DRN-3993063

The complaint

Mr B complains that Legal and General Assurance Society Limited (L&G) has terminated an incapacity claim he made on a group income protection insurance policy.

What happened

The background to this complaint is well-known to both parties, so I'm not going to set it out in detail here. Instead, I've focused on what I think are the key issues.

Mr B was insured under his employer's group income protection insurance policy. In 2012, he made an incapacity claim, due to severe back problems. At this point, L&G assessed the claim in line with Mr B's 'own occupation' definition of a 'disabled member'. L&G accepted the claim and paid benefit. In 2014, Mr B's employment was terminated and while the claim remained in payment, the definition switched to 'suited occupation', in line with the policy terms.

During the relevant period, Mr B underwent a number of surgeries and treatments. He was also prescribed medication to try and relieve his symptoms of pain, including tramadol; gabapentin; amitriptyline and sleeping medication.

In 2019, Mr B underwent a functional capacity assessment (FCA). In summary, this assessment concluded that Mr B had demonstrated some physical capacity to return to some elements of part-time, sedentary work. But the assessor concluded that Mr B suffered from fatigue and cognitive symptoms which would prevent him from carrying out productive work tasks.

Subsequently, in late August 2021, L&G asked Mr B to attend a further FCA. In brief, this concluded that Mr B was able to demonstrate that he had adequate functional capacity to return to a suited occupation or other sedentary role. It also considered surveillance and a review of Mr B's online activities it had had carried out around the same time. L&G concluded that Mr B no longer met the policy definition of a disabled member and it terminated his claim with effect from February 2022.

Mr B was unhappy with L&G's position. He queried why his cognitive function hadn't been considered, as he continued to suffer cognitive symptoms, which he associated with the medications he took. L&G's medical officer reviewed Mr B's case but maintained the claims decision. So Mr B asked us to look into his complaint.

Our investigator didn't think L&G had shown it'd been entitled to terminate Mr B's claim. That's because he didn't think it'd demonstrated that Mr B no longer met the policy definition

of a disabled member. He accepted that the 2021 FCA showed that Mr B was physically capable of returning to work. But it didn't appear there'd been an assessment of his cognitive abilities, as there'd been in 2019. And while he considered the medical officer's comments, he thought these were more generalised than referring specifically to Mr B. Overall, he didn't think that L&G had demonstrated that Mr B was cognitively capable of returning to work. So he recommended that L&G should reinstate Mr B's claim, pay backdated benefit and add

interest to the settlement.

L&G disagreed with the investigator. It subsequently arranged a neurological assessment with a neurological consultant to assess Mr B's cognitive capabilities. The consultant provided their report in December 2022. L&G would like me to take the findings of this report into account when reaching my decision.

Mr B isn't happy with the consultant's findings and would like me to ensure that L&G allows him to ask the consultant further questions.

I issued a provisional decision on 2 February 2023. In my provisional decision, I explained the reasons why I didn't think L&G had shown it was fair to terminate Mr B's claim. I said:

'First, I think it's important that I set out the parameters of this decision. I am solely considering whether it was fair and reasonable for L&G to terminate Mr B's claim in February 2022, based on the medical evidence it had available at that time. I will not be taking into account the neurological assessment which was carried out in December 2022, as that necessarily couldn't have been relied upon by L&G when it decided to terminate the claim. This is a new and current piece of evidence; which L&G may wish to take into account when it carries out a review of the claim. In my view, for me to reach a decision on this piece of evidence would mean I'd effectively handled the claim and made a new claims decision on L&G's behalf. That isn't my role and it wouldn't be appropriate for me to do so.

I appreciate Mr B has questions about the neurological assessment. As I've explained, I won't be taking that assessment into account as part of this decision. Neither will I be compelling L&G to allow Mr B to pose further questions to the neurological consultant here. If Mr B is unhappy with any action L&G decides to take as a result of the new report or how it handles his claim in the future, he will need to make a new and separate complaint about that issue.

As the investigator explained, this claim was in payment for a period stretching almost a decade. There is extensive medical and other evidence and both parties have provided detailed submissions. I'd like to reassure both parties that I've read and carefully thought about all they've said and sent us. In reaching my decision though, I haven't commented on each point that's been raised and nor do our rules require me to. Instead, I've focused on what I consider to be the key issues.

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 Mr B's policy and the available medical evidence, to decide whether L&G treated Mr B fairly.

