

President's Report

Social Entitlement Chamber

Report by the President of the Social Entitlement Chamber of the First-tier Tribunal on the standards of decision-making by the Secretary of State and Child Maintenance and Enforcement Commissioner

2008–2009

President's Report

Report by the President of the Social Entitlement Chamber of the First-tier Tribunal on the standards of decision-making by the Secretary of State and Child Maintenance and Enforcement Commissioner

2008–2009

Contents

President's Foreword	2
1. Context	3
2. Management Summary	6
3. The Sample and Results	8
4. Non-medical Decisions	16
5. Decisions involving medical evidence	21
6. Child Maintenance decisions	27
7. Conclusion	29
Annex A: Questionnaire and Sampling	31
Annex B: Sample intake and results by benefit – Tables A–G	36
Annex C: List of Abbreviations	40

President's Foreword

The duty imposed by the Social Security Act 1998 on the President of Appeal Tribunals to report on the standards of decision-making has now passed to the Senior President of Tribunals as part of the reform of tribunals heralded by the introduction of the Tribunals Courts and Enforcement Act 2007. The Senior President has delegated this duty to me as President of the Social Entitlement Chamber of the First-tier Tribunal. Jurisdiction over social security and child support appeals now sits within this Chamber.

In last year's report I alluded to the changes that were being proposed and suggested that this might provide an opportune moment to review where we are in terms of progress in improving decision-making and seek new ways of delivering feedback in the light of the empirical evidence. It has not proved possible to do so at the time of writing the current report which is why for the current year the established methodology continues, although some aspects of the presentation are slightly different. I remain hopeful that focussed, practical and instrumental information by way of feedback can effect significant change in the standards of administrative decision-making, and I have begun discussions with the Department for Work and Pensions and the Child Maintenance and Enforcement Commission to find more appropriate ways of doing so in future.

In the meantime I remain indebted to the tribunal judges and members who have completed the sample questionnaires that provide the information in the report, the clerks and operational staff who coordinate sampling at the venues and the President's Support Team who oversee the process and draw together the information.



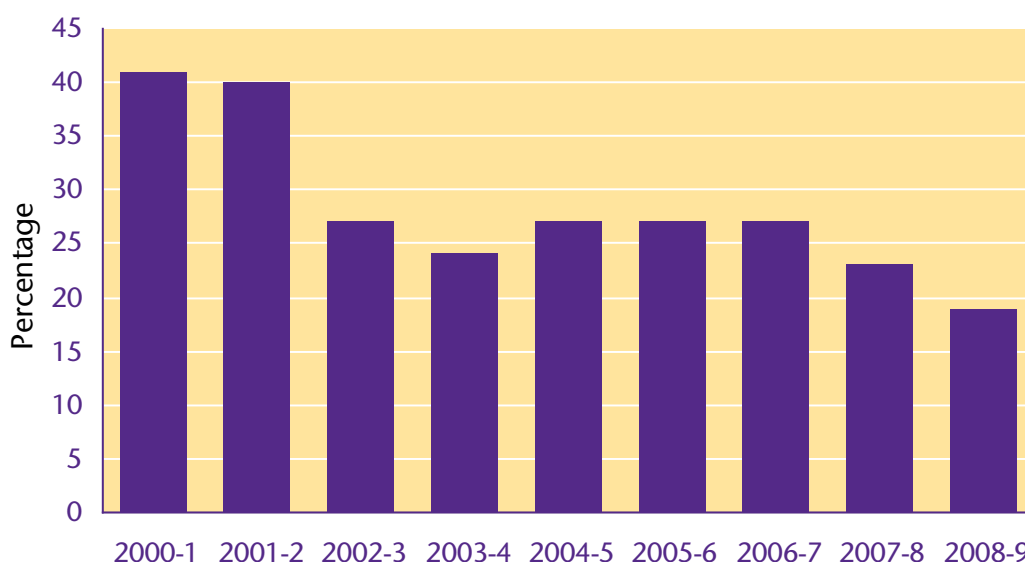
Robert Martin

President of the Social Entitlement Chamber, First-tier Tribunal.

- 1.1 The methodology used to collect data for this report was tested during a pilot exercise conducted in 1999 and this has formed the basis of the schema adopted for sampling in each subsequent year.
- 1.2 As I have already mentioned, the context of tribunal decision-making has been transformed by the introduction of the Tribunals Courts and Enforcement Act 2007 (TCE) which provides for a new First-tier Social Entitlement Chamber which embraces Social Security and Child Support (SSCS), Asylum Support and Criminal Injuries Compensation, and it would be surprising if this change did not give us pause for thought about the method of feedback to agency first tier decision-makers and whether the advice and guidance given over the years has borne fruit.
- 1.3 The statutory duty to produce a report, which has passed to the Senior President, can now be found in Section 15A of the Social Security Act 1998, and for this year the duty has been delegated to me as President of the Social Entitlement Chamber. The report, in its present form, is costly to produce, 1680 questionnaires are completed by tribunal judges. In 315 of those cases supplementary comments are added by medically qualified members of the tribunal. The cost of judicial time involved is in excess of £20,000. It is unfortunate, particularly at a time when judicial expenditure is under scrutiny, that there appears at present to be no means of assessing whether the value of the report to the Secretary of State justifies the outlay to the public purse. There is no formal requirement for the Secretary of State to respond to the report nor to give examples of ways in which previous reports had led to changes in or influenced ways in which decisions are taken. In addition feedback suggests that the first tier agencies find it difficult to use the empirical data which we provide as a basis for instrumental reform of the decision-making process which has prompted me to question the utility of the current methodology. It is to be hoped that in the coming year positive engagement will be able to resolve some of these problems satisfactorily and I am glad to say preliminary discussions have been encouraging. As far as the current position is concerned a report based on an established methodology commenting on a fixed decision-making process is likely to produce the same results year on year and unlikely to deliver the gains hoped for to tribunal users.

- 1.4 This report does not purport to represent the entirety of Secretary of State and Child Maintenance and Enforcement Commissioner decision-making. It does, nevertheless, identify trends represented in the cases that come before the First-tier Tribunal and point the way towards suggesting where improvements might be made. Of the millions of decisions made each year we only see a small number on appeal – 242,800 in 2008–2009, and we tend to see those decisions which have an adverse impact upon appellants, but common sense suggests that these cases are likely to be those where the decision-makers might have got the decision wrong.
- 1.5 Each year I make a plea for the Secretary of State to increase the number of Presenting Officers attending our hearings. Tribunal Judges and Members find their presence essential to preserving the balance of the hearing, otherwise the Tribunal itself is left in the inappropriate position of presenting the Department’s case to the appellant. Yet again I am afraid that I have been disappointed and the figures show a further decline in attendance of Presenting Officers from 23% in last year’s sample to 19% this year (Table 1). Child Support remains the usual welcome exception. The figure for attendance at Child Support hearings alone is in excess of 90% (paragraph 6.1).

Table 1. Attendance of Presenting Officers



- 1.6 Other channels of feedback from tribunals include links with the Department’s Standards Committee, supporting local Tribunal User Groups and an arrangement with Atos Origin, which supplies much of the medical evidence used by the Secretary of State, to refer medical reports which have been the subject of tribunal criticism.

Sample findings

1.7 Since the first report was published in 2001, the following key themes have regularly emerged:

- Decisions are most commonly overturned because the tribunal hearing generates additional evidence, usually in the form of oral evidence provided by the appellant. The availability of this additional information suggests that there should be more direct engagement with the appellant;¹
- There is little consistent evidence to show that cases are effectively reconsidered before coming to the tribunal. Often the appeal papers show an unwillingness on the part of the decision-maker to reconsider the decision in the absence of the appellant supplying fresh medical or other third party evidence;
- Some medical reports underestimate the severity of disability;
- There is confusion on the part of decision-makers about the appropriate evidential weight to be given to medical reports and how to address conflicting evidence;
- People with mental health problems may face additional difficulties in making claims and pursuing appeals.

1 Child Maintenance and Enforcement Commission (CMEC) cases involve three parties, CMEC and both parents. In cases involving confidential information, as defined by the rules, either parent has an option to withhold personal information from their former partner until the tribunal hearing, although they may have been contacted by the commission before the hearing and asked for additional information.

