

The complaint

Mr W complains that BUPA Insurance Limited has turned down a claim he made on a personal private medical insurance policy.

What happened

Mr W took out a 'BUPA by You' personal private medical insurance policy in 2015. In September 2020, Mr W got in touch with BUPA to make a claim on the policy. He'd been diagnosed by an ophthalmic consultant surgeon, who I'll call Mr T, with macular branch retinal vein occlusion (BRVO) and was seeking payment authorisation to undergo a course of three injections to treat the condition.

BUPA turned down Mr W's claim. It said that it didn't cover any claims for BRVO, as it considered it to be a chronic condition. Chronic conditions were specifically excluded by the policy terms. It also referred to other policy exclusions which it concluded applied to Mr W's circumstances.

Mr W disagreed. He noted that there was no specific exclusion for BRVO in the policy terms. He provided a letter from Mr T who stated that he wouldn't class Mr W's BRVO as a chronic condition and that he expected it to respond relatively rapidly to treatment.

BUPA maintained its stance. It said that this was a matter of policy, rather than taking into account Mr W's specific situation. So Mr W asked us to look into his complaint.

Our investigator didn't think Mr W's complaint should be upheld. He felt it'd been fair for BUPA to decide not to cover any claims for BRVO. And he also thought it'd been reasonable for BUPA to conclude that the injections could be treated as routine monitoring or a preventative treatment, which were also excluded by the policy terms.

I issued a provisional decision on 22 June 2022. In my provisional decision, I explained the reasons why I didn't think BUPA had treated Mr W fairly.

In summary, I concluded that the relevant regulator's rules say that insurers must handle claims promptly and fairly. And they mustn't turn down claims unreasonably. So I considered, amongst other things, the terms of Mr W's policy and the available medical evidence, to decide whether BUPA treated him fairly.

I acknowledged that around five years before Mr W was diagnosed with BRVO, BUPA had made a policy decision to exclude all cover for retinal vein occlusion. That's because following an evidence review, it'd concluded that injections were aimed at controlling the symptoms of BRVO rather than curing it and those injections would need to be continued. So it concluded that BRVO was a chronic condition.

Having reviewed the policy terms, I accepted that the contract of insurance clearly states that BUPA doesn't cover chronic conditions and defines what it means by a chronic condition. That definition says a chronic condition is:

'a disease, illness or injury which has one or more of the following characteristics:

- it needs ongoing or long-term monitoring through consultations, examinations, checkups and/or tests*
- it needs ongoing or long-term control or relief of symptoms*
- it requires your rehabilitation or for you to be specially trained to cope with it*
- it continues indefinitely*
- it has no known cure*
- it comes back or is likely to come back.'*

But I noted that the contract terms didn't set out that BRVO will be excluded as a matter of policy and course. Or that in cases of BRVO, claims will be turned down irrespective of any available medical evidence. Whilst I acknowledged that BUPA's entitled to decide what risks it will and won't cover, I referred to its obligation to provide information which is clear, fair and not misleading. So I felt that if it wished to exclude all claims for BRVO, it was open to BUPA to set this out within its policy paperwork in a clear and transparent way.

BUPA had provided me with some medical evidence from its review to demonstrate how and why it had concluded that BRVO was a chronic condition and which showed that a course of injections wouldn't cure the condition. Its Medical Director (MD) provided a quote from the Royal College of Ophthalmologists guidance:

'Based on the Branch Retinal Vein Occlusion study (BVOS),¹⁵ the prognosis of BRVO is better than CRVO with approximately 50 – 60% of untreated BRVO cases retaining a visual acuity \geq 6/12 after one year.

Therefore when a patient presents with recent onset mild visual impairment due to MO secondary to BRVO, it may be reasonable to observe the progress of the condition over the first three months of follow up.'

The MD went on to summarise as follows:

'The MO = macular oedema and it is this that the injections treat. What they are saying, basically, is that the majority of cases settle without treatment – which is one of the criteria for defining as a chronic condition.'

