

DISABILITY LIVING ALLOWANCE ATTENDANCE ALLOWANCE

LEGISLATION

The basic structure for Disability Living Allowance is set out in **Sections 71-76 of the Social Security (Contributions and Benefits) Act (NI) 1992**. Detailed rules are contained in the **Social Security (Disability Living Allowance) Regulations (NI) 1992**.

The basic structure for Attendance Allowance is set out in **Sections 64-67 of the Social Security (Contributions and Benefits) Act NI 1992**. Detailed rules are contained in **Social Security (Attendance Allowance) Regulations (NI) 1992**.



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GLOSSARY

AA – Attendance Allowance

CPAG – Child Poverty Action Group

CA – Carer’s Allowance

CTC – Child Tax Credit

DEL – Department for Employment and Learning

DLA – Disability Living Allowance

DfC – Department for Communities

ESA – Employment and Support Allowance

ESA (IR) – Income Related Employment and Support Allowance

HMRC – Her Majesty’s Revenue and Customs

JSA(C) – Contribution-based Jobseeker’s Allowance

JSA(IB) – Income-based Jobseeker’s Allowance

PC – Pension Credit

SDA – Severe Disablement Allowance

WTC – Working Tax Credit



PIP AND CHANGES TO DLA

As part of a wider reform of the welfare system, throughout 2016 and onwards, Disability Living Allowance (DLA) was replaced by Personal Independence Payment (PIP) in Northern Ireland as the main benefit paid to severely disabled people of working age from the 20th June 2016.

Initially, this only applied to:

- new claimants;
- existing DLA claimants who report changes in their circumstances or whose award is for a fixed period and is coming to an end.

From 20th December 2016, all those aged between 16 and who were under 65 on 20 June 2016 with an indefinite award of DLA are eligible to be selected for transfer to PIP.

PIP (like DLA) is a non-means tested, non-taxable and non-contributory benefit. It is paid to eligible people of working age, ie to people aged between sixteen and 64 who make new claims or who are found to meet the conditions of entitlement after reassessment. Also, just as with DLA, a person can receive PIP whether s/he is in or out of work.

PIP involves an assessment of individual needs and aims to ensure that financial support is targeted to those with the most severe disabilities or greatest need for practical help. Its purpose is to help towards some of the extra costs arising from ill health and disability. It is based on how a person's condition affects her/his daily life rather than the condition suffered.

INTRODUCTION

Before the 20th of June 2016 Disability Living Allowance (DLA) was the main source of additional income for people who have mental or physical disabilities. It is paid to those people who need attention or supervision from someone else, or who have walking difficulties. It is a non means tested and tax-free benefit, and is paid on top of any other benefit or earnings from employment which a person may receive. Entitlement to DLA can lead to increased entitlement to means-tested benefits and tax credits. Although some claimants may stay on DLA until 2019 the gradual migration from DLA to PIP has started and is likely to last at least 3 years.

DLA consists of two components, one for care needs and one for mobility needs. Within each component there are further subdivisions depending on the level of individual need, so that there are in total eleven different combinations of benefit which may be payable. A terminally ill person is automatically treated as satisfying the conditions for higher rate DLA care.



Normally, the benefit is paid directly to the person who requires the attention or supervision or who has the walking difficulty, except where that person is under sixteen or is not capable mentally of managing her/his own affairs.

People aged 65 or over who are in need of attention or supervision and are not already in receipt of DLA care component can claim Attendance Allowance (AA) instead.

1. DLA CARE COMPONENT

A person can claim the DLA care component if attention, supervision or watching over from another person is needed due to either mental or physical disabilities. The person must be so severely disabled physically or mentally that s/he requires from another person:

a) during the day

- frequent attention throughout the day in connection with bodily functions; or
- continual supervision throughout the day in order to avoid substantial danger to her/himself or others; **or**

b) at night

- prolonged or repeated attention in connection with bodily functions; or
- in order to avoid substantial danger to her/himself or others, another person is required to be awake for a prolonged period or at frequent intervals for the purpose of watching over her/him; **or**

c) part-time day attention

- in connection with her/his bodily functions, attention is required for a significant portion of the day (whether during a single period or a number of periods); **or**

d) cooking test

- s/he is sixteen or over and cannot prepare a cooked main meal for her/himself if s/he has the ingredients (cooking test).

1.1 Rates of care component

There are three different rates of DLA care component: lower, middle and higher.

Lower rate	£22.00
Middle rate	£55.65
Higher rate	£83.10

Which of these a person receives depends on which conditions are satisfied. In order to qualify for the higher rate, a person must satisfy at least one of the conditions of paragraph a) and at least one of the conditions of paragraph b) (see page 4). In other words, a considerable amount of attention or supervision must be required during the day and during the night.



In order to qualify for the middle rate, a person must satisfy at least one of the conditions of either paragraph a) or paragraph b) above. In other words, a considerable amount of attention or supervision must be required either during the day or during the night but not both.

In order to qualify for the lower rate, a person must satisfy at least one of the conditions of paragraph c) or d) above. In effect, some attention must be required during the day for a significant portion of the day or the cooking test must be satisfied. In the unreported Commissioner's Decision *DLA/1061/1999*, it was decided that day refers to daytime rather than a 24-hour day.

