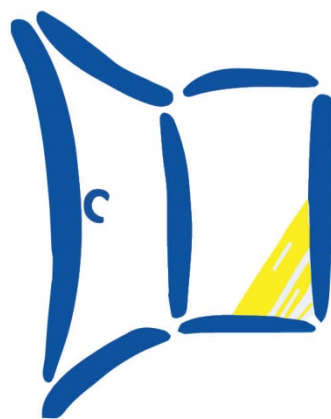


Social Welfare Appeals Office

Annual Report 2016



OIFIG ACHOMHAIRC
LEASA SHÓISIALAIGH



SOCIAL WELFARE
APPEALS OFFICE

Mr. Leo Varadkar T.D.
Minister for Social Protection
Áras Mhic Dhiarmada
Dublin 1

May 2017

Dear Minister,

In accordance with the provisions of Section 308(1) of the Social Welfare Consolidation Act 2005, I hereby submit a Report on the activities of the Social Welfare Appeals Office for the year ended 31 December 2016.

Yours sincerely,

Joan Gordon
Chief Appeals Officer

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Chapter 1:

Introduction by the Chief
Appeals Officer

Chapter 1: Introduction by the Chief Appeals Officer

The Social Welfare Appeals Office aims to provide an independent, accessible and fair appeals service with regard to entitlement to social welfare payments and to deliver that service in a prompt and courteous manner.

I am pleased to submit my Annual Report on the activities of the Social Welfare Appeals Office for the period 1 January to 31 December 2016 pursuant to Section 308(1) of the Social Welfare Consolidation Act 2005.

As was the case in 2015, a number of Appeals Officers and administrative staff availed of retirement in 2016 and a number of new Appeals Officers and administrative staff joined the Office. To those who availed of retirement, I wish them well in the future. To those who joined the team, I am delighted to welcome them and look forward to working with them in the year ahead and I wish to acknowledge the continued commitment of the entire team.

Despite the loss of experience in recent years, the Office managed to make good progress in the course of 2016 in the processing and finalisation of appeals. In the course of the year, 22,461 appeals were received compared to 24,475 in 2015. The number of appeals finalised in 2016 was 23,220 compared to 25,406 in 2015. The number of appeals on hand at the end of 2016 was 7,938, representing a small reduction when compared to the end of 2015 position of 8,697 on hand.

A more detailed account of the statistical trends relating to 2016 is set out in Chapter 2. The data shows that the vast majority of appeals relate to the illness, disability and caring and working age income support programmes. On the other hand, the number of appeals relating to pensions and child income supports is low by comparison.

The average processing time for all appeals finalised during 2016 was 20.5 weeks. This compares to 20.9 weeks in 2015. The average time taken to process appeals which required an oral hearing was 24.1 weeks (25.5 weeks in 2015), and the corresponding time to process appeals determined on a summary basis was 17.6 weeks (18.1 weeks in 2015).

Reducing processing times continues to be one of my priorities and every effort is made to reduce the time taken to process an appeal. However, this must be balanced with the competing demand to ensure that all decisions are of high quality and are made in line with the legislative provisions and the general principles of fair procedures and natural justice. In my 2015 Annual Report I provided a short overview of the 'journey' of an appeal to illustrate the various steps that are required from the time an appeal is registered in my Office until it is finally determined. In this Report I have included some more detail on the appeals process which I hope will be helpful to people considering making an appeal. This information is set out in Chapter 4.

A more detailed account on the business of the Office in the course of 2016, from staffing resources to operational issues, is contained in Chapter 3. Given the high turn-over of Appeals Officers, the training and development programme was well utilised during 2016. In addition to the formal programme of training, all newly appointed Appeals Officers were provided with mentoring support from an experienced colleague.

The opportunity to provide feedback to the Department on issues arising on appeal is an important aspect of the appeals process. Meeting with the head of the Decisions Advisory Office of the Department and her staff is one of the main channels for providing such feedback. Some of the issues discussed with that Office at our meetings in 2016 are also set out in Chapter 3.

The case-law from the courts is an important feature of the work of my Office and in the course of 2015/2016 the High Court delivered three judgments of particular relevance. Two of the judgments dealt with the issue of what constitutes a good decision while the third judgment considered the meaning of 'cohabitant', which is also of particular relevance in social welfare legislation.

In the context of a judicial review application, the High Court provided welcome clarification on the question of issue estoppel and the circumstances when my Office might or might not be bound by decisions of another decision-making body or tribunal dealing with the same issue. An overview of these judgments and the outcome of other judicial review proceedings are contained in Chapter 3.

I am aware that there is an increasing interest in the decisions made by my Office and that there is a corresponding desire that all decisions made by my Office be published. However, the majority of decisions made by my Office are not published and the outcome is generally only known to the appellant and the Department and in some cases another party with an interest in the appeal, such as an employer in the case of an appeal dealing with the issue of insurability of employment. In selecting cases to be included in the Annual Report as case studies, I endeavour to select those cases which reflect the diverse range of issues that arise on appeal across the range of programmes and schemes covering children and families, people of working age, retired and older people and employers and which I consider will be of relevance to others considering making an appeal. It is also the case that in a large number of appeals the issues under appeal are very much based on facts pertaining in an individual case and would be of limited benefit to others preparing an appeal.

In this Report I have increased the number of case studies to 38 in order to address in some way the increasing demand that more decisions be published. I have also included a number of reviews that I carried out under Section 318 of the Social Welfare Consolidation Act 2005 which I consider may be of benefit to would be appellants or their advocates. The case studies are contained in Chapter 5.

References throughout this Report to the Social Welfare Consolidation Act 2005 should be read as including all amendments made to the Act since 2005.

As well as fulfilling its primary function as an Annual Report to the Minister for Social Protection, I hope that the Report will be helpful to people preparing an appeal, the Department of Social Protection and other interested parties.

This Report can be accessed on our website www.socialwelfareappeals.ie in both English and Irish.

Joan Gordon
Chief Appeals Officer
May 2017



Chapter 2:

Statistical Trends

Appeals Finalised in 2016

We finalised 23,220 appeals in 2016.

The appeals finalised were broken down between:

- Appeals Officers (73.2%): 16,990 were finalised by Appeals Officers either summarily or by way of oral hearings (equivalent figure in 2015 was 18,913 or 74.4%);
- Revised Decisions (22.0%): 5,100 were finalised as a result of revised decisions in favour of the appellant being made by Deciding Officers before the appeals were referred to an Appeals Officer (5,200 or 20.5% in 2015); and
- Withdrawn (4.9%): 1,130 were withdrawn or otherwise not pursued by the appellant (1,293 or 5.1% in 2014).

Appeals Outcomes in 2016

The outcome of the 23,220 appeals finalised in 2016 was broken down as follows:

- Favourable (59.2%): 13,754 of the appeals finalised had a favourable outcome for the appellant in that they were either allowed in full or in part or resolved by way of a revised decision by a Deciding Officer in favour of the appellant (58.8% in 2015);
- Unfavourable (35.9%): 8,336 of the appeals finalised were disallowed (36.1% in 2015); and
- Withdrawn (4.9%): As previously indicated, 1,130 of the appeals finalised were withdrawn or otherwise not pursued by the appellant (5.1% in 2015).

Determinations by Appeals Officers in 2016

The following gives a statistical breakdown on the outcomes of determinations by Appeals Officers by reference to whether the appeal was dealt with summarily or by way of an oral hearing:

- **Oral Hearings:** (38.4%) 6,527 of the 16,990 appeals finalised by Appeals Officers in 2016 were dealt with by way of oral hearings. 4,251 (65.1%) of these had a favourable outcome. In 2015, 64.5 % of the 6,886 cases dealt with by way of oral hearings had a favourable outcome.
- **Summary Decisions:** (61.6%): 10,463 of the appeals finalised were dealt with by way of summary decisions. 4,403 (42.1%) of these had a favourable outcome. In 2015, 44.1% of appeals finalised by way of summary decision had a favourable outcome.

Processing Times in 2016

During 2016, the average time taken to process all appeals was 20.5 weeks (20.9 weeks in 2015).

Of the 20.5 weeks overall average

- 10.9 weeks was attributable to work in progress in the Department (11.1 weeks in 2015)
- 0.3 weeks was due to responses awaited from appellants (0.3 weeks in 2015)
- 9.3 weeks was attributable to ongoing processes within the Social Welfare Appeals Office (9.5 weeks in 2015).

It is noted that the average weeks in the Department will include cases that have been referred back to the customers for more information/clarification (rather than awaiting action in the Department). A breakdown is not available for the purpose of this Report.

When these figures are broken down by process type, the overall average waiting time for an appeal dealt with by way of a summary decision in 2016 was 17.6 weeks (18.1 weeks in 2015), while the average time to process an oral hearing was 24.1 weeks (25.5 weeks in 2015). The average waiting time by scheme and process type are set out in Table 6.

The time taken to finalise appeals reflects all aspects of the appeals process which includes:

- seeking the Department's submission on the grounds for the appeal;
- further medical assessments by the Department in certain illness related cases;
- further investigation by Social Welfare Inspectors where required; and
- the logistics involved in arranging oral appeal hearings where deemed appropriate.

Appeals by Gender in 2016

A breakdown of appeals received in 2016 by gender revealed that 41.9% were from men and 58.1% from women. The corresponding breakdown for 2015 was 42.6% and 57.4% respectively. In terms of favourable outcomes in 2016, 60.9% of men and 65.1% of women benefited.

Statistical tables:

[Table 1](#): Appeals received and finalised 2016

[Table 2](#): Appeals received 2010 – 2016

[Table 3](#): Outcome of appeals by category 2016

[Table 4](#): Appeals in progress at 31 December 2010 - 2016

[Table 5](#): Appeals statistics 1995 - 2016

[Table 6](#): Appeals processing times by scheme 2016

[Table 7](#): Appeals outstanding at 31 December 2016

Social Welfare Appeals Workflow Chart 2016

(Corresponding figures for 2015 are in brackets)

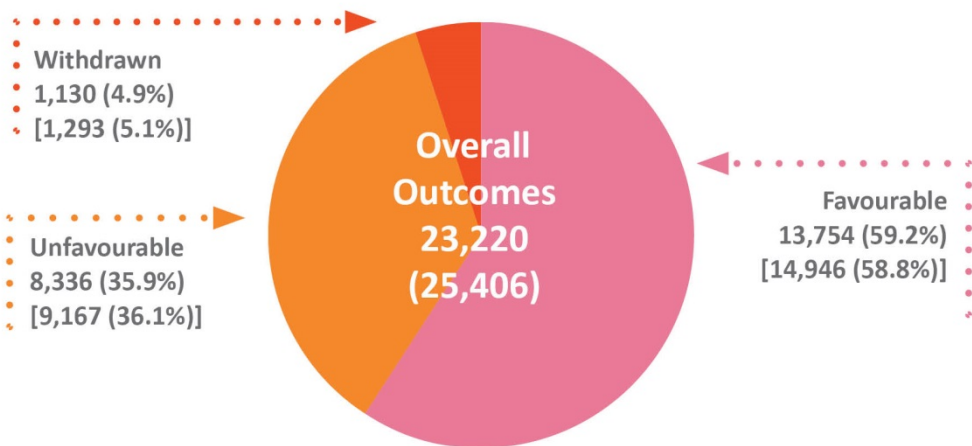
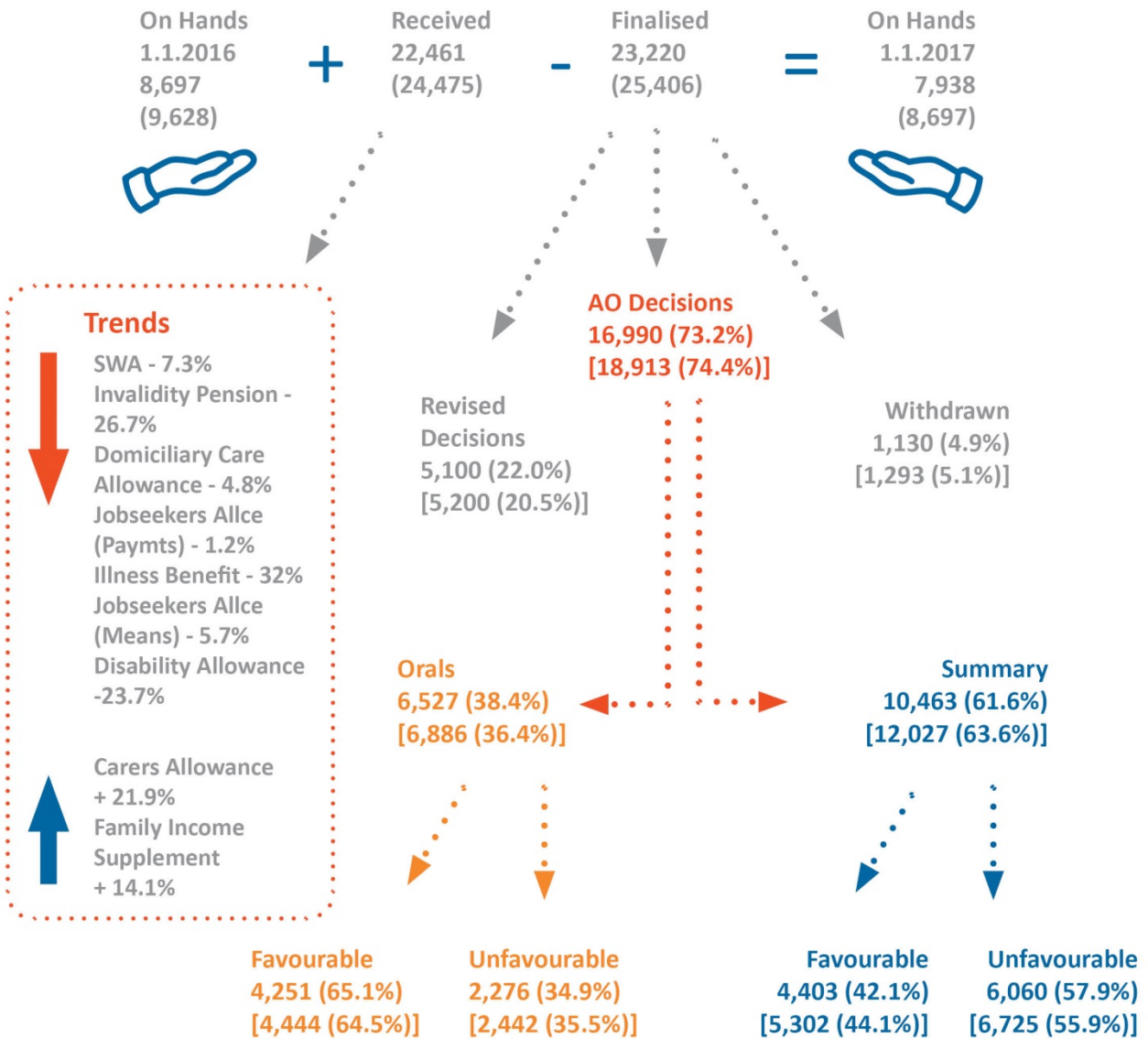


Table 1: Appeals Received and finalised 2016

	In progress 01-Jan-16	Receipts	Decided	Revised Decision	Withdrawn	In progress 31-Dec-16
PENSIONS						
State Pension (Non-Contributory)	165	397	272	81	30	179
State Pension (Contributory)	149	366	247	56	9	203
State Pension (Transition)	4	2	4	0	1	1
Widows', Widowers' Pension (Contributory)	24	49	51	7	2	13
Death Benefit	1	1	1	0	0	1
Bereavement Grant	0	3	2	0	0	1
TOTAL PENSIONS	343	818	577	144	42	398
WORKING AGE INCOME & EMPLOYMENT SUPPORTS						
Jobseeker's Allowance	811	2,031	1,568	324	141	809
Jobseeker's Transitional	13	43	28	6	5	17
Jobseeker's Allowance (Means)	947	2,050	1,623	338	198	838
One-Parent Family Payment	190	313	237	59	51	156
Widow's Widower's Pension (Non-Contributory)	9	26	20	1	1	13
Deserted Wife's Allowance	0	0	0	0	0	0
Supplementary Welfare Allowance	672	1,970	1,530	346	156	610
Farm Assist	118	196	154	45	16	99
Pre-Retirement Allowance	1	0	0	0	0	1
Jobseeker's Benefit	290	637	495	155	54	223
Deserted Wife's Benefit	6	7	10	0	1	2
Maternity Benefit	26	87	78	12	1	22
Paternity Benefit	0	1	0	0	0	1
Treatment Benefits	2	5	6	0	0	1
Partial Capacity Benefit	25	42	25	7	3	32
TOTAL WORKING AGE – INCOME & EMPLOYMENT SUPPORTS	3,110	7,408	5,774	1,293	627	2,824
ILLNESS, DISABILITY AND CARERS						
Disability Allowance	1,639	4,912	4,285	815	75	1,376
Blind Pension	10	13	17	2	0	4
Carer's Allowance	1,131	3,887	2,757	815	52	1,394
Domiciliary Care Allowance	562	1,198	864	469	11	416
Carer's Support Grant	57	164	88	56	7	70
Illness Benefit	335	819	309	341	230	274
Injury Benefit	25	56	44	13	2	22
Invalidity Pension	674	1,362	994	642	18	382
Disablement Benefit	160	298	317	45	9	87
Incapacity Supplement	11	9	9	5	0	6
Medical Care	1	4	0	2	1	2
Carer's Benefit	15	95	37	32	2	39
TOTAL - ILLNESS, DISABILITY AND CARERS	4,620	12,817	9,721	3,237	407	4,072

Table 1: Appeals Received and finalised 2016 (Cont'd)

	In progress 01-Jan- 16	Receipts	Decided	Revised Decision	Withdrawn	In progress 31-Dec-16
CHILDREN						
Child Benefit	193	595	392	190	19	187
Family Income Supplement	192	510	278	177	15	232
Back To Work Family Dividend	37	52	50	12	3	24
Guardian's Payment (Non-Contributory)	7	17	16	3	1	4
Guardian's Payment (Contributory)	18	38	37	4	1	14
Widowed Parent Grant	4	8	8	2	1	1
TOTAL - CHILDREN	451	1,220	781	388	40	462
Insurability of Employment	148	151	106	20	13	160
Liabile Relatives	10	23	9	12	0	12
Recoverable Benefits & Assistance	15	24	22	6	1	10
TOTAL – ALL APPEALS	8,697	22,461	16,990	5,100	1,130	7,938

Table 2: Appeals received 2010 – 2016

	2010	2011	2012	2013	2014	2015	2016
PENSIONS							
State Pension (Non-Contributory)	356	317	231	279	323	348	397
State Pension (Contributory)	256	106	128	136	205	264	366
State Pension (Transition)	7	29	43	38	13	3	2
Widow's, Widower's Pension (Contributory)	20	17	30	40	49	40	49
Death Benefit	-	-	-	-	1	1	1
Bereavement Grant	58	66	71	78	63	6	3
TOTAL PENSIONS	697	535	503	571	654	662	818
WORKING AGE INCOME & EMPLOYMENT SUPPORTS							
Jobseeker's Allowance - Payments	5,506	3,404	3,050	2,644	2,610	2,058	2,031
Jobseeker's Transitional	-	-	-	-	-	34	43
Jobseeker's Allowance - Means	4,050	3,465	3,240	2,923	2,648	2,174	2,050
One-Parent Family Payment	1,109	1,055	938	612	573	368	313
Widow's, Widower's Pension (Non-Contributory)	12	29	39	30	24	25	26
Deserted Wife's Allowance	-	4	1	2	2	1	-
Supplementary Welfare Allowance	1,020	3,129	5,445	4,084	2,889	2,125	1,970
Farm Assist	244	220	271	286	214	201	196
Pre-Retirement Allowance	2	1	-	-	3	-	-
Jobseeker's Benefit	1,307	1,286	1,289	882	845	735	637
Deserted Wife's Benefit	14	20	8	11	7	19	7
Maternity Benefit	29	42	29	26	19	71	87
Paternity Benefit	-	-	-	-	-	-	1
Adoptive Benefit	2	2	6	-	1	-	-
Homemaker's	1	-	1	1	-	-	-
Treatment Benefits	8	3	3	5	-	3	5
Partial Capacity Benefit	-	-	67	70	33	42	42
TOTAL WORKING AGE - INCOME & EMPLOYMENT SUPPORTS	13,304	12,660	14,387	11,576	9,868	7,856	7,408
ILLNESS, DISABILITY AND CARERS							
Disability Allowance	4,840	5,472	6,223	6,836	5,554	6,435	4,912
Blind Pension	14	21	27	34	19	22	13
Carer's Allowance	3,025	2,199	2,676	3,869	2,907	3,188	3,887
Domiciliary Care Allowance	1,858	2,401	2,186	1,688	1,301	1,258	1,198
Carer's Support Grant	162	303	278	176	133	124	164
Illness Benefit	5,471	3,657	2,647	1,761	1,227	1,204	819
Injury Benefit	23	16	13	21	9	65	56
Invalidity Pension	1,024	2,285	4,765	4,501	2,571	1,857	1,362
Disablement Benefit	342	263	409	346	385	347	298
Incapacity Supplement	15	6	21	14	1	12	9
Medical Care	21	5	6	3	28	4	4
Carer's Benefit	182	160	183	115	121	93	95
TOTAL - ILLNESS, DISABILITY AND CARERS	16,977	16,788	19,434	19,364	14,256	14,609	12,817

Table 2: Appeals received 2010 – 2016 (Cont'd)

	2010	2011	2012	2013	2014	2015	2016
CHILDREN							
Child Benefit	1,051	824	675	663	659	552	595
Family Income Supplement	227	258	301	421	434	447	510
Back To Work Family Dividend	-	-	-	-	-	64	52
Guardian's Payment (Non-Contributory)	6	13	14	11	22	18	17
Guardian's Payment (Contributory)	28	31	46	42	42	49	38
Widowed Parent Grant	3	7	6	11	8	10	8
TOTAL - CHILDREN	1,315	1,133	1,042	1,148	1,165	1,140	1,220
OTHER							
Insurability Of Employment	123	99	79	95	91	156	151
Liabile Relative	16	26	39	23	33	26	23
Recoverable Benefits & Assistance	-	-	-	-	2	26	24
TOTAL – ALL APPEALS	32,432	31,241	35,484	32,777	26,069	24,475	22,461

Table 3: Outcome of Appeals by category 2016

	Allowed	Partially Allowed	Revised DO Decision	Disallowed	Withdrawn	Total
PENSIONS						
State Pension (Non-Contributory)	76 19.8%	30 7.8%	81 21.1%	166 43.3%	30 7.8%	383
State Pension (Contributory)	33 10.6%	13 4.2%	56 17.9%	201 64.4%	9 2.9%	312
State Pension (Transition)	1 20.0%	1 20.0%	- 0.0%	2 40.0%	1 20.0%	5
Widow's/Widower's Pension (Contributory)	12 20.0%	5 8.3%	7 11.7%	34 56.7%	2 3.3%	60
Death Benefit	- -	- -	- -	1 100.0%	- -	1
Bereavement Grant	1 50.0%	- -	- -	1 50.0%	- -	2
TOTAL PENSIONS	123	49	144	405	42	763
WORKING AGE INCOME/ EMPLOYMENT SUPPORTS						
Jobseeker's Allowance - Payments	525 25.8%	98 4.8%	324 15.9%	945 46.5%	141 6.9%	2,033
Jobseeker's Transitional	12 30.8%	1 2.6%	6 15.4%	15 38.5%	5 12.8%	39
Jobseeker's Allowance - Means	287 13.3%	120 5.6%	338 15.7%	1,216 56.3%	198 9.2%	2,159
One-Parent Family Payment	89 25.6%	27 7.8%	59 17.0%	121 34.9%	51 14.7%	347
Widow's/Widower's Pension (Non-Contributory)	5 22.7%	1 4.5%	1 4.5%	14 63.6%	1 4.5%	22
Supplementary Welfare Allowance	532 26.2%	75 3.7%	346 17.0%	923 45.4%	156 7.7%	2,032
Farm Assist	31 14.4%	29 13.5%	45 20.9%	94 43.7%	16 7.4%	215
Jobseeker's Benefit	151 21.4%	40 5.7%	155 22.0%	304 43.2%	54 7.7%	704
Deserted Wife's Benefit	5 45.5%	1 9.1%	- 0.0%	4 36.4%	1 9.1%	11
Maternity Benefit	17 18.7%	1 1.1%	12 13.2%	60 65.9%	1 1.1%	91
Treatment Benefits	- -	- -	- -	6 100.0%	- -	6
Partial Capacity Benefit	9 25.7%	- -	7 20.0%	16 45.7%	3 8.6%	35
TOTAL WORKING AGE – INCOME/EMPLOYMENT SUPPORTS	1,663	393	1,293	3,718	627	7,694