I've first considered the policy terms and conditions, as these form the basis of the insurance contract. There's no dispute that following the termination of Mr B's employment in 2014, the policy switched from an 'own occupation' definition of a 'disabled member' to the 'suited occupation' definition, in line with the policy terms. So I've looked closely at the relevant policy definition which says that a disabled member is:

'in the opinion of Legal & General, is incapacitated by a specific, diagnosed illness or injury so that he is unable to undertake any occupation which Legal & General considers to be appropriate to his experience, training or education, and is not engaged in any other occupation, other than one which gives rise to payment of partial benefit.'

Page 5 of the policy sets out the 'Duration of Benefit'. This says:

‘Subject to production to Legal & General of evidence of the Insured Member's entitlement to benefit, in such form and at such times as Legal & General may reasonably require, and to the remaining provisions of this Section, payment of Member's Benefit will continue so long as the Insured Member is a Disabled Member but not in any event after Benefit Termination Date or, if earlier, the death of the Insured Member.’

In my view, L&G’s terms make it clear that it will continue to pay benefit, for as long as it’s satisfied that a policy beneficiary remains a ‘disabled member’. It’s clear that whilst L&G accepted that Mr B was entitled to policy benefit for many years, it now considers that he’s no longer incapacitated and is able to return to work in a suited occupation. So I’ve thought about whether this was a fair conclusion for L&G to draw.

It's for a policyholder to provide enough evidence to show that they have a valid claim on their policy. However, once a claim is in payment, it becomes the insurer’s responsibility to show that the policyholder no longer meets the policy terms. Generally, it’s fair and reasonable for an insurer to periodically review income protection claims and request medical evidence to determine whether a claim remains payable. So I think L&G was reasonably entitled to commission FCA reports during the life of the claim.

I’ve looked closely at the FCA report of August 2021. This, taken together with the surveillance images, appears to be the evidence upon which L&G has placed most weight. It’s clear that the report concluded:

‘The functional abilities demonstrated by Mr B are the very minimum he is able to perform safely over a normal working day.’

This conclusion was reached based on a range of physical tasks Mr B carried out during the FCA. The assessor recorded consistencies and inconsistencies in the testing. While the assessor noted that Mr B reported confusion, tiredness, poor memory, slurred speech, difficulty in concentration and anxiety, it doesn’t appear that they made any specific observations about Mr B’s cognitive abilities.

However, in 2019, the relevant assessor had found that while Mr B had some physical capacity to return to work:

It is Mr B’s ‘fatigue and cognition that would prevent him from undertaking productive work tasks and this was evident in his deterioration in function over the duration of the evaluation (increased word finding difficulty, increased distractibility, inability to attend and increase in slurred speech observed directly). Based on the results of the FCA, Mr B would be anticipated to have significant difficulty in completing work tasks that require working memory, attention to detail, multitasking or high level thinking skills. It is the evaluator’s opinion that Mr B would be unable to undertake re-training or return to work unless his cognitive/fatigue symptoms significantly improved.’

I think whether L&G has demonstrated, on balance, that Mr B was no longer cognitively incapacitated at the point it terminated the claim is the key consideration here. It seems to me that both FCA reports demonstrated that Mr B had at least some physical capacity to return to suited roles – both in 2019 and 2021. But in 2021, as I’ve mentioned, the FCA

made no direct observations on Mr B’s cognitive symptoms, despite that being recorded as the main reason why he wasn’t fit to work and remained incapacitated in 2019. Mr B continued to report such symptoms, and his treatment regime appears to have continued to include broadly similar medications. So I think it would’ve been reasonable and appropriate for L&G to have assessed whether Mr B remained incapacitated due to cognitive symptoms as part of the 2021 FCA.

As a result of Mr B's appeal on this point, L&G asked its medical officer for their opinion. While the medical officer referenced Mr B's GP reviewing the long-term use of tramadol, their observations focused more on Mr B's physical fitness to work. So I don't think it went far enough to show, on balance, that Mr B was no longer cognitively incapacitated at the time L&G decided to terminate the claim.

The medical officer's evidence of September 2022 was more focused on this point, and I've looked at this evidence closely. I've set out what I think are the most relevant extracts below:

'Amitriptyline and gabapentin are medications commonly issued to assist with nerve-related pain, which are well-tolerated by most people. Tramadol is also indicated for nerve-related pain, but as a controlled drug, is less commonly issued on a long-term basis, in recent years.

With regards to tramadol, the prescription states 'To avoid tolerance take medication a max of 5 days a week'. This confirms that this medication is an adjunct to Mr B's daily nerve-related pain medication of amitriptyline and gabapentin and he has 2 days a week without this medication, which is reassuring.

None of these three medications are associated with cognitive impairment or side-effects that would preclude work for the vast majority of people, in my experience, whether surgeons or insurance professionals…

Based on my own clinical experience as a GP and Occupational Physician, there are several people with chronic pain who take the four medications above (including at higher doses) and both live (including driving safely) and work successfully (especially in sedentary occupations), often with reasonable workplace adjustments, in line with current legislation (such as reduced productivity targets, more frequent breaks, altered working hours, e.g. starting later), tailored to the individual and reviewed as needed.