1.2 Age limits

There is no lower age limit for claiming DLA care component. In practical terms, the lower age limit is three months given that a person must have needed the attention or supervision for at least three months before benefit is payable (see 1.3), unless a claim is being lodged in respect of a baby who is terminally ill.

There is an upper age limit for claiming the care component. The legislation states that a person must claim before s/he reaches the age of 65. However, if a person has claimed DLA before the age of 65, s/he can then continue to receive DLA from the age of 65 at any of the rates for an indefinite period, as long as the conditions are satisfied. A claim for DLA care for the first time cannot be made once a person has reached the age of 65.

If a person has care needs but is over the age limit for claiming DLA, s/he should make a claim for AA. The conditions for this allowance are the same as for the middle and higher rates of the care component of DLA, and it is paid at the same rates. However, a person will have to establish that s/he has met the qualifying condition for six months before benefit can be awarded, rather than three months. Attendance Allowance has no equivalent to the lower rate care component (see 1.1) nor to the mobility component (see 2.1).

For a person under sixteen, the cooking test does not apply. A person under sixteen can only claim the lower rate care component if s/he needs attention for a significant portion of the day. Also, in order to qualify for the lower, middle and higher rate of the care component, a person under sixteen must show that the level of attention or supervision needed is higher than that usually required for a person of the same age. The two possibilities given in legislation are where the child has:

- requirements for attention or supervision substantially in excess of the normal requirements of other people her/his age; or
- substantial requirements for attention or supervision which a younger child might have, but which someone her/his age in normal physical and mental health would not have.

The extra test does not apply to a claim for a child who is terminally ill.



1.3 Qualifying periods

A person must have needed the attention or supervision for at least three months before s/he gets any money. A person can claim as soon as s/he starts needing help, and wait three months before getting benefit, or can wait the three months first and then claim the benefit.

Secondly, a person must be likely to continue to need the attention or supervision for at least six months after the date of claim (unless s/he is claiming because s/he is terminally ill – see 1.4 below).

1.4 Special rules for the terminally ill

A person who is terminally ill will be paid immediately from the date of claim, without having to satisfy the qualifying periods. A terminally ill person is automatically treated as satisfying the conditions for higher rate DLA care. The person is also exempt from the rule that s/he has to have been present in Northern Ireland for at least 26 weeks of the last 52 weeks (see section 1.5).

A person is treated as terminally ill if s/he has a progressive disease and her/his death is reasonably to be expected as a result of this disease within six months. An award will be made for a fixed period of three years. Therefore if a person lives beyond that six month period, s/he remains considered as terminally ill and remains entitled to benefit.

In order to be assessed under the special rules, it is necessary to notify the Department for Communities (DfC) that the person is terminally ill.

It is possible for another person to make the claim on behalf of a terminally ill person without her/his knowledge or authority.

1.5 Residence, presence and immigration conditions

The residence and presence conditions are that a person must:

- be ordinarily resident in Northern Ireland; and
- be present in Northern Ireland; and
- have been present in Northern Ireland for at least 104 weeks of the last 156 weeks before the claim (a child under six months must have been present for at least thirteen weeks out of the last 52 weeks. A child aged between 6 and 36 months must be present for 26 weeks in the last 156 weeks);
- not be subject to immigration control. Complex rules apply to this provision and advisers should contact Law Centre (NI) for further advice if this issue arises.



1.6 Accommodation conditions

Complex rules apply to the payment of DLA for those in the following types of accommodation:

- hospitals;
- residential care or nursing homes;
- children's homes;
- training centres for people with disabilities;
- private or voluntary homes if some or all of the cost is paid for by a health and social care trust;
- prison.

A person who is affected by these rules should firstly make a claim for benefit and then take further advice about how to challenge any adverse decision.

1.7 Disability conditions

The following is a brief commentary on the six main needs, any of which leads to entitlement to the care component of DLA. To recap, the six main needs are:

- frequent attention;
- prolonged or repeated attention;
- attention for a significant portion of the day;
- continual supervision;
- watching over;
- the cooking test.

The first three of these all relate to attention which is required in connection with a person's bodily functions.

1.7.1 Bodily functions

Lord Denning, in the Court of Appeal in *R v National Insurance Commissioner ex parte Secretary Of State for Social Services (1980)*, gave the following list of bodily functions: *'breathing, hearing, seeing, eating, drinking, walking, sitting, sleeping, getting in and out of bed, dressing, undressing, eliminating waste products, and the like, all of which an ordinary person who is not suffering from any disability does for himself, but they do not include cooking, shopping, or any of the other things which a wife or daughter does as part of her domestic duties or generally which one of the household does for the rest of the family'*.

This list is very helpful, but not exhaustive. Anything to do with a person's body or how it works can count. On this basis a tribunal of commissioners in *R(A)1/07* held that shopping and cleaning do not count as bodily functions.



For example, washing someone's face, washing all over, washing her/his hair or shaving would count. So too would communicating, speech practice and help with medication or treatment.

Other things that are closely linked to bodily functions would also count. These would include helping someone avoid making a mess in the toilet, or changing a colostomy bag, soothing someone back to sleep, or changing bedding after an accident. It may also include attention by means of the spoken word such as giving a person who is blind oral directions in unfamiliar surroundings, or reading personal correspondence to a person who has a visual impairment, or encouraging a person with a mental disability to eat, wash, dress or other activity. However, the attention has to be given in the presence of the person. Reassurance or direction given by telephone will be excluded.

