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Child disability payment and ‘severe mental impairment’

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The law: relevant rules

The rules are located in regulation 13 of the Disability Assistance for Children and Young People (Scotland) Regulations, SSI 2021 No.174.

Regulation 13(1) provides that an individual can be entitled to the higher rate of the mobility component if they are at least 3 years old.

Regulation 13 then sets out the specific rules for the SMI route as follows:

Regulation 13(2)(e) - the basic SMI rule

the individual has a severe mental impairment and severe behavioural difficulties and [*is entitled to the higher rate of the care component*]

Regulation 13(7) - ‘severe mental impairment’

An individual is taken to have a severe mental impairment, for the purpose of paragraph (2)(e), if the individual has a severe impairment of intelligence and social functioning resulting from -

(a) a state of arrested development as a result of the failure of the individual’s brain to grow or develop in the way normally expected, or

(b) a deficiency in the functionality of the brain as a result of its incomplete physical development.

Regulation 13(8) - ‘severe behavioural difficulties’

An individual is taken to have severe behavioural difficulties, for the purpose of paragraph (2)(e), if the individual exhibits disruptive behaviour which -

(a) is extreme,

(b) regularly requires another person to intervene in order to prevent or reduce the likelihood of physical injury to the individual or another person, and

(c) is so unpredictable that another person requires to be awake and watching over the individual while the individual is awake.

Regulation 13(9) - ‘intervening’

In paragraph 8(b), reference to another person intervening relates to the provision of care and support of, or treatment provided to, the individual.

The law: some recent caselaw

Note: the following decisions are about the SMI rule in disability living allowance (DLA) and are not directly about child disability payment (CDP). However, despite a few differences in the language, the rules for DLA (at section 73 of the Social Security Contributions and Benefits Act 1992 and regulation 12 of the Social Security (Disability Living Allowance)

Regulations 1991) are substantially the same as those for CDP; the decisions are therefore very likely to be considered relevant and of strongly persuasive authority.

PM (by his appointee) v SSWP [2025] UKUT 85 (AAC) (11 March 2025)

The claimant had ADHD (Attention Deficit/Hyperactivity Disorder). The First-tier Tribunal held that the claimant was not entitled to the high rate of the mobility component of DLA via the ‘severe mental impairment’ route. That was because the tribunal considered, on the basis of ‘current medical opinion’, that ADHD did not arise from ‘a state of arrested development or incomplete physical development of the brain.

Judge Wright allowed the claimant’s further appeal and substituted a decision that the claimant was entitled to the high rate of both the mobility and care components. In so deciding, the judge held (with the agreement of the Secretary of State and based on medical evidence provided by the Secretary of State) that in general terms ADHD *is* caused by arrested development or incomplete physical development of the brain. In the claimant’s case, the Secretary of State submitted in the claimant’s particular case that this was the case, with reference to evidence of the claimant’s ‘intellectual disability’, which was ‘possibly the strongest marker of arrested or incomplete brain development’ (Secretary of State’s submission, quoted at paragraph 13).

The judge pointed out that satisfying the requirement to have arrested development or incomplete physical development of the brain does not fully satisfy the test, which also requires that this state results in ‘severe impairment of intelligence and social functioning.’ Further, the severe mental impairment route was set out at section 73(3) of the Social Security Contributions and Benefits Act 1992, and that requires that the claimant must *also* meet the condition, defined in regulation 12(6), to have ‘severe behavioural problems’. The judge said, ‘While individuals with ADHD may meet these criteria in certain cases, each case will need to be considered on its individual merits; a claim must, of course, be considered on the basis of the facts and the relevant evidence. It is anticipated that cases in which a person with ADHD alone meets the conditions in reg. 12(5) and (6) are likely to be relatively rare’ (paragraph 14). But on the specific facts of the present case, where the claimant also had low IQ, speech and language difficulties, behavioural issues, anxiety, low self-esteem and ASD traits, it was accepted that all these additional requirements were also met.

TC (by his appointee NC) v SSWP (DLA) [2025] UKUT 356 (AAC) (5 November 2025)

Judge Wikeley considered the SMI route in relation to a claimant with autism spectrum disorder and developmental delay (global delay). Ample evidence showed that he was non-verbal, attended a specialist school and needed constant supervision due to running away and ‘meltdowns’ involving physical aggression to himself and others. After a dispute, he was eventually awarded the higher rate of the care component, but a decision to refuse the mobility component was maintained (he was too young to be awarded the lower rate). The First-tier Tribunal accepted that he had arrested or incomplete development of the brain, and also severe impairment of intelligence and social functioning. But the tribunal did not accept that his behaviour was such that he could be said to display ‘severe behavioural problems’.

In effect therefore, the tribunal found that the claimant did not meet the definition of that in regulation 12(6) and so could not qualify via the SMI route.

In the Upper Tribunal, Judge Wikeley held that to be wrong. On the facts and evidence, the claimant did have severe behavioural problems, and the tribunal had erred in not adequately explaining their finding to the contrary. In granting permission to appeal, Judge Wikeley noted the high bar set by the rules in the SMI route: ‘At the outset I should make the point that there are many very seriously disabled children who present with extreme behavioural problems yet who still do not meet every element of the demanding statutory tests under the SMI rules.’ That was particularly so regarding the very strict definition of severe behavioural problems provided by regulation 12(6), which in the judge’s experience was often the ‘stumbling block’ to a successful appeal. The test, particularly the meaning of ‘extreme’ disruptive behaviour in regulation 12(6), had already been considered in *MG v SSWP (DLA*) [2012] UKUT 429 (AAC) and *XTC v SSWP (DLA)* [2020] UKUT 342 (AAC).