- 2.1 The sample this year has captured a total of 1,680 cases, drawn in a manner which attempts to reflect the overall profile of cases received by the Tribunals Service during the course of the year. Child Support cases are over-represented in the sample at around 7.5%. The actual intake of Child Support cases is 2% of the total for the last year for which we have figures, 2008–2009.²
- 2.2 It is often a combination of reasons that leads to a decision being overturned on appeal. While the predominant reasons are drawn out in the report, Tribunal Judges often note that a combination of factors has contributed to the final outcome and tick a number of boxes in the questionnaires.
- 2.3 While the sample broadly reflects our intake, DLA/AA cases have been over-sampled and IB cases under-sampled. On the other hand, in Child Support cases we have deliberately skewed the size of the sample in order to collect enough data to draw some meaningful comments. As with any sample, there may be a margin of error, according to its size. A very small sample carries a wide margin of error. Care must be taken when comparing this year's results with previous years. Where there is only a small difference, this may be due to chance and will not always indicate a significant change.
- 2.4 For Jobcentre Plus and the Pension, Disability and Carers Service, the themes that have emerged are:
- Additional evidence was the reason given in the largest proportion of cases, where the tribunal overturned the decision, and this evidence was often in the form of oral evidence, provided by the appellant at the hearing;
 - In some cases the tribunal took a different view of the same evidence that had been before the decision-maker, considering that the decision-maker had been wrong not to accept that evidence or give it appropriate weight;

2 Caution should be used making any comparison between outcomes from the annual sample. The sample for 2007–2008 was 1,886 cases from an intake of 229,000 cases, the sample this year is 1,680 from an increased annual intake of 242,800, and the representativeness of the sample should be viewed in that light.

- In cases requiring medical reports, some decisions were made on the basis of reports which had under-estimated the severity of the disability. In mental health cases the full extent of the problems experienced by the appellant had not been fully taken into account;
- The presence of the appellant at the hearing has a significant impact on the outcome, either by shedding new light on existing evidence or by producing new evidence.

2.5 For the Child Support Agency, the main findings are similar:³

- The most common reason for cases being overturned was that additional evidence was presented to the tribunal, largely in the form of the oral evidence of the appellant;
- Some tribunals took a different view of the same evidence, where evidence is interpreted in a particular way decision-makers should explain why they have adopted this view and provide evidence to support it;
- Care needs to be taken with documentation and calculations. The Commission needs to be rigorous in verifying facts, taking into account evidence of the parties and following up discrepancies before the hearing;
- In preparing cases for tribunal hearings, all the documents relevant to the matter under appeal should be made available and accompany the submission.

2.6 The main themes from the report remain the gathering of evidence, weighing the evidence, reviewing existing evidence on appeal and obtaining further evidence before the hearing.

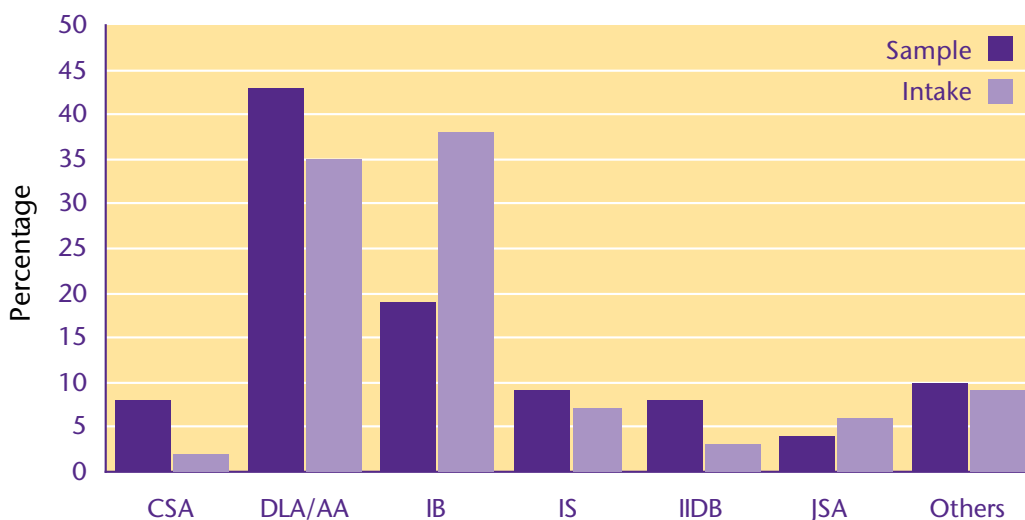
3 See Footnote 1 above.

3.1 The method employed to gather the information for this year's sample and the form of questionnaire used can be found at Annex A. During the course of the year 1,680 questionnaires were completed by the Tribunal Judge and (where relevant) the medically qualified Tribunal Member. A breakdown of the sample compared to the national intake can be found at Table 1 below.

Table 1: Sample compared to national intake

Benefit	Sample		Total intake
	No. of Cases	%	%
Child Support Assessments/Departures (or variations)	127	8	2
Disability Living Allowance / Attendance Allowance	713	43	35
Incapacity Benefit	323	19	38
Income Support	151	9	7
Industrial Injuries Disablement Benefit	133	8	3
Jobseeker's Allowance	63	4	6
Others	170	10	9
Total	1680		

National intake for 2008–2009 was 242,800.



3.2 Child Support cases are deliberately over-represented in the sample, with the aim of obtaining sufficient data to be able to draw some meaningful conclusions. This year IB cases were considerably under-represented by 19% and DLA cases were over-represented by some 8% in the sample.

Sample results

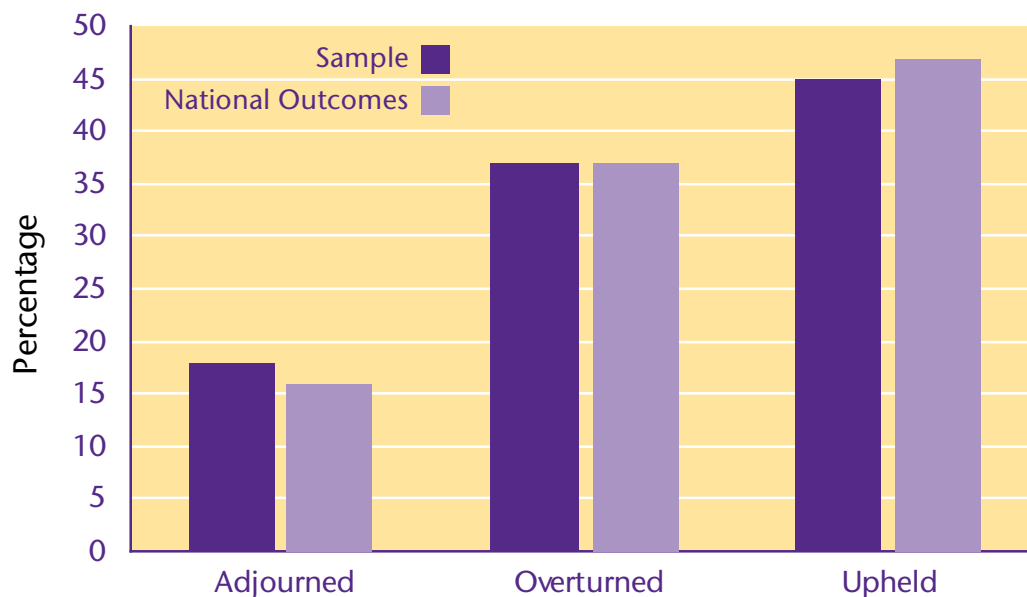
3.3 The questionnaires produced a total of 1680 replies for the period April 2008 to March 2009. The sample was restricted to those appeals which resulted in one of the following three outcomes:

- Adjudged – where there was some reason for the case not being heard, for example, where the appellant was absent through illness, or where further clarification was requested by the Tribunal Judge and the matter referred back to the decision-maker.
- Overturned – where the tribunal disagreed with the decision-maker’s determination and made a decision that was more favourable to the appellant.
- Upheld – where the tribunal agreed with the decision-maker’s determination.

Table 2 below shows the outcomes in the sample, broken down by type and compared to the national outcomes for 2007–2008. The figures show 37% of decisions being overturned with some 45% upheld.