Table 3: Outcome of Appeals by category 2016 (Cont'd)

	Allowed	Partially Allowed	Revised DO Decision	Disallowed	Withdrawn	Total
ILLNESS, DISABILITY AND CARERS						
Disability Allowance	2,830 54.7%	88 1.7%	815 15.7%	1,367 26.4%	75 1.4%	5,175
Blind Pension	5 26.3%	1 5.3%	2 10.5%	11 57.9%	- -	19
Carer's Allowance	1,375 37.9%	145 4.0%	815 22.5%	1,237 34.1%	52 1.4%	3,624
Domiciliary Care Allowance	596 44.3%	18 1.3%	469 34.9%	250 18.6%	11 0.8%	1,344
Carer's Support Grant	37 24.5%	2 1.3%	56 37.1%	49 32.5%	7 4.6%	151
Illness Benefit	136 15.5%	5 0.6%	341 38.8%	168 19.1%	230 26.1%	880
Injury Benefit	13 22.0%	1 1.7%	13 22.0%	30 50.8%	2 3.4%	59
Invalidity Pension	682 41.2%	10 0.6%	642 38.8%	302 18.3%	18 1.1%	1,654
Disablement Benefit	140 37.7%	13 3.5%	45 12.1%	164 44.2%	9 2.4%	371
Incapacity Supplement	1 7.1%	1 7.1%	5 35.7%	7 50.0%	0 00.0%	14
Medical Care	- -	- -	2 66.7%	- -	1 33.3%	3
Carer's Benefit	11 15.5%	3 4.2%	32 45.1%	23 32.4%	2 2.8%	71
TOTAL – ILLNESS, DISABILITY AND CARERS	5,826	287	3237	3,608	407	13,365
CHILDREN						
Child Benefit	68 11.3%	29 4.8%	190 31.6%	295 49.1%	19 3.2%	601
Family Income Supplement	125 26.6%	18 3.8%	177 37.7%	135 28.7%	15 3.2%	470
Back To Work Family Dividend	1 1.5%	0 00.0%	12 18.5%	49 75.4%	3 4.6%	65
Guardian's Payment (Non-Contributory)	10 50.0%	1 5.0%	3 15.0%	5 25.0%	1 5.0%	20
Guardian's Payment (Contributory)	16 38.1%	1 2.4%	4 9.5%	20 47.6%	1 2.4%	42
Widowed Parent Grant	- -	- -	2 18.2%	8 72.7%	1 9.1%	11
TOTAL – CHILDREN	220	49	388	512	40	1,209
OTHER						
Insurability	30 21.6%	4 2.9%	20 14.4%	72 51.8%	13 9.4%	139
Liabe Relative's	- -	- -	12 57.1%	9 42.9%	- -	21
Recoverable Benefits & Assistance	9 31.0%	1 3.4%	6 20.7%	12 41.4%	1 3.4%	29
TOTAL APPEALS	7,871	783	5,100	8,336	1,130	23,220

Table 4: Appeals in progress at 31 December 2010 – 2016

	2010	2011	2012	2013	2014	2015	2016
PENSIONS							
State Pension (Non-Contributory)	230	165	127	143	134	165	179
State Pension (Contributory)	110	91	106	74	97	149	203
State Pension (Transition)	11	22	39	26	9	4	1
Widow's, Widower's Pension (Contributory)	14	14	20	25	15	24	13
Death Benefit	0	0	0	0	1	1	1
Bereavement Grant	30	35	41	40	17	0	1
TOTAL PENSIONS	395	327	333	308	273	343	398
WORKING AGE INCOME/EMPLOYMENT SUPPORTS							
Jobseeker's Allowance - Payments	3,318	1,498	1,247	1,180	812	811	809
Jobseeker's Transitional	-	-	-	-	-	13	17
Jobseeker's Allowance - Means	2,496	1,866	1,522	1,453	1,029	947	838
One-Parent Family Payment	819	618	575	411	231	190	156
Widow's' /Widower's Pension (Non-Contributory)	13	18	23	16	9	9	13
Deserted Wife's Allowance	-	4	1	1	1	-	-
Supplementary Welfare Allowance	343	1,833	1,955	1,221	877	672	610
Farm Assist	163	121	161	176	102	118	99
Pre-Retirement Allowance	1	2	1	1	2	1	1
Jobseeker's Benefit	766	583	519	391	243	290	223
Deserted Wife's Benefit	14	12	10	3	5	6	2
Maternity Benefit	21	20	21	14	6	26	22
Paternity Benefit	-	-	-	-	-	-	1
Adoptive Benefit	2	2	1	-	-	-	-
Homemaker's	0	0	1	1	1	-	-
Treatment Benefits	4	1	1	2	-	2	1
Partial Capacity Benefit	-	-	67	81	21	25	32
TOTAL WORKING AGE - INCOME & EMPLOYMENT SUPPORTS	7,960	6,578	6,105	4,951	3,339	3,110	2,824
ILLNESS, DISABILITY AND CARERS							
Disability Allowance	3,046	2,958	4,030	3,121	1,944	1,639	1,376
Blind Pension	7	14	8	13	6	10	4
Carer's Allowance	2,145	1,147	1,766	1,913	1,434	1,131	1,394
Domiciliary Care Allowance	1,386	1,385	1,113	736	462	562	416
Carer's Support Grant	114	166	153	94	71	57	70
Illness Benefit	2,658	2,021	1,460	683	351	335	274
Injury Benefit	18	9	11	15	9	25	22
Invalidity Pension	612	1,582	4,356	1,889	938	674	382
Disablement Benefit	334	278	254	186	164	160	87
Medical Care	49	27	25	18	14	1	2
Incapacity Supplement	15	14	23	16	16	11	6
Carer's Benefit	73	61	75	45	32	15	39
TOTAL - ILLNESS, DISABILITY AND CARERS	10,457	9,662	13,274	8,729	5,441	4,620	4,072

Table 4: Appeals in progress at 31 December 2010 – 2016 (Cont'd)

	2010	2011	2012	2013	2014	2015	2016
CHILDREN							
Child Benefit	1,187	603	403	311	273	193	187
Family Income Supplement	105	104	147	277	159	192	232
Back To Work Family Dividend	-	-	-	-	-	37	24
Guardian's Payment (Non-Contributory)	9	10	4	7	9	7	4
Guardian's Payment (Contributory)	26	32	26	24	17	18	14
Widowed Parent Grant	1	5	5	7	1	4	1
TOTAL - CHILDREN	1,328	754	585	626	459	451	462
OTHER							
Insurability of Employment	112	136	96	124	99	148	160
Liable Relative's	22	31	21	32	15	10	12
Recoverable Benefits & Assistance	-	-	-	-	2	15	10
TOTAL – ALL APPEALS	20,274	17,488	20,414	14,770	9,628	8,697	7,938

Table 5: Appeals statistics 1995 – 2016

Year	On hands at start of year	Received	Workload	Finalised	On hands at end of year
1995	3,850	12,353	16,203	12,087	4,116
1996	4,116	12,183	16,299	11,613	4,686
1997	4,686	14,004	18,690	12,835	5,855
1998	5,855	14,014	19,869	13,990	5,879
1999	5,879	15,465	21,344	14,397	6,947
2000	6,947	17,650	24,597	17,060	7,537
2001	7,537	15,961	23,498	16,525	6,973
2002	6,973	15,017	21,990	15,834	6,156
2003	6,156	15,224	21,380	16,049	5,331
2004	5,331	14,083	19,414	14,089	5,325
2005	5,325	13,797	19,122	13,418	5,704
2006	5,704	13,800	19,504	14,006	5,498
2007	5,498	14,070	19,568	13,845	5,723
2008	5,723	17,833	23,556	15,724	7,832
2009	7,832	25,963	33,795	17,787	16,008
2010	16,008	32,432	48,440	28,166	20,274
2011	20,274	31,241	51,515	34,027	17,488
2012	17,488	35,484	52,972	32,558	20,414
2013	20,414	32,777	53,191	38,421	14,770
2014	14,770	26,069	40,839	31,211	9,628
2015	9,628	24,475	34,103	25,406	8,697
2016	8,697	22,461	31,158	23,220	7,938

Table 6: Appeals processing times by scheme 2016

	SWAO (weeks)	¹ Dept. of Social Protection (weeks)	Appellant (weeks)	Totals
PENSIONS				
State Pension (Non-Contributory)	12.7	12.5	0.4	25.6
State Pension (Contributory)	11.3	17.7	0.2	29.2
State Pension (Transition)	36.1	128.1	4.3	168.4
Widow's, Widower's Pension (Contributory)	10.3	8.1	-	18.3
Death Benefit	17.7	1.9	-	19.7
Bereavement Grant	20.7	2.4	-	23.1
WORKING AGE INCOME SUPPORTS				
Jobseeker's Allowance	9.8	10.3	0.1	20.3
Jobseeker's Transitional	10.6	9.5	-	20.1
Jobseeker's Allowance (Means)	11.6	14.0	0.1	25.7
One-Parent Family Payment	11.9	16.7	0.2	28.7
Widow's, Widower's Pension (Non-Contributory)	9.0	5.3	-	14.3
Supplementary Welfare Allowance	8.6	14.2	0.2	23.0
Farm Assist	12.4	18.4	0.2	30.9
Jobseeker's Benefit	10.2	13.7	0.1	23.9
Deserted Wife's Benefit	11.4	43.1	-	54.5
Maternity Benefit	8.2	8.2	-	16.4
Treatment Benefits	10.2	6.9	-	17.1
Partial Capacity Benefit	11.5	20.0	0.4	31.9
ILLNESS, DISABILITY AND CARERS				
Disability Allowance	8.1	9.2	0.3	17.6
Blind Pension	13.5	8.0	0.1	21.5
Carer's Allowance	7.8	9.7	0.3	17.9
Domiciliary Care Allowance	7.2	16.5	0.1	23.8
Carer's Support Grant	8.0	10.8	0.2	19.0
Illness Benefit	10.1	13.3	3.1	26.4
Injury Benefit	13.4	10.1	0.3	23.7
Invalidity Pension	10.6	14.7	0.1	25.5
Disablement Pension	10.8	15.1	0.2	26.1
Incapacity Supplement	9.8	56.7	-	66.5
Medical Care	0.1	33.8	5.4	39.1
Carer's Benefit	9.8	6.9	0.1	16.8
CHILDREN				
Child Benefit	11.5	12.9	0.5	24.9
Family Income Supplement	9.4	12.1	-	21.5
Back To Work Family Dividend	8.7	12.0	-	20.6
Guardian's Payment (Non-Contributory)	12.3	7.2	0.1	19.6
Guardian's Payment (Contributory)	10.6	4.8	1.5	16.9
Widowed Parent Grant	26.8	6.4	-	33.2

Table 6: Appeals processing times by scheme 2016 (Cont'd)

	SWAO (weeks)	¹ Dept. of Social Protection (weeks)	Appellant (weeks)	Totals
OTHER				
Insurability of Employment	34.4	22.3	-	56.6
Liable Relative's	8.8	10.1	-	18.9
Recoverable Benefits & Assistance	12.0	12.3	0.1	24.5
TOTAL – ALL APPEALS	9.3	10.9	0.3	20.5

¹ It is noted that the average weeks in the Department will include cases that the Department have referred back to the customers for more information/clarification (rather than awaiting action in the Department). A breakdown is not available for report purposes.

² The figures in this table are rounded to the nearest decimal point.

Table 7: Appeals outstanding at 31st December 2016

Scheme	In progress in Social Welfare Appeals Office	Awaiting Department response	Awaiting Appellant response	Total
Jobseeker's Allowance/Benefit	469	572	8	1,049
JA Means/Farm Assist	423	510	4	937
Supplementary Welfare Allowance	179	426	5	610
Disability Allowance	645	710	21	1,376
Carer's Allowance	661	718	15	1,394
Domiciliary Care Allowance	153	259	4	416
Invalidity Pension	172	204	6	382
Illness Benefit	127	132	15	274
Child Benefit	81	104	2	187
Other schemes	569	730	14	1,313
Totals	3,479	4,365	94	7,938



Chapter 3:

Social Welfare Appeals Office 2016

Chapter 3: Social Welfare Appeals Office 2016

The business of the Office

3.1 Organisation

Staffing Resources

The number of staff serving in my Office at the end of 2016 was **86**, which equates to **81.6** full-time equivalents (FTE).

The staffing breakdown for 2016 is as follows:

	FTE
1 Chief Appeals Officer	1.0
1 Deputy Chief Appeals Officer	1.0
1 Office Manager	1.0
37 Appeal Officers (3 work-sharing)	36.1
3 Higher Executive Officers (1 work-sharing)	2.8
12 Executive Officers (3 work-sharing)	11.2
4 Staff Officers (1 work-sharing)	3.5
26 Clerical Officers (6 work-sharing)	25.0
	<hr/>
	81.6

3.2 Training and Development within the Appeals Office

The role of an Appeals Officer is a complex and challenging one which requires the development and application of a broad range of knowledge, skills and competence. The importance of continuous professional development cannot be overestimated and this has continued to be a priority for my Office during 2016.

A comprehensive formal programme of training for Appeals Officers was developed in recent years by professional trainers working with experienced Appeals Officers and is regularly reviewed and updated. The programme consists of a mix of e-learning, trainer-delivered learning modules, mentoring and peer support. Newly appointed and more experienced Appeals Officers engage with the programme in different ways and the opportunity to learn from the experience of others and the provision of formal and informal peer support within the Appeals Officer group is a unique and highly valued aspect of the role.

The formal training modules deal with all aspects of the quasi-judicial role of the Appeals Officer including:

- The role and functions of an Appeals Officer.
- The management of all aspects of the appeals process including conducting an oral hearing.
- The legal aspects of an Appeals Officer's role.

During 2016, four Appeals Officers were appointed to my Office and availed of the structured programme of training and support, with each module building on the learning in the previous module. These newly appointed Appeals Officers were also provided with formal mentoring support from a more experienced colleague. In addition to the above, all Appeals Officers have access to the full range of training materials.

3.3 Operational Matters

Parliamentary Questions

During 2016, 341 Parliamentary Questions were put down (428 in 2015) in relation to the work of my Office. Replies were given in Dáil Éireann to 253 of those questions. 86 questions were transferred to the relevant scheme area of the Department and the remaining 2 were withdrawn when the current status of the appeal which was the subject of the Question was explained to the Deputy.

Correspondence

A total of 5,845 hardcopy enquiries and email representations were received from appellants or from public representatives on their behalf during 2016 (8,178 in 2015).

In addition, a total of 5,339 enquires were received by email from June 2016 to December 2016¹.

Freedom of information

A total of 248 formal requests were received in 2016 (287 in 2015) under the provisions of the Freedom of Information Acts. All of these requests were in respect of personal information.

3.4 Feedback to the Department

Feedback to the Department on issues arising on appeal and during the processing of same is an important feature of the appeals process. In the main, this feedback is provided through regular meetings with the Department's Decisions Advisory Office (DAO). In addition, ad-hoc meetings are convened from time to time with management of particular scheme areas to discuss specific issues that may arise.

Meetings with Decisions Advisory Office

During 2016, my office met on a number of occasions with the head of the DAO and her staff. This opportunity to provide feedback and discuss issues arising on appeal is very welcome as it allows my Office the opportunity to highlight issues that may only come to light on appeal and that could improve the overall decision-making process.

Among the issues discussed with the DAO during 2016 were:

- Developments emerging from the case-law of the courts which are of interest to both my Office and the Department.
- Suggested input to the Department's Scheme Guidelines based on the direct experience of Appeals Officers in dealing with appeals.

¹Recording of statistics of the number of enquires being received by my Office from the general public and agencies and organisations began in June 2016. The figure of 5,339 includes enquires received by email directly from the Department of Social Protection.

- The need to set out clearly the legislative provisions underpinning revised decisions of Deciding Officers and in particular the need to set out clearly the legal basis for selecting the effective date of a revised decision.
- A discussion was also had on when is a 'decision' not a decision for the purposes of the Social Welfare Consolidation Act 2005. This arises in circumstances where an appellant submits an appeal against a decision by the Department not to revise an earlier decision. The position is that such decisions are not decisions for the purposes of the Act and the original decision of the Deciding Officer is the only appealable decision.
- Discussions were also had on the legislation governing the operation of the habitual residence condition and in particular the need to consider if a person has a right to reside in the State as part of the assessment of whether a person is habitually resident in the State. The governing legislation clearly sets out that a person who does not have a right to reside in the State cannot be habitually resident.
- Issues relating to the assessment of means for various schemes – the treatment of non-cash benefits and benefit & privilege featured in the discussion.
- There was also an exchange of views relating to the meaning of 'living together' with a particular reference to its meaning in circumstances where the marriage tie is not broken.

Other Feedback

Other opportunities during 2016 to provide feedback to the Department included:

- The Chief Appeals Officer and/or the Deputy Chief Appeals Officer continued to attend meetings of the Department's Illness Programme Board which has oversight of the policy and process issues arising in relation to schemes which have a medical criterion.
- The Chief Appeals Officer and the Deputy Chief Appeals Officer had an opportunity to meet with the Chief Medical Officer to discuss issues of mutual interest relating to illness, disability and caring schemes.
- The Deputy Chief Appeals Officer presented at four seminars which were attended by clerical staff based in the Department's decentralised office in Sligo and in its local Intreo centres. This event provided an opportunity for the Deputy Chief Appeals Officer to speak to a total of 337 Clerical Officers/Deciding Officers to discuss the

role and legislative powers of Deciding Officers and Appeals Officers and to collectively consider the broader context and decision-making landscape in which Deciding Officers and Appeals Officers operate. In the course of her presentation, the Deputy Chief Appeals Officer outlined the reasons why appeal decisions may be allowed or disallowed and availed of the opportunity to receive feedback from the Deciding Officers on appeal decisions and address any concerns raised.

3.5 Meetings of Appeals Officers

Two formal meetings of the Appeals Officer group were held in April and October 2016 and in addition a number of informal meetings took place throughout the year. As many of our Appeals Officers are located outside of our headquarters in Dublin and given that a number of Appeals Officers are recently assigned to my Office, these meetings provided a valuable opportunity to share knowledge and experience, discuss issues of common interest and to promote best practice in decision-making including, in particular, consistency in the application of statutory provisions.

A collaborative approach was adopted in agreeing the agenda for each conference with input from Appeals Officers and the Deputy Chief Appeals Officer in order to promote meaningful engagement and to ensure that issues, challenges and emerging trends are considered and discussed in a timely manner.

Consistency in decision-making continues to be a major focus of the Appeals Office, particularly in relation to those questions which require a high degree of judgement and legislative interpretation. As in previous years a portion of our time was dedicated at both conferences in 2016 to this topic and we sought to achieve a common understanding of the issues involved in particular cases, the weight to be given to various types of evidence, where the burden of proof lies and the interpretation of legislative provisions. A number of case studies were presented by individual Appeals Officers on particular topics and shared with all Appeals Officers in plenary sessions with a view to achieving an agreed framework for dealing with specific types of cases.

I am pleased to report that the Secretary General of the Department, Ms. Niamh O'Donoghue, presented at our conference in October 2016. The session provided a valuable opportunity for Appeals Officers to hear of the many developments within the Department, from HR issues to developments in the use of technologies, that may impact on the work of my Office and to discuss these developments directly with the Secretary General.

3.5.1 Case-law from the Courts

The conferences provided a useful opportunity for Appeals Officers to consider, discuss and clarify various aspects of the three judgments of the High Court delivered in 2015/2016.

Two of those judgments dealt in detail with those aspects of a decision which must be met to ensure that the decision is rational, the requirement on a deciding body to give reasons for its decision so as to enable the person receiving the decision to be in a position to make a reasoned decision whether to appeal that decision or to understand whether further or different evidence might be needed on a fresh application. The Court also emphasised that it must be evident from the decision that the decision maker engaged with the evidence and directed his/her mind adequately to the issues. The Court also outlined that it is incumbent on the decision maker to set out the facts of the case, the disputes in relation to those facts, the reasons why the decision maker preferred the facts advanced by one party, or has come to an interpretation based on those facts and the weight accorded to those facts.

A judgment of the High Court delivered in May 2015 in the matter of Section 194 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 was discussed at our conference in April. The judgment is of interest to this Office as the Court considered the meaning of 'cohabitant' as defined in the 2010 Act. The Social Welfare Consolidation Act 2005 links the definition of 'cohabitant' to that set out in the 2010 Act.

3.6 Litigation

There were eight applications for judicial review of decisions of Appeals Officers in 2016. Three are ongoing and awaiting the outcome of a number of 'test cases' that are before the Court. The five remaining cases were struck out. There was also proceedings initiated by way of plenary summons in one case and this case is ongoing. Judgments were delivered in two cases during 2016.

The first case related to the insurability of a worker's employment. The central question at issue was whether the worker was engaged under a contract *of* service (employee) or under a contract *for* services (self-employed).

The applicant challenged the determination of the Appeals Officer on three grounds. The first ground was that the employment status of the notice party had earlier been determined by a decision of the Rights Commission Service and that my Office was bound by this decision, i.e. that the matter of *issue estoppel* arose. Secondly, the applicant challenged the determination of the Appeals Officer on the basis of error of law and in a mixed question of law and fact. Thirdly, the applicant sought a declaration that the proceedings before the Appeals Officer were conducted other than in accordance with the requirements

of fair procedures in that material which was not adverted to or dealt with in the course of the appeal hearing formed a material part of the Appeals Officer's determination and thus offended the principle of *audi alterem partem*.

In relation to the first ground, the Court did not consider that *issue estoppel* arose in this case, noting that the legislature had seen fit to set up different statutory schemes to deal with different employment issues. However, the Court noted that since the decision of the Rights Commission Service was largely based on the same factual circumstances, that decision must be at least of some persuasive authority and such that one would expect the decision-makers to explain the basis on which they came to a different conclusion.

In relation to the second ground, the Court, recalling the numerous decisions of the High Court and Supreme Court and the legal principles to be applied to the determination of an employment relationship emerging from those decisions, noted that these principles are still evolving. However, the Court noted that as the employment status of an individual depends on the facts of each particular case it is axiomatic that in every case the decision maker should set out the facts upon which the decision is based. The Court found that in this particular case there was a deficiency in the decision of the Appeals Officer in that the facts on which the decision was based were not clearly set out, there was a failure to deal with relevant evidence and it was not clear from the decision which facts the Appeals Officer considered to be determinative and the basis upon which those facts were accepted.

