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**Appendix 1** – Areas where information gathering and decision making functions must always be undertaken by separate members of staff

Legislation Used in Chapter 01

|  |  |
| --- | --- |
| Abbreviation | Full Title |
| CS (NI) Order 91CS (IE & D) Regs (NI) | The Child Support (Northern Ireland) Order 1991The Child Support (Information Evidence and Disclosure) Regulations (Northern Ireland) 1992 No 339 |
| Directive 79/7/EEC | Council Directive 79/7/EEC |
| ECHR | European Convention on Human Rights |
| European Communities Act 72 | European Communities Act 1972 |
| HR Act 98IS (Gen) Regs (NI)JSA Regs (NI)ROO (NI) Order 78SPC Regs (NI) | Human Rights Act 1998Income Support (General) Regulations (Northern Ireland) 1987 No 459The Jobseeker’s Allowance Regulations (Northern Ireland) 1996 No 198The Rehabilitation of Offenders (Northern Ireland) Order 1978State Pension Credit Regulations (Northern Ireland) 2003 No 28 |
| SS A (NI) Act 92 | The Social Security Administration (Northern Ireland) Act 1992 |
| SS C&B (NI) Act 92 | The Social Security Contributions and Benefits (Northern Ireland) Act 1992 |
| SS (C&I) Regs (NI) | The Social Security (Claims and Information) Regulations (Northern Ireland) 2007 No 467 |
| SS (C&P) Regs (NI) | The Social Security (Claims and Payments) Regulations (Northern Ireland) 1987 No 465 |
| SS & CS (D&A) Regs (NI)SS (GRB) Regs (NI)SS (IW) (Gen) Regs (NI) | The Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999 No 162The Social Security (Graduated Retirement Benefit) Regulations (Northern Ireland) 2005 No 121The Social Security (Incapacity for Work) (General) Regulations (Northern Ireland) 1995 No 41 |
| SS (NI) Order 98SS (POR) Regs (NI) | The Social Security (Northern Ireland) Order 1998The Social Security (Payments on account, Overpayments and Recovery) Regulations (Northern Ireland) 1988 No 142 |
| Treaty of Rome | Treaty establishing the European Economic Community |

Chapter 01 - Principles of decision making and Evidence

Who decides claims and applications?

1001 Decisions on claims and applications are made by the Department. In practice the Department does not make decisions personally. Instead, under the Carltona principle officials act on the Department’s behalf, provided that it is satisfied that they are suitably trained and experienced to do so. Throughout this Guide these officials are called decision makers.

1002 The Carltona principle dates from a judgement of the Court of Appeal in October 19431. The judgement said that the Secretary of State could not possibly make every decision for which he is constitutionally responsible and accountable to Parliament. The Department is therefore entitled to authorise a person of suitable authority to exercise these functions on its behalf.

1 Carltona Ltd v Commissioners of Works and others

1003 The Department provides training and approved guidance to decision makers on how to make decisions on its behalf. The Decision Makers Guide itself is one such form of guidance, advising decision makers how to apply social security law. Decision makers should note that approved guidance **must** be followed when applying the law to the facts of the case. However, decision makers may request advice from Decision Making Services on the application or clarification of the Decision Makers Guide in cases of doubt.

 **Note:** See DMG 1460 for guidance about legal advice as evidence.

1004 The decision maker takes all necessary actions on behalf of the Department, including

1. gathering information
2. making decisions on claims and applications
3. dealing with administrative matters such as suspension of payment.

 **Note:** The decision maker is **not** an independent officer.

1005 Although a decision maker may undertake all these functions, in some circumstances it may be appropriate to divide functions between different members of staff. However, there are some areas in which functions must always be undertaken separately for business and/or system security, see Appendix 1 for details.

1006 The decision maker must make a decision by considering all the evidence, establishing the facts and applying the law, including any relevant case law, in each case. Where legislation specifies or implies discretion, the decision maker's judgement must be reasonable and made with unbiased discretion.

 1007 – 1009

Making decisions

1010 Generally, each decision must be given on the facts as they exist at the date of the decision and not in anticipation of a future state of facts1. But there are variations and exceptions, for example where entitlement begins after the date of the claim. Entitlement can be established from a date after the date of the claim under

 **1.** the advance claim provisions2 **or**

 **2.** the principle that the decision maker must consider the claimant’s circumstances down to the date on which the claim is decided.

See DMG Chapter 02 for further guidance on deciding claims.

1 R(G) 2/53; 2 SS (C&P) Regs (NI), regs 13 to 15

1011 A decision may be revised or superseded for past periods when facts relating to the period were not known at the time. For further guidance on revision and supersession, see DMG Chapters 03 and 04.

 **Example**

 Following an investigation, an Income Support claimant is found to have been in remunerative work for a month over a year ago. The effect of the facts found is that there is no entitlement to Income Support for the one month period. The decision awarding Income Support is superseded to disallow Income Support for the period of remunerative work only. Entitlement after the period of work is unaffected.

1012 A fact is either a relevant circumstance or an occurrence which

1. exists at the time the decision is given **and**
2. is known, accepted or proved to be true.

1013 The decision maker may use the help of an expert in cases where a question of fact needs special expertise1. An expert is a person who appears to the decision maker to have knowledge or experience in determining a particular question of fact2.

1 SS (NI) Order 98, art 12(2); 2 art 12(3)

 **Example**

 A man claims Disability Living Allowance. There is insufficient evidence in the claim form and advice from Medical Services to decide the disability questions. The decision maker requests a report from an examining health care professional. The decision maker then considers all the evidence to decide whether the claimant is entitled to Disability Living Allowance.

1014 In cases other than the discretionary Social Fund payments1 if the decision is wrong it can be altered by

1. revision2
2. supersession3
3. appeal4.

 **Note:** See DMG 1270 et seq for revision and supersession of decisions made by former adjudicating and appellate authorities

1 SS (NI) Order 98, art 36 & 38; 2 arts 10 & 38; CS (NI) Order 91, arts 18 &19;
3 SS (NI) Order 98, art 11; 4 art 13; CS (NI) Order 91, art 22 & 23

1015 A decision is valid as soon as it is properly recorded by the decision maker. If a decision is not acted upon or not communicated to the relevant parties, this does not invalidate the decision1. However a decision is not fully effective unless and until it is notified2. See DMG 1116 - 1117 for guidance on how decisions are notified.

1 R(P) 1/85; R(U) 7/81; 2 R (Anufrijeva v Secretary of State for the
Home Department & Another [2003] UK HL 36; C10/07-08 (IS)

 1016 – 1029

What decisions are made by decision makers?

1030 The decision maker

1. decides any claim for a relevant benefit (see Annex A to this Volume)
2. makes contribution decisions on home responsibilities protection and credits (see DMG 1050)
3. makes any decision that is made under, or by virtue of, a relevant statutory provision (see DMG 1031).

 These decisions are called outcome decisions. It is important that decision makers distinguish between outcome decisions and other decisions and determinations. This is because only outcome decisions carry the right of appeal to an appeal tribunal1. See DMG 1100 - 1102 for further guidance on outcome decisions.

1 SS (NI) Order 98, art 9

1031 A relevant statutory provision1 is any provision in

1. Chapter II of the Social Security (Northern Ireland) Order 1998
2. the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (except Part VII)
3. the Social Security Administration (Northern Ireland) Act 1992 (except Part VIII)
4. the Social Security (Consequential Provisions) (Northern Ireland) Act 1992
5. the Jobseekers (Northern Ireland) Order 1995
6. the State Pension Credit Act (Northern Ireland) 2002
7. Part 1 of the Welfare Reform Act (NI) 2007
8. Part 1 and section 29 of the Pensions Act (NI) 2015.

1 SS (NI) Order 98, art 9(4)

 1032 – 1039

Other decisions and determinations

1040 There are other decisions made by decision makers which are not outcome decisions. These are

1. the decisions in Annex E to this Volume which are generally determinations made as part of an outcome decision
2. decisions on the discretionary Social Fund made in accordance with direction and guidance
3. determinations of findings of fact.

1041 Determinations and findings of fact are not outcome decisions but part of the process which goes towards making the outcome decision1. The decision maker should ensure that a determination is not notified as an outcome decision with appeal rights. Such a decision would be defective and may be set aside as invalid on appeal to a tribunal2.

1 R(IB) 2/04; 2 R(IS) 13/05

 **Example**

 A person applies for State Pension Credit. The decision maker finds as a fact that he is living together as husband and wife with the owner of the house he lives in. The claimant is notified of the living together as husband and wife determination and that either he or his partner must make an application for both parties. No findings are made about income, capital, housing costs etc, and no decision on entitlement to State Pension Credit is made. On appeal, the tribunal decides that it has no jurisdiction to hear the appeal as no outcome decision on the application for State Pension Credit has been made.

1042 The decision maker cannot make a decision1 on

1. Housing Benefit. These benefits are administered by the Housing Executive
2. issues in respect of National Insurance contributions, Statutory Sick Pay, Statutory Maternity Pay, Statutory Adoption Pay, Statutory Paternity Pay which are decided by Her Majesty's Revenue and Customs2 (see Annex C to this Volume).

 **Note:** See DMG 1047 - 1048 for guidance on the different roles of the Department and Her Majesty’s Revenue and Customs in Retirement Pension cases involving Guaranteed Minimum Pension.

1 SS (NI) Order 98, art 9(1); 2 SSC (TofF) (NI) Order 99, art 7(1)

 1043 – 1044

Reference to Her Majesty’s Revenue and Customs

1045 Entitlement to social security contributory benefits depends on the contribution conditions being satisfied. In practice the National Insurance contribution record is usually obtained and any decision is based on the assumption that the record is factually correct. However, where there is a dispute about the record, the matter must be referred by the Department to Her Majesty's Revenue and Customs for a formal decision1. See DMG Chapters 03, 04 and 06 for guidance on how decisions and appeals are handled after a reference to Her Majesty's Revenue and Customs.

 **Note:** See DMG 1050 - 1053 where the dispute is about whether credits should be awarded.

1 SS & CS (D&A) Regs (NI), reg 11A and 38A

1046 The Department will remain responsible for deciding whether the contribution conditions are satisfied in relation to benefits including

1. the earnings factors derived from them
2. which are the relevant income tax years
3. the years in which the contributions must have been paid or credited
4. the commencement of a period of incapacity for work
5. the start of the relevant benefit year.

1047 In Retirement Pension cases involving Guaranteed Minimum Pension, it is for Her Majesty’s Revenue and Customs to determine the amount of Guaranteed Minimum Pension from one or more occupational pensions1. The decision maker should then determine where appropriate the aggregate amount of Guaranteed Minimum Pension, and the amount of Additional Pension for the purposes of entitlement to Retirement Pension2.

1 Pension Schemes Act 93, sec 170(2); 2 sec 46; SS C&B (NI) Act 92, sec 45; R(P) 1/04

1048 Decision makers should note that

**1.** appeals against decisions about contributions matters made by Her Majesty’s Revenue and Customs are heard by tax appeal tribunal1

**2.** appeals against decisions about Guaranteed Minimum Pension made by Her Majesty’s Revenue and Customs are heard by appeal tribunals in the same way as social security appeals2.

1 SSC (TofF) (NI) Order 99, art 11; 2 Pensions Schemes Act 93, sec 170(6)

 1049

Home Responsibilities Protection and credits

1050 The Department will also remain responsible for deciding Home Responsibilities Protection and credits questions1. In practice all Home Responsibilities Protection and some credits decisions (for example, jury service, starting credits) will be taken on his behalf by Her Majesty's Revenue and Customs2.