Table 2: Sample outcomes compared to national outcomes

	Sample		National
Adjudged	305	18%	16%
Overturned	615	37%	37%
Upheld	760	45%	47%

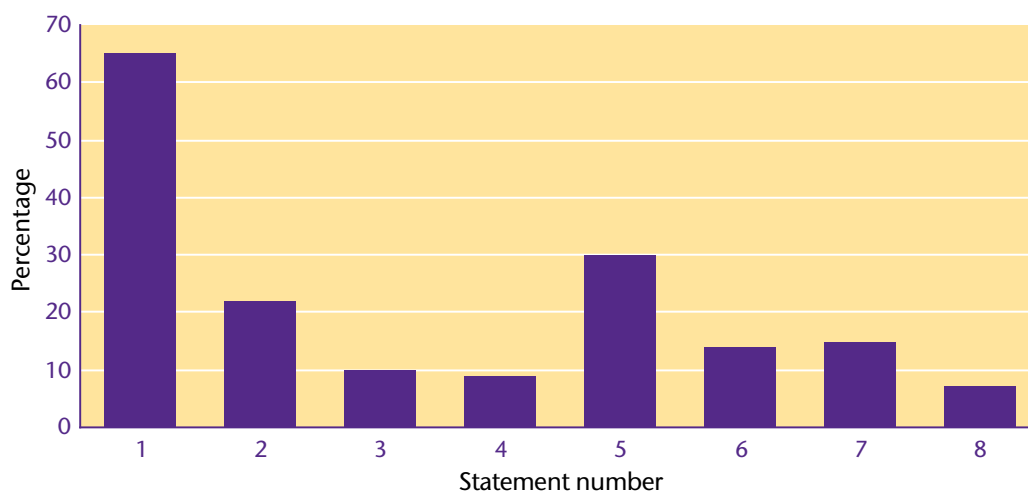


Overturned cases

3.4 When looking at the overturned cases, it is important to remember that the majority of cases that come before a tribunal are upheld. This is reflected in the sample this year where the upheld cases account for 45% of the decisions. In those cases where the Secretary of State's and Child Maintenance Enforcement Commissioner's decision was overturned by the tribunal, the main question we sought to answer was: why was the decision overturned? Tribunal Judges (and medically qualified Tribunal Members) were offered a number of statements on the questionnaire which they could tick to indicate the reasons for the decision being overturned. (They could tick more than one in each case.) The statements which were most commonly agreed with are shown in Table 3 below.

Table 3: Outcomes – 615 overturned cases

Statement	Responses
1. Additional evidence: The tribunal was given additional evidence not available to the decision-maker.	398 (65%)
2. Accepted evidence: The tribunal accepted evidence that the decision-maker had available but was not willing to accept.	138 (22%)
3. Insufficient facts: The decision was based on insufficient facts or evidence due to the inadequate investigation of the claim or reconsideration.	63 (10%)
4. Incorrect weight: The decision-maker did not give relevant facts/evidence due weight.	57 (9%)
5. Different view: The tribunal formed a different view of the same evidence.	183 (30%)
6. Different view (medical): The tribunal formed a different view based on the same medical evidence.	88 (14%)
7. Under-estimated disability: The medical report underestimated the severity of the disability.	91 (15%)
8. Avoid the appeal: The Agency could have avoided the appeal.	42 (7%)



3.5 The most common response remains that the tribunal was given additional evidence not available to the decision-maker. This reason was given in 398 cases (65%) of those overturned.

3.6 In those cases where additional evidence was provided, it took the form of oral evidence in 304 cases (49% of all overturned cases). Of these 304 cases, there were 250 (82%) where the evidence was provided by the appellant. This is not an entirely unexpected figure, since by far the greater proportion of cases in the sample were oral hearings. Of the 1680 cases in the sample 1300 were oral hearings (77%), with 572 (93%) of the overturned cases involving oral hearings.

3.7 The 65% figure for the production of additional evidence suggests that an important source of information is being overlooked in the decision-making process. There continues to be a tendency on the part of decision-makers to discount oral evidence received from the appellant in the process of evidence gathering prior to the decision and then in the preparation of the appeal, and not to seek out new evidence to verify the facts where the decision has been challenged. Where a decision is challenged it is the duty of the decision-maker to review the initial decision, satisfy themselves that the facts are correct, ensure that there is no further evidence that might lead to a review and where they do not accept evidence or doubt it explain why, making this explicit in the submission to the tribunal.

3.8 In 104 cases (17%) additional written evidence was provided to the tribunal, and in 68 cases it was a combination of written and oral evidence that was provided to the tribunal.

3.9 The tribunal formed a different view of the same evidence in 183

(30%) of the overturned cases. In 88 cases (14%) it was specifically the medical evidence that was differently interpreted. The questioning of the appellant at the hearing and the taking of a full history by the medical member of the tribunal often sheds new light on the existing evidence. In 63 (10%) it was considered that the decision was based on insufficient facts or evidence due to the inadequate investigation of the claim or reconsideration.

- 3.10 Problems were encountered evaluating evidence, reflected by the 138 cases (22%), where the decision-maker did not accept the evidence that was available, and in the 57 (9%) cases where it was considered that the decision-maker had not given the available evidence due weight, the common theme being that the evidence of the appellant was not given due regard when reaching a conclusion.⁴
- 3.11 The proportion of medical reports that underestimated the severity of the appellant's disability was 15%, 91 cases. Medical reports that come before the tribunal originate from a number of sources. In this year's sample Atos Origin had provided medical reports in 84% of cases which were overturned. In those cases where the tribunal felt the medical report underestimated the severity of the disability, the appellant attended the hearing in 65 cases (71%) and so was able to be questioned by the tribunal.
- 3.12 In this year's sample the number of cases where the tribunal took a different view of the same medical evidence was 88 (14%). In 48 (8%) of the overturned cases, the tribunal found that all the medical issues had not been addressed in the medical report used by the decision-maker; in 18 cases (3%) the decision-maker had misinterpreted the medical evidence; in 16 cases (3%) the advice in the medical report was not adequately justified; in 11 cases (2%) it was not considered that the advice in the medical report was consistent; in 47 cases (8%) it was felt that the decision-maker had overlooked evidence which might have affected the decision; in 2 cases it was felt that conflicting medical opinion had not been addressed, and in 6 cases (1%) the evidence was not in keeping with the consensus of medical opinion.

4 See Footnote 1 above.

- 3.13 In cases involving medical evidence the tribunal often comment on the value of having the appellant available to shed light on their medical history and explore issues that arise in detail. They continue to criticise decision-makers for relying on limited medical evidence, for failing to seek up to date medical evidence, particularly in cases of progressive illness, and for not taking into account available medical reports. Some medical reports relied on by decision-makers underestimated disability and there were problems in the way decision-makers interpreted medical reports and weighed this form of evidence against others. Mental health issues remain a problem both in the way claims are dealt with and in assessing care needs.
- 3.14 General Comments: Tribunals stress the impact of credible and compelling oral evidence often combined with additional new written evidence, most notably in the form of medical reports. They criticised decision-makers where they did not address discrepancies in the evidence and standard form submissions which did not address all the issues or include all the evidence. They continue to value the presence of Presenting Officers, where they attended. There was a common feeling that there was an absence of proper investigation of the circumstances surrounding the appeal before the case was sent to the tribunal for hearing. Overpayment cases were criticised where calculations were wrong and submissions did not adequately cover all the relevant issues and seek to resolve them before the hearing. Specific problems persist in the treatment of issues such as living together, capital and income.
- 3.15 At the same time the tribunal suggested that the Agencies could only have avoided an appeal in 42 (8%) of overturned cases.

3.16 This is the sixth year that we have collected information on the standard of the submissions made by the Secretary of State to the tribunal. The submission⁵ sets out the facts of the case, the evidence, and the law used to make the decision under appeal. It should include the details of the claim and the issues raised by the appeal, showing how the decision-maker weighed the evidence to reach the decision and the grounds on which the appeal is opposed. It is of crucial importance that the submission should enable the appellant, and subsequently the tribunal, to ascertain readily why and how the decision was reached. The assessment of submissions remains favourable. This year there were only 29 (5%) overturned cases where the submission failed to argue the Secretary of State's case fully and effectively. There were 15 cases (3%) where the submission failed to focus on the grounds of appeal; 15 cases (3%) where the submission failed to include all the evidence relating to the decision under appeal; 5 cases where the submission failed to include or refer to the correct statute or case-law; and 5 cases where it failed to include all the relevant facts.

3.17 The following is a summary of those areas highlighted by Judges and Members in their comments:

- The most common comment was that there were problems gathering evidence, identifying the areas of dispute, investigating discrepancies and, where possible, resolving them before the hearing or addressing them in the submission;
- Standard form submissions need to identify the facts clearly, and present a coherent argument that addresses the particular facts of the case including available case law. Some do not address the questions raised by the appeal and support this with evidence;
- Where it was clear that issues required further investigation by the decision-maker, members questioned why the cases had been put before the tribunal;

5 Submissions are now termed "the response" under the Procedure Rules introduced in November 2008. As these came into force during the course of the sampling cycle we have retained the use of the term *submission* for the purposes of this report.

- In cases involving medical evidence, members criticised circumstances where further medical evidence had not been sought, either at an earlier stage or not at all, leaving the tribunal to pursue the matter, in some cases at the cost of an adjournment;
- Tribunal Judges continue to raise concerns about how mental health issues are dealt with in the decision-making process;
- In some cases medical examinations were not thorough enough to provide a full history.

