DRN-3538903

The complaint

Miss J complains that The Royal London Mutual Insurance Society Limited ('*Royal London*') has unfairly refused her claim for total and permanent disability ('*TPD*') benefit under her critical illness policy. To resolve her complaint, she wants her claim paid in full, with interest.

What happened

Miss J took out a level term assurance policy with Royal London in February 2011 for a 19-year term. It offers her life and critical illness cover, as well as TPD benefit on a 'suited occupations' or otherwise a 'work tasks' basis. The policy has a sum assured of £243,384.

Miss J's health began deteriorating in 2015, causing pain in her lower back and legs. This progressed to the point where it impacted her ability to walk, stand or sit. In 2018, after suffering from increased pain, Miss J was diagnosed with spondylolisthesis, lumbar canal stenosis and lumbar facet joint arthropathy.

By this time, Miss J had been under the care of Mr V and later Mr M, both Consultant Spinal Surgeons. Miss J firstly underwent epidural and facet injections, but these did not resolve the issue. She also tried physiotherapy, as recommended but continued to deteriorate. In 2019, Miss J underwent spinal decompression surgery. However, it had no bearing on her symptoms which - despite a brief improvement - then worsened.

Thereafter, Miss J made a claim to Royal London for TPD benefit. By this time, she had not been able to work since March 2019.

In early 2020, her employment ended as Miss J was medically retired. At that time, the medical evidence from Dr W, an Occupational Physician, was sought. He gave his view based on an independent assessment held in person with Dr M, Consultant Occupational Health Physician. In Dr W's view, Miss J would not likely return to any remunerative occupation before retirement age without further surgery – which, given its inherent risks, she was reasonably entitled to refuse.

Royal London thereafter sought medical reports from her GP and treating consultant(s) as well as information from her employer regarding Miss J's medical retirement.

It then required Miss J to undergo an independent medical examination ('*IME*') with a different Dr W, Consultant Occupational Physician. This took place via telephone in February 2021. In Dr W's view, he felt with appropriate surgical treatment Miss J should be able to return to work, and therefore he could not regard her as totally and permanently unable to return to a suited job such as the role she previously held.

In March 2021, Royal London said it was not able to pay Miss J's claim. It said at that time, Miss J "*did not meet the policy criteria for TPD as Dr [W] considers that you will recover to allow a return to work*". It highlighted the key findings from Dr W's report and also told Miss J that the refusal of the claim didn't prejudice her from making a future claim.

Miss J complained. She also made a subject access request to Royal London for the information it held about her. In summary, she said:

- Royal London's claim refusal merely referred to Dr W;
- it made no reference to the 14 other pieces of medical evidence she had submitted;
- the only remaining option left open to her is a surgery which carried risks and no guaranteed outcomes;
- she is not prepared to undergo that surgery in good conscience as a sole parent, but she has done everything else asked of her;
- Mr M has already confirmed the surgery might help some symptoms but that is not guaranteed and it will not have any impact on her back pain;
- the evidence from her medical retirement has not been referred to at all;
- she also felt Mr M's assessment should be given more weight than Dr W;
- she considers herself permanently disabled and could not understand how Royal London had reached any other conclusion.

Royal London rejected the complaint in April 2021. It said Dr W had been supplied with Miss J's full medical file, so his assessment was given in light of the comments made by the various medical specialists, including Mr M. Dr W had given his view of the prospects of further surgical intervention for Miss J based on published studies regarding the surgery.

So, Miss J referred her complaint to this service. An investigator thought that the complaint ought to succeed. He weighed up the evidence from Miss J's three treating professionals against the views put forward by Royal London and Dr W in the IME and felt that it was reasonable for Miss J not to undergo the spinal surgery, where the risks outweighed the benefits. The parties had agreed that Miss J's situation would deteriorate if she did not have the surgery, and on this basis, he felt the claim should be paid.

Miss C said she agreed with the investigator's proposed outcome to the complaint.