In relation to the third ground, the Court found that the Appeals Officer placed significant weight on certain evidence in arriving at the decision but that the applicant had not been afforded the opportunity to address that evidence. The absence of affording such an opportunity to the applicant rendered the appeal hearing and the subsequent decision unsatisfactory.

The case has now been resubmitted to an Appeals Officer for a new determination.

The second case on which the High Court delivered judgment in December 2016 related to a challenge to a decision by the Chief Appeals Officer to issue a certificate pursuant to Section 307 of the Social Welfare Consolidation Act 2005 to the effect that the ordinary appeals procedures are inadequate to secure the effective processing of a specific appeal and that the appeal should instead be submitted to the Circuit Court for adjudication.

The applicant was successful in her request for an order quashing that decision and the central finding of the Court was that the decision lacked adequate consideration in that individual consideration of the circumstances pertaining in the particular case was required. Declarations sought by the applicant concerning unconstitutionality and incompatibility with the European Convention on Human Rights were refused.

The implications of the judgment are currently being considered.



Chapter 4:

The Appeals Process

Chapter 4: The Appeals Process

The role of the Social Welfare Appeals Office

The main role of my Office is to provide a fair and independent appeals procedure where a person is dissatisfied with a decision given under the Social Welfare Acts by a Deciding Officer or a Designated Person about their entitlement to social welfare payments or the insurability of their employment.

The Appeals Office operates independently of the Department of Social Protection and is headed by a Chief Appeals Officer and has its own Appeals Officers who are themselves independent in their decision-making role.

While the issues that are dealt with on appeal are in the main based on legal provisions set out in the Social Welfare Consolidation Act 2005 and in the Social Welfare (Appeals) Regulations (S.I. No. 108 of 1998) my Office aims to deal with those issues in an informal manner. Therefore, while the issues that arise on appeal are of a quasi-judicial nature, we are not a court, but of course we must, like all administrative bodies, observe the principles of natural justice and fair procedure. My Office aims to deliver the appeals service in a prompt, fair and courteous manner.

It should be noted that some decisions taken by officers of the Department of Social Protection are administrative in nature and are not open to appeal to my Office. Some examples of these include – Back to Education Allowance, Back to School Clothing and Footwear, Free Electricity Allowance, Free Travel, Free TV Licence and Exceptional/Urgent Needs Payments under the Supplementary Allowance scheme (a list is available on the Appeals website at www.socialwelfareappeals.ie).

In my 2015 Annual Report, I provided a brief outline of the journey of an appeal once it is registered in my Office. In the course of the past year I noticed that, despite the availability of information on our website and through information leaflets, many questions arose from people who had submitted an appeal or who were considering making an appeal in relation to other aspects of the appeals procedure. For this reason, I have decided to set out in summary form in this Report the answers to some of those questions that arose most frequently in the course of the year.

How to make an appeal

A person can make an appeal within 21 working days of receiving the decision of the Deciding Officer (about a payment of social welfare benefit or assistance, or insurability of employment) or the determination of the Designated Person (about a payment under the Supplementary Welfare Allowance scheme). The notification of the decision/determination on their entitlement will also advise of a right to appeal the decision.

A person can make an appeal by completing Form SWAO 1 which is available from local Intreo Centres or by downloading the form from the 'Your Appeal' area on the Appeals Office website: www.socialwelfareappeals.ie.

Alternatively, the grounds of an appeal may be set out in a letter or by email to: swappeals@welfare.ie.

The important thing is that the grounds of appeal are set out in full. An appeal may be sent directly to the Chief Appeals Officer at the address below or through any local Intreo Centre.

Chief Appeals Officer
Social Welfare Appeals Office
D'Olier House
D'Olier Street
Dublin 2.

Appellants should state their name, address and Personal Public Service (PPS) number and enclose:

- a copy of the decision/determination which is being appealed,
- a statement of the reasons why they are dissatisfied with the Department's decision, and
- any relevant evidence that they think may support the appeal.

If any information or copies of documents that the Department used in making the decision is needed, the relevant scheme area of the Department of Social Protection should be contacted as early as possible to request a copy of the file (or relevant documents from the file) for the purposes of preparing the appeal.

Appellants should ensure that appeals are submitted within the 21 working day statutory timeframe – even if they are awaiting some supporting evidence (e.g. medical reports from a doctor) at that stage. They may indicate, in doing so, that they intend to send further supporting evidence when it becomes available.

Can the period of 21 days be extended?

Clearly the legislature envisaged a short time-frame for submitting an appeal and this is for a very good reason – my experience is that issues under appeal become more complicated with the passage of time.

While the time-frame is short, I have discretion to accept an appeal after the expiration of the 21 working days provided for in legislation. I am not in favour of denying a person a right of appeal but I must also respect that the legislature set down a specific time-frame within which to make an appeal. There are no criteria set down in the legislation as to how that

discretion can be applied and the decision to accept or reject an appeal will largely depend on the circumstances of each individual case. In order for me to accept an appeal outside that time-frame, I need to know why an appeal was not submitted within the 21 working days. While it is easier to accept an appeal within a short period of time after the expiration of the 21 days provided for in legislation, it becomes more difficult to do so when a long period of time has elapsed.

Next Steps

When an appeal is registered in the Appeals Office, the appellant will receive an acknowledgement. The appeal must then be sent by my Office to the Department for comment in accordance with the appeals legislation. The Deciding Officer or Designated Officer may change the decision/determination in the appellant's favour at this stage, for example, in light of new evidence provided since the original decision was made. If the decision is not changed, the appeal will be returned to the Appeals Office for consideration by an Appeals Officer.

The Appeals Officer will make a decision based on the evidence available and taking account of the relevant scheme qualifying conditions which are set out in legislation.

This may be done on the basis of the written evidence only, or the appellant may be invited to attend an oral hearing. It is open to appellants to request an oral hearing when submitting an appeal. Such requests will usually be granted, unless it is clear that there is nothing to be gained from such a hearing.

Will there be an Oral hearing?

The Appeals Officer may decide to hold an oral appeal hearing to obtain more details about a case or to clarify points which are at issue in relation to the decision/determination which is under appeal. The appellant may wish to request an oral hearing because they wish to elaborate on some aspect of the evidence or they consider that they can better make their case if they have an opportunity to meet with the Appeals Officer in person. Appeals Officers make every effort to keep oral hearings as informal as possible. Should an oral hearing be required, the hearing will be held at a location as near as possible to where the appellant lives.

In what circumstances would a request for an oral hearing not be granted?

A request for an oral hearing will not be granted where there is no prospect that additional information could be provided that would affect the outcome of the appeal.

Examples of such types of appeal include the following:

- Appeals against assessment of means where the grounds of the appeal are that the assessment did not take into account certain specified expenses. If, in these cases, the scheme legislation does not allow for such expenses to be taken into account then an

appeal on this basis would have no chance of success, regardless of whether or not an oral hearing was convened.

- Appeals relating to PRSI conditionality where a minimum number of contributions are required to qualify for a particular social welfare payment. If a person does not have sufficient contributions there would be nothing to be gained from an oral hearing.

Is there a charge for making an appeal?

There is no charge for making an appeal. If an appellant has to travel to attend an oral hearing, the Appeals Office will make a payment for reasonable travel expenses incurred. An appellant can also request compensation for any loss of earnings if they have to take time off work to attend the hearing.

Can an appellant be accompanied at the oral hearing?

Yes – an appellant may be accompanied or represented at the hearing.

An appellant may be accompanied by any member of their family, or, with the consent of the Appeals Officer, by any other person. However, the accompanying person must remember that it is the appellant's appeal and the Appeals Officer will want to hear from the appellant personally.

Alternatively, an appellant may, with the prior consent of the Appeals Officer, be represented at the oral hearing by an advocate, public representative or any other person. The representative may, by agreement, give evidence at the hearing on the appellant's behalf but again, the Appeals Officer will want to hear directly from the appellant, primarily.

Do appellants need to be legally represented?

There is no need for appellants to be legally represented to make an appeal or to attend an oral hearing, but it is of course open to them to be represented by a solicitor or another person. The Appeals Officer may make an award to any such representative towards the cost of their expenses. Any such award is limited to expenses incurred for actually attending the hearing. Any legal costs must be paid by the appellant.

What is the procedure at the hearing?

In general terms, the Appeals Officer is in charge of the oral hearing and will therefore determine the procedure. An appellant can expect that the Appeals Officer will have invited a person from the Department to attend the hearing along with any other person considered by the Appeals Officer to be concerned with the outcome of the appeal e.g. an employer where the issue relates to the insurability of employment.

An Appeals Officer may postpone or adjourn a hearing if he/she considers it necessary to do so.

Is the Appeals Officer's decision final?

The Appeals Officer's decision is normally final and conclusive but may be appealed to the High Court on any question of law. However, it may be subject to review under specific provisions of the Social Welfare Consolidation Act 2005 in the following circumstances:

- under Section 317, by an Appeals Officer where new facts or evidence which are relevant to the original decision are brought to notice since the appeal decision was given, or
- under Section 318, by the Chief Appeals Officer where it is considered that the decision was wrong by reason of a mistake in relation to the law or the facts.

In making a request for a Section 317 review of an appeal decision, new evidence must be enclosed, or, if a Section 318 review by the Chief Appeals Officer is being sought, the appellant must give specific reasons why they believe a mistake has been made regarding the law or the facts.

Is an appellant entitled to claim Supplementary Welfare Allowance pending the outcome of their appeal?

If an appellant's means are insufficient to meet his/her needs pending the outcome of the appeals process, the appellant should contact his/her local Intreo Centre to explore possible entitlement to Supplementary Welfare Allowance. This is a means tested payment and the appellant will be required to complete a separate claim form and provide evidence about means in order that a decision in relation to entitlement can be made. If the decision is not in the appellant's favour, that decision can also be appealed to the Appeals Office. Supplementary Welfare Allowance appeals are prioritised for attention at all stages of the appeals process.

Even if the appellant does not qualify for a weekly Supplementary Welfare Allowance payment, he/she may wish to explore possible entitlement to an exceptional needs payment under the Supplementary Welfare Allowance scheme pending the outcome of the appeals process. Information in this regard is available at local Intreo Centres. There is no right of appeal to the Appeals Office if an appellant is refused an exceptional needs payment but an appellant can request that the refusal be reviewed within the Department.

Office of the Ombudsman

The Ombudsman can examine complaints about the everyday administrative activities carried out by the Appeals Office.

Further Information

Further information can be accessed on our website: www.socialwelfareappeals.ie or by email at swappeals@welfare.ie or by phone at LoCall: 1890 74 74 34. Persons can also call to our Office in D'Olier House, D'Olier St., Dublin 2.



Chapter 5:

Case Studies

Chapter 5: Case Studies – An Introduction

The case studies included in this Chapter represent a small sample of appeals determined during 2016. My Office deals with appeals covering a wide and diverse group of people including families, people in employment, unemployed people, people with illnesses and disabilities, carers and older people. Many appeals that come before Appeals Officers must be considered in the broader context of EU legislation, most notably the EU Social Security Coordination rules contained in EU Regulation 883/2004 and provisions of the EU Residence Directive 2004/38/EC on the right to reside in the State.

All social welfare appeals arise from adverse decisions having been made on issues of entitlement. Given the complexity of the issues that arise, it would not be possible in this Report to cover all issues in the case studies. However, I have attempted to provide a representative sample covering payment types and issues arising across the range of schemes from Child Benefit to State Pension. In the cases featured, questions at issue refer to a broad range of criteria on which entitlement was assessed, including habitual residence in the State, assessment of means, medical evidence, cohabitation, care required and/or care provided and PRSI contribution conditions. In addition, I have selected two cases on the issue of insurability of employment.

Appeals may be determined on a summary basis, with reference to the documentary evidence available or by way of oral hearing. The case studies included in the following Chapters refer to both types of appeal decision. A small sample of cases which were the subject of review by the Chief Appeals Officer has also been included. In all cases featured a brief report is outlined for each appeal included. All personal details have been withheld to safeguard the anonymity of appellants.

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5.1 Case Studies

Children and Family

5.1 Case Studies: Children & Family

2016/01 Child Benefit

Oral Hearing

Question at issue: Normal residence of qualified child

Background: The appellant had been in receipt of Child Benefit in respect of her child with effect from a date in 1999. Following an application from the child's sister for payment in respect of that child, her entitlement was reviewed and the claim referred to a Social Welfare Inspector for investigation. Ultimately, it was determined that the child was residing with her sister for the majority of the time and the appellant's claim for Child Benefit was disallowed.

Oral hearing: The appellant was accompanied by legal representatives from Community Law & Mediation (formerly Northside Community Law and Mediation Centre). The Social Welfare Inspector attended at the request of the Appeals Officer. The child's sister had been called to the hearing but had failed to attend.

The Appeals Officer noted that the child was deemed to be a qualified child for the purpose of Child Benefit. Therefore, the question at issue concerned the child's *normal residence* as provided for in legislation. The Social Welfare Inspector outlined the details of the investigation and advised that a social worker had been assigned to the child's case. The appellant confirmed that her primary social welfare payment continued to include an increase in respect of the child. She indicated that she had sole custody of the child, while the Inspector advised that she was not aware of any Court Order in relation to custody. The question of abandonment was discussed and the Inspector confirmed that she had no evidence which might suggest that the child had been abandoned by the appellant. The appellant stated that she maintains responsibility for the child's primary care; she retains the child's medical card and takes responsibility for medical matters; she is responsible for the school uniform and school expenses, and she submitted proofs of expenditure. It was also confirmed that the child had not been placed in foster care or placed with a relative under Section 36 of the Child Care Act, 1991. On the question as to residence, the appellant stated that the child had returned to her home some four weeks previously as her sister had become homeless.

The appellant's legal representatives submitted that, as payment was being withdrawn, the burden of proof lay with the Deciding Officer to establish the case for disallowance. The point was made also that the claim had been suspended from a date which preceded the Social Welfare Inspector's report. It was submitted that there was no evidence available prior to that report which would provide a basis to disallow payment. In addition, it was

asserted that the appellant had not been given an opportunity to comment on the information available to the Department prior to the decision, in line with the requirements of natural justice. Reference was made to a Freedom of Information (FOI) request, where some of the information provided had been redacted. It was asserted that, as a consequence, the appellant had been unable to address all of the details on which the Deciding Officer had relied in making the decision. In conclusion, it was stated that an internal review had been sought under the FOI provisions and that an appeal would be made to the Information Commissioner.

Consideration: The Appeals Officer noted that the governing legislation provides that the person with whom a child normally resides is qualified to receive Child Benefit. Article 159 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007) outlines rules for determining the person with whom a child may be regarded as '*normally residing*' (outlined at the end of this case study).

The Appeals Officer noted that the Deciding Officer appeared to have relied solely on Rule 1 and Rule 2. She observed that, where a child is living with more than one of the following: mother, step-mother, father or step-father, he or she is regarded as normally residing with the person with whom they reside for the majority of the time. She concluded that there was no evidence to suggest that the appellant did not have custody of the child and, even if the child was residing elsewhere, that her mother would remain the person entitled to receive Child Benefit under Rule 4. She observed that the only circumstances where the normal residency of a qualified child would fall to be determined in a manner not in accordance with Rule 4 would be those provided for in Rule 7, where the qualified child has been abandoned or deserted. She was satisfied that the evidence available indicated that the child had not been abandoned or deserted. She noted that the provisions of Rule 8 did not apply in this case; they refer to circumstances in which a child is placed in foster care, or with a relative, under Section 36 of the Child Care Act, 1991.

The Appeals Officer noted the points made in the submission regarding the burden of proof, as well as those in relation to the retrospective aspect of the decision. She noted that there is an onus on the Department to make a satisfactory case for disallowance where an existing payment is being reviewed, and she regarded as valid the point made concerning the fact that the appellant's Child Benefit had been suspended prior to receipt of the Social Welfare Inspector's report. While noting the points made with reference to the release of documents under the FOI provisions, the Appeals Officer pointed out that she has no role in the matter. The Appeals Officer concluded that the appellant was the qualified person to receive Child Benefit in respect of the child and that this decision should take effect from the date on which the payment had been suspended.

Outcome: Appeal allowed.

Extract from S.I. No. 142 of 2007:

159. For the purposes of Part 4 [Social Welfare Consolidation Act 2005], the person with whom a qualified child shall be regarded as normally residing shall be determined in accordance with the following Rules:

1. Subject to Rule 2, a qualified child, who is resident with more than one of the following persons, his or her –

*mother,
step-mother,
father,
step-father,*

shall be regarded as normally residing with the person first so mentioned and with no other person.

2. Where the persons referred to in Rule 1 are resident in separate households, the qualified child shall be regarded as normally residing with the person with whom he or she resides for the majority of the time.

3. A qualified child who is resident with one only of the persons mentioned in Rule 1, shall be regarded as normally residing with that person and with no other person provided that, where that person is the father and he is cohabiting with a woman as husband and wife, this Rule shall not apply in respect of the child where the father so elects and, on such an election, the child shall be regarded as normally residing with the woman with whom the father is cohabiting.

4. Subject to Rule 8, a qualified child, who is resident elsewhere than with a parent or a step-parent and whose mother is alive, shall, where his or her mother is entitled to his or her custody whether solely or jointly with any other person, be regarded as normally residing with his or her mother and with no other person.

5. Subject to Rule 8, a qualified child, who is resident elsewhere than with a parent or step-parent and whose father is alive, shall, where his or her father is entitled to his or her custody whether solely or jointly with any person other than his or her mother, be regarded as normally residing with his or her father and with no other person.

6. A qualified child, to whom none of the foregoing Rules apply, shall be regarded as normally residing with the woman who has care and charge of him or her in the household of which he or she is normally a member and with no other person provided that where there is no such woman in that household he or she shall be regarded as normally residing with the head of that household and with no other person.

7. Where the normal residence of a qualified child falls to be determined under Rule 4 or 5 and the person with whom he or she would thus be regarded as normally

residing has abandoned or deserted him or her or has failed to contribute to his or her support, the relevant Rule shall cease to apply in respect of that child and the person with whom the child shall be regarded as normally residing shall be determined in accordance with Rule 6.

8. Where normal residence would fall to be decided under Rule 4 or 5 above and where a qualified child has been placed in foster care, or with a relative by the Health Service Executive under section 36 of the Child Care Act 1991 (No. 17 of 1991), and has been in such care for a continuous period of 6 months he or she shall, on the 1st day of the following month or the 1st day of the 6th month following the first day of October 2007, whichever is the later, be regarded as normally residing with the woman who has care and charge of him or her in the household of which he or she is normally a member and with no other person provided that where there is no such woman in that household he or she shall be regarded as normally residing with the head of that household and with no other person.

2016/02 Child Benefit

Summary decision

Question at issue: Habitual residence

Background: The appellant came to Ireland in 2009 and had been living in ‘direct provision’ accommodation while awaiting the outcome of an application she made to the Office of the Refugee Applications Commissioner for a declaration as a refugee in accordance with the Refugee Act, 1996. Ultimately, the Minister for Justice and Equality declared her to be a refugee with effect from a date in 2016. The Deciding Officer determined that she was habitually resident in the State with effect from that date and her entitlement to Child Benefit was determined accordingly. In her appeal against that decision, the appellant referred to the considerable time it had taken to receive a declaration of refugee status, and she sought to have her claim backdated to the date on which she had applied for asylum.

Consideration: The Appeals Officer, having considered the evidence in accordance with the governing legislative provisions, noted that it is a primary condition of entitlement to Child Benefit that a person must establish that he or she is habitually resident in the State. He made reference to the legislation on habitual residence and, in particular, to Section 246(5) of the Social Welfare Consolidation Act 2005, noting that it provides that a person who does not have a right to reside in the State may not be regarded as being habitually resident. He noted that the governing legislation provides that persons who have made application for a declaration of refugee status may not be regarded as habitually resident while awaiting the outcome of such an application, as provided for in Section 246(7) of the Act and, where granted permission to remain, that they may not be regarded as being habitually resident in

the State for any period prior to that date. The relevant provision is cited as Section 246(8) of the Social Welfare Consolidation Act 2005.

The Appeals Officer concluded that the appellant had not established that she met the habitual residence condition prior to the date in 2016 when she was declared a refugee, and determined that her claim to Child Benefit was awarded appropriately from a date in 2016.

Outcome: Appeal disallowed.

2016/03 Domiciliary Care Allowance

Oral hearing

Question at issue: Whether eligibility criteria continue to be met (review)

Background: The appellant had been in receipt of Domiciliary Care Allowance in respect of her daughter, aged 14 years, who has a diagnosis of epilepsy and recurrent seizures with a background history of brain tumour. In the context of a review, the claim had been referred to a Medical Assessor of the Department of Social Protection and he had opined that the child was no longer eligible on medical grounds. Accordingly, the appellant was given an opportunity to forward additional information before a final decision was made. No further evidence was submitted, however, and the claim was disallowed. In an appeal against that decision, the appellant stated that her daughter suffers from severe headaches, requires constant attention, and that she had been called to school on many occasions as staff members were anxious to ensure that she would not have a seizure.

In the medical report completed by her G.P., it was stated that the child had been seizure free for the last two years; that she complains of frequent headache and remains under the care of Neurology. The degree to which her diagnosis affects her in the area of consciousness/seizures was assessed as severe. A letter was submitted from the children's hospital which she attends, indicating a need for educational support to maximise learning potential and stating that from a disease point of view, she remains remarkably well and has no demonstrable neurological deficits or toxicities as a result of the treatment.

Oral hearing: The appellant and her husband attended. They said that they understood the qualifying criteria and asserted that they continued to be met. They reported that their daughter must take medication at the same time every day to ensure that she does not have a seizure and that they have to oversee this. The appellant made reference to the shunt which had been fitted in infancy, in line with her daughter's initial diagnosis of primitive neuroectodermal tumour, predominantly right cerebral hemisphere with associated Hydrocephalus. She said that a second shunt had been fitted in the previous year. She went on to say that the brain tumour is still there and that it causes her daughter to have headaches. She reported that a teacher brought her home from school one day last

week, and called to the house to advise that she had been feeling unwell, had been unable to walk, and that it had been feared that she might have a seizure.

The appellant reported that the child's siblings are doing well at school but that she is not. She said that it has been suggested that she needs special educational supports and that it may be more appropriate for her to attend another school, where her needs might be met more effectively. She said that the headaches that the child experiences are quite severe and that she is experiencing difficulty in a number of areas. She reported that she had attended for a scheduled appointment and MRI scan last month but that her own specialist had been away and she would have to return for a consultation.

The Appeals Officer reviewed the medical evidence on file, referring to the G.P. statement that the child had been seizure free for the last two years. The appellant asserted that this did not reflect the nature of her current difficulties. She referred again to reports from school and the concerns expressed and the Appeals Officer suggested that she might like to submit evidence in that regard.

Further evidence: Following the hearing, a letter from the child's teacher was submitted, stating that she is in a class with 9 pupils with a full-time Special Needs Assistant (SNA) and that, although she is assigned to help the entire class, the SNA spends almost all of her time helping the appellant's daughter. It was stated that, despite a lot of extra resource classes and assistance, the child cannot read, write or count, and cannot identify basic terms. An outline was provided of the additional difficulties which her medical condition presents, including severe headaches and seizure episodes where she needs to be taken home. The child was described as being socially unaware and engaging in age inappropriate behaviour, unaware of the consequences of her actions. It was stated that an application had been made to the local HSE Disability Services team with a view to arranging further assessment for the child and the allocation of a place in a special school.

