

## **The complaint**

Ms K complains about the decision by Legal and General Assurance Society Limited ('L&G') to terminate her income protection claim.

## **What happened**

Ms K is covered by her employer's group income protection scheme, the aim of which is to pay benefit in the event she can't work because of illness or injury.

In 2017, Ms K stopped work because of illness. She made a successful claim under the scheme.

In 2020, L&G arranged for Ms K to have an independent medical examination (IME) with a specialist. After this, L&G concluded that Ms K no longer met the scheme definition of incapacity, and terminated her claim. Unhappy with this, Ms K brought a complaint to this service.

Our investigator recommended the complaint be upheld. He thought the evidence from Ms K's treating specialist supported that she was still unable to work because of ill health. He recommended that L&G reinstate the claim and pay backdated benefit, plus interest.

L&G didn't agree with our investigator's recommendations, and so the matter has been passed to me for a decision.

## **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.

The scheme definition of incapacity is:

*"Means the insured member is incapacitated by illness or injury that prevents him from performing the essential duties of his occupation..."*

In terminating the claim, the onus is on L&G to show that Ms K no longer met the above definition of incapacity. L&G's decision to terminate the claim was made after Ms K had an IME with Dr F (consultant psychiatrist) in May 2020.

I've considered Dr F's report. He thought Ms K had work-related stress due to a number of unsatisfactory experiences in the workplace, and didn't think the evidence supported that she had a depressive disorder or adjustment disorder. Dr F explained that stress isn't an illness.

I can understand why L&G had concerns about the claim after receiving Dr F's report, though I agree with our investigator that L&G ought to have obtained Ms K's treating specialist's opinion before making the decision to terminate the claim.

Ms K's treating consultant psychiatrist (Dr E) wrote a report in August 2020, a few weeks after L&G terminated the claim. Dr E confirmed that she'd treated Ms K in 2012 for depression. She then kept in contact with Ms K over the following few years, and Ms K continued to be treated by way of antidepressant medication as well as psychological therapy. During that time, Ms K continued to work and cope with any work-related stress she experienced.

Dr E then started treating Ms K again in January 2017 after she presented with a second episode of depression. Dr E acknowledged that Ms K was experiencing significant work-related stress at that time (though continued to work), but she thought that by March 2017 Ms K was presenting with a "*full house of biological symptoms of depression*". She said that Ms K's antidepressant medication was increased, and a new one added to her treatment regime.

Dr E agreed that Ms K's illness episode since 2017 had run a protracted course, but she said the reason for that was due to some other stresses in Ms K's personal life (other than just work-related stress) which meant her depressive episode had continued. Dr E said that being away from work had not helped improve Ms K's mood, as might be expected if someone had work-related stress. In conclusion, Dr E confirmed that she'd diagnosed Ms K with a recurrent major depressive disorder, and said that Ms K's barrier for returning to work remained the symptoms of her depressive illness rather than an avoidance of work. She said Ms K wasn't capable at that time of performing the duties of her role due to her symptoms.

A letter was written by Dr L (consultant occupational physician) which commented on the two reports by Dr F and Dr E. I understand Dr L had treated Ms K, though I don't know for how long. He said he agreed with Dr E's opinion that Ms K had a long-term condition which, in his opinion, constituted an ongoing functional impairment leading to an incapacity to perform the essential duties of her occupation.

I've also read a further report written by Dr F in October 2020. He commented on Dr E's report of August 2020. Dr F remained of the view that Ms K's presentation wasn't consistent with the presence of a depressive episode.

It's clear that the two experts (Dr F and Dr E) have very different opinions over whether or not Ms K is experiencing a depressive illness. They've each pointed out issues with the other's opinions and conclusions. However, I don't intend to comment on those points, as I'm not medically qualified. Instead I need to decide which expert's opinion holds the greatest weight.

Dr F and Dr E are both equally qualified, however, Dr E has treated Ms K for many years. This is in contrast to Dr F who only met with Ms K for 90 minutes. That being the case, I think greater weight should be placed on Dr E's opinion. Given that Dr E thought Ms K couldn't work because of illness, it therefore follows that L&G should reinstate the claim.

L&G also says it thinks that Ms K is capable of engaging in normal work because she's been able to make jewellery, and promote some of her pieces at some exhibitions over the last few years.

I see that Dr E had recommended that Ms K attend a weekly course to help with her illness. Also, Dr L confirmed that Ms K was encouraged to engage in weekly art therapy. I agree with our investigator that Ms K's jewellery making (and participation in a small number of events) is not comparable to the essential duties of her role for her employer, so I don't agree with L&G that this supports that Ms K no longer met the definition of incapacity.

L&G is of the view that Dr E may not be fully informed about the extent of Ms K's self-employed activities. However, I see that Dr E has read and commented upon Dr F's addendum report of October 2020, and he detailed Ms K's jewellery making activities in some detail within that report. I'm therefore satisfied that Dr E is aware of Ms K's activities in that respect.

Since terminating the claim, L&G has pointed out to this service that for a claim to be paid the member should not be engaging in any other occupation, other than one which causes payment of a partial benefit. L&G didn't terminate the claim because it thought Ms K was engaged in another occupation, and so it isn't appropriate for L&G to try and rely on a different reason to support its claims decision at such a late stage.

Though in any event, the scheme allows a disabled member to take up another occupation and explains that if this results in a loss of earnings due to the illness, then the member will still be considered disabled and partial benefit will be payable. Ms K says she hasn't made any money out of making jewellery, and only does it as a hobby. If L&G thinks differently and wishes to pay partial benefit as a result, then it should make a claims decision on this in line with the scheme terms and conditions.

### **My final decision**

My final decision is that I uphold this complaint. I require Legal and General Assurance Society Limited to reinstate the claim and pay backdated benefit due, in line with the scheme terms and conditions.

Interest should be added at the rate of 8% simple per annum from the date each benefit payment was due to the date of settlement.

If L&G considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Ms K how much it's taken off. It should also give Ms K a certificate showing this if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms K to accept or reject my decision before 13 July 2022.

Chantelle Hurn-Ryan  
**Ombudsman**