Upheld cases

3.18 Where the Secretary of State's and CME Commissioner's decision was upheld by the tribunal, the main question which we wanted to ask was: Was there anything the agencies could have done to prevent the case from having to come to a tribunal? The answer again seems to have been a resounding "No", with Tribunal Judges indicating in only 3 of the 760 upheld cases that the agencies could have prevented the appeal. In only 3 cases was it felt that the agencies had not adequately explained the decision to the appellants.

Adjournments

3.19 In 305 of the cases (18%) in the sample, the decision of the tribunal on the day was to adjourn. No analysis of these cases has been made in this report.

3.20 The following Sections, from 4–6, deal with individual categories of decision-making, focussing mainly on overturned cases, as these are the cases where the more purposive information is obtained. The volumes and percentages in Sections 4–6 relate to overturned cases only, unless otherwise stated.

4

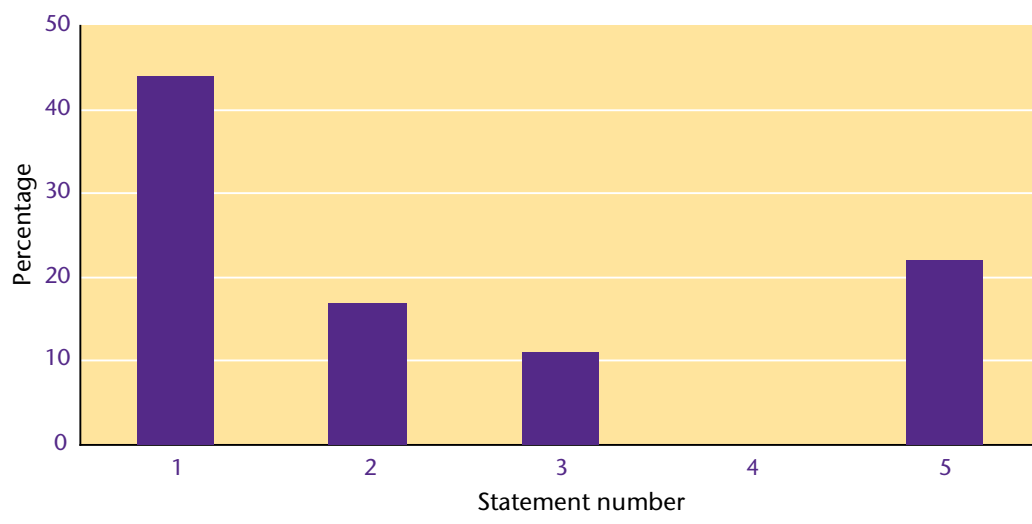
Non-medical Decisions – Jobcentre Plus, Pension Service & Debt Management

4.1 In order to focus better on the key issues for each benefit, we have, where practicable, drawn a distinction between those decisions which are primarily based on non-medical evidence and those primarily based on medical evidence. The main benefits in the first category are Jobseeker’s Allowance and Income Support. Details of the sample size and breakdown of outcomes for each benefit can be found in Annex B, Tables A, B and C. Following the creation in 2001 of a discrete Debt Management unit to recover overpayments across all benefits, it has not proved possible for us to distinguish between Debt Management decisions in non-medical cases and in medical cases. Because, in our experience, the preponderance of overpayment appeals relate to the former category, we have, for the sake of convenience, dealt with Debt Management cases under this Section.

Jobseeker’s Allowance

Table 4: 18 Overturned cases: Responses

Statement	Responses
1. Additional evidence: The tribunal was given additional evidence not available to the decision-maker.	8 (44%)
2. Accepted evidence: The tribunal accepted evidence that the decision-maker had available but was not willing to accept.	3 (17%)
3. Incorrect weight: The decision-maker did not give relevant facts/evidence due weight.	2 (11%)
4. Different view: The tribunal formed a different view of the same evidence.	0
5. Avoid the appeal: The Agency could have avoided the appeal.	4 (22%)

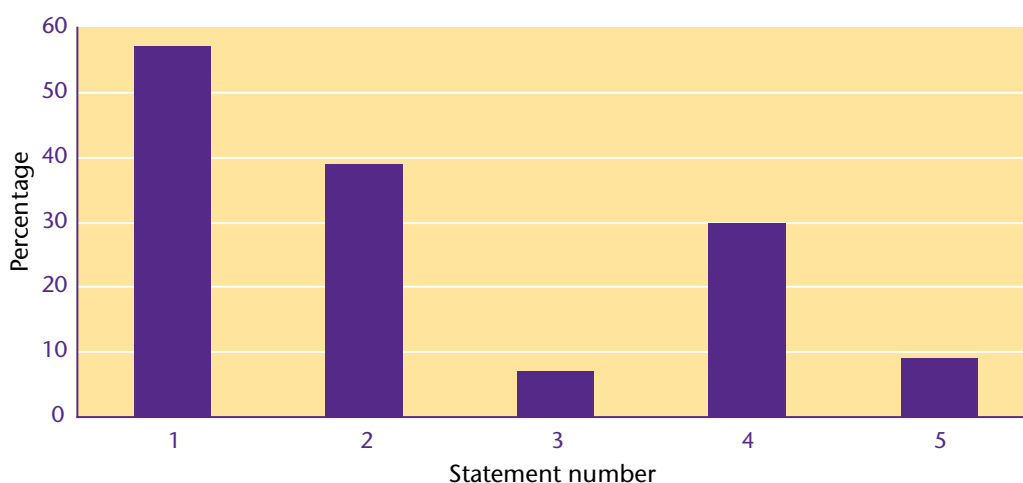


- 4.2 The number of cases upheld by the tribunal in JSA cases has increased this year to 66%, which is a slight increase on the figure of 64% for last year.
- 4.3 Of the overturned cases there were 8 (44%), where the tribunal was given additional evidence, 3 cases (17%) where the tribunal accepted evidence that the decision-maker had available but was not willing to accept and 2 (11%) where the decision-maker did not give relevant facts or evidence due weight. In the 8 cases where additional evidence was presented to the tribunal, it took the form of the oral evidence of the appellant in 4 cases. There were 4 cases where it was considered that the Agency could have avoided the appeal.
- 4.4 The standard of submissions was high, with only 4 (22%) cases where the submission failed to include all the evidence, and where the submission failed to fully and effectively argue the case and just 1 where the wrong statute or case law was cited.
- 4.5 In their comments justifying why cases were overturned tribunal judges criticised decisions where factual issues had not been resolved, and stressed the importance of the oral evidence of appellants. There was some criticism of submissions which did not address additional evidence and explain how regulations had been applied to the appellant's circumstances.

Income Support

Table 5: 46 Overturned cases: Responses

Statement	Responses
1. Additional evidence: The tribunal was given additional evidence not available to the decision-maker.	26 (57%)
2. Accepted evidence: The tribunal accepted evidence that the decision-maker had available but was not willing to accept.	18 (39%)
3. Incorrect weight: The decision-maker did not give relevant facts/evidence due weight.	3 (7%)
4. Different view: The tribunal formed a different view of the same evidence.	14 (30%)
5. Avoid the appeal: The Agency could have avoided the appeal.	4 (9%)



- 4.6 Additional evidence was provided to the tribunal in 26 cases (57%); in 23 of these cases this was in the form of oral evidence, in 20 provided by the appellant.
- 4.7 In 18 cases (39%) the tribunal accepted evidence that the decision-maker had had available but was not willing to accept; in 14 cases (30%) the tribunal took a different view of the existing evidence. The appropriate weight was not given to evidence in 3 cases (7%).
- 4.8 In 8 (17%) cases the tribunal felt that the submission did not fully and effectively argue the case. In 4 (9%) cases the submission failed to focus on the grounds of appeal and in 2 cases the submission failed to include all the evidence relating to the decision under appeal; in 1 case each the submission failed to include all the facts and refer to the correct statute or case law.
- 4.9 In commenting on the reasons why cases were overturned Tribunal Judges criticised decision-makers for failing to address disputed facts, and refusing to take claimants' evidence into account and failing to explain why they did not consider this evidence credible. Problems continue applying the regulations relating to living together decisions, treatment of capital, overpayment and right to reside.
- 4.10 In their general comments Tribunal Judges criticised decision makers for basing decisions, for example in living together situations, on circumstantial evidence, and in other situations, when challenged being unable to explain their reasoning, leaving the case to go to appeal. A common theme is that when decisions are challenged the process of review and submission writing does not address the issue in dispute, set out the reasoning, acknowledge key issues and possibly avoid the matter coming to tribunal.

Debt Management

4.11 Debt Management has taken over the recovery of overpayments across all benefits. We are unable, in this analysis, to break down overpayment cases by individual type of benefit.