Consideration: The Appeals Officer noted that the question at issue was whether the appellant's daughter continued to meet the definition of 'qualified child' for purposes of Domiciliary Care Allowance with effect from the date from which the claim had been disallowed. She noted that while some of the medical evidence appeared to indicate an improvement in the child's condition, the additional evidence provided in the context of the appeal had been compelling. Taking note of the evidence adduced at oral hearing and having had particular regard to the additional evidence submitted subsequently, she concluded that the qualifying condition continued to be met.

Outcome: Appeal succeeds.

2016/04 Domiciliary Care Allowance

Oral hearing (Section 317)

Question at issue: Whether eligibility criteria met at an earlier date

Background: The appellant's son has a diagnosis of ADHD, global delay and primary encopresis. He is one of twins, who were born prematurely. In 2011, the appellant made a claim for Domiciliary Care Allowance (DCA), submitting detailed medical evidence. The claim was refused, however, and an appeal against that decision was disallowed on a summary basis. In 2014, the appellant made a second claim in respect of her son and this was awarded. Subsequently, she requested a review by the Deciding Officer under Section 301 of the Social Welfare Consolidation Act 2005, seeking to have the claim awarded with effect from the date of the initial claim in 2011. The Deciding Officer held that the qualifying criteria were not met at the earlier date and the request was refused. A subsequent appeal was disallowed as the Appeals Officer held that good cause had not been established for the delay in making the claim and that there was no basis for backdating for a period of up to six months, as provided for in the governing legislation. The appellant then made a request for a review by the Chief Appeals Officer under Section 318 of the Act, submitting that the Appeals Officer's decision was erroneous in relation to the facts of the case and asserting that the medical criteria had been met in 2011. In addition, she stated that she had not been offered an oral hearing in 2011 and that she had not been made aware at the time that she could have requested one. The Chief Appeals Officer directed that the appeal be reopened by way of oral hearing. An appeal on the same question was also reopened in relation to the appellant's other twin son.

Oral hearing: The question at issue was outlined and the Appeals Officer made reference to the considerable amount of documentary evidence which had been submitted by the appellant in support of the initial claim in 2011. This included hospital patient data referring to: Ophthalmology, Audiology, ENT, Nutrition and Dietetics; letters of referral, assessment and consultants' reports; a letter from the Community After Schools Project, advising that the child had a 'one-to-one worker'; a letter from a Consultant in Developmental Paediatrics supporting the appellant's claim; a letter from Home School Liaison, supporting the claim and advising that the child had a Special Needs Assistant (SNA), and a letter from the local Child and Adolescent Mental Health Services (CAMHS) supporting the claim.

The appellant outlined the background to her son's difficulties. She reported on a range of issues, including speech difficulties, developmental delay, behavioural issues and bowel problems. She referred to the process of assessment and diagnosis and his ongoing struggle with everyday activities, like dressing, eating, toileting, remembering simple instructions and doing homework. She reported that she has a Home Help on Monday and Friday to assist with laundry as a consequence of his bowel problems and advised that he has been referred to a specialist to be assessed for a colostomy.

The appellant reported that her son struggles in school and that he has always had an SNA; he also has resource teaching hours; she attends a meeting with his teacher every week to discuss issues and progress, and he is taking prescribed medication, including a dose which is administered at school. She advised that his developmental skills are not appropriate to his age and that he is likely to continue to need the support of an SNA in secondary school.

On the question as to his care needs in 2011 when the initial DCA claim was made, the appellant stated that things had not changed and she spoke of the demands of meeting his needs from day one. She said that following assessment and diagnosis by the local CAMHS, she had been advised to apply for DCA and a range of services and supports had been put in place. She said that, at the time, she had been unaware that she could have requested an oral hearing of her appeal and said that there had been too much going on in her life at the time in terms of caring for both boys. She advised that her local Citizens Information Centre (CIC) had put her in touch with a Disability Advocate who had offered advice and assistance, including the option of requesting reviews under Sections 301 and 318.

Consideration: Social welfare legislation provides that an Appeals Officer may revise a decision in light of new evidence or new facts, having regard to the provisions of Section 317 of the Social Welfare Consolidation Act 2005. The Appeals Officer examined the appeal with reference to those provisions.

The Appeals Officer noted that the original appeal had been determined on a summary basis, whereas she had the benefit of an oral hearing, at which the appellant clarified the nature of her son's problems and the extent of the additional care he requires as a consequence. She noted that the documentary evidence served to support the appellant's contention that a range of supports had been provided at the time she applied first for Domiciliary Care Allowance in 2011, an application which had been supported by a number of the specialists who had been involved with her son. Having particular regard to the evidence adduced at oral hearing, she concluded that the appellant's son required continuous care and attention at a level which was substantially in excess of that normally required by his peers and that the qualifying criteria were met in connection with the appellant's claim of 2011. Accordingly, the earlier decision was revised. (The Appeals Officer also revised the decision in relation to the appellant's other son.)

Outcome: Appeal allowed.

2016/05 Domiciliary Care Allowance

Oral hearing

Question at issue: Whether the eligibility criteria are met

Background: The appellant made a claim for Domiciliary Care Allowance in respect of her daughter, who was aged 15 years. The stated diagnosis was Grade III Urinary Reflux and the medical report indicated that this was expected to continue indefinitely. In completing the ability/disability profile, the G.P. assessed the degree to which her disability affected the child's mental health and behaviour as mild and continence as moderate; all other categories were assessed as normal.

In completing the claim form, the appellant stated that her daughter requires assistance in and out of bed; has problems with balance/co-ordination; has to be careful of her diet; requires access to the bathroom during class; must get up during the night to go to the bathroom; is anxious about incontinence and finds difficulty in participating in physical education, going on long walks or staying over with friends. In terms of additional needs, she referred to the preparation and administration of medication. She enclosed a letter from the Consultant Urological Surgeon her daughter attends.

Oral hearing: The appellant reported that her daughter was getting on well at school. She said that she can cope independently with the normal activities of daily living and does not exhibit any behavioural problems. She said that the main issue is her lack of bladder control. She advised that her daughter attends a consultant three times per year and that her kidney function is being monitored. She was unaware if surgical intervention would be required. She outlined the difficulties her daughter experiences, in that she can urinate unconsciously both when awake and asleep. She is on a fluid intake regime and her teachers have been alerted that when she requests permission to go to the bathroom, she needs to be excused immediately.

The appellant reported that her daughter's diagnosis has affected her social life, that she does not go out much with her friends because of it, and that she never hosts or goes on 'sleepovers'. She said that the condition causes her great distress. She referred to the issues associated with bed-wetting, including the cost of replacing mattresses and bed linen.

Consideration: The Appeals Officer noted that the qualifying criteria for Domiciliary Care Allowance, as outlined in social welfare legislation, specify that a child must have:

- *a severe disability requiring continual or continuous care and attention substantially in excess of that normally required by a child of the same age, and that*

- *the level of that disability is such that the child is likely to require full-time care and attention for at least 12 consecutive months.*

He concluded that although the appellant's daughter suffers from a chronic kidney condition, she could not be deemed to require continual or continuous care and attention on a full-time basis, in line with the provisions of the governing legislation. He noted in particular that, apart from her bladder problems, the child had been described as being normal in all other respects; she does not suffer from any intellectual, behavioural or physical disability and is independent in the usual activities of daily living.

Outcome: Appeal disallowed.

2016/06 Guardian's Payment (Contributory)

Oral hearing

Question at issue: Whether the eligibility criteria are met

Background: The appellant's daughter was living with her when her daughter's children were born and they remained living with her for some years. Their father's identity was not known. When the children were still very young, their mother became involved in another relationship and moved out of the family home. Problems emerged, including issues in relation to addiction, and the appellant took the children back to live with her. She was granted guardianship in 2009. The appellant was in receipt of State Pension and child dependent increases were paid in respect of the children. She was also in receipt of Child Benefit. She made a claim for Guardian's Payment in 2015 and the case was referred to a Social Welfare Inspector for investigation. He interviewed the appellant and the children's mother. Subsequently, the Deciding Officer wrote to the appellant requesting independent written confirmation as to why her daughter was not in a position to care for the children. Ultimately, the claim was refused on grounds that the children were held not to be 'orphans', according to the definition outlined in Section 2(1) of the Social Welfare Consolidation Act 2005.

In outlining reasons for the decision, the Deciding Officer stated that she was satisfied that the care arrangement for the children was the result of a private, mutual agreement between their mother and the appellant and that the children were in regular contact with their mother. In her appeal against that decision, the appellant submitted that her grandchildren had been abandoned by their mother and that they should be considered orphans, and she requested an oral hearing.

Oral hearing: The appellant was accompanied by a family member, and an advocate. The Social Welfare Inspector who had investigated the case attended and, at the request of the Appeals Officer, outlined details of his investigation into the case. He referred to an

interview with the children's mother and reported her account of having lived with the appellant until she was re-housed by the local authority, and then finding herself unable to cope with the responsibility of looking after the children. She said it had been agreed that it would be best if they stayed with their grandmother. She had also advised that there was insufficient space to accommodate them.

The Appeals Officer reviewed the Deciding Officer's request for an independent statement about the care of the children, the nature of the contact between the children and their mother, and details of maintenance paid. The appellant referred to the letter from the school principal which she had submitted in support of her claim and a letter written by the children, indicating that they would not live with their mother. She referred to the involvement of social workers in the case and their approval of the arrangements put in place. She advised that she had requested a letter from social workers but was told that the case had been closed since the children were resident with her and were no longer deemed to be at risk. She stated that the children see their mother as often as they like but do not stay overnight. On the question of maintenance, she stated that the children's mother was in receipt of a social welfare payment and was not in a position to pay maintenance.

The family member who had accompanied the appellant submitted that if she had not taken the children in, they would have ended up in care due to their mother's chaotic lifestyle and her addiction. The appellant submitted that her daughter could not cope with the responsibility of caring for her children properly.

On behalf of the appellant, her advocate submitted that the decision appeared to indicate that there was no abandonment on the basis of the contact between the mother and children, whereas abandonment did not necessarily mean that a parent had no contact at all with the child. He went on to suggest that some interpretations of abandonment included cases where a child lives with a parent but the parent has failed to provide for their financial, emotional or physical security. He made reference also to a Guardian's Payment case study included in the Social Welfare Appeals Office, Annual Report 2015 (2015/04), where the Appeals Officer had accepted that abandonment must not be considered in isolation from the failure of duty by a parent as indicated by McGuinness J. in *Northern Area Health Board & ors -v- An Bord Uchtlala & anor [2002] IESC 75*.

Consideration: The Appeals Officer noted that the appellant's evidence had been credible and he accepted that she had taken the children into her care to ensure their wellbeing and protection following their brief move to alternative accommodation with their mother. He noted the involvement of social workers in the case at an early stage and the evidence which indicated that their mother had failed to provide financially for the children. He noted some contradictions in the evidence in relation to the extent of contact between the children and their mother but considered that this should not take away from the evidence

indicating that they had been raised and cared for by their grandmother. He made reference to the letter of support which the school principal had written and to the children's own letter.

He examined the assertion that the care arrangement for the children had resulted from a private mutual agreement between their mother and the appellant. He considered, however, that the evidence did not support this view. On the contrary, it indicated that the children's mother had a chaotic lifestyle in which their care was not the priority it should have been and that the appellant had intervened to ensure that they were given a secure home and stable upbringing. He made reference to the Supreme Court judgment cited and, in the absence of a legal definition of 'abandonment', accepted that it constitutes more than the failure to provide financially for the child but includes failure of a parent's duty to provide for the child's emotional and physical necessities of life. He concluded that the evidence had shown that it was the appellant who had been exercising this parental duty, and had established that the children had been abandoned and as such could be deemed to be qualified children for the purposes of Guardian's Payment.

Outcome: Appeal allowed.

2016/07 Guardian's Payment (Contributory)

Oral hearing

Question at issue: Whether the eligibility criteria are met

Background: The appellant's grandchildren came to live with her in 2011, having lived with their mother prior to that. In the same year, she was granted joint guardianship. She made a claim for Guardian's Payment which was refused on grounds that the children did not satisfy the definition of 'orphan' as defined in legislation. She made an appeal against that decision, submitting that both of the children's parents were in new relationships and were not in a position to care for them.

Oral hearing: The appellant was accompanied by her local political representative. She outlined the background circumstances, saying that the children had been born when their parents were very young. The relationship had come to an end and the children lived with their mother until 2011, when difficulties emerged.

The appellant stated that the children's father had applied to the Court for guardianship in 2011, which was granted to him, and then granted to the appellant also. The appellant reported that the children's mother had been instructed to pay maintenance, by way of a Court Order, but that she had not received any payment from her until 2015. She stated that the children's father was not paying maintenance and that he was not in a position to

do so. The appellant confirmed that she was in receipt of Child Benefit and a discretionary payment of €29.80 per child per week under the Supplementary Welfare Allowance scheme. She said that she worked hard to earn extra to provide for the children and sees them as her own. She went on to say that she felt exhausted and was no longer able to work the same number of hours, and that she needed financial assistance.

On the question as to parental contact, the appellant reported that their mother sees the children for an hour on one day each week, and that she takes them out to eat on occasions or at weekends. She reported that visits are organised with their mother only and do not include her partner. The appellant reported that their father has a good relationship with the children, that there is a good atmosphere when he visits with his other children, and that he buys presents for birthdays and at Christmas. She advised that he takes the children to sports training and stated that he is very much involved in their lives. She confirmed that he had not paid maintenance but advised that he had paid legal costs associated with the guardianship process, as well as dental bills.

On behalf of the appellant, her political representative submitted that the appellant is doing her best to provide for the children and that they are doing well at school. He contended that the governing legislation appears not to cater for the circumstances at issue and requested that the matter be dealt with as a unique case.

Consideration: The Appeals Officer noted that social services had been involved in the case only as part of the guardianship process, following the Court's instruction that the children be afforded counselling. This was provided through the Health Service Executive. She noted that both parents had failed to provide financially for the children, although legal costs in relation to guardianship had been met by their father, as had dental expenses. She observed that parental contact between the children and their parents was still intact, that an access arrangement was in place in respect of their mother, while their father had open access and visited regularly. She noted that the Social Welfare Inspector who had investigated the circumstances of the case reported that the children's father was emotionally and materially involved with them and that he has a keen interest in their development.

The Appeals Officer noted the appellant's role in providing ongoing support for her grandchildren both financially and emotionally, acknowledging that she had played a significant part in their overall development and wellbeing. On the question as to financial provision, she considered that the evidence had established that this had not been fully addressed by all of the parties involved in the case. She noted that the children's parents were very much a part of their lives, that there was evidence of regular contact with both parents and strong evidence that their father participated to a large degree in their lives. She concluded, therefore, that the children could not be held to be 'orphans' within the meaning of the legislation governing Guardian's Payment.

Outcome: Appeal disallowed.

2016/08 One-Parent Family Payment

Oral hearing

Question at issue: Cohabitation

Background: The appellant's baby was born in 2015 when she and her partner were living together. Subsequently, she made a claim for One-Parent Family Payment, stating that they had separated and that she was parenting alone. The claim was rejected on grounds that she and her partner were living together as cohabitants.

Oral hearing: The appellant was unaccompanied and the Social Welfare Inspector attended by request. The Appeals Officer referred to the Deciding Officer's statement that he had relied on the Inspector's report in determining that the qualifying criteria were not met and he asked for an outline of the details.

The Social Welfare Inspector reported that he had made an un-notified call to the appellant's home and interviewed her in connection with her claim. He stated that he had also interviewed her some eight months previously in connection with a Jobseeker's Allowance claim. That payment had been awarded at a reduced rate, based on an assessment of means derived from her partner's income from employment. The Inspector stated that, at the time, the appellant had sought a review of the assessment on the basis that her partner had to pay maintenance in respect of a child from an earlier relationship and that this should have been taken into account in determining means. He advised, however, that no adjustment had been made to the assessment and he noted that the appellant had made a claim for One-Parent Family Payment some months later. In his report to the Deciding Officer, he opined that the appellant and her partner had decided to separate after she received an unfavourable decision in connection with her Jobseeker's Allowance claim. He noted that the appellant had stated that she was receiving maintenance of €100.00 per week.

In response, the appellant stated that her former partner had been paying maintenance in respect of two children from a former relationship, and not one as the Inspector had stated. She contended that there was no concrete proof of cohabitation and asserted that there had been a lot of speculation. She went on to say that she considered this to have been a defamation of her character.

The appellant submitted that she and her partner had personal issues following the birth of their child in 2015. She stated that he had not been a good parent and had not helped out at home. She said that she had relied on the support of her parents, including the provision of

financial assistance. She insisted that the separation had not been just for financial reasons and asserted that she was only guilty of not having had a perfect relationship.

Consideration: The Appeals Officer sought to determine whether the appellant could be held to meet the relevant qualifying condition for receipt of One-Parent Family Payment, having been disqualified on grounds of cohabitation. He noted the provisions of the governing legislation relating to cohabitation, outlined in Section 2(1) of the Social Welfare Consolidation Act 2005:

'cohabitant' means a cohabitant within the meaning of section 172(1) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010;

and the disqualification at Section 175 in relation One-Parent Family Payment:

A person referred to in section 173(1) shall not, if and so long as that person is a cohabitant, be entitled to and shall be disqualified for receiving payment of One-Parent Family Payment.

The Appeals Officer made reference also to *Guidelines on Cohabitation* which the Department of Social Protection has issued for the information of Deciding Officers. He noted that this outlines the criteria by which cohabitation might be assessed and indicates that no single criterion can necessarily support a decision. He examined the evidence in the case by reference to the criteria set out in the Guidelines, including the following: the duration of the relationship, the basis on which the couple lives together, and the degree of financial inter-dependence. He noted that the appellant was emphatic in her assertion that she was not cohabiting with effect from the date specified. He noted also that the evidence submitted by the Department was circumstantial, relating to the appellant and her partner having separated after an unfavourable decision in relation to Jobseeker's Allowance, while the appellant had outlined a number of reasons for their separation. He concluded that the evidence did not establish a basis for determining that the appellant and the person named were a couple living in a *'committed and intimate'* relationship at the time of her claim for One-Parent Family Payment.

Outcome: Appeal allowed.

2016/09 One-Parent Family Payment

Oral hearing

Question at issue: Assessment of means

Background: In separating from her spouse, the appellant received €140,000 as her share of the proceeds of the sale of the family home. Normally, that money would fall to be assessed as means in determining eligibility for One-Parent Family Payment using the formula for assessing capital outlined in social welfare legislation. However, it was not included in the means assessment initially as the appellant had stated that the funds were to be used to purchase a new home for herself and her children. Under Guidelines issued to Deciding Officers by the Department of Social Protection, a period of three to six months is generally allowed for the completion of a house purchase in such circumstances. As no purchase had been made following the expiry of that period, the capital which the appellant retained was assessed as means with effect from a specified date and she made an appeal against the decision.

Oral hearing: The Appeals Officer outlined the manner in which capital is assessed and advised as to the allowances normally made where a capital sum is to be used to purchase a home. He noted that in the appellant's case the normal period allowed to complete a purchase had expired some time ago. The appellant accepted that this was the case but said she hoped she might be facilitated a little longer until she could get back on her feet. The appellant advised that she has a child with special needs who is attending school in the local area and receiving support services there. On that basis, she indicated that she was very reluctant to move too far. She outlined details of a number of properties she had been involved in trying to purchase since she separated. She spoke of having been involved in a protracted process to purchase a particular house but said it had fallen through ultimately. She submitted supporting documentary evidence. She referred to a deposit she had put on a house more recently, in an area close to where she was living, but advised that the sale had also fallen through.

The appellant went on to outline her efforts to improve her qualifications so that she could secure employment. Having completed a course in a particular area of interest, she had obtained a FETAC qualification and was actively looking for work.

The Appeals Officer asked about the apparent depletion of the capital from €140,000 to €101,000. The appellant acknowledged that she had been dipping into the capital and said that the amount had been reduced even further since her One-Parent Family Payment had been terminated. She undertook to provide a recent bank statement. She went on to say that she was aware that she has been effectively priced out of the market but hoped to get full-time employment which would put her in a better position to buy a house.

Consideration: The Appeals Officer noted the appellant's efforts to purchase a home from the capital derived from the sale of the former family home and the fact that she had been unable to use the capital in the time allowed. He noted also that the capital sum had been depleted over time and that she was unlikely now to be able to buy a property. However, he concluded that the Department had been more than reasonable in disregarding her capital for a period in excess of that provided for in the Guidelines. In the circumstances, he concluded that the point had been reached where the legislation on the assessment of capital must be applied in determining her means.

Outcome: Appeal disallowed.

5.2 Case Studies

**Working Age – Illness, Disability
and Carers**

5.2 Case Studies: Working Age – Illness, Disability & Carers

2016/10 Illness Benefit

Oral hearing

Question at issue: Eligibility (medical)

Background: The appellant, in his 40s, had a certified incapacity of chronic back pain (lumbar spine) and had been in receipt of Illness Benefit for some months. Prior to the onset of incapacity, he had been working in construction. Following two medical examinations, his claim was disallowed on grounds that he was no longer deemed to be incapable of work and not entitled to Illness Benefit under the provisions of the governing legislation (Section 40 (3)(a) of the Social Welfare Consolidation Act 2005). In support of his appeal, the appellant submitted further medical evidence, including a letter from his G.P., stating that his life had changed completely after back surgery and that he experienced acute exacerbation episodes, which could last for up to a week.

Oral hearing: The appellant was accompanied by his wife. He reported that he had undergone discectomy surgery in 2014 but that it had been unsuccessful and he was experiencing continuous back pain. He said that while there had been a reduction from the extreme level of pain which he had prior to surgery, he continued to experience an ongoing high level of discomfort.

The appellant reported that the pain tends to be more extreme in the mornings, and that he struggles to get out of bed on occasion and requires his wife's assistance. He said that he also needs help to put on his shoes and socks, he cannot do any housework or lift anything heavy, he experiences discomfort in standing or sitting for any length of time, and his sleep is disturbed. He confirmed that he had attended physiotherapy and was currently following a recommended exercise programme at home and that he has been referred to a consultant in anaesthetics and pain management and hopes to be given pain relief injections. He advised that the constant feeling of pain and discomfort, and the restrictions imposed on his lifestyle, have caused him to become depressed and that he has been prescribed anti-depressant medication. He went on to say that the dose had been increased recently and that his G.P. had suggested that he see a counsellor.

The Appeals Officer outlined details of the reports completed by the Medical Assessors for the Department of Social Protection and invited the appellant to comment. He noted that the first Medical Assessor reported that there were no signs of nerve root impingement or substantial restriction and that, in his opinion, the appellant was capable of light duties with appropriate back care. The second Medical Assessor had observed that a clinical

examination had not revealed acute nerve root irritation and he had opined that the appellant was capable of light/semi-sedentary work.

In response, the appellant said that both assessments had been held in the afternoon when he was not experiencing the same degree of stiffness and restriction as he feels in the morning. In addition, he asserted that neither assessment had been conducted during periods when he was experiencing pain most acutely and he advised that he has frequent acute episodes.

Consideration: The Appeals Officer considered that the opinions of the Medical Assessors had been qualified; both had deemed the appellant capable (at best) of light, sedentary type work. He noted that there was no indication that the appellant's mental health had been assessed. He noted also that his G.P. had provided a comprehensive letter of support and additional medical evidence which served to establish that her opinion that the appellant was not capable of work for the foreseeable future was a strongly reasoned one. He concluded that this had been reinforced by the appellant's testimony at oral hearing.

Outcome: Appeal allowed.