Nevertheless, regarding the evidence of the claimant’s behaviour in this case, the tribunal had not adequately explained why it did not consider that the claimant’s behaviour was ‘extreme’. Judge Wikeley agreed with the Secretary of State that the ample evidence set out by the tribunal did appear to show that the claimant exhibited disruptive behaviour which was extreme. Also, the tribunal had not explained what it made of that evidence, or its findings that the claimant did not meet the SMI criteria. Judge Wikeley therefore set the tribunal’s decision aside and substituted a decision that the claimant was entitled to the higher rate of the mobility component.

Extracts from Social Security Scotland’s child disability payment decision making guide

What is severe mental impairment of intelligence?

An IQ of 55 or less is generally accepted as a “severe impairment of intelligence”. However, for children and young people, the individual’s IQ is likely to be only a minor factor in assessing whether the individual has a severe impairment of intelligence. An IQ score alone is likely to give a misleading impression, because an IQ test is designed to be as independent of social context as possible. An individual with a reduced IQ will likely have had a referral to a paediatrician or other specialist. Case managers must be careful not to refuse an application because an individual has not been referred to a specialist, as there may be reasons for this.

Children and young people with a severe impairment of intelligence are likely to receive any of the following:

- specialised schooling and supervision of all activities
- intensive support service provided by support workers
- Intensive 1:1 support in a mainstream school/nursery.

What is severe impairment of social functioning?

Social functioning is what a person can do with their intelligence. For example, some children and young people can:

- relate to other people
- perform basic social skills

once they are shown how to do them. However, individuals who have a severe impairment of social functioning, as a result of arrested development, or deficiency in the functionality of the brain due to incomplete physical development of the brain may not be able to do these things because of their disability. They may alternatively only be able to acquire a few basic social skills after being shown how to perform them.

It is rare to see impairment of intelligence without an impairment in social functioning. This means there is crossover for considerations for both severe impairment of intelligence and social functioning. This includes an individual’s inability to understand danger or the impact of their behaviour.

Arrested development example from Social Security Scotland guidance

Sarah is 3 years old. Her development is substantially delayed across several domains and she is suspected of having autism. Sarah is non-verbal and she does not appear to be able to understand or comply with adult instruction. Sarah’s only way of communicating is by pointing, or by leading an adult to what she wants. When adults are unable to correctly interpret Sarah’s needs, she will become very distressed. When Sarah is extremely distressed, she will engage in self-injurious behaviours like banging her head against a wall.

Sarah is still in nappies full-time and she is not displaying any readiness for toileting training. Her gross and fine motor skills are also delayed. For example, Sarah frequently trips or falls when walking and she is unable to do up fastenings. Sarah does not seem interested in others and she prefers solitary play. The brains of people with autism are different compared to individuals without the condition. Therefore Sarah’s suspected autism, combined with her global developmental delay, would indicate that Sarah’s development is arrested.

Incomplete physical development of the brain example from Social Security Scotland guidance

Joey is 3 years old. He was born with a condition which means his brain did not develop as expected before his birth. His condition is known as agenesis of the corpus callosum. His parents apply for CDP on his behalf.

Joey’s application form and the supporting information submitted by his parents outline multiple areas of complex needs in relation to his bodily functions.

The case manager recognises that this is a condition which has affected the physical development of Joey's brain. They therefore request a clinical case discussion to explore this further and understand the condition’s longer-term impact on Joey's needs.

The practitioner confirms the impact of the condition on Joey's brain development. They explain that the impact is substantial and that Joey’s level of needs will most likely be long-term.

Behaviour which is <u>not</u> “extreme” example from Social Security Scotland guidance

Samantha is 14 years old and has conditions including Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiance Disorder (ODD).

In the CDP application completed by her mum, it is reported that Samantha has impulsive behaviours when out with her friends and has been brought home by the police twice in the last 6 months.

The case manager reviews the supporting information received from Samantha’s school. The document shows that the school are aware of the conditions and she is supported with a counselling session once a fortnight. There are no special measures in place regarding Samantha's ability to leave the school or additional support in classes.

The case manager considers the information as a whole. They recognise that a young person with regular police involvement can indicate significant needs however on balance in Samantha's individual case the infrequency of the police involvement and minimal supports in school and community suggests the severe behavioural difficulties threshold has not been met.

Behaviour which regularly requires another person to intervene

Case managers should consider whether the individual is unable to go outside alone in a way that can be done safely. However, they should not focus only on how the child is outdoors or in a structured safe environment and must consider their need for and the nature of intervention in all environments.

Case managers should consider how often intervention is needed to reach a determination of whether intervention is required in the normal course of the individual’s day.

‘Requires’ in this context means ‘reasonably requires’.

You can read the full child disability payment decision making guide here Severe mental impairment and severe behavioural difficulties test - Social Security Scotland