Having looked at the definition of a chronic condition, I didn't agree that settlement of a condition without treatment falls within one of the limbs set out in the contract. Neither did I think the guidance the MD referred to suggested that BRVO is chronic.

The MD later provided clarification on their comments and said:

'The reason injections are ineligible is because they just treat a symptom. Unfortunately this exclusion sits under the broader chronic rule - which is what gets wheeled out.

BRVO is a condition of acute onset, but it settles spontaneously. The various injections are not treating the blocked vein (for which there is currently no specific treatment), so we rule them ineligible.'

I took into account the medical evidence BUPA had provided, together with the specific medical evidence provided by Mr W's own treating consultant ophthalmic surgeon, Mr T, to consider whether I was satisfied it was fair for BUPA to deem Mr W's condition as chronic.

In brief, I felt Mr T, an expert in his own field and who'd had the opportunity to examine Mr W at first hand, had clearly stated that he wouldn't class Mr W's BRVO as chronic. And he considered the BRVO would resolve relatively rapidly should Mr W undergo the injections. And importantly, he suggested that the injections would provide treatment of Mr W's acute presentation of BRVO.

The policy terms cover claims for 'eligible treatment'. Eligible treatment is defined as follows:

'Treatment of:

- *an Acute Condition or*
- *a Mental Health Condition*

- *together with the products and equipment used as part of the Treatment that:*
- *are consistent with generally accepted standards of medical practice and*
- *representative of best practice in the medical profession in the UK*
- *are clinically appropriate in terms of type, frequency, extent, duration and the facility or location where the services are provided*
- *are demonstrated through scientific evidence to be effective in improving health outcomes, and*
- *are not provided or used primarily for the expediency of you or your Consultant or other healthcare professional*
- *and the Treatment, services or charges are not excluded under your Benefits.'*

An acute condition is defined as: *'a disease, illness or injury that is likely to respond quickly to Treatment which aims to return you to the state of health you were in immediately before suffering the disease, illness or injury, or which leads to your full recovery.'*

Taken together, I felt Mr T's evidence indicated that he believed Mr W's BRVO was an acute presentation which would resolve fairly quickly with treatment. So it seemed Mr T suggested that Mr W's condition would fall squarely within the definition of an acute condition.

Considering all of the available medical evidence, I thought it more likely than not that Mr W was making a claim for eligible treatment which was aimed at curing his condition.

BUPA had also referred to other exclusions which it considered applied to the circumstances of this claim. Namely exclusions for monitoring and screening and temporary relief of symptoms. But I explained that it's BUPA's responsibility to demonstrate that an exclusion applies which defeats a claim. Mr T's evidence didn't suggest that he'd recommended the injections either for monitoring purposes, preventative purposes or that the impact of the injections would only be temporary. And so I didn't think BUPA had provided sufficient evidence to show, on balance, that these exclusions should apply.

Overall then, I wasn't persuaded that the totality of the evidence suggested that BUPA had treated Mr W fairly. There was no clear exclusion for BRVO in the contract terms; Mr T's evidence tended to support a conclusion that Mr W's treatment is eligible and BUPA hadn't provided me with enough medical evidence to demonstrate that Mr W was suffering from a chronic condition. And as such, in these very specific circumstances, I found that BUPA should treat this claim as covered. And I told BUPA I intended to direct it to reassess Mr W's claim for the first three injections recommended by Mr T.

I asked both parties to send me any further evidence or comments they wished me to take into account.

