

The complaint

Mr F complains that Aviva Life & Pensions UK Limited has turned down an incapacity claim he made on an income protection insurance policy.

What happened

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

Mr F is insured under his employer's group income protection insurance policy. The policy provided Mr F with cover for his 'own occupation' and included a deferred period of six months.

In September 2020, Mr F suffered a myocardial infarction (MI) and underwent surgery. He was signed-off from work until January 2021, at which point, his GP recommended that he commence a phased-return to work. However, it appears that this phased-return broke down and Mr F was signed-off again in early March 2021.

Mr F's employer made a claim on the policy in June 2021. Ultimately, Aviva declined the claim. It said its Chief Medical Office (CMO) felt that Mr F would've been fit to start a three-month phased return to work in January 2021, ending in April 2021. But Aviva felt the evidence indicated that the phased-return had broken down due to a dispute between Mr F and his employer.

Unhappy with Aviva's decision, Mr F complained. Aviva requested further medical evidence from Mr F's GP and reviewed the claim again. It noted that Mr F had been entitled to sick pay from his employer until 14 October 2021, so it said no benefit would've been payable until after that date in any event.

Having reassessed the claim based on evidence post October 2021, Aviva declined it. While a consultant occupational physician had assessed Mr F as being unfit for work in any capacity, Aviva didn't think this conclusion was supported by Mr F's medical records. These showed that at points, Mr F's fit notes included work-related stress as one of the reasons for his absence from work. This was specifically excluded by the policy terms. The medical records showed that while Mr F had continued to experience symptoms, no cardiac cause nor indeed any cause at all had been found for them. It wasn't persuaded that Mr F was incapacitated in line with the contractual definition and therefore, it concluded that Mr F's claim didn't meet the policy terms.

Aviva did tell Mr F that it would be happy to support him with a phased-return to work for a three-month period and that it would be prepared to pay partial benefit during this time. It said that if a phased-return took longer than this period, it would consider extending the payment of benefit following further medical review.

Mr F remained unhappy with Aviva's decision and he asked us to look into his complaint.

Our investigator didn't think Mr F's complaint should be upheld. She considered that Mr F

hadn't provided enough medical evidence to show that he'd been incapacitated in line with the policy terms. So she felt it'd been fair for Aviva to turn down Mr F's claim.

Mr F disagreed. He provided evidence to show that he'd undergone assessment by the Department for Work & Pensions (DWP) in November 2021 and had been awarded Employment Support Allowance (ESA). This award had been backdated to August 2021. Mr F had been placed in the ESA 'support group' category.

I issued a provisional decision on 14 March 2023, which explained the reasons why I planned to uphold Mr F's complaint. I said:

'First, I'd like to reassure both parties that while I've summarised the background to this complaint; the extensive medical evidence and their submissions to us, I've carefully considered all that's been said and sent to us. Within this 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 think are 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 the insurance contract and the available medical evidence, to decide whether Aviva has treated Mr F fairly.

I've first considered the terms and conditions of the insurance policy, as these form the basis of the group contract with Aviva. Mr F's employer made a claim on his behalf for incapacity benefit, given he wasn't fit for work. So I think it was reasonable and appropriate for Aviva to consider whether Mr F's claim met the policy definition of incapacity. I've turned then to look at Aviva's definition of 'incapacity'. This says:

'The member's inability to perform on a full and part time basis the duties of his or her job role as a result of their illness or injury.'

This means that in order for Aviva to pay incapacity benefit, it must be satisfied that a policyholder's illness or injury results in their inability to perform their job role on a full and part time basis.

It's a general principle of insurance that it's for a policyholder to show they have a valid claim on their policy. This means it was Mr F's responsibility to provide Aviva with enough evidence to demonstrate that his illness had led to him being unable to carry out the duties of his job role on a full and part time basis.

Aviva assessed the evidence Mr F provided in support of his claim and concluded that it didn't indicate that he met the policy definition of incapacity. So I've next looked at the available medical evidence to assess whether I think this was a fair conclusion for Aviva to draw.

It's important that I make clear that I'm not a medical expert. Therefore, my provisional conclusions are based on an assessment of the medical evidence which has been provided to me.

Did Aviva handle the claim fairly pre-14 October 2021?