I note this policy is against the suited occupation criteria and I have evaluated this case on an individual basis for Mr B, given that there is no medical condition or medication that, in itself, would indicate an inability to work (e.g. stroke associated with permanent cognitive deficit or high-dose morphine that may preclude safe working).

Indeed, I am not aware of any single or combined medication list that automatically precludes work for an individual in non-regulated occupations (most people – by regulated occupations, I am referring to pilots, train drivers etc who face a different set of standards for fitness to work), having several patients with stronger opioids than tramadol, e.g. morphine, and conditions such as insulin-controlled diabetes etc continuing to work safely, following individual assessment of fitness to work, with workplace adjustments as needed.

I reiterate my clinical opinion that, having noted his current medication list, evidence from his treating specialist and the objective evidence of his functional ability, Mr B is capable of working safely in a suited occupation.'

As the investigator explained, we're not medical experts and our role is to assess the medical evidence provided by medical professionals who are experts in their field. I'm grateful to the medical officer for their detailed, expanded comments and I've weighed these up carefully. What I do note though is that while the medical officer has been able to provide an objective view of Mr B's medication list and his functional capacity, this still remains somewhat general in nature. The medical officer's view wasn't based on an in-person examination or assessment of Mr B, where his presentation and symptoms could be recorded first-hand. And whilst most people might not experience cognitive symptoms alongside Mr B's condition and medication, it appears in 2019, it was accepted that he himself did.

I say that because, as I've set out above, the 2019 assessor, who did have the opportunity to observe Mr B, noted that he was unfit to work as a result of his cognitive symptoms and would be unable to return to work 'unless his cognitive/fatigue symptoms significantly improved.'

In my view, there isn't enough specific and focused medical evidence from the point the claim was terminated in February 2022, to show that Mr B's cognitive symptoms had improved to the point he was no longer incapacitated. Given Mr B raised concerns about L&G's decision with regard to his cognitive symptoms at that point, it was open to it to have referred him for neurological testing at that time. Instead, it chose not to do so and maintained its claims decision. Given the 2019 findings and Mr B's reported symptoms, it may have been reasonable for it to have organised such a referral at that point.

I'd add too that I find the surveillance evidence and online review of little relevance when considering whether Mr B was cognitively incapacitated. Mr B has maintained that he doesn't suffer from neurological symptoms constantly, and he says he's never been advised against driving. Nor do I find some use of social media forums and websites to be evidence that Mr B was no longer cognitively incapacitated in February 2022.

This means that currently, I don't think that L&G has shown that Mr B no longer met the policy definition of a disabled member in February 2022, when the claim was terminated. So I currently find that it needs to reinstate the claim with effect from February 2022 and pay Mr B backdated benefit, together with interest, up until the date of settlement. At that point, should L&G wish to retake the claims decision as part of a claim review, it may be entitled to do so. If Mr B is unhappy with any further reassessment of his claim, he may be able to bring a new complaint to us about that issue alone.'

I asked both parties to provide me with any further evidence or comments they wanted me to consider.

Mr B accepted my provisional findings and reiterated that he intended to follow up the latest neurologist's report.

L&G didn't accept my provisional decision and I've summarised its response:

- L& maintained that the claims decision it made in February 2022 was fair and reasonable;

- It maintained that I should take the December 2022 neurologist's report into account. It said it was the best and most recent evidence of Mr B's neurological state and it was entirely supportive of L&G's claims decision in February 2022. It added that given the relatively short space of time between February and December 2022, the report was highly indicative of Mr B's neurological state in February 2022;

- L&G remained of the view that Mr B no longer met the definition of a disabled member. It pointed to the 2019 and 2021 FCA reports, which both concluded that Mr B was physically capable of returning to a suited occupation;

- The findings of the FCA reports were supported by the surveillance evidence, which showed that Mr B could carry heavy boxes; drive and travel significant distances;

- Neither of the FCA reports had been designed to specifically assess Mr B's cognitive capacity. While the 2019 assessor had recorded that Mr B suffered from cognitive difficulties during the assessment, the 2021 assessor had made no such observations;

- The fact that Mr B was capable of driving and using his computer to post on internet forums indicated that he could deal with the mental requirements of a suited occupation for significant portions of the day;

- Subsequent to the February 2022, L&G has obtained confirmation from Mr B that he helped to maintain a website for a family member's business and that he hadn't been advised to stop driving, either by a doctor or the DVLA;

- It relied upon its medic's conclusions that given Mr B's current medication list; he was capable of working safely in a suited occupation;

- L&G reiterated that it believed the December 2022 report should be taken into account and should not be dismissed; as it was cogent evidence of Mr B's mental state at the time of the February 2022 decision. It felt it wholly validated the earlier medical assumptions and L&G's decision at the time;

- It requested that I reconsider its medic's opinion and the December 2022 report as sufficient to indicate, on balance, that Mr B had been able to return to a suited occupation in February 2022.