2016/11 Illness Benefit

Oral hearing

Question at issue: Eligibility (medical)

Background: The appellant, in her late 50s, had worked as a chef in a nursing home prior to her Illness Benefit claim. She had a certified incapacity of stress and medical evidence referred also to epilepsy and uterine cancer. The G.P. had indicated that the expected duration of her illness was six to twelve months and advised that she attends a neurologist and a gynaecologist and that she was not taking medication. In completing the ability/disability profile, the G.P. assessed 'Mental Health/Behaviour' as mildly to moderately affected by her condition and all other categories as normal. In completing the Impact and Lifestyle questionnaire (issued in connection with a review of her claim), the appellant stated that her ability to interact with people had been affected, as had her concentration and memory, as well as her ability to cook, read and sleep. She reported that she was participating in a Vocational Training Opportunities Scheme (VTOS) course and that it was helping to restore her confidence.

The appellant was referred for a medical examination and, having regard to the Medical Assessor's opinion, her claim was disallowed as it was held that she was no longer incapable of work under the provisions of the legislation governing entitlement to Illness Benefit (Section 40(3)(a) of the Social Welfare Consolidation Act 2005). Having made an appeal, the

appellant was referred for a second medical examination. There was no change in the assessment and the decision was confirmed. In making an appeal against that decision, she requested an oral hearing.

Oral hearing: The appellant reported that she was not fit to return to her previous employment because of problems with her back. In addition, she said she considered that her communication skills were not all they had been and that her memory was not as good as it used to be, especially in the morning. She related no restrictions or problems in relation to her daily routine. She submitted that the VTOS course suited her as she could do things at her own pace, whereas she had found her previous workplace to be very stressful. She referred to a change in work practice which meant that she had been required to work a 10 hour shift and she said that this was too much for her back. She went on to say that she was no longer able for the demands of a busy kitchen and the modern requirements of food preparation and managing staff. She expressed frustration that she had been unable to complete the VTOS course because of the decision to terminate her Illness Benefit claim.

The Appeals Officer outlined details of the Medical Assessor's reports. The first referred to the diagnosis of stress and noted that the appellant had finished counselling, was not taking any medication and suggested that she might cope well with a return to work. The second report noted that the appellant had a history of epilepsy but had been seizure free for 30 years and that it had been five years since the diagnosis of cervical cancer and she was attending for annual review. In relation to the certified incapacity of stress, it was noted that her mood had improved, that she had reported no restrictions, and the opinion was offered that she was fit for light sedentary duties. The Appeals Officer reviewed the letter from the appellant's G.P., stating that she was attending a VTOS course and was managing well but felt she was unable to engage in full-time employment, and she concurred with this assessment.

Consideration: The Appeals Officer noted that her G.P. had indicated that the appellant's diagnosis of stress had affected her mental health to a mild to moderate degree and had advised that she had not been prescribed medication and was not attending any support services. He noted that the medical evidence indicated no other significant impact across the range of other abilities. Having regard to all the medical evidence and to her own account at oral hearing, he concluded that the appellant was capable of work within the meaning of social welfare legislation.

Outcome: Appeal disallowed.

2016/12 Invalidity Pension

Oral hearing

Question at issue: Eligibility (medical)

Background: The appellant, in his early 50s, had been diagnosed with diabetes mellitus, diabetic neuropathy (peripheral neuropathy) and retinopathy, vascular disease and obstructive sleep apnoea. In completing the medical report which forms part of the Invalidity Pension claim form, his G.P. stated that his certified incapacity was expected to preclude the appellant from returning to work indefinitely. In completing the ability/disability profile, his G.P. assessed his condition as affecting to a moderate to severe degree his ability to lift/carry, and to a moderate degree in terms of walking, sitting, bending, kneeling and vision, while other categories were assessed as normal.

His claim was disallowed on grounds that he was not deemed to be permanently incapable of work. In a letter in support of his appeal, the appellant's G.P. made reference to multiple medical issues which are life-long and would require management and treatment indefinitely. He outlined details of multiple drug therapies which had been prescribed for the appellant, as well as details of the Consultants he was attending.

Oral hearing: The appellant, accompanied by his wife, submitted additional medical evidence in the form of letters from a consultant respiratory physician, confirming a diagnosis of severe sleep apnoea and advising that he had commenced continuous positive airway pressure (CPAP) therapy, and a list of the prescribed medication associated with each of the conditions diagnosed.

In support of his appeal, the appellant made the following points. His work history was mainly in construction, following which he had completed a Community Employment (CE) scheme. He reported that his blood sugar levels remained persistently high and this unstable diabetic condition had led to significant other health issues for which he was also receiving treatment. This includes attending the diabetic, podiatry and cardiology clinics at his local hospital, as well as attending an ophthalmic consultant. He advised that he was undergoing tests in connection with the diagnosis of sleep apnoea and reported that he falls to sleep four or five times every day and feels exhausted all the time. He advised that he no longer walks anywhere due to the pain in his feet and dizziness associated with high blood pressure, and said that he is unable to help with housework or cooking at home because of his health issues.

Consideration: The Appeals Officer referred to the governing legislation, which provides that entitlement to Invalidity Pension is subject to a person being permanently incapable of work. He noted that this condition is satisfied where, at the time of making a claim, a person has been continuously incapable of work for:

- twelve months – and is likely to remain incapable of work for a further twelve months, or
- less than twelve months – and is likely to be incapable of work for life.

The Appeals Officer noted that by virtue of his certification for purposes of entitlement to Illness Benefit, the appellant had already established that he had been incapable of work for more than one year prior to making a claim for Invalidity Pension. Accordingly, the question to be determined was whether he was likely to remain incapable of work for twelve months beyond the date of his claim for Invalidity Pension. In this context, he noted that his diabetes remained unstable and had led to the development of neuropathy and retinopathy and that he had also been diagnosed with sleep apnoea. He was satisfied that the appellant would continue to need acute treatment of and support in the management of all of these conditions beyond the relevant date and that the combined impacts of these conditions on his daily living abilities were such as to render him incapable of work beyond this timeframe.

Outcome: Appeal allowed.

2016/13 Invalidity Pension

Oral hearing

Question at issue: Eligibility (medical)

Background: The appellant, in his early 40s, had been employed as a stonemason and sustained injury arising from an occupational accident in 2013. He was awarded Injury Benefit initially and then received Illness Benefit until his entitlement under the scheme (payment for two years) ceased. Subsequently, he had been in receipt of a basic income payment under the Supplementary Welfare Allowance scheme until he received a compensation award in the order of €150,000 and was held to have means in excess of the statutory limit and that claim was terminated. He made a claim for Invalidity Pension which was rejected on grounds that he was not permanently incapable of work, as provided for in Article 76(1)(a) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007). In his appeal, he submitted that he was able to do only light work, on medical advice, and stated that his employer would not accommodate his request in this regard.

Oral hearing: The appellant reported the manner in which he had sustained his neck injury, lifting granite in the course of his work. He said that it was a small business and no cranes or supports were available; employees were required to do heavy lifting. He made the point that he cannot return to that type of work following his injury. He described the advice he has been given about back and neck care and the need to exercise caution in relation to

everyday activities and standard types of lifting. He advised that he had approached his employer about doing light work, and he spoke of his expertise in working with granite and the possibilities for overseeing machines that measure/prepare slabs for kitchen worktops. He said that his employer was not prepared to retain his services on that basis.

The appellant advised that he had made a good recovery, notwithstanding the need for vigilance in relation to back care. He reported a residual problem with numbness of two of his fingers. He advised that he holds a Category B driving licence and that he was hoping to become a bus or truck driver and had started studying for the written test. He said that he hoped subsequently to start taking driving lessons but expressed concern as to the costs involved. He said that SOLAS (An tSeirbhís Oideachais Leanúnaigh Agus Scileanna or Further Education and Training Authority) provides assistance with the cost of training only where a person is in receipt of a jobseeker's payment.

The appellant asked if the Appeals Officer could appreciate the problem he faces: in employment terms, he is young, he is an expert at work he can no longer do, he cannot take on work that might aggravate his injury and he needs to retrain but because he is not in receipt of a jobseeker's payment he will have to fund that training himself. He went on to express concern about securing an income in the meantime.

Consideration: The Appeals Officer acknowledged the dilemma which the appellant had outlined, in terms of his age, experience and skill, and the difficulties he faced in trying to secure training for new employment as he was not in receipt of Jobseeker's Benefit or Allowance. For purposes of his claim to Invalidity Pension, however, she noted that he was required to establish that immediately before the date of claim he had been continuously incapable of work for a period of one year and was likely to continue to be incapable of work for at least a further year. She noted that in completing the ability/disability profile, his G.P. considered that the appellant's condition affected his ability to a mild degree in the areas of reaching, manual dexterity and lifting/carrying, and that all other categories were assessed as normal. She noted also that the appellant had been attending a consultant neurosurgeon who indicated that there had been a good resolution of his symptoms and that he would not expect him to be left with any long-term complications as a consequence of the accident in 2013. The Appeals Officer considered that the appellant's account, as outlined at oral hearing, was consistent with the medical evidence provided and she concluded that it had not been established that he could be deemed to meet the definition of '*permanently incapable of work*', as provided for in the governing legislation.

Outcome: Appeal disallowed.

2016/14 (OIB) Disablement Benefit

Oral hearing

Question at issue: Causal association between accident and injury

Background: The appellant, in his early 60s, had been at work on a specified date in 2013. He was carrying a tray down a flight of stairs when he missed a step and fell. He was diagnosed initially with lumbar pain but developed an infection and was diagnosed ultimately with spinal cord injury secondary to epidural abscess. He is in receipt of Invalidity Pension and his wife receives Carer's Allowance in respect of the care she provides for him. He made a claim for Disablement Benefit under the Occupational Injuries Benefit scheme and, in line with the provisions of the scheme, loss of faculty was assessed in percentage terms. It was held that all of the loss of faculty sustained was not attributable to the occupational accident and an assessment of 10% was made. As this is less than the 15% threshold provided for in the governing legislation, he did not qualify for Disablement Benefit. An appeal was made on his behalf by the local Citizens Information Centre (CIC).

Oral hearing: The appellant attended with a personal assistant and was accompanied by his wife and a member of staff from his local CIC. The Deciding Officer and Social Welfare Inspector attended at the request of the Appeals Officer.

The Social Welfare Inspector reported that he had interviewed the manager at the appellant's former workplace and she stated that she was satisfied that an accident had occurred. She advised that she had not witnessed the incident but had spoken with the appellant afterwards and advised him to go home. The Inspector stated that he had also interviewed the appellant, who advised that on the day in question he had continued working until he finished his shift, some three hours later. He attended the Accident and Emergency department of his local hospital, was prescribed pain relief and went home, with his G.P. having attended him at home on the following day. He outlined the sequence of events over the following days and weeks, where he developed an infection (epidural abscess) which caused pain and led, ultimately, to paralysis.

The Deciding Officer acknowledged the severity of the appellant's injury but indicated that he had regard to the opinion of the Medical Assessor who had accepted a temporal association between the occupational injury and the appellant's diagnosis but considered that a causal association had not been established. He referred to medical evidence which indicated a history of back issues, with the appellant having had spinal surgery, a hip replacement and deep vein thrombosis. He pointed out that the claim form completed by the appellant and certified by his G.P. had referred to lumbar pain.

On behalf of the appellant, the CIC representative submitted that before his accident the appellant was well, holding down a full-time job, active and healthy; that, subsequently, he suffered 100% disablement with no causal effect from his previous medical history. She

referred to medical evidence which outlined the details of his admission to hospital, diagnosis, treatment and referral to rehabilitation services. She submitted that the appellant suffered spinal cord injury leading to paralysis as a direct result of injuries sustained following an accident at his place of work in 2013. She contended that it was a serious error to conclude that he had sustained a 10% loss of faculty when the medical evidence pointed to 100%.

Consideration: The Appeals Officer had regard to the details outlined in relation to the accident and to the appellant's diagnosis of spinal cord injury secondary to epidural abscess, as well as the assessments made on admission to hospital and at discharge which were undertaken with reference to the American Spinal Injury Association (ASIA) classification system. He noted that it was not disputed that an occupational accident had occurred and that the appellant was incapacitated such that he required the support of a personal assistant for daily living. He considered that the question to be determined was the assessment of disablement (in percentage terms as provided for in legislation) and the extent to which that disablement might be attributed to the accident sustained in 2013.

The Appeals Officer considered that in the absence of any evidence of another accident between the time of the fall and his ultimate diagnosis, or any other event in the interim period that might have had such effect, the extent of the appellant's injuries must be held to have arisen from the accident at work. He concluded that the medical evidence confirmed that the appellant had been compromised by his previous history of back injuries and medical interventions and that it was appropriate to take this into account in determining the assessment which should be deemed to apply. He considered it reasonable to think in terms of 100% loss of faculty, given the nature of the appellant's circumstances, with a reduction of 33% to reflect earlier injuries. He concluded, therefore, that the appropriate assessment was 67%. As assessments above the rate of 20% are rounded to the nearest 10%, the award in this case was rounded upwards to 70%.

Outcome: Appeal allowed.

2016/15 Disability Allowance

Oral hearing

Question at issue: Eligibility (means)

Background: The appellant's claim was rejected on grounds that her means exceeded the statutory qualifying limit. Her weekly means were assessed at €274.00, derived from capital. In addition, she was assessed with the market value of a property which had been disposed of in 2011, when she and her husband transferred it to their son, as well as a sum of money

which they had given him as a wedding present. In connection with a claim for Carer's Allowance in 2013, account had been taken of the capital value of the house and the money given to her son. At that time, it was held that she had deprived herself of capital in order to qualify for a higher rate of Carer's Allowance. When she made a claim for Disability Allowance in 2016, the same assessment was applied in determining her means.

Oral hearing: The appellant was accompanied by her husband and the Social Welfare Inspector attended at the request of the Appeals Officer. Her husband confirmed that he was in receipt of an Invalidity Pension and advised that he had successfully appealed a decision not to grant him an increase for a qualified adult in 2015. The Inspector was not aware of this and advised that he had only been asked to report on the appellant's means for purposes of her Disability Allowance claim. He said that he had relied on a previous report which had been completed in 2013 in connection with a claim for Carer's Allowance, and he referred to the means assessed. He advised that he could not comment further as he had been unable to locate the relevant file.

In relation to the means assessed, the appellant and her husband insisted that the money withdrawn from their account in 2009 had been for the benefit of their son and had been a wedding present. They referred to the property bought in 2011 and said that it should have been put into their son's name at the time but that they had not made clear their instructions to the solicitor and that this had been an expensive mistake.

The Appeals Officer noted that no evidence was presented to support the contention that the capital and the property were disposed of for social welfare purposes. He advised the appellant that he would consider the question after he had sight of the previous appeal dealing with her husband's Invalidity Pension claim.

Consideration: The Appeals Officer examined the continued assessment of capital and property which the appellant and her husband no longer owned but were held to have disposed of in connection with a Carer's Allowance claim made in 2013. He noted that the provisions of the Social Welfare Consolidation Act 2005, Schedule 3, Part 2(4) had been cited as a basis for the decision although the relevant provisions were outlined in Schedule 3, Part 3. He noted that the Social Welfare Inspector had advised that he had been asked to report on means for Disability Allowance purposes only and that he had acknowledged having relied on a previous report completed in connection with a Carer's Allowance claim and that the considerations of the Deciding Officer had not been available to him. He noted that the capital at issue had been disposed of in 2009, while the property was transferred in 2011, and he considered that the facts of the case were such as to have required a full re-investigation. He considered that an earlier decision, made in relation to another claim, could not be the sole evidence relied upon. He noted also that, at this remove, there was no

evidence presented to support the contention that the capital and the property had been disposed of for social welfare purposes rather than for reasons of genuine family settlement. In addition, he referred to the investigation of a claim for payment of a qualified adult increase with her husband's Invalidity Pension claim and noted that another Inspector had not accepted that the capital was disposed of and the property transferred for social welfare purposes. He concurred with that assessment and concluded that the appellant had no assessable means.

Outcome: Appeal allowed.

2016/16 Disability Allowance

Oral hearing

Question at issue: Eligibility (medical)

Background: The appellant, in her mid-40s, has a diagnosis of intellectual disability, hypothyroidism and anaemia. She made claim for Disability Allowance and this was refused on medical grounds. In completing the ability/disability profile, her G.P. had assessed her abilities in the areas of 'Mental Health/Behaviour' and 'Learning/Intelligence' as affected to a mild to moderate degree by her condition. In an appeal against that decision, it was submitted that she had been in receipt of Disability Allowance previously and that her condition remained unchanged.

Oral hearing: The appellant attended with her mother who spoke on her behalf. She referred to the appellant's learning difficulties and said that she was not capable of independent living. She advised that she had attended a special school and then a training centre for people with intellectual disabilities. Subsequently, the centre had facilitated her in gaining assisted employment and she works in a local supermarket. She advised that this had been classified as work of a rehabilitative nature for social welfare purposes.

Her mother reported that the appellant had sustained injuries following a road traffic accident in 2007 and that she had taken legal proceedings on her behalf. She advised that she had received a compensation award of some €120,000 and had been made a Ward of Court, with a committee appointed to oversee the distribution of assets. She went on to say that she had lost her Disability Allowance payment on foot of the means assessed based on the compensation.

Her mother advised that she has had to seek a payment every three months equal to the Disability Allowance payment the appellant would have received. She referred to other payments made, in relation to holidays for example, and said that the amount remaining had reduced to just over €60,000. She went on to say that the appellant needs her parents'

support, that she is unable to cook or clean and has little concept of money as is shown by her being made a Ward of Court. She said that the G.P. who filled in the claim form has very little contact with the appellant who, apart from her intellectual disability, is in good health. She went on to say that she had understood originally that the claim had been refused on means grounds and could not believe that it had actually been disallowed on medical grounds, as had the claim made in 2015.

Consideration: The Appeals Officer noted that the appellant had been in receipt of Disability Allowance all her adult life until she received a compensation award which resulted in her means being in excess of the qualifying limit. However, he observed that when she reapplied in 2013, only €90,000 of her compensation remained. This resulted in a means assessment of €110.65 weekly but the claim had been refused on medical grounds. A subsequent claim in 2015 had also been refused on medical grounds. He concluded that the evidence was sufficient to conclude that the medical qualifying criteria were met. Having regard to the circumstances of case, which included the appellant being a Ward of Court and her inability to act on her own behalf, he determined that she had established an entitlement to Disability Allowance with effect from the date of the earlier claim in 2013.

Outcome: Appeal allowed.

2016/17 Disability Allowance

Oral hearing

Question at issue: Eligibility (medical)

Background: The appellant, in his mid-30s, had been in receipt of Disability Allowance from 2002. A review of his claim was carried out in 2013, when the Department of Social Protection received information from the Revenue Commissioners under a Protocol for Consultation, Information and Data Exchange. The data provided referred to Deposit Interest Retention Tax, and outlined interest earned on accounts held by the appellant. An investigation indicated that he had been awarded compensation for injuries sustained in a road traffic accident in 2003. The amount at issue was of the order of €1.75 million and it was held that he had failed to notify the Department. His claim was disallowed with effect from a date in 2003 and an overpayment in the amount of €108,000 was assessed under Section 302(a) of the Social Welfare Consolidation Act 2005. In an appeal against the decision made on the appellant's behalf, it was submitted the Department had been fully informed about the nature of his injuries and the fact that a claim was pending and its duty of care to him was questioned.

Oral hearing: The appellant was accompanied by a relative. The Deciding Officer, who attended at the request of the Appeals Officer, outlined the decision. She made reference to the significance of applying the provisions of Section 302(a), that is, that it had been held that there had been wilful concealment of a material fact. She presented details of the appellant's claim and an account of the review process. She concluded that he had failed to advise the Department of a major change to his financial circumstances in connection with an award made by the Court in 2003.

It was submitted that the appellant was just 18 years of age when interviewed by the Social Welfare Inspector in connection with his claim, that he was still receiving rehabilitative care after a catastrophic accident and he had little recollection of that time or what was asked of him. A request for access to his personal data had been made under the Freedom of Information (FOI) Acts. It was pointed out that the evidence indicated that the Inspector had noted that a personal injuries compensation claim was pending and was expected to be finalised within two years. In addition, reference was made to a request made by the same Inspector for the claim to be reviewed again in the following year, while an officer within the Disability Allowance area had indicated that a review should be undertaken by a date in 2002. It was noted that no review had been undertaken and it was submitted that this constituted negligence and a failure to implement a duty of care to the appellant. It was contended that there was no intent to deceive and that an overpayment should not be assessed.

The Deciding Officer acknowledged that a review should have been conducted but advised it had been overlooked due to staff shortages and pressure of work. She suggested that there may not have been fraudulent intent but she reiterated that there was an onus on the appellant to have notified the Department. She advised that the appellant had been informed both verbally and in writing of this obligation.

Consideration: The Appeals Officer observed that he had some sympathy with the points submitted on the appellant's behalf and he noted the extent of the injuries he had sustained. He noted also the Deciding Officer's evidence and her statement as to why the case had not been reviewed early in 2000 and he considered that the oral hearing had served to indicate that there had been no real intent by the appellant to defraud the Department. He considered that there were faults on both sides but that, ultimately, the primary responsibility rested with the appellant who should have notified the Department of the very significant compensation award made. He noted that the evidence confirmed that the appellant had been advised verbally of his requirement to inform the Department of any change to his circumstances at the application interview stage, and that he had been advised again in writing at the date of award and that reminders were also available on his

Disability Allowance payment books. He noted that there was no medical evidence to the effect that the appellant was incapable of managing his own affairs.

He concluded that the decision to disallow the application with effect from a date in 2003 was correct, with the overpayment assessed being fully recoverable. Having regard to the circumstances of the case, however, he applied the provisions of Section 302(b) of the Social Welfare Consolidation Act 2005, which refers to a revised decision given in the light of new evidence or facts, accepting that there was no wilful intent to defraud. He noted that the amount assessed as overpaid was substantial and advised the appellant that it was open to him to contact the Department of Social Protection and to comment on any proposals for recovery or to challenge any recovery plan outlined.

Outcome: Appeal disallowed.

2016/18 Carer's Allowance

Oral hearing

Question at issue: Eligibility (provision of full-time care)

Background: The appellant's claim for Carer's Allowance was disallowed on grounds that she was not providing full-time care and attention for her husband, who was in his late 70s. He had a diagnosis of severe chronic obstructive pulmonary disease (COPD), cerebral vascular accident (CVA) and coronary artery disease (CAD). The claim had been referred to a Social Welfare Inspector, who interviewed the appellant. At that time, her husband was in hospital. The Inspector reported that while there was a level of personal care being provided, he considered that the care the appellant was providing was not full-time care and attention within the meaning of legislation. This had been accepted by the Deciding Officer in his determination. In her appeal, the appellant asserted that she provides care around the clock.

Oral hearing: The appellant attended the hearing alone, while the Social Welfare Inspector attended at the request of the Appeals Officer. He outlined the details of his report and stated that he was satisfied that it reflected accurately the information which had been provided by the appellant during the course of their meeting. He stated that the appellant had advised that her husband was able, for the most part, to attend to his own personal care needs, independent of her support. He reported that while it was clear that she was providing some support, it appeared that the major part of the time she spent with her husband was in situations where companionship was required rather than care.

In response, the appellant contended that her husband requires full-time care and attention and, given the circumstances, that she is his carer. She reported that her husband had experienced three strokes which had a significant impact on his independence and his ability to undertake daily activities without continual support and supervision. She made reference to a significant history of COPD and advised that he was using home oxygen at all times.

The appellant advised that her husband receives Home Help, for one hour a day, two days a week. She said that at such times he is assisted with showering and at all other times she is his only carer. She advised that he is susceptible to losing his balance and falling, that he uses crutches when getting around the house and has a wheelchair for outdoor use. She reported that his sleep can be disturbed significantly and that she is on constant alert for any difficulties arising, particularly any problems with oxygen intake or supply. The Social Welfare Inspector confirmed that the appellant's husband had been in hospital at the time he interviewed her and conceded that it might have been more helpful if he had observed him at home.

