was entitled to RA who decided to return to regular employment could again become entitled to REA if a fresh claim was made. From 1.10.90 this is no longer possible<sup>1</sup>.

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

## Gender Recognition

71781 The law provides that where a person is issued a full GRC<sup>1</sup> then that person will be entitled to a new birth certificate reflecting the acquired gender. As the person will be for REA/RA purposes that of their acquired gender then provided all the other conditions<sup>2</sup> are satisfied the date of conversion to RA may be affected.

*1 GR Act 04; 2 SS CB Act 92, Sch 7, para 13*

### Example 1

Oliver is aged 58 and is getting REA. He is issued with a full GRC as a woman and will therefore convert to RA at pensionable age.

### Example 2

Peter is aged 63 and getting REA. He is issued with a full GRC as a woman and therefore will convert to RA straightaway.

### Example 3

Kirsty is 58 and getting REA. She is issued with a full GRC as a man and therefore will not convert to RA until age 65.

### Example 4

Dawn is aged 63 and has been converted to RA. She is issued with a GRC as a man but will not be entitled to a further award of REA because conversion to RA was properly carried out and once RA is awarded it is awarded for life.

### Example 5

Andrew is aged 68 and made his first claim to REA after he had reached pensionable age. He is issued with a full GRC as a woman and will continue to receive REA because the conditions for conversion to RA are not satisfied.

**Example 6**

Louise is aged 62 and made her first claim to REA after pensionable age. She is issued a full GRC as a man and is now under pensionable age in the acquired gender. He will continue to receive REA until age 65 and will then convert to RA.

# Provisions affecting payment

## Statutory limitations

71782 Apart from any restriction in the amount of REA payable that may occur from comparing standard of remuneration, the DM should note that limitations apply<sup>1</sup>. These are the

1. overall maximum rate of REA is restricted to 40% of the maximum rate of IIDB per award
2. total of REA and IIDB cannot exceed 140% of the maximum rate of IIDB.

*1 SS CB Act 92, Sch 7, para 11(10)*

71783 The maximum rate of IIDB is limited to the 100% rate of pension whether disablement results from one accident or successive accidents<sup>1</sup>. Where a claimant is entitled to REA for more than one accident (see DMG 71787) the total of IIDB and REA is limited to 140% of the maximum rate of Dis P.

**Note:** Before 5.12.12 special rates were payable to claimants under age 18.

*1 SS CB Act 92, s 107 & Sch 4, para 4*

71784 Though REA was introduced as a benefit in its own right on 1.10.86, transitional provisions limited the total rate of REA and IIDB to 100% of the maximum rate of IIDB during the period to 6.4.87<sup>1</sup>. The position during this period was therefore the same as had existed when SHA had been payable (see DMG 71750).

*1 SS (II & D) Misc Prov Regs, reg 9*

## Unemployability supplement

71785 During any period claimants were entitled to US they could not also be entitled to SHA. The introduction of REA on 1.1.86<sup>1</sup> did not change this. From 6.4.87 US was abolished but any beneficiary in receipt of US immediately before 6.4.87 retains entitlement for any period following, whilst the conditions remain satisfied<sup>2</sup>.

*1 SS (II & D) Misc Provs Regs, reg 11; 2 SS CB Act 92, Sch 3, para 4*

71786 Any claimant continuing to receive US will therefore not be entitled to receive REA.

## Successive accidents

71787 A history of successive accidents or PDs may involve more than one occupation. Questions of entitlement to REA in such circumstances can be settled by applying basic principles; there are no special provisions. However, the DM should note the guidance at DMG 71788 - 71793.

## Successive accidents in same occupation

71788 Where there are successive accidents in the same occupation REA can be awarded only for the loss of faculty which caused the claimant to become incapable of the relevant regular occupation. A claimant may, in any one occupation have

1. suffered more than one accident **and**
2. received IIDB for several accidents. In this situation the latest accident will be established as the cause of inability to follow the regular occupation.

However, this will not be the case where the effects of an earlier accident worsen<sup>1</sup>.