As Lord Denning has said, cooking does not count in relation to bodily functions (but see 1.7.9). This is because it is not closely enough linked to a bodily function. Helping a person to cut up food or to lift a cup to drink would count. However, where a person does her/his own cooking but needs someone to supervise for safety reasons, this will count as attention with a bodily function.

The help with bodily functions must be reasonably required rather than medically required. Thus, it is not necessary that a person is paralysed before help with shaving will count. Rather, that person may suffer from arthritis, for example, and so find it very difficult or awkward to shave, so that it is reasonable to require help to do so.

It is also reasonable for a person with a disability to expect to live a life which is comparable to that of an able-bodied person.

It would be helpful to ask what bodily functions are impaired by a person's disability, how often attention is required and how long it takes.

Attention required to enable a person to undertake a reasonable level of social or leisure activity must be taken to mean attention reasonably required. The decision maker will consider whether it is reasonable for a person with a disability to want to undertake a particular activity. It may well be that s/he will be unable to participate in any activity no matter what attention is given. Such attention is not reasonably required.

1.7.2 Day and night

Some of the conditions must be satisfied by day and some by night. In this context, night has been defined, rather vaguely, in the courts as meaning that period of inactivity, or that principal period of inactivity, through which each household goes in the dark hours, starting when the household, as it were, closes down for the night.

It is generally accepted that night starts when the carer goes to bed, or would go to bed were it not for the fact that s/he is attending to the person with a disability. Similarly, night ends when the carer gets up, or would have got up had s/he not risen earlier in order to attend to the person with a disability (see *R(A)4/74*, *CDLA 2852/2002*, *CDLA 997/2003* and *R(A)1/2004*).



Therefore, attention provided to a person in the late evening, but before the carer would normally go to bed, counts as attention provided during the day. In particular, even though a child may retire long before her/his parents, any attention provided between the child's bedtime and the parent's bedtime is counted as day time attention.

1.7.3 Frequent attention

This test is applied during the day. Attention is generally taken to mean assistance or help of an active nature in carrying out the personal things which a person cannot do for her/himself or would reasonably require help to do. The attention must be given in the physical presence of the severely disabled person.

The attention must be needed frequently and throughout the day. Frequent means several times during the day. Throughout the day means at intervals spread over the day, so consideration will be given to the pattern of help across the day. Thus, a person who needed help getting out of bed and getting dressed, but was able to cope on her/his own all day before needing help getting back into bed in the evening, would not be held to need frequent attention throughout the day.

The fact that a person can manage most bodily functions on her/his own does not mean that s/he will automatically fail this test. What is important is the pattern of a person's accepted care needs. For example, if s/he needs help with getting to the toilet a number of times a day, but can cope with most other needs, s/he may well still be held to need frequent attention with her/his bodily functions.

1.7.4 Continual supervision

This test is applied during the day. The legislation refers to continual supervision throughout the day in order to avoid substantial danger to her/himself or others. This is generally regarded as consisting of four separate elements.

- First, the medical condition must be such that it may give rise to a substantial danger to the person or to someone else.
- For example, a person might fall and dislocate a shoulder or knock into an electric fire and get burnt. Alternatively, a person might be knocked down by a motor vehicle. The danger could come from the action of the person or from someone else. Someone might carelessly push against a person with arthritis, causing her/him to fall and sustain serious injury.
- Secondly, the substantial danger must not be too remote a possibility. It is not relevant how often the danger has arisen in the past, nor indeed whether it has arisen at all. What is important is the likelihood of it arising in the future.



- In assessing the likelihood of danger, the decision maker must look not only at what has happened in the past but at what may happen in the future. In looking at how likely a danger is to arise, it must also be considered how serious the consequences of the danger would be if it were to arise. In one particular case, the Commissioner has said: *'If a small child, escaping the supervision of its mother, runs out of the house on to a public highway that may well be an isolated incident. But it only requires one such incident for the child to be killed by passing traffic. In my view, the fact that the incidents in question were isolated is nothing to the point.'*
- It is generally accepted that the more dire the possible results of some danger, then the less relevant it is how often the incident is likely to happen.
- Thirdly, a person must need supervision from someone else in order to avoid the substantial danger. This supervision may not necessarily lead to direct action on the carer's behalf.
- For example, in the reported Commissioner's Decision *R(A) 2/75* involving a person with epilepsy, the Commissioner said: *'Supervision may be precautionary and anticipatory, yet never result in intervention.'* A person's ability to call for help does not stop her/him from satisfying the condition. In the case of *Moran v Secretary of State for Social Services*, the Court of Appeal held that the fact that a carer was at hand and ready to intervene when necessary was sufficient in the case of a person with epilepsy even though the attacks were infrequent, because they were also unpredictable and help would be needed when they did occur.