Consideration: The Appeals Officer noted that the question of the appellant's husband requiring full-time care and attention was not at issue and accepted, based on this fact and having regard to the medical evidence available, that full-time care and attention was required. He noted also that the appellant was the main care provider, albeit her husband had the benefit of two hours a week by way of Home Help. He made reference to the significant difficulties her husband was experiencing as a consequence of the medical conditions diagnosed and noted that the appellant was in constant attendance, to ensure his safety. He concluded that the appellant must be held to be providing full-time care within the meaning of the governing social welfare legislation.

Outcome: Appeal allowed.

2016/19 Carer's Allowance

Oral hearing

Question at issue: Eligibility (means)

Background: In 2015, the appellant made a claim for Carer's Allowance in respect of care being provided for her son. This was rejected on grounds that her weekly means, derived from her husband's income from self-employment as a farmer, were in excess of the statutory limit. In assessing means, the Deciding Officer referred to farm income of the order of €67,000 per annum, recorded as drawings in the accounts for 2013.

Oral hearing: The appellant was accompanied by her son, for whom she provides care. It was confirmed that the question at issue referred only to means. The appellant asserted that in assessing means from the farm holding, no account had been taken of the price drop experienced by milk suppliers. She stated that this had resulted in a significant reduction in projected gross income for 2016 and she submitted monthly statements from her local Creamery Co-Operative (Co-Op) as evidence of the drop in milk prices. She asserted that it was unreasonable to calculate means with reference to accounts for previous years when the milk price had effectively collapsed in 2016, forcing the farm enterprise to engage in further borrowing.

The appellant accepted that all other current income and expenditure was broadly in line with 2014 returns, which had formed the basis of the assessment, and she undertook to provide details. She also submitted evidence of an operating loan issued by the bank in 2016, with details of interest applied and repayments being made. She undertook to provide details of milk supply in 2015 and 2016 for comparison purposes and to illustrate why projected income was expected to fall sharply. She provided farm accounts for 2014 which recorded a net profit of some €70,000. (Further documentary evidence, as outlined, was submitted following the oral hearing.)

Consideration: The Appeals Officer noted that the profit from the holding had not been assessed and, instead, personal drawings recorded in the accounts were used. He observed that, in the assessment of means, drawings were not to be assessed without qualification. He noted that a decision maker must be satisfied that the drawings are sustainable on an ongoing basis before being assessed as means and, in addition, that the source of the funds from which the drawings are made must be examined. In this case, he noted that the drawings at issue were made up of farm income, rental income, a Revenue refund, a Value Added Tax (VAT) refund, a dividend and an insurance settlement. He observed that, of these, only the farm income was assessable as means derived from cash income as the rental income had already been considered as capital. By assessing the drawings as income, he suggested that the decision maker was attempting to assess the same source of means as both capital and as income, and he pointed out that this was not appropriate.

The Appeals Officer accepted the appellant's contention that current yearly income was affected by the drop in prices, reducing projected milk income by some 23%, while overheads had remained largely the same. He noted that this was reflected in gross income and projected net profit. He made an assessment on this basis and concluded that the appellant had weekly means of €87.00.

Outcome: Appeal partially allowed.

5.3 Case Studies

Working Age – Income Supports

5.3 Case Studies: Working Age – Income Supports

2016/20 – Family Income Supplement

Oral hearing

Question at issue: Eligibility (full-time remunerative employment)

Background: The appellant had been in receipt of Family Income Supplement (FIS) during 2015 but payment ceased when she returned to full-time education in September. She made a new claim subsequently, stating that she was working 39 hours per week as a student nurse and she submitted supporting documentation from the Health Services Executive (HSE). Her claim was refused on grounds that she was not in full-time remunerative employment, in line with the qualifying criteria under the scheme.

Oral hearing: The appellant reported that she was in the final year of a four year degree course in nursing. She advised that, during the summer break in 2015, she had obtained employment as a receptionist and made a claim for FIS. She had been in receipt of payment at €128.00 per week until lectures resumed. She went on to say that the final part of the course was a nine month paid job placement and that she had commenced that placement in a local hospital in January 2016, working for 39 hours per week. She reported that she had been paid a rate of just over €7 an hour but that this was increased subsequently to the national minimum wage for all nurses. She confirmed that deductions were made for Pay Related Social Insurance (PRSI) and the Universal Social Charge (USC). She advised that she was due to complete her work placement in September 2016 and that she was in the process of looking for a nursing post on completion of the course.

Consideration: The Appeals Officer referred to the circumstances in which employments are to be excluded from consideration as remunerative employment for purposes of the legislation governing eligibility for FIS, as outlined in Article 175(2) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007). He noted that the work placement programmes specified include Community Employment (CE) schemes, the National Internship Scheme and the Rural Social Scheme and he concluded that the appellant's employment was not prescribed. He noted that deductions were being made from her earnings at the PRSI Class A rate. He observed that the only test to be applied, as provided for under Article 175, was whether the appellant's remunerative employment was full-time, that is, whether it was employment of not less than 38 hours per fortnight which was expected to continue for three months. He concluded that this test was satisfied in the appellant's case.

Outcome: Appeal allowed.

2016/21 – Family Income Supplement

Oral hearing

Question at issue: Eligibility (maintenance)

Background: The appellant applied for Family Income Supplement (FIS) in 2016, stating that his daughter was residing with her mother and that he made a voluntary contribution of €30.00 per week for her maintenance. His claim was refused on grounds that the child did not live with him and that he was not wholly or mainly maintaining his former partner, the child's mother, citing the provisions of Article 13(6) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007) as follows:

(6) Notwithstanding the provisions of sub-article (4), a qualified child resident with one parent who is living apart from the other parent and who is not claiming or in receipt of benefit or assistance shall be regarded as residing with the other parent if that other parent is contributing substantially to the child's maintenance.

In an appeal, made with the assistance of the local Money Advice and Budgeting Service (MABS), it was submitted that the appellant was contributing substantially to the maintenance of his child. It was pointed out that the child lived with her mother, who was not claiming or receiving benefit or assistance. Accordingly, it was asserted that the child should be regarded as residing with the appellant for the purposes of his FIS claim, in line with the provisions of Article 13(6).

Consideration: The Appeals Officer noted the provisions of Article 13(6), and the circumstances in which it prescribes that a qualified child residing with one parent, who is living apart from the other, may be regarded as residing with the other parent for purposes of a FIS claim. He noted that the appellant was paying maintenance of €30.00 per week on a voluntary basis and, given that this amount exceeds the weekly rate of €29.80 payable to social welfare recipients in respect of a child dependant, he accepted that the appellant was contributing substantially to the maintenance of his child. He concluded that, in the circumstances, the child should be regarded as residing with the appellant for purposes of his FIS claim.

Outcome: Appeal allowed.

2016/22 – Family Income Supplement

Oral hearing

Question at issue: Eligibility (EU Regulations)

Background: The appellant was resident with her son in Belgium and was employed by an Irish airline. She made a claim for Family Income Supplement (FIS) but this was refused on grounds that she was not resident in the State and it was held that the provisions of EU Regulation 883/2004 did not apply.

Consideration: The Appeals Officer noted that while benefits are not generally paid to persons who are resident outside the State, residence conditions can be overridden by the provisions of EU Regulation 883/2004 on the Coordination of Social Security Systems. This Regulation outlines the general principles regarding the coordination of social security rights of persons moving within the Community, with the detailed procedural and administrative matters being dealt with in Regulation 987/2009. Both Regulation 883/2004 and Regulation 987/2009 ('the Regulations') are applicable throughout the European Economic Area (EEA). The Appeals Officer noted, however, that to avail of the Regulations, it is necessary for the person to be attached to the Irish social security system in accordance with the provisions of Article 11 of EU Regulation 883/2004.

Having examined the evidence available, the Appeals Officer noted that the appellant had been subject to the provisions of the Irish social security system and paying social insurance contributions with effect from a specified date in 2008 to a date in 2013. However, he noted also that she was no longer paying Irish social insurance contributions, nor was she resident in the State. Accordingly, he concluded that Ireland could not be deemed competent to pay Family Income Supplement, or other family benefits, under EU social security regulations.

Outcome: Appeal disallowed.

2016/23 – Jobseeker's Allowance

Summary decision

Question at issue: Eligibility (retrospective assessment of means)

Background: In connection with a claim for Jobseeker's Allowance made in 2009, the appellant provided details of bank and credit union accounts which he held at the time. His means were assessed and his claim was awarded. It appears that his file was examined in connection with a claim which his partner made for Carer's Allowance in 2013. Additional information had been provided, indicating that the appellant had opened a further account in the meantime. When his claim came under review in 2015, however, it emerged that no adjustment had been made to take account of that new information. A revised decision was made and the appellant was held to have been entitled to a lower rate of payment with effect from a date in 2013. Initially, this was applied with reference to the provisions of Section 302(a) of the Social Welfare Consolidation Act 2005, which deals with fraudulent intent. When it came to light that all of the information had been disclosed at the

appropriate time but that there had been a failure to revise the means assessment accordingly, the decision was applied with reference to Section 302(c). These are the provisions usually applied where a Deciding Officer has made an error or where information was provided but not acted upon. An overpayment of some €15,000 was assessed. In his appeal submission, the Deciding Officer acknowledged that the overpayment had arisen solely as a consequence of a Departmental error as the appellant had provided the relevant information but it had not been taken into account.

Consideration: The Appeals Officer noted that the appellant had provided details of his means in full and that the Department had been made aware of the additional bank account when his partner was interviewed in 2013 in connection with her claim for Carer's Allowance. In the circumstances, he determined that the means from savings were assessable from a specified date in 2015, that is the date from which the retrospective decision had been applied, with the effect that the overpayment was eliminated.

Outcome: Appeal allowed.

2016/24 – Jobseeker's Allowance

Oral hearing

Question at issue: Eligibility (Habitual Residence Condition)

Background: The appellant, in her late 20s, was born in Spain. She came to live in Ireland originally in 2010 and worked for periods between 2010 and 2013. She went back to Spain, where she worked until her return to Ireland in 2015. She made a claim for Jobseeker's Allowance some six months later. This was refused on grounds that she was not habitually resident in the State.

Oral hearing: The appellant reported that during her previous residence in Ireland, she had worked in a number of jobs and lived with her Irish partner. She advised that she had made a claim for Jobseeker's Allowance in 2013 and had been paid for a few months at a reduced rate as her means had been assessed with reference to her partner's earnings from employment. She advised that she returned to live with her family in Spain when the relationship ended. She outlined details of her living arrangements since her return in 2015 and advised that, between then and the date of making her claim, she had one day of employment and ten days subsequently. She said that she was registered with an agency and paid on the basis of self-employment. She said that, since her return, she had been to Spain only once to renew her identity card and that she considers Ireland to be more her home than Spain at this stage. She advised that she had been refused renewal of her

European Health Insurance Card (EHIC) in Spain and had been told that she had to apply for her card in Ireland. She submitted a certificate from the Spanish Embassy stating that she is resident in Ireland, a copy of her current tenancy agreement, Notice of Income Tax registration with Revenue, a Spanish identity card with an Irish address, as well as documentary evidence confirming her involvement in a range of social activities.

Consideration: The Appeals Officer noted that the decision in the case had been made with reference to the five factors to be taken into account in determining habitual residence, outlined in Section 246(4) of the Social Welfare Consolidation Act 2005. She observed that the appellant must be assumed to have a right to reside in the State as this had not been addressed in the decision. Accordingly, habitual residence fell to be determined with reference only to the five factors. She noted that the appellant had been paid Jobseeker's Allowance in 2013 so that she must have satisfied the habitual residence condition at that time. She noted that the Department of Social Protection has issued Guidelines on the Habitual Residence Condition (HRC), which state that a person who had previously been habitually resident in the State, moves to live and work in another country and then resumes his/her long-term residence, may be regarded as being habitually resident immediately on their return. The Appeals Officer noted that the appellant had been deemed to be habitually resident in 2013 and that her circumstances were in line with those outlined in the HRC Guidelines. She noted that the evidence submitted had served to establish that her centre of interest was in Ireland and concluded that the appellant must be deemed to meet the habitual residence condition for purposes of her Jobseeker's Allowance claim.

Outcome: Appeal allowed.

2016/25 – Jobseeker's Allowance

Summary decision

Question at issue: Eligibility (means)

Background: The appellant was in his early 20s and living at home when he made a claim for Jobseeker's Allowance. As he had not reached the prescribed age of 25 years, his means were assessed with reference to the 'benefit and privilege' of living with his parents. The rules which govern the calculation of means are outlined in Schedule 3 of the Social Welfare Consolidation Act 2005. Rule 1(10) provides that:

in the case of a person entitled to or in receipt of jobseeker's allowance and who has not attained the age that may be prescribed [25 years], the yearly value of any benefit or privilege enjoyed by that person by virtue of residing with a parent or step-parent, and the Minister may prescribe by regulations the manner in which the value of the benefit and privilege may be calculated.

The manner in which the value of 'benefit and privilege' is to be calculated has not been prescribed in Regulations but the Department of Social Protection has issued guidelines for the information of Deciding Officers. These indicate that deductions from parental income are made for income tax, Pay Related Social Insurance (PRSI), Universal Social Charge (USC), pension levies, income levies, superannuation, private health insurance contributions, union fees and rent/mortgage payments. In addition, a disregard of €600 per week applies in relation to the parents' own needs and one of €30 per week in respect of any other dependent child. The balance of parental income is then assessed at 34%.

Consideration: The Appeals Officer calculated the means attributable to the appellant based on the details of parental income he had provided, in line with the formula outlined above. This indicated net parental income of €1,005.55, less a disregard of €600 for the parents and €30 in respect of one dependent child. The balance, €375.55, was assessed at 34% to give a figure of €127.70. He determined that the appellant's means, at €127.70 per week, were in excess of the maximum rate of Jobseeker's Allowance (€100.00) which may be payable to a young person living with their parents.

Outcome: Appeal disallowed.

2016/26 – Jobseeker's Allowance & Supplementary Welfare Allowance

Summary decision

Question at issue: Eligibility (right to reside)

Background: The appellant had two short periods of employment in Ireland, having worked for seventeen weeks in 2014 and for a further ten weeks in 2015. He had been doing seasonal farm work which finished in August 2015. He made a claim for a basic income payment under the Supplementary Welfare Allowance scheme in November 2015 and a claim for Jobseeker's Allowance in April 2016. Both claims were disallowed on grounds that he was not habitually resident in the State as he was held not to have a right to reside. In an appeal against those decisions, the appellant submitted that he was seeking further employment since finishing work in August 2015 and had remained in Ireland as a jobseeker.

Governing legislation: Section 141(9) of the Social Welfare Consolidation Act 2005 provides that a person must be habitually resident in the State for purposes of establishing entitlement to Jobseeker's Allowance, while Section 192 outlines the same requirement in relation to Supplementary Welfare Allowance. The legislation governing application of the Habitual Residence Condition (HRC) is outlined in Section 246 of the Act and subsection (5) provides that a person who does not have a right to reside in the State may not be regarded as being habitually resident.

The legislation which governs the rights of European citizens to reside in Ireland is outlined in the European Communities (Free Movement of Persons) Regulations 2015 (Statutory Instrument No. 548 of 2015). Article 6(2) prescribes that an EU citizen who has entered the State seeking employment continues to have a right of residence as long as he or she continues to seek employment and to have a realistic prospect of engagement.

Consideration: In determining whether the appellant had established that he had a right to reside, the Appeals Officer considered his presenting circumstances in accordance with Statutory Instrument No. 548 of 2015. Having done so, he noted the appellant's employment in Ireland since he arrived first as a jobseeker: seventeen weeks in 2014 and a further ten weeks in 2015. He concluded that these periods of employment gave him a right of residence in accordance with Article 6(3)(d) of Statutory Instrument No. 548 of 2015. This prescribes that where a person has been employed for a period of less than one year and becomes involuntarily unemployed, he or she may retain a right of residence *as a worker* for six months after the cessation of employment. Accordingly, as the appellant ceased working on a date in August 2015, his right to reside as a worker ended on a date in February 2016, as he had not secured further employment within that six month period.

The Appeals Officer noted that the governing legislation, outlined in Article 17(2) of Statutory Instrument No. 548 of 2015, prescribes that a person whose right to reside derives from Article 6(2) of that Regulation is not entitled to receive assistance under the Social Welfare Acts. He noted further that the only question before him for appeal purposes was whether or not the appellant had established a right to reside and whether he could be held to meet the habitual residence condition for purposes of his social welfare claims. He concluded that it had been established that he had a right to reside in Ireland as a jobseeker in accordance with Article 6(2) of the European Communities (Free Movement of Persons) Regulations 2015 (Statutory Instrument No. 548 of 2015). With regard to the habitual residence condition, he was satisfied that the appellant could be deemed to be habitually resident in accordance with the statutory criteria provided in Section 246(5) of the Social Welfare Consolidation Act 2005. He noted, however, that the governing legislation prescribes that a person whose right to reside derives from Article 6(2) is not entitled to receive assistance under the Social Welfare Acts. He observed, therefore, that it was for the Department of Social Protection to determine whether the other statutory qualifying criteria were met in this case.

Outcome: Appeal allowed.

Further comment: The Appeals Officer observed that where a person's claim to social assistance is disallowed with reference to the habitual residence condition on grounds that they no longer retain a right to reside, the case should be examined on all available facts, prior to appeal, for any indication that they may hold a right to reside on alternative

grounds or in a different capacity. By way of example, he cited the case of an EU jobseeker, as occurs in this case, or a family member of an EU national who has a right to reside. He made reference to the European Court of Justice Judgment in Case C-67/14 Jobcenter Berlin Neukölln v Nazifa, Sonita, Valentina and Valentino Alimanovic, where it was held that where a person relies, for right-of-residence purposes, solely on Article 6(2) of the European Communities (Free Movement of Persons) Regulations 2015 (Statutory Instrument No. 548 of 2015), any entitlement to social assistance may be further assessed by reference to *idem* Article 17(2)(a), which prescribes that a person to whom Article 6(2) applies, shall not be entitled to receive assistance under the Social Welfare Acts.

5.4 Case Studies

Retired, Older People and Other

5.4 Case Studies: Retired, Older People & Other

2016/27 State Pension (Non-Contributory)

Oral hearing

Question at issue: Eligibility (means)

Background: The appellant made a claim for State Pension (Non-Contributory) in 2016, which was refused on grounds that her means were held to have been in excess of the statutory limit. The assessment of means included income derived from a Residence Order Allowance which she was receiving from the United Kingdom in relation to her grandson who was living with her.

Oral hearing: The appellant advised that she had the care of her grandson from the time he was a baby. She outlined the background to the granting of the Residence Order in the United Kingdom, where the Court determined that she was the person with whom he should live. She stated that she had been receiving £189 sterling per week in respect of his maintenance, by way of a Residence Order Allowance, and that this had recently been increased to £222.00 sterling. She said that, when it is converted to euro, she receives between €255.00 and €258.00 each week. She submitted that the allowance is for the maintenance and upkeep of her grandson and that she should not be expected to live on it.

Consideration: The Appeals Officer made reference to the provisions of the Social Welfare Consolidation Act 2005 which specifies under Table 2 of Schedule 3 the payments that are exempted for means test purposes. She noted that this legislation specifies the exemption of payments by the Health Services Executive (HSE) in respect of a child who is 'boarded out', but that it does not specify the exemption of the Residence Order Allowance paid by the United Kingdom. However, she considered that the equality provisions of Regulation (EC) No. 883/2004 fell to be considered in this instance. This Regulation coordinates social security systems across the EU although the design, coverage and qualifying conditions of the various schemes are a matter for the individual Member States. In order that the Regulation would apply, the situation under consideration must not be confined in all respects to a single Member State. In this case, the Appeals Officer noted that the appellant was in receipt of payment in respect of her grandson and that this was being made by a local authority in the United Kingdom. Accordingly, the Appeals Officer was satisfied that the Regulation could be held to apply in this case and noted the following:

Article 5 of the Regulation, paragraph (a) states that:

where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State.

The Appeals Officer considered that the Residence Order Allowance is a payment similar to an Irish Foster Care Allowance in that it is intended to assist a person with the costs of caring for a child placed with them by order of a court. In the circumstances, it was considered that Article 5 of the Regulation should be applied and the payment at issue treated in the same way as a similar Irish payment.

The Appeals Officer then examined the question as to how the allowance should be accounted for in the means test. They noted that Article 4 of the Regulation is a general provision under which persons to whom it applies must *'enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof'*. They concluded that in accounting for the Residence Order Allowance a disregard should be applied which is equivalent to the Irish Foster Allowance payment. In the circumstances, the appeal was allowed on the basis that means should be assessed allowing a disregard up to the level of an Irish Foster Allowance.

Outcome: Appeal allowed.

2016/28 State Pension (Non-Contributory)

Oral hearing

Question at issue: Eligibility (revised decision as to means)

Background: The appellant had retired from farming and had been in receipt of a Farm Retirement Scheme payment after which she had then let the land to her son for £800 (at that time) per annum on a long term lease. This letting had previously been accepted by the Department of Agriculture when she had received a pension under the Farm Retirement Scheme. She applied for a State Pension in 2009 when the Farm Retirement Scheme had ceased and land had been transferred to her son. When her husband applied for pension some years later, it emerged that the couple had retained 42 acres of land. The holding was assessed on a capital value basis and the appellant was held to have weekly means of €170. This assessment was applied retrospectively and an overpayment was assessed in the amount of €64,000.

Oral hearing: The appellant attended with her husband and a legal representative. The Deciding Officer, who attended at the request of the Appeals Officer, read the decision and

sought to clarify the manner in which the means assessment had been revised and applied retrospectively.

On behalf of the appellant, her legal representative outlined the family circumstances. He made reference to the decision to retire from farming and apply for a pension under the Farm Retirement Scheme, the letting of land to her son on a long term lease and, ultimately, the transfer of land and retention of a holding by the appellant and her husband. It was stated that hay and grass from the holding had been sold to neighbouring farmers for €1,000 and it was submitted that this was consistent with the previous letting value of £800 per annum and reflected the couple's limited capacity due to declining health. It was submitted also that it was inappropriate to assess the capital valuation as the land was being used and, apart from the grass/hay being harvested, the couple kept some donkeys on the holding. (The keeping of animals such as donkeys is the minimum stock levels accepted for Single Farm Payment). It was contended that the assessment was incompatible with a holding that generated €1,000 per annum and that no consideration appeared to have been given to the use being made of the land.

The appellant's legal representative asserted that the capital value option was the most punitive assessment to have applied and that other options appeared not to have been explored, such as the actual income or perhaps a letting value. He submitted that there was hardship involved in the case and that the overpayment assessed had been excessive. He noted that the application of Section 302(a) of the Social Welfare Consolidation Act 2005 (which refers essentially to fraud) carries with it a high burden of proof. He submitted that while Section 302(b) had been applied in the appellant's case, the burden of proof was no less stringent when a pensioner was left to face such a substantial overpayment and that it had not been met in this case.

The Deciding Officer acknowledged that he had been aware of the income of €1,000 per annum but stated that he had not known that the land was being used. He referred to the letter issued to the appellant prior to the decision and in line with the requirements of natural justice, advising as to the information which was before him. He stated that the appellant had made no reference to the holding being in use. He referred to the auctioneer's valuation which had been supplied by the appellant's husband, and said he had accepted that valuation for purposes of assessing the capital value of the land. He made reference to repayments and it emerged that the appellant had commenced repaying the overpayment which had been assessed. The Appeals Officer reminded him that no recovery should commence until the appeal was decided.