*1 R(I) 4/83*

## Successive accidents in different occupations

71789 Where there are successive accidents in different occupations the DM should establish whether the latest occupation

1. has become the regular occupation (see DMG 71790 - 71791) **or**
2. is temporary (see DMG 71792).

71790 Where there are successive accidents in different occupations, the latest of which has become the regular occupation and, following an accident, a claimant

1. is unable to return to the regular occupation because of the relevant loss of faculty **and**
2. takes employment in a different occupation which is not of equivalent standard

there will normally be entitlement to REA.

71791 If the claimant then suffers another accident which makes them incapable of the second occupation, the claimant can claim a further award of REA provided that it can be shown that the second occupation has become the regular occupation for the further accident (see DMG 71041 - 71102). If both accidents affect the same part of the body, the DM will need to decide which loss of faculty makes the claimant incapable of following the second occupation. If the effects of the second accident have been overtaken by the effects of the first, entitlement for the second accident may well be removed.

71792 However, if there are successive accidents in different occupation and the latest is temporary

1. the first occupation may still be the regular occupation in all respects **and**
2. incapacity for the second occupation because of the further loss of faculty would not give entitlement to a second REA<sup>1</sup>.

*1 R(I) 14/62*

## Accident followed by PD

71793 If claimants are in receipt of REA because they are unable to work in their regular occupation following an IA and are later found to be suffering from a PD which is attributable to the same regular occupation, a second REA is not payable<sup>1</sup>.

However, where they

1. recover from the effects of the IA **and**
2. are then found to be incapable of following their regular occupation because of the PD

consideration should be given to the award of REA on account of the PD from the date of cessation of the original REA. This principle can be also be applied where an accident follows an accident or a PD is followed by an accident.

*1 R(I) 2/56*

## REA or RA with a pension in lieu of gratuity

71794 Before 1.10.86 claimants could choose to receive a pension in lieu of a gratuity<sup>1</sup> where they were also entitled to SHA. From 1.10.86 the right to choose a pension in lieu of a gratuity was removed<sup>2</sup>. However existing beneficiaries could continue to receive a pension in lieu of a gratuity until

1. the period of assessment expired, was reassessed or reviewed **or**
2. REA or RA was no longer payable

whichever was the earlier<sup>3</sup>. For further guidance on a pension in lieu of a gratuity where REA or RA is payable see DMG Chapter 69.

*1 SS (Gen Ben) Regs, regs 18;*

*2 SS (II & D) Misc Prov Regs, reg 7(5);*

*3 reg 7(6) as amended by SS (II & D) Misc Prov (Amdt) Regs 89, reg 2(1)(b)*

71795 - 71796

## Rounding up

71797 Any rate of REA less than the maximum rate should be calculated by rounding up to the nearest 10p<sup>1</sup>.

*1 R(I) 7/69; R(I) 9/80*

## **Regular occupation earnings less than maximum REA**

71798 If the earnings in the regular occupation are less than the maximum REA the claimant should not be compensated by an amount larger than the earnings loss. If this occurs, usually where minimal P/T working is involved, the award should not in any case be greater than that level.

71799 - 71800

## Period of award

71801 The period for which REA is to be awarded should be considered once the conditions of entitlement have been satisfied and the rate payable determined.

71802 An award of REA cannot go beyond the period of assessment of disablement<sup>1</sup>. There is no other restriction on the length of an award<sup>2</sup>. The award can begin or end on any day of the week but it may be preferable, particularly in renewal claims, to start the award on a Wednesday, the day payment is made<sup>3</sup>. REA is not payable for part of a week except in certain cases where hospital treatment allowance is put into payment.

*1 SS CB Act 92, Sch 7, para 11(9); 2 Sch 7, para 11(8); 3 SS (C&P) Regs, reg 22 & Sch 6*

71803 DMs must take all facts into account when deciding the period of initial and renewal awards. Unless there is evidence that an award may change (see DMG 71804), DMs should make an award of REA up to the

1. end of the period of assessment of disablement **or**
2. Saturday in the week the claimant reaches pensionable age if this is earlier than the date in 1. (because conversion to RA has to be considered).

**Note:** Where a person claims REA after reaching pensionable age, the DM should make an award as in 1.. Therefore, if the period of the claimant's assessment is for life, the REA award should also be for life.