Remember that it is the person's need for supervision which is relevant, not what supervision actually exists or even if supervision exists at all. Thus, a person who is not supervised but needs to be would qualify, whereas a person who is supervised at all times, but does not need to be, would not qualify. The Commissioner, in *R(A) 1/73*, said: *'If one starts with the fact that the disabled person is living with relatives who are looking after him and then asks oneself to what extent he requires supervision, that is beginning at the wrong point.'*

- Fourthly, the need for the supervision must be continual. Supervision which is only occasionally or spasmodically required is not sufficient. The frequency or regularity of occurrence of the supervision must be taken into account.
- Note, however, that the word is continual and not continuous, so that the supervision need not be non-stop. A child might need supervision when awake, but take a nap during the day. Such supervision is not continuous, since there is a break in it, but it would be considered continual; although remember the additional test for children (see 1.2).
- A mentally competent person would be expected to arrange for her/his supervision when carrying out any potentially dangerous activity such as having a bath and this would not necessarily amount to continual supervision.



1.7.5 Prolonged or repeated attention

This test is applied during the night. Again, attention is taken to mean assistance or help of an active nature.

For help to be considered prolonged, it must generally last for at least 20 minutes. Remember that attention like soothing a person back to sleep may count as attention in connection with bodily functions, and therefore will count, in the same way as getting/helping her/him use the toilet and assisting her/him back to bed.

Repeated has its usual English meaning, ie something is repeated if it is done more than once. Hence, getting up twice to attend to a person counts as repeated attention.

If attention is provided more than once, it does not matter that it does not last for 20 minutes, or indeed that all the attention in one night does not amount to 20 minutes. Attention must be prolonged or repeated, but does not have to be both. The attention need not be provided every night, or indeed most nights, as long as it can be established that there is a regular pattern of such attention being required. The House of Lords in *Moyna v Secretary of State for Work and Pensions (2003)* emphasises that a tribunal should exercise common sense and judgement in deciding whether attention which is only needed some nights satisfies the test.

1.7.6 Watching over

This test is applied during the night.

In this case, the legislation refers to the need for another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over to prevent the risk of substantial danger to the person claiming or others. Clearly, the carer must actually be awake. It is not enough for her/him to be sleeping nearby and ready to attend to the person should the need arise.

Prolonged has the same meaning as before. The carer must be watching over for at least 20 minutes.

At frequent intervals indicates the activity must be performed at least three times during the night, although, if the need for watching over arises twice during the night, then it may well be worth making an application.

Watching over has its usual English meaning. Thus, it will include being awake and listening out for a person, as well as going to see how s/he is. Like the supervision discussed above, it may be precautionary and anticipatory and yet never result in intervention. The carer may well be carrying out other duties, or be in some other part of the house, and be ready to assist if called. Almost the only thing that is absolute is the need for the carer to be awake.

1.7.7 Need for attention or supervision

The sections above detail the extent of attention or supervision which must be required by day or by night. It is not necessary, though, that such help be needed every



day or every night. The important thing is the pattern of a person's care needs, not whether they vary from one day to the next.

To take an example, a person may need help putting on an oxygen mask or opening the valve on the cylinder. Even if s/he only requires such help on a couple of nights a week, s/he may well qualify for benefit because the danger to her/him is so grave.

Such a person might only need watching over on those nights when s/he feels less well, or may need watching over every night but only need intervention on a couple of nights. In either event, the consequences of not having someone at hand are so serious that it may merit an award of DLA.

Where a person's care needs are unpredictable or sporadic, it can be a good idea to keep a diary to show what help has been provided. Any diary should be detailed, but need only be kept until such times as a clear pattern emerges on the level of care needed. Not everything needs to go down, especially if it is unrelated to caring for the person eg lighting the fire or cleaning on her/his behalf.

If attention is needed at night, then record what attention is provided, how often and on which nights, and how long the carer was awake in order to provide that care.

If supervision is required to prevent substantial danger, a diary can show just what has happened on previous occasions or what might have happened if someone had not been there to prevent it. Remember that the fact that a person has had no major accidents may simply be because s/he has always had someone on hand to help.

1.7.8 Attention for a significant portion of the day

This test is applied during daytime hours.

Attention for a significant portion of the day is something less than frequent attention throughout the day. It can also be presumed that it means something more than prolonged attention, so that a significant portion is somewhat more than 20 minutes.

From DFC information, it appears that the government intention is that one hour or more should be regarded as a significant portion of the day. A Commissioner's Decision *C(DLA) 58/1993* from Great Britain has also confirmed that attention should be for at least an hour. This is only of persuasive authority, however, and this issue is one for the decision maker or tribunal on the facts of each case. The legislation allows that the significant portion may be in a single period, or a number of shorter periods, during the day.

It will be difficult to determine whether a person needing help on a number of separate occasions each day fits the test of frequent attention on the basis of the number of times help is needed or the test of a significant portion on the basis of the total amount of time spent helping the person. This is likely to give rise to many appeals, as people may be unsatisfied with an award of the lower rate.



1.7.9 The cooking test

The legislation requires that a person be so severely disabled physically or mentally that s/he cannot prepare a cooked main meal for her/himself if s/he has the ingredients.

This test does not apply to those under the age of sixteen.

The person's inability to cook a main meal must be a result of the disability. If a person has the mental and physical ability to plan, prepare and cook such a meal, whether s/he does so or not is irrelevant.

A person will not be asked to attempt to cook a meal. Rather, s/he is asked to consider how s/he would expect to cope with the various tasks involved in cooking, when filling in the claim form.

The legislation does not clarify what is meant by cannot prepare a cooked main meal. However, it can be argued that this should be taken to mean a labour intensive main daily meal, which is freshly cooked on a traditional cooker and on a daily basis.

