

The complaint

Mrs A complains that AXA PPP Healthcare Limited has turned down a claim she made on a personal private medical insurance policy and that it applied an exclusion to the contract.

What happened

The background to this complaint is well-known to both parties and therefore, I haven't set this out in detail here. Instead, I've focused on what I think are the key issues.

Mrs A was insured by AXA under her employer's group private medical insurance policy. In March 2020, Mrs A underwent left knee replacement surgery, which I understand was paid for by AXA. She underwent a successful course of physiotherapy and was due to have a follow-up with her treating surgeon, Mr L, in June 2020. However, due to the Covid-19 pandemic, it appears that this follow-up appointment with Mr L was cancelled.

In July 2021, Mrs A took out a personal private medical insurance policy with AXA, which was underwritten on a continued medical exclusions basis. During the sales call, Mrs A was asked whether she had any treatment, consultations, investigations or diagnostic tests planned or pending. Mrs A answered no. AXA accordingly set Mrs A's premium based on her answers and applied a no claims discount level of 70%.

Subsequently, in October 2021, Mrs A consulted with Mr L and an invoice was sent to AXA for the appointment cost. During discussions, Mrs A told AXA that the appointment was a follow-up to the knee surgery she'd undergone in March 2020. When questioned why she hadn't told AXA about this planned follow-up at the time of policy sale, she said she'd forgotten about the appointment. She later said that she'd booked the appointment with Mr L, as she'd been experiencing symptoms.

AXA turned down Mrs A's claim. It said that Mrs A hadn't correctly answered the medical questions she'd been asked at the point of sale. It considered she'd been aware that she was still awaiting a follow-up to her original surgery and that therefore, she ought to have told it that a consultation was planned or pending. So it applied a retrospective exclusion to her policy for all claims related to her left knee-replacement surgery and any further revisions.

Mrs A was unhappy with AXA's decision and she asked us to look into her complaint. She said she'd begun to experience swelling and shin pain following a walking holiday in September 2021. And it was at this point she'd booked an appointment with Mr L.

Our investigator recommended that Mrs A's complaint should be upheld. She didn't think that at the time of taking out the personal policy, Mrs A had had any consultations planned or pending. So she thought Mrs A had accurately answered AXA's questions. She recommended that AXA should remove the exclusion, reassess the claim and pay Mrs A £150 compensation.

AXA disagreed and I've summarised its response to our investigator:

- It felt the information Mrs A had given it at the time of the claim was likely to be the most accurate, so it considered more weight should be placed on what Mrs A had told it at the time. Mrs A had repeatedly told AXA that this was a follow-up appointment following her earlier surgery, which had been delayed due to Covid-19.
- Mrs A had told AXA that she'd forgotten about the appointment. It said there'd been no mention of any new symptoms until Mrs A brought her complaint to us.
- AXA told us that Mrs A had checked specifically whether Mr L would be covered under her new policy – which indicated an awareness that she'd need to see him again.
- It said that at the point of sale, it had made it clear that Mrs A needed to answer medical questions accurately.
- It felt Mr L's evidence suggested that the October 2021 appointment had been a routine appointment, rather than an appointment to discuss new symptoms.
- It remarked on Mrs A's comments about public commitments AXA had made during the pandemic – and so it concluded that Mrs A had linked the 2021 appointment to her previous surgery.

The complaint's been passed to me to decide.

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 don't think AXA has treated Mrs A fairly and I'll explain why.

First, I must make it clear that this decision will *only* consider whether it was fair for AXA to decline Mrs A's claim and apply an exclusion to the contract. I appreciate Mrs A raised further concerns in response to the investigator's view – but these are new complaint points, which AXA didn't have an opportunity to address in its final response of February 2022, to Mrs A's original complaint. I understand from AXA that a new complaint has been set-up in response to the new concerns Mrs A has raised, which will be the subject of a new final response letter. Mrs A also separately made another complaint about AXA to our service, which was resolved by an investigator.

I'd also like to reassure both parties that whilst I've summarised the background to this complaint and their detailed submissions, I've carefully considered all they've said and sent me. Within this decision though, I haven't commented on each issue they've raised and nor do our rules require me to. Instead, I've focused on what I consider to be the key issues.

When Mrs A applied for the personal policy, she was asked for some information about her medical history, although the policy was underwritten on continued medical exclusions terms. AXA used this information to decide on what terms it was prepared to offer Mrs A cover – such as the price and no claims discount level.

AXA says that Mrs A didn't correctly answer a question about her existing medical history. This means the principles set out in the Consumer Insurance (Disclosure and Representations) Act 2012 ('CIDRA') are relevant. So I think it's fair and reasonable to apply these principles to the circumstances of Mrs A's claim.

CIDRA is designed to make sure consumers and insurers get an appropriate remedy if a policyholder makes what is called a 'qualifying misrepresentation' under the Act. A qualifying misrepresentation is when a consumer fails to take reasonable care to correctly answer an insurer's questions and provides inaccurate information – and when the insurer can show that it would have offered the policy on different terms (or not at all) if the consumer hadn't

made the misrepresentation. The standard of care required is that of a reasonable consumer.

When taking into account whether a consumer has taken reasonable care, I need to consider how clear and specific the questions asked by the insurer were. So I've thought about what Mrs A was asked when she took out the policy by phone. Amongst other questions, AXA asked Mrs A the following:

'Have you had treatment in hospital or consulted a specialist in the last 12 months?

Do you have any treatment, consultations, investigations or diagnostic tests planned or pending?'