71804 However, DMs should make an award for a shorter period than that at DMG 71803 where the award of REA is

1. less than the maximum rate **or**
2. at the maximum rate but there is evidence that there is likely to be a material change in the claimant's circumstances.

71805 - 71815



# Commencing date of award and related matters

## Period covered by claim

71816 The claim form for REA asks claimants to state the date from which they are claiming REA. The DM should therefore take this date into account when considering for what period the conditions for an award of REA are satisfied. If a period of entitlement is established, the DM should

1. take action as in DMG 71821 - 71822 and DMG 71836 - 71841 **and**
2. note that
  - 2.1 the award cannot begin from a date earlier than the date from which REA is claimed **and**
  - 2.2 REA for claims received on or after 7.4.97 cannot be paid for any period more than three months before the date of claim<sup>1</sup> (see DMG Chapter 02).

Entitlement cannot be established for a period for which there is no claim<sup>2</sup>. If there is no such period, the claim should be disallowed as in DMG 71826 - 71832.

*1 SS (C&P) Regs, reg 19(4A); 2 SSA Act 92, s 1(1) & (4)*

71817 If the date from which benefit is claimed is before the date from which entitlement is established, it will be necessary to disallow benefit up to the day before the award commences.

71818 The commencing date for the period under consideration will not normally be earlier than the end of a previous disallowance (see DMG 71832). See DMG 71837 if the claimant claims from a date before the end of a previous disallowance.

71819 - 71820

## Entitlement established on first claim

71821 The DM should award benefit from the first Wednesday of entitlement where

1. the claim is the first in respect of the relevant accident or PD **and**
2. the conditions for an award are satisfied from a date no more than three months before the claim is made.

71822 If the date of claim is before 7.4.97 and the first day of entitlement is more than three months before the claim, the commencing date of the award will depend on whether the claimant establishes good cause for the delay and if so for what period. The DM should disallow the claim for the appropriate period and award benefit from the next pay day if good cause is not shown.

## Entitlement established on a claim other than the first

71823 When a claim follows within three months of the end of the previous award of REA for the same accident or disease, the DM should make an award from the

1. day following the end of the previous award if entitlement is continuous
2. first Wednesday of entitlement if entitlement is not continuous.

Where the claim is made more than three months after the end of the previous award, late claim action may be necessary as in DMG 71822.

71824 Where entitlement is established on a claim made after a disallowance of REA for the same accident or disease, see DMG 71836 - 71837.

71825

## Entitlement not established

71826 Where the DM decides that a claim for REA should be disallowed because the claimant has not established entitlement to it and the claim is

1. an initial one **and**
2. made within three months of the earliest date from which an award could have been considered (if all conditions had been satisfied)

the disallowance should be from that date.

71827 If the claim is an initial one made outside the period in DMG 71826 **2.** the DM should consider the evidence to decide if it has been caused by some event, for example the claimant becoming incapable of work or a change in the pattern of earnings. Where there has been such an event or some other clear sign that the claim was intended to be from a certain date, disallowance should be from that date. Otherwise, it should be from the date of claim.

71828 If the claim is made

1. during a current award of REA **or**
2. within three months from the end of an award of REA

for the same accident or disease, the disallowance should be from the day following the end of that award. Otherwise, the principles in DMG 71827 should be applied.

71829 The guidance at DMG 71836 et seq applies if the claim follows a previous disallowance of REA for the same accident or disease.

71830

## Disallowance decision - type and effect

- 71831 If a claim for REA is specifically limited, by the claimant or the circumstances, to a closed period, the DM's decision to disallow should be in the form. "There is no entitlement to REA from (date) to (date) because..." This decision will stop further claims for the period specified, but leave open the opportunity for a claim for a later period.
- 71832 Except as in DMG 71831 a decision to disallow REA should be in the form "There is no entitlement to REA from and including (date) because..." without a terminal date. This means that the decision

1. is effective only up to the date on which it was given **and**
2. does not prevent a fresh claim being made for a later period<sup>1</sup>.

