THE HIGH COURT

[2024] IEHC 388

[2022 No. 214 SP]

IN THE MATTER OF SECTION 327 OF THE SOCIAL WELFARE CONSOLIDATION ACT, 2005

BETWEEN

N.L.

(A PERSON OF UNSOUND MIND NOT SO FOUND SUING THROUGH HIS MOTHER AND NEXT FRIEND, J.M.)

APPELLANT

-AND-

THE MINISTER FOR SOCIAL PROTECTION

CHIEF APPEALS OFFICER

SOCIAL WELFARE APPEALS OFFICE

RESPONDENTS

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 28th day of May, 2024.

INTRODUCTION

1. This is an appeal on points of law pursuant to section 327 of the Social Welfare Consolidation Act 2005 ("*the 2005 Act*") from a decision of an Appeals Officer disallowing an application for revision of an appeal decision on the appellant's claim for disability allowance. The decision of the Appeals Officer was in writing and dated 26 October 2022, and it was communicated to the appellant in a letter dated 4 November

2022. These proceedings issued on 25 November 2022 by way of a special summons as provided by Order 90 of the Rules of the Superior Courts ("*the RSC*").

2. The application for disability allowance was refused on the basis that the appellant did not satisfy the conditions under section 210(1)(b) of the Social Welfare Consolidation Act 2005 and article 137(1) of the Social Welfare (Consolidated Claims, Payment and Control) Regulations 2007 ("*the Regulations*"), namely that the appellant did not establish that he is substantially restricted in undertaking suitable employment due to the severity of his medical condition.

3. The appellant complains that the decision and conclusions reached by the Appeals Officer are irrational and unreasonable, that they erred in law by applying the incorrect standard and burden of proof, that the decision was not adequately reasoned and they disregarded the evidence that the appellant's mother (and next friend) was in receipt of carer's allowance in respect of the appellant and this should have been a significant factor in meeting the criteria for the allowance.

4. For the reasons explained in this judgment, the court has decided that the appeal should be refused.

5. In order to understand the approach that has been adopted to this case – where the court is not engaged in a fresh consideration of the application for Disability Allowance and is not asked to substitute its view for that of the Appeals Officer – it is important to emphasise from the outset the extent of the role of the court and also to consider the statutory framework that gives rise to the questions of law.

THE STATUTORY SCHEME

6. The Social Welfare Consolidation Act 2005 and associated regulations address a variety of forms of statutory entitlements that may be sought by eligible persons. The 2005 Act and Regulations thereunder set out the eligibility criteria for the various entitlements, how they may be applied for, the identification of the officials who are charged with making decisions at various stages in the process, the manner in which those decisions should be made, and sets out a variety of mechanisms by which first instance decisions can be appealed and revised.

7. The core statutory criteria governing disability allowance are contained in Part 3 of the 2005 Act, and the Regulations (as amended). The provision for disability allowance is found in Chapter 10 of Part 3 of the 2005 Act, which is headed "*Social Assistance*".

8. Section 210 of the Act of 2005 (as amended) states that:

   "*Subject to this Act, an allowance ("disability allowance") shall be payable to a person –*

   (a) who has attained the age of 16 years but has not attained pensionable age;

   (b) who is by reason of a specified disability substantially restricted in undertaking employment (in this Chapter referred to as "suitable employment") of a kind which, if the person was not suffering from that disability, would be suited to that person's age, experience and qualifications, whether or not the person is availing of a service for the training of disabled persons under section 68 of the Health Act 1970…"

9. Section 210(8) of the Act of 2005 (as amended) provides:-

   > "*The conditions under which a person shall be regarded for the purposes of this section as being substantially restricted in undertaking suitable employment by reason of a specified disability shall be specified by regulations.*"

10. Article 137 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 S.I. No. 142/2007 provides:-

    > *"(1) Subject to sub-article (2), for the purposes of section 210, a person shall be regarded as being substantially restricted in undertaking suitable employment by reason of a specified disability where he or she suffers from an injury, disease, congenital deformity or physical or mental illness which has continued or, in the opinion of a deciding officer or an appeals officer, may reasonably expect to continue for a period of at least 1 year.*
    >
    > *(2) A person shall not be regarded as being substantially restricted in undertaking suitable employment where it is subsequently shown to the satisfaction of a deciding officer or an appeals officer that he or she is no longer likely to continue to be substantially restricted in the undertaking of employment for a period of at least 1 year.*"

11. 'Deciding Officers' are appointed by the Minister under section 299 of the 2005 Act, and by section 300 (2)(b), those officers are charged with deciding every question under Part 3 of the 2005 Act. Section 300A(1)(o) of the 2005 Act gives the Deciding Officer the power to seek a medical assessor's opinion on the question of, "*whether, for the purposes of section 210, the person, by reason of a specified disability, is substantially restricted in undertaking employment of a kind which if the person was not suffering*

from that disability, would be suited to that person's age, experience and qualifications."

12. If a person is dissatisfied with a decision of a Deciding Officer, section 311 provides for an appeal to an 'Appeals Officer', who will engage in a *de novo* consideration of the issue.

13. Section 317 of the 2005 Act, which is the provision at the centre of this appeal, provides a process by which:-

> "*An appeals officer may, at any time revise any decision of an appeals officer, where it appears to the appeals officer that the decision was erroneous in the light of new evidence or of new facts brought to his or her notice since the date on which it was given, or where it appears to the appeals officer that there has been any relevant change of circumstances since the decision was given.*"

14. It can be noted that in *Little v. The Chief Appeals Officer & Ors* [2023] IESC 25, the Supreme Court has held that in a section 317 revision the following analysis applies:

> "*53. As regards an application for revision of an appeals officer's decision pursuant to s. 317(1)(a) of the 2005 Act, an appeals officer may revise where it appears to him or her that "the decision was erroneous" in the light of new evidence and new facts which had been brought to his or her notice since the date on which it was given. The language used in this provision suggests as follows, in my opinion.*
>
> *54. Firstly, the "decision" sought to be revised is the decision of the appeals officer as to the question referred on appeal. As set out para. 52 above, this is*

the same question which was before the deciding officer, i.e., whether the claimant was entitled to the benefit claimed at the date the claim was made.