1 SS (NI) Order 98, Sch 3, paras 16 & 17; 2 SSC (TofF) (NI) Order 99, art 16

Credits awarded by Her Majesty’s Revenue and Customs

1051 Her Majesty’s Revenue and Customs considers whether to award credits for

**1.** Statutory Sick Pay

**2.** Statutory Maternity Pay

**3.** Statutory adoption pay

**4.** Working Tax Credit (including the disability element)

**5.** jury service

**6.** periods of wrongful imprisonment or detention in legal custody

**7.** auto credits for

 **7.1** 16-18 year old people

 **7.2** men aged 60-65

**8.** approved training where not awarded by the Department

**9.** Gulf crisis credits.

Credits awarded by Department

1052 The Department considers whether to award credits for

**1.** incapacity and limited capability for work

**2.** maternity

**3.** unemployment

**4.** carers entitled to Carer’s Allowance

**5.** approved training.

 For further guidance on awarding credits, see Departmental specific guidance.

1053 Where

**1.** a claim is disallowed because the contributions conditions are not satisfied **and**

**2.** the claimant alleges that they should be awarded credits for a past period

 the decision maker should decide the credits issue before dealing with the dispute about the contributions conditions. This may mean referring the credits claim to Her Majesty’s Revenue and Customs for a decision where appropriate.

 **Example**

 A claim for Employment and Support Allowance is disallowed because the claimant failed the second contribution condition in one of the relevant years. In that year the claimant had been awarded 48 unemployment credits through two awards of Jobseeker’s Allowance. In the remaining period he had been on holiday. The claimant argues that he should be awarded credits for the missing weeks. The decision maker awards 2 unemployment credits, and revises the Employment and Support Allowance disallowance to award benefit.

 1054 – 1059

Determinations on incomplete evidence

1060 The decision maker can make assumptions about certain matters where the evidence required to make a determination for the purposes of an outcome decision is incomplete. This enables an outcome decision to be made without waiting for information. A further determination can be made and the decision revised or superseded as appropriate when the evidence is received. See DMG Chapters 03 and 04 for guidance on revision and supersession.

Housing costs - Income Support, State Pension Credit and Employment and Support Allowance

1061 Where

1. the decision maker has to decide a claim or make a supersession decision **and**
2. a determination is required about what housing costs are to be included in an award of

**2.1** Income Support1 **or**

**2.2** State Pension Credit2 **or**

**2.3** Employment and Support Allowance3 **and**

1. there is not enough evidence to make that determination

 the decision maker can make the determination on the basis of the evidence already held4.

1 IS (Gen) Regs (NI), reg 17(1)(e), 18(1)(f) & Sch 3; 2 SPC Regs (NI), reg 6(6)(c) & Sch 2;
3 ESA Regs (NI), reg 67(1)(c), 68(1)(d) & Sch 6; 4 SS & CS (D&A) Regs (NI), reg 13(1)

Other Income Support determinations

1062 Where

1. the decision maker has to make a determination about whether

**1.1** the applicable amount is reduced or disregarded for persons affected by trade disputes1 **or**

**1.2** a person is treated as receiving relevant education2 **or**

**1.3** the applicable amount includes the Severe Disability Premium3 **and**

1. there is not enough evidence to make that determination

 the decision maker makes the determination on the basis that the missing evidence is adverse to the claimant4.

1 SS C&B (NI) Act 92, sec 125(3); IS (Gen) Regs (NI), reg 12; 3 reg 17(1)(d), 18(1)(e) & Sch 2;
4 SS & CS (D&A) Regs (NI), reg 13(2)

State Pension Credit determinations

1063 Where

1. the decision maker has to make a determination about whether a claimant’s appropriate minimum guarantee includes an additional amount for the severely disabled1 **and**
2. there is not enough evidence to make that determination

 the decision maker makes the determination on the basis that the missing evidence is adverse to the claimant2.

1 SPC Regs (NI), reg 6(4) & Sch 1, para 1; 2 SS & CS (D&A) Regs (NI), reg 13(3)

Jobseeker's Allowance determinations

1064 Where

1. the decision maker has to make a determination about whether

**1.1**  the applicable amount is reduced or disregarded for persons affected by trade disputes1 **or**

**1.2** a person is treated as receiving relevant education2 **and**

1. there is not enough evidence to make that determination

 the decision maker makes the determination on the basis that the missing evidence is adverse to the claimant3.

1 JS (NI) Order, art 17; 2 JSA Regs (NI), reg 54; 3 SS & CS (D&A) Regs (NI), reg 15

Other Employment and Support Allowance determinations

1065 Where

1. the decision maker has to make a determination about whether a claimant’s applicable amount includes the Severe Disability Premium1 **and**
2. there is not enough evidence to make that determination

 the decision maker makes the determination on the basis that the missing evidence is adverse to the claimant2.

1 ESA Regs (NI), reg 67(1), 68(1) & Sch 4, para 6; 2 SS & CS (D&A) Regs (NI), reg 13(2)

 1066 – 1069

Deciding a claim with no election

1070 Where

1. a person claims a Category A or Category B Retirement Pension, Shared Additional Pension or Graduated Retirement Benefit **and**
2. an election is required1 because entitlement is deferred **and**
3. no election is made at the date of claim

 the decision maker may decide the claim before the election is made or treated as made2. See DMG Chapter 75 for guidance about deferring entitlement and making elections.

1 SS (GRB) Regs (NI), Sch 1, para 12 or 17; 2 SS & CS (D&A) Regs (NI), reg 13A(1) & (2); reg 13A(3)

1071 The decision maker must revise the decision on the claim once the election is made or treated as made. See DMG Chapter 03 for guidance about revising decisions.

 1072 – 1079

Referring a claimant for a medical examination

Reference by decision maker

1080 Before making a decision on a claim for, or entitlement to, a relevant benefit (except where an incapacity for work, limited capability for work or limited capability for work related activity determination is required) the decision maker may refer the claimant to a health care professional approved by the Department for an examination and report. The decision maker may make the referral at the initial, revision or supersession stage of a claim. The claimant is referred only when a medical examination is **necessary** to obtain information to enable the decision maker to reach a decision on the claimant’s claim or entitlement to benefit1.

1 SS (NI) Order 98, art 19(1); SS & CS (D&A) Regs (NI), reg 19(1)

Incapacity for work, limited capability for work and limited capability for work related activity

1081 Where a decision maker is determining incapacity for work, limited capability for work or limited capability for work related activity whether on a claim for benefit or credits, the claimant can be referred for an examination1 by a health care professional approved by the Department.

1 SS C&B (NI) Act 92, sec 167A(3); SS (IW) (Gen) Regs (NI), reg 8; ESA Regs (NI), reg 23 & 38

Reference by tribunal

1082 The tribunal may refer a claimant for a medical examination where information is needed to determine an appeal1 and an issue raised by the appeal2

1. is whether the claimant satisfies the disability conditions for

**1.1** Attendance Allowance3 **or**

**1.2** Disability Living Allowance4 **or**

**1.3** Severe Disablement Allowance5

**2.** relates to the period for which the disability conditions for Attendance Allowance or Disability Living Allowance are likely to be satisfied

**3.** is the rate of an award of Attendance Allowance or Disability Living Allowance

**4.** is whether the claimant is incapable of work

**5.** relates to the extent and assessment of disablement for Industrial Injuries Benefits (except Reduced Earnings Allowance) and Severe Disablement Allowance6

**6.** is whether the claimant suffers a loss of faculty as a result of an industrial accident7

**7.** relates to a disease or injury for the purposes of Industrial Injures Benefits (except Reduced Earnings Allowance)8

**8.** relates to Old Cases Schemes9.

1 SS (NI) Act 98, sec 20(2); 2 SS & CS (D&A) Regs (NI), reg 41; 3 SS C&B (NI) Act 92, sec 64 & 65(1);
4 sec 72(1) & (2) & 73(1), (8) & (9); 5 sec 68; 6 Sch 6; 7 sec 103; 8 sec 108; 9 sec 111 & Sch 8

1083

Meaning of health care professional

1084 A health care professional is1

**1.** a registered medical practitioner

**2.** a registered nurse

**3.** a registered occupational therapist or physiotherapist2 **or**

**4.** a member of such other regulated profession as prescribed3.

 **Note:** For the purposes of claims to the higher rate of Disability Living Allowance mobility component on the grounds of severe visual impairment, optometrists registered with the General Optical Council and orthoptists registered with the Health Professional Council are health care professionals.

 No other professions have been prescribed as health care professionals at present.

1 SS (NI) Order 98, art 39(1); SS (C&P) Regs (NI), reg 2(1); SS (IW) (Gen) Regs (NI), reg 2(1)
2 Health Act 99, s 60; 3 NHS Reform & Health Care Professions Act 02, s 25(3); SS (NI) Order 98, art 39(1)

Meaning of medical practitioner

1085 A medical practitioner is defined in the UK as a registered medical practitioner. This definition includes a person outside the United Kingdom who has the equivalent qualifications as those of a registered medical practitioner1.

1 SS A (NI) Act 92, sec 167

Failure to attend for medical examination

1086 In benefit cases where incapacity for work is not an issue, the decision maker decides against the claimant if they fail, without good cause, to attend for or submit to a medical examination1. What decision is made depends on the reason for referring the claimant for examination. The decision maker can make adverse assumptions following the failure.

1 SS (NI) Order 98, art 19(3)

1087 Generally, in the case of

1. a claim, the decision maker should disallow
2. reassessment following a provisional award of Industrial Injuries Disablement Benefit, the decision maker should disallow
3. an application for revision, the decision maker should notify that the decision is not revised - (see DMG Chapter 03)
4. an application for supersession, the decision maker should make a decision not to supersede - (see DMG Chapter 04).

1088 There may be some cases where it is not appropriate to give a decision as in DMG 1087. This is where the decision maker was able to award benefit on the existing evidence, and the examination was required in order to establish whether a higher rate of benefit should be awarded.

 **Example**

 A claim for Disability Living Allowance is received. The decision maker accepts from the evidence that the claimant is entitled to the higher rate of the mobility component. The evidence for entitlement to the care component is inconclusive, and the decision maker refers the claimant to a health care professional for examination and report. The claimant refuses to attend without good cause. The decision maker awards the mobility component, but decides that the conditions for the care component are not satisfied.

1089 The decision maker may also suspend and terminate benefit where a claimant fails, without good cause, to attend a medical examination and

**1.** the Department wishes to check the correctness of an award **or**

**2.** the claimant has applied for revision or supersession1.

 See DMG Chapter 04 for further guidance on suspension and termination.

1 SS (NI) Order 98, art 24; SS & CS (D&A) Regs (NI), reg 19

1090 In cases where an incapacity for work, limited capability for work and a limited capability for work related activity determination is required, and the person fails, without good cause, to attend or submit to a medical examination, the decision maker should treat the person as capable of work1. See DMG Chapter 13 or DMG Chapter 42 for details.

1 SS (IW) (Gen) Regs (NI), reg 8(2)

Has the appointment been cancelled

1091 People cannot fail to attend the medical examination if the appointment had already been cancelled by medical services1. The decision maker should investigate any indications that the claimant had made contact with the issuing office before the time of the examination. This is so that they can satisfy themselves that the appointment had been left open for the claimant.