However, Royal London disagreed. It made some detailed further submissions. In summary, it said:

- on 8 October 2019, Mr V's view on Miss J's position was that the next step ought to be a type of fusion surgery;
- he reconfirmed this is his 10 December 2019 report to Royal London, confirming he recommended posterior lumbar interbody fusion ('*PLIF*') surgery, which led to her referral to Mr M;
- Miss J has been given the option of undergoing surgery which could improve her symptoms, and it is entirely up to her whether she pursues this option;
- by having this choice, the criteria of irreversible disability set out in the policy wording has not been fulfilled;
- it is not saying that Miss J has to undergo surgery in order to meet the claim;
- nor is it suggesting that Miss J would make a full recovery;
- what it contends is that the surgery may improve her symptoms to the level where she can engage in employment again in the future;
- in the IME, it was set out by Dr W that once stenosis/nerve root compression is addressed with surgery, Miss J's back pain could be managed through conservative treatments such as core strengthening and physical activity;
- furthermore, Dr W suggested in his IME that Miss J may have potential for improvement without surgery;
- he also felt that the risks of the surgery may have been misunderstood by Miss J;
- he explained that PLIF was a standard surgical procedure that was relatively commonplace;

- if it were as high risk as suggested by Miss J, it would never be undertaken;
- he said he had seen many patients undergo the procedure and recover sufficiently in order to return to normal employment;
- Dr W contended that though it could take up to two years, Miss J may well recover naturally post-surgery;
- and, Miss J could undergo Acceptance and Commitment Therapy (a form of behavioural therapy) to assist her with managing the symptoms of her condition;
- it was also felt that Miss J could use adaptations to her car, chair and the use of intermittent standing;
- it remained of the view that at Miss J's age and given her specific circumstances, there was ample opportunity for her to recover.

Our investigator was not prepared to change his view on the complaint, so it was referred for a decision. In the interim, additional medical information was sought from Mr M in respect of the impact of Miss J's condition, regarding the potential surgical option. Specifically, we requested clarification on the risks of surgery and the impact on Miss J and her ability to undergo any suited occupation. To that end, Miss J referred back to her treating consultant to seek additional evidence, based on his view of her specific policy wording.

Miss J supplied a further letter issued to her GP by Mr M from September 2021 where he explained why he felt it was unreasonable for her to be forced into surgery and how the surgery may alleviate Miss J's leg pain, but not her back pain. He then issued a second letter later that month where he addressed her inability to work.

Royal London said that neither letter altered its view on Miss J's claim.

Miss J also made some further comments. She said:

- her consultant has given a fair, balanced and professional view;
- he has outlined why surgery is risky for her;
- there is also the potential of making her situation worse;
- he also explained how she was disabled for the purposes of equality legislation;
- she therefore feels the ongoing refusal of her complaint is discriminatory.

In May 2022, Mr M supplied a further detailed letter of his view on Miss J's condition, and the risks of the surgery.

In June 2022, Royal London said that the medical evidence still did not change its view on the complaint. Our investigator also confirmed that he still believed the complaint ought to be upheld. On that basis, Royal London asked that the complaint be referred to 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.

I'd like to thank the parties for their considerable patience whilst this matter has been pursued at this service and further evidence has been sought to assist our investigation. I realise that this has been particularly difficult for Miss J.

Having looked at everything before me, I believe this complaint should be upheld and that a claim ought to be paid by Royal London. I'll explain why that is below.

The policy Miss J holds doesn't include income protection – so it doesn't pay out where a

policyholder is too ill or incapacitated to be able to carry out their job. It offers cover in the event of a listed critical illness. So, Royal London has rightly looked at a TPD claim as this is not tied to one condition. Instead, a claim can be paid if Miss J is totally unable to perform any suited occupation ever again and importantly, that this would be the case permanently.

To satisfy a claim, the policy wording must be met in full. In Miss J's policy, the wording says:

> "*Total Permanent Disability before age 60 – Suited Occupations*
>
> *Becoming permanently disabled through illness or injury before age 60:*
>
> - *While having a full-time (16 hours or more a week) remunerative occupation immediately before the start of the disability and*
> - *To the extent of being medically or physically unfit to perform any remunerated occupation which is suited by way of knowledge experience or training*
>
> *The disability must be irreversible with no reasonable prospect of there ever being any improvement.*"

The definition set out above is a high threshold to meet. This is true of TPD definitions generally – it is not specific to Royal London but instead, set out as suggested wording by the Association of British Insurers in model wordings for such policies. These types of TPD cover measure policyholders against their inability to perform occupations or undertake specified activities of daily living or functional activities.

I accept that Royal London could not reasonably have concluded that Miss J met the policy definition until it had seen satisfactory evidence regarding her care and reasonable treatment options open to her. To successfully make a TPD claim, there needs to be evidence of permanency and totality as well as - in the case of 'suited occupation' cover - the insured being unable to undertake any suitable occupation at all because of the disability.

However, from the information I've seen, I believe that Royal London should reasonably have concluded that the definition has been met. And that is since Miss J has exhausted all treatment options that have been proposed, aside from the PLIF surgery. I note Dr W referred to Acceptance and Commitment Therapy, but this is in relation to pain-management post PLIF surgery, not as a free-standing option that would likely reverse Miss J's position from medical retirement.

