DRN-3133099

Financial Ombudsman Service

The complaint

Mr and Mrs C complain that Legal and General Assurance Society Limited unreasonably refused to consider a critical illness claim made under their joint term assurance policy, and instead cancelled Mrs C's cover altogether.

To resolve their complaint, Mr and Mrs C want L&G to pay their claim in full.

What happened

In bringing their complaint, Mr and Mrs C are represented by Mr M, a third party financial adviser.

Mr and Mrs C applied for joint mortgage protection on 16 June 2015. It offered them decreasing life and critical illness cover with an initial sum assured of £137,970 for a 21-year term. The application was completed on their behalf by their financial adviser.

The application was accepted on standard terms and acceptance of those terms was confirmed by Mr and Mrs C on 21 June 2015. The policy began on 17 August 2015.

In 2020, Mrs C was sadly diagnosed with a type of cancer. In July 2020, Mr C made a claim to L&G for critical illness benefit. Thereafter L&G spoke with Mrs C in September 2020 and also sought further medical evidence to validate her claim.

In April 2021, L&G said it wasn't able to consider the claim, because it had identified a discrepancy in Mrs C's recorded weight on her medical records. In the policy application, she had stated she was 87kg and 165cm tall. However, when visiting the GP shortly after the policy came into force it was recorded that Mrs C weighed 110kg.

On that basis, it could not have insured Mrs C. L&G explained that it had to void the policy from the outset due to 'deliberate/reckless' misrepresentation.

Mr and Mrs C complained. They said they were disgusted with the language used to refuse the claim – where it was insinuated that Mrs C had lied. They said, in summary:

- there was no understanding of Mrs C's current circumstances, and L&G had acted insensitively throughout;
- they had highlighted inconsistencies in Mrs C's medical records but L&G hadn't addressed them;
- the claim process had dragged on for months without any proper contact until Mr M got involved;
- the call of September 2020 was at a time where Mrs C was undergoing gruelling treatment yet the call handler had insisted she must discuss the matter despite feeling confused and unwell;
- medical professionals make errors with weight recordings – for example, in a chemotherapy session of September 2020 paperwork showed Mrs C to be 160cm tall, when she was in fact 165cm;

- two GP records from 2013 show weights similar to that disclosed in 2015 but these were ignored;
- Mrs C believed she had lost weight since 2013 and declared as such on the 2015 application form;
- she did not begin to gain weight until 2016, at which time she had to purchase new clothes – and she recalls this;
- therefore the GP record of July 2015 stating she weighed 110kg is incorrect;
- she accepts the GP records of 2016 and 2017 are likely correct in terms of her weight because of some family issues she had in 2016 including a bereavement, but the height was still wrong;
- but these were still less than the 2015 record – and she didn't lose weight in 2016;
- the record of 2018 stating she weighed 70kg is wrong though her height is finally accurate;
- the fact she was recorded as having lost some 30+kgs in 2018 shows how GP's and medical professionals mis-record weights frequently;
- Mr and Mrs C went to see their financial adviser in 2018 as they had wanted to reapply for insurance on moving to a new house – and at that time he told them they shouldn't reapply because Mrs C had gained weight;
- there was no way of proving Mrs C knew (which she denies) she weighed more than she disclosed on her application – to then use this as a reason to say she acted deliberately to obtain insurance was unfair;
- Mrs C truly believed she had given accurate answers;
- L&G had decided which evidence it accepted and which it ignored with no reasonable measure or basis;
- if L&G places so much emphasis on the figures being 100% accurate, why didn't it insist on a GP appointment with height and weight being recorded at that time and agreed by all parties;
- Mrs C feels she has been accused of fraudulent behaviour and it was impossible to reach that conclusion.

In May 2021, L&G issued a response to the complaint. It said it was satisfied it had reached the right outcome with the claim. When assessing the evidence from the relevant oncology department, it noted Mrs C's Body Mass Index ('*BMI*') was recorded as 45 on 27 July 2020. It was for this reason it had been prompted to review Mrs C's disclosed weight and height on her application against what was recorded in the relevant medical records.