1 R(IB) 1/01

Good cause

1092 Good cause is not defined in legislation but a number of Commissioners’ decisions deal with it. It includes any facts which would probably have caused a reasonable person to act as the claimant acted1, for example

**1.** the claimant’s health at the time

**2.** the nature of the claimant’s illness

**3.** the information that the claimant received

**4.** whether the claimant was outside Northern Ireland at the time

**5.** whether there was any postal delay.

1 R(SB) 6/83

1093 For details on how to obtain and weigh up medical evidence see DMG 1520 - 1599.

1094 – 1099

Outcome decisions

1100 The most important issue for a claimant who makes

1. a claim **or**
2. an application for

**2.1** revision **or**

**2.2** supersession **or**

**2.3** an industrial accident declaration

 is the outcome of that claim or application. For a claim, the claimant wants to know whether the claim has been successful, and if so, how much benefit will be paid and from when. The same principle applies to an application.

1101 The decision on a claim or application is called an outcome decision because it tells the claimant the outcome of the claim or application. An outcome decision incorporates all subsidiary determinations such as the separate elements of entitlement to benefit and the day from which benefit will be paid.

1102 The claimant has a right of appeal against outcome decisions only1 as listed in Annex D to this Volume. An outcome decision on a claim, for example, is whether or not the claimant is entitled to benefit. As part of the process of making that decision, the decision maker makes determinations or findings of fact which lead to the outcome. These determinations generally do not have the right of appeal - see Annex E2. Although an appeal is against the outcome decision, in practice the claimant may wish to focus on a component part of the decision. For further details on appeals see DMG Chapter 06.

1 SS (NI) Order 98, art 13, Sch 3; 2 art 13, Sch 2

 **Example 1**

 A woman is receiving Income Support as a lone parent with three children. Following investigation, the decision maker determines that she has been living together as husband and wife with the father of her children since before the date of claim. The awarding decision is revised for ignorance of a material fact. The outcome decision is that she is not entitled to Income Support from the date of claim as her partner works full time. The claimant has the right of appeal against that decision, although the issue under appeal is the question of living together as husband and wife.

 **Example 2**

 A man who works part-time makes a claim for Jobseeker's Allowance. The decision maker makes determinations about treatment of earnings and availability. The outcome decision is that he is entitled to Jobseeker's Allowance.

 1103 – 1104

Tribunals and outcome decisions

1105 A tribunal is not required to substitute an outcome decision for the decision under appeal1. The power enabling them to deal only with the issues raised by the appeal2 does not have the effect that they have to make a decision on every issue if there is a more appropriate way of dealing with those issues. Where the tribunal decides the issue but does not give a new outcome decision, the case is sent back to the decision maker. See DMG Chapter 06 for more details about tribunals and outcome decisions.

1 R(IS) 2/08; 2 SS (NI) Order 99, art 13(8)(a)

1106 If the case is remitted to the decision maker, a new outcome decision should be made incorporating the tribunal’s decision. The tribunal’s decision is binding on the decision maker, subject to supersession or appeal. See DMG Chapters 04 and 06 for further guidance.

 1107

Industrial Injuries Disablement Benefit decisions

1108 In addition to decisions on claims, Industrial Injuries Disablement Benefit decision makers make the following types of outcome decisions, both of which carry a right of appeal

**1.** in an industrial accident case, an accident declaration1

**2.** an assessment of disablement2.

 **Note:** See DMG 1190 - 1191 for guidance on Industrial Injuries Disablement Benefit determinations.

1 SS (NI) Order 98, Sch 3, para 7;
2 SS & CS (D&A) Regs (NI), reg 26(c); SS C&B (NI) Act 92, sec 103 & 108 & Sch 6

1109 An assessment of the extent of disablement arising from a claim for an industrial accident or a prescribed disease is a separate decision from the one awarding or disallowing benefit1. This means that on a first claim for benefit where an industrial accident has resulted in a loss of faculty or an industrial disease has been diagnosed, the decision maker gives two separate outcome decisions

**1.** an assessment of disablement **and**

**2.** a decision awarding or disallowing benefit.

 **Note:** Both decisions should be recorded in full on one LT54.

1 SS & CS (D&A) Regs (NI), reg 26(c)

1110 However, if the decision maker determines that there is no loss of faculty or the disease is not diagnosed, they make a single decision disallowing benefit which incorporates that determination (see DMG 1190 - 1191).

How is the decision recorded?

1111 In most cases the decision is recorded on the Department’s computer system. However, where a decision is revised or superseded, Departmental procedures may require that it is recorded clerically, e.g. on form LT54. A revision or supersession must

1. identify the person to whom it relates and
2. identify the decision it is changing and
3. specify whether it is revising or superseding an earlier decision and
4. specify the grounds or authority for doing so.

 For example, in a case where the claimant has previously passed the personal capability assessment, and on a further personal capability assessment fails to satisfy the test, the record of decision should say:

 “I have superseded the decision of the decision maker/adjudication officer/appeal tribunal dated …. [date] awarding incapacity benefit/ credits. This is because the Department has received medical evidence following an examination by an approved doctor, since the decision was given.

 …[The claimant] does not score 15 points for the physical descriptors or 10 points for the mental health descriptors, or an aggregate score of 15 points where both physical and mental health descriptors apply. The personal capability assessment is not satisfied.

 As a result…. [the claimant] is not incapable of work and is not entitled to Incapacity Benefit/Credits from and including …. [date].

1112 Where more than one decision needs changing on revision or replacing on supersession, each decision should be identified where possible. This is particularly important in overpayment cases.

Defective decisions

1113 Where a decision following revision or supersession is appealed, it is the formal record of the decision which will be considered by the tribunal. Failure to set out the basis for the decision in the record may result in the tribunal declaring it to be

 **1.** defective **or**

 **2.** unidentifiable as a revised or supersession decision.

 Decision makers should ensure that this is not necessary by following the guidance in DMG 1111.

1114 In most cases the tribunal should perfect or correct such decisions1. However, where it is not possible to identify whether the decision under appeal is a supersession or revised decision, the tribunal may conclude that it is not possible to remedy any defects, for example because there is no effective date, or the decision is in reality a determination of fact. In such cases the decision maker may need to make a decision which complies with the requirements for revision or supersession as appropriate2.This may have the effect that the decision takes effectfrom a later date in cases where the effective date is the date of the decision. There may also be an impact on any overpayment decision.

1 R(IB) 2/04; 2 R(IS) 13/05

 **Example**

 The claimant is in receipt of Income Support as a lone parent. Following a fraud investigation, the decision maker makes a determination that the claimant is living together as husband and wife with the father of her children. The determination is notified as an outcome decision with appeal rights, although it does not record what effect the living together as husband and wife determination has on entitlement to Income Support.

 A further decision is made about the overpayment of Income Support from the date that the claimant is found to be living together as husband and wife. The claimant appeals the decision to a tribunal. The tribunal concludes that no overpayment decision can exist because one of the requirements for such a decision, a proper revision or supersession decision, has not been made. The decision maker has the power to make a proper revision or supersession decision, and to make a proper overpayment decision.

 1115

How is the decision notified?

1116 The written notification of an outcome decision is issued to the claimant either clerically or by computer1. The notification contains

**1.** information which gives the effect of the decision such as whether there is entitlement to benefit and where appropriate the amount payable and when it is payable from **and**

**2.** an explanation of revision and appeal rights2 because a party who is notified of an outcome decision andis unhappy with that decision, may apply for revision or appeal it.

1 SS (NI) Order 98, art 4(1); 2 SS & CS (D&A) Regs (NI), reg 28(1)(c)

1117 The information about revision and appeal rights invites the claimant to ask for an explanation of the decision - see DMG 1120 - 1124. The claimant is also advised that a written statement of reasons can be requested if no reasons for the decision were given in the notification1 - see DMG 1130 - 1135.

1 SS & CS (D&A) Regs (NI), reg 28(1)(b)

When is the decision notified

1118 A decision is notified when it is

**1.** handed to the claimant or appointee **or**

**2.** sent by post to the person’s last known address1.

Where a decision is posted, decision makers should bear in mind that the notification may not leave the office on the day that it is produced2.

1 SS & CS (D&A) Regs (NI), reg 2(b); Interpretation Act 78, sec 7; 2 R(IB) 1/00

Failure to notify the decision

1119 A decision is not effective unless and until it is notified - see DMG 1015. This can lead to disputes about whether the time for revision or appeal has expired1, or whether the condition for making an overpayment decision is satisfied2. It is therefore important to ensure that evidence is available to show that a decision has been notified. Evidence of notice can be a clerical or computer record3.

1 SS & CS (D&A) Regs (NI), reg 2, 3(1)(b) & 4 and 31(1)(a) & 32;
2 SS A (NI) Act 92, sec 69(5A); 3 R(CS) 4/07

Explanation

1120 Where

**1.** a claimant or their representative queries a decision by

**1.1** asking for it to be explained

**1.2** requesting a written statement of reasons

**1.3** making an application for revision

**1.4** making an appeal **and**

**2.** the decision is not changed by revision or supersession

 the decision maker or another suitably trained officer should offer the claimant or representative an informal explanation of the decision. The claimant or representative should be contacted by telephone if possible, unless they have specifically requested a response in writing.

1121 The purpose of the explanation is to help the claimant understand the decision and to clarify any areas of dispute in the event of an application for revision or appeal.

 **Note:** An explanation is not a compulsory step in the revision or appeal process.

1122 The explanation must

**1.** be personalised

**2.** be given in a manner that is clear, understandable and effective

**3.** explain why the decision was made

**4.** explain the effects of the law on the facts

**5.** deal with any further points the claimant or representative may make

**6.** ensure that the claimant understands the decision even if they do not agree with it

**7.** ensure that the revision and appeal process including time limits is explained.

1123 If the claimant

**1.** cannot be contacted **or**

**2.** does not want an explanation **or**

**3.** is not satisfied with the explanation

 the action which prompted the offer of an explanation should be continued in the normal way. For applications for revision, see DMG Chapter 03 and appeals, see DMG Chapter 06.

1124 Where

1. the explanation followed an application for revision or an appeal **and**
2. the claimants accepts the explanation

 they should be asked whether they wish the application or appeal to go ahead. See DMG Chapter 06 for guidance on withdrawing an appeal.

 1125 – 1129

Request for written statement of reasons

1130 Where an outcome decision is notified without a statement of reasons for the decision, the claimant has one month from the day following the date of notification to ask for the written statement1. Claimants can ask for a written statement of reasons, for example by asking for an explanation of a decision, either orally, by telephone or in person at an appropriate office, or in writing. They **do not** have to use the specific words “request for a written statement of reasons”. Where the application is made orally, the Department must keep a record of the conversation. The decision maker must supply the statement within 14 days of receiving the request or as soon as practicable afterwards2. See DMG Chapter 03 and 06 for guidance on extending the revision and appeal period where a written statement is requested.

1 SS & CS (D&A) Regs (NI), reg 28(1)(b); 2 reg 28(2)

1131 A written statement of reasons should

1. be personalised
2. give an explanation of why the decision was made
3. provide details of the law used to make the decision, and how it was applied
4. give information about the extended time limit for revision and appeal.

 The decision maker should note when the statement is issued in order to calculate time limits for revision and appeal where appropriate.

1132 Where a decision is revised, the claimant can request a written statement of reasons for the decision in its revised form, even if a statement was provided for the original decision. This is because there is a right of appeal against a decision as revised1. Rights to request a written statement should always be notified when a decision has the right of appeal.

1 SS & CS (D&A) Regs (NI), reg 31(2)(a)

1133 Where a decision is not revised, there is no right to request a statement of reasons for the refusal to revise, as this is not a decision with a right of appeal. The rights to request a statement or appeal the original decision still exist subject to time limits. See DMG 1130 and DMG Chapter 06 for guidance on time limits.

1134 Where the request for a written statement is made outside the one month period in DMG 1130, the statement should still be issued so that the claimant can understand why the decision was made. However, the claimant should be advised that the time for applying for revision , or for an appeal is not extended.