I am also mindful that Dr W's assessment of Miss J was a remote assessment and no measured evidence was undertaken regarding her incapacity. That may be because of restrictions around social distancing during the Covid-19 pandemic and I understand that. However, I don't agree with Royal London where it decided to place greater weight on the IME by Dr W than the views of Mr M, Mr V, or the medical retirement assessment from Dr W.

Notably, the assessment made of Miss J when she was medically retired was undertaken by Dr M, a Consultant Occupational Health Physician who held comparable medical expertise as Royal London's assessor, operating as a Consultant Occupational Physician. These two reports contrast significantly. However, Dr M undertook an observation of Miss J's incapacity.

In his assessment, Dr M said "*this is a degenerative condition and is not something she is likely to make a full recovery from. If she does proceed with the surgery, her leg pain will hopefully improve but she is likely to continue to have lumbar spinal pain and ongoing disability. Without surgery, I do not feel she will be able to return to work before normal*

retirement age".

He also noted "*the matter of whether she meets the criteria for total incapacity is complicated by whether or not she will have spinal fusion surgery in the future. If she proceeds with surgery, there is a possibility that she will able to eventually return to a sedentary role. As she has decided against surgery, her symptoms are not expected to improve and she is therefore not felt likely to be able to undertake any form of remunerated employment before normal retirement age, fulfilling the criteria for total incapacity.*"

C's previous role in financial services was field-based. It involved a significant degree of travel by car each week, as well as meetings and desk-based work. I do accept that the evidence from Dr M is based on criteria relating to Miss J's job, rather than against her policy wording as held with Royal London. However, they are similar, and the assessment refers to any form of paid employment, which is a higher bar than suited employment.

Contrastingly in the IME, Dr W noted how his professional view was that Miss J could make a substantial improvement over time. However, he said that "*in view of the symptoms she still has, this is unlikely to happen with conservative treatment, and the longer she waits, the more likely she will have permanent nerve damage. I would expect most spinal surgeons to be recommending a fusion procedure now, this would typically be PLIF and decompression*".

For that reason, additional evidence was sought from the current treating consultant, Mr M, and he has supplied letters on Miss J's behalf in both September 2021 and May 2022.

In September 2021, he noted:

> "*There are few people who have as much experience in this area of surgery as myself and I have published papers on the matter. Surgery poses risks and these risks need to be considered as real risks to the patient. The risks are those of infection, damage to the nerves to the bladder, bowel or feet and one can still have neurogenic pain continuing and scarring with continuing pain related symptoms.*
>
> *The absolute indication for surgery would be if the patient was losing bowel, bladder or leg function which is not the case; the main issue here is one of pain which prevents her from performing adequately. Her symptoms have become a bit more manageable since leaving work and I feel it would be unreasonable to force her into having an operation.*"

And in May 2022, he set out:

> "*Subsequent to my previous letter the situation with regards to her spine is that she has had one surgery to her spine and has slippage of one vertebra on the other; this vertebra will not go back to its original place by itself and the condition is therefore permanent. If she was to have surgery it would help realign the spine but it cannot be guaranteed to take away her pain.*
>
> *I have seen her before and I gave her a list of potential complications from this type of surgery. These include injury to the nerves to the bladder, bowel and feet; one can also damage the sac in which the nerves lie; one could also have bleeding anteriorly with the major vessels and a risk to life of less than 1 in 1,000 but nevertheless any spinal surgery is to be taken seriously.*
>
> *The surgery would essentially be indicated for unrelenting leg pain. She has been seen by another surgeon and fits the criteria for being considered for surgery;* ***however, my view is to live with the symptoms she has at present rather than***

> ***going for surgery as surgery itself has its major risks. It is only at the stage where she is having difficulty coping that one would consider surgery*** *[my emphasis]**.***
>
> *Surgery would be expected to help with leg symptoms but not with back symptoms. Her condition would therefore be classified as permanent and is not likely to change with time.*
>
> *Surgeries of this nature are only considered when at least one surgeon feels that the patient is at a level where the surgery would be appropriate and then it has to go through an MDT which has to accept the surgery is in the patient's best interests and sometimes with a second opinion due to the risks involved. Unfortunately the surgery does not address back pain and one would not do this surgery for back pain. Spinal surgery for back pain is not effective and is something we have moved away from as modern spinal surgeons.*"

I note that Royal London confirmed it its comments to this service following the investigator's view that it is not saying that Miss J has to undergo surgery in order to meet her claim, but it believes (based on the IME and its internal view of the evidence) that the proposed PLIF is a reasonable step to resolving Miss J's symptoms such that she could work again.