In *Moyna v Secretary of State [2003]*, the House of Lords stated that interpretation of the cooking test requires taking a broad view over the relevant period of time, taking into account the available evidence of the person's abilities and testing them against the hypothetical test by looking at her/his abilities to perform activities involved in cooking. A person who can only use pre-prepared or frozen meals in a microwave oven may not be capable of preparing or cooking a main meal using a traditional cooker. The meal is intended for one person, and not for the family or for others living with her/him. Nevertheless, it can be assumed to include cooking more than one thing at once. It is also unclear whether a person's dietary requirements are to be taken into account.

In order to cook such a meal, a person should normally be capable of a number of tasks, including:

- reaching into the kitchen sink;
- turning on and off water, electricity and gas taps;
- washing, peeling and chopping vegetables;
- using utensils such as a potato peeler or knife;
- using a cooker;
- lifting hot or heavy pans;
- telling if food is cooked properly.

In addition, the person needs to be able to manage both physical tasks (eg lifting, carrying, bending, using kitchen equipment) and mental tasks (eg concentrating and planning).

Even if a person can perform all the individual tasks necessary to cook a meal, s/he may not be able to combine them all together to produce a meal. If a person has to be



supervised while cooking, in case anything untoward might happen which s/he could not cope with, then s/he should not be considered able to cook for her/himself.

A tribunal may consider a person's ability to prepare a meal with easily available aids and appliances, such as a draining spoon to avoid the lifting of heavy pots or the use of a perching stool to avoid standing. It will all be a question of what is reasonable in the circumstances.

Even if a person does not experience the difficulties most days but does so on a regular basis, it is arguable that the test is satisfied.

2. DLA MOBILITY COMPONENT

To qualify for the mobility component of DLA, a person must be capable of taking advantage of outdoor journeys.

A person qualifies for the higher rate component if due to a physical condition s/he:

- is unable or virtually unable to walk; or
- is both blind and deaf; or
- has a severe visual impairment; or
- was born without feet or is a double amputee; or
- is severely mentally impaired and has severe behavioural problems and qualifies for the highest rate of DLA care component.

A person qualifies for the lower rate if s/he is so severely disabled physically or mentally that s/he:

- needs guidance or supervision most of the time.

2.1 Rates of mobility component

Lower component **£22.00**

Higher component **£58.00**

In order to qualify for either rate, a person's condition must be such that s/he is capable of taking advantage of outdoor journeys. Thus, a person who is in a coma clearly is unable to walk, but will not get the mobility component since s/he would not be able to benefit from what the legislation calls enhanced facilities for locomotion. The same would apply to a person who is not allowed to be moved for medical reasons.

However, it is not essential that the person is interested in going out or that s/he would enjoy going out, as long as it would be beneficial for her/him to go out.



2.2 Age limits

To qualify for the higher rate of the mobility component a person must be at least three years old.

To qualify for the lower rate of the mobility component a person must be at least five years old.

The same upper age limit of 65 as for the care component applies to the mobility component. If a person has claimed mobility component before the age of 65, s/he can continue to receive it for an indefinite period as long as s/he satisfies the conditions.

For the lower rate of mobility component to be paid to children between five and sixteen, it must be shown that:

- the child needs substantially more guidance or supervision than another person the same age in average physical and mental health; or
- a child of the same age in average physical and mental health would not require such guidance or supervision.

Again, younger children face a stiffer test, since younger children need more supervision while walking out of doors in any case. Remember too that children below the age of three cannot qualify for the mobility component anyway. However, the second part of this test refers to the sort of guidance or supervision required.

An eight year old in average health may need supervision at traffic lights or to prevent her/him wandering into the road after a ball and so on, but will not require the sort of guidance and encouragement needed by another eight year old, who, because of mental disability, flatly refuses to walk anywhere and sits down in the road. The latter child can get benefit as the amount of guidance needed is substantially more than that for the child in good health.

2.3 Qualifying periods

First, a person must have had the mobility difficulties for at least three months before s/he gets an award. A person can claim as soon as help is needed but wait three months before getting benefit or can wait the three months first and then claim the benefit.

Secondly, a person must be likely to continue to have the mobility difficulties for at least six months after the start of the award.

There is no qualifying period for mobility component if a person is terminally ill (see section 1.4). Entitlement will start right away but only if s/he satisfies the normal qualifying conditions for the higher rate.

2.4 Residence, presence and immigration conditions

The residence and presence conditions are that a person must:



- be ordinarily resident in Northern Ireland; and
- be present in Northern Ireland; and
- have been present in Northern Ireland for at least 104 weeks of the last 156 weeks before the claim; and
- not be subject to immigration control.

2.5 Disability conditions

2.5.1 People who are unable or virtually unable to walk

A person satisfies the condition for receipt of benefit if unable to walk, or if her/his walking ability is very limited so s/he is virtually unable to walk, or if what walking s/he is capable of constitutes a danger to her/him or would be likely to lead to a serious deterioration in her/his health.

The cause of the person's incapacity to walk must generally be physical rather than mental. However, those with mental disabilities may qualify under the categories for those who are severely mentally impaired or for those needing guidance or supervision when walking (see 2.5.3 and 2.5.4).