1135 In exceptional circumstances a further written statement can be provided, for example where the claimant requires further clarification of the decision.

 1136 – 1149

Finality

1150 A decision made by a decision maker, a tribunal or a Commissioner is final1 unless it is

**1.** revised (decisions of decision makers only)2

**2.** superseded

**3.** terminated after an award has been suspended

**4.** changed or replaced an appeal

**5.** corrected **or**

**6.** set aside (decisions of tribunals or Commissioners only).

**Note:** See DMG 1180 - 1191 for guidance on finality of determinations.

1 SS (NI) Order 98, art 17(1); 2 art 10

1151 Where a decision is changed or replaced as in DMG 1150, the new or revised decision becomes the final decision on the claim or application, even where it does not change the outcome1. But see DMG 1152 - 1153 where an outcome decision is not replaced on appeal.

1 R(I) 9/63

Changing a tribunal’s decision

1152 Where a tribunal

**1.** allows an appeal on the issue or issues raised

**2.** does not give an outcome decision

**3.** remits the case to the decision maker

 the decision maker must follow the tribunal’s decision when dealing with the matters referred back for subsequent decision. See DMG 1105 - 1106 for further guidance.

1153 The tribunal’s decision on the issues it has dealt with is **final** unless

**1.** there are grounds to supersede the decision (see DMG Chapter 04) **or**

**2.** the decision maker considers it is erroneous in law and applies for leave to appeal (see DMG Chapter 06)1.

1 SS (NI) Order 98, art 17(1)

 1154 – 1159

Claim or award disallowed

1160 Where a claim is disallowed or an award is disallowed following supersession, a later claim for the same period cannot be determined. The decision maker should give a decision on the later claim from the date following the disallowance.

 **Example**

 A decision awarding Employment and Support Allowance which is superseded and disallowed on 21 July from and including 9 July is effective down to 21 July. Entitlement can only be considered from 22 July if a claim is then made for any period before 22 July.

1161 Where a disallowance is given by a decision maker, the claim is disallowed for the period from the first date covered by the claim to the date of the decision. However where the disallowance is confirmed on appeal to a tribunal or Commissioner, the period of the disallowance is not extended up to the date of the new decision. This is because a tribunal cannot take account of any changes after the date of the decision maker’s decision1.

1 SS (NI) Order 98, art 13(8)(b)

 1162 – 1169

Revision following backdating request

1170 The decision maker should also consider whether a request for backdating, in a case where an award is made following termination of an earlier award for the same benefit, should be treated as an application for revision of the decision which ended that award. This applies where the claimant in the backdating request argues that

**1.** the decision ending the previous award was incorrect **or**

**2.** the fresh claim should be backdated to the day following the last day of the previous award.

 1171 – 1179

Finality of determinations

1180 Normally, determinations embodied within an outcome decision are not conclusive for the purposes of a further claim for the same benefit1.

1 SS (NI) Order 98, art 17(2)

 **Example**

 Following a change of address, a claimant is found to be living together as husband and wife. Her award of Income Support is superseded on a relevant change of circumstances and disallowed from the date of the change. The decision maker also decides that the overpayment is recoverable due to the claimant's failure to disclose. On an appeal against the overpayment decision, the decision maker's findings on living together as husband and wife in the supersession decision is not binding on the tribunal. The finding is also not conclusive on a further claim for Income Support.

Incapacity for work

1181 DMG 1180 does not apply where the determination is about incapacity for work. Where the decision maker makes a determination that a person is, or is treated as, capable or incapable of work, any decision maker should use those findings as conclusive for the purposes of further benefit decisions1.

1 SS & CS (D&A) Regs (NI), reg 10

 **Example 1**

 A man is awarded Incapacity Benefit because he is suffering from chronic arthritis. He is also awarded Income Support. He has been incapable of work for 196 days and the decision maker applies the personal capability assessment. The decision maker considers all the evidence relevant to the personal capability assessment and determines whether the man is incapable of work. The determination on the man’s incapacity for work is then conclusive in determining his ongoing entitlement to Income Support.

 **Example 2**

 A woman claims contribution-based Jobseeker’s Allowance and is looking for work as a typist. She recently had an accident and has broken her leg. When she applied for Incapacity Benefit she was found capable of work. The decision maker uses the determination on incapacity for work as conclusive when considering the woman’s capability for work for the purposes of Jobseeker’s Allowance.

Limited capability for work

1182 DMG 1180 also does not apply where the determination is about limited capability for work. Where the decision maker makes a determination that a person has or does not have, or is treated as having or not having limited capability for work, any decision maker should use those findings as conclusive for the purposes of further benefit decisions1.

1 SS & CS (D&A) Regs (NI), reg 10(1)(c)-(d) & (2)

 1183 – 1189

Industrial Injuries Disablement Benefit

1190 Determinations on

1. date of onset1 **and**
2. diagnosis, made either before 5.7.99 or on or after 18.3.052

are exceptions to the general rule in DMG 1180 and are conclusive for decisions made on that claim and further claims including reduced earnings allowance. (Note, however, that determinations on diagnosis made on or after 5.7.99 but before 18.3.05 are not conclusive.)

1 SS (II) (PD) Regs (NI) 1986, reg 6; 2 reg 5(2); R(I) 2/03; R(I) 2/04

1191 This means that they are binding on future decision makers, and cannot be changed unless the outcome decisions in which they are incorporated can be altered by one of the methods in DMG 1150.

 **Example 1**

 On a claim for Industrial Injuries Disablement Benefit made on 14.4.96, the Adjudicating Medical Authority decides that the claimant is not suffering from prescribed disease A11. The adjudication officer disallows the claim on 4.6.96. A new claim for the same disease is made on 5.9.05. Medical opinion is that the claimant is suffering from the disease and has done so since 1.4.85. The previous determination on diagnosis was binding, so unless there are grounds for revising or superseding the decision of 4.6.96, the date of onset cannot be earlier than 5.6.96.

 **Example 2**

 On a claim for Industrial Injuries Disablement Benefit made on 7.9.01, the decision maker determines that the claimant is not suffering from prescribed disease A11. The claim is disallowed on 16.11.01. A further claim is made on 5.9.05 for the same disease. Medical advice is that the claimant has been suffering from prescribed disease A11 since 1.1.80 with an assessment of disablement of 4%. The decision maker is not bound by the diagnosis on the previous claim and determines that 1.1.80 is the date of onset.

 **Example 3**

 On a claim for Industrial Injuries Disablement Benefit made on 14.6.05, the decision maker determines that the claimant is not suffering from prescribed disease A11. The claim is disallowed on 19.7.05. A further claim is made on 22.11.05 and the Medical Adviser is of the opinion that the claimant has been suffering from the disease since 1.4.85. The decision maker considers all the evidence and decides that the latest medical evidence is only a change of opinion and that there are no grounds to revise or supersede the decision of 19.7.05. The previous diagnosis determination is binding and the date of onset cannot be any earlier than 20.7.05.

 **Example 4**

 On a claim for Industrial Injuries Disablement Benefit made on 14.6.05, the decision maker determines that the claimant has been suffering from prescribed disease A11 since 3.1.05 and assesses disablement at 15% from 7.4.05 indefinitely. A claim for Reduced Earnings Allowance is received on 6.8.05 and accompanying medical evidence suggests that the claimant has suffered from the disease since 1989. The previous determination on the date of onset is binding and cannot be changed unless there are grounds for revising or superseding the assessment of disablement. As the decision maker decided that grounds do not exist, the claim for Reduced Earnings Allowance is disallowed.

1192 – 1199

General principles of common law

1200 The decision maker must make a decision taking account of common law principles and European law (see DMG 1230). The common law principles are

1. definitions of words and phrases
2. relevant law
3. estoppel (personal bar in Scotland) and *res judicata*
4. natural justice.

Definitions

1201 The decision maker can find definitions of words and phrases

1. within the Acts and Orders
2. at the beginning of each set of regulations
3. in case law (decisions of Commissioners, the Court of Appeal, the House of Lords and the European Court of Justice)
4. in the Interpretation Act (Northern Ireland) 1954
5. in the Interpretation Act 1978.

 The decision maker may use a dictionary if none of these sources contain a definition1.

1 R(SB) 28/84

1202 Headings and side notes1 can be helpful in understanding a provision as can the explanatory memorandum attached to a statutory rule. These are not part of the legislation but are permissible aids to construction which can be used to aid understanding.

1 R v Montila & Others

1203 – 1204

Relevant law

1205 When a decision maker is determining a claim or an application, the relevant law is the law applying at the time the claim or application is made. Where there is a change in a particular legal provision so that it

**1.** ceases to have effect **or**

**2.** begins to take effect

 during the period of a claim or application, the decision maker should apply the change in the law only from the date of the change1 unless the legislation has retrospective effect or there are specific transitional provisions.

1 R(I) 4/84

Uprating

1206 Legislation1 provides for benefit rates to be altered in accordance with the Uprating Order without the need for the decision maker to supersede the previous awarding decision. But in certain Jobseeker’s Allowance, Income Support and State Pension Credit cases the decision maker is still involved in giving a supersession decision2 (see DMG Chapter 04).

1 SS A (NI) Act 92, sec 135(3); 2 SS & CS (D&A) Regs (NI), reg 14

 1207 – 1209

Estoppel (personal bar in Scotland)

1210 In general law the doctrine of estoppel, known in Scotland as personal bar, has the effect of blocking or preventing a person from alleging or proving in later proceedings, matters which have already been decided in earlier proceedings1. When this doctrine is applied by decision makers it is called *res judicata* (see DMG 1212 - 1213).

1 R(I) 9/63

 Example

 A decision maker decides that a woman has had an industrial accident. The woman appeals against the rate of benefit paid and the case goes to an appeal tribunal. At the tribunal hearing the woman argues further points about the industrial accident. The issues surrounding the industrial accident have already been decided by a decision maker therefore estoppel applies.

1211 The doctrine of estoppel does **not** apply where the claimant

1. on the advice or a promise given by the Department, has formed a view about future benefit rights and
2. has taken a particular course of action.

 The decision maker must decide the matter solely on the basis of the relevant legislation, even though the decision may be contrary to the original advice or promise1.

1 R(P) 1/80; R(SB) 8/83 & R(SB) 4/91 Appendix

 Example

 A claimant in receipt of income-based Jobseeker’s Allowance is considering extending his mortgage. He rings his local Jobs and Benefits Office and is told that the new mortgage would be met as part of his housing costs. He takes out the new mortgage. The decision maker decides that the loan is not eligible for housing costs. Estoppel does not apply, because the decision maker is not bound by the advice given by another person in the Department.

*Res judicata*

1212 *Res judicata* prevents a judicial authority from deciding a matter that has already been decided by a person of similar status. This principle is given effect for decision makers by a provision in legislation1, and is also known as the principle of finality (see DMG 1150 et seq).

**Note:** This does not apply to most determinations and finding of fact - see DMG 1180 et seq.

1 SS (NI) Order 98, art 17

1213 Once a decision maker has made a decision, a further decision cannot be given on the period of that claim, or the outcome of an application for revision or supersession1 **except** where the later decision is given by way of

1. revision **or**
2. supersession **or**
3. appeal.

1 R(S) 1/83(T); R(SB) 4/85

 1214 – 1219

Natural justice

1220 There is a common law requirement that decision makers should observe the rules of natural justice. The rules are not prescribed collectively but they represent the manner in which justice is expected to be achieved. An unbiased approach is needed, reflecting the principle that impartiality is at the heart of the judicial process.