However, it agreed it had not reviewed the claim or treated Mrs C with the compassion and sensitivity that it should have, and it recognised that its customer service had fallen notably short. Specifically, it had continued with the call in September 2020 when Mrs C was clearly distressed and had asked for Mr C to address it. Whilst L&G had needed to speak with Mrs C about her information, it recognised this would have been better placed in written format to avoid distress. To that end, it offered to pay Mrs C £400 to reflect the upset she was caused.

Finally, L&G confirmed it had offered to continue with Mr C's insurance as a sole policy, and he had accepted as such – therefore a partial refund of premiums was issued to Mrs C.

Mr M brought Mr and Mrs C's complaint to this service, where it was considered by one of our investigators. He said L&G had chosen to ignore that in January 2018 Mrs C was recorded as weighing 70kg. He also explained how Mrs C worked in the insurance sector and she understood the duty to make accurate disclosures better than the average person. On that basis, Mr and Mrs C wouldn't have paid almost £1,000 per annum in policy premiums for cover that would not likely pay out because of inaccurate information.

In Mr M's view, L&G had searched for ways to avoid the claim and justify voiding a policy

because of a recent reference to Mrs C's BMI in 2020 – which had no bearing on her circumstances in 2015. It had also taken some seven months to give the outcome to the claim, and only after Mr M had become involved. This delay, along with badgering Mrs C about an unrelated arthritis diagnosis caused her significant upset at a time when she was undergoing life-saving treatment for her type of cancer. Mrs C ought therefore to have this stress and anguish recognised in the form of compensation.

Mr M said the premise that an insurer can avoid a genuine claim merely because a policyholder has gained weight or suffered from unrelated medical conditions in subsequent years undermined the entire basis of the protection insurance industry.

Our investigator believed that L&G had reasonably determined that a misrepresentation occurred on the policy application. He said he felt it was fair to rely on Mrs C's medical records regarding her recorded weight. If L&G had known this, it couldn't have insured her. Finally, he felt the £400 offered by L&G was reasonable compensation for the customer service issues Mr and Mrs C had raised.

Mr M said that Mr and Mrs C did not accept the investigator's conclusions. He said the financial adviser that assisted Mr and Mrs C in applying for the policy said he saw no reason to disagree with Mrs C's confirmed weight and height when recording her answer – and given the 23kg difference in the GP record, this would have been apparent to him.

On this basis, Mr M submitted that the investigator had not fairly considered the evidence, as the adviser's recollection was also evidence which should be taken into account.

Further, Mr M said there should be considerable doubt placed on the GP record. The GP recorded Mrs C as 70kg in January 2018, which was a significant difference. Further, the records relating to her height had varied. This must, in his view, show the inaccuracy of the records as a whole.

Mr M also said that the record the investigator put to Mrs C dated 27 July 2015 never took place at all – Mrs C cannot remember it and says she never met the medical professional recorded on those notes.

Mr M said L&G had the option of underwriting the application at outset; it could have asked for a medical examination at the time but it chose not to do so. Instead, is has relied on weight readings which are subsequent to the application, clearly questionable in nature and it has ignored any evidence to the contrary as justification for declining the claim.

Our investigator was not persuaded to change his view on the complaint. So, the matter was referred for a decision by an ombudsman.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having reviewed all of the information carefully, I am of the view that this complaint cannot succeed. I know Mr M and Mr and Mrs C feel very strongly about this matter and my decision isn't the answer they were hoping for, but I will set out my reasons for reaching this conclusion below. I'd also like to send my best wishes to Mrs C, as I can see that she has been through a particularly difficult time.

When applying for insurance, if an applicant doesn't tell his or her insurer relevant information in response to a clear question it's known as 'misrepresentation'.