If it is accepted that a person's mental disablement is due to some underlying physical cause, then s/he may qualify under this category. This would happen, for instance, in cases of brain damage or epilepsy.

2.5.1.1 Unable to walk

This means exactly what it says. If a person is capable of walking at all, even if only a step, then s/he is not unable to walk, and so will not qualify under this heading, although s/he may be able to qualify as virtually unable to walk.

Note that any artificial aid or prosthesis that is worn or used, or could be worn or used, must be taken into account when assessing whether someone is unable to walk. Thus, a person with one leg is clearly unable to walk, but if there is an artificial leg which would be suitable for her/him and would enable walking then s/he will not be treated as unable to walk. In this case, it is still worth considering whether the person is virtually unable to walk.

The sort of aids which count include artificial limbs, walking frames or crutches, but note that a person in a wheelchair may be mobile but is not walking.

In Commissioner's Decision *R(M) 2/89*, it was held that a one-legged man who could get about on crutches was not walking, and so qualified for benefit. Walking has been defined as moving the body by alternate steps of the feet. There is specific provision in the legislation for people who have had amputations. If a person has had both legs amputated at sites above the ankle, or was born with no feet, then s/he is automatically to be treated as being unable to walk, and is thus entitled to benefit.



2.5.1.2 Virtually unable to walk

This is a much more complicated test. A number of factors have to be taken into account in assessing whether a person is virtually unable to walk. These are the distance over which, speed at which, length of time for which and manner in which a person can walk without severe discomfort. Often a number of these considerations are inter-related.

Many people are equally poor at walking outdoors as indoors, but the legislation states that it is the ability to walk out of doors which is important. This can be relevant where outdoor factors such as wind and weather affect a person's ability to walk and also where the person would have problems with balance on road or pavement surfaces.

The legislation does not specify a distance at which a person who cannot walk any further would be said to be virtually unable to walk. All the factors must be considered on an individual basis including any rest periods during walking and, where relevant, any recovery period required after walking. It is important to remember that distance is only one factor and any decision made should consider a person's overall ability to walk including walking speed, length of time a person can walk and the manner of walking.

Any walking which is achieved can only be counted if it is done without severe discomfort. This is an extremely subjective test, as different people have different thresholds of pain. The regulation says discomfort and not pain, and it is to be presumed that severe discomfort is something short of severe pain. Discomfort can be something quite different from pain. For instance, some people are restricted in their walking ability because they become quite exhausted and are unable to continue. Others have to stop because they become breathless. If severe discomfort starts, any extra distance a person walks should be ignored.

A person may be virtually unable to walk depending on her/his ability to negotiate the type of surface normally encountered outdoors. No account should be taken of walking steep hills or rough ground.

2.5.1.3 Exertion required to walk

A person will be treated as virtually unable to walk if the exertion of walking poses a danger to her/his life or could lead to a serious deterioration in health.

This could apply to a person with certain heart conditions where the exertion of walking could bring on an angina attack which could lead to her/him suffering a heart attack. A person with a serious chest complaint may also qualify under this heading.

It must be the exertion which causes the danger. It could be said that a passing car poses a danger to the life of someone who, due to blindness or some other complaint, might wander into the road. However, such a person would not qualify under this heading, since the exertion required to walk has no relation to the danger posed.

The person's place of residence, eg on a steep hill or far from bus stops, cannot be taken into account, nor can her/his ability or inability to use public transport.



A person needs to show that s/he would never recover or recovery would take a significant period of time (eg twelve months) or would require some form of medical intervention.

2.5.2 People who are both blind and deaf

There are three main criteria which a person must satisfy in order to get benefit under this category.

First, the degree of disablement resulting from the loss of vision must amount to 100 per cent, ie loss of sight to such an extent as to render the person unable to perform work for which eyesight is essential.

Secondly, the degree of disablement resulting from the loss of hearing must amount to at least 80 per cent on a scale where 100 per cent represents absolute deafness.

Finally, the combined effects of the deafness and blindness must render the person unable to walk to any intended or required destination out of doors without the assistance of another person.

2.5.3 People who have a severe sight impairment

This category extends the payment of the higher rate of the mobility component of DLA to people with severe sight impairment. A person must be certified by a consultant ophthalmologist as severely sight impaired or blind or severely visually impaired. A person is severely visually impaired if:

- s/he has visual acuity, with appropriate corrective lenses if necessary, of less than 3/60; or
- 3/60 or more, but less than 6/60, if s/he has a complete loss of peripheral vision and a central visual field of no more than 10° in total.

2.5.4 People who are severely mentally impaired

This category extends the payment of the higher rate of the mobility component of DLA to people with mental disabilities. In practice, though, very few people will satisfy the entitlement criteria since the conditions are very restrictive.

To qualify, a person must be severely mentally impaired, display severe behavioural problems and qualify for the highest rate of the care component of DLA.

A person is defined as severely mentally impaired if s/he suffers from a state of arrested or incomplete development of the brain, which results in severe impairment of intelligence and social functioning.

The requirement of incomplete development of the brain indicates that a person must have been mentally impaired from birth or before the brain reaches its state of final development at the age of 30. It does not include a person with psychotic or psychopathic conditions, even though s/he may exhibit similar symptoms. This is because these conditions affect people whose mental development had been normal



until the onset of the disease. Similarly, a person who suffers from Parkinson's or Alzheimer's disease or dementia will be excluded also.

