

The complaint

Ms W complains about Legal and General Assurance Society Limited's (L&G) decision to stop paying her income protection insurance claim.

What happened

Ms W is insured under her employer's group income protection insurance policy.

In July 2020, Ms W was signed-off from work suffering from severe facial pain and rib pain. She was referred to an ear, nose and throat (ENT) consultant surgeon, who recommended that Ms W should undergo sinus surgery. Her employer made a claim on the income protection insurance policy. L&G accepted Ms W's claim in full from 19 October 2020.

The surgery was carried out on 13 November 2020. Ms W was initially signed-off from work for a four-week period and was due to undergo a review after four weeks. This didn't take place until late January 2021. Ms W's GP signed her off for a further period, as she was suffering from post-operative pain and because she was undergoing further investigations for another condition.

L&G requested information from the ENT consultant surgeon about Ms W's surgery and her condition. The surgeon stated that in his view, Ms W could've returned to work on a full-time basis two to three weeks after the surgery had taken place. On that basis, L&G decided to cease benefit from 4 December 2020 – three weeks after the surgery had been carried out.

Ms W was unhappy with L&G's decision and she asked us to look into her complaint.

Our investigator didn't think Ms W's complaint should be upheld. He didn't think there was sufficient medical evidence to show that Ms W was prevented from returning to work on 4 December 2020 because of an incapacity. So he thought it'd been fair for L&G to limit policy benefit up to that date.

I issued a provisional decision on 3 November 2022. In my provisional decision, I explained the reasons why I thought Ms W's complaint should be partly upheld and that L&G should pay benefit until 11 December 2020. I said :

'The relevant regulator's rules say that insurers must handle claims promptly and fairly. And that they mustn't turn down claims unreasonably. So I've considered, amongst other things, the terms of the policy and the available medical evidence, to decide whether L&G treated Ms W fairly.'

I've first turned to consider the policy terms and conditions, as these form the basis of Ms W's employer's contract with L&G. The policy says:

'Subject to the terms of this policy, the benefit will be paid in respect of an insured member from the benefit start date, provided he is a disabled member.'

The policy says that L&G will terminate benefit for a specific list of reasons. One of those

reasons is:

'if the insured member ceases to be a disabled member.'

L&G has defined what it means by a 'disabled member' as follows:

'Means an insured member who at any time,

- i. meets the incapacity definition, and*
- ii. is not engaged in any other occupation, other than one which causes payment of a partial benefit in accordance with Part 3, Section 7 of this policy.*

And the definitions section of the policy says that 'own occupation' incapacity:

'Means the insured member is incapacitated by illness or injury that prevents him from performing the essential duties of his occupation immediately before the start of the deferred period.'

I think the policy terms make it clear that L&G will stop paying incapacity benefit if it's satisfied that an insured person is no longer prevented from carrying out their essential duties as a result of injury or illness.

In this case, L&G accepts that Ms W was incapacitated from carrying out her role between 19 October and 4 December 2020 as a result of her sinus surgery. It based its decision to stop benefit on 4 December 2020 on a report provided by Ms W's consultant surgeon. L&G received a copy of this report in February 2021. L&G had asked the consultant when they expected Ms W to be able to return to work. The consultant answered:

'She should be able to return to work 2-3 weeks after her surgery, on a full time basis.'

L&G decided to terminate benefit exactly three weeks after Ms W's surgery had taken place. So I've gone on to think about whether this was a fair decision for it to reach.

Ms W has provided us with a copy of a fit note, dated 13 November 2020, which she says was signed by the consultant surgeon who carried out her surgery. It's difficult to say with certainty who signed the fit note, but I can see it was clearly issued on the date Ms W underwent surgery and so it seems more likely than not that it was her treating consultant surgeon who did so. The fit note states that the reason for Ms W's absence was 'surgery' and that she would be unfit for work for four weeks. As such then, the medical evidence from the date of the operation indicates that Ms W was incapacitated as a result of the surgery for at least four weeks from that date. And it seems to me that Ms W couldn't have returned to work until at least four weeks after the surgery had taken place unless a revised fit note had been issued in the intervening time. There's no evidence that such a fit note was issued. Four weeks post-surgery was 11 December 2020. So I currently think that L&G should pay benefit until 11 December 2020, as I'm satisfied that the medical evidence shows that Ms W was incapacitated until that date.

I appreciate that Ms W's GP provided a further fit note. This was dated 11 December 2020 and stated that Ms W was unfit for work for a further month, due to the surgery she'd undergone. I've thought carefully about this. But there's no evidence from the consultant surgeon who treated Ms W which indicates that they felt she wouldn't be fit for work after the initial four-week period had elapsed. And indeed, it seems they subsequently told L&G that Ms W would've been fit for full-time work after two-three weeks post-surgery (although it appears the report was issued some weeks after the first fit note had run out).

And Ms W hasn't provided any report or letter from the consultant surgeon which sets out what was discussed during her follow-up appointment in late January 2021. So there's no evidence from her treating specialist which shows that Ms W hadn't recovered as planned or that she was incapacitated by the surgery for longer than the four weeks she was initially signed-off for. If Ms W is able to obtain such evidence from the treating specialist, it's open to her to send this to L&G for its further consideration.