1221 – 1229

General principles of European Community law

1230 The following paragraphs set out the general principles of European Community law that apply to social security legislation. Detailed guidance on its application is in DMG Chapter 07.

1231 When interpreting European Community legislation, the decision maker must consider the purpose of the provisions and not just the meaning of the words1. Cases of difficulty should be referred to Decision Making Services for advice.

1 R v Henn [1981] A.C. 850

1232 The main sources of European Community law are

1. treaties establishing the European Community. The European Community can only legislate on matters in areas where it has been given powers to do so by the Treaties
2. secondary legislation (regulations, directives, recommendations, decisions and opinions)
3. judgements of the European Court of Justice.

 1233 – 1234

Regulations

1235 Regulations apply to all European Economic Area countries1. See DMG Chapter 07 part 1 for a list of all European Economic Area Countries. They become part of national law as soon as they are agreed by the Council of Ministers. There is no need for a separate Act of Parliament or secondary legislation.

1 Treaty of Rome, art 249

Directives

1236 Directives are binding, in terms of the result to be achieved, upon each Member State to which they are addressed. But it is left to the national authorities to decide the form and methods used to achieve the result. In the United Kingdom, an Act of Parliament or secondary legislation under statute1, is usually needed.

1 European Communities Act 1972

1237 A Directive may have direct effect if

**1.** it, or part of it, is clear and precise

**2.** it, or part of it, is unconditional **and**

**3.** the time limit within which it had to be implemented has passed.

 “Direct effect” means that a person may rely on a provision of a Directive.

 Example

Directive 79/7/EEC was issued in 1978 and gave Member States six years to implement equal treatment in social security (see DMG Chapter 07). The Directive took effect on 23.12.84 and is binding on all Member States from that date. Most necessary changes to United Kingdom law were made by that date to conform to the Directive.

Opinions and recommendations

1238 Opinions and recommendations have no legal force but they state the collective view of the European Community. The European Court of Justice and national courts must take opinions and recommendations into account when deciding cases1.

1 Case 322/88, Grimaldi

Supremacy of European Community law

1239 European Community law is supreme1. This means that where there is a conflict between the provisions of European Community law and that of any European Economic Area national law

**1.** European Community law must be applied **and**

**2.** the national law must be set aside2 or amended as appropriate.

1 Case 48/71 Commission v Italy, Case 36/75 Ruttili, Case 106/77 Simmenthal;
2 European Communities Act 72, secs 2 & 3

1240 Where European Community law is applied directly to set aside or amend United Kingdom law, the United Kingdom law must be changed so that the disadvantaged group is brought up to the level of the advantaged group. This is called levelling up1.

1 Case 43/75 Defrenne v Sabena

1241 Where a European Economic Area country amends its national legislation to provide equal treatment for men and women1, it can specify any conditions provided that from 23.12.84 those conditions apply equally to men and women. This is so even if the conditions are harder to satisfy after 22.12.84 than before that date. This is called levelling down. For further details on equal treatment see DMG Chapter 07.

1 Directive 79/7/EEC

1242 – 1249

Judgments of the European Court of Justice

1250 Judgments of the European Court of Justice are not generally available to decision makers. The decision maker should contact Decision Making Services for information about these decisions.

Referring questions to the European Court of Justice

1251 When in doubt about the correct interpretation of European Community legislation on an individual case

**1.** a tribunal (but see DMG 1255)

**2.** a Commissioner **or**

**3.** the Court of Appeal

 can refer a question to the European Court of Justice for a preliminary ruling1.

1 EC Treaty, art 234

1252 If a case is before the Supreme Court and there is still an outstanding question involving European Community law, the Supreme Court **must** refer a question to the European Court of Justice. When the European Court of Justice has answered the question, the Supreme Court decides the appeal.

1253 As a general rule, where an appeal can be made to a higher court from the authority currently considering the case it is better to give a decision on the question at that level andleave the higher court to make a reference1 to the European Court of Justice.

1 R(S) 5/83

1254 Where the question of a referral arises during the course of a tribunal, the decision maker should ask the tribunal to consider the matter **without** referring the question to the European Court of Justice at that stage. If the tribunal refuses to decide the question before them, the decision maker should ask for an adjournment so that legal advice and representation can be arranged.

1255 If the tribunal refuses to adjourn, the decision maker should ask for the request and refusal to be included in the note of evidence. The decision maker should then pass the papers to Decision Making Services for advice.

1256 – 1259

European Convention on Human Rights

1260 The European Convention for the Protection of Human Rights and Fundamental Freedoms is a treaty of the Council of Europe. The Convention contains Articles which guarantee a number of basic human rights. In addition, Protocols have been signed which are to be regarded as additional articles to the Convention. The main Convention Rights are set out in Annex G to this volume.

Human Rights Act 1998

1261 The Human Rights Act 1998 which gives effect in the UK to the rights and freedoms guaranteed under the European Convention on Human Rights came into force 2.10.00.

1262 Public authorities, including courts and tribunals are under a duty to act compatibly with the Convention rights and all legislation must be read compatibly with the Convention rights as far as it is possible to do so. Also, courts and tribunals should have regard to the jurisprudence of the European Court of Human Rights and decisions and opinions of the Commission and Committee of Ministers.

1263 Decision makers applying the normal principles of decision making, which are

1. natural justice
2. consideration of evidence
3. standard of proof **and**
4. application of relevant law

should not find themselves in breach of Article 6 of the Convention. This is because they are already expected to determine questions without bias or discrimination and within a reasonable timescale.

1264 For further guidance on appeals to tribunals involving human rights, see DMG Chapter 06.

 1265 – 1269

Revising and superseding decisions of former authorities

Introduction

1270 Decisions on benefits current in 1999 made by the adjudicating and appellate authorities before the coming into force of current legislation1 can be revised or superseded under the new system of decision making. This is made possible by treating them as decisions as made under current legislation2.

1 SS (NI) Order 98; 2 art 9(1)(a) or (c); Commencement Orders

1271 Decisions on former benefits can also be revised or superseded. They are prescribed as relevant benefits for the purposes of decision making. Decisions on these benefits are also treated as decisions made by the Department under the Order. See Annex A to this Volume for a list of relevant benefits.

1272 The Order came into force on different days for different benefits. These are

**1.** 5.7.99 for Industrial Injuries Disablement Benefit

**2.** 6.9.99 for Retirement Pension, Widow’s Benefit, Incapacity Benefit, Severe Disablement Allowance and Maternity Allowance

**3.** 18.10.99 for Attendance Allowance, Disability Living Allowance, Carer’s Allowance, Jobseeker’s Allowance and credits

**4.** 29.11.99 for Income Support and Social Fund Maternity, Funeral and Cold Weather Payments

**5.** 16.10.06 for prescribed former benefits.

 1273 – 1279

Meaning of adjudicating authority

1280 An adjudicating authority is

* 1. an adjudication officer
	2. an adjudicating medical practitioner
	3. a specially qualified adjudicating medical practitioner
	4. a medical board
	5. a special medical board.

Meaning of appellate authority

1281 An appellate authority is

1. a Disability Appeal Tribunal
2. a Medical Appeal Tribunal
3. a Social Security Appeal Tribunal
4. a Social Security Commissioner.

Decisions of adjudicating authorities

1282 Decisions of adjudicating authorities made before the day in DMG 1272 are treated as decisions of the Department. This means that they can be revised1 or superseded2 under the new provisions.

1 SS (NI) Order 98, art 10(1); 2 art 11(1)(a)

Decisions of appellate authorities

1283 Decisions of appellate authorities made before the day in DMG 1272 can be superseded1 under the new provisions.

1 SS (NI) Order 98, art 11(1)(b)

 1284 – 1299

Evidence

Introduction

1300 The guidance in the following paragraphs sets out the general principles which the decision maker should follow regardless of the benefit or business area involved. See DMG 1001 for details of the authorisation of suitable people to exercise the function of decision maker on behalf of the Department.

1301 The decision maker should approach the determination of claims and applications objectively by always

1. considering the evidence
2. from that evidence, establishing the facts of the case
3. applying the law to those facts.

1302 Proper consideration and careful recording of evidence when making and recording decisions are essential. It is particularly important that telephone conversations and interviews are accurately recorded. This approach assists decision makers dealing with disputes and may avoid appeals. It also helps in any subsequent appeal proceedings.

1303 The provision of sufficient information or evidence to establish the national insurance number is a specific requirement for certain benefits. For details see DMG Chapter 02.

 1304 – 1309

Types of evidence

1310 Decision makers, like any other statutory authority, must base all decisions on evidence. There are three types of evidence

1. **direct** - for example, a statement by a witness to an industrial accident
2. **indirect** - for example, a statement by someone who did not see the accident but saw the victim immediately afterwards and saw the injuries and the circumstances which probably caused them
3. **hearsay** - for example, a statement by someone recording what they were told about the accident.

1311 Each type of evidence may be either

1. **documentary** - for example, certificates or wage slips
2. **oral** - for example, a statement given verbally (such as in a telephone call)
3. **real** - something tangible, for example, a wage packet with the money in it.

1312 The decision maker can use all three types of evidence. Some carry more weight than others1. The weight given should be carefully judged in the circumstances of the particular case. As a general rule, direct evidence is more significant than indirect or hearsay evidence. Also, the closer in time to the event the decision maker obtains and considers the evidence, the more helpful it is likely to be.

1 R(I) 4/65

1313 There may be situations where the decision maker has “secondary” evidence as opposed to “primary” evidence, for example where a medical report refers to a video recording which is unavailable or no longer exists. The lack of the primary evidence does not mean that secondary evidence is not admissible, and appropriate weight should be given to it.

 **Example**

Joanne, in receipt of higher rate mobility and lowest care components of Disability Living Allowance, was videotaped by private investigators in a personal injury claim. The tapes were shown to her consultant and he wrote a report, part of which said “It is clear that she is able to walk and would be able to perform the majority of household chores”. The decision awarding Disability Living Allowance was superseded and the award terminated. Through various delays, by the time the claimant’s appeal is heard by an Appeal Tribunal, the video is no longer available but the report is. The claimant argues that without the tape (primary evidence) the secondary evidence should not be relied upon to withdraw the claimant’s benefits. The tribunal has to have regard to all the evidence before it, including the report, and has to weigh all such evidence and reach a conclusion.

 1314 – 1319

Responsibility for collecting evidence

1320 Evidence on which the decision maker decides the claim or application is collected on behalf of the Department. In some cases this person will also be the decision maker. Evidence can be collected by telephone, letter or interview. Where evidence is collected by letter, a copy of a letter asking specific questions should always be kept with the reply. Where evidence is collected by telephone, the questions asked should be recorded along with the replies. See DMG 1451 et seq in fraud cases. Documentary evidence carries the most weight and is preferred.

1321 The circumstances in which statements are obtained - that is, voluntarily or during an interview under caution - can be important. Where the circumstances are not clear, an explanation should be attached to the statement.

 1322 – 1329

Evidence from Her Majesty’s Revenue and Customs

1330 Any information held by Her Majesty’s Revenue and Customs for the purposes of

**1.** contributions functions (see DMG 1042 **2.**)

**2.** Statutory Sick Pay

**3.** Statutory Maternity Payment

may (or on request by an officer authorised by the Department must) be given to an officer of the Department where the information is required for social security purposes1. This enables the decision maker to obtain information about matters such as contribution records an employed earners employment.

1 SS A (NI) Act 92, sec 115D

1331 In the same way information held by the Department for social security purposes may be given to Her Majesty’s Revenue and Customs where necessary for their functions in DMG 13301.