55. Secondly, the appeals officer may revise where it appears that the decision "was" erroneous in light of new evidence or new facts. One can note the word "was" framed in the past tense, as opposed to language such as "is" or "has become" erroneous. It seems to me that the new evidence or new facts must relate back to the original decision as to eligibility. I agree with the trial judge that the decision not to award a benefit was not erroneous if a person was established not to be eligible for a benefit on the basis of the evidence initially presented, and it is shown by evidence tendered later on a review application that a person claiming benefit has since become entitled to that benefit by subsequently fulfilling the relevant qualification criteria." [emphasis added]

15. An appeal to the High Court of an Appeals Officer's decision is provided for under section 327 of the 2005 Act which states:-

"*327. Any person who is dissatisfied with –*

(a) the decision of an appeals officer, or

(b) the revised decision of the Chief Appeals Officer,

on any question…may appeal that decision or revised decision, as the case may be, to the High Court on any question of law."

LEGAL PRINCIPLES AND STATUTORY SCHEME

16. The jurisdiction of this court addressing an appeal pursuant to section 327 of the 2005 Act was described by Phelan J. in *M.D. v. Minister for Social Protection* [2023] IEHC

88. That description, which is set out in full below, was endorsed expressly on appeal by the Court of Appeal, [2024] IECA 28, at paragraph 24 of its judgment.

17. Having considered the cases of *Fitzgibbon v. Law Society of Ireland* [2014] IESC 48, [2015] 1 IR 516 and *Orange Ltd v. Director of Telecoms (No 2)* [2000] IESC 22, [2002] 4 IR 159, Phelan J. stated:-

> *"56. The legal principles governing the jurisdiction of the High Court in an appeal on a point of law were again considered by the Supreme Court in Attorney General v. Davis [2018] 2 I.R. 357 (in the context of extradition). In that case, McKechnie J. held (at para. 53) that a statutory appeal on a point of law will enable the Court to interfere with a decision appealed against in four overlapping circumstances as follows:*
>
> *1) errors of law as generally understood;*
>
> *2) errors such as would give rise to judicial review including illegality; irrationality, defective or absence of reasoning, and procedural errors of some significance;*
>
> *3) errors which may arise in the exercise of discretion which are plainly wrong; and*
>
> *4) certain errors of fact.*
>
> *57. McKechnie J. went on to identify (at para. 54) a non-exhaustive list of the issues of fact which may be regarded as errors of law:*
>
> > *"i. findings of primary fact where there is no evidence to support them;*
> >
> > *ii. findings of primary fact which no reasonable decision-making body could make;*

iii. inferences or conclusions:

- *which are unsustainable by reason of one or more of the matters listed above;*
- *which could not follow or be deducible from the primary findings as made; or*
- *which are based on an incorrect interpretation of documents."*

58. From the foregoing it is apparent that there is a significant overlap between the High Court's jurisdiction in judicial review proceedings and by way of statutory appeal on a point of law. I approach this appeal, however, on the basis that my jurisdiction to intervene to set aside a decision in respect of an error of law is wider than in judicial review proceedings in that the jurisdiction on a statutory appeal is not constrained to errors of law which go to the jurisdiction of the decision maker and the decision maker is not entitled to deference in areas of law. Although not every error of law is sufficient to vitiate the decision on a statutory appeal, nonetheless, where the ground of challenge constitutes a pure error of law (for example, a failure to apply the correct statutory test or a breach of the duty to give reasons) and I am persuaded that an error of law which has occurred is significant enough in terms of the actual decision made to vitiate that decision, then I should set the decision aside without regard to the special position of the Appeals Officer as a specialist decision maker. This is because the Appeals Officer does not have expertise or specialised knowledge relative to the High Court in deciding questions of law.

59. On the other hand, the Appeals Officer is entitled to deference in deciding mixed questions of law and fact such as arise when a challenge is brought on the basis that the decision is unreasonable having regard to the evidence adduced. Clearly, however, if there is no evidence to support a finding of primary fact, the findings made are not ones which a reasonable decision-making body could make and/or or inferences or conclusions are drawn which are unsustainable because they could not follow or are based on an incorrect interpretation of documents, then I should set aside that decision notwithstanding the special expertise of the Appeals Officer because these constitute errors of law and fall to be treated as such."

18. As will be seen, in this appeal, it will be necessary to consider certain issues of statutory interpretation. In the analogous context of a dispute about domiciliary care allowance, the Supreme Court has made clear that in a situation where the Oireachtas has decided to apply public funds to provide for those who are caring for a child with severe disability, the proper approach to interpretation should be informed by the fact that the statutory provisions are remedial. As such, the provisions should be interpreted against the backdrop of the following principles identified by Clarke C.J. in *J.G.H. v. Residential Institutions Review Committee* [2018] 3 I.R. 68 (at page 78):

"*[20] The underlying principle behind the proper approach to the interpretation of remedial legislation is that it must be assumed that the Oireachtas, having decided that it is appropriate to apply public funds to compensate a particular category of persons, did not intend that potentially qualifying applicants would be excluded on narrow or technical grounds, for that would be wholly inconsistent with the purpose of the legislation. On the*

other hand, the Oireachtas is entitled, when deciding to apply public funds in a particular way, to define, within constitutional bounds, the limits of any scheme which it is decided should be put in place. Where that scheme is remedial, courts should not be narrow or technical in interpreting those bounds but they should not be ignored either."