BUPA's response

BUPA didn't accept my provisional findings. It said:

- *'The injections are only managing the symptoms (macular oedema) rather than treating the condition (the blocked vein) and therefore is excluded under the temporary relief of symptoms exclusion. This is really the key point for this treatment (rather than the distraction of the chronic exclusion).'*
- The drug licences for the two injections are specifically for treating macular oedema, secondary to retinal vein occlusion. Therefore, they weren't treating the BRVO.
- Guidance from the Royal College of Ophthalmologists made it very clear that the injections were treating the macular oedema caused by the BRVO and not the vein occlusion itself.
- A leading eye hospital had explained in published findings that there was no treatment for BRVO, but that the macular oedema can be treated.
- Mr W's condition had resolved after a short period of time, but that wasn't because of the injections.
- The injections don't permanently resolve the macular oedema, they reduce its effect on a temporary basis. The injections need to be repeated on a regular basis whilst there is active disease.
- Whilst there was no dispute that the injections provided a therapeutic benefit in managing macular oedema and reducing vision loss, treatment which only provides temporary relief of symptoms is specifically excluded by the terms of Mr W's policy.

Mr T's further evidence

I asked Mr W if he could obtain Mr T's comments on the evidence BUPA had provided. Mr T provided the following further comments specifically in relation to BUPA's response:

'My comment on the statement is that macular oedema is not a symptom. The symptom is that which is experienced by the patient which in this case would be visual reduction. Macular oedema is a clinical sign. It is a direct consequence of the branch retinal vein occlusion.'

I think one of the difficulties with BUPA'S approach is that branch retinal vein occlusions do resolve spontaneously. In the large series of branch retinal vein occlusions..., the medium time to resolution was 21 months for serious branch retinal vein occlusions and 18 months for more minor ones. There is a significant proportion that resolve within 3 or even 6 months. The problem is that if one does not provide treatment during this time, the retina is permanently damaged and the visual outcome is poor. Thus treatment is required even though the condition is self-limiting in many.

I do understand BUPA's point that some of these vein occlusions can become chronic and require injection therapy over long periods of time. My personal feeling is that the most appropriate approach is to allow treatment for a period of time and for cover to then cease if

that period of time is extended. There are various points at which one could draw the line, but 6 months would seem a reasonable one for me as the condition will be resolved for a reasonable proportion of patients within that time.

There also seems a common sense problem with BUPA's definition in that a vein occlusion is an acute event. It is not something like hypertension which often starts insidiously and mostly requires lifelong treatment. That is not the case for branch retinal vein occlusion and the vast majority of patients will cease treatment at some point. Thus it is not a lifetime condition, but one that is temporally limited. It seems unfair to me, and falls outside what most people would understand as a chronic condition, to include something that has an acute onset and a defined resolution point.'

Mr W also provided further comments on BUPA's response. Broadly, he felt BUPA was shifting the reason for declining the claim away from the chronic condition exclusion to focus on the temporary relief of symptoms exclusion. He didn't think it had provided clinical evidence to demonstrate that the treatment only provided temporary relief of symptoms. He referred to National Institute for Health & Care Excellence (NICE) guidelines which had assessed the clinical efficacy of the injections to treat BRVO. He felt that if, after a period, the original injections failed, it would be fair to treat any further treatment as excluded by the policy. But he didn't think BUPA could pre-emptively decide the outcome of the treatment, particularly when his treating doctor had felt there was a possibility that the treatment could be effective.

We asked BUPA for its further comments on Mr T's new evidence. It responded to say:

'One of our medical directors has reviewed the information and our stance remains the same. They explain that the point is that the underlying condition is the CRVO (sic), which the injections are not treating/curing.'

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 done so, I still don't think BUPA has treated Mr W fairly and I'll explain why.

First, I'd like to thank Mr W and BUPA's medical team for their detailed submissions (including the additional evidence from Mr T) in response to my provisional decision. This is a complex, very finely balanced case and turns on a very specific set of circumstances. This decision is not intended to form a precedent and has been reached following a detailed assessment of the contract terms and the totality of the medical evidence.