Table 6: 28 Overturned cases: Responses

Statement	Responses
1. Additional evidence: The tribunal was given additional evidence not available to the decision-maker.	12 (43%)
2. Accepted evidence: The tribunal accepted evidence that the decision-maker had available but was not willing to accept.	8 (29%)
3. Incorrect weight: The decision-maker did not give relevant facts/evidence due weight.	1 (4%)
4. Different view: The tribunal formed a different view of the same evidence.	11(39%)
5. Avoid the appeal: The Agency could have avoided the appeal.	1 (4%)



4.12 In 12 cases (43%) additional evidence was provided to the tribunal that was not available to the decision maker, in 10 (36%) cases this was in the form of oral evidence provided by the appellant. In 11 cases (39%) the tribunal formed a different view of the same evidence; in 8 (29%) the tribunal accepted evidence that the decision-maker had available but was not willing to accept, in 6 (21%) the decision was based on insufficient facts or evidence due to the inadequate investigation of the claim or reconsideration; and in 1 case the decision-maker did not give relevant facts or evidence due weight.

- 4.13 The standard of submissions was high but there were 4 (14%) where the submission failed to fully and effectively argue the case, 2 where the submission failed to include all the relevant facts, including disputed facts, and 1 case that referred to the wrong statute or case law.
- 4.14 Tribunal Judges criticised submissions that failed to produce evidence to support the decision even when cases had been adjourned for this to be done. Similarly they criticised the agencies for not providing presenting officers when requested. Overpayment periods and calculations were also a source of criticism, some being incorrect. Disclosure of information was a particular problem with issues concerning disclosure often being unresolved or appropriately addressed before the case was presented to the tribunal.

5

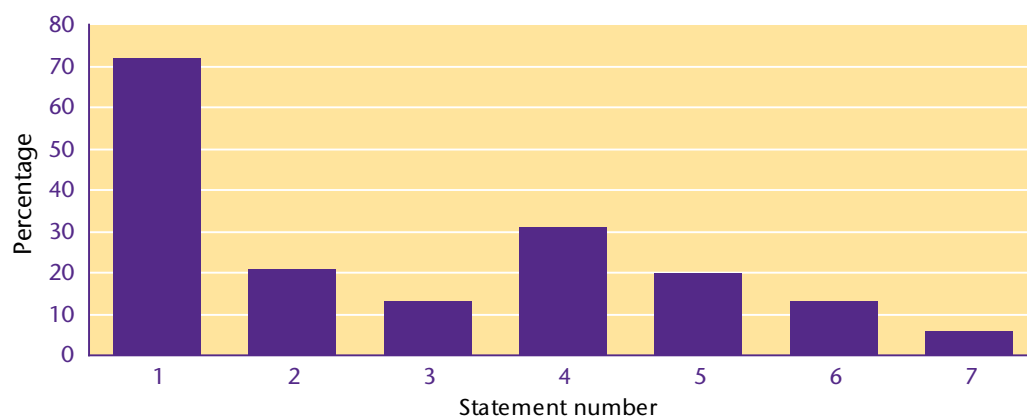
Decisions involving medical evidence – Disability and Carers Benefits and Incapacity Benefit

5.1 In this category the main benefits are Disability Living Allowance, Attendance Allowance, Industrial Injuries Disablement Benefit and Incapacity Benefit. Sample size and outcomes can be found at Annex B, tables D to F.

Disability Living Allowance / Attendance Allowance

Table 7: 256 Overturned cases: Responses (combined)

Statement	Responses
1. Additional evidence: The tribunal was given additional evidence not available to the decision-maker.	185 (72%)
2. Accepted evidence: The tribunal accepted evidence that the decision-maker had available but was not willing to accept.	53 (21%)
3. Incorrect weight: The decision-maker did not give relevant facts/evidence due weight.	33 (13%)
4. Different view: The tribunal formed a different view of the same evidence.	79 (31%)
5. Different view (medical): The tribunal formed a different view based on the same medical evidence.	51 (20%)
6. Under-estimated disability: The medical report under-estimated the severity of the disability.	32 (13%)
7. Avoid the appeal: The Agency could have avoided the appeal.	17 (6%)



5.2 The proportion of overturned cases in the sample is 35%, a slight reduction from 40% last year.

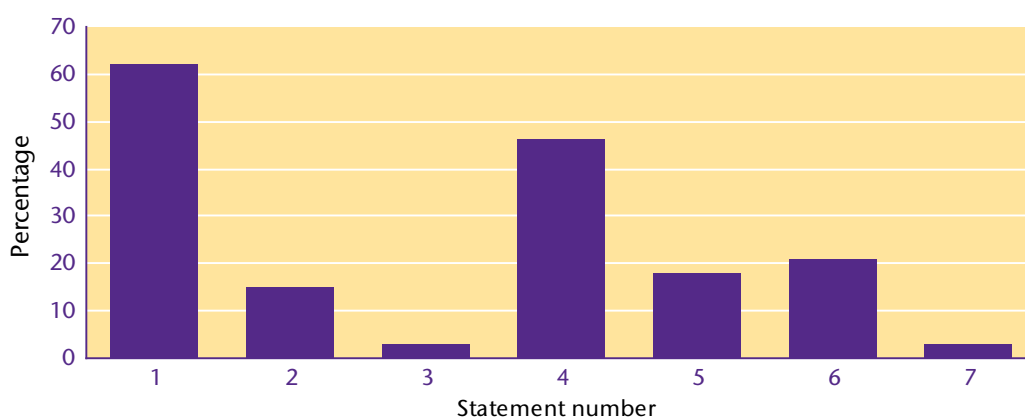
- 5.3 Additional evidence was presented to the tribunal in 185 cases (72%). This was largely in the form of oral evidence – 142 cases (58%). In 122 of these cases (48%), the additional oral evidence was given by the appellant. The tribunal formed a different view of the same evidence in 79 cases (31%). In 53 cases (21%) the tribunal accepted evidence that the decision-maker had but was not willing to accept, and in 33 cases (13%) the decision-maker did not give relevant facts or evidence due weight. In 27 cases (11%) the decision was based on insufficient facts or evidence due to inadequate investigation of the claim or reconsideration. In 18 cases (7%) the decision-maker overlooked evidence that would have affected the decision.
- 5.4 At the same time Tribunal Judges thought that in only 17 (7%) of the overturned cases the Agency could have avoided the appeal.
- 5.5 The standard of the submissions was considered high. There were just 13 cases (5%) where the submission failed to fully and effectively argue the case, and 8 (3%) where the submission failed to focus on the grounds of appeal. There were 3 cases (1%) where the submission failed to include all the evidence relating to the decision under appeal and 2 cases where the submission failed to include details of all the facts, including disputed facts.
- 5.6 General comments on overturned cases focus on obtaining further evidence, absence of sufficient medical evidence, the use of evidence, particularly evaluating and weighing the evidence of medical reports, and relating this to the circumstances of the appellant. A common and consistent criticism was that decision-makers would alight upon evidence that supported their decision whilst ignoring the evidence of appellants and medical practitioners without explaining why they placed weight on one source of evidence and not another. There were also cases presented to tribunals with missing medical evidence or without a full medical history. Where appellants presented with a range of related medical problems decision-makers had difficulty forming a full picture of overall care needs.
- 5.7 At the hearing the oral evidence of appellants remains a key factor when reaching a different conclusion and emphasises the importance of any review involving direct contact with the appellant before the hearing. Decision-makers had particular difficulty addressing inconsistencies in the evidence and resolving these issues before the hearing often leaving the tribunal to seek additional medical evidence.

- 5.8 In terms of medical evidence the tribunal formed a different view of the same medical evidence in 51 (20%) cases, considered that the original medical report underestimated the severity of the disability in 32 (13%) and in 19 (7%) cases did not consider that the medical evidence was used appropriately by the decision-maker. In 18 (7%) cases not all the medical issues were addressed in the medical report and in 15 (6%) the decision-maker misinterpreted the medical evidence.
- 5.9 There was some criticism where no medical evidence had been requested to resolve matters and it had been left to the tribunal or the appellant to obtain further medical reports. Mental health issues are a continuing source of problems in terms of making claims and assessing the impact of mental health issues on disability. In some cases mental health issues were not fully addressed or given due weight. Additional medical evidence, the oral evidence of the appellant and a full medical history were the key issues for tribunals. Problems were noted where interpreters were not present at medical examinations and this would have clarified issues possibly avoiding an appeal.

