DRN-3339311

The complaint

Mr P is unhappy with the result of The Prudential Assurance Company Limited's (Prudential) review of the sale of his annuity in 2008.

What happened

I set out the background and my provisional findings to this complaint on 17 January 2022, this is set out below and forms part of this decision.

'In 2008 Mr P took out an annuity with Prudential. More recently, the Financial Conduct Authority (FCA), decided to conduct an industry wide review of non-advised annuity sales made after 1 July 2008. This was generally known as the 'Thematic Review'.

The review examined whether customers were given enough information about the availability of, and their potential eligibility for, enhanced annuities. The review also examined if customers were made aware of the Open Market Option (OMO), where they could get an annuity from another provider.

Mr P's annuity sale was reviewed and Prudential concluded that Mr P was made aware of the options available to him when he chose to take out an annuity with Prudential.

Mr P and his wife, representing him, didn't agree. They said they don't recall receiving the Key Features Document (KFD), that Prudential has relied upon. And even if they did receive it, they didn't agree that the information was clear and not misleading. They said Mr P had hypertension with organ damage and he was a smoker. But none of the information Prudential said it had given them made it clear Mr P could get an enhanced annuity for this. They've pointed to the fact the KFD only referred to serious illnesses and it had a caveat that the fund had to be over £20,000 after taking tax free cash – which Mr P's wasn't. They've also said whilst lifestyle conditions were mentioned (in a separate part of the KFD) – it wasn't clear that this was linked to getting an enhanced annuity. Mr P says he was never asked about his lifestyle or medical conditions.

Prudential says its KFD was deemed complaint by the FCA. And in a call at the time with Mr P when he asked whether he could cash in his annuity – it asked if he had any medical conditions and he said "no". Mr P has said that this was at a point when he'd made his mind up and was in relation to cashing in his annuity – he didn't realise he could claim an enhanced annuity for his hypertension and or lifestyle factors such as smoking – so he didn't want to tell Prudential about his medical condition.

Our investigator looked into matters but didn't uphold the complaint, he said that the OMO had been made clear. And whilst the enhanced annuity was caveated by the £20,000 limit – the fact that Mr P could look on the open market for other providers had also been explained. Mr and Mrs P didn't agree – citing the reasons they'd previously given.

Provisional findings

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

Having done so, I am minded to uphold this complaint and tell Prudential it needs to calculate whether Mr P could've received a higher annuity if his health and/or lifestyle circumstances at the time had been taken into account. I'll explain why I've reached this position, based on the evidence I've received so far.

Prudential itself – when writing to Mr P to invite him to have his annuity reviewed said:

"The FCA wanted to establish if customers were provided with sufficient information about enhanced annuities before they purchased their annuity. In particular the FCA wanted to establish if customers were made aware:

- *That they could receive a higher income if they had certain medical or lifestyle conditions. This is known as an 'enhanced annuity'.*
- *If they were eligible for an enhanced annuity with Prudential that they could shop around for an enhanced annuity from another provider in order to potentially get a higher income; and*
- *That even if they were not eligible for an enhanced annuity with Prudential that they may still be eligible for an enhanced annuity from another provider."*

As an aside, Mr and Mrs P have said they doubt they received the KFD and didn't recognise it – after it was sent to them as part of the complaint process. But the covering letter and retirement forms they did receive made numerous mentions of the KFD and it being enclosed, so I think on the balance of probabilities it was received. I've looked carefully at the information Prudential says it supplied Mr P at the time and in particular the KFD.

Below is page 6 – which is the first time an enhanced annuity is mentioned, and the only mention of lifestyle factors linked to health.

What will my starting income be?

Your quotation shows how much income we will pay you, based on specific pension annuity options. Other income options are available, if you'd like to see what these are, please ask us for more quotations. The amount of income you get will depend on a combination of things, including:

- The pension annuity options you choose.
- Your age and sex – normally younger people get a lower income than older people and women get less income than men of the same age. In both cases this is because we generally expect younger people and women to live longer. If you buy a joint-life pension annuity we will also take the age and sex of your dependant into account.
- The size of your pension annuity investment.
- Our standard annuity rate at the time you buy – this will principally be based on current returns from fixed interest investments, our latest estimates of life expectancy and our costs and expenses.
- Your health – if you have a serious illness you may qualify for an enhanced annuity rate. See 'Can I get an enhanced Annuity rate if I am in poor health?' for more information.
- Your lifestyle – health related factors such a whether you smoke may also be taken into account.
- Your postcode – people living in areas where life expectancy is likely to be lower than average may receive higher pension incomes than people living in areas where life expectancy is higher than average.