DFC will generally determine a person's intelligence with reference to an intelligence quotient test.

Average intelligence across the whole population is said to be represented by an intelligence quotient, or IQ, of 100. It is generally accepted that a person has severe impairment of intelligence if s/he has an IQ of around 55 or less. Less than 0.5 per cent of the population would attain such a score if they were to complete a standard IQ test. However, this is only one method of calculating intelligence and the Court of Appeal in Great Britain has decided that this test may in some circumstances be too narrow to gauge a person's useful intelligence and that all the circumstances of the case should be considered.

Severe impairment of social functioning indicates that a person has serious learning difficulties and will find difficulty in communicating with other people. It is generally accepted that such a person will be unable to learn to do more than the basics necessary for life such as feeding and dressing. A person will satisfy the test of displaying severe behavioural problems if s/he exhibits disruptive behaviour which:

- is extreme; and
- regularly requires another person to intervene and physically restrain the person in order to prevent injury to her/him or to someone else, or to prevent damage to property; and
- is so unpredictable that the person requires another person to be present and watching over her/him whenever s/he is awake.

2.5.5 People who need guidance or supervision

The lower rate of the mobility component applies where a person is so severely disabled physically or mentally that s/he cannot walk outdoors on unfamiliar routes without guidance or supervision from another person most of the time.

Assessment for the lower rate of the mobility component is based on a person's need for guidance and supervision and therefore it can apply to people with epilepsy or who are blind or have learning difficulties.

A person may use certain routes that s/he is familiar with and for which s/he does not require guidance. For instance, a person who has a mental disability may have learnt the route to the local shop and may be happy to go there unaided, but would be unable to go anywhere else without assistance. Such familiar routes do not count in the assessment of a person's need for guidance or supervision. Note that the guidance or supervision must be required most of the time, and not all the time.

If a person is prevented from going out unaccompanied due to fear and anxiety, the fear and anxiety must be symptoms of a mental disability or mental disabilities themselves in order to count. Further, they must be severe enough to prevent a person going out without guidance or supervision from another person. A person may also qualify if s/he



has a physical disability that causes so much fear and anxiety that s/he can be said to be mentally disabled and as a result cannot go outside without guidance or supervision.

To satisfy the guidance or supervision test, a person must be able to show that the actual guidance or supervision s/he receives from someone else will overcome her/his inability to take advantage of walking outdoors.

It is the actual effect of the guidance or supervision on that person that counts rather than just looking at her/his disability in general. For example, a person who suffers from agoraphobia and who refuses to leave her/his home because of her/his condition cannot satisfy the test because no amount of guidance or supervision will assist her/him to overcome her/his disability.

3. CLAIMING DLA

From the 20th of June 2016, Working age claimants (16-65) have to claim PIP instead of DLA, which means no new claims of DLA can be made for this age group. However claimants under 16 years of age will still be able to apply for DLA. There will also be a significant number of claimants who were over 65 before 20th of June 2016 who may continue to claim DLA as long as they meet the relevant criteria.

Claim forms for DLA are available from advice centres and Citizens Advice Bureaux or from the Social Security Agency (SSA). A leaflet to be used to request a claim form can be obtained from a post office.

There is an advantage to a person in seeking the claim form from the SSA directly. Where a claim form is requested from the SSA, the date of claim will be taken to be the date the claim form was requested if the claim is returned to the SSA within six weeks of that date. Where a claim form is obtained from an advice agency, the claim will be treated as made on the date the completed pack is received by the SSA.

The claim form for DLA covers both the care and mobility components. There are different forms for those under the age of sixteen (DLA 1A Child) and those over sixteen (DLA 1A Adult). The claim form contains a self-assessment questionnaire for the disability conditions which apply to DLA.

The form is meant to serve as the basis on which the decision maker decides the claim. It asks many questions about the person's disability and its effect. At the end of the form, the person is asked to collect a statement from someone who knows her/him. This statement should be completed by a health care professional who is very familiar with the person's illnesses and/or disabilities and the needs these give rise to.

It is intended that a person should not need to be examined by a health professional before a decision is made on her/his claim.

The information contained in the parts relating to a person's disabilities and/or illnesses should be enough on which to base a decision, especially if the statement from someone who knows the person claiming is completed. The decision maker may contact other people involved with the person for information in relation to her/his



application if consent is given on the form. Also, if it is not clear from the form what the effect of the disability is, the decision maker may arrange for a health professional to examine the person, or may obtain a factual report from the person's GP.

An examination may also be arranged if the forms are incomplete. Additionally, a small number of people will be examined for the purposes of checking the standard of adjudication of DLA claims.

A person who is terminally ill will not have to fill most of the questions relating to disabilities and/or illnesses unless s/he is claiming for the mobility component of DLA. Instead, s/he should get a form DS 1500 completed by her/his doctor to certify her/him as terminally ill. Another person can do this on behalf of the terminally ill person, without her/his knowledge if necessary.

Awards of DLA or AA can be made either for fixed periods or for indefinite periods. Where an indefinite award is made there is no requirements to renew the claim. However, it is always open to the DfC to revise or supersede the award if particular circumstances are met.