This applies whether the decision was given by a DM, a FtT or the UT. Where the commencing date of the disallowance is after the date on which the decision was given (for example a claim for a future period following a current award or the end of the 90 day period), the decision disposes of the claim. However this does not stop a further claim for any period later than the date on which the decision was given.

*1 R(I) 3/65*

71833 - 71835

## Fresh claim following disallowance

- 71836 If, following a disallowance of REA, the claimant makes another claim, any award cannot go back further than the day following the effective end of the disallowance of the earlier claim. Subject to that exception, the new claim should be considered as though nothing had gone on before it.
- 71837 If there is entitlement from a date before the end of a previous disallowance decision, the DM should consider if that decision can be revised or superseded to allow REA for the appropriate period. The decision should be
1. separate from the decision on the fresh claim **but**
  2. given in conjunction with it.
- Note:** See DMG Chapter 03 for guidance on revision and DMG Chapter 04 for guidance on supersession.
- 71838 If the claimant indicates that they are claiming from a date before the end of a period of disallowance, but the DM cannot reconsider his earlier decision a new decision should be issued to that effect.

71839 If the earlier disallowance decision was given before the period for which benefit was claimed, as in DMG 71832, an award can be made, if there is entitlement, from the pay day following the date on which the earlier claim was disallowed.

71840 If

1. a fresh claim is made within three months of the effective end of the previous disallowance **and**
2. there is no entitlement

the claim should be disallowed from and including the day following the date on which the previous decision was effective.

71841 If

1. a fresh claim is made more than three months later than the effective date of the previous disallowance **and**
2. it is apparent that there was some event which caused the claim (see DMG 71826 - 71829)

the claim should be disallowed from and including the date of the event. Where there was no event the disallowance should be made from the date of the claim. If the claimant appeals against the decision see DMG 71713.

71842 - 71851

## **Appeal action**

71852 If on an appeal the FtT find that the conditions for REA are satisfied, the reasons for allowing the appeal **may** give grounds for considering if any earlier unfavourable decisions by the DM should be revised or superseded.

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

71853 - 71855

# Special considerations arising on REA appeals and supersession

## Appeals

71856 Guidance on appeals is in DMG Chapter 06. The following paragraphs provide additional guidance on particular matters arising on REA appeals.

71857 The circumstances in which a further medical opinion obtained or submitted on appeal or reboarding contain evidence of a change of circumstances (see DMG Chapter 04). If disallowance has been imposed in accordance with the advice of a consultant or a medical adviser, the DM should consider revision and award is justified on the evidence submitted on appeal.

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

71858 - 71860

## Additional points to be covered in the submission to First-tier Tribunal

71861 An adverse decision on a claim for REA may have been given on one specific ground but further questions for decision may come up on appeal.

### Example

A claim may have been disallowed on the grounds that the claimant was not incapable of the regular occupation because of the relevant loss of faculty. But if the AT were to decide differently, the question of capability for work of an equivalent standard or near equivalent standard would also arise. In such a situation, documentary evidence covering the additional entitlement factor(s) should be included in the case papers. It should be drawn to the FtT's attention, for example that it must be established that the claimant

1. is incapable of the regular occupation **and**
2. is incapable of suitable equivalent employment **and**
3. has not established incapability for suitable equivalent employment

in order to satisfy entitlement to REA.

71862

- 71863 Where the FtT award REA they must state the rate and period of the award<sup>1</sup>. The DM should, therefore, in the submission
1. remind the FtT that should they decide that the claimant satisfies the conditions for REA they must state the rate and period of the award **and**
  2. draw attention to any factor which would limit the period of award, for example the end of a disablement assessment.

*1 R(I) 64/52*

71864 - 71865

### **Pneumoconiosis - existence of recommended dust conditions**

71866 A claim may be disallowed on the grounds that the claimant is not incapable of following suitable work of an equivalent standard because of pneumoconiosis. That is the former occupation should be in recommended dust conditions. The claimant or their Association may claim on appeal that even though the colliery manager or area industrial relations officer has stated that the work is carried out in recommended dust conditions, by the very nature of the work these conditions cannot be maintained continuously and therefore suitable work cannot exist in such conditions.