Industry guidance and relevant law on consumer disclosures in insurance contracts allows an insurer to consider if any misrepresentation occurred from the outset of a policy. If the circumstances around a claim prompt an insurer to believe a misrepresentation may have occurred within an application, it's entitled to consider what ought to have happened at that time. That is what L&G has done.

When it was obtaining information from specialists treating Mrs C's specific type of cancer, it was noted that Mrs C had a recorded BMI of 45. Whilst it was entirely possible Mrs C had gained weight since her policy began, L&G didn't act unfairly in looking at this matter further because it was markedly different from the record of Mrs C's weight in the policy application.

There was also reference to arthritis, which had not been disclosed. On this basis, L&G sent a targeted medical report to Mrs C's GP, covering the relevant period preceding the policy application – and it limited its questions to only those two points.

The matter of arthritis has rightly been disregarded by the parties and I won't be looking at that further. In respect of Mrs C's BMI, L&G asked for the GP's recorded height and weight (to calculate BMI) for any date prior to when the policy began.

L&G says its underwriting rules meant it couldn't have insured Mrs C for any critical illness cover at all, and life cover would have attracted a rating too large to offer as a standalone policy. Because of this, it can't pay a claim now and has accordingly returned the premiums Mrs C paid for her share of the joint cover.

It therefore falls to me to look at what Mrs C was asked, and determine if I think she made a misrepresentation, upon which L&G could amend the terms it offered and/or avoid the policy. The correct position is to decide what ought to have happened at the time of the application. That means looking at what was asked against the relevant evidence (including the medical records) up to the date Mrs C signed the declaration on the 'checking your details' form.

In response to being asked her height without shoes and weight in indoor clothes, Mrs C said she was 165cm (5 feet 5 inches) and 87kg (13 stone 10lb) on her application. She also gave a corresponding UK dress size.

The only two relevant entries in Mrs C's medical records are both from 2013- in May and December of that year. Those both mis-record Miss C's height as 162cm (5 feet 4 inches) and note her weight as 89kg and 93kg respectively.

Unlike Mr M's submissions, I do not accept that the medical records in relation to height vary wildly. Almost all the GP records of height record Mrs C as 162cm, with one outlier of 1.6m – which may have merely disregarded the decimal place. And, these are approximately 3cm/one inch below Mrs C's stated height. I do not consider this to be a vast difference in relation to calculating BMI. Measurements of height may, in my view, vary within a small range such as 3cm.

The two 2013 records are consistent with Mrs C's quoted weight on her application. However, the policy did not come into force until 17 August 2015. The letter to Mr and Mrs C of 16 June 2015 states how L&G was able to offer Mr and Mrs A the cover they'd asked for on standard terms, and asks then when they want the cover to start – not that any insurance contract had already come into effect.

Mrs C then signed a 'checking your details' form on 21 June 2015 – she was sent a copy of her answers to review, and this expressly set out that "*if the answers on your application are not correct, or are out of date it may mean that a claim will be declined and the policy or*

policies cancelled… Please tell us straight away if you need to change any of your answers before the policy starts".

The policy application declaration signed by Mrs C also says "*[I] agree to immediately inform Legal & General in writing if there are any changes to any answers under the following categories given on the application before the policy starts: Medical information*".

I therefore take the view that Mrs C knew, or ought reasonably to have known that L&G needed to be aware of any changes to her stated answers before the policy started – which was at a date of their choosing for the mortgage protection to align with their capital repayment mortgage.

Mrs C attended her GP the following month – on 27 June 2015 - and met with a doctor to discuss paraesthesia of her hand and foot, neck, and back pain. It was recorded by the GP that Mrs C had gross truncal obesity and the plan in relation to her symptoms was noted as "*weight loss encouraged*". Mrs C's weight was recorded as "*on examination 110kg (17st 5lb)"*.

