Social Welfare Appeals Office

Annual Report 2015

Report by the Chief Appeals Officer on the activities of the Social Welfare Appeals Office in 2015

Social Welfare Appeals Office

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SOCIAL WELFARE
APPEALS OFFICE

Ms. Joan Burton T.D.
Tánaiste and Minister for Social Protection
Áras Mhic Dhiarmada
Dublin 1

April 2016

Dear Tánaiste,

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 2015.

Yours sincerely,

Joan Gordon
Chief Appeals Officer

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Contents

Foreword by the Chief Appeals Officer 7

Chapter 1: The Appeal Journey 10

Chapter 2: Statistical Trends 13

Chapter 3: Social Welfare Appeals Office 2015 30

Chapter 4: Insurability of Employment 39

Chapter 5: Case Studies – An Introduction 46

5.1 Case Studies: Children & Family 49

5.2 Case Studies: Working Age – Illness, Disability & Carers 62

5.3 Case Studies: Working Age – Income Supports 71

5.4 Case Studies: Retired, Older People & Other 82

5.5 Case Studies: Estate Cases 90

5.6 Case Studies: Insurability of Employment 95

Foreword

by the Chief Appeals Officer

Foreword 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 first annual report on the activities of the Social Welfare Appeals Office for the period 1 January to 31 December 2015 pursuant to section 308 (1) of the Social Welfare Consolidation Act, 2005.

While 2015 was a challenging year, with the retirement of a number of experienced Appeals Officers, I am nonetheless pleased to report that my office made significant progress in the course of the year in relation to the processing and finalisation of social welfare appeals. I am pleased to report a reduction from 9,628 to 8,697, in the number of appeals on hand at the end of 2015 when compared to the end of 2014.

2015 saw a significant number of appeals office colleagues leaving on retirement and I would like to wish them well in their retirement. I would also like to welcome colleagues who have recently joined the office and I look forward to working with them in the coming year. In the course of 2015, 24,475 appeals were received in my office. This compares to 26,069 in 2014. The number of appeals finalised in 2015 was 25,406 compared to 31,211 in 2014.

The average processing time for all appeals finalised during 2015 was 20.9 weeks. This compares to 24.2 weeks in 2014. The average time taken to process appeals which required an oral hearing was 25.5 weeks, (28.6 weeks in 2014) and the corresponding time to process appeals determined on a summary basis was 18.1 weeks (21.1 weeks in 2014).

The processing times for appeals covers all phases of the appeal process, including some elements which are outside the direct control of my office. In order to illustrate this process in a little more detail I have decided to provide a short overview of the 'journey' of an appeal in Chapter 1 of this report.

This report sets out a range of statistical data relating to 2015. 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 ability to work independently is one of the greatest strengths of my office but it also brings with it a huge responsibility to be fair to all parties interested in the outcome of an appeal. It is for this reason that, while improvements in appeals processing times will

remain a priority for my office in 2016 and while the speed at which appeals are determined is of course vital to appellants, the need to ensure quality and consistency in decision making will continue to be a priority in the year ahead.

The work outlined in this report is indicative of the diverse range of issues which come to the attention of Appeals Officers on appeal. In a slight departure from recent years, I have decided to provide sample case studies from across the range of programmes and schemes that come within the remit of my office, covering children and families, people of working age, retired and older people and employers.

I have dedicated one chapter to the issue of insurability of employment relating to the question of whether a person is employed under a *contract of service* or a *contract for services.* While the cases we decide may be small in number relative to the overall number of appeals we receive, the issues involved tend to be complex in nature and the outcome of appeals in this area is of major significance to the parties involved and to the Department.

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

This report and more detail on individual cases can be accessed on our website www.socialwelfareappeals.ie

Joan Gordon

Chief Appeals Officer

April 2016

Chapter 1:

The Appeal Journey

Chapter 1: The Appeal Journey

Many of the procedures which impact on appeal processing times are underpinned by the Social Welfare (Appeals) Regulations (Statutory Instrument No. 108 of 1998 (as amended)) and are in place in order to ensure that every appellant is given the opportunity to make their case and have all of their evidence fully considered by an Appeals Officer.

When an appeal is received in the appeals office it is registered and the processing time is measured from that date. As required by regulations, the appeals office then notifies the Department that the appeal has been lodged. That notification requires that any file or documents relevant to the appeal is forwarded to the appeals office and also seeks a submission from the Deciding Officer/Designated Person on the extent to which the facts advanced by the appellant are admitted or disputed.

At this point in the process, the Department reviews the original decision to decide whether it should be revised in favour of the appellant. In some cases, this may involve a further review of new evidence by a Medical Assessor or a Social Welfare Inspector. All this activity takes time, but it also affords the appellant many opportunities to strengthen their case along the way. In a significant number of cases it saves time as the appeal can be resolved without the need for it to be considered by an Appeals Officer. By way of example, 20.5% (5,200) of the 25,406 appeals finalised during 2015 were revised by the Deciding Officer/Designated Person **in favour of the appellant** during this stage of the process.

Where the decision is not revised by the Department, the file with the appeal submission is returned to the appeals office and added to the files awaiting assignment to an Appeals Officer. Given the volume of appeals and in order to be fair to all appellants, the assignment of appeals is generally dealt with in chronological order. The only exceptions to this are Supplementary Welfare Allowance (including Rent Supplement) appeals which are prioritised for attention as soon as the file and submission is received from the Department.

When a case is assigned to an Appeals Officer, he or she will examine the documentary evidence presented and consider if the appeal can be properly and fairly decided on a summary basis. Where an oral hearing of the case is required, it is estimated that the logistics involved can add another 6 weeks to the process as the hearing venue must be scheduled and the appellant is generally given 2-3 weeks' advance notice. At any time during this process, up to and including the oral hearing of the appeal, an appellant can submit additional information, which affords them the opportunity to strengthen their case.

Oral hearings are convened in the appeals office headquarters buildings in D'Olier Street in Dublin and at a range of venues countrywide. An Appeals Officer will generally schedule a number of days appeal hearings together in the one location in order to make most

effective use of time and resources and s/he may hear up to 6 appeals in a day. On completion of the hearing 'run' the Appeals Officer will consider the evidence presented and decide and record the appeal decisions. The appellant will be notified of the outcome of the appeal and the file will be returned to the Department for implementation of the decision.

The quasi-judicial nature of the appeals system means that there are inevitable time lags involved but every effort is made to keep these to a minimum and appeal processing times are kept under constant review. However, the system is flexible and fair and the time taken is proportionate to the complexity of many of the issues under appeal which require a high level of judgment and often involve conflicting evidence and/or complex legal questions.

Chapter 2:

Statistical Trends

Chapter 2: Statistical Trends

Our main statistical data for 2015 is set out in commentary form below and in the "Workflow Chart" and tables which follow.

Appeals Received in 2015

In 2015, the Office received 24,475 appeals. While this represents a reduction of 1,594 on the 26,069 appeals received in 2014, it is significantly higher than the number of appeals being received prior to 2009.

The majority of the reduction relates to appeals in the working age, income and employment support schemes. Appeals in relation to Jobseeker's Allowance (payments) reduced by 21.2%, while Jobseeker's Allowance (Means) reduced by 17.9%.

There were also reductions in receipt of appeals in respect of Invalidity Pension, down 27.8%; Domiciliary Care Allowance down 3.3%; and Illness Benefit appeals, down 1.9%. Appeals of Disability Allowance increased by 15.9%, while Carer's Allowance appeals increased by 9.7%. The number of Supplementary Welfare Allowance appeals received reduced by 26.4% when compared to 2014.

Clarifications in 2015

In addition to the 24,475 appeals registered in 2015, a further 4,628 appeals were received where it appeared to us that the reason for the adverse decision may not have been fully understood by the appellant. In those circumstances, the letter of appeal was referred to the relevant scheme area of the Department requesting that the decision be clarified for the appellant. We informed the appellant accordingly and advised that if they were still dissatisfied with the decision following the Department's clarification, they could then appeal the decision to my office.

During 2015, only 904 (19.5%) of the 4,628 cases identified as requiring clarification were subsequently registered as formal appeals. This is considered to be a very practical way of dealing with such appeals so as to avoid unnecessarily invoking the full appeals process.

Workload for 2015

The workload of 34,103 for 2015 was arrived at by adding the 24,475 appeals received to the 9,628 appeals on hand at the beginning of the year.

Appeals Finalised in 2015

We finalised 25,406 appeals in 2015.

The appeals finalised were broken down between:

- Appeal Officers (74.4%): 18,913 were finalised by Appeal Officers either summarily or by way of oral hearings (equivalent figure in 2014 was 24,081or 77.2%);
- Revised Decisions (20.5%): 5,200 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 (5,306 or 17.0% in 2014); and
- Withdrawn (5.1%): 1,293 were withdrawn or otherwise not pursued by the appellant (1,824 or 5.8% in 2014).

Appeals Outcomes in 2015

The outcome of the 25,406 appeals finalised in 2015 was broken down as follows:

- Favourable (58.8%): 14,946 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 (56.5% in 2014);
- Unfavourable (36.1%): 9,167 of the appeals finalised were disallowed (37.7% in 2014); and
- Withdrawn (5.1%): As previously indicated, 1,293 of the appeals finalised were withdrawn or otherwise not pursued by the appellant (5.8% in 2014).

Determinations by Appeal Officers in 2015

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

- **Oral Hearings:** (36.4%) 6,886 of the 18,913 appeals finalised by Appeals Officers in 2015 were dealt with by way of oral hearings. 4,444 (64.5%) of these had a favourable outcome. In 2014, 64.7% of the 7,523 cases dealt with by way of oral hearings had a favourable outcome.
- **Summary Decisions:** (63.6%): 12,027 of the appeals finalised were dealt with by way of summary decisions. 5,302 (44.1%) of these had a favourable outcome. In 2014, 45.1% of appeals finalised by way of summary decision had a favourable outcome.

Processing Times in 2015

During 2015, the average time taken to process all appeals was 20.9 weeks (24.2 weeks in 2014).

Of the 20.9 weeks overall average

- 11.1 weeks was attributable to work in progress in the Department (13.4 weeks in 2014)
- 0.3 weeks was due to responses awaited from appellants (0.4 weeks in 2014)
- 9.5 weeks was attributable to ongoing processes within the Social Welfare Appeals Office (10.5 weeks in 2014).

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 2015 was 18.1 weeks (21.1 weeks in 2014), while the average time to process an oral hearing was 25.5 weeks (28.6 weeks in 2014). 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.

See also Chapter 1 – the Appeal Journey.

Appeals by Gender in 2015

A breakdown of appeals received in 2015 by gender revealed that 42.6% were from men and 57.4% from women. The corresponding breakdown for 2014 was 44.6% and 55.4% respectively. In terms of favourable outcomes in 2015, 64.2% of men and 61.4% of women benefited.

Statistical tables:

Table 1: **Appeals received and finalised 2015**

Table 2: **Appeals received 2009 – 2015**

Table 3: **Outcome of appeals by category 2015**

Table 4: **Appeals in progress at 31 December 2009 - 2015**

Table 5: **Appeals statistics 1994 - 2015**

Table 6: **Appeals processing times by scheme 2015**

Table 7: **Appeals outstanding at 31 December 2015**

Social Welfare Appeals Workflow Chart 2015

(Corresponding figures for 2014 are in brackets)

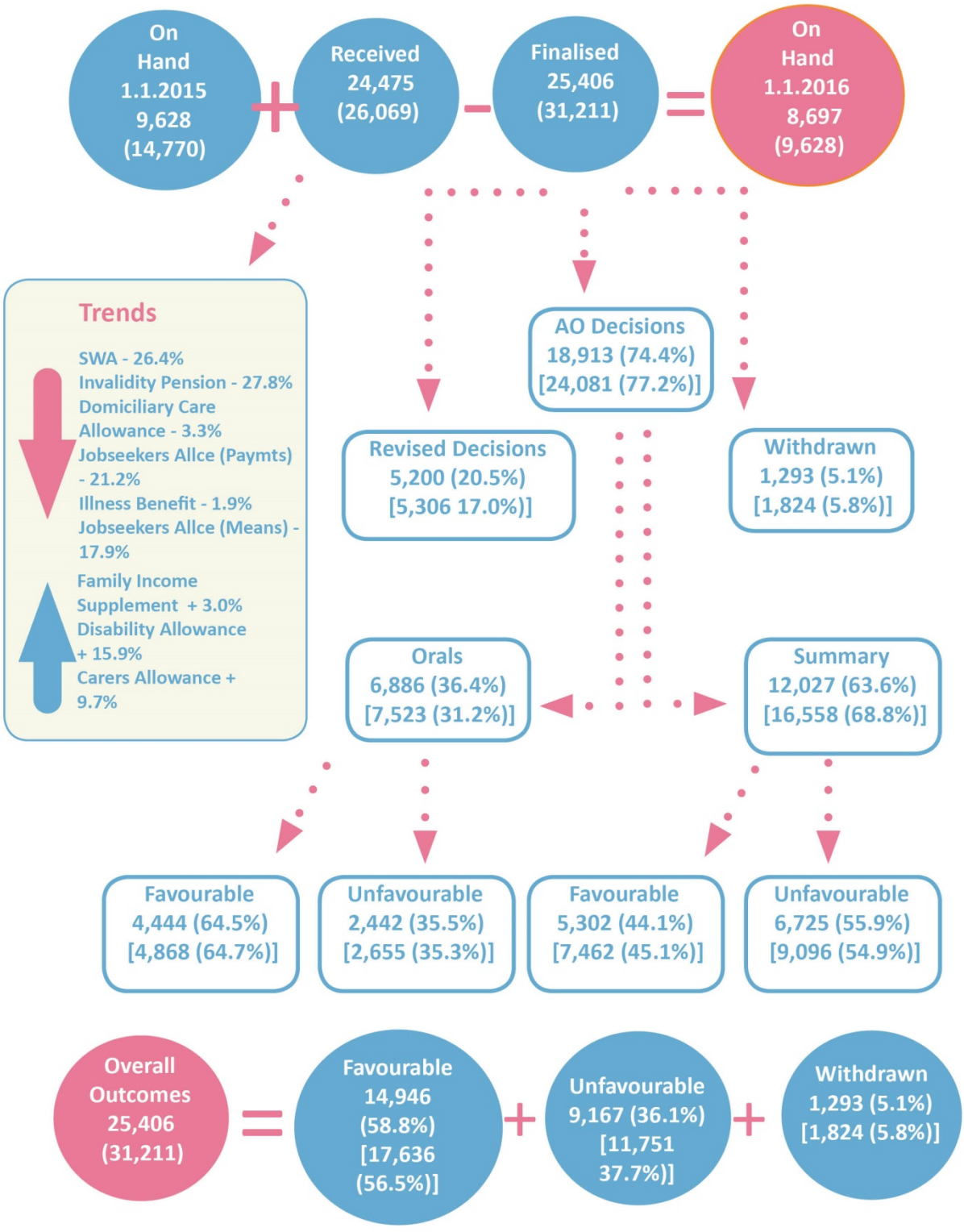


Table 1: Appeals Received and finalised 2015

	In progress 01-Jan-15	Receipts	Decided	Revised Decision	Withdrawn	In progress 31-Dec-15
PENSIONS						
State Pension (Non-Contributory)	134	348	233	54	30	165
State Pension (Contributory)	97	264	154	48	10	149
State Pension (Transition)	9	3	8	0	0	4
Widows', Widowers' Pension (Contributory)	15	40	29	1	1	24
Death Benefit	1	1	1	0	0	1
Bereavement Grant	17	6	20	3	0	0
TOTAL PENSIONS	**273**	**662**	**445**	**106**	**41**	**343**
WORKING AGE INCOME & EMPLOYMENT SUPPORTS						
Jobseeker's Allowance	812	2,058	1,624	260	175	811
Jobseeker's Transitional	0	34	7	8	6	13
Jobseeker's Allowance (Means)	1,029	2,174	1,728	299	229	947
One Parent Family Payment	231	368	268	84	57	190
Widow's Widower's Pension (Non-Contributory)	9	25	16	8	1	9
Deserted Wife's Allowance	1	1	1	1	0	0
Supplementary Welfare Allowance	877	2,125	1,780	373	177	672
Farm Assist	102	201	134	29	22	118
Pre-Retirement Allowance	2	0	1	0	0	1
Jobseeker's Benefit	243	735	515	120	53	290
Deserted Wife's Benefit	5	19	16	1	1	6
Maternity Benefit	6	71	31	19	1	26
Homemaker's	1	0	1	0	0	0
Treatment Benefits	0	3	1	0	0	2
Partial Capacity Benefit	21	42	26	7	5	25
TOTAL WORKING AGE – INCOME & EMPLOYMENT SUPPORTS	**3.339**	**7,856**	**6,149**	**1,209**	**727**	**3,110**
ILLNESS, DISABILITY AND CARERS						
Disability Allowance	1,944	6,435	5,220	1,443	77	1,639
Blind Pension	6	22	16	1	1	10
Carer's Allowance	1,434	3,188	2,862	579	50	1,131
Domiciliary Care Allowance	462	1,258	837	313	8	562
Respite Care Grant	71	124	91	43	4	57
Illness Benefit	351	1,204	426	508	286	335
Injury Benefit	9	65	37	9	3	25
Invalidity Pension	938	1,857	1,573	511	37	674
Disablement Benefit	164	347	305	43	3	160
Incapacity Supplement	16	12	11	6	0	11
Medical Care	14	4	0	3	14	1
Carer's Benefit	32	93	57	52	1	15
TOTAL - ILLNESS, DISABILITY AND CARERS	**5,441**	**14,609**	**11,435**	**3,511**	**484**	**4,620**

Table 1: Appeals Received and finalised 2015 *(Cont'd)*

	In progress 01-Jan-15	Receipts	Decided	Revised Decision	Withdrawn	In progress 31-Dec-15
CHILDREN						
Child Benefit	273	552	449	172	11	193
Family Income Supplement	159	447	237	167	10	192
Back To Work Family Dividend	0	64	15	9	3	37
Guardian's Payment (Non-Contributory)	9	18	16	4	0	7
Guardian's Payment (Contributory)	17	49	36	11	1	18
Widowed Parent Grant	1	10	7	0	0	4
TOTAL - CHILDREN	**459**	**1,140**	**760**	**363**	**25**	**451**
Insurability of Employment	99	156	91	5	11	148
Liable Relatives	15	26	22	4	5	10
Recoverable Benefits & Assistance	2	26	11	2	0	15
TOTAL – ALL APPEALS	**9,628**	**24,475**	**18,913**	**5,200**	**1,293**	**8,697**