BACKGROUND FACTS

19. The appeal is brought on behalf of a young man, N.L., who was born in 2005. In the affidavit sworn by his mother, it was noted that while all developmental milestones were within normal limits, N.L. has diagnoses of Autism Spectrum Disorder ("*ASD*"), ADHD, type-1 diabetes, chromosomal deletion, a borderline learning disability, dyspraxia and hepatic steatosis. On the basis of the mother's affidavit, these diagnoses affect N.L.'s day-to-day life including his mental health and behaviour; and he requires continual care and attention (such as attending medical appointments and administering his medication).

20. The appellant's mother is the appellant's full time carer. Until the appellant reached his sixteenth birthday, his mother was in receipt of domiciliary care allowance ("*DCA*"). She continues to be in receipt of carer's allowance. On 15 October 2021 and shortly before the appellant's sixteenth birthday, he applied for disability allowance. At that point, his mother's DCA would soon cease. The application was supported by a medical report from the appellant's GP confirming diagnoses of ADHD, 1Q2.1 chromosomal deletion, Autism Spectrum Disorder, type-1 diabetes and hepatic steatosis together with: (i) a Letter from his Consultant Paediatrician dated 10 September 2021; (ii) the

Psychological Report prepared by the Education Psychologist dated 20 November 2017; and (iii) the Cytogenetic Analysis from October 2014.

21. On the application form completed by the appellant, it was confirmed that he was attending a special needs school in his home county; that he suffered every day with concentration, poor memory and interaction with people; that he found climbing, sitting and walking hard due to his diagnoses; his manual dexterity was affected due to having ADHD and ASD; his communication and sensory skills had been affected all his life; and his hobbies and leisure were affected because everyday tasks were hard for him and tiring due to his type-1 diabetes. It was stated that he found it hard to be motivated to get out for short walks and some exercise. It was confirmed he was on medication at the time of making the application, namely, melatonin, Novo Rapid and Tresiba.

22. In the Medical Report accompanying the application form, the appellant's GP confirmed that his conditions are expected to last indefinitely. The medical report was in the standard form required by the first-named respondent ("*the Department*") and addressed the degree to which the appellant's diagnoses affected his ability/disability in a number of categories including mental health, speech, learning, consciousness, balance, vision, hearing, speech, manual dexterity and walking. The GP confirmed that the appellant was in the normal range for many areas such as vision, hearing, speech, continence, reaching, lifting, bending, sitting, standing, climbing stairs and walking, but was either mildly or moderately impacted in areas such as mental health, behaviour, learning, intelligence, balance, co-ordination and manual dexterity. The GP also detailed the appellant's hospital admissions in 2021 for sugar stabilisation and in 2020 for hypoglycaemia. The appellant's prescription sheet was attached to the report.

23. The Consultant Paediatrician's Letter was directed mainly to the appellant's diagnosis of diabetes. The letter confirmed that the Consultant recently treated the appellant in the diabetes clinic and that he was very happy with his glycaemic control at that time. It was reported that the appellant has much better energy levels since his insulin doses were increased following a phone consultation with him and a hospital admission. The Consultant noted that his mother had concerns about his blood pressure but that it was normal when taken.

24. The Cytogenetic Analysis confirmed that the appellant has the chromosomal deletion 1Q2.1, the effect of which can range from asymptomatic to severe developmental delay and multiple congenital anomalies.

25. The Psychological Report dated from 2017 (when the appellant was twelve years old). It recorded that at that time, some four years before the application for disability allowance, the appellant was transitioning to secondary school. Concerns were raised by the appellant's school as he was making poor academic progress and as such a cognitive assessment was requested. It was reported by the appellant's mother that he has always been clumsy and his speech was delayed. The appellant's mother also reported a history of dyspraxia, ADHD and autism on the appellant's father's side of the family. The results of the cognitive assessment were that the appellant presented with a Borderline General Learning Disability and was functioning within the low range of ability; and there was a large, but not significant difference between his non-verbal ability (low average) and his verbal ability (low). It was confirmed that the appellant's quantitative reasoning was exceptionally low. It was noted that the findings may have

been an underestimate of the appellant's ability due to his visual difficulties, however his visual ability is still stronger than his verbal ability. The appellant's literacy and numeracy scores were within predicted levels for his scored ability. The Educational Psychologist concluded that the appellant would continue to progress and learn but more slowly than others, but that a learning disability will not stop him from having a full and enjoyable life provided adequate resources are put in place for him. It was suggested that when the appellant completed the Junior Certificate programme, consideration should be given to the Leaving Cert Applied which would offer the appellant a "*distinct, self-contained two year practical programme aimed at preparing the student for adult and working life. It has a strong vocational emphasis.*"

26. An opinion of a Medical Advisor was sought in accordance with section 300A of the Act on 1 November 2021, and her opinion was provided on 2 November 2021. In their opinion, the Medical Advisor indicated that the appellant was not substantially restricted in undertaking employment of a kind which, if the person was not suffering from that condition, would be suited to that person's age, experience and qualifications. The Medical Advisor explained:-

> "[The appellant] *has a diagnosis of Dyspraxia. He was admitted to hospital for 3 days for blood sugar stabilisation in 2021. I note Diabetic clinic report September showing satisfactory glycaemic control. He is on diabetic medication as listed and melatonin/*
>
> *There is no report attached with respect to ADHD, ASD or any learning difficulties. He is not on medication for ADHD. He does not attend CAHMS. I note he attends a special needs school, there is no psychoeducational report*

attached. Diagnostic & Follow up reports would be of value with any future applications.

The AME at this time indicates that his diabetic control is stable, there is no information attached with respect to his psychoeducational level or mental health diagnoses. This while [name] *may have some restriction due to his conditions and he is not substantially restricted from undertaking employment/education for a 12 month period at this time.*"

27. By letter dated 29 November 2021, the Deciding Officer refused the application for disability allowance on the grounds that the appellant did not satisfy the conditions for receipt of disability allowance which are that, "[t]*he person must be suffering from an injury, disease, congenital deformity or physical or mental illness or defect which has continued or may reasonably be expected to continue for the period of at least a year and* [a]*s a result of that condition, the person is substantially restricted in undertaking work which would otherwise be suitable having regard to the person's age, experience and qualifications*".