I am mindful that Mrs C cannot recall this appointment and specifically that she says she does not believe it happened. I also note Mr M says the financial adviser did not consider Mrs C weighed 110kg the month before when completing the application. This evidence is something I take into account, but I must also assess the evidence in the medical records. Where there is conflicting evidence, I have concluded what I believe is most likely, on the balance of probabilities.

Mrs C accepts her weight records in 2016 – set out by the GP as 107kg and in 2017 – as 106kg were likely correct. I recognise she has explained that traumatic events of 2016 were what unfortunately caused her to gain weight.

However, I have seen no objective reason why L&G ought to either disregard the medical record or conclude that the record was falsified. Though the next record post-dates the policy application, the record of Mrs C's plan in respect of weight loss was carried to her next visit at the GP. On this occasion, she underwent routine gynaecological testing with a nurse in November 2015 and her weight was recorded as 115kg (18st 2lb).

Mr M argues that the two medical records of 2013 would indicate Mrs C was the weight she disclosed on her application. But these records are not the most proximate to the application. And I do not consider a visual assessment of Mrs C's weight by her financial adviser is likely to be as reliable as a measure recorded by a medical professional and confirmed as having been taken during an examination of Mrs C.

Similarly, I do not place any significance on the record of January 2018. Though it is noted in that record that Mrs C weighed 69.8kg, this was not an observation on examination by any medical professional – rather, the record is a typing of notes by a member of support staff who was completing electronic patient registration data for administrative reasons. This record was not of any medical assessment or examination by a clinician. That this record was mistyped does not determine that I must ignore the GP's assessment of July 2015.

I recognise that it cannot be said with any exact certainty what Mrs C's weight was in June 2015. Nonetheless my view is that the examination by Mrs C's GP is the most likely evidence of Mrs C's accurate weight in 2015, given it was little over a month after Mrs C had given and reconfirmed her answers to L&G. And crucially, I find this is the most persuasive evidence of her weight before the policy began.

I therefore believe there was a misrepresentation as Mrs C did not set out an accurate

response to a clear question in the policy application. And once that's been established, relevant law on disclosure in consumer insurance contracts says that it should be categorised in one of *two* ways – either, as deliberate/reckless or otherwise as careless.

Any deliberate or reckless misrepresentation will result in the voiding of an insurance policy, with or without the return of premiums.

In the event of 'careless' misrepresentation, an insurer must consider a proportionate remedy. This means the outcome will depend on what the underwriting decision would have been had the misrepresentation not occurred at the time. If insurance could have been offered under different terms or for a different cost, an insurer can amend the contract to reflect this. Otherwise, if it would not have been able to insure the applicant, it can void the policy.

In my view Mrs C's actions fall within the 'careless' category; she made a mistake or oversight resulting from a lack of care rather than any intent to deceive L&G. Careless misrepresentation is set out as anything from an understandable oversight, or an inadvertent mistake, to serious negligence. I believe Miss C's failure to accurately disclose her weight sits in that band, noting the GP record of July 2015 discussed her weight and gave a plan to address her paraesthesia symptoms by attempting to achieve weight loss.

In the event of misrepresentation that is careless an insurer can avoid a policy altogether – if it can demonstrate that it could not have offered any insurance in the first place. And this is what L&G has already done, returning Mrs C's premiums to her.

I have seen the underwriting information, and whilst I cannot repeat the exact limit here, L&G uses a weight threshold proportionate to each height for the purposes of calculating a policyholder's BMI. In Mrs C's case, her recorded weight (at her stated height of 165cm) in 2015 exceeds that threshold, meaning L&G would have refused all critical illness cover and not offered standalone life assurance because the rating was too high.

I'm therefore unable to order or compel it to reach a different assessment and pay Mrs C's claim, as that is not the appropriate remedy for this type of misrepresentation; if L&G had known about Mrs C's relevant medical circumstances, it would never have offered her critical illness cover in the first place.

My final decision

Despite my sympathy for Mr and Mrs C's circumstances I cannot uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C and Mrs C to accept or reject my decision before 10 February 2022.

Jo Storey
Ombudsman