Industrial Injuries Disablement Benefit

Table 8: 39 Overturned cases: Responses

Statement	Responses
1. Additional evidence: The tribunal was given additional evidence not available to the decision-maker.	24 (62%)
2. Accepted evidence: The tribunal accepted evidence that the decision-maker had available but was not willing to accept.	6 (15%)
3. Incorrect weight: The decision-maker did not give relevant facts/evidence due weight.	1 (3%)
4. Different view: The tribunal formed a different view of the same evidence.	18 (46%)
5. Different view (medical): The tribunal formed a different view based on the same medical evidence.	7 (18%)
6. Under-estimated disability: The medical report underestimated the severity of the disability.	8 (21%)
7. Avoid the appeal: The Agency could have avoided the appeal.	1 (3%)



5.10 Additional evidence was provided to the tribunal in 24 (62%) cases, in 13 cases (33%) in the form of oral evidence, in 10 (26%) provided by the appellant. In 18 cases (46%) the tribunal formed a different view of the same evidence that had been before the decision-maker. In 6 cases (15%) the tribunal accepted evidence that the decision-maker had available but was not willing to accept; in 1 case the decision-maker did not give relevant facts or evidence due weight and in 1 case did not complete an adequate investigation of the claim. There was just 1 case where the tribunal felt that the Agency could have avoided the appeal.

5.11 The standard of the submissions was very high with no adverse comments about the standard of submission.

5.12 In commenting on the reasons for overturning decisions Tribunal Judges highlighted the importance of recording a detailed medical history, the value of oral evidence and the opportunity the tribunal had to question the appellant. In some cases it was felt that mental health issues were not taken into account.

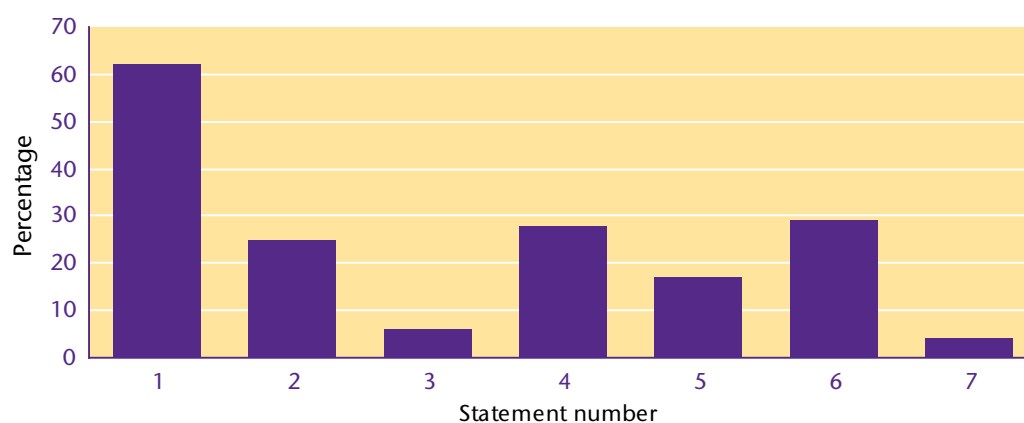
5.13 There were 8 cases (21%) where the medical report under-estimated the severity of the disability, 7 cases (18%) where the tribunal formed a different view of the same medical evidence and 6 cases each (15%) where medical evidence had been overlooked and all the medical issues were not addressed in the medical report. In 2 cases the tribunal did not feel that the advice in the medical report was in keeping with the consensus of medical opinion.

5.14 In terms of the medical evidence tribunal members criticised medical reports which underestimated the severity of the disability, decision-makers who did not give appropriate weight to disabling factors and in some cases the lack of medical evidence presented to the tribunal.

Incapacity Benefit

Table 9: 170 Overturned cases: Responses

Statement	Responses
1. Additional evidence: The tribunal was given additional evidence not available to the decision-maker.	105 (62%)
2. Accepted evidence: The tribunal accepted evidence that the decision-maker had available but was not willing to accept.	42 (25%)
3. Incorrect weight: The decision-maker did not give relevant facts/evidence due weight.	11 (6%)
4. Different view: The tribunal formed a different view of the same evidence.	48 (28%)
5. Different view (medical): The tribunal formed a different view based on the same medical evidence.	29 (17%)
6. Under-estimated disability: The medical report under-estimated the severity of the disability.	50 (29%)
7. Avoid the appeal: The Agency could have avoided the appeal.	7 (4%)



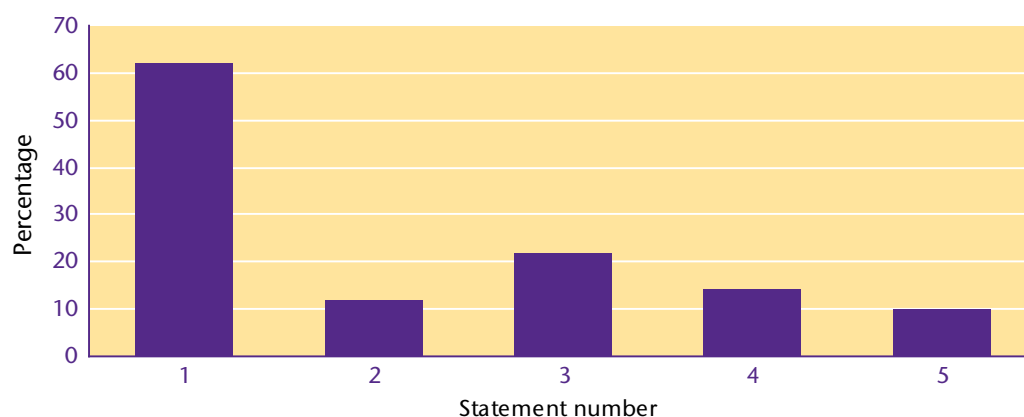
5.15 The tribunal was given additional evidence in 105 cases (62%), in 87 (51%) cases in the form of oral evidence in 65 (38%) provided by the appellant. In 48 (28%) of the overturned cases, the tribunal formed a different view of the same evidence that had been before the decision-maker; in 42 cases (25%) the tribunal accepted evidence that the decision-maker had but was not willing to accept. In 11 (6%) cases the decision-maker did not give relevant facts or evidence due weight, and in 8 (5%) the decision was based on insufficient facts or evidence due to the inadequate investigation of the claim or reconsideration. However, in only 7 cases (4%) did the tribunal consider that the Agency could have avoided the appeal.

- 5.16 The standard of submissions remains high, with just 2 cases each where the submission failed to include all the evidence relating to the decision under appeal and focus on the grounds of appeal, and 1 each where the submission failed to include all the relevant facts, refer to the correct statute or case law and fully and effectively argue the case.
- 5.17 Comments on the overall standard of decision-making raised concerns regarding how far the department takes into account Upper Tribunal decisions and therefore applies the correct tests. Tribunal Judges were concerned where the evidence did not reflect the appellant's condition and contained inconsistencies that were not addressed in the decision-making process and in the submission before being referred to the tribunal. They were also concerned that credible evidence of appellants was often ignored without good reason.
- 5.18 In terms of the medical evidence in 50 cases (29%) it was felt that the medical report had under-estimated the severity of the disability and in 29 cases (17%) the tribunal formed a different view of the same evidence. In 24 cases (14%) it was felt that not all the issues had been addressed in the medical report, in 17 cases (10%) medical evidence had been overlooked and in 10 (6%) the advice in the medical report had not been adequately justified. There were 6 cases (4%) where the advice in the medical report was not consistent.
- 5.19 The comments directed towards medical evidence highlight the impact of other factors contributing to medical conditions such as the effect of alcoholism and the importance of obtaining an overall picture of disability. They also highlighted problems involved in the interaction between physical and mental health problems. Criticism was made where a face to face interview would have resolved the issues but this had not been considered by the decision-maker to resolve discrepancies, and where a medical examination had been completed but the length of time taken for a full examination and compilation of a medical history appeared too short. A common complaint was that the medical assessor had underestimated the appellant's condition.

Child Maintenance

Table 10: 50 Overturned cases: Responses

Statement	Responses
1. Additional evidence: The tribunal was given additional evidence not available to the decision-maker.	31 (62%)
2. Accepted evidence: The tribunal accepted evidence that the decision-maker had available but was not willing to accept.	6 (12%)
3. Incorrect weight: The decision-maker did not give relevant facts/evidence due weight.	11 (22%)
4. Different view: The tribunal formed a different view of the same evidence.	7 (14%)
5. Avoid the appeal: The Agency could have avoided the appeal.	5 (10%)



6.1 Following recent reforms, the Child Maintenance and Enforcement Commission (CMEC) has taken over the administration of the Child Support Agency (replacing the Department for Work and Pensions in that role). However, decision-making continues to be undertaken by the Child Support Agency. Tribunals deal with four main categories of decisions, namely assessments, departures, variations and referrals. Referrals are not included in the sample cases, since the case is referred to the tribunal without a decision having been made by CMEC at the first tier. We continue to skew the sample to generate a higher proportion of Child Support cases, in order to obtain more meaningful results. In marked contrast to the DWP agencies, CMEC sent Presenting Officers in 101 of the 111 oral hearings in the total sample, a 91% attendance rate, something to be warmly welcomed.