Please note Prudential may offer different rates if you purchase an annuity through an external financial adviser.

The page directs those with a 'serious illness' to another part of the KFD – page 11. Which is included below:

Can I get an enhanced annuity rate if I am in poor health?

With Prudential you could qualify for a higher than normal income from an Enhanced Pension Annuity if:

- Your annuity investment is £20,000 (after taking any tax-free cash) or more, and
- You have a serious medical condition such as a stroke, some cancers, diabetes or disease of the kidney, heart or lung which could shorten your life expectancy.

If you buy a joint-life pension annuity we can also take your partner's health into account, even if your health is fine.

If you think you are eligible please tell us. We will then ask you to complete our medical questionnaire so that we can decide if you qualify for an Enhanced Pension Annuity income. In some cases we may ask your doctor to send us a medical report.

If you are diagnosed with a serious illness after your pension annuity has started, we will not be able to enhance your income.

Effect on your income: If you do qualify for an enhanced pension annuity Income you could get up to an additional 15% a year, maybe more depending on the severity of your medical condition. If you would like a quotation for an Enhanced Pension Annuity please contact us on the number on your personal quotation you have already received.

I don't think someone of Mr P's circumstances would necessarily have even thought to read this page given it says this is only for those with serious illness.

But if they did, the first criteria stated is the requirement of £20,000. Mr P's fund didn't meet this requirement – so its plausible if he did read this that he would've stopped here as he didn't meet this requirement. Concluding he wouldn't qualify for an enhanced annuity with Prudential. Beyond this – the description of qualifying conditions is again 'serious illness' such as a stroke or cancer. And it goes on to say if you think you are eligible please tell us.

Prudential says that Mr P didn't tell them about his medical conditions – but with Mr P's circumstances I don't think he would've thought he was eligible – he wasn't – and so why would Mr P have told Prudential about his conditions at this point? His fund wasn't large enough to qualify (minus tax free cash amount – and a lump sum was his motivation for taking his benefits) and his medical conditions at the time didn't fit Prudential's description of what qualified a person for an enhanced annuity.

So I think someone of Mr P's circumstances wouldn't have spent too long thinking about the opportunity of an enhanced annuity. Prudential's KFD set out conditions that meant he wasn't eligible for one.

The FCA set out as part of the thematic review that in the event customers weren't eligible for an enhanced annuity with the provider, they should be given sufficient information to understand they could still qualify for an enhanced annuity with another provider. Someone of Mr P's circumstances reading the KFD would've likely concluded that enhanced annuities were for serious illness only – and that they weren't eligible for it with Prudential due to the fund size requirement. There was no direct mention of enhanced annuities being available elsewhere – or there being enhanced annuities available for less serious conditions or lifestyle factors without serious illness. The information provided needs to be clear, fair and not misleading. I don't think it would've been clear to Mr P on this point.

Prudential's reasoning that Mr P was given sufficient information, relies on the individual to link the enhanced annuity to the OMO explanation elsewhere in the document. The OMO parts of the document make no mention of enhanced annuities – and Mr P's would've thought an enhanced annuity was only available to those with 'serious illness'.

In terms of lifestyle factors such as smoking – this is mentioned only the once in the document (as shown above) and directly after the explanation that an enhanced annuity required 'serious illness'. It leads on from the enhanced annuity explanation to say "health factors such as smoking may also be taken into account". There is nothing to say smoking without serious illness could qualify for an enhanced annuity. Given how it is worded and its positioning in the document - I think someone of Mr P's circumstances would likely conclude that they didn't have a serious illness, and only if they did, would smoking play a factor in the annuity.

So I don't agree with Prudential, in the circumstances of this case, that the KFD (and the covering information supplied with it) meant that Mr P would've been aware of all the options available to him. Because of the way it was explained in the KFD and in relationship to his circumstances – I don't think he would've thought he was eligible for an enhanced annuity.