28. The Deciding Officer stated that he had examined all the documents provided in support of the application and weighed up the evidence including the Medical Assessor's opinion and found that, "[a]*lthough the medical evidence shows a level of incapacity it does not show substantial restriction which would preclude the person from taking up training.*"

29. The appellant's mother appealed the Deciding Officer's decision to the Chief Appeals Officer, by letter received by the Department on 20 December 2021, requesting that the decision be reconsidered. In the letter, the appellant's mother explained, *inter alia*, that she had been in receipt of DCA in respect of the appellant from when he was a young age, and that "*he is not able to do anything for himself unless he has me always there for him*".

30. On the 21 February 2022, the Social Welfare Appeals Office notified the appellant that an Appeals Officer had disallowed the appeal. The letter stated that no reports were submitted with regards to the appellant's ADHD diagnosis and that the appellant is not on any medication for ADHD. It was also noted that the Report regarding his learning disability was carried out when the appellant was a child and as a result did not reflect his current suitability for employment. With regard to the point that the appellant's mother was in receipt of DCA and carer's allowance for the care of the appellant, the letter stated that did not in itself establish that the appellant is substantially restricted in undertaking employment.

THE IMMEDIATE PROCESS LEADING TO THE DECISION UNDER CHALLENGE

31. On 19 August 2022, the solicitors acting for the appellant wrote to the Chief Appeals Officer on behalf of the appellant enclosing further evidence in respect of the appellant's circumstances, requesting that the matter be revised pursuant to section 317 of the Act. The following arguments were made and further evidence was submitted:
    a. The letter asserted a difficulty in understanding why, if the circumstances exist for carer's allowance, it could be found that the appellant is not substantially restricted in terms of the application for disability allowance.

b. The letter enclosed the "Application for the National Disability Network" together with a letter from a doctor dated 29 June 2022 which stated that the appellant has significant co-morbidities, including insulin dependent diabetes, ADHD, Autism, Dyspraxia and 1Q21.1 microdeletion. The doctor's letter also stated that the appellant was on Novo Rapid and Tresiba insulin and was unable to administer the medications himself. The medical opinion of the doctor was that the appellant's care needs were in excess of those required of a child of the same age.

c. The solicitor's letter also enclosed a letter from the appellant's school which stated, "[the appellant's] *deficits are mainly in his everyday life skills and ability to socialise in any meaningful way. It is very difficult for him to form relationships. He would also find it very difficult…to cope without assistance with basic living skills.*"

32. On 4 November 2022 a letter addressed to the appellant confirmed that the appellant's appeal remained disallowed.

THE IMPUGNED DECISION

33. As it is central to this appeal it is worth setting out the reasons given by the Appeals Officer as set out in the letter dated 4 November 2022. That letter stated that the Appeals Officer, having reviewed the additional information submitted along with the original file, found:-

"*The onus is on the appellant to establish their entitlement to a payment and produce relevant evidence, including medical evidence. As per the contention that appellant's mother is in receipt of Carer's Allowance in respect of the appellant and that this should be a significant factor in meeting the criteria for Disability Allowance. This is not the case, each application under the scheme is judged on their own qualifying criteria.*

As an Appeals Officer I can only judge the merits of the appeal before me not on the history of the appellant's relationship with the Department of Social Protection. It would appear from the Doctor's note that the appellant's mother was awarded Carer's Allowance in respect of a child of 7 years, as such this does not reflect on the appellant's current suitability for employment.

[…]

Having carefully considered the contents of the new evidence provided it does not establish that the appellant is substantially restricted in seeking suitable employment due to the severity of his medical condition…A revision of the original decision under Section 317 of the Social Welfare Consolidated Act 2005 is not warranted and accordingly the original decision stands."

DISCUSSION OF ISSUES

34. The approach to this type of appeal described in the extract from the *M.D. v Minister for Social Protection* case above must be emphasised in light of the manner in which the questions of law were framed by the appellant. When the case was commenced, the appellant sought to agitate a large number of questions. This was unhelpful as (a) it introduced a level of uncertainty about what precisely was being challenged, and (b) it

gave rise to a strong impression that the court in fact was being asked to engage in what amounted to a *de novo* hearing of the application for disability allowance. As a result, during case management the appellant was required to refine the questions. From my consideration of the oral and legal submissions, the questions can broadly be set out as follows:

a. First, the appellant argues that the Appeals Officer erred in law by misapplying the relevant statutory test. This is a pure question of law.

b. Second, the appellant argues that the Appeals Officer applied the incorrect burden of proof, did not afford appropriate weight to the appellant's evidence, or made errors of fact. The question of 'burden of proof' insofar as it applies to the situation faced by the Appeals Officer is a question of law. However, the way the Appeals Officer addressed the evidence is a matter of fact or depending on one's perspective a mixed question of law and fact, and this is an area in which the court can only intervene where the findings are unsustainable on the evidence.

c. Third, the appellant argues that the decision was unreasonable and/or inadequately reasoned. The approach to those matters is well established and constitute mixed questions of law and fact.

35. For the purposes of this judgment, it seems to me that it is better to deal with the question of the adequacy of reasons first. This is because if the decision under challenge is not adequately reasoned it will have to be remitted, and it would be premature to address the remaining questions until a properly formulated decision is made. In addition, it may be helpful for the later analysis to set out the essence of the case in considerable detail at this point.

Reasons

36. The appellant argued that the reasoning of the Appeals Officer was deficient in that there was an insufficient explanation of why the appellant's evidence was not accepted and that there was insufficient engagement by the officer with the facts.