1 SS A (NI) Act 92, sec 115E

 1332 – 1333

Evidence from an authority administering Housing Benefit

1334 When a claimant supplies information to an administering authority for the purposes of claiming Housing Benefit and this information is supplied to the Department, the Department must use the information without verifying its accuracy1. This information can be used for the purpose of a claim for, or award of, specified benefits2.

1 SS (C&I) Regs (NI), reg 3(2); 2 reg 3(1)(b)

1335 Information provided as in DMG 1334 does not have to be used without carrying out further checks on its accuracy if

**1.** it is supplied more than twelve months after it was used by an administering authority for Housing Benefit purposes1 **or**

**2.** the information is supplied within twelve months of its use by the administering authority but the Department has reasonable grounds for believing the information has changed in the period between its use by the administering authority and its supply to the Department2 **or**

**3.** the date on which the information was used by the administering authority cannot be determined3.

1 SS (C&I) Regs (NI), reg 3(3)(a); 2 reg 3(3)(b); 3 reg 3(3)(c)

 **Example**

 A claimant provides evidence of his savings to support his claim for Housing Benefit. The administering authority verifies that his savings are £10,000 - this includes shares. This information is sent to the Department. Eight months later a claim for Income Support is made. The Department requests that the claimant provides evidence of his savings due to the likelihood that the value of his savings will have changed.

1336 Where social security information is verified by an administering authority and forwarded to the Department, the Department must use this information without verifying its accuracy for the purpose of a claim or award of a specified benefit1. However, information may be checked if

**1.** the Department has reasonable grounds for believing the information is inaccurate **or**

**2.** the information is received more than four weeks after it was verified by the administering authority2.

1 SS (C&I) Regs (NI), reg 4(2); 2 reg 4(3)

Meaning of social security information

1337 Social security information means

**1.** information relating to social security, child support or war pensions **or**

**2.** evidence obtained in connection with a claim for or an award of a specified benefit1.

1 SS A (NI) Act 92, sec 5B(4)

Meaning of specified benefit

1338 The term “specified benefit” means one or more of the following benefits1

**1.** Attendance Allowance

**2.** Bereavement Allowance

**3.** Bereavement Payment

**4.** Carer’s Allowance

**5.** Disability Living Allowance

**6.** Employment and Support Allowance

**7.** Incapacity Benefit

**8.** Income Support

**9.** Jobseeker’s Allowance

**10.** Retirement Pension

**11.** State Pension Credit

**12.** Widowed Parents Allowance

**13.** Winter Fuel Payment.

1 SS (C&I) Regs (NI), reg 1(3)

1339 Claims for some social security benefits can also be made at local authorities administering Housing Benefit, known as alternative offices1. See DMG Chapter 02 for further guidance. Information or evidence supplied to, or obtained by alternative offices relating to the claim may be verified, recorded and forwarded to the Department as soon as possible2.

1 SS A (NI) Act 92, sec 5A; SS (C&P) Regs (NI), reg 4(6B)(b), 4C(4), 4(6A)(c) & (d); 2 reg 4(6C)(d)

 1340 – 1342

Standard of proof - balance of probability

1343 The decision maker must decide claims and applications on the balance of probability. This is not the same as “beyond reasonable doubt”, the standard test for proof in criminal trials.

1344 The balance of probability involves the decision maker deciding whether it is more likely than not that an event occurred, or that an assertion is true1. It does not mean that the claimant can be given the benefit of the doubt2. If the evidence is contradictory the decision maker should decide whether there is enough evidence in favour of one conclusion or the other to show which is the more likely. The decision maker may decide on the basis of findings made on the balance of probability or may find that there is not enough evidence to satisfy them about findings one way or the other.

1 R(I) 4/65; 2 R(I) 32/61

1345 Alternatively the decision maker may find that there is insufficient evidence to establish the facts one way or the other and ask for more evidence1. Claimants must supply all information and evidence required in connection with the decision2. The decision maker should do as much as possible to see that all the necessary evidence is brought to light.

1 R v S of S ex parte CPAG [1990] QB540; 2 SS (C&P) Regs (NI), reg 7(1); JSA Regs (NI), reg 24

1346 – 1349

Failure to provide evidence

1350 If the claimant fails to provide the requested evidence or information a penalty may be imposed

1. for failure to sign a declaration in claims for Jobseeker’s Allowance
2. in Child Support cases, by way of a Reduced Benefit Direction.

1351 Evidence requirements for Income Support and Jobseeker’s Allowance are in benefit specific guidance.

1352 When making a decision, the decision maker should decide the importance of the failure and any reasons given for not providing evidence, as this could cast doubt on the facts previously provided. See DMG 1405 for guidance on the burden of proof.

 **Example 1**

 An Income Support claimant states that there is no capital or income from the sale of her business, because the money from the sale was used to clear the business debts. The decision maker asks for evidence of the transaction. The claimant is unable to produce any. The transfer of the business was within the family. The decision maker is entitled to take the view that it is more likely that the claimant has not disposed of the assets of the business.

 Example 2

 A jobseeker states he left his employment because of a grievance with the employer, but on being asked to provide more detail, does not reply. The decision maker can impose a sanction because the jobseeker has not proved just cause for leaving his employment voluntarily.

 1353 – 1369

Treated as capable of work

1370 Where the claimant has not replied to enquiries requesting evidence of incapacity for work1, there are special rules to treat a person as capable of work. They apply if the claimant fails without good cause to

1. return the questionnaire for the personal capability assessment2 **or**
2. attend or submit to a medical examination3 for the own occupation test or personal capability assessment.

See DMG Chapter 13 for details.

1 SS (IW) (Gen) Regs (NI), regs 6, 7 & 8; 2 reg 7; 3 reg 8

1371 Decision makers should note that a claimant cannot be treated as capable of work for a period where they have failed to provide medical evidence. The appropriate test of incapacity must be applied. See DMG 1545 and Chapters 04 and 13 for further guidance.

Treated as not having limited capability for work

1372 Where the claimant has not replied to enquiries requesting evidence of limited capability for work1, there are special rules to treat a person as capable of work. They apply if the claimant fails without good cause to

1. return the questionnaire for the work capability assessment2
2. attend or submit to a medical examination3.

 See DMG Chapter 42 for details.

1 ESA Regs (NI), regs 21, 22 & 23; 2 reg 22; 3 reg 23

1373 Decision makers should note that a claimant cannot be treated as not having limited capability for work for a period where they have failed to provide medical evidence. The appropriate test of limited capability for work must be applied. See DMG 1551 and Chapters 04 and 42 for further guidance.

 1374 – 1379

Corroboration of evidence

1380 There is no rule of law that corroboration of the claimant’s own evidence is necessary1. But the decision maker should not accept evidence, from the claimant or anyone else, uncritically. It needs to be weighed carefully, in the light of the circumstances of the case.

 **Example**

 A man claims Income Support. He states he has capital of £20,000. The decision maker therefore decides that he is not entitled to Income Support. Four weeks later the man makes another claim for Income Support. He states that he has spent all of his capital, but he cannot produce evidence of any expenditure. The decision maker decides that the man still has capital of £20,000 and that he is not entitled to Income Support.

1 R(I) 2/51; R(SB) 33/85

 1381 – 1384

Evidence provided by an authority administering Housing Benefit

1385 Evidence verified by an administering authority and supplied to the Department should not be verified by the Department where it is used for the purposes of claims for or awards of certain benefits. But see DMG 1334 - 1339 for exceptions to this rule.

 1386 – 1389

Contradictory evidence

1390 If the evidence is contradictory, the decision maker should

1. try to resolve the discrepancy **or**
2. decide that there are sufficient grounds to decide the point on balance of probability. See DMG 1343 et seq.

 Example

 A woman has been in receipt of Income Support for three years for herself and her partner. She has not notified the Department of any change of circumstances. Her partner makes a claim as a single person stating that he and the woman are no longer living together as husband and wife. The claimant and her partner are interviewed. The evidence at the interviews points to a deterioration in the relationship but not to separation. The decision maker accepts the woman’s statement that she and her partner continue to live together as husband and wife and disallows her partner’s claim.

Self-contradictory evidence

1391 The claimant’s own evidence may include statements which conflict with each other. These mutually contradictory statements usually need explaining.

 **Example**

 An Incapacity Benefit claimant, suffering from low back pain fails to attend for a medical examination. He states that he is unable to travel to the medical centre by public transport due to his disability and cannot afford taxi fares. When asked how he manages for shopping etc he replies that he needs very little because he takes the bus to his parent’s house each day and they provide his meals. The distance between the claimant’s house and his parent’s is similar to that between his house and the medical centre. The decision maker decides that the claimant’s reason for not attending the medical examination is not enough on its own to excuse the failure.

Inherently improbable evidence

1392 The decision maker may decide that a claimant’s statement is inherently improbable. This is where it is very unlikely that what has been asserted can be true.

 **Example**

 Following an investigation, the decision maker finds that the partner of a Jobseeker's Allowance claimant is in remunerative work and disallows the award of Jobseeker's Allowance. The claimant states that he had no idea that his wife had been working as a cleaner for five hours every weekday evening for the past three years. The decision maker decides that this is inherently improbable, and that the overpayment is recoverable.

1393 In some cases the decision maker may decide that uncorroborated evidence (that is, evidence not supported by any other evidence) cannot be accepted because it is self-contradictory or improbable. Such evidence may contradict itself, or other evidence before the decision maker, or the decision maker may consider that it is unlikely to be true. In such cases the decision maker may request further evidence. If none is available the decision maker should decide the claim or application on the evidence provided already.

1394 – 1399

Claimant’s own evidence

1400 A claimant’s statement, whether oral or in writing, is evidence. It is often the bestevidence and sometimesthe only evidence available, even after enquiries. In such a case, the decision maker must decide whether the claimant has discharged the burden of proof. See DMG 1405 et seq.

 Example 1

 A claimant was overpaid Jobseeker’s Allowance for several years because an increase in the hourly rate for his part-time work was not taken into account. During the investigation he stated that he had declared the increase at an interview at the Social Security Office. He said he remembered the conversation in detail, including the fact that the interviewer said that she would write down the details and make sure that the increased income was taken into account. The claimant could not remember any other details of the interview or completing the claim form which stated that his part time earnings had increased. The decision maker decided that the statement was unlikely to be true. This view was reached after considering the claimant’s selective memory of events and was reinforced because he had not disclosed recent changes in his hours and income. The decision maker decides that the claimant has not discharged the burden of proof.

 **Example 2**

 A woman declared part-time work at the beginning of her claim and regularly reported changes. During a check on employment details it is found that a pay rise has not been taken into account for three months. There is no record of disclosure of the increase in the claim file. The claimant states that she declared the additional income in a letter in which she also reported that her son had left the household. The letter cannot be found but the claim had been adjusted to exclude the child around the date of the alleged letter. The decision maker decides that, on the balance of probability, the claimant had reported the change in income and it had been overlooked in dealing with the family circumstances.

1401 The decision maker should look at each statement made by the claimant and assess it on its merits. A statement may occasionally be so extraordinary that it casts doubt on the credibility of the person and any other statements they have made. The decision maker should be careful in assessing these matters on written evidence alone. It may be necessary to interview the claimant to get clarification or further information.

1402 If it is clear from the case papers that a claimant has previously made statements which have proved to be incorrect, the decision maker is entitled to regard evidence provided by that claimant critically, regardless of whether these statements were genuine errors or attempts to mislead.

 Example

 An incapacity benefit claimant, is claiming for a partner who has earnings which he states are the same each month. The papers show that on occasions his partner has not told him of overtime and bonus payments. The overpayments are not recoverable because he did not know the facts and could not be expected to disclose the additional earnings. The decision maker cannot rely on the claimant’s evidence and asks to see the pay slips each month.