Mrs A answered no to both questions. But AXA believes that she should have answered yes to the second question, as it considers she was awaiting a follow-up with Mr L at the point of sale. So I've looked closely at the evidence to decide whether I think Mrs A took reasonable care to answer the question she was asked.

It's clear that Mrs A underwent left knee replacement surgery, which was carried out by Mr L, in March 2020. It seems AXA met the cost of this surgery under a claim Mrs A had made on her employer's policy. This surgery took place around 15 months before the new policy was inception. It's also common ground that while Mrs A was scheduled to have a follow-up with Mr L in June 2020, this didn't happen due to the pandemic. On that basis, I think Mrs A answered the first question I've listed above accurately.

In my view, whether Mrs A took reasonable care when answering the second of the two questions I've referred to is more finely balanced. I acknowledge AXA's point that Mrs A did tell it, more than once, that the appointment she had with Mr L in October 2021 was a follow-up to her initial surgery. And that she'd forgotten about the appointment. I'd add too that in some cases, I may well find that the claims evidence and testimony from the time of claim can be more persuasive than a subsequent version of events

But in this particular case, I've also placed significant weight on the surrounding circumstances and documentary evidence from the time of sale and afterwards. While Mrs A had been due for a follow-up with Mr L in June 2020, all parties accept this appointment was cancelled. I've simply seen no evidence that this appointment was rescheduled prior to May 2021, when Mrs A first went through the quote process, or had been rescheduled by July 2021, at the time she took out the policy. Nor do I think Mrs A ought reasonably to have been aware that her previous surgery needed to be signed-off by Mr L – especially given the delay between surgery and her eventual appointment.

As I've mentioned, policy inception took place around 15 months after the surgery had been carried out and over a year after the original follow-up had been cancelled. So I don't think Mrs A could or should reasonably have been aware, in July 2021, that she still, technically, required a follow-up with Mr L and that this was something she'd need to tell AXA about in response to the second question it asked. I think it's entirely reasonable to conclude, on balance, that Mrs A may simply have forgotten such an appointment *could* be required at an indeterminate point in the future. Or that she'd understand that she needed to answer AXA's question here in the affirmative. I appreciate she asked specifically whether Mr L would be covered under the new policy. But I don't find this prejudicial to her position. It seems entirely likely that Mrs A wanted to ensure that if she did need future orthopaedic treatment, Mr L would be an eligible specialist under the policy, given their previous medical relationship and operative success.

I've also borne in mind the documentary evidence Mrs A has provided. She says that she

noticed pain following a holiday in September 2021. She's provided evidence of that holiday. And she's also sent us a copy of her appointment booking with Mr L – which is dated 28 September 2021. I'm satisfied that this corroborates Mrs A's version of events and explanation as to why an appointment was arranged at this point. I accept that Mr L's clinic letter does effectively sign Mrs A off from his care, which suggests that a surgical follow-up took place during the October 2021 appointment. And he made specific reference to the impact of the pandemic on her follow-up and rehabilitation. But critically, the letter says:

'The issue she has is some pain in the shin following a walk like this with occasional swelling.'

It's possible, of course, that the appointment was booked in September 2021, exclusively as a follow-up to the original surgery. But it seems more likely to me that Mrs A booked the appointment because she began to suffer from pain and swelling. And that the surgical follow-up which appears to have happened during the consultation was incidental to the main purpose of the appointment.

I do take AXA's point regarding Mrs A's failure to refer to her symptoms at the point of claim. And as I've said, I accept this complaint is finely balanced. But on balance, I find it's more likely that not that, at the time of sale, Mrs A *wasn't* reasonably aware of a planned or pending consultation with Mr L. Nor have I seen enough evidence to demonstrate that a follow-up had always been intended to be rescheduled – especially given the long delay between the surgery and the appointment. Overall, I am persuaded it's more likely that Mrs A booked the appointment in September 2021, in response to her new symptoms.

On that basis then, and based on the specific circumstances of this individual complaint, I find that Mrs A answered AXA's questions accurately and to the best of her knowledge and belief. Accordingly, I think Mrs A did take reasonable care to answer the second question she was asked by AXA. This means that I don't think there was any qualifying misrepresentation by Mrs A at the time of policy sale. And so it follows that I'm not persuaded that AXA is reasonably entitled to apply the legal remedy set out in CIDRA to the circumstances of Mrs A's claim.

For clarity, I don't find that AXA is entitled to re-underwrite the policy or apply the retrospective exclusion for left knee replacement surgery or revision. In my view, the fair and reasonable outcome to this complaint would be for AXA to remove this exclusion from Mrs A's policy and to reconsider the claim subject to the remaining terms and conditions of the contract. I should make it clear that I'm not directing AXA to pay this claim – it will be for AXA to reassess the claim without reference to the exclusion and to consider whether it's otherwise covered by the policy terms and conditions.

I also agree with our investigator that AXA should pay compensation for the distress and inconvenience it's caused Mrs A in the handling of her claim. It's put her to some time and trouble in attempting to resolve the matter and I don't doubt it caused her unnecessary, additional upset. I find that an award of £150 compensation is fair to reflect the material distress and inconvenience I think Mrs A has likely been caused by AXA.

My final decision

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

I direct AXA PPP Healthcare Limited to:

- Remove the exclusion for investigations or treatment related to Mrs A's left knee replacement and any revisions;

- Reassess her claim in line with the policy terms and conditions (taking into account any applicable policy excess) and;
- Pay Mrs A £150 compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A to accept or reject my decision before 12 April 2023.

Lisa Barham
Ombudsman