Table 2: Appeals received 2009 – 2015

	2009	2010	2011	2012	2013	2014	2015
PENSIONS							
State Pension (Non-Contributory)	319	356	317	231	279	323	348
State Pension (Contributory)	88	256	106	128	136	205	264
State Pension (Transition)	22	7	29	43	38	13	3
Widow's, Widower's Pension (Contributory)	15	20	17	30	40	49	40
Death Benefit	1	-	-	-	-	1	1
Bereavement Grant	46	58	66	71	78	63	6
TOTAL PENSIONS	**491**	**697**	**535**	**503**	**571**	**654**	**662**
WORKING AGE INCOME & EMPLOYMENT SUPPORTS							
Jobseeker's Allowance - Payments	3,179	5,506	3,404	3,050	2,644	2,610	2,058
Jobseeker's Transitional	-	-	-	-	-	-	34
Jobseeker's Allowance - Means	3,615	4,050	3,465	3,240	2,923	2,648	2,174
One Parent Family Payment	805	1,109	1,055	938	612	573	368
Widow's, Widower's Pension (Non-Contributory)	19	12	29	39	30	24	25
Deserted Wife's Allowance	-	-	4	1	2	2	1
Supplementary Welfare Allowance	789	1,020	3,129	5,445	4,084	2,889	2,125
Farm Assist	137	244	220	271	286	214	201
Pre-Retirement Allowance	3	2	1	-	-	3	0
Jobseeker's Benefit	1,354	1,307	1,286	1,289	882	845	735
Deserted Wife's Benefit	5	14	20	8	11	7	19
Maternity Benefit	11	29	42	29	26	19	71
Adoptive Benefit	2	2	2	6	-	1	0
Homemaker's	-	1	-	1	1	0	0
Treatment Benefits	10	8	3	3	5	0	3
Partial Capacity Benefit	-	-	-	67	70	33	42
TOTAL WORKING AGE - INCOME & EMPLOYMENT SUPPORTS	**9.929**	**13,304**	**12,660**	**14,387**	**11,576**	**9,868**	**7,856**
ILLNESS, DISABILITY AND CARERS							
Disability Allowance	4,696	4,840	5,472	6,223	6,836	5,554	6,435
Blind Pension	21	14	21	27	34	19	22
Carer's Allowance	1,977	3,025	2,199	2,676	3,869	2,907	3,188
Domiciliary Care Allowance	836	1,858	2,401	2,186	1,688	1,301	1,258
Respite Care Grant	262	162	303	278	176	133	124
Illness Benefit	4,945	5,471	3,657	2,647	1,761	1,227	1,204
Injury Benefit	37	23	16	13	21	9	65
Invalidity Pension	642	1,024	2,285	4,765	4,501	2,571	1,857
Disablement Benefit	263	342	263	409	346	385	347
Medical Care	42	21	5	6	3	28	4
Incapacity Supplement	8	15	6	21	14	1	12
Carer's Benefit	121	182	160	183	115	121	93
TOTAL - ILLNESS, DISABILITY AND CARERS	**13,850**	**16.977**	**16,788**	**19,434**	**19,364**	**14,256**	**14,609**

Table 2: Appeals received 2009 – 2015 *(Cont'd)*

	2009	2010	2011	2012	2013	2014	2015
CHILDREN							
Child Benefit	1,361	1,051	824	675	663	659	552
Family Income Supplement	170	227	258	301	421	434	447
Back To Work Family Dividend	-	-	-	-	-	-	64
Guardian's Payment (Non-Contributory)	23	6	13	14	11	22	18
Guardian's Payment (Contributory)	11	28	31	46	42	42	49
Widowed Parent Grant	1	3	7	6	11	8	10
TOTAL - CHILDREN	**1,566**	**1,315**	**1,133**	**1,042**	**1,148**	**1,165**	**1,140**
OTHER							
Insurability Of Employment	102	123	99	79	95	2	156
Liable Relative	25	16	26	39	23	33	26
Recoverable Benefits & Assistance	-	-	-	-	-	2	26
TOTAL – ALL APPEALS	**25,963**	**32,432**	**31,241**	**35,484**	**32,777**	**26,069**	**24,475**

Table 3: Outcome of Appeals by category 2015

	Allowed	Partially Allowed	Revised DO Decision	Disallowed	Withdrawn	Total
PENSIONS						
State Pension (Non-Contributory)	61 *19.2%*	27 *8.5%*	54 *17.0%*	145 *45.7%*	30 *9.5%*	317
State Pension (Contributory	36 *17.0%*	5 *2.4%*	48 *22.6%*	113 *53.3%*	10 *4.7%*	212
State Pension (Transition)	0 *0.0%*	2 *25.0%*	0 *0.0%*	6 *75.0%*	0 *0.0%*	8
Widow's/Widower's Pension (Contributory)	7 *22.6%*	1 *3.2%*	1 *3.2%*	21 *67.7%*	1 *3.2%*	31
Death Benefit	0 *0.0%*	0 *0.0%*	0 *0.0%*	1 *100.0%*	0 *0.0%*	1
Bereavement Grant	1 *4.3%*	0 *0%*	3 *13.0%*	19 *82.6%*	0 *0.0%*	23
TOTAL PENSIONS	**105**	**35**	**106**	**305**	**41**	**592**
WORKING AGE INCOME/ EMPLOYMENT SUPPORTS						
Jobseeker's Allowance - Payments	536 *26.0%*	116 *5.6%*	260 *12.6%*	972 *47.2%*	175 *8.5%*	2,059
Jobseeker's Transitional	1 *4.8%*	1 *4.8%*	8 *38.1%*	5 *23.8%*	6 *28.6%*	21
Jobseeker's Allowance - Means	284 *12.6%*	108 *4.8%*	299 *13.3%*	1,336 *59.2%*	229 *10.2%*	2,256
One Parent Family Payment	112 *27.4%*	18 *4.4%*	84 *20.5%*	138 *33.7%*	57 *13.9%*	409
Widow's/Widower's Pension (Non-Contributory	4 *16.0%*	1 *4.0%*	8 32.0%	11 44.0%	1 4.0%	25
Deserted Wife's Allowance	1 50.0%	0 0.0%	1 *50.0%*	0 *0.0%*	0 0.0%	2
Supplementary Welfare Allowance	634 27.2%	77 3.3%	373 16.0%	1,069 45.9%	177 *7.6%*	2,330
Farm Assist	30 *16.2%*	15 *8.1%*	29 *15.7%*	89 *48.1%*	22 *11.9%*	185
Pre-Retirement Allowance	0 0%	1 100.0%	0 00.0%	0 00.0%	0 00.0%	1
Jobseeker's Benefit	160 *23.3%*	38 *5.5%*	120 *17.4%*	317 *46.1%*	53 *7.7%*	688
Deserted Wife's Benefit	7 *38.9%*	7 *38.9%*	1 *5.6%*	2 *11.1%*	1 *5.6%*	18
Maternity Benefit	3 *5.9%*	1 *2.0%*	19 *37.3%*	27 *52.9%*	1 *2.0%*	51
Homemaker's	0 *0%*	0 *0%*	0 *0%*	1 *100.0%*	0 *0%*	1
Treatment Benefits	0 *0%*	0 *0%*	0 *0%*	1 *100.0%*	0 *0%*	1
Partial Capacity Benefit	13 *34.2%*	0 *0.0%*	7 *18.4%*	13 *34.2%*	5 *13.2%*	38
TOTAL WORKING AGE – NCOME/EMPLOYMENT SUPPORTS	**1,785**	**383**	**1,209**	**3,981**	**727**	**8,085**

Table 3: Outcome of Appeals by category 2015 *(Cont'd)*

	Allowed	Partially Allowed	Revised DO Decision	Disallowed	Withdrawn	Total
ILLNESS, DISABILITY AND CARERS						
Disability Allowance	3,384 *50.2%*	85 *1.3%*	1,443 *21.4%*	1,751 *26.0%*	77 *1.1%*	6,740
Blind Pension	6 *33.3%*	0 *0.0%*	1 *5.6%*	10 *55.6%*	1 *5.6%*	18
Carer's Allowance	1,352 *38.7%*	155 *4.4%*	579 *16.6%*	1,355 *38.8%*	50 *1.4%*	3,491
Domiciliary Care Allowance	571 49.3%	40 *3.5%*	313 *27.0%*	226 *19.5%*	8 0.7%	1,158
Respite Care Allowance	33 *23.9%*	2 1.4%	43 *31.2%*	56 *40.6%*	4 *2.9%*	138
Illness Benefit	199 *16.3%*	16 *1.3%*	508 *41.6%*	211 *17.3%*	286 *23.4%*	1,220
Injury Benefit	11 *22.4%*	0 *0.0%*	9 *18.4%*	26 *53.1%*	3 *6.1%*	49
Invalidity Pension	1,135 *53.5%*	17 *0.8%*	511 *24.1%*	421 *19.8%*	37 *1.7%*	2,121
Disablement Benefit	105 *29.9%*	20 *5.7%*	43 *12.3%*	180 *51.3%*	3 *0.9%*	351
Incapacity Supplement	7 *41.2%*	0 *00.0%*	6 *35.3%*	4 *23.5%*	0 *00.0%*	17
Medical Care	0 *00.0%*	0 *0.0%*	3 *17.6%*	0 *00.0%*	14 *82.4%*	17
Carer's Benefit	25 *22.7%*	5 *4.5%*	52 *47.3%*	27 *24.5%*	1 *0.9%*	110
TOTAL – ILLNESS, DISABILITY AND CARERS	**6,828**	**340**	**3,511**	**4,267**	**484**	**15,430**
CHILDREN						
Child Benefit	83 *13.1%*	35 *5.5%*	172 *27.2%*	331 *52.4%*	11 *1.7%*	632
Family Income Supplement	88 *21.3%*	8 *1.9%*	167 *40.3%*	141 *34.1%*	10 *2.4%*	414
Back To Work Family Dividend	1 *3.7%*	0 *00.0%*	9 *33.3%*	14 *51.9%*	3 *11.1%*	27
Guardian's Payment (Non-Contributory)	10 *50.0%*	1 *5.0%*	4 20.0%	5 *25.0%*	0 *00.0%*	20
Guardian's Payment (Contributory)	15 *31.3%*	3 *6.3%*	11 *22.9%*	18 *37.5%*	1 *2.1%*	48
Widowed Parent Grant	0 *00.0%*	0 *00.0%*	0 *00.0%*	7 100.0%	0 *0%*	7
TOTAL – CHILDREN	**197**	**47**	**363**	**516**	**25**	**1,148**
OTHER						
Insurability	20 *18.7%*	0 *00.0%*	5 *4.7%*	71 *66.4%*	11 *10.3%*	107
Liable Relative's	0 *00.0%*	0 *00.0%*	4 *12.9%*	22 *71.0%*	5 *16.1%*	31
Recoverable Benefits & Assistance	4 *30.8%*	2 *15.4%*	2 *15.4%*	5 *38.5%*	0 *00.0%*	13
TOTAL APPEALS	**8,939**	**807**	**5,200**	**9,167**	**1,293**	**25,406**

Table 4: Appeals in progress at 31 December 2009 – 2015

	2009	2010	2011	2012	2013	2014	2015
PENSIONS							
State Pension (Non-Contributory)	169	230	165	127	143	134	165
State Pension (Contributory)	62	110	91	106	74	97	149
State Pension (Transition)	9	11	22	39	26	9	4
Widow's, Widower's Pension (Contributory)	9	14	14	20	25	15	24
Death Benefit	1	0	0	0	0	1	1
Bereavement Grant	19	30	35	41	40	17	0
TOTAL PENSIONS	**269**	**395**	**327**	**333**	**308**	**273**	**343**
WORKING AGE INCOME/EMPLOYMENT SUPPORTS							
Jobseeker's Allowance - Payments	2,095	3,318	1,498	1,247	1,180	812	811
Jobseeker's Transitional	-	-	-	-	-	-	13
Jobseeker's Allowance - Means	2,269	2,496	1,866	1,522	1,453	1,029	947
One Parent Family Payment	469	819	618	575	411	231	190
Widow's' /Widower's Pension (Non-Contributory)	12	13	18	23	16	9	9
Deserted Wife's Allowance	0	0	4	1	1	1	-
Supplementary Welfare Allowance	140	343	1,833	1,955	1,221	877	672
Farm Assist	98	163	121	161	176	102	118
Pre-Retirement Allowance	0	1	2	1	1	2	1
Jobseeker's Benefit	667	766	583	519	391	243	290
Deserted Wife's Benefit	3	14	12	10	3	5	6
Maternity Benefit	6	21	20	21	14	6	26
Adoptive Benefit	2	2	2	1	0	0	-
Homemaker's	0	0	0	1	1	1	-
Treatment Benefits	6	4	1	1	2	0	2
Partial Capacity Benefit	-	-	-	67	81	21	25
TOTAL WORKING AGE - INCOME & EMPLOYMENT SUPPORTS	**5,767**	**7,960**	**6,578**	**6,105**	**4,951**	**3,339**	**3,110**
ILLNESS, DISABILITY AND CARERS							
Disability Allowance	2,846	3,046	2,958	4.030	3.121	1,944	1,639
Blind Pension	8	7	14	8	13	6	10
Carer's Allowance	1,339	2,145	1,147	1,766	1,913	1,434	1,131
Domiciliary Care Allowance	776	1,386	1,385	1,113	736	462	562
Respite Care Grant	185	114	166	153	94	71	57
Illness Benefit	2.420	2.658	2,021	1,460	683	351	335
Injury Benefit	21	18	9	11	15	9	25
Invalidity Pension	467	612	1,582	4,356	1,889	938	674
Disablement Benefit	169	334	278	254	186	164	160
Medical Care	43	49	27	25	18	14	1
Incapacity Supplement	7	15	14	23	16	16	11
Carer's Benefit	74	73	61	75	45	32	15
TOTAL - ILLNESS, DISABILITY AND CARERS	**8,355**	**10,457**	**9,662**	**13,274**	**8,729**	**5,441**	**4,620**

Table 4: Appeals in progress at 31 December 2009 – 2015 *(Cont'd)*

	2009	2010	2011	2012	2013	2014	2015
CHILDREN							
Child Benefit	1,420	1,187	603	403	311	273	193
Family Income Supplement	73	105	104	147	277	159	192
Back To Work Family Dividend	-	-	-	-	-	-	37
Guardian's Payment (Non-Contributory)	16	9	10	4	7	9	7
Guardian's Payment (Contributory)	9	26	32	26	24	17	18
Widowed Parent Grant	-	1	5	5	7	1	4
TOTAL - CHILDREN		**1,518**	**1,328**	**585**	**626**	**459**	**451**
OTHER							
Insurability of Employment	77	112	136	96	124	99	148
Liable Relative's	22	22	31	21	32	15	10
Recoverable Benefits & Assistance	-	-	-	-	-	2	15
TOTAL – ALL APPEALS	**16,008**	**20,274**	**17,488**	**20,414**	**14,770**	**9,628**	**8,697**

Table 5: Appeals statistics 1994 – 2015

Year	On hands at start of year	Received	Workload	Finalised	On hands at end of year
1994	5,317	13,504	18,821	14,971	3,850
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	13,419	5,703
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	20,724
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

Table 6: Appeals processing times by scheme 2015

	SWAO (weeks)	[1] Dept. of Social Protection (weeks)	Appellant (weeks)	Totals
PENSIONS				
State Pension (Non-Contributory)	11.2	10.5	0.4	22.1
State Pension (Contributory)	14.8	14.6	0.5	29.8
State Pension (Transition)	32.3	34.4	-	66.7
Widow's, Widower's Pension (Contributory)	27.3	9.4	-	36.6
Death Benefit	20.1	2.5	-	22.6
Bereavement Grant	14.1	51.4	-	65.5
WORKING AGE INCOME SUPPORTS				
Jobseeker's Allowance	10.8	9.5	0.1	20.4
Jobseeker's Transitional	9.9	2.4	-	12.3
Jobseeker's Allowance (Means)	11.0	13.8	0.1	24.9
One Parent Family Payment	16.0	12.5	0.4	28.9
Widow's, Widower's Pension (Non-Contributory)	12.3	15.7	0.9	28.9
Deserted Wife's Allowance	5.3	10.7	-	16.0
Supplementary Welfare Allowance	8.6	9.8	0.2	18.7
Farm Assist	13.5	17.0	0.1	30.5
Pre-Retirement Allowance	12.8	2.2	-	15.0
Jobseeker's Benefit	9.7	8.4	0.1	18.3
Deserted Wife's Benefit	13.0	3.9	0.3	17.1
Maternity Benefit	11.0	4.8	-	15.7
Treatment Benefits	16.8	1.1	-	17.9
Partial Capacity Benefit	10.9	21.4	0.5	32.8
ILLNESS, DISABILITY AND CARERS				
Disability Allowance	8.1	11.0	0.1	19.2
Blind Pension	10.7	9.0	-	19.7
Carer's Allowance	8.1	12.0	0.4	20.5
Domiciliary Care Allowance	7.8	13.1	0.1	21.0
Respite Care Grant	8.2	20.6	-	28.7
Illness Benefit	10.3	12.2	3.1	25.6
Injury Benefit	13.4	6.1	-	19.5
Invalidity Pension	8.3	19.6	0.1	28.0
Disablement Benefit	13.2	11.4	0.2	24.8
Incapacity Supplement	15.2	22.6	-	37.8
Carer's Benefit	8.3	7.9	0.1	16.2
CHILDREN				
Child Benefit	13.1	11.0	0.3	24.4
Family Income Supplement	9.4	14.0	0.1	23.5
Back To Work Family Dividend	6.1	2.8	-	8.8
Guardian's Payment (Non-Contributory)	12.0	12.9	-	24.9
Guardian's Payment (Contributory)	12.5	9.7	0.5	22.6
Widowed Parent Grant	12.5	5.9	-	18.4

Table 6: Appeals processing times by scheme 2015 *(Cont'd)*

	SWAO (weeks)	[1]Dept. of Social Protection (weeks)	Appellant (weeks)	Totals
OTHER				
Insurability of Employment	31.8	17.8	0.6	50.3
Liable Relative's	14.2	10.5	-	24.7
Recoverable Benefits & Assistance	12.6	6.5	-	19.1
TOTAL – ALL APPEALS	**9.5**	**11.1**	**0.3**	**20.9**

[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.

Table 7: Appeals outstanding at 31st December 2015

Scheme	In progress in Social Welfare Appeals Office	Awaiting Department response	Awaiting Appellant response	Total
Jobseeker's Allowance/Benefit	588	524	2	1,114
JA Means/Farm Assist	521	542	2	1,065
Supplementary Welfare Allowance	220	449	3	672
Disability Allowance	861	758	20	1,639
Carer's Allowance	625	489	17	1,131
Domiciliary Care Allowance	193	369	0	562
Invalidity Pension	285	386	3	674
Illness Benefit	78	223	34	335
Child Benefit	94	99	0	193
Other schemes	653	654	5	1,312
Totals	**4,118**	**4,493**	**86**	**8,697**

Chapter 3:

Social Welfare Appeals Office 2015

Chapter 3: Social Welfare Appeals Office 2015

The business of the office

3.1 Organisation

Staffing Resources

The number of staff serving in my office at the end of 2015 was **83**, which equates to **77.95** full-time equivalents (FTE).

The staffing breakdown for 2015 is as follows:

	FTE
1 Chief Appeals Officer	1.0
1 Deputy Chief Appeals Officer	1.0
1 Office Manager	1.0
35 Appeal Officers (3 work-sharing)	34.15
3 Higher Executive Officers (1 work-sharing)	2.8
12 Executive Officers (3 work-sharing)	11.2
6 Staff Officers (2 work-sharing)	5.0
24 Clerical Officers (7 work-sharing)	21.8
	____
	77.95

3.2 Training and Development within the Appeals Office

During 2015 there was a continued focus on the roll-out of the comprehensive programme of training for Appeal Officers which was developed during 2014 by professional trainers working with experienced Appeal Officers. The programme, which consists of a mix of e-learning, trainer-delivered learning modules, mentoring and peer support is aimed at building the knowledge, capacity and competence of our more newly appointed Appeal Officers and continuing the professional development of our more experienced officers.

The 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 appeal process including conducting an oral hearing
- The legal aspects of an Appeals Officer's role.

On appointment to the role, an Appeals Officer is provided with a structured programme of training and support with each module building on the learning in the previous module. The newly appointed Appeals Officer can also avail of formal mentoring support from a more experienced colleague.