The terms of the policy say that in order for benefit to be paid, a policyholder must have been incapacitated for the full deferred period and afterwards. In this case, the deferred period is six months and Mr F's deferred period would've ended on 23 March 2021. Mr F was first deemed unfit for work, following the MI, in late September 2020. But he returned to

work, on a phased-return, in January 2021. As such then, his initial period of absence ended well within the deferred period.

Aviva said that its CMO would've recommended that Mr F recommence work on a phased return, with a return to full-time hours on 15 April 2021. So it said it would've paid proportionate benefit after the expiry of the deferred period on 23 March 2021 and 15 April 2021.

Unfortunately, the phased-return arrangements broke down and Mr F was signed-off again on 2 March 2021. In any event though, even if the phased-return had been successful, it seems no benefit would've been due. That's because Mr F was still receiving company sick pay until 14 October 2021. And so it seems there was no loss of earnings for Aviva to cover until this point.

In my view, it was reasonable for Aviva to consider further medical evidence in order to establish whether Mr F had subsequently met the policy definition of incapacity. I've looked carefully at the available medical evidence, including occupational health reports; cardiology letters and Mr F's GP records. I agree with Aviva that from March 2021, there were clear indications that Mr F had reported work-related stress and anxiety, as well as post-MI symptoms. These symptoms were included on the fit notes completed by the GP, as well as in the GP records. I acknowledge too that there is reference to Mr F considering early retirement and finding his role stressful prior to the MI. The inclusion of work-related stress and anxiety on Mr F's fit notes, in addition to post-MI symptoms, continued until late August 2021. I accept that work-related causes of absence are excluded specifically from cover.

I'm also mindful that follow-up cardiology referrals didn't find a cardiac cause for Mr F's continuing symptoms (amongst other things, of shortness of breath; pain; chest pain and clamminess). Indeed, while I appreciate Mr F disputes one cardiologist's findings – it was suggested that his symptoms were psychological in nature.

As I've set above though, it appears benefit wouldn't have been payable until after 14 October 2021 in any case. And I don't currently think Aviva's conclusions on this point are unfair. This means I don't intend to direct it to pay Mr F's claim prior to 14 October 2021.

However, I don't think that the evidence I've referred to above means that the claim post this date must necessarily fail, as I'll go on to explore.

Did Aviva handle the claim fairly after 14 October 2021?

Aviva obtained Mr F's medical records post-October 2021. Again, I think this was a reasonable and appropriate step for it to take. From 26 August 2021 onwards, the GP issued monthly fit notes which no longer referred to work-related stress and anxiety. Instead, these notes stated that Mr F was unfit for work due to 'persistent symptoms post-MI' – a clear link with the MI Mr F had suffered in 2020. His records post-14 October 2021 note regular consultations with the GP, setting out the continuance of his symptoms and it appears that he was seen by cardiology again after this point; suffered a collapse and was referred to a Musculo-skeletal clinic to investigate his pain.

Mr F met with a consultant occupational physician (who I'll call Dr M) on 21 October 2021.

I've set out what I consider to be Dr M's most relevant findings below:

'(Mr F) has been otherwise well until he had a heart attack in September last year. He required a stent to be fitted. At present, he explained that he struggles on a day-to-day basis with ongoing symptoms. He has profound fatigue, generalised weakness, chest and neck

pains, shortness of breath, poor sleep, numbness in his hands and right-arm pain. He had a recent collapse and awaits further investigations in relation to this. **He has no perceived work-related stressors at present, although he did state that previously he felt unsupported by Management but explained to me that this is no longer the case...**

Indications are that Mr F is not fit for work in any capacity at this stage. I do not believe any adjustments would enable a return to work at present. He has a cardiology review next month and I am hopeful that this will provide him with some guidance as to the cause of his recent collapse and whether or not his medications will need adjusting or further intervention will be required in view of his ongoing symptoms. (Emphasis added).

Dr M was asked: Is there an underlying health concern?

He answered: 'He had a heart attack in September 2020 and has ongoing symptoms. He awaits cardiology review and, indeed, is being assessed next month.'

It's also clear that in November 2021, a health professional from the DWP carried out a work capability assessment on Mr F, following an application for ESA. The DWP placed Mr F in the support group category and found him to be eligible for ESA. Mr F has provided evidence to show he was awarded ESA and placed in this category. I've looked carefully at the government's requirements, not just for ESA eligibility, but also at how it determines which group to place claimants in. I note that if a claimant is placed in the support group, the DWP considers they're incapable of work at that point and aren't expected to prepare for work in the future. The website also says that a claimant will usually be in the support group if their illness or disability severely limits what they can do.