37. As noted by Burns J. in *M.D. v. Minister for Social Protection* [2024] IECA 28, in the context of a decision under the Social Welfare code, the duty to give reasons does not extend to a requirement to demonstrate an engagement in detail with the evidence such that the decision maker is obliged to explain why he preferred certain submissions over other submissions and/or to specify the weight that he attributed to the various pieces of evidence before him. The Court of Appeal located the correct test in the well-known observations of Clarke C.J. in *Connelly v. An Bord Pleanála* [2021] 2 I.R. 752.

38. In this case, it appears to me that the reasons for the decisions are abundantly apparent. My conclusion stems from the terms of the decision from November 2022 when it is considered in the context of the relevant statutory exercise undertaken, in the light documents and information submitted on behalf of the appellant, and the manner in which the questions were addressed at various stages in the process.

39. This was a situation in which the appellant was aware that the Deciding Officer and an earlier Appeals Officer had rejected the claim on the basis that the materials and information submitted did not reach the necessary statutory threshold. The appellant, in the approach adopted by the respondents, was required to establish why he was substantially restricted in undertaking suitable employment by a reason of a specified disability which was expected to last for a period of at least one year.

40. The February 2022 decision informed the appellant that, having regard to the medical evidence provided, he had not established his eligibility. At all stages it was open to the appellant to obtain and submit all relevant information; and in that regard, it is necessary to rehearse the information that actually had been submitted.

41. As noted above, initially, the information provided comprised a report from a Consultant Paediatrician from September 2021 which addressed the diabetes diagnosis. On any analysis, and certainly viewed on its own, this report did not address the matters that had to be established to satisfy the section 210 criteria in the 2005 Act and the Regulations. Likewise, the cytogenic analysis did not explain (and probably on its own could not be expected to explain) how the results of the analysis would lead to a decision that the appellant met the necessary threshold. In addition to being at that point quite historic, the educational psychology report appeared to have been prepared for a separate purpose, being directed to assisting in planning for the appellant's transition to and secondary school. That report notes but does not find or diagnose that the appellant suffered from autism or ADHD. It does diagnose a borderline general learning disability and guardedly found that the appellant was functioning at the low range of ability. The psychologist did not provide any view on whether the appellant would be substantially restricted in undertaking suitable employment by reason of a specified disability.

42. The GP's report was more substantial and was prepared for the purpose of the application for disability allowance. The GP specified that the appellant had a diagnosis, *inter alia*, of ADHD and autistic spectrum disorder, and that the conditions were expected to last indefinitely. The GP completed a checklist which required him to identify on a five-part scale (progressing through 'normal', 'mild', moderate', 'severe'

and 'profound') the degree to which the appellant's condition has affected their ability in sixteen identified areas. In that regard, the GP indicated that the appellant was moderately affected in the areas of 'learning/intelligence', 'balance/coordination', and 'manual dexterity'. The appellant was in the mild to moderate scale for the area of 'mental health/behaviour', and he was in the normal range for the remaining twelve areas. The GP did not fill in portions of the form that could have addressed medical history, clinical findings, or additional information. The GP confirmed that the appellant was 'suitable for work/training for rehabilitative purposes'. The attached prescription sheet identified antihistamines and melatonin together with diabetes medication.

43. In addition to the medical/psychological evidence, the appellant through his mother self-reported his difficulties. In that part of the form, the appellant reported that he suffered with concentration and memory; that he found climbing, sitting and walking hard; that his manual dexterity was affected; and that his diabetes affected his ability to engage in hobbies and leisure activities.

44. As noted above, the Deciding Officer also had the benefit of an opinion from a medical assessor, who also was not satisfied that the threshold criteria was met.

45. The appellant was also aware that an appeal had been decided on by an Appeals Officer in February 2021. The decision of that Appeals Officer was in writing and ran to three and a half pages. It is important to note that the decision that is the subject of this statutory appeal was a decision on whether the 21 February 2021 appeal decision should be revised. The decision under challenge must be understood in the context of that earlier appeal decision.

46. The February 2021 appeal decision accurately summarises the information submitted and the earlier decisions. The decision notes the additional information that had been submitted in a letter from the appellant's mother received on 20 December 2021. That letter raised the issue of how she could be in receipt of DCA and carer's allowance, but the appellant could not receive disability allowance. The decision notes the relevant statutory and regulatory provisions. The decision notes that at that time the appellant was attending a special school and noted the self-reported difficulties that the appellant experienced.

47. In terms of the substantive decision, and bearing in mind that at this point the court is seeking to ascertain whether reasons for the decision can be identified, the Appeals Officer made the following points:
    a. There were no reports submitted regarding the ADHD diagnosis and the appellant was not prescribed medication for that condition.
    b. The Appeals Officer decided that the fact that the appellants mother was in receipt of DCA and carer's allowance did not establish that the appellant was substantially restricted in undertaking employment.

48. Taking all of the information submitted together the Appeals Officer was not satisfied that the appellant was substantially restricted in undertaking employment which would otherwise be suited to a person of his age, experience and qualifications.

49. In my view, that decision was adequately reasoned, and the appellant and his representatives ought to have been in a position to understand in general terms why the

decision was made and had enough information to decide on whether that decision should be challenged.

50. In August 2022 the appellant's solicitors wrote to the Chief Appeals Officer noting the decision that had been made some five months earlier in February 2022. The letter attached further evidence and, pursuant to section 317 of the 2005 Act, sought a revision of the February 2022 appeal decision. The letter makes three main points: First, the point about carer's allowance was expanded somewhat. Essentially it seemed to be argued that where carer's allowance is provided there should be an inference that the criteria for disability allowance are met. Second, it was argued likewise that there should be an inference that the appellant met the criteria on the basis that he was enrolled in a special school. This was because, it was asserted, that such enrolment could only occur if the student was "*at the severe end of the spectrum in terms of educational attainment.*" Third, the letter attached (a) an application for the National Disability Network which was said to demonstrate the level of restriction experienced by the appellant; (b) a letter from the appellant's GP; and (c) a letter from the appellant's school.