In addition to the above, the full group of Appeal Officers meet twice yearly with the Chief Appeals Officer and Deputy Chief Appeals Officer for a two-day conference. These bi-annual conferences are an important vehicle for Appeal Officers to share knowledge with and learn from the experience of other colleagues and for the Chief Appeals Officer to fulfil her statutory obligation to discuss matters relating to the discharge of Appeals Officer functions, including, in particular, consistency in the application of statutory provisions.

3.3 Operational Matters

Parliamentary Questions

During 2015, 428 Parliamentary Questions were put down (912 in 2014) in relation to the work of my office. Of that number, replies were given in Dáil Éireann to 327 questions, 96 were transferred as not falling due for answer by the Social Welfare Appeals Office but the appropriate scheme section in the Department of Social Protection. The remaining 5 were withdrawn when the current status of the appeal case which was the subject of the Question was explained to the Deputy.

Correspondence

A total of 8,178 enquiries and representations were received from appellants or from public representatives on their behalf during 2015 (8,994 in 2014[1]).

Freedom of information

A total of 287 formal requests were received in 2015 (134 in 2014) 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 which may arise.

Meetings with Decisions Advisory Office

During 2015 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 to highlight issues that may only come to light on appeal and which could improve the overall decision making process.

Among the issues discussed with the DAO during 2015 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 (which are prepared by the DAO for Deciding Officers) based on direct experience of Appeal Officers in dealing with appeals.
- Overpayments resulting from revised decisions of Deciding Officers and the effective date of such decisions.
- The operation of the habitual residence condition and in particular the need to include grounds and reasons for the decision so as to ensure that the applicant receiving the decision is fully aware of the factors which were considered by the Deciding Officer. This helps to ensure that the applicant fully understands the basis

[1] The figure of 5,296 included in the 2014 Annual Report was incorrect. The correct figure was 8,994.

for the decision and can assist in preparing for an appeal if that course of action is decided on.

- The meaning of casual work, part-time work and subsidiary employment.
- The need for Deciding Officers and Designated Persons to fully address the appellant's appeal contentions in their submissions and to ensure the appeal file is presented to the Appeals Officer in a coherent manner.

Other Feedback

Other opportunities during 2015 to provide feedback to the Department included:

- The Chief Appeals Officer and/or the Deputy Chief Appeals Officer attended 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 make a presentation at a Management Training day on the appeals process and issues of a general nature that arise in the appeal process. There was also an opportunity to hear attendees' comments on issues of concern to them arising from the appeal process.
- The Deputy Chief Appeals Officer attended a Project Team meeting on Quality Assurance, as part of the Department's Employee Engagement and Innovation Programme. This event provided an opportunity for the Deputy Chief Appeals Officer to speak to the Project Team about the appeals office's experience of decisions of the Department.

3.5 Meetings of Appeal Officers

Two formal meetings of the Appeals Officer group were held in March and October 2015 and in addition a number of informal meetings took place throughout the year. As many of our Appeal Officers are located outside of our headquarters in Dublin, these meetings provide a valuable opportunity for them to share knowledge and experience, discuss issues of common interest and to promote best practice in decision making. 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. The office strives through our discussions and conferences to achieve a common understanding among Appeals Officers 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.

Given that many questions that come before Appeal Officers require a high degree of judgement, I am pleased to report that I was able to dedicate one day of our conference in October 2015 to the question of decision making. This session was provided by Professor Owen Darbishire of the Saïd Business School, Oxford. Decision making is one of Professor Darbishire's many areas of expertise. This session was extremely informative and provided Appeals Officers with very useful insights which could be applied in their decision-making function.

Other issues discussed at Conference included:

3.5.1 Case-law from the Courts

The implications of three High Court judgments which were delivered in late 2014 where the applicants had sought to challenge SWAO appeal procedures, particularly those relating to the illness disability and caring schemes. The judgments, which were summarised in the 2014 Annual Report, all found in favour of my office and reiterated the flexibility and informality of the appeals system. The conference provided a useful space for Appeals Officers to consider, discuss and clarify various aspects of the judgments.

The challenge for Appeal Officers of ensuring consistency while maintaining their independence in determining appeal questions in the medical and care area was also discussed. This can arise where, for example, it has been established that the medical conditionality of the scheme has been satisfied. The question before the Appeals Officer is then a subjective one relating to the potential impact of the medical condition vis a vis the conditionality of the schemes in question, e.g. the level of care that may be required and the impact on the person's capacity to work.

3.5.2 Permanently Incapable of Work

In 2015, a number of appeals were dealt with which revolved around the meaning of 'permanently incapable of work' for the purposes of Invalidity Pension. The legislation provides that a person is regarded as being permanently incapable of work where (i) he or she is incapable of work and is likely to remain so for life or (ii) immediately before the date of claim he or she has been incapable of work for a period of 12 months and is likely to be incapable for a further 12 months. It is the second part of this second test that regularly arises on appeal. Cases have arisen where the 12 months, or a substantial part of it, has elapsed since the Deciding Officer's disallowance but medical evidence has been submitted and accepted by another area of the Department (e.g. Illness Benefits) as evidence of incapacity for other purposes, usually for the purposes of claiming credited contributions following benefit being exhausted. In such circumstances it would not be tenable to disregard that medical evidence for the purposes of another scheme.

3.5.3 EU Social Security Coordination Rules (EU Regulation 883/2004) and Right to Reside (EU Residence Directive 2004/38 and SI 656/2006)

Many appeals that come before Appeals Officers must be considered under EU legislation. In light of this it was considered timely to devote some time at conference to a consideration of the provisions in the main legislative instruments, namely, the EU Social Security Coordination Rules (EU Regulation 883/2004) and Right to Reside (EU Residence Directive 2004/38 and SI 656/2006). Relevant case-law from the European Court of Justice was also considered.

Regulation 883/2004

EU Regulations on the coordination of social security systems have been in existence in one form or another since 1958. The original Regulation 3/58 was replaced by Regulation 1408/71 which in turn was replaced by Regulation 883/2004. The basis of the Regulations is contained in Art 48 of the **Treaty on the Functioning of the European Union** which requires the adoption of "such measures in the field of social security as are necessary to provide freedom of movement for workers ". In particular the Treaty requires arrangements to be made to secure for employed and self-employed migrant workers and their dependants aggregation of contributions for the purposes of qualifying for benefits and payment of benefits within the territories of the Member States.

The Regulations are essentially a system to regulate conflicts in social security legislation where a person has exercised their right of free movement under the EU Treaties. Among other things, the Regulations set out the rules to determine what country is liable to make payments, remove residence conditions for some categories of benefits and, in some circumstances, how payments are to be calculated. The Regulations provide for a system of *coordination* rather than *harmonisation* which means that Member States have the powers, subject to observing the equality provisions of the legislation, to determine the type of benefits in their systems and the qualifying conditions. Accordingly, having applied EU Regulations, the basic qualifying conditions decided by each Member State involved must be satisfied before an individual can receive a payment from that State.

The Regulations won't always provide the answer to a specific issue or question that may arise on appeal but, as a general rule, applying the principles of the Regulations and the case law of the ECJ should lead to a correct and fair outcome.

EU Directive 2004/38 and S.I. No. 226 of 2006

Directive 2004/38/EC of the European Parliament and of the Council, which came into force on 30th April 2004, lays down the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and

their family members, the right of permanent residence in the territory of the Member States for Union citizens and their family members, and the limits that can be placed on these rights. It does not prevent Member States from providing for national provisions that are more favourable for the people concerned.

In order to comply with the Directive, Ireland brought into force the European Communities (Free Movement of Persons) Regulations 2006 (S.I. No. 226 of 2006), which was in turn replaced by the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006). These were amended in turn by the European Communities (Free Movement of Persons) (Amendment) Regulations 2008.

The Directive applies to all EU citizens who move to or reside in a Member State other than that of which they are a national, and to their family members who "accompany or join" them. EU citizens and their family members have the right to leave the territory of a Member State to travel to another Member State. Member States are required to grant EU citizens the right to enter another Member State with a visa or identity card or passport, and are required to grant non-EU national family members with a valid passport leave to enter their territory.

The main conditions relating to the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members are:

- Union citizens have a right of residence on the territory of a Member State for a period up to three months without any conditions.
- Family members of EU citizens who do not have the nationality of a Member State enjoy the same rights as the citizen spouse whom they accompany or join.
- Union citizens have a right of residence for more than three months if they:

    - are workers or self-employed in the Member State,
    - have sufficient resources not to become a burden on the State,
    - are enrolled at a private or public establishment and have sickness insurance, and
    - are family members accompanying or joining the Union citizen.

Union citizens acquire the right of permanent residence in the host Member State after a five-year period of uninterrupted legal residence. Family members of the Union citizen who are not nationals of a Member State and who have lived with a Union citizen for five years also have a right to permanent residence.

The Directive entitles family members, irrespective of their nationality, to be entitled to take up employment or self-employment. Union citizens and their family members enjoy equal treatment with the nationals of the Member State.

3.6 Litigation

There were six applications for judicial review of decisions of Appeal Officers in 2015. Four of the cases are ongoing, one of which was heard in the High Court in the course of 2015. The two remaining cases were struck out.

The case which was heard in the High Court relates to the insurability of a worker's employment. The central question at issue is whether the worker was engaged under a contract ***of*** service (employee) or under a contract ***for*** services (self-employed). The judgment of the Court was delivered in early 2016 and I will report further on the outcome in the context of my 2016 Annual Report. However, as a number of appeals were determined in the course of 2015 on this issue I have decided to include an overview of the most relevant factors considered by Appeal Officers when determining appeals of this nature. That overview is contained in Chapter 4.

Chapter 4:
Insurability of Employment

Chapter 4: Insurability of Employment

Contract of Service/Contract for Services

Introduction

A person's classification for social insurance purposes is important not least because it affects the rate of PRSI which they pay on their salary or income which in turn determines the social insurance benefits and or pensions to which they are entitled. Generally a person is classified for PRSI purposes as an employee (under a contract ***of*** service) or a self-employed (contract ***for*** services). Employers also have an interest in matters relating to classification of individuals for social insurance purposes as it impacts on their liability to pay the employers' portion of PRSI.

Section 300(2) of the Social Welfare Consolidation Act, 2005 gives statutory power to Deciding Officers of the Department of Social Protection to determine questions relating to the insurability of employment for social insurance purposes. All such determinations/ decisions can be appealed under the provisions of Section 311 of the 2005 Act to an Appeals Officer. On occasion questions arise as to whether the appeal can proceed in circumstances where an issue relating to a person's insurability of employment is before some other forum which may impact on the Appeals Officer's determination. I am of the view that an Appeals Officer is not prevented from proceeding with the appeal in such circumstances as the power to determine such questions has been given by the Oireachtas in the first instance to Deciding Officers of the Department and, on appeal, to Appeal Officers. In the event of another forum, tribunal or Court making a finding that may subsequently impact on the outcome of an appeal, the legislation contains other avenues to allow for the determination to be revisited. This includes the power given to an Appeals Officer under Section 317 of the 2005 Act to revise any decision of an Appeals Officer in light of new facts or evidence. In addition, Section 318 allows the Chief Appeals Officer to revise any decision of an Appeals Officer where the decision was erroneous by reason of some mistake having been made in relation to the law or the facts.

While on the face of it, determining classification for social insurance purposes may appear straightforward, the issues can be complex not least because of the passage of time when both parties may have operated on the basis of their relationship being of one nature but the facts show something different. Complexity can also be a feature where there is 'mixed' insurance, for example when a person moves between the public and private sector.
In the following sections I have concentrated on those issues relating to insurability questions that featured most prominently during 2015 while recognising that there are many other issues that may arise in this area.

Employed v Self-Employed

Appeals relating to the question of whether a person was employed under a contract of service (employee) or a contract for services (self-employed) tend to be the most commonly occurring insurability appeals and a number of appeals were determined in my office in the course of 2015 on this issue.

The terms 'employed' and 'self-employed' are not defined in law. Thus Appeals Officers must exercise a high degree of judgement in making their determinations. In doing so, Appeals Officers have regard to a range of indicators that has evolved over time from the case law of the Courts. In addition, Appeals Officers have regard to the *Code of Practice for Determining Employment and Self-Employment Status of Individuals* which was drawn up by a Government appointed expert group in 2001 and updated in 2007.

In the following sections I have summarised the most relevant factors to be considered by Appeals Officers emerging from the judgments of the Courts, while recognising that there is an abundance of case-law on this issue that I have not covered.

The Courts have found that the determination as to the appropriate insurability classification must be arrived at by looking at what a person actually does, the way in which it is done and the terms and conditions under which the person is engaged, be they written, verbal, or implied. It is clear from relevant case law that there is no one factor which may be taken as determinative of either contract of service (employee) or contract for services (self-employed). Reflecting precedent from the Courts, the Code of Practice places an emphasis on the need to look at the job as a whole, including working conditions and the reality of the relationship, when considering the nature of an employment relationship. The Code of Practice states that the overriding test will always be whether the person performing the work does so 'as a person in business on their own account', known as the 'economic test'. It frames the question to be addressed in the following terms: is the person a free agent with an economic independence of the person engaging the service?

Guidance by way of legal precedent

The four main tests for establishing the difference between a contract of service and a contract for services that have evolved from the case-law of the Courts can be summarised as follows:

- the control test – is the person under the control of another person who directs as to how, when and where the work is to be carried out?
- the integration test - has the worker become 'part and parcel' of the organisation?
- the test of mutuality of obligation - is there a mutual obligation between the parties to provide or accept the work offered? and
- the test of economic reality - this test incorporates all of the above to establish whether the worker is in 'business on his own account'.

When the question of whether a person is employed under a contract of service or a contract for services is before an Appeals Officer, the Supreme Court decision [1998] in the case of *Henry Denny v Minister for Social Welfare* always features in the consideration of the issues. That case concerned the employment status of a Denny supermarket demonstrator.

In its deliberations the Supreme Court adopted an approach set down in the English case of *Market Investigations v Minister of Social Security [1969] 2 Q.B. 173* for determining whether a contract is one ***of*** service or one ***for*** services. In this case it was held that the Court should consider if the person was performing the service as a person in business on his own account. If the answer to that question is yes, then the contract is one for services; if the answer is no, then the contract is one of service. Adopting that approach in *Henry Denny & Sons v Minister for Social Welfare,* Keane J. quoted with approval the following passage:

> *… the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account'. If the answer to that question is 'yes' then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.*

In his judgment, Keane J concluded:

- Generally each case should be decided in the light of its particular facts.
- In general a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself.
- The degree of control exercised over how the work is to be performed, although a factor to be taken into account is not decisive.
- The inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises or equipment or some form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her.

The Supreme Court in *Denny* also considered the weight to be given by an Appeals Officer to the classification the parties ascribe to themselves, most notably, that one party is an 'employee' or 'an independent contractor'. In this case the company argued that the Appeals Officer had erred in law in failing to have sufficient regard to the terms of the written contract between it and the demonstrator, which stated that the demonstrator was "deemed to be an independent contractor" and nothing in the agreement should "be construed as creating the relationship of master and servant or principal and agents". However, the Court found that while an Appeals Officer is not entitled to ignore the terms and conditions under which the demonstrator was engaged he was required to consider "the facts or realities of the situation on the ground" to enable him reach a decision on whether the demonstrator was an employee or an independent contractor.

Based on the facts of the case, Keane J stated it was open to an Appeals Officer to find that the demonstrator was an employee.

The issue of the reality of the relationship between the parties was also addressed by the Supreme Court in *Castleisland Cattle Breeding Society v Minister for Social and Family Affairs* [2004]. In this case the Supreme Court held that, notwithstanding the requirement to examine the terms of the written contract, in determining whether a contract was one of service, or for services, an Appeals Officer was bound to examine and have regard to what was the real arrangement, on a day-to day basis, between the parties.

In the High Court decision *Minister for Agriculture and Food V John Barry and Others* which involved temporary veterinary Inspectors at a meat factory, Edwards J in considering the case law said it can sometimes be unhelpful to speak of 'tests' (the control test, the integration test, enterprise test etc.) because none of them are truly tests which will resolve the issue but rather are aides to reaching a conclusion.

Edwards J concluded by re-stating that every case must be considered in the light of its particular facts and it is for the court or tribunal considering those facts to draw the appropriate inferences from them. This requires the exercise of judgement and analytical skill and it is not, according to Edwards J, possible to arrive at the correct result by testing the facts of the case in some rigid, formulaic way.

In finding that mutuality of obligation has to be satisfied if a contract of service is to exist, Edwards J went on to elaborate on what this test involves and stated the following:

The requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something

else, but not a contract of service. It was characterised in Nethermere (St Neots) Ltd v Gardiner, [1984] ICR 612 as the "one sine qua non which can firmly be identified as an essential of the existence of a contract of service". Moreover, in Carmichael v. National Power PLC, [1999] ICR, 1226 at 1230 it was referred to as "that irreducible minimum of mutual obligation necessary to create a contract of service." Accordingly the mutuality of obligation test provides an important filter. Where one party to a work relationship contends that that relationship amounts to a contract of service, it is appropriate that the court or tribunal seized of that issue should in the first instance examine the relationship in question to determine if mutuality of obligation is a feature of it. If there is no mutuality of obligation it is not necessary to go further. Whatever the relationship is, it cannot amount to a contract of service. However, if mutuality of obligation is found to exist the mere fact of its existence is not, of itself, determinative of the nature of the relationship and it is necessary to examine the relationship further.

The judgment is important in terms of emphasising that no one test or factor can be determinative in arriving at a conclusion.

The extent to which a person is employed as an integral part of the business (the integration test) featured in the Sunday Tribune case [1984]. In this case the Court concluded that two journalists were employed under a contract of service while one journalist was not employed under a contract of service but was an independent contractor. This case illustrates that the nature of the work, in this case writing articles for the newspaper, is not of itself determinative. Carroll J. in her judgment reiterated that '*the court must look at the realities of the situation in order to determine whether the relationship of employer and employee in fact exists regardless of how the parties describe themselves.* Carroll J went on to consider the degree to which the journalists were employed as part of the business and the extent to which their work could be regarded as an integral part of the business or whether the work is not integrated into the business but was only ancillary to it.

The Court concluded that the employment of one journalist passed the simple test of control by the employer and was therefore employed under a contract of service. In the case of the second journalist, the Court concluded that the person's employment was an integral part of the business of the newspaper. Her column was to run for 50 of the 52 weeks of the year. She took part in editorial conferences. There was provision for the equivalent of holiday pay.

In the case of the third journalist, the Court concluded that her employment was not an integral part of the business of the newspaper as she was a freelance contributor who secured commissions in advance. She was under no obligation to contribute on a regular basis and if she did not negotiate a commissioned article, the Court presumed that the editor could secure articles from some other source.

Classification of working proprietary directors for social insurance purposes

Prior to 28th June 2013, the classification of proprietary directors who owned or controlled shares in the company in which they worked had been determined on a case by case basis taking account of the Code of Practice and the tests/factors outlined in the preceding section.