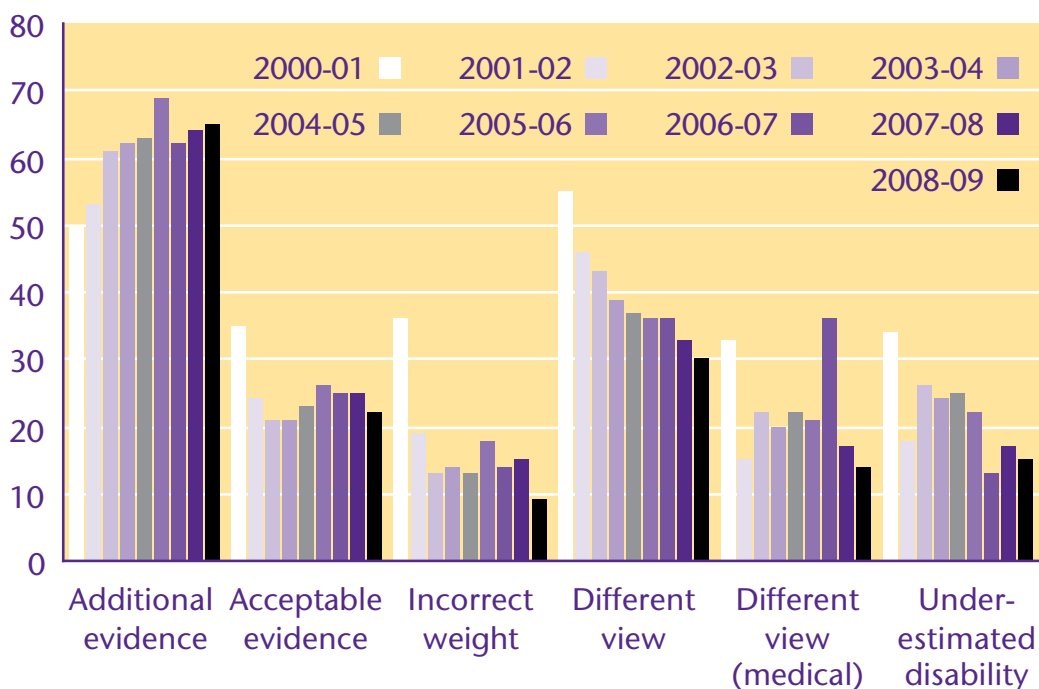
- 6.2 In 31 cases (62%) the tribunal was given additional evidence not available to the decision-maker; in 20 cases (40%) this was in the form of oral evidence; in 17 cases (34%) it was provided by the non-departmental parties. In 11 cases (22%) the decision-maker did not give relevant facts or evidence due weight; in 7 (14%) the tribunal formed a different view of the same evidence and the decision-maker overlooked evidence that would have affected the decision; in 6 cases (12%) the tribunal accepted evidence that the decision-maker had available but was unwilling to accept, and in 5 each (10%) the decision-maker did not give relevant facts due weight, the calculations were not correct and the appeal could have been avoided.
- 6.3 The standard of submissions was high with just 2 cases each where the submission failed to include all the evidence relating to the decision and effectively argue the case and 1 case each where the submission failed to include all the facts, refer to the correct statute or case law and focus on the grounds of appeal.
- 6.4 In their comments on the overall standard of decision-making Tribunal Judges criticised what were felt to be standard submissions which did not comment on additional evidence, and cases presented where papers had been lost. Problems remain with inaccurate calculations and some reluctance to fully investigate matters before the hearing. The value and high standard of performance on the part of Presenting Officers was noted.

7.1 The main issues from the annual sampling remain the following:

- Overturned cases – the most common reason for a decision being overturned is that additional evidence is generated by the hearing. This is mainly in the form of oral evidence available from the appellant;
- Evidence – availability, interpretation and quality of the evidence are issues, particularly in the case of medical evidence which was criticised where it under-estimated the severity of the appellant's disability;
- Mental health and sensory impairment – decision-makers and medical reports continue to be criticised where they do not explore mental health problems or issues surrounding sensory impairment adequately;
- Further evidence – greater efforts needs to be made to resolve discrepancies and pursue unresolved issues before cases are brought to a tribunal, by actively seeking additional evidence at the reconsideration stage and, where appropriate, contacting the appellant to discuss the grounds of appeal and trying to resolve matters before they come to a tribunal hearing. Tribunal Judges criticised decision-makers for not exploring and resolving inconsistencies in evidence and submission writers were criticised for not dealing with these issues in the submission;
- Evidence relating to claims needs to be accessible, where necessary being retained, and made available to the tribunal.

7.2 A synoptic picture drawn from 9 years of sampling can be seen from the Table 11 below.

Table 11: Common questions from nine years of sampling



7.3 In the sample this year there is slight increase in the number of overturned cases where a deciding factor was the tribunal having the advantage of additional evidence. The main source of that evidence tends to be the oral testimony of the appellant, which reinforces why it is considered so important to encourage people to attend the hearing but also explains why Tribunal Judges become frustrated when decision-makers choose not to accept the oral evidence of appellants without good reason.

Questionnaire & sampling

The questionnaire itself identified the case, the date, the venue and the Tribunal Judge so that individual appeals could be tracked where there were queries. It was substantially restructured following discussions with stakeholders and in the light of the results from the pilot exercise run during October 1999, in the light of new undertakings to attempt to capture more information regarding the medical evidence available to the tribunal, and following the results of the first full year of data collection.

In each case the completion of the questionnaire was undertaken by salaried Regional or District Tribunal Judges hearing cases at venues throughout the country. In addition we also asked medically qualified Tribunal Members of the tribunal comment on the medical evidence where this was appropriate.

With the use of a method of random selection which was previously provided by colleagues in PDCS Operational Research, we have sought to produce a sample that reflects the broad profile of cases considered by the tribunal but, as stated earlier, we have encountered difficulties in obtaining the necessary statistical and analytical support to review our sampling model in the way we would have liked.

The sampling method was weighted towards Child Support cases in order to gather enough information on the cases that came before the tribunal to provide meaningful results.

The responses were collected and the details from the questionnaires entered on a database to produce the results in a format that could be used to analyse the data.

Judicial Checklist April 2008–March 2009		
Appeal Number: (See session case list)		
1. Date of Hearing:		
2. Venue:		
3. Composition of Tribunal: (See session case list)	<input type="checkbox"/> 01 Legal member only	
	<input type="checkbox"/> 02 Legal and financial member	
	<input type="checkbox"/> 03 Legal, medical and disability member	
	<input type="checkbox"/> 04 Legal and medical member	
	<input type="checkbox"/> 05 Legal and specialist medical member	
	<input type="checkbox"/> 06 Legal and 2 specialist medical members	
4. Type of Hearing:	<input type="checkbox"/> Oral	<input type="checkbox"/> Paper
5. Name of Chairman:		
6. Date of decision under appeal:		
7. Codes: (See session case list)	Benefit Code (No.)	Issue Code (Letters)
8. Attendance:	<input type="checkbox"/> PO	
	<input type="checkbox"/> Appellant	
	<input type="checkbox"/> Representative	
	<input type="checkbox"/> Respondent	
9. Where there was no Presenting Officer please tick if one would have been helpful and indicate why below.	<input type="checkbox"/> a. To explain the reasoning behind the decision	
	<input type="checkbox"/> b. To explain the submission	
	<input type="checkbox"/> c. To address additional evidence	
	<input type="checkbox"/> d. Other – please specify	
10. Outcome:	<input type="checkbox"/> Overturned	
	<input type="checkbox"/> Upheld	
	<input type="checkbox"/> Adjourned	

Please complete the rest of the questionnaire for all cases whether Overturned, Upheld or Adjourned. In all cases we need to know why the panel agreed or disagreed or why cases are Adjourned.

In each case please (including cases upheld) tick if applicable and provide additional information at the end in the space provided.