I asked Aviva for its CMO's comments explaining why they maintained that Mr F still hadn't met the definition of incapacity after 14 October 2021, based on the medical evidence available. I've copied some of Aviva's response below:

'No physical cause has been found for his ongoing symptoms. At the point he initially ceased work again at the beginning of March 2021, there were clear workplace stressors in terms of the support he'd received from his employer and their unwillingness to allow a more sustainable return to work plan. It's quite possible had he been able to undertake a more gradual phased return, with support from his employer, he would have remained in the workplace and I don't feel there's any evidence to suggest this would not have been possible. I appreciate the OH report from October 2021 confirms Mr F was unfit for work at the time, however there's no evidence to suggest they had sight of his medical records and therefore while it may have been their opinion at the time that Mr F should refrain from work given his ongoing symptoms and while awaiting his next cardiac appt, I don't feel they had sight of all the relevant evidence in order to make a fully informed decision.

I would also point out we do not expect someone to be fully recovered or symptom free before returning to work, just that they be capable of undertaking the duties of their own occupation in some capacity, with suitable workplace modifications in place if required. As it stands, Mr F fortunately recovered from his heart attack, and was able to return to work well within the deferred period. Unfortunately, his employer was not supportive and it seems there had been some ongoing workplace issues present for some time, even prior to his absence. Their lack of support and unwillingness to support a longer term phased return to

work likely contributed to the failure of this phased return and as advised, our CMO feels had this been able to take place over a more reasonable period, there's no evidence to suggest this wouldn't have been successful.

While I appreciate Mr F has remained anxious, and this is entirely understandable given his

previous heart attack and family history, he has been reassured on various occasions his symptoms do not appear to have a cardiac cause and it's likely his issues are largely psychological in nature, given the length of time he has now been absent, I agree with his GP's comments in that there is also likely an element of deconditioning involved and it's understandable he will likely be anxious about returning to work, especially in view of the previous failure and lack of support provided by his employer. That said, I still maintain the medical evidence does not demonstrate his symptoms have been of such severity as to render him totally incapacitated under the policy terms and conditions and I do feel with the right support from his employer, he is capable of some work.

Aviva were not able to pay benefit under the policy during his initial phased return, as benefit was not payable until October 2021 when his company sick pay ceased. We have however agreed to pay partial benefit going forward on his return to work should he do so in the future for a period of 3 months and I feel this is more than fair and reasonable under the circumstances.

In terms of Mr F's acceptance for ESA, the assessment for such will be different to that which takes place in respect of this insurance policy. I acknowledge medical evidence was reviewed by whoever carried out the assessment, however I do not know what was provided, or what specific criteria they've assessed against and so I can't comment as to how this differs. I would point out however they're unlikely to consider workplace stress, which has clearly been a contributing factor in Mr F's case.

While it does appear any ongoing issues have since been resolved, at the point he ceased work for the second time in March 2021, this was quite clearly a significant stressor and something we can't ignore. His employer is required under the policy terms and conditions to make reasonable adjustments to help facilitate a return to work and it's very clear they were not willing to do so in the first instance. It's also unlikely they will be looking at whether that person could work with suitable workplace modifications or amendments to their role and this is something we're also looking at within our assessment.

Regarding your request for comments directly from our CMO in respect of ESA, please see the below response;

"ESA is assessing how much you can work, and you can work whilst claiming ESA hence not be TD from our aspect. You can work full time and still get ESA e.g. in voluntary work again, depending on your insured occupation, this might make an IP claim highly unlikely.

Assessment for ESA is by filling in a form and then sometimes only a phone call from the DWP. This means an assessment can be made with no medical input whatsoever apart from a Fit Note. Fit notes are in nearly every case issued against someone's own occupation and takes no account of a suitable or generic role which is often part of an IP assessment. An IP assessment, in contrast, takes into account GP notes, hospital and consultant notes & letters, OH reports, employer's input, independent medical information and sometime examinations and other forms of important information making a much fuller and holistic assessment of a case"

I've weighed up the available medical evidence very carefully. As I've explained, as I'm not a medical expert, I necessarily must consider the available specialist evidence and decide which I find most persuasive. I'm grateful for Aviva's further submissions and its CMO's comments. I've considered these submissions closely.