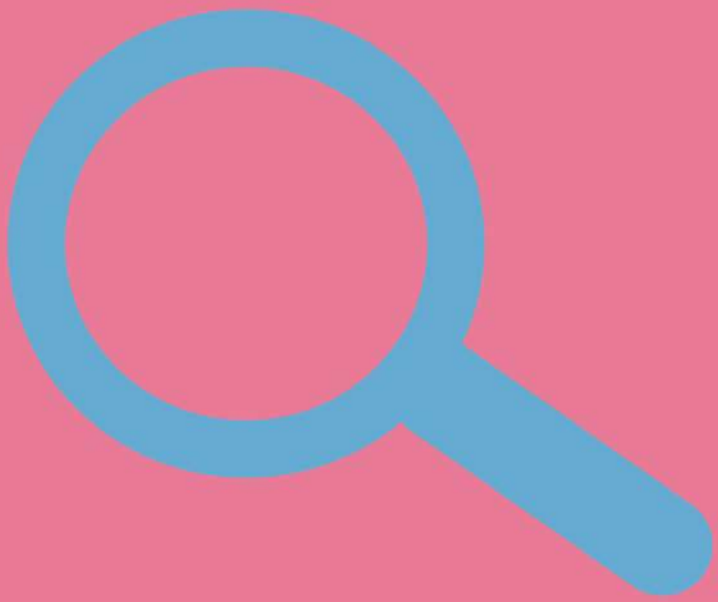
Section 16 of the Social Welfare and Pensions (Miscellaneous Provisions) Act 2013, which came into force on 28th June 2013, provided clarity on the status for social insurance purposes of working directors who own or control 50% or more of the shares in the company in which they work. Section 12 and Part 2 of Schedule 1 of the Social Welfare Consolidation Act, 2005 now contain the provisions governing insurability of working directors.

Under the provisions introduced in 2013 proprietary directors **who own or control 50% or more** of the shareholding of the company are not employed contributors of that company for the purposes of social insurance. Accordingly, they are insured for social insurance purposes as self-employed contributors and are liable to pay PRSI at Class S.

The PRSI classification of proprietary directors **who own or control less than 50%** of the shareholding of the company continues to be determined on a case by case basis, taking account of the Code of Practice and tests/factors outlined in the preceding sections.

Section 12 of the 2005 Act as amended also provides that the provision shall apply to employment that is performed both before and after the date of commencement date of 28th June 2013. Where however, these provisions are to be applied retrospectively, the legislation affords the person the option of electing to have the decision relating to his or her employment prior to the enactment of the legislation, made under the Code of Practice and tests/factors outlined in the preceding section rather than the new provisions. It is important to note that the legislation is specific in providing that any such decision only applies to the period of employment prior to 28th June 2013.

In practical terms this means that if a proprietary director with a shareholding of 50% or more had been paying PRSI contributions at Class A prior to 28th June 2013, he or she would be liable to make a Class S contribution from 28th June 2013 and the period before 28th June 2013 could be subject to change retrospectively if a decision by a Deciding Officer of the Department was made on the person's case. This could happen at any time in the future, either at the request of the person themselves or on the request of a Deciding Officer considering entitlement to a payment on the basis of contributions paid.



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 2015. 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. As outlined in Chapter 3, 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 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 one case on the issue of insurability of employment to illustrate the practical application of the criteria which I have outlined in Chapter 4 on this subject.

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. For the first time, 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.

The following Index provides a short reference to the case studies featured.

5.1 Children and Family

2015/01 Child Benefit – Question at issue: Habitual residence

2015/02 Domiciliary Care Allowance – Question at issue: Eligibility criteria

2015/03 Domiciliary Care Allowance – Question at issue: Date of award

2015/04 Guardian's Payment – Question at issue: Abandonment

2015/05 Guardian's Payment – Question at issue: Concurrent payment

2015/06 One Parent Family Payment – Question at issue: Cohabitation

5.2 Working Age – Illness, Disability and Carers

2015/07 Illness Benefit – Question at issue: Eligibility (medical)

2015/08 Illness Benefit – Question at issue: Eligibility (medical)

2015/09 Disability Allowance – Question at issue: Eligibility (re employment)

2015/10 Disability Allowance – Question at issue: Eligibility (re employment)

2015/11 Carer's Allowance – Question at issue: Eligibility (re care required)

2015/12 Carer's Allowance – Question at issue: Eligibility (re care provided)

5.3 Working Age – Income Supports

2015/13 Jobseeker's Benefit – Question at issue: Subsidiary employment

2015/14 Jobseeker's Allowance – Question at issue: Means assessment

2015/15 Carer's Benefit & Maternity Benefit – Question at issue: Concurrent payments

2015/16 Maternity Benefit – Question at issue: Eligibility

2015/17 Back to Work Family Dividend – Question at issue: Eligibility

2015/18 Supplementary Welfare Allowance (Rent) – Question at issue: rent cap

5.4 Retired, Older People & Other

2015/19 State Pension (Contributory) – Question at issue: Eligibility (re contributions)

2015/20 State Pension (Contributory) – Question at issue: Eligibility (re contributions)

2015/21 State Pension (Non-Contributory) – Question at issue: Means assessment

2015/22 & 2015/23 – Unspecified payment – Question at issue: Cohabitation

5.5 Estate Cases

2015/24 State Pension (Non-Contributory) – Question at issue: Claim against estate

2015/25 State Pension (Non-Contributory) – Question at issue: Claim against estate

5.6 Insurability of Employment

2015/26 Insurability – Question at issue: Employee or self-employed

2015/27 Insurability – Question at issue: Treating contributions as paid

5.1 Case Studies

Children & Family

5.1 Case Studies: Children & Family

2015/01 Child Benefit
Oral hearing
Question at issue: Habitual residence

Background: The appellant, a national of a central European state, was living with her partner. She made a claim for Child Benefit in 2015, following the birth of their daughter, stating she was living in Ireland since 2007. Her claim was rejected in respect of an initial period as the baby had been placed in care in line with a Court order (by consent). A Social Worker with TUSLA, the Child and Family Agency, confirmed that the child had been returned to her mother's care on a date specified. The claim was disallowed with effect from that date on grounds that the appellant was not habitually resident in the State, and the following reasons were cited:

- The nature of your residence in Ireland does not provide for the approval of habitual residency.
- Neither you nor your partner is employed in Ireland and you do not appear to be in a position to support yourself without becoming a financial burden on the State.
- You have not provided any evidence that confirms that you have a right to reside in Ireland.
- From the evidence produced to date there is nothing to substantiate that you are habitually resident in the State.

Oral hearing: The appellant was accompanied by a relative and she requested that he assist with interpreting as she speaks English but was concerned that she might require the support of someone with a better grasp of the language. She reported that she came to Ireland in 2007, and that she had lived with her parents. She advised that she had three children living in Ireland: two of whom are in foster care while the third is a baby in respect of whom the claim at issue was made. She said that she and her partner are both unemployed but that they work sometimes, washing cars at the local garage. She said that they paid rent of €100.00 per week and received assistance from St Vincent de Paul.

The appellant said that she has been living with her current partner for about five years, having been single prior to that. She stated that she had not left the State during the period of her residence in Ireland and said that all her family lives here now. She went on to say that she wanted to maintain contact with her two daughters who are in foster care.

In terms of proof of residence, the appellant said that she had obtained a PPS number in 2008 and that she had submitted proof of residence in support of an earlier claim for Child Benefit, which she made in 2010. She said that the claim had been refused as she was not considered to have been habitually resident at that time. She went on to say that she had not made a further claim or pursued her appeal against that decision as the two children were taken into care subsequently. She submitted that, while her third child had been placed in care initially, the baby had been returned to her care and she needed Child Benefit to support her.

Further evidence: Details of the appellant's claim to Child Benefit in 2010, and the subsequent appeal, were confirmed.

Consideration: The Appeals Officer noted the duration of the appellant's residence in the State with reference to the European Communities (Free Movement of Persons) (No. 2) Regulations 2006, S.I. No. 656 of 2006, Article 12, which provides as follows in relation to permanent residence in the State:

> 12. (1) Subject to paragraph (3) and Regulation 13, a person to whom these Regulations apply who has resided in the State in conformity with these Regulations for a continuous period of 5 years may remain permanently in the State.

She noted that there was nothing to indicate that the provisions of Article 12 of S.I. No. 656 of 2006 did not apply in the appellant's case. Having considered all the circumstances of the case including, in particular, the length and continuity of her residence and evidence as to an established centre of interest, the Appeals Officer concluded that the appellant could be deemed to be habitually resident in the State for purposes of her Child Benefit claim of 2015.

Outcome: Appeal allowed.

2015/02 – Domiciliary Care Allowance
Oral hearing
Question at issue: Whether the eligibility criteria are met

Background: The appellant's daughter (aged 6 years) underwent surgery when she was 2 years old. However, she reacted adversely and sustained cardiac damage. She has been diagnosed as suffering from Heart Block, Plaque (Guttate) Psoriasis, and has had a pacemaker surgically implanted. In her appeal, the appellant stated that both the cardiac problem and the Psoriasis are life-long conditions which require constant monitoring and frequent attention both during the day and at night.

Oral hearing: The appellant attended, accompanied by a relative. The Appeals Officer asked if she had been advised as to the cause of the conditions which her daughter now suffers

and she responded that she had never received a satisfactory explanation. She said that the child had been monitored and examined extensively prior to heart surgery in 2013, having had a heart monitor fitted regularly from 2011 up to the time of the operation in 2013. She had attended a number of consultants, and had been admitted to hospital for tests and observation in the week prior to the operation. She had not been on medication before the pacemaker was fitted.

The Appeals Officer asked the appellant to outline the additional care and attention that her daughter now requires. She advised that she cannot be allowed near generators or microwave cookers, that she cannot use mobile phones or tablets, and must avoid loud beat music as all these situations have the potential to interfere with the pacemaker. She recalled an incident where the pacemaker had activated a security alarm as she was leaving a shop, and said that it had been very embarrassing. She is required to attend an outpatients' clinic for treatment of Psoriasis and she finds this very distressing and cries every time she has to travel for the appointments.

The appellant stated that her daughter is additionally very restricted in the activities she can engage in and is not allowed, for example, to attend the circus, or go to a disco, or take part in sports. She said that she is very isolated from other children. Her food is also restricted; she can eat meat and vegetables but cannot be allowed white bread, pasta or cheese, as she must avoid wheat and dairy products. She can dress herself adequately other than the problems that arise from the cream that is applied for the Psoriasis. The appellant said that the medication prescribed is normally restricted to adult use. Her sleeping pattern is regularly disturbed and interrupted due to her skin problem, as she may scratch in her sleep and aggravate the condition, causing a flare-up which wakes her. This can require a full application of cream to assist in bringing the flare-up under control. On a daily basis, she must be washed and have three applications of cream.

The appellant stated that her daughter is not on any medication other than the topical application of cream for Psoriasis and that she attends outpatient appointments on a quarterly basis. She attends her local primary school, where there is a defibrillator on site in the event that she should require it.

The appellant submitted that heating and electricity bills for the family are usually very high as her daughter must be bathed frequently. She referred also the travelling costs for attending appointments in Dublin, and advised that her daughter's clothing must be replaced regularly because of the difficulty in washing clothes that have been in contact with the cream applied for Psoriasis.

Conclusion: The Appeals Officer noted that there were two specific medical conditions referred to, and that the appellant's daughter required specific care for each. He noted that medical evidence, in the form of the ability/disability profile, indicated that she was affected to a mild degree in one area only as a result of these conditions – that of

reaching/lifting/carrying. In all other areas, she had been assessed as having a normal ability level. Having considered all the medical evidence and the evidence adduced at oral hearing, he concluded that it had not been established that the appellant's daughter requires additional care and attention which is substantially in excess of that required by a child of the same age without the conditions diagnosed, as set out in social welfare legislation for the purposes of Domiciliary Care Allowance.

Outcome: Appeal disallowed.

2015/03 – Domiciliary Care Allowance
Oral hearing
Question at issue: Date of award

Background: The appellant made a claim for Domiciliary Care Allowance in 2010, in respect of her son who was 6 years old at the time. Her claim was disallowed and she made an appeal against the decision. The appeal was disallowed summarily in 2011. She reapplied in 2014 and the second claim was also disallowed. She made an appeal and, in reviewing the claim in connection with the appeal, the Deciding Officer revised the decision and awarded the allowance. The appellant wrote to the Department subsequently, requesting a review of the date of award. The Deciding Officer indicated that he considered a revision of his decision was not warranted.

Oral hearing: The appellant attended alone. She confirmed that her son had a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). She referred to evidence submitted as part of her claim in 2010 and said that the family doctor, in completing the ability/disability profile, had assessed mental health/behaviour as being affected to a severe degree and learning/intelligence to a moderate degree. She went on to say that at the time of her application in 2014, mental health/behaviour was still assessed as being affected to a severe degree, while learning/intelligence was similarly assessed. She said that her son had been taking psycho-stimulant medication since 2010 and that the prescribed dose had not changed.

The appellant submitted that the level of care required by her son in 2010 was the same as that required in 2014. She provided an outline of his particular care requirements. She said that, since 2010, he could not be left alone at any time; he has to be spoon-fed at all meals, he must still be bathed and dressed or undressed, and accompanied to the bathroom in case he floods it. She reiterated that this level of care had not changed since 2010. In reply to the Appeals Officer's question as to why she had not claimed Domiciliary Care Allowance again until 2014, she said that her son was attending a psychiatrist who had told her to apply as he believed that the child was eligible.

Consideration: The Appeals Officer noted that the question as to entitlement had been determined by an Appeals Officer in 2011 so that the question now fell to be considered

with reference to the provisions of Section 317 of the Social Welfare (Consolidation) Act, 2005. This provides that an Appeals Officer may at any time revise a decision of an Appeals Officer where it appears to him or her that the decision was erroneous in the light of new evidence or new facts which have been brought to notice since the date on which it was given.

The Appeals Officer noted that the appeal had been disallowed in 2011 without the benefit of an oral hearing. He considered that there was new evidence in the form of additional medical evidence presented in support of the appellant's claim in 2014, as well as her oral evidence which had not been available to the Appeals Officer in making a summary decision in 2011. He noted, in particular, the appellant's assertion that the impact of her child's disability and the level of care he required had not changed between the date of her original application in 2010 and 2014 when she was awarded the allowance. He concluded that the level of care required by and being provided to the appellant's son subsisted in 2010 and, in the circumstances, revised the appeal decision of 2011 under Section 317 of the Social Welfare Consolidation Act, 2005, allowing the appeal from the date of the original application in 2010.

Outcome: Appeal allowed.

2015/04 Guardian's Payment (Contributory)
Oral hearing
Question at issue: Whether the children may be regarded as orphans

Background: The appellant had been caring for her two grandchildren since 2000. Her daughter, the children's mother, had a serious drug addiction and their father did not support them. She applied for a Foster Care Allowance but was held to be ineligible as she was related to the children and they were not, nor had they been, in the care of the HSE. She made a claim for Guardian's Payment in 2002 and this was backdated for two years. However, following a review in 2014, it was held that the qualifying conditions of abandonment and failure to provide no longer applied. The Deciding Officer relied on the report of a Social Welfare Inspector, which indicated that the children's father had regular contact with them and was providing weekly payments of €140 in line with a Court Order granted in 2007. The appellant denied this version of events and made an appeal against the decision.

Oral Hearing: The appellant was accompanied by a local public representative, and the Deciding Officer attended at the request of the Appeals Officer. At the Appeals Officer's invitation, the Deciding Officer outlined the background to the case and the reasons for her decision, including reference to interviews conducted by the Social Welfare Inspector where the children's father advised that he was paying maintenance of €140 per week, on foot of a Court Order sought by the appellant.

For her part, the appellant stated that she had to break down the door of her daughter's flat in 2000 so that she could take the children, who were in a state of neglect. She said that she had encountered hardship in raising them, as she had received no support from the HSE. She expressed concern that a Foster Care Allowance was not payable as it is set at a higher rate and would have been accompanied by a formal care plan. She stated that no one had ever contacted her to know if she was doing an adequate job in raising the children. She said that, in addition, because she was in receipt of Guardian's Payment, rather than a Foster Care Allowance, she was not entitled to get any grants for extending her family home to accommodate two young children and so had no option but to get another mortgage, which had placed her under additional financial pressure.

The appellant advised that the two children have lived with her since they were babies and that her daughter had not recovered from her addiction despite numerous attempts. In relation to their father, she stated that he never had any hand in bringing up the children. He had contributed towards their crèche fees but, when he stopped paying, she was advised to take legal action and she obtained a Maintenance Order for €140 per week. She stated that when they were younger, he took them occasionally to the cinema or for an overnight stay but had not done this for a number of years. She stated that she had proposed that he seek full custody of the children but that he had continuously refused to take any responsibility for them. She advised that he discontinued paying maintenance when he lost his job in 2015 and is currently making no contribution. She said that he had never partaken in their health or education choices or disciplinary issues, nor asked to be consulted in any way, that he had no responsibility for school matters and was not listed anywhere as their next-of-kin. Whilst he became their joint guardian in 2007, he has never exercised guardianship nor availed of the custody agreement made at the time.

Conclusion: The Appeals Officer made reference to the provisions of Section 2 (1) of the Social Welfare (Consolidation) Act, 2005 which defines an 'orphan' as a qualified child –

(a) Both of whose parents are dead, or

(b) One of whose parents is dead or unknown or has abandoned and failed to provide for the child, as the case may be, and whose other parent

(i) is unknown, or

(ii) has abandoned and failed to provide for the child where that child is not residing with a parent, adoptive parent or step-parent.

While there is no legal definition of 'abandonment' or 'failure to provide', the Appeals Officer noted dictionary definitions of *abandon* as being '*to leave completely and finally; to forsake utterly; to give up control of*' or '*a subjective emotional state in which people feel undesired, left behind, insecure or discarded*'. Legally, in the Supreme Court, McGuinness J. has held that failure of duty towards a child does not necessarily or invariably amount to

abandonment, but that the requirement of abandonment is not to be considered in isolation, separate from the failure of duty. It is 'such a failure' of duty that may amount to abandonment [2002] IESC 75. In re Justice, Levin J. wrote '*A parent abandons a child if the parent has failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child*'. Tusla, the Child and Family Agency, states on its website that: '*Child abandonment occurs when a child's parent or guardian wilfully withholds emotional, physical, and financial support, with no regard for the child's safety and welfare. This may include physical abandonment, such as leaving a child somewhere with no intent to return for him, or it may include failure to provide physical supervision, emotional support, and other necessities of life for a child living in the home'.* The Appeals Officer considered that abandonment and failure to provide must be held to be more than merely financial, as in this case, with the provision of maintenance via the courts; it includes the failure of a parent's duty to provide for the emotional and physical necessities of life which the appellant had evidenced in her oral testimony regarding both parents.

She noted that the Department had accepted initially that the children had been abandoned and as such met the legislative conditions which define an orphan for purposes of the Guardian's Payment scheme. In addition, it had been accepted that there were family arrangements in place at the time and that the appellant was the main carer and provider for the children. She noted that this arrangement had continued, with the only change being in 2007 when the appellant sought formally to obtain maintenance for the children. She concluded that the evidence available served to establish that there had been no fundamental change in circumstances which would warrant withdrawal of the payment and accordingly that the appeal should succeed.

Outcome: Appeal allowed.

2015/05 Guardian's Payment, Widow's Pension & Carer's Allowance
Summary decision and Section 318 review
Question at issue: Concurrent payment

Background: The appellant, who was in receipt of a Guardian's Payment and Widow's Pension (Non-Contributory), made a claim for half-rate Carer's Allowance. This was refused on grounds that she was already in receipt of two payments. It was held that the legislative provisions which refer to overlapping payments applied. As a full-rate Carer's Allowance is payable with Guardian's Payment, but only half-rate may be paid with Widow's Pension, an assessment was made as to the highest combination of the payments at issue. On that basis, the Guardian's Payment continued in payment and full-rate Carer's Allowance was awarded. The appellant made an appeal, submitting that the Guardian's Payment should not be subject to the overlapping payment provisions as it was paid in respect of her niece.