3.1 Change of circumstances

A person who has an existing award of DLA has a duty to report any change of circumstances which may affect entitlement to benefit or the amount of benefit to be paid. Where a person's health or condition has improved, s/he may have her/his benefit reduced or removed altogether.

Where a person has an existing award of either the care or mobility component of DLA and her/his health deteriorates, s/he may wish to apply for an increase in the component awarded, or the inclusion of another component to cover the increased needs. A person can do this by way of a revision or supersession. See *Law Centre (NI) Encyclopedia of Social Welfare Rights A.9 Decision Making and Appeals*.

An application for a revision or supersession can have a variety of outcomes. The person applying for a revision or supersession should be made aware of the fact that her/his entitlement to DLA could be unchanged or it could be reduced or removed. The DfC may decide:

- that the person's current award accurately reflects her/his care/mobility needs and entitlement remains at the current rate;
- to increase the person's award of benefit to the level requested due to increased needs;
- to reduce or remove the person's current entitlement (ie one or both components) on the grounds that her/his care/mobility needs are not as great as was initially believed.

Before applying for an increased award, care should be taken to avoid a person's current award being reduced or removed altogether. Therefore it is necessary to collect evidence which not only serves to minimize the risk of a person's entitlement



being reduced or removed but also points to the changes in her/his needs which have led to the application for an increase.

A person should also consider when the current award is due to expire as a renewal form is often sent out a few months before the renewal is due and the change of circumstances can be included in the renewal claim.

4. ADJUDICATION OF CLAIMS

The system for dealing with claims for DLA (and for AA for people who are 65 or over) falls into the following sections:

- a decision maker decides the initial claim;
- if the person is dissatisfied, s/he has one month in which to ask for a revision of the original decision. A revision, also known as a Mandatory Reconsideration, must be applied for and a decision given on it before a person can lodge an appeal.;
- if the person is dissatisfied with the outcome of the Mandatory Reconsideration, s/he has a further month within which to appeal to an appeal tribunal.

The appeal after an unsuccessful appeal tribunal lies with the Social Security Commissioner on a point of law only and from there potentially to the Court of Appeal and Supreme Court.

5. HOW DLA AFFECTS OTHER BENEFITS

DLA is both tax free and non-means tested. It does not affect a person's other income, nor does any other income affect entitlement to DLA.

DLA may be claimed at the same time as any national insurance benefit such as Incapacity Benefit, with just two exceptions. The care component cannot be paid at the same time as Constant Attendance Allowance with Industrial Disablement Benefit or a War Pension. The mobility component cannot be paid at the same time as War Pensioners' Mobility Supplement. In both cases, only the higher of the DLA component or the other benefit will be paid.

For the purposes of Employment and Support Allowance (ESA), Income Support, Income-based Jobseeker's Allowance (JSA), Housing Benefit and Pension Credit (PC), as well as Child Tax Credit and Working Tax Credit, DLA does not count as income. In fact, getting DLA may well increase the amount of those benefits and tax credits to which a person is entitled.

Receipt of any rate of DLA or AA will entitle a person to a Christmas bonus.

If a person is receiving the higher or middle rate of DLA or either rate of AA and someone regularly looks after her/him, the carer may be entitled to a separate benefit, Carer's Allowance. However, the person receiving DLA or AA might lose her/his entitlement to a severe disability premium with Income Support, JSA, ESA or Housing



Benefit (or severe disability additional amount with PC) so both the DLA/AA claimant and the carer will need advice about how they would be better off financially.

6. ATTENDANCE ALLOWANCE

A person aged 65 or over can claim AA if s/he is in need of attention, supervision or watching over from another person due to either mental or physical disabilities. A person aged under 65 can claim DLA care component. AA is non-means tested and tax free. Residence, presence and immigration conditions apply to AA. The rules are the same as for DLA. These are discussed above at 1.5 in relation to DLA.

6.1 Qualifying conditions

A person must be so severely disabled physically or mentally that s/he has satisfied one of the disability conditions set out below for a continuous period of six months immediately before the award begins.

The disability conditions are that s/he requires (from another person):

a) during the day

- frequent attention throughout the day in connection with bodily functions; or
- continual supervision throughout the day in order to avoid substantial danger to her/himself or others; or

b) at night

- prolonged or repeated attention in connection with bodily functions; or
- in order to avoid substantial danger to her/himself or others s/he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over her/him.

See 1.7.1 to 1.7.7 for analysis of the above.

6.2 Terminal illness

As with DLA Care Component, the qualifying period of six months is waived when a person is terminally ill (see section 1.4). Benefit is payable from the date the decision maker accepts that the legal test of terminal illness is satisfied.

6.3 Accommodation conditions

See 1.6 for further information. The rules are the same as for DLA.

6.4 Claiming AA

Benefit is claimed by completing a form DS2 which is also a self-assessment form.



6.5 Revision and appeals

Again the system is similar to that under the DLA rules (see section 4 above).

6.6 Benefit rates

Lower rate **£55.65**

Higher rate **£83.10**

7. FURTHER INFORMATION

*Welfare Benefits and Tax Credits Handbook, 19th Edition, CPAG, 2017/2018, £61.00.**

Disability Rights Handbook, Disability Alliance ERA, 2017/2018, 42nd Edition £33.99.

*Available from CPAG, 94 White Lion Street, London, N1 9PF.

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