71867 If this situation arises the DM should, in the written submission to the FtT, refer to the statement which has been prepared by the Department about recommended dust conditions introduced from 1.11.77 by British Coal. A copy of the statement should be included in the appeal papers. It should be noted that "dust approved conditions" are to be distinguished from conditions which are "dust free"<sup>1</sup>. Although the term "dust approved conditions" has been replaced by "recommended dust conditions", caselaw should still be cited in this type of case.

*1 R(I) 12/67*

71868 The DM should not normally ask for an adjournment if the matter is raised at the FtT hearing where

1. the claimant does not raise the question of recommended dust conditions before the submission is prepared **and**
2. the DM does not include reference to the Department's statement in the submission.

The DM should use the information in the statement, together with the evidence already obtained from the colliery manager or area industrial relations officer, to support the contention that the regular occupation or equivalent employment is carried out in the area in recommended dust conditions.

71869 The DM should not

1. become involved in technical details about sampling
2. obtain or discuss figures of dust concentrations.

The DM should rely in the written and oral argument solely on the colliery manager's or area industrial relations officer's statement that a particular colliery or coal face is worked in recommended dust conditions.

71870 In the statement prepared by the Department it is recognized that even in areas in which British Coal state that the requirements as to levels of respirable dust from 30.9.75 are satisfied, the dust level may on occasion rise above the accepted limits. The members of special medical boards appreciated this fact and took it into account when issuing letters of advice. The DM should

1. draw attention to these points in the submission when necessary **and**
2. emphasise that it is prolonged exposure to heavy dust which should be avoided.

71871 - 71875

### **New evidence introduced at the First-tier Tribunal hearing**

71876 If new evidence about the regular occupation is introduced at the FtT hearing the DM may, if it is of sufficient weight, draw the FtT's attention to the fact that the medical evidence presented in the submission may not now be sufficiently conclusive and suggest that the FtT may wish to adjourn to

1. confirm with the employers the new details of the regular occupation given to the FtT **and/or**
2. seek the advice of the medical adviser on incapacity for the new regular occupation as in DMG 71291.

71877 - 71880

## **Action following the First-tier Tribunal decision**

71881 When a disallowance is reversed on appeal by the FtT, the DM should consider whether an appeal to the UT should be made and, if so, should refer all papers urgently to DMA Leeds in accordance with the guidance in DMG Chapter 06.

71882 - 71885

## **Further claim received while appeal to Upper Tribunal is outstanding**

71886 Where the claimant, Association or DM, appeals to the UT against a decision of the FtT, the DM cannot put off making a decision on any further claim (including a renewal claim where the FtT have awarded REA) while waiting the outcome of the appeal. The new claim should be considered afresh on its merits although the principles adopted by the FtT may well give a lead. Where

1. the appeal to the UT has been made by the DM on the ground that the decision of the FtT was in error of law and the claimant is not entitled to REA
2. any further claim will normally be for disallowance, unless there has been a change of circumstances.

71887

## **Supersession**

71888 General guidance on supersession is in DMG Chapter 04. The guidance at DMG 71889 et seq relates specifically to REA.

## **Capacity for work**

71889 When considering a revision or supersession<sup>1</sup> of a decision relating to the claimant's capacity for employment, the DM should follow the guidance at DMG 71890 - 71893. However, before the decision can be changed there should be clear evidence of a change of circumstances for capacity or suitability.

*1 SS Act 98, s 9 or 10*

71890 A supersession decision should not be made only on the ground that it is no longer likely that the claimant will remain permanently incapable of following the regular occupation. The DM should arrange an explanation of the decision for the claimant before

1. seeking advice on the medical aspects **and**
2. consulting the Jobcentre regarding the claimant's industrial potential

where evidence is received which suggests that a claimant has become capable of following the regular occupation or suitable employment of an equivalent standard, although the claimant has not actually returned to or taken up such employment. A supersession should not be made unless it can be supported by strong evidence.