Furthermore, the Association of British Insurers (ABI), which I believe Prudential were a member of at the time, published in July 2008 a 'Good Practice Guide' to "Improving customers' retirement experiences". The Guide stressed the importance of providing adequate information to customers in relation to enhanced annuities, encouraging providers to draw the customer's attention to product features and terms and conditions that may significantly affect benefits. Under the Guide the provider should "In quoting all available options draw the customer's attention in good time to particular options that may be to their advantage." The Good Practice Guide also provided a template cover letter for insurers to use in their packs. The suggested wording in relation to Enhanced Annuities was:

“Do you have a recognised medical condition? Are you a smoker? If so, you may be able to buy an annuity that pays more because of these factors. They are known as ‘enhanced’ or ‘impaired’ annuities”.

In the specific KFD Prudential says Mr P was sent – it only referred to enhanced annuities alongside the qualification of serious illness. I don’t think the information Prudential provided Mr P met the standards set out by the ABI – and which I think represented good practice at the time.

I recognise that Mr P was asked in a call later in the process whether he had any medical conditions and he said “no”. However, this was in relation to receiving a cash value in special circumstances – and Mr P likely would have thought he wouldn’t qualify, given what the KFD said about enhanced annuities. The same point stands for why, when he was offered the opportunity to hear all the options available to him, he said he didn’t need to hear them. And I can’t be sure in any event (given what we know about Prudential’s explanation of enhanced annuities in its written documentation) that it would’ve been explained to Mr P that his conditions could qualify for an enhanced annuity. And that whilst he didn’t qualify for a Prudential enhanced annuity, he may qualify for an enhanced annuity elsewhere.

Therefore, unless I receive information or evidence that changes my mind, I intend to uphold this complaint and require Prudential to review the annuity sale based on what we now know about Mr P’s health and lifestyle at the time. I think had Mr P known he could potentially receive a higher annuity – he would’ve explored this option.

I think the fairest and most practical way to consider whether Mr P has suffered a loss, is to use the redress methodology from the FCA’s thematic review process. This will show whether Mr P’s medical conditions and/or smoking could’ve secured a higher annuity than he did with Prudential.

I’m aware that as part of this methodology, the FCA has an interest rate built into the calculator for past loss. In the circumstances of this case – where Mr P (if there is a loss found) has been deprived of money he otherwise should’ve received and could’ve enjoyed – Prudential should substitute the in-built interest rate with an award of 8% simple interest per year. This will reflect the cost to Mr P of being deprived of this money.’

In response to the provisional decision Prudential said, in summary:

- The FSA agreed their retirement packs were compliant with their requirements
- It’s retirement pack made clear the option of the Open Market Option (OMO) and that Mr P should seek independent financial advice.
- Its retirement pack clearly suggested Mr P should shop around and could get a better rate elsewhere.
- It re-iterated that its retirement pack mentioned Enhanced Annuities and lifestyle factors
- These were separate and the lifestyle factors didn’t mention serious ill-health but Mr P chose not to tell it of any health factors
- Two of the serious ill-health conditions mentioned in the Key Features Document (KFD) were diabetes and kidney disease – both of which were health conditions listed by Mr P as part of its review. It cannot therefore agree Mr P wouldn’t have thought these applied to him
- It is surprised that I made the assumption that Mr P would’ve been misled by the Key Features document as he’d argued he didn’t receive it.

Mr P in response to the provisional decision added him and his wife had found the process very stressful and a compensatory element should be added to any award.

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.

And having done so I see no reason to depart from the findings I reached in my provisional decision.

I've thought about what Prudential has said but for the reasons I explained in my provisional decision, I think in these circumstances, the way its information was presented likely misled Mr P.

Prudential has argued that the FSA deemed their retirement pack compliant but what I have to decide is whether Mr P has been treated fairly in the circumstances of this complaint. And more specifically was Mr P given clear and not misleading information that he could get an enhanced annuity elsewhere. I don't think he was.

Part of the reason for the review was the regulator was concerned that individuals weren't being told they could get enhanced annuities elsewhere. Prudential believes the information presented about the OMO was enough to achieve this. But I disagree. As I've already explained, I think Mr P would've likely thought he wouldn't be eligible for an enhanced annuity as Prudential set out in its documentation that this required a serious illness and a fund larger than what he had. Whilst this was specific to Prudential, there was nothing to suggest he would be eligible elsewhere.