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, whilst I'm grateful to L&G for its detailed further submissions, I still don't find that it was fair to it to terminate Mr B's claim in February 2022 and I'll explain why.

First, I must reiterate that I have not taken the December 2022 report into account when making this decision. It remains the case that this piece of evidence was obtained around 10 months after L&G terminated the claim. This is a period of almost a year. I make no finding on the outcome of the report. But I'm not persuaded that the neurologist's assessment was carried out so promptly after the claims decision was made that I could reasonably find that it most likely reflected Mr B's cognitive abilities in February 2022. As I've explained above, this piece of evidence simply wasn't available when L&G decided to terminate the claim. And I don't find that it can fairly retrospectively rely upon it to support a claims decision made 10 months earlier.

With that said, under the terms of this policy, L&G is entitled to review the claim to decide whether or not Mr B continues to meet the contractual definition of a disabled member. So the December 2022 is a piece of new and current evidence it may wish to take into account when it reviews the claim.

L&G refers to the fact that both the 2019 and 2021 FCA reports found that Mr B was physically capable to returning to a suited occupation. As I set out in my provisional decision, I don't dispute that both assessors made the finding that Mr B was capable of at least some physical work. Indeed, were this claim to turn only on Mr B's physical ability to return to work, it's likely that I'd have concluded that L&G had acted fairly. However, irrespective of whether the FCA reports were designed to test Mr B's cognitive ability or not, it's still the case that the 2019 assessor *did* assess Mr B's cognitive ability. They concluded that he would be unable to return to work unless his cognitive and fatigue symptoms significantly improved. L&G doesn't appear to have disputed this finding and continued to pay benefit.

It's clear that the 2021 FCA didn't assess Mr B's cognitive capacity and instead focused on his physical abilities. As I've set out above, given Mr B reported similar symptoms and as his

treatment regime had remained broadly the same, I still think it might have been reasonable and appropriate for L&G to assess whether Mr B remained incapacitated due to cognitive symptoms at that point. Given it didn't do so, there was no direct, personally-tailored, functional assessment of Mr B's cognitive capacity at the point the claim was terminated.

L&G's medic has provided a detailed opinion as to why he believes that Mr B was cognitively capable of work. I'd reassure L&G again that I did consider the medic's clinical opinion very carefully. But it's still the case that the medic's opinion is more general in nature and focuses on how the majority of people may be affected (or not) by the medication Mr B is prescribed. While this evidence is useful, the 2019 FCA report found that Mr B himself *did* experience cognitive symptoms and was unable to work as a result. It's clear the FCA assessor's findings were based on a personal, subjective review of Mr B, rather than an objective consideration of how such medications may affect people more widely. So I find the 2019 FCA report to be a more persuasive piece of medical evidence overall than the medic's opinion.

There's no dispute that Mr B drives, can lift boxes and interacts on the internet. As I explained in my provisional decision though, I simply don't think this is persuasive evidence that Mr B was fit to work in February 2022. I say that because as both FCA reports found, Mr B was *physically* capable of working. And by Mr B's own account, his neurological symptoms aren't continuous. So I don't find the fact that he is able to drive, help out on a website or engage in internet forums show it's most likely that he was no longer cognitively incapacitated in February 2022.

Overall, in my view, I don't find that L&G has provided enough evidence to show, on balance, that Mr B no longer met the contractual definition of a disabled member in February 2022. This means I don't think it's shown it was reasonably entitled to terminate the claim. So I still find that it needs to reinstate the claim with effect from February 2022 and pay Mr B backdated benefit, together with interest, up until the date of settlement. At that point, should L&G wish to retake the claims decision as part of a claim review, it may be entitled to do so. If Mr B is unhappy with any further reassessment of his claim, he may be able to bring a new complaint to us about that issue alone.

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 Legal & General Assurance Society Limited to reinstate Mr B's claim from the point it was terminated until the date of settlement. It must calculate and pay Mr B any backdated benefit payments due, and it must add interest at an annual rate of 8% simple from the date each backdated payment was due until 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 Mr B how much it has taken off. It should also give Mr B a certificate showing this if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 30 March 2023.

Lisa Barham
Ombudsman