Consideration: The Appeals Officer considered it significant that the land at issue had been let under a scheme approved by the Department of Agriculture. The Officer was satisfied that the evidence served to establish that the retained holding could not be assessed under

Part 3.1(1) of Schedule 3 of the Social Welfare Consolidation Act 2005 as the appellant and her husband were using the land. He referred to evidence submitted which indicated that the holding generates approximately €1,000 per annum. Allowing €100 for necessary expenses, he assessed the net value at €900 per annum.

The Appeals Officer accepted that overpayments, arising from a revised decision under Section 302(a) or 302(b), must be individually justified and considered that the larger the overpayment the greater the burden of proof and justification was required. It was noted that there was no indication as to why the Deciding Officer had chosen not to apply the discretion available in the legislation under Section 302(b) and that that it had not been shown why a capital value assessment was deemed appropriate in the circumstances of the case. It was considered that insufficient grounds had been provided for the decision. Having regard to the points submitted on her behalf, including the distress caused to the appellant and what the Appeals Officer regarded as the incorrect application of the legislation, it was concluded that the decision should not apply retrospectively and that the revised means should apply from a date in 2014.

Outcome: Appeal allowed.

Further comment: The Appeals Officer noted that recovery of the overpayment had commenced in advance of an appeal decision and observed that this was not in line with the policy of the Department of Social Protection.

2016/29 State Pension (Contributory)

Oral hearing

Question at issue: Date of award

Background: The appellant, who attained pension age in 2013, made a claim for State Pension in 2012. She was deemed eligible for pension at a reduced rate but remained in receipt of the higher rate of Increase for a Qualified Adult paid with her husband's State Pension (Contributory). Subsequently, she applied successfully to have her business partnership with her husband recognised as a joint enterprise under the Commercial Partnership Scheme. As a consequence, outstanding Pay Related Social Insurance (PRSI) contributions at the PRSI Class S rate were deemed to have been payable for the period from 1988 (when social insurance was extended to the self-employed) to the date when she reached pension age. Pension was awarded at the maximum rate, with effect from the date in 2015 when the PRSI liability was discharged. An appeal was made, seeking to have payment backdated to her 66th birthday in 2013, and an oral hearing was requested.

Oral hearing: The appellant was accompanied by a local political representative. The Deciding Officer, who attended at the request of the Appeals Officer, outlined the decision

and confirmed that it had been made with reference to Section 110 of the Social Welfare Consolidation Act 2005. This provides that a pension may not be paid until all PRSI contributions at the Class S rate have been returned.

Her local representative sought to point out that the appellant's PRSI liability arose only after the insurability decision which had resulted in a determination that PRSI contributions were due at the Class S rate for the period at issue. He queried the interpretation of Section 110 and contended that it was a technicality that there was a payment of PRSI outstanding. He asserted that had the correct rate been applied from the outset, there would not have been an issue. He submitted that the appellant was entitled to pension with effect from the date of attaining age 66 years and that arrears of pension were due. In addition, he stated that there was provision in social welfare legislation for backdating claims in certain circumstances and submitted that this should also be examined in the context of the appeal.

Consideration: The Appeals Officer noted that the evidence served to establish that the Department of Social Protection had not known that the appellant was in a business partnership with her husband as this had not been brought to attention until her accountant requested a decision regarding insurability in 2015. He considered that it was open to the appellant to have asserted her status as a self-employed contributor at any time from 1988, when social insurance was extended to the self-employed. He noted that there was no evidence to indicate that the appellant had ever sought to have this matter clarified prior to the request made by her accountant and, had she done so, that the matter could have been resolved well in advance of her 66th birthday. He noted that the Department of Social Protection had initiated an investigation as to her insurability status as soon as it had been requested.

The Appeals Officer noted the legislation outlining the manner in which social insurance contributions are to be assessed for purposes of determining entitlement to State Pension, and the particular provisions which apply in assessing contributions which are made in respect of self-employment. Section 110(2) of the Social Welfare Consolidation Act 2005 provides that where a claim for State Pension is made on or after 6 April 1995, the contribution conditions are not regarded as having been satisfied unless all contributions payable in respect of self-employment have been paid, as follows:

'a State Pension (Contributory) shall not be payable in respect of any period preceding the date on which all self-employment contributions have been paid'.

On the question of backdating the claim, the Appeals Officer noted that the relevant legislation refers to circumstances in which a person fails to make a claim within the prescribed time. It was noted that in the appellant's case there had been no delay in making the claim and the Officer was satisfied that the question of backdating did not arise.

The Appeals Officer observed that the provisions of Section 110(2) are very clear and do not allow for discretion in their implementation, providing as they do that pension may not be awarded on any date earlier than that on which contributions due in respect of self-employment are deemed to have been paid.

Outcome: Appeal disallowed.

2016/30 State Pension (Contributory)

Oral hearing

Question at issue: Rate of pension awarded

Background: The appellant made a claim for State Pension (Contributory). An examination of her social insurance record indicated that she had a total of 694 Pay Related Social Insurance (PRSI) contributions over the period 1970 to 2014, giving her a yearly average of 16 contributions. Accordingly, pension was awarded at a reduced rate, corresponding to a yearly average of 16 contributions. In an appeal made on her behalf, her accountant submitted that she had worked on the family farm although there had not been a formal partnership in place and that there might, therefore, be further contributions due to be applied to her social insurance record. An oral hearing was requested.

Oral hearing: The appellant, her husband and their accountant attended. The Appeals Officer noted that the appellant was seeking to have her social insurance record enhanced by the possible inclusion of contributions at the PRSI Class S (self-employed) rate. The Officer pointed out, however, that this was a question which would have to be addressed to the Scope Section in the Department of Social Protection as this is the area where decisions as to insurability are made. The Officer made reference also to the possibility that any alteration of the appellant's social insurance record in recognition of her labour on the family farm could have consequences for the State Pension (Contributory) already in payment to her husband. Their accountant indicated that he grasped the implications of this. The Appeals Officer advised that should the appellant wish to be considered retrospectively as a self-employed person for PRSI purposes, she could seek a formal determination from Scope Section.

In concluding the hearing, a question was raised as to whether the appellant might qualify as a qualified adult with an increase payable on husband's pension. However, the accountant indicated that she had a private pension which would put her income over the qualifying limit. A question was raised also concerning public sector employment.

Consideration: The Appeals Officer sought clarification subsequently as to whether the appellant had been in public sector employment and paying social insurance at the modified

rate of PRSI. This applies to employees who had entered the public sector prior to 1995. The Officer was advised that the appellant had been paying contributions at the modified rate and noted that the consequence of this was that question of her self-employment during the same period was moot as she had been subject to the modified rate of PRSI and was excluded from social insurance as a self-employed person. It was noted that she had a yearly average of 16 contributions and was unlikely to be able to enhance this record. It was concluded that the decision was correct and that the manner in which the appellant's entitlement to a State Pension (Contributory) had been calculated was in line with the provisions of social welfare legislation.

Outcome: Appeal disallowed.

Further comment: The Appeals Officer observed that cases such as this should be addressed to the Scope Section in the Department of Social Protection before being dealt with on appeal as the question of determining self-employment is a matter for that Section in the first instance.

5.5 Case Studies

Insurability of Employment

5.5 Case Studies: Insurability of Employment

2016/31 Insurability

Oral hearing

Question at issue: Appropriate rate of PRSI payable

Background: From a date in 2015 until the date of their marriage later that year, the appellant was employed by her husband, a self-employed veterinary surgeon in a veterinary practice, and paid Pay Related Social Insurance (PRSI) at the standard Class A rate. That employment was terminated with effect from the date before their marriage, a Form P45 confirming cessation of the employment from the same date was issued and the appellant's employment contract was terminated. She continued to work at the practice and paid social insurance contributions at the PRSI Class S (self-employed) rate. In connection with a claim for Maternity Benefit made some time later, her insurability status was examined. She was deemed to have continued as an employee after the date of marriage and the employment was held to be an excepted employment with reference to Part 2, Schedule 1 of the Social Welfare Consolidation Act 2005 and no longer insurable under the Social Welfare Acts. The legislative provisions in question apply to employment in the service of the spouse or civil partner of the employed person.

Oral hearing: The appellant and her husband attended. They outlined the background to the change which they asserted occurred in relation to the appellant's work in the veterinary practice following their marriage in 2015. They submitted that the appellant assisted with and participated in the business, performing ancillary and supportive tasks to those performed by her husband. They made reference to administrative tasks, including book-keeping, the maintenance of business records and customer accounts, processing payments and issuing of receipts. They stated that the appellant also assisted with the provision of grooming services and pharmaceutical treatment for small animals. They advised that she had made returns to Revenue in respect of income from self-employment and they confirmed that she had paid PRSI at the Class S rate in the period at issue.

Consideration: The Appeals Officer made reference to the appellant's husband having been a self-employed contributor for social insurance purposes. It was noted that her former position as an employee had been terminated with effect from a specified date, as evidenced by the issue of a Form P45 which confirmed the cessation of employment. It was noted also the nature and extent of the work undertaken by the appellant, with effect from the relevant date. The Appeals Officer was satisfied that from that date, the appellant had been performing ancillary tasks to those performed by her husband as a self-employed contributor in the course of his veterinary enterprise and that she was subject to PRSI at the

Class S rate. Accordingly, she was deemed to be a self-employed contributor as is prescribed for the purpose of entitlement to Maternity Benefit.

Outcome: Appeal allowed.

2016/32 Insurability

Oral hearing

Question at issue: Appropriate rate of PRSI payable

Background: The worker had requested a decision as to his insurability status after his employment with the company ceased. The nature of the employment was investigated and a Social Welfare Inspector reported the details of his interviews with the worker and the sole trader who had engaged his services. The Deciding Officer noted disagreement between the parties in regard to holiday/sick pay, hours worked, control/direction/dismissal and whether personal service was required. He regarded the provision of labour only and the payment of a fixed monthly wage to be significant factors. He concluded that the worker had been employed under a contract of service and was insurable, therefore, under the Social Welfare Acts for all benefits and pensions at PRSI Class A where his weekly earnings exceeded the statutory threshold (€38.00 per week). The sole trader made an appeal, submitting that he had taken the worker on as a contractor and not as an employee.

Oral hearing: The appellant trader attended, as well as the worker, the Social Welfare Inspector and the Deciding Officer at the request of the Appeals Officer. Details of the investigation and decision were outlined.

The appellant confirmed that he was a sole trader, trading as a consulting company which provided services to industry. He accepted that the worker had been paid a fixed monthly rate but asserted that he came and went as he pleased and did not hold to fixed hours. He stated that he had always identified the worker as a contractor when making introductions. He advised that he had taken him on to do sales and marketing and the agreement had been to pay him a specified amount per month plus a 10% commission on sales. He pointed out that the worker did not have a Personal Public Service (PPS) number or an Irish bank account and had wanted to be paid in cash, and he asserted that he had been reluctant to register for tax purposes.

The worker advised that he had been engaged as an employee in the United Kingdom and worked for some ten years prior to meeting the appellant who had offered him a position. He stated that he had understood his role would be that of an office manager while the appellant generated work and expanded the operation. He reported that when one of the office staff was out sick he had opened and closed the premises and he denied that he had

worked from home. He accepted that he had been paid in cash and was informed that he was being treated as a contractor. He pointed out that he was still resident in Ireland and had obtained employment following his departure from the business. He conceded that he had only made contact with Revenue and the Department of Social Protection following his departure from the company. He clarified details of payments received and advised that no commission was paid as he had not sold anything.

The appellant trader asserted that he had been clear in outlining the terms of the contract, advising that the worker would not be paying PRSI and would be responsible for his own tax affairs. He referred to the worker's failure to obtain a PPS number when he came to Ireland to work and submitted that this was the first thing he should have done had he regarded himself as an employee. He stated that he saw nothing unusual in continuing to pay the worker in cash as he had believed that he had been paying a contractor and he stated that he had retained proof of payments. He made reference to the word 'dismissal', and stated that he took this to mean the same as termination of contract.

Consideration: The Appeals Officer made reference to the *Code of Practice for determining the Employment and Self-Employment status of Individuals*, drawn up in 2001 and updated in 2007 and again in 2010. In this case, it was noted that the worker had been paid a fixed monthly rate and that he had provided labour in return for payment. The Officer was satisfied that a mutuality of obligation existed whereby the appellant trader offered work to the worker who agreed to provide the service in return for payment. It was noted that there was a dispute as to the actual working hours but the evidence indicated that the worker did at least work regular core hours. The Officer did not accept the contention that he came and went as he pleased.

The Appeals Officer noted the appellant's assertion that the worker did not have a PPS number or an Irish bank account but had wanted to be paid in cash and had been reluctant to register for tax purposes. The Officer accepted this as relevant but noted that it was not determinative of the issue. The Officer did not accept the appellant's explanation that the word 'dismissal' could have been used loosely to mean termination of contract. While the worker had not requested a P60 or a P45 on leaving the business, he had approached the local Intreo Office of the Department of Social Protection and sought to rectify his PRSI status. It was noted also that the worker had a history of insurable employment and considered it significant that he had taken up insurable employment following his departure from the company.

The Appeals Officer considered that the worker had not been exposed to financial risk by having to bear the cost of making good faulty or substandard work carried out under the contract, and it was noted that he had received a fixed regular rate of pay. The worker had not assumed responsibility for investment and management in the enterprise and had not

had the opportunity to profit from sound management in the scheduling and performance of engagements and tasks. The Officer noted that the evidence was that the worker had been working on his own initiative and had some control over what was done and how. The Officer regarded these factors as being consistent with a managerial position within the business.

The Appeals Officer noted that the contract had been between the appellant trader and the worker and that the worker was not free to hire other people to do, or assist in, the work which it had been agreed would be undertaken. It was noted that the materials for the job, in this case a laptop, had been provided by the appellant trader, that the work was done at the appellant trader's business premises, and that the worker did not have public liability insurance and that this did not arise as he was working on the trader's premises. The Appeals Officer concluded that the worker was employed under a contract of service by the nominated company and was therefore insurable under the Social Welfare Acts for all benefits and pensions at PRSI Class A where the weekly earnings exceeded the threshold.

Outcome: Appeal disallowed.

5.6 Case Studies

Section 318 Reviews

5.6 Case Studies: Section 318 Reviews

Reviews of Appeals Officers' decisions in accordance with Section 318 of the Social Welfare Consolidation Act 2005

Introduction

Provisions of Section 318: Section 318 of the Social Welfare Consolidation Act 2005 allows the Chief Appeals Officer to revise the decision of an Appeals Officer in certain circumstances and provides as follows:

The Chief Appeals Officer may, at any time, revise any decision of an appeals officer, where it appears to the Chief Appeals Officer that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts.

This section of my Report includes a summarised account of a sample of the reviews carried out by me in 2016. In each case, and in accordance with the provisions of Section 318, I emphasise that my role is a revising one and is not another avenue of appeal. In considering requests for a review under Section 318 I must consider whether the Appeals Officer may be held to have erred in relation to the law or the facts.

Like the previous case studies, the reviews included in this part of my Report represent an abridged account of the salient features in each case and all details have been anonymised.

2016/318/33 Carer's Allowance

Section 318 review

Question at issue: Full-time care and attention required

Grounds for review: It was asserted that the Appeals Officer had provided little if any information with respect to the evidential weight attributed to the evidence in the case and that his reasoning and findings were not compatible with the facts and the law. It was submitted, essentially, that the evidence pointed to a finding that full-time care and attention was required although the Appeals Officer's decision was to disallow the appeal.

Background: The claim in this case was made in respect of the care of a person, in their late 50s, who had a diagnosis of recurrent psychotic depression. It was reported that she had been attending a psychiatrist since 2009, when she presented with a severe depressive episode with associated psychotic symptoms and severe anxiety. Her psychiatrist provided an account of her responses to treatment and subsequent relapses, as well as an account of what were described as three different powerful medications which she had been prescribed. The appellant made a claim for Carer's Allowance in 2015 in respect of care he was providing and this was refused as the Deciding Officer considered that the person being cared for was not so invalided or disabled as to require full-time care and attention, in line with the provisions of the relevant legislation. The Appeals Officer held an oral hearing and concluded subsequently that while it had been shown that support was required, it had not been established that there was a need for full-time care and attention as defined in social welfare legislation.

Review: The relevant legislation is Section 179(4) of the Social Welfare Consolidation Act 2005, which provides that a relevant person shall be regarded as requiring full-time care and attention where –

(a) the person has such a disability that he or she requires from another person—

(i) continual supervision and frequent assistance throughout the day in connection with normal bodily functions, or

(ii) continual supervision in order to avoid danger to himself or herself,

(b) the person has such a disability that he or she is likely to require full-time care and attention for at least 12 consecutive months, and

(c) the nature and extent of the person's disability has been certified in the prescribed manner by a registered medical practitioner.

In the course of my review, I considered all of the evidence which was before the Appeals Officer including the following medical evidence:

- Medical report which formed part of the Carer's Allowance claim form – completed by a nominated psychiatrist,
- Letter (specified date in 2015), from the same psychiatrist.

The question at issue was whether or not the evidence which was before the Appeals Officer supported the appellant's contention that the person being cared for required full-time care and attention within the meaning of the governing social welfare legislation. In considering this matter, I examined the question as to whether she might be held to require continual supervision in order to avoid danger to herself, in line with Section 179(4)(a)(ii) of the Social Welfare Consolidation Act 2005. It was accepted that she did not require supervision and assistance with normal bodily functions, as outlined in Section 179(4)(a)(i).

I noted that the evidence which was before the Appeals Officer comprised the medical evidence outlined above, as well as the appellant's written submission and his testimony at oral hearing. The salient points made in relation to the care requirements of the person in question were as follows:

- She is unable to do any cooking as she forgets she is cooking and lets food burn.
- She falls asleep most days and has fallen on to the floor on a number of occasions.
- She puts items away and becomes distressed thinking they are lost.
- She often thinks other people are talking about her and can get distressed.
- She will not go anywhere unaccompanied.
- She will not answer the phone or open post.
- She does not really manage any tasks independently.
- When the appellant must be away, he arranges for someone to stay in the house as she would not be safe left on her own.

In the request for a review of the Appeals Officer's decision, it was submitted that while the medical evidence did not provide definitive proof that the person being cared for required full-time care and attention, it included sufficient information to indicate that the need for full-time care was quite probable. It was asserted that when this was examined together with the appellant's testimony, it established the likelihood that she could not function safely without continual supervision by the appellant.

Having reviewed the evidence in the case, I took the view that the Appeals Officer did not give sufficient consideration or weight to the question as to the level of supervision required in order that the person being cared for would avoid danger to herself, in the context of her diagnosis and having due regard to the appellant's account of the difficulties she encountered in relation to the activities of daily living. I considered that the evidence presented supported the contention that she required continual supervision in order to avoid danger to herself in accordance with Section 179(4)(a)(ii) and that the extent of the care which the appellant had outlined was, therefore, consistent with full-time care and attention as defined in the legislation. For that reason I decided to revise the Appeals Officer's decision and to allow the appeal.

Outcome: Decision revised and appeal allowed.

2016/318/34 Carer's Allowance

Section 318 review

Question at issue: Overpayment assessed

Grounds for Review: A review was sought on the basis that the Appeals Officer had not given sufficient weight to certain facts relating to the appeal, as follows:

- The appellant had relied on an opinion of a social worker engaged with Tusla regarding her continued entitlement,
- No consideration had been given to the exemption of 13 weeks provided for in the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (No. 142 of 2007),
- In relation to the recovery of any amounts due, the appellant was prepared to make repayments as specified.

Background: The appellant was awarded Carer's Allowance in September 2009 in respect of care she was providing for her son. In 2015, a Social Welfare Inspector called to her home and it emerged at this meeting that her son was no longer residing there having been admitted to a children's residential unit at the end of 2013. As a result, a Deciding Officer, relying on Section 302(b) of the Social Welfare Consolidation Act 2005, decided that the appellant was not entitled to Carer's Allowance with effect from the relevant date. In addition, she was held not to have had an entitlement to a Respite Care Grant paid in 2014. (This was re-named Carer's Support Grant in 2016.) Following an oral hearing, an Appeals Officer disallowed the appeal.

Review: I examined each of the three grounds separately.

Information provided in error by Tusla: The contention here is essentially that the appellant's reliance on information provided by Tusla should be equated to the provisions of Article 246(1) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007) which provides that:

The amount of an overpayment to be repaid may be reduced or cancelled where the overpayment arose because of –

*(a) a failure by the Department to act within a reasonable period on information which was provided by or on behalf of the person concerned, or
(b) an error by the Department,*

and the person concerned could not reasonably have been expected to be aware that a failure or error had occurred.

It cannot be said that the Department acted in error in this case and I can find no grounds on which I can equate the provisions of Article 246(1) to the provision of information provided by Tusla. There is an onus on all recipients of social welfare payments to notify the Department of any change in their circumstances that may impact on their entitlement or continued entitlement. It was open to the appellant to contact the Department if she had any enquiries relating to her payment or her continued entitlement to Carer's Allowance. The onus was not on Tusla to contact the Department.

From my review of the evidence, I note that some weeks before the appellant's son was admitted to the residential unit, a Deciding Officer of the Carer's Allowance section had written to her and advised that a review of her entitlement had been undertaken. This letter outlined in some detail the events which may affect entitlement to Carer's Allowance, including circumstances where full-time care and attention is no longer being provided or where the carer or the person being cared for is admitted to hospital or to residential care. For the reasons outlined I found no grounds to revise the decision of the Appeals Officer on the basis of this contention.

Consideration of exemption for 13 weeks: It was submitted that the report of the oral hearing indicated that the Appeals Office did not consider if the exemption provided for by Article 136(a) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007) applied in the appellant's case. Article 136(a) provides that a carer may continue to be regarded as providing full-time care and attention to a relevant person where –

(a) he or she would qualify for payment of an allowance but for the fact that either the carer or the relevant person is undergoing medical or other treatment of a temporary nature in an institution for a period of not longer than 13 weeks, or ...

I noted that the Appeals Officer's report of the oral hearing made reference to the appellant's account of the arrangements put in place for her son, stating that it had been intended initially that he would return home on 3 to 4 days per week. However, his behaviour had become increasingly violent and it was agreed that he would remain in the residential unit from late in 2013. From my review of the evidence, it was clear that the care arrangement was voluntary and that both the appellant and her husband were actively involved in a shared parenting plan and visited their son on a daily basis. However, I am satisfied that the care arrangement, while voluntary, was not temporary in the sense provided for by Article 136(a). I therefore found no grounds to revise the decision of the Appeals Officer on the basis of this contention.

Recovery of Overpayment: As outlined by the Appeals Officer, the recovery of the overpayment does not come within the remit of the Social Welfare Appeals Office and is a matter between the Department of Social Protection and the appellant.

For the reasons outlined above, I was satisfied that the Appeals Officer did not err in fact or law and consequently I declined to revise the decision in this case.

Outcome: Request for revision denied.

2016/318/35 Jobseeker's Allowance

Section 318 review

Question at issue: Habitual residence

Grounds for Review: A review was requested on the grounds that the Appeals Officer erred in finding that the appellant was not habitually resident in the State. The terms of the request specifically referred me to a statement in the Appeals Officer's decision that the appellant's family, including his wife, live in [country], so that his centre of interest could be deemed to be stronger there. It was submitted that the Appeals Officer erred by giving undue weight to this as if it were fact.