Prudential has pointed out, that on its questionnaire Mr P listed medical conditions that were referred to in its KFD. And so it said it doesn't agree Mr P wouldn't have thought these applied to him. The medical conditions referred to in the KFD were on a page that readers were directed to if they had serious illness. And within that page again the qualification was made of serious illness.

As I've said, I don't think it's likely based on the evidence I've seen that Mr P would've viewed himself as having a serious illness at the time. Mr and Mrs P said in their response to Prudential after it presented the KFD as evidence it had told Mr P about his options, said that Mr P didn't have a serious illness, just an 'everyday' illness (hypertension). And I think the supporting evidence corroborates this as their likely thought process at the time.

That said, the KFD did refer to disease of the kidney in its examples of serious illness. It was explained that the illness needed to be one that could shorten your life expectancy. It appears Mr P did have kidney issues around the time of taking out the annuity. However, it's not clear how serious Mr P's kidney issues were at the time.

He'd been referred to, and seen, a specialist and it was recorded there was hypertension with end organ damage. And Mr P said in his questionnaire as part of Prudential's review that he had been diagnosed at the time with CKD, or Chronic Kidney Disease. But it appears this condition can have a wide range of seriousness and is often mild and many people live long lives with it. And from the evidence I have from the time, I don't think its likely Mr P would've thought of this as a serious illness. I say this because the notes from the 2008 appointment with the specialist only refer to him losing weight and reducing his blood pressure – there is no mention of any serious consequences or complications with his kidneys.

In any event, I think someone of Mr P's circumstances wouldn't have spent too long thinking about the opportunity of an enhanced annuity based on the information presented to him by Prudential. Prudential's KFD set out conditions that meant he wasn't eligible for one – even before the mention of example conditions. The first requirement was a fund size larger than Mr P had.

Prudential also said that the KFD listed diabetes and Mr P included that condition in the review form he completed. But Mr P stated he is unsure of when he was diagnosed with diabetes and it isn't mentioned on the clinician's notes from 2008 – so it appears this diagnosis came after taking out the annuity.

Mr P had disputed whether he'd received the KFD. He hasn't categorically said he didn't, but he doesn't remember it. But this isn't surprising given the time that has passed, and I have to make a decision on the balance of probabilities. As Prudential's pack refers a number of times to the KFD – and this was a standard part of its retirement pack – I think Mr P more than likely received it. And had he done so, I don't think the information within the pack and the KFD was sufficient to let him know he could qualify for an enhanced annuity with another provider. Had he known he could get an enhanced annuity elsewhere based on his health and lifestyle factors I think he would've looked into this.

Finally, Mr and Mrs P have said that they believe there should be a compensatory element added to my award to recognise the distress and inconvenience of going through this process. And the potential pension lost out on. I appreciate raising this complaint has been time consuming, I can see that a lot of time and effort has been spent. But there will always be a level of inconvenience and stress in bringing any complaint, so I don't think an award should be made on that basis. Furthermore, it wasn't until Prudential contacted Mr P about the review that he was aware that there may have been an issue with his sale, so prior to this there wouldn't have been any knowledge that something might be wrong.

Whilst I think Prudential could've given Mr P clearer information and having done so he would've looked into alternatives elsewhere, this doesn't necessarily mean Mr P has suffered a financial loss. Its possible Prudential's annuity rate might have exceeded what Mr P could've got elsewhere. So I don't think there are sufficient grounds to make an award for trouble and upset in relation to Prudential's error.

Putting things right

Prudential should review the annuity sale based on what we now know about Mr P's health and lifestyle at the time. I think had Mr P known he could potentially receive a higher annuity – he would've explored this option.

I think the fairest and most practical way to consider whether Mr P has suffered a loss, is to use the redress methodology from the FCA's thematic review process. This will show whether Mr P's medical conditions and/or smoking could've secured a higher annuity than he did with Prudential.

I'm aware that as part of this methodology, the FCA has an interest rate built into the calculator for past loss. In the circumstances of this case – where Mr P (if there is a loss found) has been deprived of money he otherwise should've received and could've enjoyed – Prudential should substitute the in-built interest rate with an award of 8% simple interest per year. This will reflect the cost to Mr P of being deprived of this money.

My final decision

I uphold Mr P's complaint against The Prudential Assurance Company Limited and direct it to put matters right as explained above

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 28 March 2022.

Simon Hollingshead
Ombudsman