51. The application for the National Disability Network document dates from May 2022 and appears on its face to have been prepared by the appellant for the purpose of an application to the Rehab Group for a training programme. The form is completed by the applicant and their doctor. The doctor sets out that the appellant had a diagnosis of "*Autism, Dyspraxia, ADHD, 1q21.1 microdeletion*". Under the heading "*Impact on daily life*", the GP reports: "*Concentration, sleep, dealing with emotions, can lose temper, learning difficulty*". The GP did not fill in the section that allowed him to

provide "*details of any other information that may be relevant to this person's training and social/vocational rehabilitation*." The GP noted that he had not referred the appellant to any other professional, such as a psychologist, psychiatrist, social worker occupational therapist, or speech and language therapist.

52. The GP's letter is dated 29 June 2022. It rehearses information that was provided by the appellant's mother: that he is unable to self-administer his diabetes medication, that he is unable to care for himself independently and support is always required, and that she has been his full time carer since the appellant was seven years old. The GP states: "*I feel that [the appellant's] care needs are in excess of those required for a child of the same age without above diagnoses and are likely to continue beyond the following twelve months.*"

53. The letter from the school is dated 25 July 2022. The letter notes that the appellant has a mild learning difficulty and requires much assistance with his learning. The letter states that his "*deficits are mainly in his everyday life skills and ability to socialise in any meaningful way. It is very difficult for him to form relationships. He would also find it very difficult I feel to cope without assistance with basic living skills."*

54. The decision of the Appeals Officer dealing with the revision application was reduced to writing and dated 26 October 2022 and it was formally notified to the appellant in a document dated 4 November 2022.

55. Before considering the terms of the decision it is necessary to reiterate that section 320 of the 2005 Act generally treats a decision by an Appeals Officer as final. The section 317 process requires the Appeals Officer to revise the earlier decision where it appears that the decision was erroneous (which according to *Little v. Chief Appeals Officer*

[2023] IESC 25 involves a consideration of matters at the time when that decision was made) in the light of new evidence or new facts which have been brought to his or her notice since the date when it was given. Accordingly, the decision in October 2022 was not a fresh or *de novo* consideration of the evidence. The task of the Appeals Officer was to decide if the new evidence or new facts led to a finding that the original decision was erroneous.

56. It bears observing that at any stage in this process it was open to the appellant and his representatives to have sought and obtained a fresh medical or other professional report that expressly addressed the question of why the appellant met the section 210 criteria. This was not done. In fact, when one considers the letter from the appellant's solicitor in August 2022 there was a reformulation of the arguments about carer's allowance (which was not a new fact or new evidence) and an argument about inferences that should be drawn from the fact that the appellant attended a special school (which was a new argument on the basis of facts that were identified from the outset in the process). The new evidence was the application form for the National Disability Network, the letter from the GP and the letter from the school. None of those documents address the critical question posed by section 210 and the Regulations. Instead, it appears that the Appeals Officer was invited to infer from that evidence that the criteria was met.

57. Having correctly identified the relevant statutory provisions, and summarised accurately the new evidence, the Appeals Officer expressed the view that the onus was on the appellant to establish their entitlement to the payment and to produce relevant evidence. The Officer stated that each application must be determined on the basis of the qualifying criteria for the particular scheme and therefore previous interactions with the Department for other payments were not relevant. In any event, the officer noted

that the application for carer's allowance had been made and allowed when the appellant was seven years old, and was not reflective of his current suitability for employment. The officer noted that insofar as the GP letter repeats what was said by the appellant's mother this did not amount to medical evidence. Likewise, it was stated that the National Disability Network application form did not present any new medical evidence. Finally, the Officer observed that the letter from the school addressed the appellant's learning difficulties and the assistance required in that regard.

58. The Appeals Officer concluded that the new evidence did not establish that the appellant was substantially restricted in undertaking suitable employment due to the severity of his medical condition. In those premises the appeal remained disallowed.

59. In all the circumstances, I am unable to find that the review decision was inadequately reasoned. While the appellant may disagree with the conclusions or with the approach adopted by the Appeals Officer, it is clear to me that the reasons are set out in a way that allowed the appellant to understand why the decision was made, and - to a very large extent as evidenced by the extensive initial questions of law - the appellant was equipped with sufficient information to be able to make an informed decision on whether an appeal or other challenge was warranted.

The correct statutory test

60. Three main arguments were made under this heading, and a fourth argument only emerged at the hearing of the appeal.

61. First, it was said that the Appeals Officer erred in law by applying the wrong statutory test because in some paragraphs of the decision the Appeals Officer used the phrase

"*seeking employment*" rather than the words "*undertaking employment*", which is the language used in section 210 of the 2005 Act. Clearly this was an error, the relevant part of the test is whether the appellant was substantially restricted in undertaking employment and not in seeking employment. The court has to address the decision as it was formulated rather by reference to any later clarification that may be proffered in a subsequent challenge. As noted by the Court of Appeal in *Stanberry Investments Ltd v. Commissioner of Valuation* [2020] IECA 33, this court is not charged with the exercise of rewriting a decision of a lower tribunal with a view to sustaining its validity.

62. The error here should not have been made, and it is extremely important that care is taken by decision makers to ensure that the language used is accurate. Nevertheless, in this case I am satisfied that the error here was a misstatement that does not affect the validity or otherwise vitiate the decision. A consideration of the decision as a whole and taken in the context of the overall decision-making process, makes it clear that the Appeals Officer was directing her efforts towards the correct test. It is noteworthy that in the introductory paragraphs of her decision identified the correct statutory test. In addition, the decision under challenge was concerned with the question of whether the February 2021 appeal decision should be revised. In that decision, the correct formulation was utilised throughout the decision. In the premises I am satisfied that the error was not such as to suggest that the Appeals Officer had misdirected herself in law or had misunderstood the relevant test.