Consideration: The Appeals Officer referred to Section 247(5A) of the Social Welfare (Consolidation) Act, 2005 which provides that Carer's Allowance is not payable where a person is in receipt of more than one other social welfare payment. He noted that the appellant was already in receipt of two payments when she applied for Carer's Allowance and, on that basis, he concluded that the appeal could not succeed.

Request for review: The appellant sought a review by the Appeals Officer of his decision and, ultimately, requested a review by the Chief Appeals Officer under Section 318 of the Social Welfare (Consolidation) Act, 2005.

Review by the Chief Appeals Officer: The Chief Appeals Officer undertook a review, indicating that her role was a revising one under the terms of the legislation, rather than another avenue of appeal.

Grounds for Review: Solicitors acting for the appellant submitted that there were errors in fact and law in interpreting the legislation governing concurrent payment. They referred also to Section 133 (3) of the Social Welfare Act, 2005 which provides that a Guardian's Payment be paid to a person other than the guardian in whose care the orphan normally lives or, subject to any conditions that may be prescribed, directly to an orphan who is at least 18 years of age and is not normally living with a guardian. They indicated that this provision was not brought to the appellant's attention and advised that her niece had recently attained 18 years.

In connection with the review, and while not specifically requested, the Chief Appeals Officer examined the application of the provisions relating to multiple payments set out in the Social Welfare Consolidation Act, 2005 and the accompanying Regulations. She noted that Section 247(5A) of the Act provides that –

> "*A payment under section 186A shall not be payable where a person is in receipt of more than one payment by virtue of regulations made under subsection (4)",*

while Section 247(1) provides that –

> *"Where, but for this subsection, more than one of the following would be payable to or in respect of a person in respect of the same period, only one shall be paid—*
>
> > *(a) any benefit specified in section 39(1) other than death benefit by way of a grant in respect of funeral expenses, bereavement grant or widowed or surviving civil partner grant, or*
> >
> > *(b) any assistance specified in section 139(1) other than a payment under section 186A, domiciliary care allowance, supplementary welfare allowance or widowed or surviving civil partner grant".*

She noted that the general rule created by this provision is that only one payment can be paid, irrespective of whether a claimant can establish a qualifying entitlement under two or more schemes. In addition to certain exceptions set out in the Act, Section 247(4) confers power on the Minister to make Regulations in the following terms:

> *"Notwithstanding subsections (1) and (2), the Minister may make regulations enabling more than one of the payments specified in those subsections to be paid to or in respect of a person in respect of the same period".*

She noted that Regulations had been made pursuant to that provision, as outlined in the Social Welfare (Consolidated) Claims, Payments and Control Regulations, 2007 (S.I. No. 142 of 2007), where Chapter 5 of Part 7 contains provisions in relation to 'overlapping benefits' and Article 222 specifically provides for *'Payment of guardian's payment with other social welfare payments'.*

The Chief Appeals Officer noted that pursuant to this Article, where Guardian's Payment and a number of specified payments set out in Article 222(3) are payable *'to or in respect of'* a person *'in respect of the same period',* both such payments may be paid *'to or in respect of that person in respect of that period*'. She considered that this was noteworthy in relation to the provisions of Section 247(3) of the 2005 Act which states that for the purpose of this section:

> *"….any payment specified in subsection (1) (a) or (b) payable in respect of a person shall be regarded as such specified payment payable to that person".*

Accordingly, Guardian's Payment, being a payment in respect of an orphan, is not regarded as a payment to the guardian but as a payment to the orphan. Thus, a guardian can receive a Guardian's Payment and a payment in their own right, such as a Widows Pension, without offending Section 247.

In the circumstances, the Chief Appeals Officer concluded that Section 247 (5A) did not preclude the appellant from receiving half-rate Carer's Allowance and Widow's Pension (Non-Contributory) by virtue of having been in receipt of Guardian's Payment, this latter payment being a payment to the orphan. Accordingly, she asked the Department to review the appellant's entitlement and to make the necessary adjustment to her payments for the period in question. In addition, she noted that it was open to the appellant to apply to the Department for a decision as to whether the Guardian's Payment might be paid to some other person or directly to her niece. Accordingly, she revised the decision of the Appeals Officer under Section 318 of the Social Welfare Consolidation Act, 2005 and allowed the appeal.

Outcome: Appeal allowed.

2015/06 – One Parent Family Payment
Oral hearing
Question at issue: Cohabitation in relation to a claim in payment

Background: The appellant had been in receipt of One Parent Family Payment since 2010 and in 2014, her claim was reviewed. A Social Welfare Inspector's report noted that a car which was registered to a (named) person had been observed outside her home, along with a pair of men's work boots. She interviewed the appellant, who denied that the person concerned lived there. She acknowledged that she had been on holiday with her children and partner (the person named) but said that he did not live with her. Details of the appellant's means were reviewed also. The Inspector confirmed subsequently that the appellant's partner owned another house which had been let. She contacted him and he confirmed that he owned the house and said that he lived there occasionally, while also living with his elderly parents. Images taken from the social media website, Facebook, showing the appellant and her children with the person named, on a date in 2012, were included in the Inspector's report. The Deciding Officer wrote to the appellant, informing her of the Inspector's report and inviting her comments prior to making a decision, in line with the requirements of natural justice. In her reply, the appellant stated that when she attended an interview with the Inspector, she panicked on learning that her claim was being investigated and gave incorrect information regarding the duration of her relationship. She said that her partner stayed at her house on occasion but that they had only recently come to view their relationship as more permanent. She stated that he had not contributed in any way to her mortgage or the upkeep of her home, and that she had to rely on an insurance protection policy to help pay her mortgage when she lost her job. She stated that her G.P. could confirm that she and her children attended as a family unit. Ultimately, the claim was terminated on grounds that she was cohabiting and therefore disqualified for receipt of One Parent Family Payment.

In a letter of appeal, the appellant stated that she lives at a specified address, while her partner owns and lives in his own home at another address. She said that she was finding it very difficult to cope since her payments ceased. In support of her appeal she submitted: copies of her partner's P60 forms, his insurance, motor tax, and NCT details, bank statements and documents from Irish Water, the Revenue Commissioners and the local sports club – all indicating his stated address. In addition, she submitted bank statements, phone and electricity bills, as well as other correspondence in her own name, at her home address.

Oral hearing: The appellant was accompanied by a family member. The Inspector attended at the Appeals Officer's request, and outlined the details of her report. She stated that while her investigation confirmed that his car was registered at his stated address, she was of the opinion that the appellant's partner did not reside there and that this had been confirmed by the tenant who was currently renting the property. She said that the

appellant had misinformed her as to the duration of the relationship and she noted that when she called the person named on the phone, he told her that he was at home, in the appellant's house.

The appellant stated that she and her partner did not live together as a couple, and never had. She acknowledged that she may have been untruthful regarding the duration of their relationship, saying that they had been dating since 2012, but that it was only in recent months that they realised it was serious and only then that she introduced him to her children as her partner. She added that he had stayed overnight on occasions when her children were away and, referring to the nature of his work, said that he was away from home quite a lot. She said that he does not provide any care/maintenance for her children and that her siblings do so when required. She reiterated that the mortgage on her home and all utility and household bills are met solely by her. She added that while they were on holiday, he had parked his car at her house for security reasons.

The Inspector stated that, based on her investigation, she considered that it had been established that the appellant was cohabiting with the person named although she acknowledged that she had seen his car only once parked at the appellant's home.

Conclusions: The Appeals Officer noted that when a person applies for a social welfare payment, the burden of proof lies with them to show that they meet the conditions of entitlement. However, once a claim is in payment, if consideration is to be given to withdrawing the payment, the burden of proof shifts and rests with the Department to establish that a change/withdrawal is appropriate.

He noted the provisions of the governing legislation, as follows: Section 175 of the Social Welfare (Consolidation) Act, 2005 prescribes that a 'qualified parent shall not, if and so long as that parent and any person are cohabiting as husband wife, be entitled to and shall be disqualified for receiving payment of one-parent family payment. Section 15 of the Social Welfare and Pensions Act, 2010 inserted the following definition into Section 2 (1) of the Act of 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.*

Section 172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 prescribes –'*for the purposes of this Part, a cohabitant is one of 2 adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other'.* It goes on to provide that all the circumstances of the relationship must be considered and, in particular, the following:

(a) the duration of the relationship;

(b) the basis on which the couple live together;

(c) the degree of financial dependence of either adult on the other and any agreements in respect of their finances;

(d) the degree and nature of any financial arrangements between the adults including any joint purchase of an estate or interest in land or joint acquisition of personal property;

(e) whether there are one or more dependent children;

(f) whether one of the adults cares for and supports the children of the other; and

(g) the degree to which the adults present themselves to others as a couple.

The Appeals Officer noted that the evidence submitted in support of the decision to terminate the appellant's claim on grounds of cohabitation included reference to her partner's car and a pair of men's boots having been observed outside her home, her partner's house being rented out to a long-term tenant, his other stated residence at his parent's home not having been confirmed, and the appellant having misinformed the Inspector as to the duration of their relationship.

The Appeals Officer noted that while the appellant and her partner may present themselves as a couple within their community, there were no obvious financial links with each other, no children from the relationship, and the care and support of her children was provided by the appellant and her family. He considered that whilst an issue of credibility may arise in the case, he was not satisfied that the Department had proven cohabitation and, in the circumstances, concluded that it would be unreasonable and unfair to uphold the decision.

Outcome: Appeal allowed.

5.2 Case Studies

Working Age –
Illness, Disability & Carers

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

2015/07 Illness Benefit
Oral hearing
Question at issue: Eligibility (medical)

Background: The appellant, a woman in her 50's, had a diagnosis of Multilevel Degenerative Disc Disease and had been in receipt of Illness Benefit since 1990. Following a review, which included an assessment by a Medical Assessor for the Department of Social Protection, her claim was disallowed on grounds that she 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).

Oral hearing: The appellant attended alone. She reported that she had had a good job that she enjoyed, prospects of progressing in her role and an expectation of a good pension in retirement. However, in view of her medical condition, she was required to retire on grounds of ill health.

The appellant stated that, at times, she is unable to do anything for herself, and that she has to take periods of rest throughout the day to get some relief from pain. She advised that she had no recollection of hurting her back but that the problem got worse after childbirth. She said that she tries to swim but cannot afford it at the moment. She advised that her husband and children help with household tasks. Her husband is farming and this helps as he is in and out during the day. She said that when she cooks, she prepares something that will do dinner for a few days.

The appellant stated that she had to have a pain relief injection in the previous month and that she had had another one about six months before that. She said that when the pain is bad, she is unable to dress herself and that using the bathroom presents difficulty. She reported that she has also developed neck pain over the last number of years and that she gets bad pins and needles in her right arm and elbow so that it can take her an hour in the morning before she can move her arm comfortably. She went on to provide an account of the extent to which she felt she was compromised in the activities of daily living as a result of her diagnosis, and she provided details of an appointment with a Consultant Neurophysiologist which had been scheduled for a date in the following month.

The appellant advised that it had taken her two years to complete an ECDL (computer training) course because she was unable to sit for long periods. She provided details of the medication she has been prescribed.

Consideration: Having examined all the evidence available, including that adduced at oral hearing, the Appeals Officer concluded that it had been established that the appellant was incapable of work, in line with the qualifying conditions for receipt of Illness Benefit.

Outcome: Appeal allowed.

2015/08 Illness Benefit
Oral hearing
Question at issue: Eligibility (medical)

Background: The appellant, a woman in her 40s, was suffering from Ligament Injury in her left knee which had started late in 2013. She was employed as a packing operator in a local factory. In connection with a review of her Illness Benefit claim, her G.P. provided a report at the request of the Department of Social Protection and advised that the condition was likely to last for 6 to 12 months. He also completed an ability/disability profile, assessing the appellant as being affected to a severe degree in the categories of bending, sitting, standing, climbing and walking. The appellant attended a Medical Assessor for the Department and a report of that examination was made available to the Deciding Officer. Ultimately, it was determined that the appellant was not incapable of work, in line with the qualifying criteria for receipt of Illness Benefit.

Oral hearing: The appellant attended alone. She advised that she had been in receipt of Jobseeker's Benefit following the disallowance of her Illness Benefit claim. She reported that she had recently started a six-month training course in computer applications with a view to retraining. She advised that she was still submitting medical certificates to the Department.

The appellant outlined the background to the injury she had sustained, describing how she had tripped over some cable in the workplace and suffered an injury to her left leg. She was referred to the company doctor and had an MRI scan. This showed a tear in the ligament and she was advised that she could not return to work until she was fit. She reported that she attends her G.P. and had been referred for a steroid injection in her knee some twelve months earlier. She advised that she had attended a Physiotherapist and that she continues to do the recommended exercises at home. She takes pain relief medication as required. The appellant reported that she is aware of her left knee, that she feels the bones grinding and that the knee dislocates quite often so that she has to bend her leg to get it back to where it should be. She said that the Orthopaedic Consultant had advised that she was too young for a knee operation but that it was likely that surgery would be required in the future.

In terms of progress, the appellant reported that it had become easier to manage than when she sustained the injury originally. However, she had concluded that she would not be returning to her previous employment and that she saw her future in retraining for office/administrative work. In conclusion, she advised that she had made a claim for compensation in connection with the injury.

Consideration: The Appeals Officer noted that while the appellant continued to have difficulties associated with her knee injury, she was keen to embark on a new career and was currently retraining in an area that would better accommodate her needs. Having considered carefully all of the evidence, including that adduced at oral hearing and the medical evidence available, she concluded that it had not been established that the appellant was incapable of work, in line with the qualifying conditions for receipt of Illness Benefit.
Outcome: Appeal disallowed.

2015/09 – Disability Allowance
Oral hearing
Question at issue: Medical eligibility in terms of employment

Background: The appellant, in his mid-30 s, had a diagnosis of Lower Back Pain and Hypertension. His G.P. assessed the categories of mental health/behaviour, walking, standing, sitting/rising as being moderately affected by his condition, while indicating that he was affected to a severe degree in relation to lifting/carrying, climbing stairs/ladders, and bending/kneeling/squatting. He advised that the appellant was suffering from severe low back pain, was unable to undertake any physical work, and was awaiting an orthopaedic consultation.

Oral hearing: The appellant was unaccompanied at the hearing. An official interpreter attended at the request of the Appeals Officer. The appellant outlined the following regarding his circumstances:

- His last employment was on a farm, where he had been sorting potatoes. This was seasonal work. He had been asked to do additional work which involved feeding the animals but he was having problems with his back at the time and was unable to do so. He had worked as a Kitchen Porter prior to the farm work.
- He said that his back first gave him problems about 5 years previously. He said there was no particular trigger, although he had been the victim of an assault and this may have been a contributory factor as he had been badly beaten. He said he had been hospitalised for a week in a [specified] central European country due to his back problem and that he had been treated with injections and medication.
- He submitted medical evidence for the Accident and Emergency department of his local hospital, where he had been taken by ambulance some months earlier due to severe back pain. He referred to a CT scan taken, which had shown problems with the discs in his back, although did not have a copy of the results with him. He advised that he had returned to the hospital the following month to see a doctor about rehabilitation exercises (appointment card submitted) but said that he had

been told that he was not a suitable candidate for the exercises at present.

- He advised that he had attended hospital again recently due to the severity of the pain in his back, and that he had been prescribed medication. He submitted a copy of the prescription.
- He confirmed that he was awaiting an appointment with an Orthopaedic Surgeon (letter submitted). He said that he had been advised that he might need surgery and he was concerned about the risks.
- He reported that he was not able to bend and put his socks on; he cannot stay in one position for long; he must get out of bed in a certain way; he experiences shooting pain down his left leg to his heel; he is taking a range of medication including sleeping tablets, and is upset by the situation.
- The appellant confirmed that he also suffers from Hypertension. This is monitored by his doctor and the medication is changed from time to time. He reported that he can feel sick at times and gets headaches if it is not properly controlled.
- The appellant advised that he wears a pain relief band around his waist, and said that he would work if he was fit to do so. In conclusion, he said that he was nervous about his current situation.

Consideration: The legislation governing entitlement to Disability Allowance provides that the allowance is payable to a person who is, by reason of a specified disability, substantially restricted in undertaking employment of a kind which, if the person was not suffering from the disability, would be suited to that person's age, experience and qualifications.

The Appeals Officer noted the medical evidence, including the G.P. report which indicated that the appellant's mobility was moderately to severely affected by his condition. She noted the appellant's account of his circumstances, his experience as a Kitchen Porter and also his work sorting potatoes on a farm. In addition, she had regard to the G.P. statement that he was not able to do any physical work. She concluded that it had been established that the appellant was substantially restricted in undertaking suitable employment, by reason of a specified disability that had continued for at least one year and, therefore, that he satisfied the criteria for receipt of Disability Allowance.

Outcome: Appeal allowed.

2015/10 – Disability Allowance
Oral hearing
Question at issue: Medical eligibility in terms of employment

Background: The appellant has a diagnosis of Diabetes, Type 1, and made a claim for Disability Allowance when she reached 16 years of age**.** Her mother had been in receipt of Domiciliary Care Allowance (payable until a child is aged 16 years) in respect of her care. The claim was rejected, with the Deciding Officer stating that in arriving at the decision, he had taken account of the opinion of the Department's Medical Assessor who considered that the appellant was not substantially restricted in seeking suitable employment, by reason of a specified disability which had lasted or was expected to last for a period of at least one year. The appellant made an appeal, emphasising the long-term nature of her specified disability.

Oral hearing: The appellant was accompanied by her mother. In line with the medical evidence on file, she confirmed that she had been diagnosed in 2004. She advised that her insulin prescription had been administered by injection initially and that she had required four injections per day. She said that this had imposed restrictions on her lifestyle. However, she advised that she had since had a pump fitted for the administration of insulin and that she was in close contact with the diabetic nurse in her local hospital, so that any checks or queries could be dealt with promptly.

The appellant reported that she continues to check her blood sugars four times daily, that she is always 'carb counting' in relation to meals, and that she has given up swimming as she is not comfortable in terms of the insulin pump getting wet. She said she was a bit worried about how she will manage in college, without her mother's care and support, and having to transfer to another hospital when she reaches 17 years. She confirmed that she is in Transition Year (TY) in school and provided an account of her participation in a busy TY programme. She reported that she takes part in a number of sports and that she goes horse-riding often.

The appellant's mother outlined the nature of the care and support she continues to provide, including being on call at all times, and she outlined her concerns for her daughter in the future.

Consideration: The Appeals Officer noted that the appellant had presented as positive and able to cope well with her specified disability, that she had an active lifestyle and was getting on well at school, with plans for third level education. She noted her age, experience and qualifications and, having examined all the evidence, concluded that the appellant could not be deemed eligible for receipt of Disability Allowance.

Outcome: Appeal disallowed.

2015/11 – Carer's Allowance
Oral hearing
Question at issue: Eligibility in terms of care required

Background: The appellant made a claim for Carer's Allowance in respect of care being provided for her parents, both of whom were in their seventies. Her father had been diagnosed with Ischaemic Heart Disease, Diabetes Mellitus and Chronic Obstructive Pulmonary Disease (COPD), while her mother had a diagnosis of Diabetes Mellitus, Anaemia, Hypertension, High Cholesterol, COPD and Chronic Kidney Disease. The claim was refused on grounds that neither person was held to require full-time care and attention as provided for in the governing legislation.