 1403 – 1404

Burden of proof

1405 A clear understanding of where the burden of proof lies helps the decision maker to weigh the evidence and decide whether further evidence should be sought. Decision makers should note that

1. initially the burden lies with the claimant to prove that the conditions for a claim or application are satisfied1 but the decision maker should do as much as possible to ensure that the claimant has every opportunity to provide all relevant evidence and where the information is available to them rather than the claimant, then they must take the necessary steps to enable it to be traced
2. where the decision maker wishes to show that an exception to a condition of entitlement is not satisfied, the burden of proof rests with the decision maker2
3. there is no presumption in favour of the claimant though for Industrial Injuries Scheme Benefit the claimant is normally presumed to have the prescribed disease if he has worked in the prescribed occupation; for example, a cotton weaver with byssinosis (see DMG Chapter 67 for full guidance)
4. where an allegation is denied by the claimant it is generally for the decision maker to prove the facts
5. the burden of proving that the conditions for revision or supersession are satisfied lies with the person who applies for revision or supersession
6. in overpayment cases the burden of proof for the purposes of determining the sum to be recovered falls on the decision maker3 (see DMG Chapter 09)
7. where a criminal court convicts a person of an offence related to obtaining or receiving benefit, that conviction shifts the burden of proof relating to the same benefit and period at issue from the decision maker to the claimant4.

 **Note 1:** An example of **2.** is where there is a claim for a Social Fund funeral payment, it is for the decision maker to show that the claimant is not entitled because a close relative is not in receipt of a qualifying benefit.

 **Note 2:** Where **5.** applies the question of whether the **conditions** for revision or supersession are satisfied must be considered separately from the question of whether the decision should be revised or superseded.

1 R(SB) 2/83(T); 2 Department for Social Development v Kerr [2004] UKHL 23;
3 SS A (NI) Act 92, sec 69; R(SB) 34/83; 4 R(S) 2/80

1406 – 1419

Evidence in certain situations

Destruction of documents

1420 The Department routinely destroys documents, either to clear storage space or because there does not seem to be any reason for keeping them. No one can make any presumptions about what evidence the documents might have contained1. This means that claimants cannot say that the destroyed documents must have supported their case. This principle does not apply if the claimant can prove that the documents were disposed of with the sole intention of destroying evidence.

1 R(IS) 11/92

1421 The decision maker should take account of any available evidence and make a decision on the balance of probabilities. Where it is impossible to reconstruct the document the decision maker should not assume any fact but decide the question on the basis of any other evidence.

1422 The decision maker must consider the burden of proof when looking at evidence. This can rest with either the claimant or the decision maker.

 1423 – 1429

Evidence of Departmental procedures

1430 Where a case relies on systems of work or Departmental forms no longer available, the Department should

**1.** get evidence of the system of work **or**

**2.** explain why the original form is not available.

 The decision maker could then decide on the balance of probabilities whether the procedures were properly followed.

 **Example**

 An overpayment has been identified. The decision maker is looking at recoverability. Benefit is paid to the claimant by direct payment. The decision maker knows the benefit cannot be paid by direct payment unless the claimant signs a declaration of understanding and agreement that overpayments may be recovered1.

 The decision maker decides that the prescribed conditions for recoverability are satisfied even though the original document has been destroyed under normal destruction procedures.

1 SS (POR) Regs (NI), reg 11(2)(b)

Evidence of a decision

1431 It may be necessary for the Department to produce evidence of a decision of a decision maker, for the purpose of an appeal for example. If so, the evidence of the decision should contain a certificate signed on behalf of the Department stating that the document is such a record. The certificate must be signed by an officer specifically authorised to do so1.

1 SS (NI) Order 98, Sch 1, para 13

1432 A certificate should **not** be produced where there is no evidence that a decision was made or recorded, or that the decision was different from that provided in any explanation or recorded in a submission to a tribunal.

 **Example**

 The claimant is in receipt of Income Support as a lone parent. Following an investigation, the decision maker records a determination that the claimant is living together as husband and wife with the father of her children, and has been for 3 years. He is in remunerative work. The award of Income Support is terminated from a current date. The decision maker’s determination is incorrectly notified with appeal rights. The Department cannot certify that the determination is a decision superseding and ending entitlement from the date the claimant began to live together as husband and wife.

1433 Where DMG 1432 applies, the decision maker should not use the certification process to construct a record of what ought to have been decided. Decision makers should be aware that it is a false statement which could lead to criminal sanctions1.

1 Perjury Act 1911, sec 5

1434 Where the decision was made electronically, the decision maker should

**1.** produce a computer printout showing the decision history **and**

**2.** provide an explanation of codes used in the computer record.

See DMG 1111 - 1113 for guidance on recording decisions.

 1435 – 1439

Evidence given in confidence

1440 If evidence raises any question of confidentiality, the matter must be resolved before it is put to the decision maker. If any confidential evidence is disclosed to the decision maker, that evidence must be disclosed to the tribunal. However, the tribunal may make an order prohibiting the disclosure or publication of confidential evidence.

1441 All evidence available to the decision maker should be available to the tribunal and disclosed to the claimant or representative1 except medical evidence that is harmful to the claimant’s health.

1 R(S) 1/58

1442 All information obtained in the course of deciding a claim or application is confidential between the claimant and the statutory authorities. **It follows that personal details of one claimant should not be put to the decision maker as evidence for the claim or application of another claimant**. An exception would arise if a claimant claims to have responsibility for a child or children included on another person’s claim.

1443 Information given in confidence from a third party, such as

**1.** social workers **or**

**2.** doctors **or**

**3.** letters containing allegations where the writer has not given written permission for the contents to be disclosed

 should not be available to the decision maker when making the decision.

1444 All information obtained in the course of deciding an application should be regarded as confidential.

1445 All the evidence that is put to the decision maker must be put to the tribunal if a claimant appeals. This includes confidential evidence. See DMG Chapter 06 for details.

 1446 – 1449

Appeals: Address of partner from whom claimant is separated

1450 Where a document shows any details which could lead to the location of the claimant being discovered by the other party, these details must not be made known to the tribunal if the separated partner has asked for their whereabouts not to be divulged. If this information is not to be released the decision maker should

**1.** prepare a note to the Presenting Officer to explain the omission to the tribunal **and**

**2.** make sure that all copies of the document have the information blanked out.

Fraud

1451 To ensure that decision makers act independently and fairly officers involved in fraud work do not make decisions with regard to payment of benefit. Cases of suspected fraud which need a decision must be referred to an officer who is not a fraud specialist. See Appendix 1.

1452 Full-time fraud specialists temporarily engaged on other duties and staff who are employed part-time on fraud work may make decisions while they are carrying out duties unrelated to fraud work. They must not give a decision on any case

**1.** which is the subject of current fraud action **or**

**2.** in which they have been engaged in investigating fraud.

 1453 – 1459

Advice on the law

1460 Advice produced for the purposes of litigation e.g. advice on a particular case or advice on potential legal challenges, for example from the Departments Solicitors or Decision Making Services does not need to be disclosed to the claimant, the claimant’s representative or the tribunal. This type of information is covered by legal professional privilege. There is also no obligation to supply the advice where there is a request to disclose it under the Data Protection Act 19981. However, if a request to disclose is made under the Freedom of Information Act 20002 the information may be disclosable if it is in the public interest to do so. Advice provided outside the litigation context will be disclosable unless it comes from a solicitor or barrister.

1 Data Protection Act 98, Sch 7, para 10; 2 Freedom of Information Act 2000, sec 2 and 42

 1461 – 1469

Decisions given by other courts

1470 In making decisions, decision makers should take account of

**1.** their own independent conclusions **and**

**2.** decisions of appellate authorities including reported Commissioner’s decisions.

1471 The decision maker is bound by decisions of the appellate authorities (see DMG 1475) on questions which are identical to those they have to decide.

 1472 – 1473

Appellate Authorities

1474 The appellate authorities are

**1.** the Commissioners

**2.** the higher courts.

Commissioners’ Decisions

1475 Reported decisions are those of general importance. They

**1.** deal with points of construction on statutes and regulations

**2.** add to the consistent and orderly development of the law

**3.** have the agreement of at least the majority of Commissioners

**4.** often deal with important questions of interpretation of provisions in the Acts and regulations

**5.** have been selected for reporting by an editorial board of commissioners.

1476 Reported decisions are now numbered using neutral citation - see Annex K - an example of which *KS v Secretary of State for Work and Pensions (JSA)* [2009] UKUT 122 (AAC); [2010] AACR 3. To explain the composition of the citation, it is broken down below into its component parts

**1.** *KS v Secretary of State for Work and Pensions (JSA)* refers to the parties to the appeal and the benefit involved

**2.** [2009] UKUT 122 (AAC) refers to the year the decision was made, United Kingdom Upper Tribunal and the neutral citation number, i.e. the consecutive number of the case within the year’s series and the name of the chamber making the decision

**3.** [2010] AACR 3 refers to the year the decision was reported, the name of the publication it is reported in and the consecutive reporting number within that year’s series.

 Similarly if a Northern Ireland Commissioner decision is decided as suitable for reporting in GB, the Administrative Appeals Chamber will add the year of reporting to the neutral citation number followed by the reference “AACR” and the consecutive reporting number for that year. So, the unreported example referred to in paragraph 7, if reported in 2010, would become

 “SG v Department for Social Development (IS) [2010] NICom 17; [2010] AACR 4”

 (where “4” for the purpose of this example is the next consecutive number for reporting in that year).

 The Administrative Appeals Chamber have indicated that names in the citation can be abbreviated, so again using the reported Northern Ireland example in paragraph 10, “SG v DSD (IS) [2010] NICom 17; [2010] AACR 4” is acceptable. This format should always be used the first time reference is made in an appeal response to a decision with a neutral citation. Any subsequent references can be in the abbreviated format “SG v DSD (IS)”.

 This format will be used on all decisions reported from 1.1.2010 onwards. Reported decisions numbered under the old “R” format can continue to be cited as before. A typical example for GB would be R(IS) 1/08 and for Northern Ireland R 2/01(IS).

1477 At the head of each reported decision is printed

**1.** a brief note of the facts of the particular case **and**

**2.** the substance of the decision.

 This headnote is not part of the decision and carries no authority. A guide to reported decisions can be found in the index to decisions of the commissioner in Northern Ireland. Annex L contains an explanation of the previous reported decision serial numbers and the benefits to which they relate.

1478 Copies of all reported decisions are held by

 **1.** the President of the Appeals Service

 **2.** Appeals Service regional offices.

 Decision makers in all offices of the Department should have access to all reported decisions.

1479 Reported decisions have the support of the majority of Commissioners and contain points of general importance about the interpretation of the law. Both reported and unreported decisions are sources on the interpretation of legislation. The decision maker should rely primarily on reported decisions. Many unreported decisions do not deal with matters of general importance and are specific only to the facts of a particular case.

1480 Great care is needed before using an unreported decision as the basis for general application in similar cases. If decisions of individual Commissioners conflict, then a reported decision has more weight than an unreported one1. A decision of a Tribunal of Commissioners should be preferred to that of a single Commissioner2. Where a claimant or a representative produces a decision without warning at a tribunal, the presenting officer can seek an adjournment so that a copy of the decision can be obtained and made available to all parties.

1 R(IS) 9/08; 2 R(I) 12/75

1481 – 1489

Court of law

1490 The conviction of a claimant in a court of law for falsely obtaining benefit should not be ignored and should have a bearing on the case relating to benefit1. When a prosecution has taken place the decision maker should try to obtain

**1.** all the evidence that was available for the criminal proceedings **and**

**2.** evidence of the conviction itself

 before giving a decision on benefit, or revising a decision which has already been given.