However, whilst I don't dispute that no cardiac cause has been found for Mr F's symptoms, it seems to me that both the GP and Dr M have attributed Mr F's ongoing symptoms at least in part to his past MI. Dr M, a consultant occupational physician and as such, an expert in their

field, assessed Mr F as being entirely unfit for work, even if workplace adjustments were to be made. I find this report a persuasive piece of medical evidence. It corroborates the GP's continued assessment of Mr F being unfit to work after October 2021 due to post-MI symptoms. And as I've set out above, the DWP placed Mr F in its support group in November 2021 (and backdated its assessment to August 2021). The capability assessment letter it sent Mr F in October 2021 stated that the assessment would be carried out by a 'healthcare professional' and ESA assessments also appear to take GP evidence into account. It seems to me that by placing Mr F in the support group, the relevant DWP healthcare professional concluded that he couldn't work and wouldn't be expected to look for work in the future. Again, this clearly corroborates the findings of Dr M and Mr F's GP.

I appreciate that an ESA assessment likely differs from the way in which an income protection claim is assessed. And that Dr M may well have not been aware of Mr F's cardiac findings overall. But in my view, the totality of the fit notes; GP records; Dr M's report and the DWP ESA award all point to a conclusion that, on balance, Mr F was unfit to work in any capacity. And on that basis, it appears to me that Mr F has provided enough medical evidence to show he met the policy definition of incapacity after 14 October 2021. This means that I don't think it was fair or reasonable for Aviva to turn down his claim after that date. Therefore, I currently intend to direct Aviva to accept, backdate and pay Mr F's claim from the date his sick pay ended and pay interest on those backdated payments, in line with the remaining terms and conditions of the policy. These terms include a requirement for Mr F to remain employed by his employer in order for cover to continue to apply.'

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

Aviva said that it didn't think there was much it could add to what it had said before. So it said that while it disagreed with my findings, it did accept my provisional decision. It said it thought it would be reasonable to review the claim again in six months' time.

Mr F asked me to consider some additional comments which set out the impact of Aviva's actions on him. He said that he's now been dismissed by his employer, which invalidated the insurance policy and which therefore left him unable to make any future claims. He felt this was grossly unfair. He considered that Aviva's decision to decline his claim had fed into his employer's decision to terminate his employment. He said that the situation had had a huge impact on his daily life and on his family. He felt it was impossible to quantify the effect on his emotional and physical well-being. He said he was experiencing financial hardship and that he would like an apology from Aviva, as well as full compensation.

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'm still satisfied that it was unfair for Aviva to turn down Mr F's claim. And I remain persuaded that the fair and reasonable outcome to this complaint is for Aviva to accept and pay Mr F's claim from 14 October 2021 onwards, together with interest, in line with the policy terms and conditions.

I was pleased to note that while Aviva disagreed with my provisional findings, it has agreed to accept my provisional decision. As such, I don't think I need to consider the claim aspect of the complaint in any further detail, other than to reiterate that I think the totality of the medical evidence demonstrates that Mr F did meet the policy definition of incapacity. And therefore, I've decided that it was unfair for Aviva to turn down Mr F's claim.

It's clear that Mr F has been through a difficult time. I was very sorry to read of the financial hardship he's suffered and the impact of his employer's decision to end his employment. However, Mr F's employment is a matter between his employer and Mr F – it's entirely separate to the complaint Mr F brought to us. Therefore, I don't think it would be appropriate for me to comment on that point.

The redress I am awarding in this case includes interest at an annual rate of 8% simple. Interest awards are designed to compensate consumers for the loss of use of money – in this case, to represent the time Mr F was without incapacity benefit after the point I think the claim ought to have been accepted and paid. I still think this is appropriate and fair compensation in all the circumstances of this complaint.

Overall, I do sympathise with Mr F's position and I'm very sorry to hear about the impact this matter has had on his well-being. Mr F has requested an apology from Aviva for its decision to turn down the claim and this is something Aviva may wish to consider.

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 Aviva Life & Pensions UK Limited to:

- Accept, backdate and pay Mr F's claim from the date his sick pay ended;
- Pay interest on the backdated payments at an annual rate of 8% simple from the date each payment was due, until the date of settlement.

If Aviva considers that it's required by HM Revenue & Customs to take off income tax from that interest it should tell Mr F how much it has taken off. It should also give Mr F 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 F to accept or reject my decision before 23 May 2023.

Lisa Barham
Ombudsman