71891 A disallowance on the grounds that the claimant was not permanently incapable of the regular occupation may be reconsidered, provided that the evidence leaves no doubt in the decision maker's mind. Opinions from medical sources which merely express views contrary to those on which the decision was based would normally be insufficient to justify revision or supersession. The normal course open to the claimant would be to make a fresh claim. Occasionally clear evidence may come to light showing, for example, that at the time the decision was given the effects of the relevant loss of faculty were more serious than was then suspected, or that effects had subsequently arisen which had not been foreseen. If such evidence removes all doubt concerning the permanent nature of the claimant's incapacity, then revision or supersession can be contemplated on the basis of mistake or ignorance of a material fact or a relevant change of circumstances **since** the decision was given.

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

71892 A revision or supersession should be considered where there is a return to, or change of, employment which may affect entitlement to, or the rate of, REA; for example, when a claimant is clearly re-established in the regular occupation or becomes established in alternative employment or is promoted.

71893 A revision or supersession should be considered where during a period of award of REA the claimant registers with the Jobcentre for an occupation, the normal earnings of which

1. are equivalent to those in the regular occupation **or**
2. indicate that the current award is too high.

### **Earnings**

71894 Where the DM changes a decision because it was based on an error of fact<sup>1</sup>, for example an arithmetical error in calculating earnings, the new decision should

normally proceed on the evidence of probable earnings available to the DM when the decision was given. The DM should follow the guidance at DMG 71895 - 71898.

*1 R(I) 3/87; R(I) 73/53*

71895 A revision or supersession should be considered where there is a return to, or change of employment, which may affect entitlement to, or the rate of, REA; for example, when a claimant becomes established in alternative employment or is promoted.

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

71896 A clear cut change of working pattern in the same job may also provide grounds for revision or supersession.

71897 Awards of REA for a forward period are based on the best estimate which can be made of the difference in the probable standard of remuneration in the respective employments involved for the period concerned. This includes changes in remuneration which have been firmly agreed at the time when the award is made. Subsequent increases in wage rates resulting from pay awards, whether affecting both employments concurrently or at different stages during the period of an award should **not** be regarded as a change of circumstances. Sporadic variations in the normal average weekly earnings during the currency of an award would not justify a reconsideration of the decision.

71898 Where a claimant who is not employed finds a job in the suitable alternative employment which has been used as a basis for the award of REA, revision or supersession will **not** usually be appropriate merely because the claimant's earnings from the job indicate that the decision maker's estimate of the standard of remuneration was either too high or too low. Actual earnings may, however, reveal that information on which the DM based his estimate was incorrect and that he was mistaken as to a material fact.

## **Uprating**

71899 The uprating of REA will not normally require a supersession. However, in some REA cases uprating gives grounds for supersession (see DMG Chapter 04).

71900 Changes in relation to the award of REA has been subject of case law<sup>1</sup>. If a supersession is not appropriate, relevant changes in earnings should be taken into account when a further award is being considered.

*1 R(I) 73/53*

71901 - 71905

## Supersession following disallowance

- 71906 The guidance on supersession in DMG Chapter 04 should be applied when considering new facts about a disallowance of REA. In addition, DMs should note that
1. if the decision is changed an award can be made for an appropriate period and is not restricted to the period of the previous disallowance
  2. in view of the limited effect of a “from and including” decision (see DMG 71832) a
    - 2.1 change of circumstances that occurred after **or**
    - 2.2 new decision on a special question that relates only to a period after the effective end of a previous “from and including” disallowance, cannot be material to that decision and cannot provide reasons for supersession.

- 71907 If
1. a claimant applies for supersession **and**
  2. the DM is of the opinion that there is no entitlement before the end of the previous disallowance **and**
  3. because of the change or the new decision the claimant could establish entitlement to REA for a period later than the end of the previous disallowance

the DM should give a decision, explain the appeal procedures and invite a new claim.

- 71908 Where the DM is satisfied that entitlement is established for a period before the end of a previous disallowance, there will normally be reasons why the decision can be changed. For example, the claimant's earnings may have been wrongly given in the previous evidence, or the condition due to the relevant loss of faculty may have deteriorated during the period.

- 71909 When changing a decision on revision or supersession there is a limitation to the period for which benefit may be paid<sup>1</sup>.

*1 SS & CS (D & A) Regs, reg 5 & 7*

71910 - 71999

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