63. The second error asserted by the appellant was that the Appeals Officer was unduly restrictive in the interpretation or application of the concept of '*substantial restriction*'. This was premised on the appellant's steadfast assertion that, in fact, because of his disabilities he is substantially restricted in undertaking employment of the kind

prescribed in the legislation. That of course was the question that had to be considered by the Deciding Officers and Appeals Officers that dealt with this case. The appellant highlighted that the Appeals Officer who decided the appeal from February 2021 attached inappropriate weight to a comment by the appellant's GP that he was suitable for working or training for rehabilitative purposes. Two issues can be observed on this point. First, the appellant is fully correct that section 210(10) makes clear that a person shall not be disqualified for receipt of disability allowance while engaging in a prescribed course of education, training or development. Second, however the appeal in this case was not taken in respect of the February 2022 decision. The appeal herein is concerned with the decision on the application for a revision pursuant to section 317 of the 2005 Act, and as noted above, there are clear parameters to that process. As a matter of fact the revision decision did not address or attach any weight to the observations made by the GP regarding education or training.

64. The third asserted error was that the Appeals Officer did not identify or make a finding on the nature of the employment which would be suited to the appellant. It was argued that it was erroneous not to engage with that question. I do not accept that this proposition is correct. The premise of the legislative provisions is that it is for the applicant for claiming this form of assistance to establish eligibility. There is no restriction on the evidence that can be offered by an applicant in that regard. In fact, the revision process allows the applicant to proffer new evidence or facts even after the conclusion of the appeals process. The Deciding Officers and Appeals Officers can only make a decision by applying their knowledge and expertise to the facts put before them by an applicant. The appellant did not identify anything in the legislation that suggests that the statutory officers are obliged in effect to maintain catalogues of potential

employment scenarios for persons of differing ages, experiences and qualifications against which an applicant's application can be analysed.

65. A fourth argument was developed in the oral argument by reference to article 137 of the Regulations. Section 210(8) of the 2005 Act provides that "*the conditions under which a person shall be regarded for the purposes of this section as being substantially restricted in undertaking suitable employment by reason of a specified disability shall be specified by regulations.*" Article 137(1) provides:-

> *"(1) Subject to sub-article (2), for the purposes of section 210, a person shall be regarded as being substantially restricted in undertaking suitable employment by reason of a specified disability where he or she suffers from an injury, disease, congenital deformity or physical or mental illness which has continued or, in the opinion of a deciding officer or an appeals officer, may reasonably expect to continue for a period of at least 1 year."*

66. The appellant argued that the effect of article 137 was to provide an understanding of the test in section 210 whereby the applicant simply had to show that they suffered from a specified disability in order to establish that they should be regarded as being substantially restricted in undertaking suitable employment. This was not an argument that had been made to the Deciding Officer or Appeals Officer. It was not an argument expressed as one of the questions of law in the Special Summons nor was it articulated in the appellant's written submissions.

67. As noted by the respondents, if article 137 of the Regulations meant what was argued by the appellant - that once a person has a specified disability under article 137 they were automatically eligible for disability allowance - this would lead to an absurd or

anomalous result. Such an interpretation would involve the subordinate legislation amending section 210 of the parent Act of 2005, by removing the requirement that the applicant establish that they are substantially restricted in undertaking suitable employment. I cannot be satisfied that the Minister in promulgating regulations intended such an absurd or anomalous result, and even if that was intended it would seem to be plainly unlawful having regard to Article 15 of the Constitution.

68. In my view the proper interpretation of article 137 is that it is attempting to define or describe a "*specified disability*". If the applicant establishes that they have a specified disability as described in article 137, the decision maker then moves to a consideration of whether the applicant has established the substantial restriction criteria.

Burden of proof argument

69. Under this heading, the appellant asserts that there was prima facie evidence before the Appeals Officer that the appellant met the criteria for the allowance. The argument as developed was that in the absence of further evidence from the respondents the prima facie evidence became conclusive proof. Separately the argument was made that the Appeals Officer failed to give adequate weight to the evidence.

70. With regard to the latter argument, it is important to return to the criteria set out by the Supreme Court in *Attorney General v. Davis* [2018] 2 I.R. 357. That case makes clear that in a statutory appeal of this type there are limited circumstances in which errors of fact can lead to a successful finding that a decision maker erred to the point that the decision can be overturned. Implicit in the test is a recognition that a core task reserved to the decision maker is to weigh the evidence and reach a finding. It is not enough for

an appellant to say that the weight attached to the evidence could have been different, or that different findings could have flowed from the evidence. If that were the test, then this would transform a limited statutory appeal to something far closer to a *de novo* hearing. To be challenged successfully, the treatment of the evidence by the Appeals Officer must result in findings unsupported by the evidence or where they are findings that no reasonable decision maker could make.

71. The court must take account of the fact that the decision that is the subject matter of this appeal together with the preceding decisions were decisions that the Oireachtas directed should be made by Deciding Officers and Appeals Officers. The decision makers are entitled to some level of deference on their treatment of factual matters within their area of expertise, and to a very large extent that deference is incorporated into the legal threshold for disturbing findings of fact. Here, the Appeals Officer considered the facts and materials that the appellant chose to present in support of his application. Having considered those materials, the Appeals Officer determined that the appellant had not established that he fell within the eligibility criteria for disability allowance. I am satisfied that this finding was a finding available to the Appeals Officer on the basis of the evidence and should not be disturbed.