Oral hearing: The appellant attended the hearing in the company of one of her parents. The Appeals Officer sought to clarify the provisions of the legislation, making reference to the circumstances in which a person may be considered to have a need for full-time care and attention. He outlined the medical evidence which was available.

In outlining her parents' care needs, the appellant provided some background to her circumstances and an account of a typical day, with specific attention to her caring role. In this she submitted:

- Her parents live close by and she would generally call into them at around 9.30 a.m. By that time, they have usually mobilised, dressed and groomed. They do not need regular assistance with dressing or matters of hygiene, including washing/showering. She assists her mother with showering occasionally and also does physiotherapy to relieve joint discomfort associated with Arthritis.

- The appellant attends to making the breakfast and housekeeping, which includes making beds, cleaning and washing clothes.

- Her parents are reluctant to go out and usually stay indoors, watching television or listening to the radio. She usually accompanies her mother to collect her pension and do a little shopping. Her father takes short walks for exercise.

- The appellant prepares the dinner for 1 p.m. and all the family, including the appellant's own family, have their dinner in her parents' house. Her parents usually stay around the house in the afternoon. They have a light tea in the evening.

- The appellant does not usually call on her parents in the evening but is available, if needed. Her parents retire to bed, unassisted.

- The appellant pointed out that she monitors her mother's bloods daily as she is unable to do it herself. She understands the readings and notifies the relevant service when bloods are high. He mother self-injects her insulin.

- The appellant's brother brings both parents to their various hospital and G.P. appointments. He also looks in daily on his parents and looks after the fire, fetching turf and so on.

Consideration: The governing legislation, Section 179 of the Social Welfare (Consolidation) Act, 2005 prescribes that for the purposes of Carer's Allowance a relevant person is 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, and

(b) The nature and extent of his or her disability has been certified in the prescribed manner by a medical practitioner

The Appeals Officer noted the medical evidence provided in respect of each of the appellant's parents, and the fact that the family G.P. had suggested that they both required ongoing care and attention. He noted also that no issues of concern were raised in relation to their safety. In relation to the appellant's father, he noted that his medical condition was considered to have a moderate effect on his mental health, balance/co-ordination, vision and hearing, a mild effect on his continence and a mild to moderate effect on his ability to undertake the activities of daily living.

The Appeals Officer noted that the medical evidence provided in relation to the appellant's mother indicated that her condition had a moderate effect on her mental health, balance/co-ordination and vision and a mild to moderate effect on her ability to undertake the activities of daily living.

The Appeals Officer noted that the appellant's evidence had indicated that her parents were able, without support, to mobilise in the morning and attend to their own grooming, including hygiene. She had advised that her parents spend most of their time indoors, being reluctant to going out particularly because of mobility challenges associated with their medical conditions. He noted that for the most part, the appellant does the domestic tasks, including preparing all meals, making beds, cleaning and washing clothes. He noted that the appellant attended to some of her parents' personal needs, including assisting her mother with bathing, monitoring her blood sugar levels, and providing some physiotherapy. After a careful assessment, he concluded that whilst the evidence established that the appellant's parents required a level of care, it had not been established that they required full-time care and attention within the meaning of the provisions of social welfare legislation.

Outcome: Appeal disallowed.

2015/12 – Carer's Allowance
Oral hearing
Question at issue: Eligibility in terms of care provided

Background: The appellant applied for Carer's Allowance in respect of care being provided for her grandfather, who resides with his daughter and her family. He is in his late sixties and had been deemed to require full-time care. The appellant lived with her parents and went to a rural area to care for her grandfather on a Monday to Friday basis. This was confirmed in the report of a Social Welfare Inspector. The claim was refused on grounds that the appellant was held not to be providing full-time care and attention as she was not resident with her grandfather on a full-time basis and the care was shared with her aunt who was living with him. In her appeal, the appellant stated that she provides full-time care from Sunday to Friday and that her aunt looks after her grandfather on Saturdays only.

Oral hearing: The appellant advised that she was in receipt of Jobseeker's Allowance and that she continued to live at her parents' home. She outlined the background to the current arrangement in which she provides care for her grandfather. The appellant's aunt continued to live with her parents after she married. She has three children and is in full-time employment. When the appellant's grandmother became ill some years ago, the appellant went to live with and care for her. She continued to visit her grandfather for a few days a week after her grandmother's death in 2012, initially just to keep him company. As his health declined, however, she began and has continued to care for him. She referred to her grandfather's diagnosis of Parkinson's disease, together with Angina and renal problems.

The appellant stated that she used to stay with her grandfather from Monday to Friday, going home each Saturday and returning on Sunday and, more recently, going home on Sunday and returning around mid-day on Monday. She advised that she travels by train and she submitted receipts for some of the weeks involved (a total of 19 return tickets), stating that she had not kept them all.

The appellant reported that she gets her grandfather up in the morning, helps him to wash and dress and then gets his breakfast. She advised that his Parkinson's has deteriorated and that he is almost fully incontinent. She administers his medications, collecting them and putting them in order. Her aunt collects his pension and assists him in paying the bills and she has no knowledge or input to this. She advised that she had completed a carer's training course, which had helped her to cope, especially in relation to protecting her back, which had been taking a lot of strain. She went on to say that she cooks for all the family, does her grandfather's laundry and, while she does not drive, she accompanies him to all medical appointments, usually getting a lift from a neighbour or another family member, who lives nearby.

Consideration: The Appeals Officer noted that the appellant was fully unemployed and in receipt of Jobseeker's Allowance, whilst her aunt and family were working. She noted the circumstances in which the current arrangements had arisen and the fact that the appellant had undertaken a carer's training course, with the intention of caring for her grandfather. She had regard also to the fact that the other household members were absent during the day, returning only in the evening, and that the appellant was providing personal care on a daily basis. She observed that the appellant's account, given at the oral hearing, was genuine and credible and she noted that the provision of care now extends to part of each weekend. On the basis of the evidence available, including the fact that appellant lives with her grandfather for the majority of the time and is his sole carer, the Appeals Officer was satisfied that she was providing full-time care and attention, despite travelling home at weekends.

Outcome: Appeal allowed

5.3 Case Studies: Working Age – Income Supports

2015/13 – Jobseeker's Benefit
Summary decision
Question at issue: Subsidiary employment

Background: The appellant was employed on a casual basis in a local fish factory and was also engaged in small-scale farming. He had been in receipt of Jobseeker's Benefit over several years, requalifying as required, in respect of periods when his casual employment was not available to him due to the fact that his farming, estimated at an average of two hours per day, seven days per week, was deemed to be subsidiary self-employment as prescribed in legislation. As he was a casual worker, the legislative requirement that a person must have incurred a substantial loss of employment did not apply in his circumstances. When the appellant had exhausted his most recent Jobseeker's Benefit claim, his case was examined to determine if he requalified with effect from a specified date in 2015. In a departure from previous practice, the Deciding Officer held that he was not unemployed as his farming was no longer deemed to be subsidiary self-employment.

Legislation: Section 62 of the Social Welfare (Consolidation) Act, 2005, prescribes the qualifying conditions for receipt of Jobseeker's Benefit, including the requirements for *'a day of interruption of employment'* and *'a period of interruption of employment'*.

Article 44 of the Social Welfare (Consolidated Claims, Payment and Control) Regulations, 2007 (S.I. 142 of 2007) provides for treating a day as a day of unemployment where a person is engaged in employment or self-employment of a subsidiary nature, as follows:

44. (1) For the purposes of Chapter 12 of Part 2, a day shall not be treated as a day of unemployment if it is a day in respect of which a person –

> *(a) fails to prove to the satisfaction of the Minister that he or she is unemployed, capable of work and available for employment, or*
>
> *(b) follows any occupation from which he or she derives any remuneration or profit, unless such occupation -*
>
> > *(i) could ordinarily have been followed by him or her in addition to his or her usual employment and outside the ordinary working hours of that employment and –*
> >
> > > *(I) the remuneration or profit from any day of such occupation does not exceed €12.70, or, where the remuneration or profit is in respect of a period longer than a day, such remuneration or profit does not on the daily average exceed that amount, or*

(II) not less than 117 employment contributions have been paid in respect of him or her in respect of the period of 3 years immediately preceding that day or in respect of the last 3 complete contribution years immediately preceding that day

In his appeal submission, the Deciding Officer stated that the appellant was a seasonal factory worker and a self-employed farmer. His employment in the factory, at 24 out of the previous 37 weeks, or 89 from a total of 259 days, was casual work and had no discernible pattern. Although noting that the relevant Department of Social Protection Guidelines do not specify a requirement that the *'usual'* job is full-time, he concluded that a *very substantial gap* is required between the main occupation and the subsidiary occupation in terms of primacy, as the appellant must be engaged in one employment to a considerably greater extent than the other and both must be worked alongside each other.

The Deciding Officer concluded that the days of employment preceding the current claim were irregular, with significant periods of unemployment; as the employment could not be said to have any ordinary/regular working hours, a significant amount of the appellant's farming took place outside but not alongside normal working hours; the appellant had been classified as a casual worker over an extended period and this could not also be considered to be a main occupation to which farming was subsidiary, and it would be contradictory to decide that a person is a casual worker and that he has a second subsidiary employment outside the ordinary working hours of his usual employment. The Deciding Officer concluded that the appellant had two part time jobs.

Consideration: The Appeals Officer noted that the appellant's farming had been deemed to be subsidiary self-employment for Jobseeker's Benefit purposes over several years and that there was no evidence of a recent or sudden increase in the level of farming or of a relevant change in the level or pattern of casual work. Consequently, he observed that the reasons for an adverse decision by the Deciding Officer were unclear in connection with the current claim.

When determining whether or not the subsidiary employment/self-employment rule applies, legislation does not prescribe that one or other of the occupations must be full-time or that the gap between the level of employment vis-à-vis the subsidiary occupation should be substantial. These issues, to the extent that they are addressed, are provided for in law by way of prescribing that it should be possible to carry out the subsidiary employment or occupation in addition to and outside the *'ordinary working hours'* of the usual employment, and by prescribing that a minimum number of contributions are required or that the prescribed threshold of average daily income from self-employment is not exceeded. In this context, the Appeals Officer considered that the appellant's *'ordinary working hours'* of employment could be determined only by the history of the employer's requirements, which were outside the appellant's control, and by the ability of the appellant to follow the *'other'* occupation with reference to his history in relation to that *'other'*

occupation, considered in tandem with his record of acceptance or refusal of any work offered by the employer (or indeed of any other offers of work).

The Appeals Officer considered that, in the absence of any refusal of an offer of work by reason of his farming obligations, the appellant could be said to have always carried out his farming outside the hours of employment and including, when working, alongside the employment. He observed that it would appear extremely harsh to conclude that, where a person is employed for a substantial part of the year but where his hours of employment, over which he has no control, are variable, he simply cannot qualify for Jobseeker's Benefit under the subsidiary self-employment provision, regardless of the level of farming. He noted the Deciding Officer's conclusion that, as the employment was casual in nature and of irregular hours, a significant amount of the appellant's farming took place outside, but not alongside, his employment. The Appeals Officer conceded that this might be true but that it did not alter the fact that the appellant had also been engaged in both during significant and substantial periods of employment. Accordingly, he concluded that the appellant's engagement in farming for an average of two hours per day was subsidiary self-employment, as prescribed for purposes of Jobseeker's Benefit.

Outcome: Appeal allowed.

2015/14 – Jobseeker's Allowance
Oral hearing
Question at issue: Assessment of means

Background: The appellant's claim for Jobseeker's Allowance was referred to a Social Welfare Inspector for an investigation of means. The Inspector reported that the appellant had been renting a house for a year and a half with a [named] person and, prior to that, they had been renting a house together for two years. The Inspector noted that a means assessment for an earlier claim in 2011 had included an assessment of that person's income and that the appellant had not made an appeal against the decision at that time, although she conceded that the income assessed had been considerably lower at that time. The Inspector noted also that the appellant had received an award following an unfair dismissals action and that he had transferred €12,500 of that award to the other person for what he said were loan repayments. Accordingly, the Inspector considered that they were cohabiting and submitted a report to the Deciding Officer on that basis. Ultimately, the appellant was assessed with means of €522.00 per week derived from his own and his partner's self-employment, and his claim was disallowed on grounds that his means were in excess of the statutory limit.

Oral hearing: The appellant attended alone, while the Social Welfare Inspector attended at the request of the Appeals Officer. The Inspector outlined the details of her report, making reference to the house that the appellant and his partner had purchased for €235,000 in

2007 – financed by means of the appellant's contribution of €100,000 from his divorce settlement and a joint mortgage of €165,000. She said that the appellant had reported that he was paying the mortgage while his partner paid utility bills although the accounts were held in his name. She noted that, at interview, the appellant had denied cohabitation.

The Inspector reported that the appellant's income from self-employment had been assessed on the basis of invoices submitted; these were not complete and the assessment had been completed with reference to bank statements. She stated that she had reported annual profit at €10,523, or €202.36 per week. She stated that the appellant had claimed the [named] person as a qualified adult when in receipt of a Back to Work Allowance payment between specified dates in 2012 and 2014. In conclusion, she noted that the appellant's investment in the house appeared to far outweigh that of the other person and she reiterated her assertion that they continued to cohabit.

For his part, the appellant denied cohabitation. He said that he had rented a room from the [named] person at two properties. He advised that, subsequently, he got a job in another county and he became aware of a further vacancy in the company and advised her as she had lost her job in the meantime. He stated that they had purchased the house together as a commercial transaction intending to refurbish it and sell it on at a profit. However, that had not worked out. He said that currently the [named] person was barely speaking to him as he was making no contribution to the house and she was paying interest only on the mortgage. He stated that they lead completely separate lives. He said that income details for the [named] person referred to 2012, with income of €20,240 and rent of €3,640 but no other expenses taken into account.

The appellant said also that the [named] person had paid for most of the work done on the house and he believed she contributed more than he had. He made reference to the Inspector's statement about the claim in 2011 and said he had not made an appeal as he had been paid Jobseeker's Allowance, albeit at a reduced rate. He said he had never put down on any application form that the person concerned was his partner.

The appellant advised that he had ceased self-employment as he had had to sell his equipment to get money. The Appeals Officer advised that if he wished to submit further evidence, such as accounts in respect of the [named] person which would allow a more accurate assessment of expenses to be taken into account, he would allow a further period of two weeks before determining the appeal; in the absence of any further information, he would proceed to make a decision based on the evidence available.

Consideration: The Appeals Officer noted that the appellant had lived with the [named] person at three different locations over a protracted period and that they had moved together from the north east to the south of the country. In addition, they had obtained a joint mortgage and bought a house together. He noted that the appellant did not appeal a previous decision in 2011 although he acknowledged that the means assessed at the time

were small and he noted also that the appellant had claimed for the person concerned as an adult dependant on his Back to Work Allowance between 2012 and 2014. He considered that the evidence indicated cohabitation. He noted that, following the oral hearing, the appellant had written to advise that the [named] person had declined to give details of her income and that the appellant had reiterated his assertion that he should be treated as an individual for means purposes and not as one of a couple. In the absence of any additional details as to income, the Appeals Officer concluded that the appellant had not established that his weekly means were less than the limit provided for in legislation and he noted that even when the appellant's own income from self-employment was excluded, his means exceeded that limit.

Outcome: Appeal disallowed.

2015/15 – Carer's Benefit & Maternity Benefit
Oral hearing and subsequent Section 318 review
Question at issue: Concurrent payment of benefits

Background: The appellant had been in full-time employment prior to the birth of her first child. When her child was diagnosed as having a disability, she made a claim for Carer's Benefit and returned to work on a part-time basis. The claim was awarded with effect from a date in 2012 for the maximum period (104 weeks) for which Carer's Benefit may be paid. The appellant applied for and was awarded Maternity Benefit in 2013. In connection with that claim, she had provided details of her Carer's Benefit payment. Subsequently, however, she was advised that Carer's Benefit is not payable with other social welfare payments such as Maternity Benefit and a Deciding Officer held that she was not entitled to Carer's Benefit with effect from the date on which Maternity Benefit had been paid. The effect of the decision was to create an overpayment of some €5,000.

Oral hearing: The appellant outlined the background to her claim for Carer's Benefit and her decision to make the claim. She stated that, on the application form, there had been a list of circumstances outlined that may affect Carer's Benefit and a statement indicating that there was a requirement to notify the Department in the event of such circumstances occurring. She pointed out that payment of Maternity Benefits was not included on the list. In addition, she stated that when she completed the application form for Maternity Benefit she had declared that she was in receipt of Carer's Benefit. She said that she did not consider that she was liable for the overpayment which had been assessed.

The appellant acknowledged that she had signed a declaration on the Carer's Benefit claim form, indicating that she would notify the Department of any change in income or circumstances. She advised that she had been aware that her combined income was quite high but that she had considered that this was something to which she had an entitlement in view of her circumstances. She advised that her second child had also been diagnosed

with the same disability and that she was in receipt of Carer's Allowance and Domiciliary Care Allowance in respect of both children.

Consideration: Having regard to the provisions of the legislation, the Appeals Officer concluded that the appellant was not entitled to receive Carer's Benefit for the period that she had paid been Maternity Benefit. Accordingly, the appeal was held not to succeed. Following further submissions, the Appeals Officer revised his decision and determined that it should take effect from a specified date only, with the effect that the amount of the overpayment was reduced.

Request for review: Solicitors acting for the appellant sought a review of the Appeals Officer's decision in accordance with Section 318 of the Social Welfare Consolidation Act, 2005. The Chief Appeals Officer carried out a review, advising that her role under the terms of the legislation was a revising one rather than another avenue of appeal.

Grounds for Review: In support of the request, two points were put forward: that when the Department notified the appellant of the award of Carer's Benefit, the receipt of Maternity Benefit was not listed as one of the circumstances that would affect her entitlement, and in her application for Maternity Benefit she had provided details of the Carer's Benefit payment. It was asserted that the Appeals Officer did not exercise his discretion properly in relation to the reduction in the overpayment assessed against the appellant.

The Chief Appeals Officer examined the background to the case and the details of the appellant's claim. She noted that the appellant's attention had been drawn to the circumstances and events which might affect her Carer's Benefit and of the necessity to notify the Department if any of these occurred. She observed that only one of the twelve events related to receipt of a payment (Domiciliary Care Allowance) and that the others related to circumstances such as change in care arrangements, change of address, bank details or marital status. Maternity Benefit was not mentioned.

Having reviewed all the material that was before the Appeals Officer, the Chief Appeals Officer was satisfied that the appellant had provided full details of her Carer's Benefit payment when she applied for Maternity Benefit. She concluded that, in doing so, she had fully discharged her obligation to notify the Department of a change of circumstances that might affect her entitlement to Carer's Benefit – albeit that the payment of Maternity Benefit was not listed as a payment that might affect her continued entitlement to Carer's Benefit. She noted that the information had been submitted to the Department in ample time to allow payment of Carer's Benefit to be discontinued and to avoid the concurrent payment of Carer's Benefit and Maternity Benefit. She concluded, therefore, that the decision of the Appeals Officer was erroneous in that appropriate consideration was not given to all the facts of the case and that discretion had not been appropriately applied by

the Appeals Officer. In the circumstances, the Chief Appeals Officer determined that the revised decision should have taken effect from a current date and no overpayment raised.

Outcome: Appeal allowed.