1 R(S) 2/80

1491 The initial responsibility of showing that the conviction relates to the benefit and period at issue rests on the decision maker. A conviction for an offence relating to the same benefit and period at issue before the decision making authorities has the effect, on reconsideration, of shifting the burden of proof on to the claimant who has been convicted. The claimant must show, on the balance of probability, that there is entitlement to the benefit at issue.

Rehabilitated offenders

1492 It is a criminal offence for anyone whose official duties involve access to official records to disclose information about spent convictions of rehabilitated offenders other than in the course of those duties1. See DMG 1494 et seq.

1 ROO (NI) Order 78, art 10

1493 An offender who has been sentenced on conviction to

**1.** a term of imprisonment **or**

**2.** detention in legal custody of not more than 2½ years

 can be rehabilitated by avoiding re-conviction for a serious offence within a specified period beginning with the date of conviction1.

1 ROO (NI) Order 78, art 3(1)(a)

1494 When an offender has completed the rehabilitation, the conviction becomes spent and no evidence relating to it is admissible in proceedings before a judicial authority1. Decision makers are judicial authorities within the meaning of the Order.

1 ROO (NI) Order 78, art 5(1)

1495 The decision maker should only consider evidence relating to spent convictions when that evidence is essential to the determination of the claim. The decision maker is then acting within official duties for the purposes of the Order.

 1496 – 1499

Industrial tribunals

1500 Decisions of Appeal Tribunals are not binding on Industrial Tribunals or vice versa. Although the issues before the tribunals have much in common, they are not identical1. The decision maker should consider any relevant evidence given to an Industrial Tribunal, but does not have to take the same view of its credibility or draw the same inferences.

1 R(U) 2/74; R(U) 4/78

1501 – 1509

Coroner’s court

1510 A Commissioner declined to follow the decision of a Coroner’s jury, declaring that it was the duty of Commissioners to determine the probabilities, having regard to the evidence before them1. Decision makers have the same duty.

1 R(I) 25/60

1511 – 1519

Medical evidence

1520 In general medical evidence should be treated in the same way as any other evidence. Medical training is not required, but there are additional considerations for decision makers.

1521 Medical evidence is often given as a medical opinion and is not conclusive. See DMG Chapter 04.

1522 The decision maker is entitled to reject an opinion1 where there is direct or circumstantial evidence which raises a strong inference against the opinion. Where doctors or health care professionals disagree, the decision maker has to decide, on the balance of probabilities, which of the contrasting opinions is more likely to be correct. The view of the claimant’s own doctor is not conclusive2.

1 R(S) 4/60; 2 R(S) 4/56

1523 Where a decision hinges on a medical issue the decision maker must seek advice from Medical Services if they have any doubt about

**1.** whether the evidence is sufficient to make a decision **or**

**2.** how it should be interpreted.

1524 It should be remembered that the onus is on the claimant to provide evidence in support of their claim or application. The decision maker may consider that additional evidence will help the Senior Medical Officer give better advice. If this can be obtained quickly, either from the claimant or elsewhere, it should be requested. However, if the information is then delayed, the claim form or application should be sent to the Senior Medical Officer who should be told that further evidence has been sought but not received. It will be for the Senior Medical Officer to decide how to then proceed.

1525 The decision maker may refer any question of special difficulty to one or more experts for examination and report1. An expert in this context may include, for example

1. a registered medical practitioner
2. a physiotherapist
3. a nurse.

 Examination includes a physical examination if the claimant agrees2. Referral to an expert may be made through the Senior Medical Officer. See benefit specific guidance for more details.

1 SS (NI) Order 98, art 12(2) & art 19; 2 R(I) 14/51

1526 The decision maker should decide the claim or application in the light of all the evidence including the medical practitioner’s report.

 1527 – 1539

The role of Medical Services

Attendance Allowance and Disability Living Allowance

1540 When a person makes a claim for Disability Living Allowance or Attendance Allowance, they complete a claim form including a self assessment of how their disability affects their daily life. This contains personal details such as name, address and whether they normally live in Northern Ireland. They may also supply

1. a statement from another person, for example from a carer or a doctor, about the claimant’s illness and disability
2. a corroborative statement from a third party to verify the claimant’s disability.

1541 Although Disability Living Allowance and Attendance Allowance claims can be decided on the basis of evidence in DMG 1540, decision makers can

1. seek further evidence themselves **or**
2. refer the claim to Medical Services for advice.

1542 The main role of medical services is

1. to arrange references to an Examining Medical Practitioner
2. to provide advice, either by report or verbally (using the helpline), to the decision maker on claims and applications.

1543 – 1544

Incapacity Benefit and National Insurance credits

1545 When a person claims Incapacity Benefit or National Insurance credits, and the personal capability assessment is the test of incapacity, they are usually required to complete a questionnaire, which enables them to describe how their incapacity affects their ability to perform specified tasks. The decision maker refers this to Medical Services.

1546 Medical Services gives an opinion on

1. whether the person passes the personal capability assessment without the need for examination and report **or**
2. arranges for the person to be referred to a medical officer for examination and report.

1547 In cases where

1. the personal capability assessment has to be applied because the claimant has stopped sending in medical certificates and
2. the claimant has been treated as capable of work because they failed to

 **2.1** return the questionnaire **or**

 **2.2** attend for and submit to a medical examination **and**

1. limited or no evidence of incapacity for work is available

 Medical Services is unlikely to be able to give an opinion on incapacity for work. The decision maker should weigh the available evidence and make assumptions about the personal capability assessment on the balance of probabilities.

 **Example**

 The claimant sends in form SC1 followed by a medical certificate which states he should refrain from work for two weeks due to back pain. No further certificates are received from the claimant and he does not return the questionnaire. The decision maker does not refer the case to Medical Services and on the balance of probabilities assumes that the claimant scores 0 points on the personal capability assessment after treating the claimant as capable of work for failure to return the questionnaire.

 1548 – 1550

Employment and Support Allowance and credits

1551 To be entitled to Employment and Support Allowance a claimant must have limited capability for work1. Claimants who are not treated as having limited capability for work have to answer a questionnaire. The questionnaire is designed for the claimant to give as much information as possible about their condition and how it affects them in their daily functioning and how they manage their condition. Medical Services are responsible for gathering the information required. This includes sending the questionnaire.

1 WR Act (NI) 07, sec 1(3)(a)

1552 Medical Services will also provide an independent medical opinion on the claimant’s condition, functionality and their ability to perform activities related to work. They do not provide a diagnostic examination.

1553 The questionnaire and the medical opinion are referred to the decision maker to consider whether the claimant has limited capability for work. See DMG Chapter 42 for full guidance.

 1554 – 1559

Industrial Injuries Disablement Benefit and Severe Disablement Allowance

1560 Where there is a claim for an Industrial Injuries Disablement Benefit or Severe Disablement Allowance, a reference to the Senior Medical Officer will usually be required. This is particularly important in relation to industrial injuries, because the medical practitioner who advises the decision maker will have experience in dealing with these benefits and decision makers must have regard to that fact when making their decision1. See DMG Chapters 57 and 64-73 for details on the handling of claims for these benefits.

1 SS & CS (D&A) Regs (NI), reg 12(3)(b)

1561 When a claimant notifies that their condition has deteriorated, the decision maker should seek medical advice on whether there has been a change and, if so, the date it occurred. In relevant prescribed diseases cases1, the decision maker should ask whether a recrudescence question arises (see DMG 4425 and 67215). Medical advice may be that the claimant’s condition has deteriorated, stayed the same or improved. It may also cast doubt on the original diagnosis or loss of faculty (see DMG 4331 for guidance on distinguishing medical opinion from fact). See DMG Chapter 04 for guidance on what decisions are required following the advice.

1 SS (II) (PD) Regs (NI), reg 7

 1562 – 1564

Reduced Earnings Allowance

1565 In determining the relevant loss of faculty on a claim for Reduced Earnings Allowance a decision maker

1. is not bound by an opinion given by the medical experts
2. is concerned with a claimant’s capacity or otherwise, for their regular occupation
3. cannot award the allowance for any period outside the period of assessment of disablement
4. can admit and accept evidence from other sources, which tends to illustrate the disabling effects, if any, of the loss of faculty1.

1 R(I) 7/64

 1566 – 1569

Exchange of medical reports

1570 A claimant may argue that a medical report produced for another benefit should be used to decide a claim or dispute. The decision maker should, if possible, obtain a copy of the report and take it into account when making the decision.

1571 The same applies when a decision maker is sent a medical report by another officer of the Department. For example, an officer dealing with a claim for Industrial Injuries Benefits may be sent medical reports obtained for the purpose of a compensation recovery case.

1572 Decision makers should bear in mind that medical reports are produced in order to determine whether the person satisfies the conditions of entitlement for a particular benefit and that some of the findings might not be relevant to another benefit. If reports appear to conflict, decision makers must take into account the level of expertise of the doctors concerned. For example, an examining medical practitioner is specially trained to assess disability in the context of a claim for Disability Living Allowance or Attendance Allowance and their evidence would therefore be preferable to that of another medical practitioner when deciding a claim for those benefits. Decision makers should consult Medical Services if they have difficulty interpreting the medical evidence.

1573 The decision maker also needs to be aware of other factors which may affect the weight to be given to the report as evidence. For example, where a personal capability assessment report is used as evidence to disallow an award of Incapacity Benefit or credits, and the decision is overturned on appeal, the personal capability assessment report may not be a useful source of evidence when deciding a claim for Disability Living Allowance.

 1574 – 1589

Consent and Harmful Medical Information

1590 Claims for Incapacity Benefit, Severe Disablement Allowance, Attendance Allowance, Disability Living Allowance and Industrial Injuries Benefit to collect medial evidence include consent to the information being made available to the decision making authorities. The whole report should be disclosed to the claimant or representative, unless DMG 1591 applies.

1591 Medical evidence should not be disclosed to the person to whom it relates if disclosure would be harmful to the health of that person. If a report from a doctor or consultant is signed to indicate that no information need be withheld, the report can be disclosed on request as normal. Where the doctor states that information in the report is harmful, the decision maker should consider whether it should be disclosed, asking Medical Services for advice in cases of doubt. The decision maker should take account of the evidence where it is relevant.

1592 Where the decision maker considers that disclosure of medical evidence would be harmful, the evidence should not be disclosed to anyone acting for the person concerned unless the decision maker is satisfied that it is in the interest of the person to do so. If the evidence is disclosed it should be on the understanding that it will not be disclosed to the person to whom it relates.

 1593 – 1594

Appeals

1595 Where

1. medical evidence used to make a decision is considered by the decision maker to be potentially harmful **and**
2. an appeal is made against the decision

 the appeals officer should prepare a submission, with all relevant documentation.

1596 The documents and submission should be forwarded to the appeals service along with the AT37. Only the AT37 should be noted if it is felt that any part of the submission or its documentation could be potentially harmful to the claimant.

1597 The appeals officer should ask the clerk to forward these papers on to the legally qualified member for a ruling on disclosure1 and a direction as to what action to take.

1 SS & CS (D&A) Regs (NI), reg 42

1598 The submission will be returned by the appeals service with a copy of the relevant AT10(hme) and a covering note. The Appeals Officer should follow any directions from the legally qualified member.

 1599 – 1999

Appendix 1

Areas where information gathering and decision making functions must always be undertaken by separate members of staff

1. Allocation of National Insurance numbers.
2. Determinations about living together as husband and wife and living together as civil partners.
3. Fraud investigation.
4. Instrument of payment replacement.
5. Social Fund.