72. I consider that the arguments regarding the burden of proof are misplaced. An application for a statutory benefit is not analogous to adversarial *inter partes* litigation. There is no competition between the applicant and the respondents to establish facts. Insofar as applications for Disability Allowance are concerned, the scheme of the 2005 Act is clear. The allowance will not be given unless and until (a) there is an application in the proper form, and (b) the applicant satisfies the decision maker that they have established their entitlement. The case law relied upon by the appellant, which

addresses the issue of how establishing a prima facie case will lead to a favourable determination unless the other side establishes the contrary, is applicable to an adversarial dispute where two parties compete before a decision maker. It is not the correct model for an application for statutory benefits such as disability allowance.

73. In this case I consider that the Appeals Officer was correct in proceeding on the basis that it was a matter for the appellant to establish that new facts or new evidence led to a situation where the Appeals Officer was satisfied that the original appeal decision was erroneous. The Appeals Officer has been appointed by the Minister to exercise the power to make revision decisions. That involves a function that requires an engagement with and appraisal of what are said to be new facts or new evidence, and a consideration of the effect of those matters on the integrity of the original appeal decision. Contrary to the assertion implicit in the appellant's submission, the Appeals Officer must exercise their judgement and cannot simply endorse what is contended for by an applicant. If the Appeals Officer simply proceeded on the basis that the allowance must be given if there was *some* evidence that an applicant was substantially restricted in the manner required by the legislation this would impermissibly hollow out the statutory power, and transform a function that involves engagement and critical appraisal to something approaching a rubber stamping exercise.

Carer's allowance argument

74. The appellant argued that the Appeals Officer should have concluded that the appellant was entitled to disability allowance because his mother was in receipt of carer's allowance. In her decision, the Appeals Officer made two points. First, each application for a statutory benefit or allowance must be considered by reference to its own

particular criteria. Second, in this case the mother's application for carer's allowance had been granted when the applicant was seven years old and did not reflect on the applicant's current suitability for employment.

75. In this appeal, the appellant makes the argument that because the threshold for access to carer's allowance and DCA (which was being received when the initial application was made) had been met at an earlier point by reference to their particular criteria, it followed that the Department already had accepted as established a state of affairs that, in turn, ought to lead to a conclusion that the appellant was eligible for disability allowance. In finding that this argument is incorrect, a number of observations can be made.

76. First, the scheme of the 2005 Act makes it very clear that each form of social assistance is separate from the other. In order to avail of the payment, an application must be made, and eligibility established by reference to the particular criteria applicable to each form of benefit. That was a legitimate policy choice to be adopted by the Oireachtas, and the appellant has not sought to argue that there is any frailty in this legislative approach.

77. Second, in theory it was open to the Oireachtas to adopt a more holistic approach to benefits, for instance, by expressly linking eligibility for one form of assistance to eligibility for another. This was not done. There is nothing expressed in the 2005 Act that permits an applicant for disability allowance to establish eligibility by reference to their receipt of another payment or benefit.

78. Third, I am not able to discern that such a situation could be said to arise by implication. An applicant for disability allowance must establish (a) that they have attained the age of 16 years, (b) that they are substantially restricted in undertaking employment of a

kind which, if the person was not suffering from that disability, would be suited to that person's age, experience and qualifications, and (c) that the substantial restriction is because of a specified disability. These specific matters must be considered by the Deciding Officer and, if necessary, by an Appeals Officer. On the other hand, carer's allowance is applied for by the carer not the person affected by a disability. It is dealt with in Chapter 8 of the Part 3 of the 2005 Act, at section 179. The applicant for the allowance must show that they reside with and provide full time care to a '*relevant person*'. The relevant person must have such a disability that he or she requires full time care and attention. Section 179(4) clarifies that a person shall not be regarded as requiring full time care and attention unless 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 the person is likely to require that care and attention for at least 12 consecutive months. These are different tests, applied to different applicants, involving different criteria, and addressing different needs. There is no basis for suggesting by implication that satisfying the criteria to be treated as a '*relevant person'* under section 179 is a matter that ought to be considered for the purposes of the section 210 criteria.

79. Hence as a matter of statutory interpretation and allowing for the purposive approach to be taken in construing the 2005 Act, I cannot find that the Oireachtas intended that the eligibility for one benefit is a matter that ought to taken into account in considering eligibility for a separate benefit.

80. Fourth, it is a basic tenet of administrative law that statutory decision makers in the position of Deciding Officers and Appeals Officers may only take account of relevant factors. Here the relevant legislative provisions require the Appeals Officer to take account of new evidence and new facts that go to the question of establishing whether the appellant was entitled to disability allowance. As an entitlement to carer's allowance is decided by reference to different criteria, I do not agree that this is a relevant factor in the consideration of an application for disability allowance. It can be observed that the position adopted by the appellant could lead to unfair results. If, for instance, the applicant for disability allowance had been refused a separate but arguably related benefit, it could be unfair or irregular if that refusal was a factor that was relied upon by the Deciding Officer or Appeals Officer.

Irrationality/Unreasonableness

81. While this is a substantial argument, it can be dealt with relatively briefly in light of the matters set out above. I have set out above the decision on the revision application made by the Appeals Officer together with the decision that the appellant sought to have revised and the materials that were submitted to the Appeals Officer. I have found that the Appeals Officer directed herself correctly in relation to the relevant legal tests, and appropriately weighed the evidence. In my view, the Appeals Officer cannot be said to have reached an unreasonable or irrational decision. The decision that was made was open to the Appeals Officer on the evidence. It is irrelevant that she could have legitimately decided the application in a different way, or that the appellant disagrees with the outcome. It was a matter for the Appeals Officer to consider the evidence as a whole and the submissions made, and having done so, the Appeals Officer was not satisfied that the appellant had established that he met the criteria in section 210 of the

2005 Act. In the premises, I cannot find that the revision decision of the Appeals Officer was irrational.

CONCLUSION

82. In all the circumstances and for the reasons explained in this judgment I am refusing the statutory appeal. I will list this matter for a final hearing on the question of costs and the formulation of final orders before me at 10.30 am on Tuesday 25 June 2024.