2015/16 Maternity Benefit
Summary decision
Question at issue: Eligibility

Background: The appellant, a non-EEA national, was disallowed Maternity Benefit on the grounds that she was not an employed contributor as she was required to hold a work permit to engage in employment in Ireland. She had worked in Ireland and held an employment permit (green card) and later had permission to live in Ireland and work without a work permit, having been granted a Stamp 4 (immigration stamp). Following her marriage, she moved with her husband to live in Northern Ireland and both continued to work in Ireland. In his determination, the Deciding Officer held that the appellant, on expiry of her Stamp 4 status, was required to have a work permit in order to work in Ireland. The appellant's husband is a United Kingdom national who had worked in Ireland and had a full social insurance contribution record for the previous eight years. He had continued to work in Ireland after he and the appellant moved to Northern Ireland to live.

Consideration: The Appeals Officer observed that the appeal involved complex EU law. He noted that the status of the appellant in the context of her husband's migrant worker status in Ireland was not considered prior to the decision to disallow her claim to Maternity Benefit. He made reference to Directive 2004/38/EC, which consolidated a range of EU law including Article 11 of Regulation (EEC) 1612/68. This Article is now Article 23 of Directive 2004/38/EC, and the relevant provision was transposed into national law by Regulation 18(1) (b) of the European Communities (Free Movement of Persons) (No. 2) Regulations, 2006, S.I. No. 656 of 2006.

The Appeals Officer referred to Section 2 of the Employment Permits Act, 2003, which provides that a non-national may not engage in employment in the State unless he or she has a work permit. However, he noted that subsection (10) of Section 2 (as amended by Section 3(b) of the Employment Permit Act, 2006) provides that the requirement for a foreign national to obtain a work permit does not apply to those persons who are entitled to enter the State and to take up employment pursuant to the treaties governing the European Communities.

The Appeals Officer referred also to Article 11 of Regulation (EEC) 1612/68, which was interpreted by the European Court of Justice in a Judgment of 30 June 2006, Case C-10/05 Mattern, to mean that the non-EU national spouse of an EU national migrant worker in a Member State had the right to work only in the Member State in which the EU national

spouse is employed. He drew attention also to a case dealt with by the High Court in 2010, in Decsi & Ors –v- Minister for Justice, Equality and Law Reform [2010] IEHC 342, where that Court reiterated that the non-EEA spouse of a non-Irish EU national (working in Ireland) had a right to work in Ireland without a work permit.

The Appeals Officer concluded that the appellant, as the spouse of a United Kingdom national who works in Ireland and lives in Northern Ireland, did not require a work permit in order to work in Ireland, in accordance with the provisions of EU law. He determined, therefore, that the appellant was an employed contributor for purpose of her claim to Maternity Benefit and was entitled to that benefit where the other statutory qualifying conditions were met.
Outcome: Appeal allowed.

2015/17 Back to Work Family Dividend
Summary decision
Question at issue: Eligibility

Background: The Back to Work Family Dividend scheme was introduced in January 2015, and intended as an income support in circumstances where people who have children cease to claim social welfare payments and seek to rely on income from employment or self-employment. It is paid in the form of a financial support, or dividend, payable over a two year period and determined with reference to a person's entitlement to an increase in payment in respect of a qualified child, calculated at the point where they cease to claim a social welfare payment and subject to a minimum payment for each child.

In the case at issue, the appellant's claim was disallowed on grounds that his employment took place in Northern Ireland and that he was not eligible under the terms of the scheme. In setting out his grounds of appeal, he asserted that no reference had been made in the guidelines to advise that such employment was outside the scope of the scheme.

Consideration: The Appeals Officer referred to the governing legislation which provides that 'employment' in the context of this payment means 'insurable employment' as an 'employed contributor'. He noted that employed contributors are those persons working in the State under a contract of service (employees) and making contributions to the Social Insurance Fund and, accordingly, that this excludes persons working in Northern Ireland. In addition, he observed that under EU Regulations, family benefits such as the Back to Work Family Dividend may be claimed only in the State in which the worker is employed and to which he or she pays social insurance. Accordingly, the Appeals Officer concluded that the appellant did not qualify for payment under the scheme.

Outcome: Appeal disallowed.

2015/18 Supplementary Welfare Allowance (Rent Supplement)
Oral hearing
Question at issue: Maximum rent limit and access to children

Background: Under the Supplementary Welfare Allowance scheme, a Rent Supplement may be paid where a person is paying rent which is within the limit set out in social welfare legislation. The limit varies according to the area in which the person lives and the number of people sharing the accommodation. The appellant was in receipt of Rent Supplement which had been calculated with reference to the maximum rent limit (cap) which applied in respect of a single person living in that area. He applied for an increase and sought to have the supplement calculated with reference to a higher limit which would take account of the need for him to have access to his children. The application was refused as the higher rent was deemed to be in excess of the maximum rent limit which applied.
Oral hearing: The appellant reported that he had been living at his current address for four years, a two bedroomed apartment that was not in the best condition. He said that as he would help occasionally with maintenance, the landlord had allowed him to pay rent at the rate of Rent Supplement he received as a single person. He reported that the landlord was selling the apartment and he had wanted to move. He confirmed that he had applied for Rent Supplement in respect of accommodation for himself and his children. He advised that he had not moved to any new property as he did not have the money and was currently residing with a friend. He said that he wanted accommodation for himself and his three children and he considered that a two bedroom property would suffice. He said that currently any accommodation was difficult to source in the urban area where he was living, as a lot of what was available was very expensive and/or landlords would not take persons who wished to avail of Rent Supplement.
The appellant reported that his ex-wife and their children continued to live in the local authority accommodation which had been the family home. He said he had been seeking custody and access to the children for years and had been granted access as follows:
Week 1 – Friday after school to Sunday at 5.00 p.m., Tuesday after school to 7.30 p.m.
Week 2 – Wednesday after school until Friday morning.
The appellant reported that prior to these access arrangements being drawn up, the children would visit. He advised that he had been due to attend court two months earlier regarding custody. However, as he did not have accommodation, he did not attend. He said that his ex-wife's solicitor had indicated that the matter will be brought before the court again as he is failing to abide by the access agreement. He said that he would forward evidence to this effect (and this was submitted subsequently).

Consideration: The Appeals Officer noted that the appellant had pursued custody of his children through the courts and that access had been granted as outlined above, and confirmed by way of Court Order. She noted that the appellant was not able to adhere to this arrangement due to unsuitable accommodation. Based on all the evidence, she

determined that the maximum rent limit which should apply in the appellant's case was one that takes cognisance of his children's needs.

Outcome: Appeal allowed.

5.4 Case Studies

Retired, Older People & Other

5.4 Case Studies: Retired, Older People & Other

2015/19 State Pension (Contributory)
Oral hearing
Question at issue: Eligibility with reference to contributions paid

Background: The appellant applied for State Pension (Contributory) and her claim was disallowed as she did not have the required 520 paid contributions prior to her 66th birthday. The Deciding Officer noted that she had 449 paid contributions. The appellant challenged the level of contributions recorded and the Department discovered additional contributions had been paid in the years 1979 and 1980. Her social insurance record was updated to show 505 paid contributions and the appellant's claim was re-examined. However, as she had not achieved the required minimum of 520 contributions, the application was rejected again. In her appeal submission, the appellant asserted that she had worked full-time for a [named] employer from 1969 to 1980, and she disputed that the contributions shown on her record should vary from year to year. In addition, she stated that she had also worked in 1982.

Oral hearing: The question at issue was outlined and the appellant began by referring to her contribution history records. She asked the Appeals Officer to note that two records had been issued to her; initially, she had been notified that she had only 449 paid contributions but following her challenge, her record was updated to 505 contributions. She submitted for inspection various historical letters regarding her employment.

The appellant referred to a letter from the [named] employer, dated from 1980, which certified that she had worked from 5 January 1970 to 4 January 1980. She was adamant that she had worked without a break in that ten year period and could not explain why a full 52 contributions had not been returned every year.

The appellant reported that her first child was born in 1980 and that she had taken maternity leave. She estimated that she would have resumed work in April of that year. She advised that she had resigned from her employment in 1980 and pointed out that the letter from her employer confirmed that she was due four days holidays. She submitted that this indicated that she had had at least three months service in that year.

The appellant recalled being told by the Department some years ago that there had been a mix-up in her record. She said she was at a loss as to how credits were awarded because, as far as she could recall, she had not claimed any social welfare payment. In conclusion, she advised that she had done part-time work for a short period in 1982 but had eventually left her employment because of child-care issues.

Consideration: The Appeals Officer observed that there had been inconsistencies in the returning of social insurance contributions generally during the period 1979-1981, with the introduction of the Pay-Related Social Insurance (PRSI) system in April 1979 in the midst of a postal strike. He recalled that employers had encountered problems in the acquisition of social insurance stamps or refill franking machines. He suggested that this must be borne in mind where a contributor's record is incomplete in these particular years. He noted that the appellant's record, while initially incomplete, had been rectified in respect of those years.

The Appeals Officer noted that prior to the introduction of the PRSI system, social insurance records were returned manually in January of each year in the case of men and each July for women. Accordingly, the women's social insurance year ran from 3 July 1978 to 5 April 1979, a total of 40 weeks. He noted that the appellant's record for 1978/79 had been amended to show 40 contributions and observed that this was correct. He noted that the 1979/80 year showed another 40 contributions, and that the appellant had provided evidence to indicate that she had resigned from her employment on 4 January 1980 so that these 40 contributions were also correct.

The Appeals Officer noted that the appellant had submitted evidence that she had resumed work on a part-time basis and a letter issued by her employer in September 1980 confirmed that she had accumulated 4 days holidays in her service at that point in time. He noted that she would have had to work for over 3 months to accumulate 4 days leave entitlement so that the 16 contributions recorded in 1980/81 were probably correct. He observed, however, that what was not recorded was the appellant's stated employment in 1982. He noted her insistence that she had worked after her second child was born in 1982 although, unfortunately she had been unable to provide any specific details as to dates or duration.

In examining the appellant's record for 1970/71, the Appeals Officer noted that it showed just 37 contributions. This was into her second years' service with the [named] employer and she had been adamant at oral hearing that she had not been absent for 15 weeks. On closer examination of the record sheet and the notation used, the Appeals Officer discovered that what had been recorded as 37 should in fact have been 51 (+ 1), giving the appellant a full year's contributions and adding an additional 15 contributions to her record. Accordingly, she had the required 520 contributions.

Outcome: Appeal allowed

2015/20 – State Pension (Contributory)
Summary decision
Question at issue: Eligibility with reference to contributions paid

Background: The appellant applied for a State Pension (Contributory). His application was refused as the Deciding Officer held that he did not meet the requirement of having at least 520 paid full-rate social insurance contributions prior to his 66th birthday. His social insurance record indicated a total of 519 such contributions. He made an appeal against the decision and stated that he had worked abroad for three months in 2004, as the employee of an Irish aid agency, and had not been awarded any contributions for this period of time. He submitted that these contributions would have allowed him to meet the qualifying requirement. The Appeals Officer determined the appeal on a summary basis.

Consideration: Based on an assessment of his social insurance record, the Appeals Officer concluded that the appellant had not been attached to the Irish social insurance system prior to his departure in 2004. He noted that the evidence indicated that his most recent social insurance attachment was to the system in the United Kingdom, by virtue of having paid 52 contributions there in the 1998/1999 year, the last year for which there was an insurance record available, and prior to his employment by the aid agency in 2004. He noted that the appellant's last insurance contributions in Ireland had been recorded for the 1997/1998 year and, accordingly, that he had not been awarded contributions for the time spent working abroad with reference to the provisions of Article 98 of the Social Welfare (Consolidated Contributions and Insurability) Regulations, 1996 (S.I. 312 of 1996). This legislation provides for consideration of temporary employment in the circumstances specified, which include a requirement to have been ordinarily resident in the State, as follows.

> *98. (1) Where an insured person who is ordinarily resident in the State is temporarily employed outside the State in the service of an employer who is resident or has a place of business in the State in an employment which, but for the words "in the State" in paragraph 1 of Part 1 of the First Schedule to the Principal Act would be employment within the meaning of that paragraph, the said paragraph shall be construed as if the words "in the State" were deleted therefrom and the provisions of the Principal Act which govern the payment of employment contributions shall apply in respect of that person.*

The Appeals Officer noted that there was no evidence that the appellant had been employed in the State from 1999 to the date prior to the commencement of his employment with the aid agency, which would have given him an entitlement to social insurance contributions for the period in question. He concluded that the decision was correct and that the manner in which the appellant's claim had been calculated was in line with the provisions of the governing legislation. He noted that the appellant was in receipt

of a State Pension (Non-Contributory) at the maximum rate, including a living alone allowance and a fuel allowance. He advised that the appellant should be aware that were he to have qualified for a contributory pension, it would be on a reduced basis with reference to his contribution record, and the rate of payment would be significantly lower than the rate of the non-contributory pension which he had been awarded.

Outcome: Appeal disallowed.

2015/21 – State Pension (Non-Contributory)
Summary decision
Question at issue: Means and overpayment assessed following review

Background: Following a review of his means, it came to light that the appellant had capital which had not been disclosed. The Deciding Officer made a revised decision and determined that the appellant had means which affected the rate of pension he received between 2009 and 2014. Arising from that decision, an overpayment of some €22,000 was assessed. The Deciding Officer relied on the provisions of the Social Welfare Consolidation Act, 2005, Section 302 (a), as a basis for the decision. An appeal was made on the appellant's behalf by an Information Officer/Advocate with his local Citizens Information Service. It was submitted that the appellant had a diagnosis of Parkinson's disease and that he never opened or read any correspondence that came in the post. The appeal was determined by way of summary decision.

Consideration: The Appeals Officer referred to the submission made on the appellant's behalf, including details of the appellant's medical diagnosis, noting that his sister had assisted in acquiring the information requested by the Social Welfare Inspector during the review process. She noted that it had been submitted that he had an entitlement to Widower's Pension (Contributory) with effect from 2008, when his wife died, and that he need not have made a claim for State Pension (Non-Contributory) had he received a Widower's Pension. It was pointed out that he had been in receipt of Disability Allowance and that, in line with advice given by staff of the Department of Social Protection, he had applied for State Pension (Non-Contributory) on reaching 66 years of age. The Information Officer/Advocate advised that she had assisted in having a claim completed by the appellant and that an award of Widower's Pension (Contributory) had been made with effect from a date in 2015.

The Appeals Officer noted the Deciding Officer's conclusion that retrospective payment of Widower's Pension (Contributory), with an offset against the overpayment assessed in relation to State Pension (Non-Contributory), could not be provided for as the revised decision was made with reference to Section 302 (a) of the Act. Those legislative provisions outline the manner in which revised decisions are to take effect where the original decision was given, or had continued in effect, by reason of any statement or representation which

was to the knowledge of the person making it false or misleading or by reason of the wilful concealment of any material fact. The Deciding Officer was satisfied that this was the appropriate legislative provision to apply as the appellant had failed to notify a change in his circumstances, that is, the lodgement of €40,000 to his bank account in 2009.

The Appeals Officer observed that a high standard of proof must be held to be required where Section 302 (a) is deemed to apply, not least because of the additional penalties which it entails, such as the restriction on offsetting other entitlements against overpayments assessed, as provided for under Section 342A. In this regard, she noted that the Social Welfare Inspector who interviewed the appellant and noted his circumstances, had made no reference to the possibility of fraudulent intent and that the Deciding Officer had not indicated the basis for his assertion in this regard. In addition, she noted that the appellant had a diagnosis which imposes limitations in relation to managing his affairs and that, while he had not notified the Department about the bank lodgement, neither had he advised as to his wife's death. While it might be argued that the former would have affected his pension adversely, the latter would have provided the basis for a claim.

The Appeals Officer concluded that while it had been established that the appellant had capital that was not disclosed, there was no evidence to suggest that there had been fraudulent intent. Accordingly, she determined that the revised decision should apply for the dates specified but with reference to the provisions of the Social Welfare (Consolidation) Act, 2005, Section 302 (b), allowing for the retrospective award of Widower's Pension (Contributory) to be offset against the overpayment assessed in relation to State Pension (Contributory).

Outcome: Appeal partially allowed.

2015/22 & 2015/23 – Unspecified payment in respect of two appellants
Oral hearing
Question at issue: Cohabitation

Background: The appellants were each in receipt of named payments. In the context of a review of entitlement, and an investigation by a Social Welfare Inspector, a question arose as to cohabitation. The Inspector interviewed each of the appellants and submitted reports and accompanying documents for determination. The Deciding Officer made reference to the interviews conducted by the Social Welfare Inspector and concluded that each of the appellants had concealed a material fact, that is, that they were cohabiting with one another. Ultimately, it was concluded that both persons were disqualified for receipt of the named payments as they were cohabiting. A revised decision was made in each case, with reference to the provisions of Section 302 (a) of the Social Welfare (Consolidation) Act, 2005, and overpayments were assessed. An appeal was made by both parties. In response

to a request made by solicitors acting for each of the appellants, and with the approval of the Chief Appeals Officer, the appeals were heard together – with a separate report and decision completed in each case.

Oral hearing: The appellants attended, and each was represented separately by a solicitor. The Social Welfare Inspector attended at the request of the Appeals Officer. The decision at issue in each case was outlined, as was the manner in which the Appeals Officer intended to proceed.

It was acknowledged that the second appellant resided at the address of the first appellant for some years. It was contended, however, that the parties had never cohabited within the meaning of the Social Welfare Acts and, in particular, that they had not been engaged in an intimate/sexual relationship at any time. It was submitted that they had been nothing but platonic friends, had separate bedrooms, that the first appellant had her own independent means, that she was not engaged to, nor did she have any intention of marrying the other person.

In support of the appeal, reference was made to a Court Judgment, dated 5 May 2015, *In the matter of Section 194 of the Civil Partnership and Certain Rights and Obligations Cohabitants Act 2010* [2015] IEHC 309, where Baker J found [paras. 21, 77, 78, 79] that in order to be a cohabitant for purposes of the 2010 Act, a relationship must be more than one of mere friendship and must be or have been at some point sexually intimate.
Medical evidence was submitted outlining medical issues which prevented a sexually intimate relationship. It was also submitted on behalf of both appellants that in the report of his investigation of the two claims, the Social Welfare Inspector had stated that the appellants were co-resident.

Consideration: The Appeals Officer made reference to the provisions of the governing social welfare legislation. In particular reference was made to the definition of 'Cohabitant' which is defined in section 2(1) of the Social Welfare (Consolidation) Act, 2005, to mean a cohabitant within the meaning of section 172(1) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010, which provides:

> *– …a cohabitant is one of 2 adults (whether of the same or opposite sex) who live together in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other.*

The Appeals Officer observed that, prior to 2010, the relevant section of the Act provided for disqualification where two people were cohabiting 'as husband and wife'. In the cases at issue, the Appeals Officer noted that if cohabitation in an intimate and committed relationship was not established, it could not be contended that the appellants concealed a material fact and, accordingly, that each would retain an entitlement to the named payments and no overpayment would arise. In this regard, he considered that the

Judgment of Baker J, IEHC 309, was critical in assessing the evidence in the cases at issue. He made reference to paragraphs 21, 77, 78, 79, 86 and 95 of the Judgment as being of particular relevance, one of which states:

> Para 86 – "*The Act offers no assistance as to what is meant by an intimate relationship, but having regard to s. 172(3) it is clear that the relationship must have been at some point in time a sexual relationship for intimacy to be found. The intimacy that is intended is a sexual intimacy and not merely the intimacy of a close friendship".*

The Appeals Officer noted from the evidence presented by the Department in the context of its review, which pre-dated the Court Judgment cited, that many of the interconnected elements to which Baker J had made reference were considered to be in place in this case. In Paragraph 95, for example, it is stated that:

> *The basis of a relationship involves a number of interconnected elements such as the degree of shared activities that persons enjoy, such as shared meals, especially evening meals and breakfast, shared activities, shared division of household chores and shared holidays*…"

However, he had regard also to the medical evidence which confirmed that throughout the period at issue, the capacity of having an intimate relationship did not exist. On the basis of this evidence, and having regard to the unequivocal findings of Baker J [2015] IEHC 309, that a relationship must have been, at some point in time, a sexual relationship for intimacy to be found, he concluded that it had not been established that the appellants were cohabiting within the meaning of the governing legislation for the period since 2010 or, in the period prior to 2010, 'as husband and wife' within the meaning of the legislation which applied at the time. Accordingly, each of the appellants was entitled to the named payment during the period at issue and no overpayment applied.