However, I am also mindful that in its final response to Miss J's complaint, Royal London said "*it is only with the fullness of time and when all treatment [regimens] have been tried and failed that one would be able to conclude that a patient's disabilities render them totally and permanently disabled from being unable to carry out any remunerated occupation which is suited by way of knowledge, experience or training*".

Miss J's policy wording does not contractually require her to have exhausted every treatment option open to her. Nonetheless, in general terms, I do think it is fair for an insurer to seek medical evidence for a claimant about treatment, therapy or means of management for a condition which could have an impact upon his or her prognosis. That's since the evidence will address the permanence of disability and whether any outstanding treatment could have an impact on symptoms, sufficient to have a bearing on the person's ability to work again.

However, I do not believe that every conceivable treatment option must be undertaken by a policyholder for the purposes of satisfying a TPD claim. It will depend on their specific condition and variables such as their circumstances, the availability of any proposed treatment option, and the risks attached. It is a matter of choice for any claimant as to what, if any, available treatment is right for them and I do not believe it is my role to interfere in that. I must look at if it is fair and reasonable for an insurer to reach the view that a specific treatment open to a policyholder is one which they ought reasonably to undertake based on the bearing that treatment would have on their prospect of improvement.

The medical evidence (including Dr W's IME) shows that Miss J will not recover to be able to work again with only conservative treatment options – and that the only remaining possibility for a possible partial recovery is a second surgery. However, Mr M makes it clear that his professional view is that he does not recommend surgery to Miss J due to inherent risks and that it would not address her back pain – in the bold emphasis I have given above.

To be clear, this service does not conduct claim assessments; instead, it is for me to decide if the refusal of the claim was a fair decision for Royal London and its medical officers to take, based on the medical evidence before it. And I do not believe that it is fair to continue to refuse the claim on the basis that Miss J could undergo PLIF surgery where Mr M has set out in definite terms that he does not recommend Miss J to undertake the procedure, based on the risks involved and the persistence of her permanent symptoms. I note he reached his

view having knowledge of the requirements of Miss J's TPD policy wording.

It is entirely possible that suitably qualified medical experts can reach different conclusions on reviewing the same set of medical facts. In scenarios such as these where professionals give differing views, I'll decide which I think is the more reasonable on balance.

The view of Mr M is something I give more weight to; this is not merely based on a measure of his knowledge or experience over Dr W, it is that as the attending Consultant and specialist in the relevant field, he was best placed to give his view of the totality and permanency of Miss J's condition and if, in her case, it was reasonable to undertake the only remaining surgical treatment option where he would be performing that surgery.

I also note that Mr M's view accords with all of the other medical evidence I've seen, aside from the IME. I have seen no objective reason as to why I ought to disregard his comments, where he has treated Miss J for many years.

The rules which apply to this service set out that I am entitled to decide the outcome of a complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And having done so, I believe by the time of Mr M's clarification in May 2022, there was no fair basis upon which Royal London continued to refuse Miss J's claim. That is because Mr M has provided evidence of total and permanent disability such that the policy term above has been met; and he has explained that Miss J's only remaining surgical option, in his expert view, has major risks. I therefore believe the claim should be paid.

Putting things right

The Royal London Mutual Insurance Society Limited must pay Miss J's TPD claim in full. Interest should be added to the claim payment.

It is worth noting that our awards of 8% interest are applied where a consumer may have been unreasonably deprived of their money; for example, if an insurer had sufficient evidence to meet a claim but failed to process a claim payment.

In Miss J's case, I believe the interest shouldn't run from the date Royal London first gave its claim outcome to Miss J in March 2021. At that time, her Consultant Spinal Surgeon had provided some comment on Miss J's circumstances but it was not until May 2022 that he clarified his detailed written view on her disability and the feasibility of PLIF surgery for her specific circumstances in full.

Interest ought therefore to run from 24 June 2022. That is the date Royal London confirmed to this service that its claims assessors considered Mr M's report did not alter its original decision. However, for the reasons set out above I consider it was clear that the medical evidence satisfied the policy wording and Royal London should pay the claim as at that date.

If Royal London considers it is legally obliged to deduct income tax from the interest paid, it should issue a tax deduction certificate with the payment. Miss J may be able to reclaim the tax paid from HM Revenue and Customs, if applicable.

My final decision

I uphold this complaint. I direct The Royal London Mutual Insurance Society Limited to pay Miss J's TPD claim, with interest as detailed above. I make no other award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss J to accept or reject my decision before 9 December 2022.

Jo Storey
Ombudsman