11. The tribunal accepted evidence that the decision-maker had available but was not willing to accept.	<input type="checkbox"/>
12. The panel forms a different view of the same evidence.	<input type="checkbox"/>
13. The facts were not in dispute but the decision-maker had misconstrued their effect in law.	<input type="checkbox"/>
14. The tribunal was given additional evidence that was not available to the decision-maker. (If you have ticked this box please indicate at box 26 what the nature of the additional evidence was i.e. reduced earnings.) The evidence was in the form of:	<input type="checkbox"/>
a) Expert report handed in	<input type="checkbox"/>
b) Expert report obtained by the tribunal	<input type="checkbox"/>
c) Oral evidence	<input type="checkbox"/>
d) Further written evidence	<input type="checkbox"/>
Who provided the evidence?	<input type="checkbox"/>
a) The Appellant	<input type="checkbox"/>
b) The Representative	<input type="checkbox"/>
c) Other (please specify)	<input type="checkbox"/>
14b. Where the tribunal was provided with additional evidence, was there any indication why this was not presented earlier, please provide details. e.g. appellant not asked for it after submitting appeal, only became available later:	
15. The decision was based on insufficient facts/evidence due to inadequate investigation of the claim or reconsideration.	<input type="checkbox"/>
16. The decision-maker overlooked evidence that would have affected the decision.	<input type="checkbox"/>
17. The decision-maker did not give relevant facts/evidence due weight.	<input type="checkbox"/>
18. The calculations were not correct.	<input type="checkbox"/>
19. The decision was not properly explained to the claimant.	<input type="checkbox"/>
20. The agency could have avoided the appeal.	<input type="checkbox"/>

21. The submission failed to include all the evidence relating to the decision under appeal.	<input type="checkbox"/>
22. The submission failed to include all the relevant facts including disputed facts.	<input type="checkbox"/>
23. The submission failed to include or refer to the correct statute or case law.	<input type="checkbox"/>
24. The submission failed to focus on the grounds of appeal.	<input type="checkbox"/>
25. The submission failed to fully and effectively argue the case.	<input type="checkbox"/>
<p>26. If you have ticked any of the above please tell us why. (Please use the box at 28 to expand on any issues as necessary).</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>	
<p>27. Adjourned cases: The case was adjourned because:</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>	
<p>28. Further information: Please comment on the overall standard of decision making including the reasons why the decision was/was not supported, the standard of evidence and how it was used in the decision making process. Please include here any positive comments you have. Continue overleaf if necessary.</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>	

April 2008–March 2009

Medical Checklist

Please tick if applicable. NB If any box has been ticked box 39 must be completed.

(To be completed by the medically qualified panel member)

29. The medical evidence was used incorrectly by the decision-maker.	<input type="checkbox"/>
30. The decision-maker misinterpreted the medical evidence.	<input type="checkbox"/>
31. Medical evidence has been overlooked that would have affected the decision.	<input type="checkbox"/>
32. The panel forms a different view based on the same medical evidence.	<input type="checkbox"/>
33. The medical report has under-estimated the severity of the disability.	<input type="checkbox"/>
34. All the medical issues were not addressed in the medical report.	<input type="checkbox"/>
35. Advice in the medical report was not in keeping with the consensus of medical opinion.	<input type="checkbox"/>
36. The advice in the medical report was not adequately justified.	<input type="checkbox"/>
37. Conflicting evidence from other sources was not addressed in the medical report.	<input type="checkbox"/>
38. The advice in the medical report was not consistent.	<input type="checkbox"/>
39. If the medical report was not produced by Atos Origin please state who provided the report e.g. G.P., consultant	
40. If you have ticked any of the above boxes please tell us why and add any further observations you may have concerning the use of the medical evidence in the decision-making process. Please include any positive comments.	

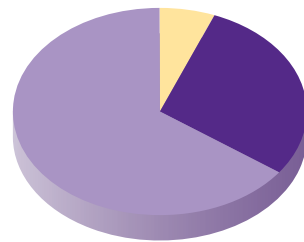
April 2008–March 2009

The following tables show the sample results for each category commented on in the report with the number of cases by outcome with accompanying chart to show the distribution.

Table A: Jobseeker's Allowance 2008–2009

Sample composition by tribunal outcome.

Outcome	Number	Percentage
Adjourned	4	6%
Overtured	18	29%
Upheld	41	65%
Total	63	



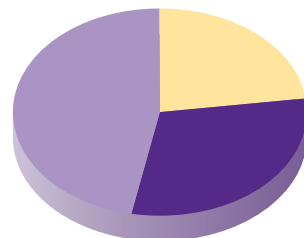
Key

- Adjourned
- Overtured
- Upheld

Table B: Income Support 2008–2009

Sample composition by tribunal outcome.

Outcome	Number	Percentage
Adjourned	34	23%
Overtured	46	30%
Upheld	71	47%
Total	151	



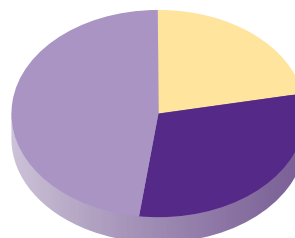
Key

- Adjourned
- Overtured
- Upheld

Table C: Debt Management 2008–2009

Sample composition by tribunal outcome.

Outcome	Number	Percentage
Adjourned	20	22%
Overtured	28	30%
Upheld	44	48%
Total	92	

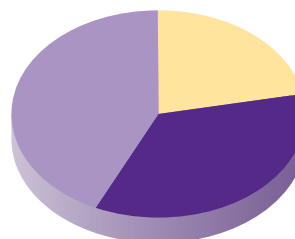


Key
■ Adjourned
■ Overtured
■ Upheld

Table D: Disability Living Allowance/Attendance Allowance 2008–2009

Sample composition by tribunal outcome.

Outcome	Number	Percentage
Adjourned	156	22%
Overtured	256	35%
Upheld	308	43%
Total	720	

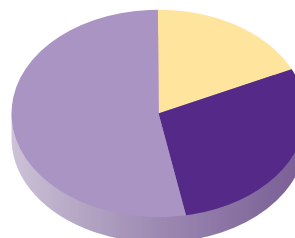


Key
■ Adjourned
■ Overtured
■ Upheld

Table E: Industrial Injuries Disablement Benefit 2008–2009

Sample composition by tribunal outcome.

Outcome	Number	Percentage
Adjourned	24	18%
Overtured	39	29%
Upheld	70	53%
Total	133	

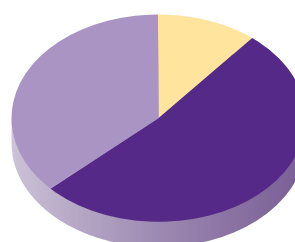


Key
■ Adjourned
■ Overtured
■ Upheld

Table F: Incapacity Benefit 2008–2009

Sample composition by tribunal outcome.

Outcome	Number	Percentage
Adjourned	35	11%
Overtured	170	52%
Upheld	121	37%
Total	326	



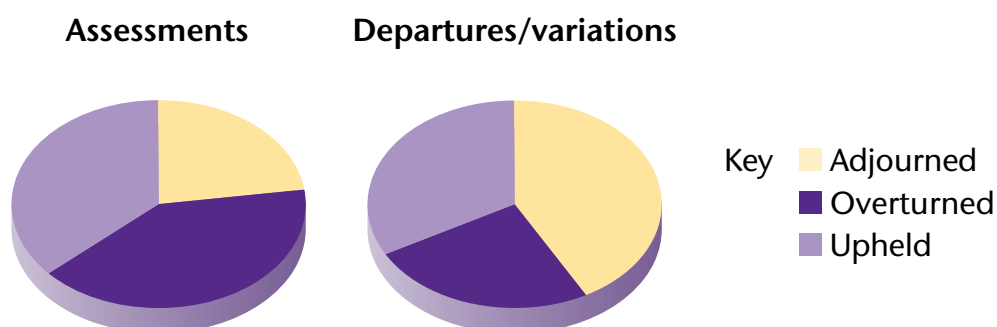
Key
■ Adjourned
■ Overtured
■ Upheld

Table G: Child Maintenance 2008–2009

Sample composition by tribunal outcome.

The Tribunals Service deals with three main categories of decisions – assessments, departure decisions (now including variations) and referrals. On referrals the tribunal is the body making the decision and these decisions have therefore been omitted. The headline statistics, broken down into the two remaining categories are as follows.

Outcome	Assessments	Departures	Total
Adjourned	26 (23%)	5 (42%)	31 (25%)
Overtured	47 (41%)	3 (25%)	50 (39%)
Upheld	42 (37%)	4 (33%)	46 (36%)
Total	115	12	127



List of Abbreviations

Term	Abbreviation
Attendance Allowance	AA
Disability Living Allowance	DLA
Incapacity Benefit	IB
Income Support	IS
Industrial Injuries Disablement Benefit	IIDB
Jobseeker's Allowance	JSA

Published by The Tribunals Service. Printed November 2010.

© Crown Copyright 2010

You may re-use this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or e-mail: psi@nationalarchives.gsi.gov.uk

Any enquiries regarding this publication should be sent to Chamber President, Social Entitlement Chamber, Tribunals Service, 5th Floor, Fox Court, 14 Gray's Inn Road, London, WC1X 8HN.

This publication is also available on our website at <http://www.tribunals.gov.uk/tribunals/Publications/publications.htm>