Outcome: Appeal allowed.

5.5 Case Studies

Estate Cases

5.5 Case Studies: Estate Cases

2015/24 State Pension (Non-Contributory)
Oral hearing
Question at issue: Claim against the deceased pensioner's estate

Background: The deceased had been awarded pension in 1998 and had been in receipt of Disability Allowance prior to attaining pension age. At the time of the pension claim, he had declared a credit union account with a balance of some €1,900. His entitlement was reviewed in 2011 when he denied having any capital in the bank. Following his death, an investigation by a Social Welfare Inspector indicated undisclosed capital of €59,000 and his means were assessed retrospectively to take account of this. As a consequence of the revised means assessment, an overpayment of some €38,000 was calculated and a demand for payment was made against the estate. His sister, the executrix of the estate, made an appeal against the decision and solicitors acting on her behalf questioned the amount of the overpayment. It was submitted that the deceased never had capital in the [named] bank as his sister had provided this money for the upkeep of his residence.

Oral hearing: The sister of the deceased attended and was represented by her solicitor. The Deciding Officer attended at the request of the Appeals Officer, while the Social Welfare Inspector had moved to other duties and was unable to attend.

The solicitor in the case sought to provide some background, referring to the sister of the deceased, the fact that she had worked for some years in the United Kingdom before returning to the family home. He referred to the capital held at a [named] bank, and said that this had always belonged to his client and submitted that an affidavit from 1996 confirmed this. It was submitted that she had intended that the funds be used for the upkeep and renovation of the family home so that it would remain habitable until she returned to live there. It transpired that her brother had proved unable to maintain the house and evidence was produced showing that expenditure in the order of €230,000 had been incurred in the previous year for extensive renovations.

A copy of the grant of probate was submitted and it was pointed out that the net value of the estate came to just €20,000. It was submitted that the Department had misrepresented the ownership of the funds assessed and that the deceased had no interest in those funds. He had not been able to fulfil the purpose for which the capital had been set aside and he had never accessed the bank account at issue.

The Deciding Officer explained the assessment: the deceased had been assessed with capital held in his own name and a half share of the capital held in a joint account with his

sister. She noted that there was evidence of transfers of funds between the accounts which suggested that they had been managed. In response, the deceased's sister pointed out that her brother had received no State payments until he was aged 49 years and she had enquired about his entitlements. At that stage, he had received a Disabled Person's Maintenance Allowance (subsequently Disability Allowance). She confirmed that she had managed the accounts and had moved the capital so that the best yield could be achieved. His sister described the deceased as having a learning disability and said that he had not been capable of managing things. They had another brother who died in 1995 and since then she had had to return home every 6 weeks. She recalled that the deceased had been duped by individuals purporting to do maintenance work and, on one occasion, had withdrawn €2,000 from his credit union account to pay them. She said that he had been vulnerable to such approaches and, after that, she had warned the bank and credit union to be aware of him seeking to withdraw funds.

The Deciding Officer conceded that the Department had not implemented its review policy over the years in question but said she believed that a reminder of the qualifying conditions had issued around the year 2000. It was accepted that there was no record of such a reminder on file. The Deciding Officer agreed there could be circumstances when a joint account was assessed in full against one of the named account holders. She went on to say, however, that she believed that the deceased could have accessed the account had he wished to. She noted that the Social Welfare Inspector had reported that there had been no evidence to indicate that the capital in the joint account was not the property of the deceased.

His sister insisted that the deceased did not have access to the [named] bank account and she said she objected to the Department seeking to recover what was, in effect, her savings. In conclusion, her solicitor reiterated the assertion that the deceased had no control over the funds at issue, the capital was the property of the deceased's sister and he had been a party of convenience only and had never sought to access the account. It was submitted that it was wrong therefore to attribute those funds to him.

Consideration: The Appeals Officer considered that there was no doubt as to the amount of capital held; the balances had been verified. What was in doubt, however, was whether one half of the money held in a joint account should have been assessed as capital held by the deceased and therefore a notifiable increase in his means which he had failed to declare. He examined the question as to where the funds came from. The evidence indicated that the deceased had been awarded a Disabled Person's Maintenance Allowance sometime in the 1980s, consistent with his sister's account of him and her reference to his intellectual disability. The Appeals Officer noted that the Social Welfare Inspector made reference to the actual ownership of the funds but had dismissed his sister's assertion that the funds in the joint account were not the property of the deceased. The Appeals Officer considered

that, in circumstances where the deceased had no income other than a social welfare payment, evidence was required to establish that he had access to the funds at issue and that he had accessed those funds. He noted that there was no evidence of income from any source apart from his pension and whatever his sister had provided him with. He noted also that there was no evidence that he had managed the account from the nursing home where he spent the last three years of his life, yet significant transactions had taken place during those years and his sister had confirmed that she managed the funds. In the circumstances, he concluded that it was appropriate to apply the discretion which is permitted in the legislation and to make the decision effective from a current date only with no retrospective effect.

Outcome: Appeal allowed.

2015/25 State Pension (Non-Contributory)
Oral hearing
Question at issue: Claim against the deceased pensioner's estate

Background: The late pensioner made a claim for State Pension (Non-Contributory) in 1987. Her means were investigated and the capital declared, some £17,000, was assessed. Pension was awarded. A review conducted in 1992 indicated capital of £16,000, with a similar amount noted at a further review in 1997. Following the pensioner's death in 2011, a schedule of assets was submitted to the Department, indicating that she held assets in the amount of €80,000 at the time of her death. A revised decision was made where the Deciding Officer concluded that pension was payable at a lower rate in the period from 2002 to 2011. As a result, an overpayment of some €45,000 was assessed against the estate. The executor sought to establish if the deceased would have had an entitlement to a contributory State Pension. Details of her social insurance record were examined and she was held to have an entitlement to a reduced Pre-1953 State Pension. The effect of this decision was to reduce the overpayment to €37,000, and a demand for payment was issued to the estate. An appeal was made by the executor.

Oral hearing: The personal representative of the deceased attended and was accompanied by a solicitor. The formal decision was presented and the evidence relied upon in making the decision was outlined.

The question as to entitlement to a contributory State Pension was discussed and it was pointed out that the deceased had applied in 1981 but her claim was refused. The Appeals Officer sought to clarify that a special Pre-1953 State Pension (Contributory) was introduced with effect from 5 May 2000, and applied to persons with social insurance contributions paid prior to 1953. This pension is payable at half the maximum standard rate. The Appeals Officer referred to evidence provided by the Department which indicated that, when the deceased's entitlement to a Pre-1953 State Pension (Contributory) had been established the overpayment had been recalculated and reduced from the amount originally assessed to

the current level of €37,000.

In support of the appeal, it was submitted that the deceased would have been a saver and that she had lived frugally and had not spent much money down through the years. It was stated that her house was in very poor repair, that she only ever had one car and that she had never taken a holiday.

Consideration: In arriving at a decision in the case, the Appeals Officer examined all of the available evidence, including that adduced at the oral hearing. She noted that, at the time of application, the deceased's means were investigated and she had disclosed capital of £17,000. No other means were disclosed at the time. The Appeals Officer referred to the reviews conducted in 1992 and 1997, when the deceased would have had an opportunity to disclose all her means and noted that capital of the order of £16,000 was declared. In contrast, she noted that the schedule of assets indicated capital of some €80,000 at date of death. She concluded that, under the terms of the relevant social welfare legislation, this capital was assessable as means. She determined that means had been assessed correctly in accordance with the relevant social welfare legislation and that the overpayment was recoverable from the assets of the deceased in accordance with the provisions of Section 335 (b) of the Social Welfare Consolidation Act, 2005.

Outcome: Appeal disallowed.

5.6 Case Studies

Insurability of Employment

5.6 Case Studies: Insurability of Employment

2015/26 Insurability
Oral hearing
Question at issue: Social insurance status: employee or self-employed

Background: The issue arose when solicitors acting for individual sought a formal decision as to his employment status. The matter was referred for investigation and Social Welfare Inspectors interviewed the parties and arranged for completion of the Form INS1 questionnaires on insurability of employment or self-employment. The Inspectors also clarified the question as one which referred to the working relationship between the worker and the company. The Deciding Officer in the Department's Scope Section noted that the individual concerned worked as a facilities manager, maintaining and looking after residential property. He had been employed in a similar capacity with the same company previously and PRSI at Class A had been paid up to the date that he was let go. Subsequently, the company retained him under new terms and conditions. They paid him €300 for 2 days work and classified him as a contractor liable for his own tax and social insurance. He was required to submit an invoice for payment. The Inspector reported that while the new conditions differed considerably from the previous employment, the worker had accepted them. According to the company, he was not subject to control or direction and it was considered that he could not be dismissed. The Deciding Officer considered that he did not stand to gain or lose financially from the performance of his duties, did not carry public liability insurance and worked on the company premises. The Deciding Officer held that the worker was employed by the company and insurable under the Social Welfare Acts at PRSI Class A, provided that earnings were at least €38.00 per week. Where earnings were below this threshold, PRSI Class J was to apply.

The company made an appeal against that decision, and submitted that the individual concerned was made aware of his status and the employment relationship from the outset and had agreed the cost for the provision of his services; he had full control over what work was done, how it was done and when it was done; he was entitled to sub-contract the work, and he was free to provide his services to other businesses.

Oral hearing: Two representatives of the appellant company attended. The worker and the Deciding Officer attended at the request of the Appeals Officer. The Deciding Officer outlined his decision and the grounds on which he had relied. After some discussion, it was agreed that the question at issue was the status of the individual's working relationship with the company from a date in 2009, and whether he worked under a contract **of** service or a contract **for** services.

For the appellant company, it was stated that there was no dispute with the worker but that it was considered that his status changed completely in 2009 after he had been made redundant by another company. It was stated that, at that time, the new working arrangements and the terms on offer had been discussed. It was claimed that the company was not in a position to hire a staff member but had sought to retain the work on a contract basis.

In response the worker insisted that he had submitted a P45 to the company's office. He denied that he was told that he was being retained on a self-employed basis but recalled that he had been left without any payment for about 5 weeks. He asserted that he had protested the new terms at the time but got nowhere and in the uncertain economic climate, he went along with the conditions that were being imposed on him. He continued working but his hours and days were gradually cut down, eventually to just 2 days a week from a date in 2011. He said that he had refused to sign a contract offered to him in 2009. He confirmed that he had always worked as an employee and had had no history of self-employment. He outlined the work he had undertaken, involving maintenance such as cleaning and painting as well as dealing with more serious issues such as flooding.
For the appellant company, it was not denied that the company had received the worker's P45. It was stated that the company had only tried to provide for him after he was made redundant. It was remarked that the individual concerned was a good worker and that the company had been keen to retain him. The company's position was that the worker had accepted his altered status and had not complained. The company did not become aware of the issue until the Department began its investigation.

The worker disputed this. He insisted that he had never accepted the conditions which he believed had been imposed upon him. He listed the local Citizens Information Centre, the Department's local office, local radio and, ultimately Scope Section as avenues he had pursued. He stated that he had told the Revenue Commissioners of his situation and that he was not paying tax as he had refused to register as self-employed. He added that he had set aside funds should he find himself having a tax liability.

The company acknowledged that the worker had protested his self-employed status but maintained that the company had done the best that could be done for him after his redundancy by seeking to create a position for him. With regard to payments, it was accepted that the worker had been paid on a monthly basis and that there had been times when payments were delayed due to cash flow problems within the company. It was agreed that the worker had been offered the prospect of finding a position in the company as an employee.

The position in relation to holidays was discussed, as was the question regarding hours worked. The company held that the worker decided what hours he worked and how and

when he did the work. The company accepted that if he provided contractors to cover when he was on holiday, those contractors billed the company and not him. The company quoted case law and the tests applied in the case of *Ready Mix Concrete(SE) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497* and the changed status that applied to the lorry drivers in that case. It was accepted that, in this case, the worker supplied labour only, did not provide any equipment, did not hold public liability insurance and worked on the company premises.

Consideration: The Appeals Officer noted that the question at issue was whether the worker was employed under a contract of service or under a contract for services while working for the appellant company. He considered that the contract between the parties identified the irreducible mutuality of obligation requirement as endorsed by the High Court in the Minister for Agriculture and Food -v- John Barry and Ors, where Edwards J held that:

> *The requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service. It was characterised in Nethermere (St Neots) Ltd v Gardiner, [1984] ICR 612 as the "one sine qua non which can firmly be identified as an essential of the existence of a contract of service". Moreover, in Carmichael v. National Power PLC, [1999] ICR, 1226 at 1230 it was referred to as "that irreducible minimum of mutual obligation necessary to create a contract of service." Accordingly the mutuality of obligation test provides an important filter. Where one party to a work relationship contends that that relationship amounts to a contract of service, it is appropriate that the court or tribunal seized of that issue should in the first instance examine the relationship in question to determine if mutuality of obligation is a feature of it. If there is no mutuality of obligation it is not necessary to go further. Whatever the relationship is, it cannot amount to a contract of service. However, if mutuality of obligation is found to exist the mere fact of its existence is not, of itself, determinative of the nature of the relationship and it is necessary to examine the relationship further.*

The Appeals Officer made reference to the Government appointed expert group, the 'Employment Status Group' which had been established to outline clear criteria for determining whether a person was an employee or self-employed. It endorsed the test applied in *Henry Denny & Sons (Ireland) Limited trading as Kerry Foods and The Minister for Social Welfare* [1998] 1 IR 36. Having regard to the criteria outlined, the Appeals Officer summarised the relevant considerations as follows:

- The worker supplies labour only on the company premises.

- The worker receives a fixed rate of payment related to the number of days worked.

- The worker does not sub-contract the work. However, when cover had been required, that cover was paid by the company and not by the [named] person.

- The worker is not exposed to financial risk in the entrepreneurial sense and stands to lose his job only. He is not exposed to wider losses. He has not invested in the company and does not assume any responsibility for the management of that business.

- There is exclusivity in the relationship between the worker and the company. The worker has no history of self-employment and does not carry public liability insurance.

- The worker never accepted his changed status and has protested his status over the years and even sought to bring the matter to a head by withholding tax.

- The worker works on the company premises and is subject to control and direction. One can assume that the worker is also liable to dismissal.

- While the worker has not enjoyed annual leave arrangements or sick pay, he would in the first instance have to establish employee status and this is what he is seeking to do.

Following close examination of the evidence, the Appeals Officer concluded that there were more elements of employee status than contractor status and he determined that the worker has been employed by the company under a contract **of** service and therefore insurable at PRSI Class A for any week that he earns €38.00 or more. This decision was effective from the relevant date in 2009.

Outcome: Appeal disallowed.

2015/27 Insurability
Oral hearing
Question at issue: Treating contributions as having been paid

Background: The appellant applied for a State Pension (Contributory) and his claim was rejected as he did not have the required 520 full-rate social insurance contributions paid. In completing his application form, he indicated that he had started work with a named employer on 1 July 1965 at which time he was aged 17 years. However, his social insurance

record indicated that his date of entry into insurance was 6 December 1965 and that 4 contributions had been recorded in that year. His claim was rejected and details of his social insurance record were provided when he was notified of the decision. On receipt of the notification, the appellant wrote to the Deciding Officer, stating that he had started work on 1 July 1965. The case was referred for investigation by a Social Welfare Inspector and she reported that the person who owned the business at the time had since died. However, the owner's son confirmed that the appellant had been an employee but said that his father's record keeping was non-existent and that it was possible the appellant's date of commencement had been incorrectly recorded. The Inspector recommended that the appellant's social insurance record be amended to show his date of entry as 1 July 1965. However, the Deciding Officer concluded that there was insufficient evidence to amend the appellant's record and that his date of entry into social insurance should remain as stated.

Oral hearing: The appellant attended, and the Deciding Officer and Social Welfare Inspector were present at the request of the Appeals Officer. The Deciding Officer outlined his decision and explained that, notwithstanding the report of the Inspector and the statements made by the appellant, he was not satisfied that there was sufficient evidence to warrant an amendment to the appellant's social insurance record. He advised that the registry sheet recorded the details of the stamped card used at the time, and was the primary source of information. He stated that, in the appellant's case, the registry sheet gave the date of commencement as 6 December 1965. He identified three keys elements to confirm that start date: the registry sheet, the fact that it was the date given by the appellant when he applied for his insurance card, and 4 contributions were recoded for 1965 which was consistent with the period from 6 December 1965 to the end of the year.
The appellant recounted his memory of starting work and insisted that he did not start in the month of December. His recollection was that he started soon after his 17th birthday and he recalled hitching to and from work and arriving home at 7 p.m. in the evening when it was still bright. He said he would not have started work in the darkness of mid-winter without a secure lift to and from work. He made reference to an incident involving payment for a tool box and inaccuracies with the record keeping in the company, and suggested this might account for the incorrect date having been stated. He stated that he had no recollection of applying for an insurance card or being asked to supply one by his employer.
The Social Welfare Inspector advised that there had been an agent, engaged by the Department of Social Welfare in the 1960's, whose task it was to ensure that employers stamped social insurance cards. She said it was known that the agent, whom she named, would visit employers towards the end of the year and arrange for social insurance cards to be stamped and to supply cards for any new employees that had started in the course of the year. She said it was possible that the appellant's employer had obtained a social insurance card from the agent at the end of the year and that the date it was supplied was recorded as the start of his employment.

Consideration: The Appeals Officer examined the question as to whether there were sufficient grounds to treat as paid those contributions which the appellant submitted should have been recorded in respect of his first employment with the named employer, and prior to his stated commencement date of 6 December 1965. The relevant legislative provisions are outlined in Article 70 (3) (a) of the Social Welfare (Consolidated Contributions and Insurability) Regulations, 1996 (S.I. 312 of 1996). He noted the appellant's assertion and direct evidence at the hearing that he did not start in the month of December 1965 and his clear recollection of arriving home when it was still daylight. He found his evidence in this regard credible and convincing.

The Appeals Officer noted the appellant's consistency and the fact that in completing his pension claim form in 2013, he had given his start date as 1 July 1965. This was before his application was rejected, when the implications in terms of pension entitlement were not known to him. He noted also that the Social Welfare Inspector had a good knowledge of the history of social welfare services in the area and that she had been clear in her evidence as to the likelihood of a mistake in relation to the appellant's start date.

While the Appeals Officer noted the Deciding Officer's reasons for not amending the appellant's social insurance record, he found that the evidence adduced at oral hearing was persuasive and sufficient to treat the unpaid contributions as having been paid. He determined that 22 social insurance contributions should have been paid in respect of the period 1 July 1965 to 5 December 1965 and that these should be treated as paid for the purpose of the appellant's right to benefit in accordance with the provisions of Article 70 (3) (a) of Statutory Instrument No. 312 of 1996.

Outcome: Appeal allowed.

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