BUPA has provided clinical evidence from both from the Royal College of Ophthalmologists and from a leading eye hospital. I acknowledge that the published information it's sent me indicates that BRVO is a blockage in the branch vein and that macular oedema is a complication of BRVO. Mr T accepts that macular oedema is a clinical sign of BRVO. I acknowledge too that BUPA's evidence suggests that intravitreal injections need to be continued until there is no sign of active disease and that this may take a few years. BUPA accepts that the injections may help manage the macular oedema but has relied on medical evidence to conclude that the injections can't cure the BRVO.

With that in mind, BUPA has now placed greater weight on the following policy exclusion, which I referred to in my provisional decision, but did not set out in full:

'Temporary relief of symptoms

Treatment, the main purpose or effect of which is to provide temporary relief of symptoms or which is for the continuing management of a condition.'

I've thought about this very carefully. It seems to me that there is potential in cases of BRVO for the need for more regular injections to control the condition on an ongoing basis. It also appears that symptoms may recur and need further treatment. In such circumstances and dependent on the evidence, I may well find that BUPA could fairly rely on the above exclusion to decline a claim.

But I need to take account all of the evidence before me. BUPA's evidence is general in nature and doesn't consider Mr W's specific circumstances. As I set out above, Mr T, who is an ophthalmic specialist and who has had the opportunity to examine Mr W at first hand, has made no suggestion that the injections were recommended for continuing management of BRVO. And neither has he indicated that the injections would only provide temporary relief of symptoms. Indeed, his evidence would suggest the opposite, as I note he said that he expected Mr W's macular branch retinal vein occlusion to *'resolve relatively rapidly with injection treatment.'* He added that he would recommend BUPA funding a course of three injections to *'provide treatment of the acute presentation of (Mr W's) retinal branch occlusion'*.

On this basis then, on balance, I find Mr T's patient-specific evidence compelling in this case. I don't think the available evidence supports BUPA's conclusion that Mr T had only recommended the injections to provide temporary relief of Mr W's symptoms.

Mr T's evidence indicates that the macular oedema caused by BRVO can cause permanent retinal damage if it's left untreated and that a patient's visual outcome will be poor. BUPA has also accepted that Mr W's eyesight was likely to be affected as a result of the macular oedema secondary to BRVO. I set out in my provisional decision why I felt Mr W was suffering from an acute condition rather than a chronic condition and my findings on this point have remained unchanged. BUPA's MD acknowledged that BRVO was a condition of acute onset and Mr T reiterated this point in his further submission when he said: *'(The condition)...has an acute onset and a defined resolution point.'* I remain persuaded then that the injections fall within the definition of eligible treatment.

BUPA's policy does include eyesight cover, but it *hasn't* excluded BRVO or macular oedema under that particular or any other section. I note it has specifically excluded other eyesight-related conditions. And so it's still the case that if BUPA chooses to exclude all claims for BRVO, it's open to it to make this clear in the contract. It's said it's made a policy decision not to cover it, but it hasn't set this out in the policy terms. In my view, the treating specialist has stated that this is a condition of acute onset, which would resolve with treatment. The policy covers claims for eligible treatment.

Moreover, BUPA has also defined the word 'treatment' separately in its contract terms. The policy says treatment is: *'surgical or medical services (including diagnostic tests) that are needed to diagnose, relieve or cure a disease, illness or injury.'* Taking BUPA's evidence into account, it seems that the injections would at least relieve Mr W's disease. And based on Mr T's findings, it seems that the injections would resolve it. This means, overall, I still find the evidence indicates that Mr W's condition is acute in nature and therefore eligible under the policy. Accordingly then, I find that the recommended treatment of a course of three injections is covered under the policy terms. I must make it clear that I am not making the finding that BUPA needs to pay any for any further injections, (should they ultimately be required) as part of this decision

My final decision

For the reasons I've given above and in my provisional decision, my final decision is that I uphold this complaint.

I direct BUPA Insurance Limited to reassess Mr W's claim in line with the remaining policy terms and conditions.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 27 September 2022.

Lisa Barham
Ombudsman