I note too that the GP hasn't set out why they believed Ms W remained incapacitated or what her remaining symptoms were. Ms W described residual pain and swelling to L&G's rehabilitation specialist, which affected her ability to wear the glasses she needed for work. But L&G's medical officer referred to post-surgical aids which would've been available to her to assist with this. I appreciate Ms W wasn't made aware of these aids until some time after the surgery had taken place. But I don't think I could fairly find that L&G should be held responsible if Ms W's treating team didn't make her aware of the option to use such aids. As the investigator said, L&G wasn't treating Ms W and so I wouldn't expect it to offer her post-surgery treatment advice or options.

It's clear that during the relevant period, Ms W was also undergoing investigations into an adrenal nodule, which had been diagnosed. She says her GP felt she shouldn't return to work until these investigations had been carried out. These investigations don't appear to have been related to the sinus condition which had led to the surgery. It seems the investigations took place on 18 February 2021. Having reviewed the referral for investigation into the nodule, dated 12 January 2021, there's no indication that the nodule was causing Ms W any symptoms nor that it would've prevented her from working. So I don't think it was unfair for L&G to conclude that there was insufficient evidence to show that either the nodule or the investigations into it had led to Ms W being incapacitated.

I sympathise with Ms W, as I don't doubt that she continued to suffer pain and discomfort following her surgery for longer than she'd hoped. But in my view, there's simply insufficient specialist medical evidence which shows that her condition prevented her from fulfilling the essential duties of her role on a full-time basis after 11 December 2020. And so I currently think it would be fair for L&G to stop paying benefit from that date onwards.'

I asked both parties to send me any further evidence they wished me to consider.

In summary, L&G said it was not typical for us to rely on a fit note as medical evidence. And in this case, the fit note of 13 November 2020 contradicted the consultant's later report. So it said it didn't consider the note to be satisfactory evidence of incapacity. Nevertheless, it agreed to arrange one week's further benefit to be paid to Ms W in full resolution of the complaint.

Ms W disagreed with my provisional findings. She felt I'd overlooked an important aspect of her complaint. She said she'd been told post-surgery that she'd receive a follow-up appointment letter. Her appointment was subsequently booked for 21 January 2021. But she said that at that appointment, the consultant said that an appointment had been made for around a month earlier – but she'd never been sent that letter. This meant she hadn't had the opportunity to discuss the post-operative issues she'd suffered during December 2020.

Ms W said that during the appointment on 21 January 2021, the consultant disclosed that during her surgery, the severity of her condition had become apparent. During the appointment, the consultant had told Ms W that her cartilage was still healing and should've healed within a couple of weeks. She felt that the hospital's administrative failings that led to her being penalised in respect of the time she was incapacitated. She'd been prevented from discussing her extreme pain with the treating consultant during December 2020. If the cartilage had still been healing in late January 2021, she felt this showed this would also

have been the case during December 2020. So she considered I needed to take this into account when deciding her period of incapacity.

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 find that L&G should pay benefit until 11 December 2020 and I'll explain why.

L&G has now agreed to pay Ms W a further week of incapacity benefit to represent the period between 4 and 11 December 2020. For completeness though, I would add that the fit note of 13 November 2020 is contemporaneous, objective medical evidence which indicates that the doctor who completed it believed that Ms W would be unable to work for a four-week period following her surgery. As I set out in my provisional decision, Ms W says that it was the consultant who signed the fit note. As such, it remains the case that I consider it appropriate to take this piece of medical evidence into account when considering the evidence as a whole. I acknowledge the consultant later stated that he felt Ms W could return to work full-time within two-three weeks of the surgery. But the fit note which Ms W says the consultant signed on the day of the operation itself, indicated that she'd be unfit for work for a four-week period. So I remain satisfied that it's fair and reasonable for me to place weight on this contemporaneous medical evidence when deciding the fair outcome to this complaint.

Ms W feels that due to a potential administrative error on her hospital's part, she lost out on the opportunity to discuss her ongoing pain and recovery with the consultant during December 2020. I sympathise with her position. But as I've explained, L&G isn't responsible for any of the actions of the hospital. That's because it wasn't treating Ms W. It's reasonably entitled to rely on the medical evidence it's provided with in order to assess whether a policyholder a) meets the definition of incapacity and b) if a claim's in payment, whether they continue to do so.

In this case, whilst I don't doubt Ms W's testimony, there's simply no objective medical evidence which shows that she remained incapacitated after 11 December 2020. Neither L&G nor I have been provided with a copy of a consultant's report following the January 2021 appointment which indicates that she was still incapacitated after 11 December 2020. So I don't think I can reasonably require L&G to pay benefit after that date. It still remains open to Ms W to obtain further evidence from her consultant in support of her position for L&G's consideration should she wish to do so.

My final decision

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

I direct Legal and General Assurance Society Limited to pay Ms W additional incapacity benefit between 4 and 11 December 2020. It must add interest to this amount at an annual rate of 8% simple from the date this payment was due until the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms W to accept or reject my decision before 20 December 2022.

Lisa Barham

Ombudsman