Background: The appellant came to Ireland in 2005. He applied for Jobseeker's Allowance in October 2015 having been outside of the State for a period of 3 months and in that connection he also completed an application form entitled Habitual Residence Condition (HRC1). By a decision in November 2015 and relying on Sections 149(1) and 246 of the Social Welfare Consolidation 2005, a Deciding Officer of the Department advised him that he did not satisfy the habitual residence condition for the following reasons: length and continuity

of residence in the State does not provide for HRC approval – three absences in two years; centre of interest stronger elsewhere – got married on last visit to [country], close family members abroad – wife, mother, brother and sister; residency not continuous; no established employment record in the State; no apparent means of financial support: one of the conditions of temporary permission to remain in the State is that persons make every effort to gain employment and not be a burden on the State. By a decision in March 2016, an Appeals Officer disallowed the appeal. Having examined the evidence with reference to the five factors to be considered in determining if the appellant met the habitual residence condition, the Appeals Officer outlined the reasons for the decision as follows:

The appellant was refused as he was absent for three periods in three years, his centre of interest is stronger elsewhere, his close family members are abroad, his residency is not continuous, and he has no established employment record or apparent means of support.

Review: Habitual residence is a question of fact depending on the circumstances of each case, decided in accordance with the statutory provisions set out in Section 246 of the Social Welfare Consolidation Act 2005. Section 246(4) sets out the following five factors to be taken into account when deciding whether a person is habitually resident in the State:

- (a) the length and continuity of residence in the State or in any other particular country,*
- (b) the length and purpose of any absence from the State,*
- (c) the nature and pattern of the person's employment,*
- (d) the person's main centre of interest, and*
- (e) the future intentions of the person concerned as they appear from all the circumstances.*

From my review, I noted that the appellant had been living in Ireland since 2005. He is a [specified] national and returned to [country] for the following periods: July-September 2013, July- September 2014 and July-October 2015. It appeared, but this was not clear from the evidence, that he had been in receipt of Jobseeker's Allowance and did not encounter any difficulties with re-claiming until his return to Ireland in October 2015. The main reason cited by the Deciding Officer for the disallowance related to length and continuity of residence in the State, in particular the fact that the appellant returned to [country] on three occasions and, on his third visit, got married to a person who had no stated plans to come to Ireland. I noted also an incorrect reference to a '2 year presumption clause' in the Department's appeal submission of January 2016.

The Appeals Officer in disallowing the appeal expressed the view that the appellant's centre of interest could be stronger in [country] and found that his centre of interest had shifted there. On behalf of the appellant, it was submitted that he had lived in the State for a period of 12 years and that the only change in his position was that he got married. It was stated that he had made many friends and acquaintances in Ireland and had integrated fully in his local community and that his intentions were to remain indefinitely. In support of his request for a review the following was submitted:

- Letter from the Irish Naturalisation and Immigration Services (INIS) informing the appellant that the Minister for Justice and Equality had decided to renew his temporary permission to remain in the State, on a Stamp 4 basis, for three years until 2019. Certain conditions were attached to that permission.
- Letter from his local Education and Training Board (ETB) confirming that he had been accepted on a Computer Basics (Equal Skills) Course.
- A number of documents as evidence that he had been actively and genuinely seeking employment in the State.

It seems to me that the overwhelming reason in finding that the appellant was not habitually resident in the State was that both the Deciding Officer and the Appeals Officer considered that his marriage in his home country had the effect of shifting his centre of interest from Ireland where he had lived since 2005, to the country where his wife and immediate family members reside. It was stated that he married in 2012, whereas the Deciding Officer and Appeals Officer were of the view, based on information he provided, that he married during his most recent visit in 2015. The appellant merely stated that the third time he went to [country] he got married. The certificate relating to the marriage is somewhat ambiguous – a date in 2015 is shown but it is not clear if this is the date of issue or the date of marriage. In any event, the date does not coincide with his absence in 2015.

It appeared to me that, despite the lack of clarity surrounding the date of marriage and certain other aspects of the information available, the only change in the appellant's position since he came to Ireland in 2005 was that he got married and his wife resides in [country]. While accepting that he has a centre of interest there, this does not of itself preclude him from satisfying the habitual residence condition in Ireland. From my review of the evidence, I find that insufficient weight was given to the fact that he had been resident in Ireland since 2005 and I note that he provided evidence of his efforts to find employment and that he was given a place on an ETB course.

While accepting that the appellant's marriage is a significant event which is relevant in the consideration of whether he is habitually resident in Ireland or not, I am satisfied that its significance is far outweighed by the length and continuity of residence in Ireland since 2005 – some 11 years.

I am satisfied that the Appeals Officer gave disproportionate weight to the appellant's marriage and the fact that his wife resides outside the State and did not fully consider all the other factors in determining if he could be deemed to be habitually resident in the State at the date of his claim in October 2015. In the circumstances I revised the decision of the Appeals Officer and allowed the appeal.

Outcome: Decision revised and appeal allowed.

2016/318/36 One-Parent Family Payment

Section 318 review

Question at issue: Means and cohabitation

Grounds for review: The appellant denied being in a relationship with the nominated person while receiving One-Parent Family Payment and she alleged errors of fact, as follows:

- The information provided by the Social Welfare Inspector was incorrect,
- The Appeals Officer did not conduct the appeal hearing in a fair manner.

Background: The appellant had been awarded One-Parent Family Payment in 2002 when she had one qualified child. In the context of a review, it emerged that she had another child for whom she had not sought payment. An investigation indicated that she was registered as the joint owner of a property since 2001. Ultimately, it was held that she had failed to show that her means did not exceed the statutory qualifying limit and that she had been in a cohabiting relationship with a nominated person who was the joint owner of the property at issue. Accordingly, payment was terminated. A revised decision was applied with effect from the date of claim and an overpayment of some €135,000 was assessed.

The Appeal: The Appeals Officer indicated that she considered the evidence advanced by the Department to be more convincing and concluded that the appellant had not been eligible for receipt of One-Parent Family Payment from the date of claim on grounds that she had failed to show that her weekly means were below the appropriate limit as she had failed to declare her joint ownership of a property with a nominated person. In addition, the

Appeals Officer held that the appellant had failed to show that she was not cohabiting with that person. Accordingly, the appeal was disallowed.

Review: I examined the means and cohabitation aspects of the decision separately.

Means: I noted the appellant's assertion that she had not been asked to show that her means were below the specified limit and could see no evidence to suggest that such a request had been made but not complied with. It was not clear to me what the import of her interest in the property was in relation to her claim for One-Parent Family Payment and this was not detailed at all by the decision-makers. There was no exploration as to what legal and practical control the appellant could exercise such that she could sell or derive a profit from the property. It is clear that if she lived at the property and was cohabiting with the nominated person, as upheld by the Appeals Officer, then the question as to means did not arise as she would have been disqualified for One-Parent Family Payment in such circumstances.

Cohabitation: In a situation where an existing payment is being reviewed, the onus is on the Department to make a satisfactory case for a disallowance. In this particular case, given the lengthy period at issue and the significant financial consequences of a revised decision for the appellant, an evidence-based case was required, indicating that it was highly probable that the appellant was residing with the nominated person during the entire period in question in '*an intimate and committed relationship*', as provided for in the governing legislation. In putting together such a case, the Department must, at a minimum, have followed its own *Guidelines on Investigating Cohabitation*. Those Guidelines list the criteria by which cohabitation may be assessed and I examined the evidence in this case with reference to each of those criteria, as follows:

Duration of the relationship: The appellant was clear in her contention that she had not cohabited with the nominated person in the period at issue. The only evidence to the contrary was circumstantial.

Basis on which the couple live together: The appellant jointly owned a property since 2001 and her car, registered at her parents' address, had been observed outside that property on five occasions in 2014. The Appeals Officer noted that there was no other evidence and that the appellant had stated that she allowed the nominated person to take her car as it had a baby seat.

Degree of financial interdependence: The nominated person paid some maintenance in respect of the children. Apart from this, there was no evidence pointing to any degree of financial interdependence.

Degree and nature of any financial arrangements between the adults: The appellant and the nominated person were joint owners of a house. There was no evidence of any other financial arrangements between them.

Dependent children: There were two dependent children.

Care and support for children of the other adult: This did not arise.

Degree to which the adults present themselves as a couple: There was no evidence.

In this case, the appellant had been in receipt of a payment for many years and this was withdrawn following a review. In the circumstances, the burden of proof was clearly on the Department to establish that cohabitation existed and not on the appellant to prove the contrary. I note that the Appeals Officer considered that the evidence advanced by the Department was more credible and convincing than that put forward by the appellant and that the Officer concluded the appellant had failed to show that she was not cohabiting with the nominated person. This was clearly an error of law. In misdirecting themselves on this point, I could only conclude that the Appeals Officer had placed an unreasonable burden of proof on the appellant such as to render the appeal hearing unfair. The Department, in its guidelines on cohabitation, accepts that *'where an entitlement may be disallowed, limited or withdrawn, the onus is on the Department to establish that cohabitation exists'*. I am of the view that the Department did not meet the requirements set out in its own guidelines to establish that cohabitation existed and that the Appeals Officer did not give sufficient weight to this fact and to the other evidence provided by the appellant, as outlined above, in support of her position.

Revised decisions and overpayments: I addressed the legislative provisions relating to revised decisions outlined in Chapter 1 of Part 10 of the Social Welfare Consolidation Act 2005. The *'effect of revised decisions by Deciding Officers'* is clearly laid out in Section 302 and prescribes in mandatory terms when and in what circumstances a revised decision is to take effect. There are potentially significant consequences flowing from these provisions, such as in the appellant's case where an overpayment of some €135,000 had been raised. The Department's *Guidelines on Revised Decisions and Their Date of Effect* state that a *decision should include reference to:*

- *The relevant provision in the legislation under which payment is being allowed, disallowed, or reduced;*
- *The sub-section of Section 302 of the Social Welfare Consolidation Act 2005 being applied in determining the effective date of the revised decision.*

The Department's *Guidelines on Overpayment Recovery* state that:

An overpayment is created where a Deciding Officer or a Designated Person makes a revised decision under Section 302 or Section 325 of the Social Welfare Consolidation Act 2005 and the effect of the decision is to reduce a person's entitlement retrospectively.

I could find no evidence to indicate that the revised decision was made with reference to any of the provisions in Section 302, nor could I see where the appellant had been advised of the amount of the overpayment. This combination of failures is an error in law and in my view a serious denial of the appellant's right to natural justice and fair procedures. The Appeals Officer did not direct her attention to the provisions and the obligations arising from this section in their consideration of the appeal. In light of all of the above considerations I concluded that the Appeals Officer had erred in law and, in the circumstances, revised the decision.

Outcome: Decision revised and appeal allowed.

2016/318/37 Disablement Benefit (OIB)

Section 318 review

Question at issue: Accident/incident or cumulative effect

Grounds for review: The appellant sought a review on grounds that a serious breach of health and safety provisions had not been addressed fully by the Appeals Officer. He asserted that his employer must take responsibility for his medical condition as there had been a failure to comply with the Safety, Health and Welfare at Work Act 2005. In addition, he submitted that it did not make sense to refuse his claim on grounds that his condition was not caused by one specific incident. He contended that although the incident occurred over a number of weeks and was cumulative in nature, it was still an incident that would not have occurred if the proper health and safety procedures had been followed.

Background: The question at issue was the appellant's entitlement to Disablement Benefit under the Occupational Injuries Benefit scheme following an alleged accident at work during a period of two months in 2015, but with particular reference to an incident on a specified date in the course of his work as a maintenance supervisor in a nursing home. The Deciding Officer had rejected his claim on grounds that his incapacity for work was not caused by an accident (one specific incident) arising out of and in the course of employment. The Appeals Officer concluded that his condition could not be attributed to a specific incident but that the nature of the work in which he had been engaged over a number of weeks brought an existing problem to the fore. Accordingly, he held that his incapacity could not be regarded as an occupational accident for purposes of the governing legislation.

Review: The legislation governing entitlement to Disablement Benefit under the Occupational Injuries scheme is contained in Chapter 13, Part 2 of the Social Welfare Consolidation Act 2005 and the Social Welfare (Consolidated Occupational Injuries) Regulations 2007 (S.I. No. 102 of 2007). As outlined by the Appeals Officer in his report of the oral hearing and in subsequent correspondence, discussion at the oral hearing had been wide ranging and included views expressed about the health and safety aspects of the work carried out by the appellant. The question before the Appeals Officer, however, was whether the appellant's condition could be attributed to one specific incident arising out of and in the course of employment in line with the provisions of the governing legislation. It was not the role of the Appeals Officer to determine whether the accident/incident would or would not have happened if appropriate health and safety procedures had been followed.

I reviewed the Appeals Officer's report of the oral hearing and found that the question as to whether the appellant's condition could be attributed to one specific incident, arising out of and in the course of employment, had been fully explored. I concluded that his injury could not be attributed to a specific incident but rather that it had resulted from the cumulative effect of heavy physical work over a number of weeks which brought an existing problem to the fore. I did not find that the Appeals Officer had erred in fact or law and, in the circumstances, declined to revise the decision.

Outcome: Request for revision denied.

Further comment: I noted that the Appeals Officer's decision had been supported by an extensive report of the oral hearing, including an outline of the evidence considered and the reasons for the decision. As that report had not been included in the notification that issued to the appellant initially, I issued a copy for his information.

2016/318/38 Child Benefit

Section 318 review

Question at issue: Claim made under EC Regulations

Grounds for Review: A review was requested on the following grounds:

- the Department failed to consider their obligation to pay Child Benefit under Regulation (EC) No. 883/2004, and
- in relation to backdating, the provisions of Article 60(1) of Regulation (EC) No. 987/2009 should have been applied.

Background: In 2010, the appellant made a claim for Child Benefit in respect of his daughter who lives with her mother in another EU country. In 2011, he was advised that his claim under EU Regulations was disallowed as his ex-wife had not replied to correspondence. His appeal against that decision was disallowed as he was deemed not to be the qualified person to receive Child Benefit.

Review: I examined each of the two contentions separately.

Failure to consider the obligation to pay Child Benefit under Regulation (EC) No. 883/2004: Social security arrangements for migrant workers and their families are coordinated across the EU in accordance with Regulation (EC) No. 883/2004 and its implementing Regulation (EC) No. 987/2009. For purposes of these Regulations, Child Benefit is classified as a ‘family benefit’ and the rules for the coordination of family benefits are provided in Title III, Chapter 7, Articles 67-69(a) of Regulation No. 883/2004 and Title III, Chapter VI, Articles 58-61 of the implementing Regulation. Article 67 provides that *‘a person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his/her family members residing in another Member State, as if they were residing in the former Member State. However, a pensioner shall be entitled to family benefits in accordance with the legislation of the Member State competent for his/her pension.’* Article 68 goes on to set out priority rules in the event of overlapping entitlements from more than one Member State.

Residence in a Member State other than the competent State (Article 67 of 883/2004): When a person is insured under the legislation of one Member State while members of their family reside in another Member State, benefits are to be provided by the competent institution according to the legislation that the former State applies as if the family members were residing in its territory. In addition, a pensioner is entitled to family benefits in accordance with the legislation of the Member State competent for their pension.

Priority rules (Article 68 of No. 883/2004): When rights are established under the same period for the same family members under several legislations, the following priority rules apply. Rights available on the basis of an activity as an employed or self-employed person are given the first priority, followed by rights available on the basis of receipt of a pension, and rights obtained on the basis of residence are given the third priority. In the case of benefits payable by more than one Member State on the same basis, the order of the priority of rights is established by the following subsidiary criteria:

- a) In the case of rights available on the basis of activity as an employed or self-employed person, the place of residence of the children takes precedence, provided that there is such activity. Additionally, the highest amount of the

benefits provided for by the conflicting legislations may also take precedence where appropriate;

- b) In the case of rights available on the basis of a pension, the place of residence of the children takes precedence provided that a pension is payable under its legislation. Additionally, the longest period of insurance or residence under the conflicting legislations may also take precedence where appropriate;
- c) In the case of rights available on the basis of residence: the place of residence of the children takes precedence.

In the appellant's case, it was established that he was employed in Ireland and that his ex-wife was employed in another EU country, where the child resided. In those circumstances, and in line with the priority rules set out in Article 68 of Regulation No. 883/2004, the country where his ex-wife was living was responsible for paying family benefits by priority and Ireland was liable to pay any additional amount under its legislation such that the highest amount of the benefits under the national legislations are provided – commonly referred to as a differential supplement or top-up.

From my review of the evidence, I noted that the Department had followed the procedures in place to establish any entitlement to Child Benefit in Ireland and in doing so applied the rules contained in Regulation 883/2004 on the coordination of family benefits. Having established, based on the appellant's employment in Ireland, that there was a possible entitlement to Child Benefit from Ireland, the Department applied national rules, as it is entitled to do, relating to the payment of Child Benefit. The legislation governing Child Benefit is contained in Part 4 of the Social Welfare Consolidation Act 2005 and Regulations made thereunder. Under Section 219 of the Act, a child is a qualified child for Child Benefit if s/he is under 16 years or aged 16, 17 or 18 years and either in full-time education or incapable of self-support by reason of long-term physical or mental incapacity. With the exception of the child being required to be ordinarily resident in the State, this section applied to the appellant's claim.

Section 220 of the Act goes on to define a qualified person and provides as follows:

(1) Subject to subsection (3), a person with whom a qualified child normally resides shall be qualified for child benefit in respect of that child and is in this Part referred to as "a qualified person."

(2) For the purpose of subsection (1)—

(a) the Minister may make rules for determining with whom a qualified child shall be regarded as normally residing,

(b) a qualified child shall not be regarded as normally residing with more than one person, and

(c) where a qualified child is resident in an institution and contributions are made towards the cost of his or her maintenance in that institution, that child shall be regarded as normally residing with the person with whom in accordance with the rules made under paragraph (a) he or she would be determined to be normally residing if he or she were not resident in an institution but, where the person with whom the child would thus be regarded as normally residing has abandoned or deserted the child, the child shall be regarded as normally residing with the head of the household of which he or she would normally be a member if he or she were not resident in an institution.

(3) A qualified person, other than a person to whom section 219(2)(a), (b) or (c) applies, shall not be qualified for child benefit under this section unless he or she is habitually resident in the State.

The provisions which apply in determining with whom a qualified child shall be regarded as normally residing are set out in the Social Welfare (Consolidated Claims, Payments and Control Regulations) 2007 (S.I. No. 142 of 2007). Article 159 provides as follows:

Normal residence

159. For the purposes of Part 4, the person with whom a qualified child shall be regarded as normally residing shall be determined in accordance with the following Rules:

1. Subject to Rule 2, a qualified child, who is resident with more than one of the following persons, his or her –

*mother,
step-mother,
father,
step-father,*

shall be regarded as normally residing with the person first so mentioned and with no other person.

2. Where the persons referred to in Rule 1 are resident in separate households, the qualified child shall be regarded as normally residing with the person with whom he or she resides for the majority of the time.

3. A qualified child who is resident with one only of the persons mentioned in Rule 1, shall be regarded as normally residing with that person and with no other person provided that, where that person is the father and he is cohabiting with a woman as

husband and wife, this Rule shall not apply in respect of the child where the father so elects and, on such an election, the child shall be regarded as normally residing with the woman with whom the father is cohabiting.

4. Subject to Rule 8, a qualified child, who is resident elsewhere than with a parent or a step-parent and whose mother is alive, shall, where his or her mother is entitled to his or her custody whether solely or jointly with any other person, be regarded as normally residing with his or her mother and with no other person.

5. Subject to Rule 8, a qualified child, who is resident elsewhere than with a parent or step-parent and whose father is alive, shall, where his or her father is entitled to his or her custody whether solely or jointly with any person other than his or her mother, be regarded as normally residing with his or her father and with no other person.

6. A qualified child, to whom none of the foregoing Rules apply, shall be regarded as normally residing with the woman who has care and charge of him or her in the household of which he or she is normally a member and with no other person provided that where there is no such woman in that household he or she shall be regarded as normally residing with the head of that household and with no other person.

7. Where the normal residence of a qualified child falls to be determined under Rule 4 or 5 and the person with whom he or she would thus be regarded as normally residing has abandoned or deserted him or her or has failed to contribute to his or her support, the relevant Rule shall cease to apply in respect of that child and the person with whom the child shall be regarded as normally residing shall be determined in accordance with Rule 6.

8. Where normal residence would fall to be decided under Rule 4 or 5 above and where a qualified child has been placed in foster care, or with a relative by the Health Service Executive under section 36 of the Child Care Act 1991 (No. 17 of 1991), and has been in such care for a continuous period of 6 months he or she shall, on the 1st day of the following month or the 1st day of the 6th month following the first day of October 2007, whichever is the later, be regarded as normally residing with the woman who has care and charge of him or her in the household of which he or she is normally a member and with no other person provided that where there is no such woman in that household he or she shall be regarded as normally residing with the head of that household and with no other person.

Based on the information available, I considered that it was clear that for the purposes of these rules, the appellant's daughter was normally residing with her mother and, in those circumstances, any differential supplement or top-up was payable to her in accordance with the legislation outlined above. It was for this reason that the Department wrote to her in December 2010 and again in March 2011, advising that a claim for Child Benefit had been received from her ex-husband in respect of their daughter. The correspondence also outlined that Child Benefit is normally paid to the parent who is residing with the child and

invited her to complete a form in order to enable the Department to process and pay the claim. She was invited to opt for payment of Child Benefit to be made directly to her or to authorise payment be made to another person. In reply, she stated that as she was bringing up the child in a country where the authorities were paying family allowances, she did not see why she should authorise payment be made to the child's father. She did not address the option of having Child Benefit paid directly to her.

This was the position when the matter came before an Appeals Officer in September 2012. The fact is that in the absence of information from the child's mother, it was not open to the Appeals Officer to allow the appeal and the Department had indicated that it had not been possible for that reason to process and pay the claim.

Backdating and the application of Article 60(1) of Regulation (EC) 987 of 2009:

Article 60 of Regulation (EC) No. 987/2009 lays down the procedure for applying Articles 67 and 68 of Regulation (EC) No. 883/2004. Article 60(1) provides that:

The application for family benefits shall be addressed to the competent institution. For the purposes of applying Articles 67 and 68 of the basic Regulation, the situation of the whole family shall be taken into account as if all the persons involved were subject to the legislation of the Member State concerned and residing there, in particular as regards a person's entitlement to claim such benefits. Where a person entitled to claim the benefits does not exercise his right, an application for family benefits submitted by the other parent, a person treated as a parent, or a person or institution acting as guardian of the child or children, shall be taken into account by the competent institution of the Member State whose legislation is applicable.

In the request for a review, it was submitted that the appellant had failed to make a claim for Child Benefit within 12 months of date of first entitlement, that being when he first took up employment in Ireland in 2007. It was contended that as his ex-wife had submitted a claim in the EU country where she lived, this earlier claim should be taken as a claim made by him in line with Article 60(1). However, there is no evidence that his ex-wife submitted a claim in November 2007. Article 60(1) would cover a situation where, for example, either parent submitted a claim in error in 2007 to the authorities of the other EU country when the appellant had taken up employment in Ireland. It seemed to me, however, that there was no such application for family benefits that comes within the ambit of Article 60(1) and consequently there is no basis for backdating his claim to 2007 based on this contention.

For the reasons outlined, I did not find that the Appeals Officer erred in fact or law and in the circumstances I declined to revise the decision of the Appeals Officer.

Outcome: Request for revision denied.

Further comment: It is clear that where the legislation of a number of EU Member States must be coordinated to allow for payment, a high level of cooperation is required between the institutions of the Member States involved and the persons who make application for benefits. In this case, it appears that the appellant may not have fully understood the situation. For that reason, and in light of the request for a review, I asked that the Department re-examine its correspondence with the child's mother to ascertain whether the claim can be processed.

